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FEDERAL PRACTICE AND PROCEDURE – ATTORNEY'S FAILURE TO FILE APPELLATE BRIEF IN CONFORMANCE WITH THIRD CIRCUIT RULES RESULTS IN DISMISSAL OF CASE.

Kushner v. Winterthur Swiss Insurance Co. (1980)

On August 2, 1977, Mr. and Mrs. Marvin Kushner were injured in an automobile accident in Zurich, Switzerland.[1] The Kushners filed suit against four corporate defendants,[2] seeking compensation for the injuries which they had sustained.[3] All defendants filed motions to dismiss.[4] The district court granted the motions of three defendants,[5] but denied the motion of the fourth defendant, Hill Refrigeration.[6] Hill filed an answer to the complaint[7] and commenced discovery.[8] Before the case was ready for trial,[9] however, the plaintiffs filed an appeal in the United States Court of Appeals for the Third Circuit claiming that the district court had erred in dismissing the action as to three of the four defendants.[10]

As required by rule 30(a) of the Federal Rules of Appellate Procedure and Third Circuit Rule 10(3),[11] the appellants' counsel filed a

1. Kushner v. Winterthur Swiss Ins. Co., 620 F.2d 404, 405 (3d Cir. 1980).

2. *Id.*

3. *Id.* Named as defendants were: Emhart A. G., a Swiss corporation; Hill Refrigeration Division of Emhart Industries, a New Jersey corporation; Emhart Corporation, a Connecticut company; and Winterhur Swiss Insurance Company, a New York corporation. *Id.* Winterhur does business in Switzerland and was the liability insurance carrier for Emhart. *Id.* Jurisdiction was based on diversity of citizenship. *Id.*

4. *Id.* All motions to dismiss were filed pursuant to FED. R. CIV. P. 12(b)(6) (failure to state a claim upon which relief can be granted). 620 F.2d at 405. The motions of defendants Emhart A. G. and Winterthur were also based upon lack of personal jurisdiction. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* The Third Circuit held that the appeal violated rule 54(b) of the Federal Rules of Civil Procedure and Third Circuit Rule 21(1)(A) which govern the appealability of cases involving multiple parties and claims. 620 F.2d at 408. For a discussion of rule 54(b) and Third Circuit Rule 21(1)(A), *see* note 22 *infra.*

11. 3D CIR. R. 10(3). For those sections of Rule 10(3) which appellant violated, *see* notes 15 & 19 *infra. See also* rule 30(a) of the Federal Rules of Appellate Procedure which contain the same requirements. FED. R. APP. P. 30(a).

brief and a separate appendix with the court.[12] But, contrary to the requirements set forth in Third Circuit Rule 21(2)(A)(g)[13] and rule 32(a) of the Federal Rules of Appellate Procedure, the names and addresses of counsel were not set forth on the cover.[14] The brief also violated Third Circuit Rule 10(3)(1)[15] and Federal Rule of Appellate Procedure 30(a)(1),[16] in that it did not contain the relevant docket entries of the proceedings below.[17] Lastly, the brief did not comply with Third Circuit Rule 10(3)(5) in that the index was not paginated,[18] and Rule 10(3)(6) because it did not contain the required notice of appeal.[19] Pursuant to Third Circuit Rule 21(3),[20] the Third Circuit[21] dismissed the appeal, *holding, inter alia,*[22] that a failure to file a proper

12. 620 F.2d at 406. The brief was entitled "BRIEF FOR PLAINTIFFS – APPELLANTS, MARVIN AND DOLORES KUSHNER – APPENDIX." *Id.*

13. 3D CIR. R. 21(2)(A)(g).

14. 620 F.2d at 406. Third Circuit Rule 21(2)(A)(g) provides in pertinent part: "The front covers . . . of the briefs and of the appendices, if separately printed, shall contain the names and addresses of counsel representing the party on whose behalf the document is filed." 3D CIR. R. 21(2)(A)(g). *See also* FED. R. APP. P. 32(A), which contains the same requirement.

15. 3D CIR. R. 10(3)(1). Third Circuit Rule 10(3)(1) provides that the "appellants shall prepare and file an appendix to the briefs which shall contain: 1) the relevant docket entries in the proceedings below . . . ." *Id.*

16. *See* FED. R. APP. P. 30(A)(1), which contains the same requirements as 3D CIR. R. 10(3)(1). *See* note 15 *supra.*

17. 620 F.2d at 406.

18. *Id.* Third Circuit Rule 10(3)(5) provides that the appendix shall contain "a table of contents with page references." 3D CIR. R. 10(3)(5).

19. 620 F.2d at 406. Third Circuit Rule 10(3)(6) provides that the appendix shall contain "the notice of appeal . . . ." 3D CIR. R. 10(3)(6).

20. 3D CIR. R. 21(3). Third Circuit Rule 21(3) provides in part: "If the court shall find that the provisions of this rule have not been adhered to, it may, in its discretion, impose sanctions as it may deem appropriate, including but not limited to the dismissal of the appeal, imposition of costs or disciplinary sanctions upon counsel." *Id.*

21. The case was heard by Judges Aldisert, Weiss, and Garth. Judge Aldisert wrote the opinion.

22. A second ground of dismissal was lack of subject matter jurisdiction. 620 F.2d at 409. The appellants had failed to comply with Third Circuit Rule 21(1)(A) which provides in pertinent part:

> *Brief of the Appellant or Petitioner.* The brief of the appellant or petitioner shall contain under appropriate headings and in the order here indicated:
>
> . . . .
>
> (b)(1) . . . if the appeal is from an action involving multiple claims or multiple parties, a certification that the final judgment applies to all claims or parties, or that the district court has made an express determination that there is no just reason for delay and an express direction for the entry of judgment under F.R.C.P. 54(b) . . . .

3D CIR. R. 21(1)(A).

The Third Circuit's examination of the district court's order and docket entries revealed that the district court had not made a determination that there was no just reason for delay and an express direction for the entry of judgment under FED. R. CIV. P. 54(b). 620 F.2d at 408. With only a few exceptions, litigants may appeal only upon entry of a final judgment which applies to all

appendix in conformity with Third Circuit Rules constitutes grounds for dismissal of an appeal. *Kushner v. Winterthur Swiss Insurance Co.*, 620 F.2d 404 (3d Cir. 1980).

As recently as 1977, the Third Circuit examined the problem posed by an attorney's failure to observe the basic requirements for the format of briefs and appendices in *United States v. Somers.*[23] In *Somers,* the court expressed its reluctance to dismiss appeals for failure to comply with appellate rules,[24] but stated that, in the future, "counsels' refusal, failure or unwillingness" to learn appellate rules will result in the imposition of appropriate sanctions.[25] Several other circuits have dismissed an appeal as a sanction for noncompliance with local court rules and the Federal Rules of Appellate Procedure.[26] In many instances, however, the dismissal was only conditional, in that the errant attorneys were given an opportunity to correct the deficiencies of their briefs.[27]

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claims or parties or upon a determination by the district court that there is no just reason for delay coupled with an express direction for the entry of judgment as to one or more but less than all of the claims or parties. *Id.* at 407. *See* 28 U.S.C. § 1291 (1976); FED. R. CIV. P. 54(b); Comment, *Appealability and Finality in the Third Circuit — Is the United States Supreme Court More Appealing Than the Third Circuit,* 25 VILL. L. REV. 884, 886-95, 910-12 (1980).

23. 552 F.2d 108 (3d Cir. 1977). In *Somers,* counsel for the appellant had failed to include in the appendix documents and transcripts which the court deemed necessary to a proper disposition of the issues in the case before it. *Id.* at 114. The court was forced to obtain these documents through its own efforts. *Id.*

24. *Id.* at 115. The *Somers* court stated that, although it had hesitated to impose sanctions for failure to comply with appellate rules in the past, it must do so in the future since the court can no longer afford the time and effort necessary to prepare counsels' case and to supply counsels' record deficiencies. *Id.*

25. *Id.* at 115, *citing* 3D CIR. R. 21(3).

26. *See, e.g.,* United States v. Kush, 579 F.2d 394 (6th Cir. 1978) (failure of attorney to comply with rules requiring preparation and filing of acceptable appendix on appeal); United States v. Seaboard Coast Line R.R., 517 F.2d 881 (4th Cir. 1975) (brief filed by the government purported to include an appendix, but appendix failed to meet minimum requirements of FED. R. APP. P. 30); Martin v. Reynolds Metals Co., 336 F.2d 394 (6th Cir. 1964) (appellant's failure to furnish specification of error in brief was in violation of Ninth Circuit local rules).

27. *See* United States v. Kush, 579 F.2d 394 (6th Cir. 1978) (dismissal for violation of FED. R. APP. P. 30 would be vacated if counsel filed a proper appendix by a specified date); Alnajjar v. Ford Motor Co., 523 F.2d 6 (6th Cir. 1975) (dismissal conditional on failure to correct deficiencies within specified time); Walters v. Shari Music Co., 298 F.2d 206 (2d Cir. 1962) (appeal would be dismissed unless appellant, within specified time, filed new printed appendix conforming to rule).

Although these cases indicate that some circuits are beginning to enforce their appellate rules strictly, other circuit have discarded the appendix requirement altogether. *See* 5TH CIR. R. 13 (appeals from district courts and Tax Court, and petitions for review of orders of an administrative agency, shall be on the original record "without requirement of the appendix prescribed by F.R.A.P. 30"). For examples of other rules which abandon the appendix requirement, *see* 8TH CIR. R. 11(A)(1); 9TH CIR. R. 4(B).

The court in *Kushner* acknowledged that, in dismissing the appeal, it was setting precedent within the circuit.[28] To justify its holding, the court observed that the Federal Rules of Appellate Procedure are the product of much careful thought and must be carefully observed if an appeal is to be considered in an appropriate manner.[29] The court emphasized that the caseload which Third Circuit judges must handle is increasing[30] and, thus, that the court could no longer afford to spend extremely valuable time trying to obtain vital information which counsel had negligently or deliberately omitted from the appendix.[31]

The *Kushner* court took pains to point out that the apparent injustice or hardship suffered by an appellant, whose appeal was dismissed under Third Circuit Rule 21(3), is mitigated by his ability to bring a malpractice action against his attorney.[32] The court also pointed out that, in the case before it, the appellants would have a second opportunity to appeal after final judgment was entered in the district court.[33]

In light of the treatment given this area of the law in other circuits which have dismissed appeals for failure to comply with procedural rules[34] and the warning which the Third Circuit had previously given in *Somers*,[35] it is submitted that the *Kushner* court was justified in

28. 620 F.2d at 407. The Third Circuit noted that it was not only setting precedent, but also giving fair warning to all concerned that cases similar to this one, in which counsel fails to abide by the Federal Rules of Appellate Procedure and Third Circuit rules, may also result in dismissal. *Id.*

29. *Id.* at 406. The court, in keeping with what it felt to be the policy of the rules, recognized that there are competing interests which must be balanced. *Id.* The court identified the competing interests as the harm caused to parties whose appeal is dismissed because of counsel's failure to follow the rules and the disservice caused to litigants represented by assiduous counsel when the court spends excessive amounts of time on poorly prepared briefs. *Id.*

30. *Id.* The court observed that its jurisdiction includes three states and one territory with a combined population of over 18 million. *Id.* While the number of appeals over the last 20 years had more than quintupled, the number of judges had only increased from seven to nine. *Id.* This case load exceeds a recent study's recommended assignment per judge by 22%. *Id.* at 406 n.3, *citing* P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL 196 (1976).

31. 620 F.2d at 407. Aside from these practical reasons for dismissing these appeals, the court indicated that there is "jurisprudential" justification for its decision. *Id.* To raise an appeal, the appellant must necessarily allege that the district court broke some rule of substantive or procedural law. *Id.* It is not, therefore, unjust or unfair to require the appellant to comply with the appellate rules when he applies for relief. *Id.* The court remarked that "sauce for the goose is sauce for the gander." *Id.*

32. *Id.* at 408. *See* Wade, *The Attorney's Liability for Negligence,* 12 VAND. L. REV. 755 (1959); notes 37-38 and accompanying text *infra.*

33. 620 F.2d at 407. The Appellant's opportunity for a subsequent appeal results from the court's alternative holding that the order appealed from was not a final judgment nor otherwise appealable. *See* note 22 *supra.*

34. *See* notes 26-27 and accompanying text *supra.*

35. For a discussion of *Somers, see* notes 23-25 and accompanying text *supra.*

imposing a sanction as severe as dismissal of the appeal. There is, however, a substantial likelihood that unconditional dismissals will in fact work undue hardships on appellants in other cases.[36] The court cavalierly suggests a malpractice action as a remedy for such a dismissal,[37] but nowhere in its opinion does the court suggest that litigants have availed themselves of this option, nor does the court take cognizance of the difficulties encountered by litigants in bringing malpractice actions against their attorneys.[38] Because the appellants in *Kushner* will have a second opportunity to appeal, an opportunity created by the procedural posture of the case,[39] the court may not have felt that the parties would be too severely penalized for the error of their attorney. It is submitted, however, that the deterrent to shoddy advocacy obviously sought by the court, as well as the broader interest of orderly judicial administration, might have been more effectively advanced had the court more fully articulated its appreciation of the competing concerns and stated definitively its resolve to uniformly enforce its rules in the future through the use of the other sanctions available to it.[40]

While it is conceded that the practical reasons advanced by the Third Circuit for enforcing its procedural rules with strong sanctions[41] are legitimate, it is suggested that the court might be better advised to follow the practice in other circuits of making the dismissal only conditional.[42] Such a procedure would both effectively counteract attorneys' apparent indifference to appellate procedure rules and protect their client's interests since the attorneys would know that a shoddy brief or

36. *See* notes 38-40 and accompanying text *infra.*

37. 620 F.2d at 408.

38. *See* text accompanying note 32 *supra.* The court in *Kushner* simply states that this option is available to those who wish to proceed against their attorneys. 620 F.2d at 408. It is submitted, however, that this solution may not sufficiently protect the client's interests as his task in attempting to recover in a negligence action is a formidable one. Wade, *supra* note 32, at 774. In an action against their attorney, the appellants in *Kushner* would be required to win two cases: They would have to show both that the attorney was negligent; and that they were entitled to win in the *Kushner* suit, and would have won, but for their attorney's negligence. *Id.* It is also suggested that the additional time required and the expenses incurred in waging a malpractice action, even if it were successful, are additional reasons why the court should reconsider dismissal of the case as the solution to the problems which it faces.

39. *See* note 22 *supra;* text accompanying note 33 *supra.*

40. 620 F.2d at 407. The *Kushner* court acknowledged that it was setting precedent upon which the court could rely in future cases of similar nature. *Id.* It is submitted, however, that the court failed to consider the impact of such precedent in cases where the parties may not have the procedural "out" that existed in *Kushner.* In this respect, the court's decision skirted the problems which a dismissed party would have where its only alternative would be an action for malpractice against his attorney. *See* notes 37-38 and accompanying text *supra.* For a discussion of the other alternatives open to the court, *see* notes 41-43 and accompanying text *infra.*

41. For a discussion of the practical problems which the court faces, *see* notes 30-31 and accompanying text *supra.*

42. *See* note 27 and accompanying text *supra.*

appendix would have to be redone. It is further suggested that where an attorney's conduct in handling a client's affairs is professionally inadequate or incompetent, the court might recommend, and the State Bar authority might impose, appropriate professional discipline aimed at discouraging such conduct.[43] Consequently, it is submitted that the sanction of unconditional dismissal of an appeal should be reserved only for cases of the most egregious non-compliance with the Court's rules but that *Kushner* should serve as a stern warning of the Third Circuit's insistence upon correct and timely compliance with its rules of procedure.

Peter D. Holbrook

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43. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON 6; EC 6-1 & 6-2, DR 6-101(A)(2) ("A lawyer shall not . . . handle a legal matter without preparation adequate in the circumstances"). *See also* ABA MODEL RULES OF PROFESSIONAL CONDUCT 1.1 & Comment (Discussion Draft, January 30, 1980). In a number of cases it has been held that where an attorney has been negligent or inattentive, or has exhibited a lack of professional competence in the handling of his client's affairs, he has violated the Code of Professional Responsibility, thereby warranting the imposition of disciplinary action, the extent of which depends upon the particular facts of the situation. *See, e.g., In re* Hudson, 218 Kan. 216, 542 P.2d 181 (1975) (attorney violated Code of Professional Responsibility and indefinite suspension was warranted where attorney failed to handle matter and permitted default judgment to be entered against client); Attorney Grievance Comm'n v. Demyan, 278 Md. App. 240, 363 A.2d 966 (1976) (negligent failure to ensure execution of certain deeds to client, to acknowledge receipt of client's check, to deposit same in bank account and to properly account for those funds constitute violations of Code of Professional Responsibility warranting reprimand); Florida Bar v. Provost, 323 So. 2d 578 (Fla. 1975) (attorney breached ethical duties by negligently failing to represent and protect the interests of his clients).

1980-81]

FEDERAL COURTS — MANIFEST INJUSTICE EXCEPTION — USED TO DENY RETROACTIVE APPLICATION OF THE 1978 AMENDMENTS TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA).

Sikora v. American Can Co. (1980)

The plaintiffs,[1] employees of American Can Co. (American Can), claimed that their employer's pension plan discriminated against employees aged fifty-five.[2] American Can's pension plan provided for early retirement of employees between the ages of fifty-five and sixty-five, at the option of either the employee or the company.[3] Pensions were based upon the employee's salary, contributions, and years of service.[4] Pursuant to the terms of the plan, American Can retired the plaintiffs — Honeiser, age fifty-six, in 1976; and Kalmbach, age sixty-one, in 1975.[5]

The plaintiffs filed suit in the United States District Court for the District of New Jersey claiming that their retirements were involuntary [6] and that such retirements prior to the age of sixty-five were violative of the ADEA.[7] In response to the plaintiffs' claims for damages and

1. Sikora v. American Can Co., 622 F.2d 1116 (3d Cir. 1980). In the original suit, the four plaintiffs, John Sikora, Otto Kalmbach, Frederick Meyer and Vladimir Honeiser, alleged violations of the ADEA. *Id.* at 1118. Sikora settled his case after the appeal was taken and Meyer's claim was dismissed by stipulation, thus leaving Kalmbach and Honeiser with claims against American Can. *Id.* at 1119. American Can employed Honeiser on March 16, 1964 and Kalmbach on December 3, 1962. *Id.* at 1118.

2. *Id.* at 1116. American Can is a corporation organized and existing under the laws of the State of New Jersey and authorized to do business in New Jersey. *Id.*

3. *Id.* at 1118. A 1974 change in the plan provided a formula for early retirement at the option of either the company or the employee. *Id.* Under the plan, an employee's pension could be reduced by one-fourth of one percent for each month that his early retirement came before age 65, unless the employee had completed 30 years of accredited service and was age 55. *Id.*

4. *Id.* American Can's voluntary retirement plan was created on July 1, 1969 and extended to regular full-time, salaried employees except for those employees covered by a collective bargaining agreement. *Id.* In January 1972, employee contributions were eliminated and the pensions were based upon years of service and salary. *Id.*

5. *Id.* Plaintiff Honeiser had been working for American Can for 12 years and upon the date of his involuntary retirement he became eligible for a pension of $194.92 per month for life. *Id.* He had been previously earning $1,706 per month. *Id.* Plaintiff Kalmbach was employed by the defendant for 13 years and was pensioned at $215.91 per month. *Id.* He had been earning $1,511 per month before his involuntary retirement. *Id.*

6. *Id.*

7. *Id.* The plaintiffs were claiming a violation of the ADEA which reads in pertinent part:

Section 4(a). It shall be unlawful for an employer —

(1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation,

reinstatement,[8] American Can moved for summary judgment, maintaining that their "bona fide" retirement plan made the otherwise involuntary retirements fall outside the conduct proscribed by the ADEA.[9]

The district court granted summary judgment on the retirement claims holding that an involuntary retirement pursuant to a bona fide pension plan was not violative of the 1967 ADEA.[10] Judgment was entered on March 20, 1978.[11] On April 6, 1978, the same day that the plaintiffs appealed the lower court decision,[12] Congress amended the 1967 ADEA, making it unlawful to involuntarily retire an individual on the basis of the age of the employee, *including* retirements pursuant to a bona fide pension plan.[13] On appeal, the plaintiffs argued that

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terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a) (1976).

8. 622 F.2d at 1118. The plaintiffs also amended their complaint to include age discrimination allegations relating to merit and salary increases. *Id.* at 1119.

9. *Id.* at 1118-19. American Can pointed to § 623(f)(2) of the 1967 ADEA which read in pertinent part:

(f) It shall not be unlawful for an employer, employment agency, or labor organization —

. . . .

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual.

29 U.S.C. § 623(f)(2) (1976) (amended 1978). For the text of the section as amended, *see* note 13 *infra.*

10. 622 F.2d at 1119. The district judge found the Third Circuit's decision in *Zinger v. Blanchette* to be controlling. *Id., citing* Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied,* 434 U.S. 1008 (1978). In *Zinger,* the Third Circuit had held that the involuntary retirement of a 64-year-old railroad employee was not violative of the 1967 ADEA. 549 F.2d at 910. The court held that under the Act, forced early retirement pursuant to a reasonable and bona fide retirement plan was lawful. 622 F.2d at 1119.

11. 622 F.2d at 1119.

12. *Id.* The plaintiffs' first appeal was dismissed for failure to comply with FED. R. CIV. P. 54(b). 622 F.2d at 1119.

13. *See* 29 U.S.C. § 623 (Supp. II 1978). The 1967 ADEA was amended in 1978, and now provides in pertinent part:

(f) It shall not be unlawful for an employer, employment agency, or labor organization —

. . . .

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to

the 1978 amendments to the ADEA should be applied in this case even though the disputed retirements occurred prior to the effective date of the amendments.[14]

The United States Court of Appeals for the Third Circuit[15] vacated the judgment of the district court,[16] *holding* that the 1978 ADEA amendments do not apply retroactively to involuntary retirements which occurred prior to the effective date of the amendments. *Sikora v. American Can Co.*, 622 F.2d 1116 (3d Cir. 1980).

In 1967, Congress enacted the ADEA with the intention of promoting employment of the elderly based upon their ability rather than their age: by prohibiting arbitrary age discrimination in employment, it was expected that employers and employees would then be able to confront and resolve many of the problems of age and its impact upon employment.[17] To achieve these purposes, the ADEA provided that an employer's "fail[ure] or refu[sal] to hire or discharge any individual or otherwise discriminate against any individual with respect to his . . .

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hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.

Id. For the text of the section as it was prior to the amendment, *see* note 9 *supra.*

14. 622 F.2d at 119.

15. The case was heard by Judges Adams, Rosenn, and Weis. Judge Weis wrote the opinion of the court. Judge Adams filed a dissenting opinion.

16. 622 F.2d at 1124. The case was remanded to the district court for a determination of whether American Can's pension plan was bona fide and not a subterfuge. *Id.* The district court, on remand, was also to resolve the plaintiffs' claims of discrimination in denying raises. *Id.*

17. *See* 29 U.S.C. § 621(a)-(b) (1976). The statement of findings and purpose reads as follows:

(a) The Congress hereby finds and declares that —

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems are grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Chapter to promote employment of older persons based on their ability rather than age: to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Id.

age" shall be unlawful.[18] Further, the Act originally provided that involuntary retirements pursuant to a bona fide pension plan would not be unlawful.[19]

The Supreme Court, in *United Air Lines, Inc. v. McMann*,[20] interpreted the "bona fide pension plan" language to constitute an exception to the 1967 Act.[21] Thus, when a bona fide pension plan is shown not to be a subterfuge for the avoidance of obligations imposed by the Act, the courts had held that retirements pursuant to such plans were valid.[22] Following the *McMann* decision, Congress amended the 1967 ADEA to expressly strengthen and broaden the Act and forced retirements, even though previously allowed under a bona fide pension plan, were precluded.[23]

A clear bias against the retroactive application of statutes and laws has existed since the earliest decisions of the Supreme Court.[24] In the 1798 case of *Calder v. Bull*,[25] the Supreme Court recognized that, generally, laws should not be given retroactive effect because of the unjust and often oppressive consequences resulting from such application.[26]

18. *Id.* § 623(a)(1) (1976).

19. *Id.* § 623(f)(2) (amended 1978).

20. 434 U.S. 192 (1977). In *United Air Lines*, the plaintiff, an employee of United Airlines, was retired at age 60 in accordance with the provisions of the company's pension plan. *Id.* at 193-94. The plaintiff claimed that the retirement was involuntary and violated the 1967 ADEA. *Id.* at 194.

21. *Id.* at 202. The Court held that such retirements, if pursuant to a bona fide pension plan, are not unlawful under § 623(f)(2). *Id. Accord* Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978). In *Zinger*, the court stated that, under the Act, "involuntary retirement pursuant to a bona fide plan which is not a subterfuge . . . is not unlawful." 549 F.2d at 910. For a further discussion of *Zinger*, *see* note 10 *supra*.

22. *See e.g.*, Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978); Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974).

23. 29 U.S.C., § 623(f)(2) (Supp. II 1978). For the text of the amendment, *see* note 13 and accompanying text *supra*. As stated in the amendment's legislative history, "[t]he primary purpose of this legislation is to strengthen and broaden the provisions of the ADEA to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age." S. REP. No. 95-493, 95th Cong., 2nd Sess. 1, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 504.

24. *See generally* Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

25. 3 U.S. (3 Dall.) 386 (1798).

26. *Id.* at 391. In *Calder*, the Supreme Court rejected an ex post facto challenge to a Connecticut statute. *Id.* at 386. The 1795 statute allowed a new hearing to be granted to a 1793 cause of action which, under an older statute, had lost all right of appeal. *Id.* at 386-87. Although the Court held that there was no ex post facto problem because the action involved no vested rights, it noted that "it is a good general rule, that a law should have no *retrospect*." *Id.* at 391 (emphasis by the Court). As the *Calder* Court noted, "Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government." *Id.* at 396, *citing* MASS. CONST. art. 24.

Thus, absent a clear expression by the legislature to the contrary, a statute is presumed to have prospective effect only.[27]

However, the Court has recognized a special type of retroactivity which requires the application of a change in the law to cases pending on appeal.[28] This "special" type of retroactivity was first expressed in *United States v. The Schooner Peggy*[29] where the Court retroactively applied a treaty which was enacted in 1800 while the litigation was pending.[30] The Circuit Court had condemned a French ship pursuant to a federal statute, but the Supreme Court reversed on the basis of the treaty language which provided for mutual restoration of captured property which had not yet been definitely condemned.[31] The *Schooner Peggy* Court reasoned that the treaty should be applied retroactively because when "subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."[32] The Court did urge, however, that retroactive application be granted more readily to cases involving great national concerns than to those involving private parties.[33]

27. *See* Brewster v. Gage, 280 U.S. 327, 337 (1930); Waugh v. Board of Trustees, 237 U.S. 589, 595 (1915); United States v. American Sugar Refining Co., 202 U.S. 563, 577 (1906); United States v. Heath, 7 U.S. (3 Cranch) 399 (1806).

28. *See* notes 29-52 and accompanying text *infra.*

29. 5 U.S. (1 Cranch) 103 (1801).

30. *Id.* at 110. On April 24, 1800, a United States ship, following instructions to seize any French vessel found in American territorial waters, captured the French vessel, Schooner Peggy. *Id.* at 103. The vessel was condemned as a "prize" on September 23, 1800. *Id.* at 107. On February 18, 1801, a treaty was ratified between France and the United States providing for mutual restoration of captured property not yet definitively condemned. *Id.* at 107. The Court noted that the lower court's condemnation was not definitive because the decision was appealed and thus the controversy was still pending. *Id.* at 109. The Court held that the treaty applied retroactively to the vessel and that it should be returned. *Id.* at 110.

31. *Id.* at 110.

32. *Id.*

33. *Id.* The *Schooner Peggy* Court specifically stated that, "[I]t is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties . . . ." *Id.*

The principles of *Schooner Peggy* were reaffirmed by the Court in *Thorpe v. Housing Auth.*, where the Court reiterated the general rule that "an appellate court must apply the law in effect at the time it renders its decision." 393 U.S. 268, 281 (1969) (footnotes omitted). Further, the Court held that the rule extended to constitutional and judicial changes as well as to statutory changes of the law. *Id.* at 282.

See also United States v. Alabama, 362 U.S. 602, 604 (1960) (per curiam) (applying Civil Rights Act of 1960 to a case pending on appeal; the Act created a cause of action against the state); Ziffrin, Inc. v. United States, 318 U.S. 73, 78 (1943) (applying Interstate Commerce Act amendment to pending permit application); Carpenter v. Wabash Ry., 309 U.S. 23, 26-29 (1940) (applying the Bankruptcy Act amendment which specified that it was to apply to pending cases); Dinsmore v. Southern Express Co., 183 U.S. 115, 119-21 (1901) (amend-

The Court, in *Bradley v. Richmond School Board,*[34] ruled that legislation which was enacted while an appeal in the case was pending was properly applied to that case.[35] In *Bradley,* the district court had awarded attorneys fees to plaintiffs who had successfully sued for desegregation of a Virginia school district.[36] At the time of the district court's decision there existed no statutory basis for the court's award of attorney's fees to the plaintiffs.[37] During an appeal by the school district, but before the appellate decision, Congress enacted legislation providing federal courts with the power to award reasonable attorney's fees.[38] The Supreme Court allowed retroactive application of the new legislation,[39] but stated that statutes should not be given retroactive effect where there was statutory language or legislative history to the contrary[40] or where retroactive application would result in manifest injustice to one of the parties.[41] The *Bradley* Court suggested that three considerations were appropriate in determining the presence or absence of manifest injustice:[42] the nature and identity of the parties; the nature of their rights; and the nature of the impact of the change

ment to War Revenue Act of 1898 used to dismiss suit brought under the Act); Note, *Statutory Authorization for Awarding of Attorneys' Fees Applied Retroactively to Services Rendered Prior to Its Enactment, Despite an Absence of Language on Legislative History Indicating it Was to be Applied to Pending Cases,* 24 DRAKE L. REV. 435, 439 (1975).

34. 416 U.S. 696 (1974).

35. *Id.* at 724.

36. *Id.* at 705-06.

37. *Id.* at 709, *citing* Bradley v. Richmond School Bd., 472 F.2d 318, 330-31 (4th Cir. 1972).

38. 416 U.S. at 709. *See* 20 U.S.C. § 1617 (1970 ed. Supp. II) (Education Amendments Act of 1972).

39. 416 U.S. at 711. The Court noted that the origin and justification of the rule can be found in *Schooner Peggy,* where Chief Justice Marshall advocated retroactive application of changed law to cases on appeal. *Id.* at 711-12. Specifically, the Court found that the parties in *Bradley,* a publicly funded governmental entity and a class of children, were involved with a matter of great national concern in the form of school desegregation litigation. *Id.* at 718-19. The *Bradley* Court found no matured rights in that the school board was always subject to instructions from the public. *Id.* at 720. Also, the Court noted that no increased burden was placed upon the school board since it was already constitutionally responsible for providing pupils with a non-discriminatory education. *Id.* at 721.

40. *Id.* at 712.

41. *Id.* at 711. Relying on the decisions of *Schooner Peggy* and Thorpe v. Housing Auth., 393 U.S. 268 (1969), the *Bradley* Court arrived at three criteria upon which to base a finding of manifest injustice. 416 U.S. at 716-17. For a discussion of these criteria, *see* notes 42-43 and accompanying text *infra.*

42. 416 U.S. at 717. As the Court stated:

> The concerns expressed by the Court in *Schooner Peggy* and in *Thorpe* relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon these rights.

Id.

on those rights.[43] The first of the set, the nature and identity of the parties, relates back to the *Schooner Peggy* preference for applicability of recent legislation to areas of great national concern and not in cases between private individuals.[44] The second and third considerations evolve from the Court's unwillingness to infringe upon mature rights[45] or impose unanticipated obligations upon the parties.[46]

In *Greene v. United States*,[47] retroactive application of a 1960 Department of Defense regulation to the plaintiff was denied because the plaintiffs' rights were deemed to have vested as a result of a 1959 Supreme Court decision.[48] The 1959 decision had held that Greene's security clearance had been wrongfully revoked,[49] and Greene subse-

43. *Id.* In applying the three criteria, the Court noted that a dispute between a publicly funded government entity and a class of children was not one between private individuals but rather constituted a great national concern. *Id.* at 718-19. Further, the *Bradley* Court found no matured or unconditional rights affected by retroactive application. *Id.* at 720. As to the third concern, the Court found no impact on the parties' rights since retroactive application of § 718 did not alter the school board's constitutional responsibility for providing pupils with a nondiscriminatory education. *Id.* at 721. Accordingly, from these circumstances, the *Bradley* Court held that applying § 718 retroactively would not result in manifest injustice. *Id.*

44. *Id.* at 719. For a discussion of *Schooner Peggy, see* notes 29-33 and accompanying text *supra.*

45. 416 U.S. at 720. The *Bradley* Court noted concern over the possibility of injustice arising from retroactive application of changed law to a right that has matured or vested. *Id.* Generally, statutes will not be given retrospective operation if to do so would impair or disturb vested rights. *See* note 47 *infra.* The normal sense of the word "vest" is to indicate a present and immediate interest as distinguished from one which is contingent. 92 C.J.S. *Vest* (1955). Thus, a major obstacle to retroactive application is presence of a vested right. 416 U.S. at 720.

46. 416 U.S. at 720. The Court declared it would avoid retroactive application due to unfairness if such application would have the impact of creating new and unanticipated obligations. *Id.*

47. 376 U.S. 149 (1964). *Greene* was cited by the Court in *Bradley* during its discussion of "the nature of the rights affected by the change." Bradley v. Richmond School Bd., 416 U.S. at 720. According to the *Bradley* Court, *Greene* was an example of the courts' refusal to "apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." *Id.*

Greene involved a controversy over the 1953 discharge of the plaintiff, an employee in a munitions company, due to revocation of his security clearance. 376 U.S. at 150. The Supreme Court, in 1959, held that the discharge was unlawful since neither the right to confrontation nor cross-examination had been granted to the plaintiff. Greene v. McElroy, 360 U.S. 474, 508 (1959).

After the loss of his job, the plaintiff had taken a lower paying job and had sued for the difference in salaries under a 1955 Department of Defense regulation allowing reimbursement of employees who had received a final determination of their contract rights. 376 U.S. at 151-52 & n.3. The Department refused to grant the request under the 1955 regulation but claimed that a new 1960 regulation, which required proof by the employee that he would presently be entitled to a security clearance, applied. *Id.* at 152-53.

48. *See* 376 U.S. at 153, 164.

49. Greene v. McElroy, 360 U.S. 474 (1959). For a discussion of *McElroy, see* note 47 *supra.*

quently applied to the Department of Defense for reimbursement under a 1955 regulation.[50] The Department, however, wanted to apply a 1960 regulation which would require the applicant to prove he would now be eligible for a security clearance.[51] The Supreme Court held that the earlier decision as to Greene's right to reimbursement had vested and matured Greene's right and, thus, it refused to apply a changed law to a case on appeal where it would affect a right which had matured and become unconditional.[52]

In City of *Los Angeles v. Manhart*,[53] the Court denied retroactive application of an amendment to Title VII of the Civil Rights Act of 1964 because of the great impact that the change in the law would have upon the parties.[54] *Manhart* involved an alleged sex discrimination, in violation of Title VII, stemming from the city's pension plan which required larger contributions from female employees than from male employees.[55] The Court held that the impact of a retroactive award would have a disastrous effect on the solvency of pension and insurance plans and therefore denied retroactive application of the law.[56]

Against this background, Judge Weis framed the issue of the *Sikora* appeal as whether the 1978 ADEA amendments should be applied retroactively to the plaintiffs' involuntary retirements.[57] After noting the general rule that a statute is presumed to apply prospectively, Judge Weis recognized that the application of a change in the sub-

50. For a brief discussion of the 1955 regulation, *see* note 47 *supra*.

51. 376 U.S. at 159. The Court, in Greene v. United States, rejected the Department's contention that the 1960 regulation was applicable and held that the plaintiff's rights to reimbursement had vested and matured as a result of the earlier Greene v. McElroy decision. *Id.* at 160-61.

52. *Id.* at 164. *See also* Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164 (1944). (Court refused application of Chandler Act to a proceeding under § 77B of the Bankruptcy Act where a final decree by the Tax Court had been entered prior to the effective date of the statute).

53. 435 U.S. 702 (1978).

54. *Id.* at 723. *See* 42 U.S.C. § 2000e-2 (a) (1) (1976), *as amended by* Pub. L. No. 95-555, § 1, 92 Stat. 2076.

55. 435 U.S. at 704.

56. *Id.* at 712-22. The Court noted that over fifty million Americans used retirement plans other than Social Security and over $600 billion were reserved as of 1976 for retirement benefits. *Id.* at 722, *citing* AMERICAN COUNCIL OF LIFE INSURANCE, PENSION FACTS 1977 20-23. Further, the Court stated that the determination of the amount set aside always includes risks that the insurer foresees. 435 U.S. at 721. The Court reasoned that allowing a retroactive Title VII award would create an unforeseen risk since prohibition against sex-differentiated employee contribution was a marked departure from past practice. *Id.* at 722. The Court concluded that retroactive liability would be devastating. *Id. See also* Rosen v. Public Serv. Elec. & Gas Co., 428 F. Supp. 454, 466-68 (D. N.J. 1971) (special sensitivity shown to retroactive Title VII awards in pension plan area).

57. 622 F.2d at 119. For a discussion of the 1967 ADEA and the 1978 amendments to the Act, *see* notes 9 & 13 *supra*.

stantive law to a case which is pending is an execption to this rule.[58] In order to determine whether the exception for pending cases should be applied to the *Sikora* appeal, the court first examined the statutory language and found the wording inconclusive.[59] The court next considered the legislative history and found indirect support for the position that the amendments were not to apply retroactively.[60]

In considering the manifest injustice exception as it was articulated in *Bradley*,[61] the court noted the Supreme Court's admonition in *Schooner Peggy*, that courts should struggle hard against retroactive application with respect to private parties,[62] and observed that *Sikora* was such a case.[63] Looking to the nature of the parties' substantive rights, the court found that since both parties had voluntarily entered into the pension plan, their contractual rights, obligations and expectations should be protected.[64] Judge Weis pointed to the Fifth Circuit's decision in *Brennan v. Taft Broadcasting*[65] and a Bulletin from the Secretary of Labor,[66] both interpreting the 1967 ADEA to permit in-

58. 622 F.2d at 119-20. Judge Weis traced this exception to *Schooner Peggy* where Chief Justice Marshall first espoused the rule. *Id.* For a discussion of *Schooner Peggy*, *see* notes 29-33 and accompanying text *supra*.

59. 622 F.2d at 1120. Specifically, the court noted that, by its terms, the Act was to "take effect on the date of enactment," April 6, 1978, and found this language to be equivocal. *Id.* The court recognized that the language could prohibit involuntary retirements before age 65 after April 6, 1978. *Id.* Judge Weis also noted, however, the possibility that the amendment served to erase conflicting provisions from existing retirement plans and eliminate contractual language defenses. *Id.* Both constructions were deemed to be plausible by the court. *Id.*

60. *Id.* at 1120-21. The court found only one reference to the issue in legislative history. *Id.* In response to a question as to retroactivity from Senator Randolph, Senator Williams responded: "The bill is not retroactive. The question of mandatory retirements prior to the effective date of this bill will be determined by the courts' interpretation of *existing* law." *Id.* at 8, *citing* 123 CONG. REC. S17, 304 (1977) (remarks of Sen. Williams) (emphasis added). On this basis, the court found that "the brief legislative history seems to indicate that Congress intended a prospective application." 622 F.2d at 1121.

61. For a discussion of the *Bradley* criteria, *see* notes 42-46 and accompanying text *supra*.

62. 622 F.2d at 1122. For a discussion of *Schooner Peggy* regarding suits between private parties, *see* note 33 *supra*.

63. 622 F.2d at 1122. The court considered the present situation to deal with a private matter which, if affected, would have no great repercussions either internationally or nationally. *Id.*

64. *Id.* at 1122-23. For a review of the provisions of the plan, *see* notes 4-6 and accompanying text *supra*.

65. 500 F.2d 212 (5th Cir. 1974). *Brennan* involved the compulsory retirement of a 60 year old plaintiff pursuant to the terms of the defendants' retirement plan. *Id.* at 214. There the court interpreted the 1967 ADEA to allow forced retirement pursuant to a bona fide pension plan. *Id.* at 215.

66. *See* 29 C.F.R. § 860.110 (1979). The Secretary of Labor issued an interpretive bulletin in 1969 which provides that, "the act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan." *Id.* In a report to Congress,

voluntary retirements before age 70, as evidence that the defendant's rights had vested.[67] The court concluded that these contractual rights had become fixed and unconditional and that retroactive application of the amendment would prejudice these vested rights.[68]

Concerning the impact that retroactive application would have upon the parties' rights, Judge Weis emphasized the disastrous effects upon the solvency of pension plans that retroactive application could trigger.[69] Fear of such a disastrous effect contributed to the court's finding of manifest injustice.[70] Upon review of the record, Judge Weis found that retroactive application would result in manifest injustice to the employer and therefore held that the amendments did not apply retroactively to a retirement that occurred prior to the effective date of the enactment [71] and concluded that the presumption in favor of retroactivity articulated in *Bradley* was inapplicable to the case because of the positive legislative history and the "need to prevent manifest injustice." [72] Since the court was not in a position to determine the validity of the pension plan, however, the case was remanded for a determination of whether the plan was bona fide.[73]

Judge Adams filed a strong dissent challenging the validity of the majority's interpretation and application of the *Bradley* criteria.[74]

Secretary of Labor Brennen stated that mandatory retirements were permissible so long as they were part of a bona fide pension plan. UNITED STATES DEPARTMENT OF LABOR, REPORT PERTAINING TO ACTIVITIES IN CONNECTION WITH THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 17 (January 1975).

67. 622 F.2d at 1123. Judge Weis stressed that, to the extent that the defendants had the contractual option to retire its employees under both the Bulletin and the *Brennan* decision, its rights and obligations were fixed by 1975 and 1976 when they retired the plaintiffs. *Id.* The plaintiffs, Judge Weis noted, had no firmly established right to remain employed until they reached age 65. *Id.*

68. 622 F.2d at 1123. The Court considered the retirement plan a contract that was in prima facie compliance with the law when the retirement occurred. *Id.*

69. *Id.* at 1123. The Court stated: "Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." *Id.*, quoting City of Los Angeles v. Manhart, 435 U.S. at 721. For a discussion of *Manhart, see* notes 53-56 and accompanying text *supra.*

70. 622 F.2d at 1123.

71. *Id.* at 1123-24.

72. *Ibid.* Although the court found only one reference to retroactivity in the legislative history, it concluded that there did exist a "positive legislative history" against retroactive application. *Id. See* note 60 and accompanying text *supra.*

73. 622 F.2d at 1124. The case was remanded for a determination of whether the age limits for early retirements were too low and the pensions inadequate. *Id.* The necessity to remand was due to the fact that the district court had included no factual basis in the record for its determination that the pension plan was bona fide. *Id.*

74. *Id.* at 1124-35 (Adams, J., dissenting). For a discussion of the criteria as developed in *Bradley* and applied by this court, *see* notes 42-46 & 61-73 and accompanying text *supra.*

Judge Adams agreed that "for cases pending . . . at the time the law is changed, the [Supreme] [C]ourt appears to have abandoned the presumption of prospectivity, adopt[ing] instead a rule of presumed retroactivity . . ." subject to a scrutiny of the legislative history, statutory direction, and the manifest injustice exception to the rule.[75]

Under Judge Adams' analysis, Congress had not shown a clear intention to limit the amendments to prospective application only.[76] Judge Adams also argued that careful scrutiny failed to reveal conclusively that retroactive application would result in manifest injustice to the parties or their rights.[77] In support of this conclusion, Judge Adams argued that the private status of the parties, although a criterion involved in the determination of manifest injustice, should not have been given such critical significance by the majority.[78] Such a construction, he argued, would constrict the retroactive rule, making it applicable to only a few public law cases.[79] Considering the nature and identity of the parties, Judge Adams, unlike the majority, argued that this case involved a great national concern,[80] comparable to the issue considered in *Schooner Peggy*.[81] In addition, he found that the parties' rights had not been fixed and unconditional at the time of the retirement[82] because the 1967 Act had not been conclusively inter-

75. 622 F.2d at 1127 (Adams, J., dissenting).

76. *Id.* at 1129 (Adams, J., dissenting). Judge Adams found the brief legislative history to fall "short of a 'clear legislative direction' that [the] law have only a prospective effect . . ." which he felt was required under Thorpe v. Housing Auth., 393 U.S. 268 (1969), and *Bradley*. Id. For a discussion of the legislative history, *see* note 60 *supra*. For a discussion of *Thorpe* and *Bradley, see* notes 33-46 and accompanying text *supra*.

77. 622 F.2d at 1135 (Adams, J., dissenting). Since the legislative history and congressional direction were inconclusive, Judge Adams accordingly turned his attention to the presence or absence of manifest injustice. *Id.* at 1129-35 (Adams, J., dissenting).

78. *Id.* at 1129-31 (Adams, J., dissenting). Judge Adams argued that by allowing private status such a significant role, a limitation was created which would be inconsistent with the broad language of Thorpe v. Housing Auth., 393 U.S. 268 (1969), and Bradley. *Id.* For a discussion of *Thorpe, see* note 33 *supra*.

79. 622 F.2d at 1130 (Adams, J., dissenting).

80. *Id.* at 1130-31 (Adams, J., dissenting). Judge Adams ascertained that the legislative history of the Act indicated that a great national concern was involved. *Id.* From examination of the House and Senate Reports, Judge Adams characterized the Act as a remedy to a "problem on a par with racial and sexual discrimination—matters of concededly great national importance." *Id., citing* H.R. REP. No. 95-950, 95th Cong., 2d Sess. (1977); S. REP. No. 95-493, 95th Cong., 2d Sess. (1977).

81. For a discussion of *Schooner Peggy, see* notes 29-33 and accompanying text *supra*.

82. 622 F.2d at 1131-32 (Adams, J., dissenting). Judge Adams maintained that there was no basis to be found for the vesting and maturing of the defendants' rights. *Id.* For a discussion of the majority's assertions that the parties rights had vested, *see* notes 65-68 and accompanying text *supra*.

preted at that time.[83] Thus, Judge Adams concluded that manifest injustice would not result from a retroactive application of the amendment and that the general rule allowing application of changed law to pending cases should be followed.[84]

It is submitted that the dissent's criticism concerning the court's finding of manifest injustice is valid.[85] Although the majority stated that the legislative history seems to indicate that Congress intended only prospective application, it also correctly observed that neither the legislative history nor the statutory direction provide a clear directive as to congressional intent.[86] It is submitted, therefore, that the actual basis of the majority's opinion was the finding of manifest injustice.[87] While the court correctly recognized the general rule that when the revelant law is changed while a case is on appeal the new law is to be applied,[88] it is suggested that the court avoided such application by an erroneous finding of manifest injustice.

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83. 622 F.2d at 1132 (Adams, J., dissenting). Judge Adams observed that only a decision by the Supreme Court, the Third Circuit or the District of New Jersey could supply any basis upon which American Can could have relied to vest and mature their rights. *Id.* Judge Adams believed that since the retirements in this case took place within the Third Circuit, American Can's right to retire the plaintiffs could not mature because of a decision of a sister Court of Appeals. *Id., citing* Bradley v. Richmond School Bd., 416 U.S. at 720. Judge Adams noted that the defendant had not pleaded reliance on the Secretary of Labor's interpretive bulletin. 622 F.2d at 1132 (Adams, J., dissenting).

84. 622 F.2d at 1135 (Adams, J., dissenting).

85. *See* 622 F.2d at 1124-35 (Adams, J., dissenting). For a discussion of the dissent's criticism, *see* notes 75-84 and accompanying text *supra.*

86. 622 F.2d at 1120-22. Although the majority found *some* indication that Congress intended a prospective application, the court stated that "the statutory language is not determinative" and that the brief legislative history only "*seems* to indicate that Congress intended a prospective application." *Id.* at 1122 (emphasis added). *See* note 60 and accompanying text *supra.*

87. 622 F.2d at 1123. Although the court did find some legislative history which supported its position, it is submitted that it was neither definitive nor precise enough for the court to base its decision upon the legislative history alone. *Id. See* note 60 and accompanying text *supra.* The need to prevent manifest injustice was the lengthier, more involved issue on which the court based its decision. *See* 622 F.2d at 1122-24.

88. 622 F.2d at 1119-20. It is submitted that although no formal rationale has ever been advanced for use of the *Schooner Peggy* principle, it has been used continuously to achieve uniformity and reliability in the federal courts. The Supreme Court has rejected application of the rule that appellate courts should review a judgment only to determine whether it was correct *when made. See* Vandenbark v .Owens-Illinois Co., 311 U.S. 538, 543 (1940). The *Vandenbark* Court, instead, applied the *Schooner Peggy* principle as *the* guide for federal review noting that although Justice Marshall had dealt there with a treaty and its relation to private parties, the principle has found acceptance in a variety of situations. *Id.* at 543. *See, e.g.,* Oklahoma Packing Co. v. Oklahoma Gas Co., 309 U.S. 4 (1939); Sioux County v. National Surety Co., 276 U.S. 238 (1927); Moores v. National Bank, 104 U.S. 625 (1881); Kibbe v. Ditto, 93 U.S. 674 (1976).

The court, it is submitted, overly emphasized and relied upon the status of the plaintiffs and the defendant as private entities.[89] Although the Supreme Court in *Schooner Peggy* did urge courts to struggle hard against retroactive application when the situation involves a private case between individuals,[90] the opinion did not state that private individual status conclusively barred retroactive application.[91] Moreover, the majority failed to recognize that age discrimination is an issue of great national concern.[92] The dissent more aptly regarded the issue as one akin to racial and sexual discrimination and of "profound national importance." [93]

It is further submitted that the majority's position that the defendant had two interpretive rulings upon which to rely [94] fails to support the finding that the defendants' rights had vested or matured. As the dissent noted, only a final decision by the Supreme Court, the Third Circuit, or the District Court for the District of New Jersey could definitely vest and mature American Can's rights and obligations.[95]

Regarding the majority's argument that the solvency of pension plans must be protected, it is submitted that the opinion failed to reveal how invalidating a clause in a pension plan which concerned involuntary retirements amounts to the drastic change in pension plans

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89. For a discussion of the majority's view as to the nature of the parties, *see* notes 62-63 and accompanying text *supra.*

90. *See* note 33 and accompanying text *supra.*

91. *Id.*

92. As stated in the ADEA's legislative history: "Society as a whole suffers from mandatory retirement. In hearings before the House Select Committee on Aging, Professor James Schultz . . . testified that mandatory retirement of willing and able employees costs the nation three-tenths of 1 percent of its annual gross national product. This represents 4.5 billion . . . dollars." S. REP. NO. 95-493, 95th Cong. 2d Sess. 4, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 507.

It was also noted in the legislative history of the Act that: "Mandatory retirement works severe injustices against the aged. For many, retirement income from public or private sources is unavailable or inadequate to support a comfortable existence . . . . Substantial evidence exists that mandatory retirement may have a severe deteriorative impact on the physical and psychological health of older individuals." *Id.* at 3-4, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 506-07.

93. 622 F.2d at 1131 (Adams, J., dissenting). *See generally,* Comment, *The Age Discrimination in Employment Act Amendments of 1978: A Legal and Economic Analysis,* 7 PEPPERDINE L. REV. 85 (1979).

94. *See* notes 65-67 and accompanying text *supra.*

95. *See* 622 F.2d at 1132 (Adams, J., dissenting); notes 82 & 83 *supra.* The vesting of rights in *Greene v. United States* was brought about by a Supreme Court decision. 376 U.S. at 160-61. In *Sikora,* the Supreme Court, Third Circuit, or the District Court for the District of New Jersey might have rendered a decision contrary to that of the Fifth Circuit's *Brennan* decision and American Can would have then been bound by that decision. *See* notes 82 & 83 *supra.* Only a decision by one of those authorities could have conclusively bound and *vested* American Can's right thus barring retroactive application. For a discussion of vesting, *see* note 45 *supra.*

cautioned against in *Manhart*.[96] It is submitted that the majority applied the manifest injustice execption in a way that unnecessarily limited the presumption of retroactivity pronounced in *Schooner Peggy* and *Bradley*.[97]

It is suggested that the decision in *Sikora* will have a very narrowing effect on retroactive application of changed law to cases pending in the Third Circuit. It is submitted that the court's finding of manifest injustice extended the exception beyond the scope intended by the Supreme Court.[98] This decision, it is suggested, *could* have been used to enforce a broad compliance with the *Schooner Peggy* principle[99] as did the Supreme Court in *Bradley*.[100]

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96. For a discussion of *Manhart, see* notes 53-56 and accompanying text *supra*. In *Manhart,* the court denied retroactive application of a Title VII amendment to avoid drastic changes in pension plans. 435 U.S. at 702. However, the *Manhart* Court based its decision in part upon sensitivity shown by other courts to the actual and proven danger of retroactive Title VII awards in the pension fields. *Id.* at 722. It is submitted that the majority in the *Sikora* case identified no specific, actual danger to pension plans which would result from retroactive application of this ADEA amendment. 622 F.2d at 1123. It is also submitted that the major threat to pension plans results from unforeseen risks that insurance companies failed to incorporate in their calculations. For the perceived risks noted in *Manhart, see* note 56 *supra*. In *Manhart* the Court recognized a marked departure from standard practices. 435 U.S. at 722. In *Sikora,* the ADEA of 1967 was admittedly a statute not open to construction and thus there were no certainties as to its content. The risks, it is submitted, were foreseeable.

97. For a discussion of *Schooner Peggy* and *Bradley, see* notes 29-46 and accompanying text *supra*.

98. For a discussion of the manifest injustice exception, *see* notes 41-56 and accompanying text *supra*. The majority in the *Sikora* case admitted that "the precise category of cases to which the 'manifest injustice' exception applies has not been clearly defined." 622 F.2d at 1122. Yet, it is submitted that the decision, by relying on speculative impact and overemphasis of the parties' private status, expanded the exception, thereby limiting the *Schooner Peggy* rule of retroactivity. *See id.*

It is also submitted that the majority, in finding manifest injustice, circumvented the actual intent of Congress to bar forced retirements under pension plans. *See* 29 U.S.C. § 623 (1976). Although the legislative history was inconclusive, it is suggested that the sequential acts of Congress in relation to the amendments demonstrate a desire to allow retroactive application. The ADEA was enacted in 1967; *United Air Lines* (construing ADEA as allowed forced retirements if under a bona fide pension plan) was decided by the Supreme Court in 1977. For a discussion of *United Air Lines, see* notes 20-21 and accompanying text *supra*. Then, in 1978, Congress revised the ADEA to *specifically* prohibit such retirements. 622 F.2d at 1119. Thus, it is submitted, an inference may be drawn that Congress had intended forced retirements to be precluded by the 1967 ADEA and that only in view of the *United Air Lines* decision did it find it necessary to enact the amendments to *specifically* preclude such forced retirements.

99. For a discussion of *Schooner Peggy, see* notes 29-33 and accompanying text *supra*.

100. For a discussion of *Bradley, see* notes 34-46 and accompanying text *supra*. *See also,* Note, *Statutory Authorization for Awarding of Attorneys' Fees Applied Retroactively to Services Rendered Prior to Its Enactment, Despite an Absence of Language or Legislative History Indicating It Was to be Ap-*

A question raised by *Sikora* is whether retroactive application will generally be denied to all or most private litigation cases. If, as the majority seems to suggest, private status is to be a laregly determinative factor, it would as the dissent notes, "invert what the [Supreme] Court has defined as a general rule into a limited rule applicable only to a relatively small number of public law cases." [101] It is suggested that the court in the present case, by denying retroactive application of the ADEA amendments to the pending case due to a finding of manifest injustice, restricted a developing rule which was clarified and relied upon in *Bradley*.[102]

John H. McCarthy, Jr.

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plied to Pending Cases, 24 DRAKE L. REV. 435 (1975). (Author recognizes that should the Court seek to enforce a broad compliance with the *Schooner Peggy* principle, it has, by *Bradley,* laid for itself a strong foundation for such action).

101. *See* 622 F.2d at 1130 (Adams, J., dissenting).

102. *See* notes 34-46 and accompanying text *supra.*

FEDERAL PRACTICE AND PROCEDURE — CONSTITUTIONAL LAW — THE FIFTH AMENDMENT RIGHT TO DUE PROCESS PREVAILS OVER THE SEVENTH AMENDMENT RIGHT TO JURY TRIAL IN COMPLEX LITIGATION.

In re Japanese Electronic Products Antitrust Litigation (1980)

National Union Electric Corp. (NUE) and Zenith Radio Corp. (Zenith) brought actions seeking treble damages and injunctive relief[1] against competitors for an alleged conspiracy to destroy the United States domestic consumer electronics industry in violation of federal antitrust laws.[2] Counterclaims were filed by certain defendants alleging antitrust violations on the part of Zenith.[3]

1. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 992 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980). NUE's complaint was filed in the district of New Jersey on December 21, 1970. 478 F. Supp. at 892 n.3. Zenith filed its complaint in the Eastern District of Pennsylvania on September 20, 1974. *Id.* at 892 n.4. The actions were consolidated for trial by the Pennsylvania district court. 631 F.2d at 1073. Both the Antidumping Act of 1916, 15 U.S.C. § 72 (1976), and the Clayton Act, 15 U.S.C. § 15 (1976), allow for the award of treble damages.

2. 631 F.2d at 1072. The conspiracy is alleged to have lasted 30 years, involving over 100 coconspirators. *Id.* The relevant statutory provisions include: 1) The Antidumping Act of 1916, which prohibits imports from being sold in the United States "at a price substantially less than the actual market value or wholesale price" in the countries where the goods are produced or otherwise marketed, provided the acts are done with the intent of destroying or injuring an industry in the United States. 15 U.S.C. § 72 (1976). 2) The Sherman Act, which makes conspiracies in restraint of trade or which attempt a monopolization of United States commerce unlawful, 15 U.S.C. §§ 1, 2 (1976). 3) The Wilson Tariff Act, which declares as illegal and void any conspiracy made between parties, either of whom is importing goods into the United States, with intent to effect a restraint of trade. 15 U.S.C. § 8 (1976). Zenith alleged separate violations of § 7 of the Clayton Act, which prohibits a company, engaged in commerce, from acquiring interests in another company, also involved in commerce, where that acquisition may substantially lessen competition or tend to create a monopoly. 631 F.2d at 1072. *See* 15 U.S.C. § 18 (1976). Zenith also alleged a separate violation of the Robinson-Patman Act, which makes it unlawful for any person engaged in commerce to discriminate in its pricing policies or schemes for the purpose of destroying competition. 631 F.2d at 1072. *See* 15 U.S.C. § 13(a) (1976).

3. 631 F.2d at 1072-73. Zenith is accused of violating §§ 1 and 2 of the Sherman Act as well as the Robinson-Patman Act. *Id. See* 15 U.S.C. §§ 1, 2, 13(a) (1976). For the pertinent provisions of these acts, *see* note 2 *supra*. The defendants also accused Zenith of being part of a sham litigation scheme against Zenith's competitors. 631 F.2d at 1072-73. The United States Supreme Court has recognized that the Sherman Act might be justifiably applicable to situations in which the litigation maintained by a party is a "mere sham designed to suppress competition." Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973). Sears, Roebuck Co., an additional defendant in *Japanese Antitrust*, also challenged Zenith's advertising practices, asserting that Zenith violated § 43 of the Lanham Act, which prohibits false designation of origin. 631 F.2d at 1073. *See* 15 U.S.C. § 1125 (1976).

Upon Zenith's and NUE's timely demands for jury trial,[4] the defendants moved to strike the jury trial demands on the ground that these actions were "so 'extraordinarily complex,' 'so massive as to make them unique in the annals of United States antitrust and trade litigation,' and beyond the practical abilities and limitations of a jury." [5] The district court denied the motion to strike, concluding that complexity was "not a constitutionally permissible reason for striking the plaintiffs' jury demands." [6]

On an interlocutory appeal from the district court's pretrial order,[7] the United States Court of Appeals for the Third Circuit [8] reversed, *holding* that due process requires the denial of a jury trial where the complexity of the case renders a jury unable to rationally resolve the issues with a reasonable understanding of the facts and the law to be applied to those facts. *In re Japanese Electronic Products Antitrust Litigation,* 631 F.2d 1069 (3d Cir. 1980).

The traditional approach to determining whether a right to jury trial is guaranteed by the seventh amendment [9] arises from the English

4. 631 F.2d at 1073.

5. 478 F. Supp. at 892. The discovery in this case lasted nine years and over 20 million documents were produced for inspection. *Id.* at 895. The depositions alone totalled over 100,000 pages and the court anticipated a trial of approximately one year. *Id.*

6. *Id.* at 942. Dealing as well with the statutory and historical arguments, the district court rejected the contention that the complexity would make a jury trial so unfair as to deny the parties their fifth amendment due process rights. *Id.* at 936. For the Third Circuit's approach to the statutory and historical arguments, *see* notes 57-65 and accompanying text *infra.* In so holding, the district court emphasized the competence of a jury, the protections which are available against a jury rendering an irrational verdict, and the functions which a jury performs in the fact finding and overall judicial process. 478 F. Supp. at 934-42. For the Third Circuit's treatment of these factors, *see* notes 75-78 and accompanying text *infra.* The district court suggested that a jury's ability to resolve complex cases can be enhanced with proper judicial guidance. 478 F. Supp. at 936. Judge Becker referred to a recent Presidential Commission's report that forwards suggestions, including those espoused by Judge Becker, to enable juries to remain competent factfinders in antitrust cases. *Id.* at 936 n.82, *quoting* REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 107 (1979).

7. The Third Circuit permitted the interlocutory appeal which the trial court certified as appropriate pursuant to 28 U.S.C. § 1292(b) (1976). 631 F.2d at 1073. Section 1292(b) allows a district judge to certify an order not otherwise appealable, and a court of appeals to permit an appeal to be taken from such an order, which involves a "controlling question of law as to which there is substantial ground for difference of opinion and [from which] an immediate appeal . . . may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b) (1976).

8. The case was heard by Chief Judge Seitz and Judges Maris and Gibbons. The majority opinion was written by Chief Judge Seitz. Judge Gibbons filed a dissenting opinion.

9. The seventh amendment provides in pertinent part: "In suits at common law . . . the right of a jury trial shall be preserved." U.S. CONST. amend. VII.

practice, as it existed in 1791,[10] of affording jury trials in actions at law[11] but not those in equity.[12] While the courts of law and equity have been merged in the federal system,[13] the law-equity distinction remains determinant as to when a jury trial will be afforded.[14] The Supreme Court has, however, parted with the static historical approach[15]

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10. C. WRIGHT, LAW OF FEDERAL COURTS § 92, at 450 (3d ed. 1976). *See also* Dimick v. Schiedt, 293 U.S. 474, 476 (1935). The English common law as of 1791 is apparently chosen because the seventh amendment provides that "in suits at common law" the right to jury "shall be preserved" and the amendment was adopted in 1791. *See* Wolfram, *The Constitutional History of the Seventh Amendment,* 57 MINN. L. REV. 639, 640-49 (1973).

11. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 8.2, at 351 (2d ed. 1977). The United States Supreme Court has stated that the framers of the Constitution meant actions at law to be those in which legal rights were at issue as opposed to actions in equity where equitable rights were at issue and equitable remedies were administered. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 436 (1830).

12. F. JAMES & G. HAZARD, *supra* note 11, § 8.2, at 351. It is often stated that the jurisdiction of a court of chancery is limited to actions for which the law courts could not provide an adequate remedy. 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 132, at 181 (5th ed. 1941). "Adequate remedy" generally refers to the capabilities of a court to grant complete relief, and the procedures available to grant that relief, so that complete justice is done. *Id.* § 176, at 240. An equitable accounting, where accounts between parties are balanced and the amount due is enforced, is considered to be an action where the remedy at law is inadequate and equity jurisdiction is appropriate because the accounts are complicated and beyond jury determination. H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 202, at 540 (2d ed. 1948). For additional discussion of equitable accountings, *see generally* 4 J. POMEROY, *supra,* §§ 1420-21, at 1076-81.

Historically, common law actions were limited to particular forms of action. F. JAMES & G. HAZARD, *supra* note 11, § 1.3, at 10-12. Redress for situations not fitting into these forms of action could only be had by petitioning the king. *Id.* The chancellor, at the direction of the king, would hear these petitions using the equitable procedures available to him. *Id.* The chancellors eventually developed their own substantive and procedural rules for dealing with the actions that fell within their jurisdiction, including the remedy of specific performance, where the remedy at law was inadequate. *Id.* § 1.4, at 13-14. Thus, a dual system of equity and law developed such that parties to a dispute might have to bring more than one action and have equitable rights determined in one forum and legal rights in another, or a party suing in equity could be non-suited because his proper remedy was at law. *Id.* § 1.5, at 15. For a further discussion of the duties and function of the Chancellor, *see* Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment,* 80 COLUM. L. REV. 43 (1980).

13. *See* FED. R. CIV. P. 2, 18. The dual system of law and equity was also abolished in England by the Judicature Acts of 1873 and 1875. F. JAMES & G. HAZARD, *supra* note 11, § 1.6, at 19.

14. F. JAMES & G. HAZARD, *supra* note 11, § 8.3, at 359-60; 4 C. WRIGHT & A MILLER, FEDERAL PRACTICE AND PROCEDURE § 1045, at 154 (1969). While the Federal Rules of Civil Procedure could properly merge the two forms of action, it would have been beyond the scope of their enabling legislation to have addressed the substantive law question of when the right to a jury trial attaches. 9 C. WRIGHT & A. MILLER, *supra,* § 2301, at 11.

15. Note, *The Right to A Jury Trial in Complex Litigation,* 92 HARV. L. REV. 898, 901 (1979). This departure from the traditional historical analysis has been referred to as a dynamic approach. *Id.* at 899. The district court

and concluded that the availability of equitable relief, and the consequent foreclosure of the right to a jury trial,[16] is dependent not upon the historical basis of the cause of action, but rather upon whether the legal remedy would be inadequate.[17] Thus, the Supreme Court has recognized that the expansion of legal remedies has necessarily constricted the scope of equity[18] and that the required showing of inadequacy of the legal remedies will only be met in rare cases.[19] Similarly, newly created statutory causes of action carry the right to a jury trial if they create legal rights.[20]

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in the instant case, in arguing for the validity of the historical analysis, stated that recent Supreme Court decisions have relied on the historical analysis in seventh amendment application. 478 F. Supp. at 927-29.

16. F. JAMES & G. HAZARD, *supra* note 11, § 8.2, at 351-52. *See* notes 8-12 and accompanying text *supra*.

17. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509 (1959) (right to jury trial of legal issue could be lost to a prior determination of an equitable issue, only under imperative circumstances). For a discussion of adequacy of the legal remedy as the criterion for equity jurisdiction, *see* note 12 *supra*.

18. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509 (1959). The Court has attributed the expansion of legal remedies to the adoption of Declaratory Judgment Act and the liberal joinder provisions of the Federal Rules of Civil Procedure. *Id. See* FED. R. CIV. P. 1, 2 & 18. A jury trial is now available in situations where, before the adoption of the federal rules, the case would have been tried to a judge. 9 C. WRIGHT & A. MILLER, *supra* note 14, § 2301, at 12.

19. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962). The *Dairy Queen* Court reiterated that inadequacy of the legal remedy is a prerequisite to equity deciding the claim. *Id.* at 478. The Court noted that the availability of special masters in complicated cases would make it a rare case where the remedy at law would be declared inadequate. *Id.* Rule 53 of the Federal Rules of Civil Procedure provides for the appointment and compensation of special masters. FED. R. CIV. P. 53.

20. Pernell v. Southall Realty, 416 U.S. 363 (1974) (the right to recover real property existed and was protected at common law thus making the seventh amendment applicable to a suit brought under a statute establishing a procedure for recovery of possession of real property); Curtis v. Loether, 415 U.S. 189 (1974) (seventh amendment applicable to actions brought under the Civil Rights Act of 1968 if the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law); Fleitmann v. Welsbach St. Lighting Co., 240 U.S. 27 (1916) (when the penalty involved is treble damages, the statute should be read as authorizing enforcement of liability by a trial by jury); Meeker v. Lehigh Valley R.R., 162 F. 354 (C.C.S.D.N.Y. 1908) (action brought under antitrust laws for improper activities in the shipment of coal was an action at law to which the parties were entitled to a jury trial).

In *Ross v. Bernhard,* the Supreme Court held that the right to jury trial accompanies those issues in a shareholders' derivative suit which, if the corporation were suing in its own right, would be tried to a jury. 396 U.S. 531, 536 (1970). In so holding, the Court read the *Fleitmann* case as interpreting the antitrust statute to anticipate a jury trial when treble damages were being sought. *Id.* The Court noted that the *Fleitmann* opinion had "Seventh Amendment overtones [but] its ultimate rationale was grounded in the antitrust laws." *Id. See also id.* at 547 (Stewart, J., dissenting).

It should be noted that the district court in the instant case rejected the *Ross v. Bernhard* language as being dispositive of the issue of whether the antitrust laws guarantee a jury trial. 478 F. Supp. at 901-02 n.20. The remainder of its statutory analysis parallels that of the Third Circuit. *Id.* at

The notion of complexity's role in equity jurisdiction and its place in modern seventh amendment interpretation has been the subject of considerable recent commentary.[21] Moreover, in recent years, complexity has been the basis upon which several courts have stricken jury trial demands.[22] The first of these, *In re Boise Cascade Securities Litigation*,[23] was a securities fraud action brought by shareholders allegedly injured in a complex business acquisition effected by Boise Cascade.[24] The district court held that the factual issues, the complexity of the evidence, and the time involved in trying the case rendered a jury unable to be a "rational and capable fact finder." [25] The *Boise* court relied on *Ross v. Bernhard* [26] for authority to inquire into a jury's ability to resolve complex issues.[27] In *Ross*, the Supreme Court had stated in a footnote that the "practical abilities and limitations of juries" was one of three factors to be considered when ascertaining the legal or equitable nature of an issue for seventh amendment purposes.[28]

902-04. For a discussion of the Third Circuit's statutory analysis, *see* notes 57-61 and accompanying text *infra*.

21. *See, e.g.*, Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 838-46 (1980) [hereinafter cited as Arnold I]; Campbell & Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965 (1980); Arnold, *A Modest Replication to a Lengthy Discourse*, 128 U. PA. L. REV. 986 (1980) [hereinafter cited as Arnold II]; Devlin, *supra* note 12, at 65-95; Janofsky, *The "Big Case": A Big Burden on Our Courts*, 66 A.B.A. J. 848, 850 (July 1980).

22. Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978); ILC Peripherals Leasing Corp. v. International Bus. Machs. Corp., 458 F. Supp. 423 (N.D. Cal. 1978); *In re* U.S. Fin. Sec. Litigation, 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976). *See* notes 22-41 and accompanying text *infra*.

23. 420 F. Supp. 99 (W.D. Wash. 1976).

24. *Id.* at 101.

25. *Id.* at 103. The court noted as problem areas: proof as to establishing fraud on the defendants' part, difficult accounting concepts, and the possibility of a four to six-month trial. *Id.* at 101-04.

26. 396 U.S. 531 (1970). In *Ross*, the Supreme Court held that a shareholder asserting legal rights in a derivative action had a right to a jury trial. *Id.* at 542. The *Ross* court adopted the analysis of *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), to the effect that procedures or forms of action developed after the merger of law and equity carried with them the right to a jury trial if they enforced legal rights and provided adequate legal remedies, regardless of the pre-merger roots of the form of action. 396 U.S. at 542. For a discussion of *Beacon Theatres* and *Dairy Queen*, *see* notes 18-19 and accompanying text *supra;* notes 32-33 and accompanying text *infra*. For a discussion of the merger of law and equity, *see* notes 13-14 and accompanying text *supra*.

27. 420 F. Supp. at 104.

28. 396 U.S. at 538 n.10. The footnote stated: "[T]he 'legal nature' of an issue is determined by considering, first the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Id.* The *Ross* Court inserted this footnote

The *Boise* court found, without elaboration, that the *Ross* footnote was of "constitutional dimensions." [29] Relying on it and the fifth amendment due process right to a fair trial,[30] the *Boise* court concluded that the seventh amendment did not guarantee a jury trial in that instance.[31]

Several recent cases have utilized the language in *Beacon Theatres, Inc. v. Westover* [32] and *Dairy Queen, Inc. v. Wood,*[33] to the effect that inadequacy of the legal remedy is the touchstone of equity jurisdiction,[34] in support of the proposition that where a case is beyond a jury's abilities, the remedy at law is inadequate and determination of the issues by the court is appropriate.[35] The district court in *ILC*

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in its opinion but did not apply it in deciding the case. *See id. See also* Wolfram, *supra* note 10, at 643-44.

29. 420 F. Supp. at 105. Although the *Boise* court gives no explanation as to why it found the *Ross* footnote to be of constitutional dimensions, it goes on to add that the footnote should be seen as a limitation on seventh amendment interpretation. *Id.* However, the same footnote has been looked upon as mere dicta and not controlling. *See In re* U.S. Fin. Sec. Litigation, 609 F.2d 411, 425 & n.43 (9th Cir. 1979), *cert. denied,* 446 U.S. 929 (1980). *But see* Hyde Properties v. McCoy, 507 F.2d 301, 305-06 (6th Cir. 1974) (factors enumerated in the *Ross* footnote applied to distinguish between legal and equitable nature of fraudulent conveyance of promissory notes); SEC v. Associated Minerals, Inc., 75 F.R.D. 724, 725-26 (E.D. Mich. 1977) (*Ross* footnote criteria applied to alleged securities laws violations).

The *Boise* court suggested that the *Ross* footnote recognizes that the due process right to fairness is defeated when the factfinder in a case is unable to determine those facts. 420 F. Supp. at 104.

30. The fifth amendment provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. The *Boise* court noted that an impartial and capable factfinder is essential to the fairness that is guaranteed in the resolution of a civil action. 420 F. Supp. at 104.

31. 420 F. Supp. at 104. The *Boise* court argued that the complexity of a case will reach a point where a jury can no longer be an impartial and capable factfinder, thereby depriving a party of his right to a fair trial. *Id.*

32. 359 U.S. 500 (1959). In *Beacon Theatres,* the Supreme Court held that only in the most imperative circumstances could the jury trial right be lost by equitable issues being decided before legal issues. *Id.* at 510-11. The district court in that case had denied the defendant's demand for a jury trial on certain legal issues because the plaintiff had sought declaratory relief which was characterized by the court as equitable. *Id.* at 502-03. In discussing whether the fact that the plaintiff's claim for declaratory relief was traditionally regarded as equitable justified leaving the entire case to be resolved in equity, thereby denying the defendant a jury trial, the court noted that under the Declaratory Judgment Act and the Federal Rules of Civil Procedure, the legal remedy was adequate to provide the plaintiff with a fair and orderly adjudication of the controversy. *Id.* at 506-08. *See also* notes 18-19 and accompanying text *supra.*

33. 369 U.S. 469 (1962). In *Dairy Queen* the Court, in analyzing the claims involved in order to determine whether they were legal or equitable in nature, reasoned that simply because a complaint is cast in terms of an accounting does not necessarily make the claim equitable. *Id.* at 477-78. Rather, the Court stated, an equitable accounting, like all other equitable remedies, is available only where the remedy at law is inadequate. *Id.* at 478.

34. *See* notes 32 & 33 *supra.*

35. Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 66 (S.D.N.Y. 1978); ILC Peripherals Leasing Corp. v. International Bus. Machs. Corp., 458 F. Supp.

Peripherals Leasing Corp. v. International Business Machines Corp.[36] took this approach and concluded that, because of the difficult accounting and engineering concepts involved, the case was beyond the understanding of the jurors.[37] Using a similar analysis in *Bernstein v. Universal Pictures, Inc.*,[38] to deny a jury trial demand,[39] the district court stated that "the adequacy of the legal remedy necessarily involves the adequacy of the jury and its competency to find the facts."[40] The court concluded that "to hold that a jury trial is required in this case

423, 445 (N.D. Cal. 1978); *In re* U.S. Fin. Sec. Litigation, 75 F.R.D. 702, 710 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

In addition to employing the *Dairy Queen* and *Beacon Theatres* analysis, these cases also utilized the *Ross* footnote as support for the proposition that the jury's inability to handle the case made equity jurisdiction appropriate. Bernstein v. Universal Pictures, Inc., 79 F.R.D. at 66; ILC Peripherals Leasing Corp. v. International Bus. Machs. Corp., 458 F. Supp. at 445; *In re* U.S. Fin. Sec. Litigation, 75 F.R.D. at 710. For a discussion of the *Ross* footnote, *see* notes 28-29 and accompanying text *supra*. For a discussion of *Dairy Queen* and *Beacon Theatres*, *see* notes 18-19 & 32-33 and accompanying text *supra*.

36. 458 F. Supp. 423 (N.D. Cal. 1978). *ILC Peripherals* was a complex antitrust case dealing with an alleged monopolization within the computer industry. *Id.* at 426. After a five-month trial, the jury deadlocked and a mistrial was declared. *Id.* The trial judge then granted the defendant's motion for a directed verdict on the ground that no reasonable jury could find in the plaintiff's favor. *Id.* at 444. The court then went on to order that, in the event that the directed verdict was reversed on appeal and the case remanded for a new trial, the jury demand be stricken in light of the demonstrated inability of the jury to comprehend the complex facts. *Id.* at 448. The court suggested that even if jury trials are not altogether eliminated in complex antitrust cases, there should at least be a limit of one jury trial in such cases. *Id.*

37. *Id.* at 445-46, *citing* Dairy Queen, Inc. v. Wood, 369 U.S. at 478; Beacon Theatres, Inc. v. Westover, 359 U.S. at 509. The *ILC Peripherals* court took note of the Supreme Court's observation that in order for a party to demonstrate that the legal remedy is inadequate in an accounting between parties, the accounts must be "of such 'a complicated nature' that only a court of equity can satisfactorily unravel them." 458 F. Supp. at 445, *quoting* Dairy Queen, Inc. v. Wood, 369 U.S. at 478. The *ILC* court also found support in the early case of *Kirby v. Lakeshore & Mich. R.R.* for the proposition that equity has a special role in the trial of complex issues. 458 F. Supp. at 446, *citing* Kirby v. Lakeshore & Mich. R.R., 120 U.S. 130 (1866). It should also be pointed out, however, that the *ILC* court recognized that the mere existence of complicated facts was not a basis for equity jurisdiction. 458 F. Supp. at 446, *citing* Curriden v. Middleton, 232 U.S. 633 (1914); United States v. Bitter Root Dev. Co., 200 U.S. 451 (1906).

38. 79 F.R.D. 59 (S.D.N.Y. 1978). The *Bernstein* case was an immense class action of music composers and lyricists, with members numbering between 400 and 1100, asserting antitrust violations against members of the motion picture and television industry. *Id.* at 61-62. In stressing the complexity of the case, the court noted that resolution of the litigation would require over 1,000 "mini-trials," consideration of esoteric accounting problems, and a four-month principal trial—assuming the court devoted an entire five-day week to the case. *Id.* at 62-64.

39. *Id.* at 70.

40. *Id.* at 66.

would be to hold that the seventh amendment gives a single party at its choice the right to an irrational verdict." [41]

In contrast, the United States Court of Appeals for the Ninth Circuit has recently held that there is no complexity except to the seventh amendment.[42] In *In re U.S. Financial Securities Litigation* (hereinafter referred to as *USF*),[43] a protracted, multi-party action involving alleged securities law violations,[44] the Ninth Circuit reversed a district court decision that had denied a jury trial demand on grounds of complexity,[45] holding that there is no complexity exception to the seventh amendment.[46] In reaching its conclusion, the court rejected the argument that a complex securities case, where accounting concepts are to be introduced at trial, was analogous to an action for an equitable accounting where, traditionally, no right to jury trial exists.[47] The *USF* court also suggested that reliance upon the *Ross* footnote as a basis for denying the right to a jury trial was unfounded.[48] Finally, the Ninth Circuit expressed its confidence in the fundamental competence of juries,[49] and thus concluded that no case is so complex that a party's

41. *Id.* at 71.

42. *In re* U.S. Fin. Sec. Litigation, 609 F.2d 411 (9th Cir. 1979), *cert. denied,* 446 U.S. 929 (1980).

43. 609 F.2d 411 (9th Cir. 1970), *cert. denied,* 446 U.S. 929 (1980).

44. *In re* U.S. Fin. Sec. Litigation, 75 F.R.D. 702, 707 (S.D. Cal. 1977), *rev'd,* 609 F.2d 411 (9th Cir. 1979), *cert. denied,* 446 U.S. 929 (1980). The district court in *USF* commented that the documents that would have to be read and understood by the factfinder "would be like sitting down to read the first 90 volumes of the Federal Reporter, 2d Series — including all the headnotes." 75 F.R.D. at 707.

45. 75 F.R.D. at 714. The district court set out guidelines to be considered in determining when complex litigation would fall within equity's jurisdiction. First, mere complexity alone is not enough, but it may suffice if coupled with complicated accounting problems which are not amenable to jury determination. *Id.* at 711. Second, jury members must be incapable of understanding and dealing rationally with the issues. *Id.* Third, unusually long trials may make extraordinary demands upon the jurors, preventing them from functioning effectively throughout the trial. *Id.*

46. 609 F.2d at 432.

47. *Id.* at 423. For a discussion of the equitable accounting and its place in equity jurisprudence, *see* note 12 *supra.*

48. 609 F.2d at 426. For a discussion of the *Ross* footnote, *see* notes 28-29 and accompanying text *supra.* The *USF* court reasoned that, since subsequent Supreme Court decisions did not consider the practical abilities and limitations of juries and determined the right to a jury by examining the legal or equitable nature of an issue, the *Ross* footnote was not to be read as "establishing a functional interpretation of the Seventh Amendment." 609 F.2d at 426.

49. 609 F.2d at 427. The court argued that to assume that jurors are incapable of understanding complicated matters "unnecessarily and improperly demeans the intelligence of the citizens of this Nation. . . . [Rather,] [j]urors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks which is rarely equalled in other areas of public service." *Id.* at 430. For a discussion of jury's competency as factfinder, *see generally* Higginbotham, *Continuing the Dialogue:*

due process right to a fair trial is undermined by the possibility of the rendition of an irrational verdict.[50] The court reasoned that with the available procedural devices[51] and competent attorneys, proficient at organizing voluminous, esoteric information, a jury is fully able to understand the case before it.[52]

Against this background, the Third Circuit began its analysis in *Japanese Antitrust* by outlining the areas of complexity involved: 1) proof of the Antidumping Act claims,[53] 2) proof of the alleged conspiracy,[54] 3) resolution of technical financial issues,[55] and 4) understanding various conceptually difficult legal and factual issues.[56]

The threshold issue for the court was the argument raised by the appellees that the Clayton Act provided a statutory right to a jury trial, making a seventh amendment analysis unnecessary.[57] In rejecting this argument,[58] the court distinguished the Clayton Act remedy provision from the Age Discrimination in Employment Act remedy provision, to which the appellees sought to compare it, and as to which the Supreme Court had found congressional intent to include in the legislation a right to a jury trial.[59] The majority in *Japanese Antitrust* was unable to find that Congress had expressed a similar intent in the Clayton Act.[60] However, the court observed that, even if the appellees' argument was

Civil Juries and the Allocation of Judicial Power, 56 TEX. L. REV. 47 (1977). *But see* notes 75-78 and accompanying text *infra*.

50. 609 F.2d at 432.

51. *Id.* at 427-29. The court cited several examples: (1) FED. R. CIV. P. 56 (summary judgment entered as a matter of law); (2) FED. R. CIV. P. 42(b) (motion for separate trial on certain issues); and (3) FED. R. CIV. P. 53(b) (district court may appoint special masters to assist jury with complex matters). 609 F.2d at 429.

52. 609 F.2d at 427, 431.

53. 631 F.2d at 1073. For the applicable provision of the Antidumping Act, *see* note 2 *supra*.

54. 631 F.2d at 1073.

55. *Id.*

56. *Id.*

57. *Id.* at 1075.

58. *Id.* at 1078.

59. *Id.* at 1075-76, *citing* Lorillard v. Pons, 434 U.S. 575 (1978). The *Lorillard* Court found that a right to jury trial was intended by Congress' "directive that the ADEA be enforced in accordance with the powers, remedies, and *procedures* of the [Fair Labor Standards Act.]" *Id.* at 580 (emphasis by the Court). The Court went on to note that a statutory right to jury trial was well established under the Fair Labor Standards Act. *Id.* at 580.

60. 631 F.2d at 1076. The court also rejected the appellees' contention that Meeker v. Lehigh Valley R.R., 162 F. 354 (C.C.S.D.N.Y. 1908), and Fleitmann v. Welsbach St. Lighting Co., 240 U.S. 27 (1916), may be read as having recognized that the Clayton Act created a statutory right to a jury trial. 631 F.2d at 1076-77. These cases, upholding the right to jury trial for actions brought under the antitrust laws, were interpreted by the majority to have merely applied the seventh amendment to statutorily created causes of action. *Id.* For further discussion of the *Fleitmann* and *Welsbach* cases, *see* note 20 and accompanying text *supra*.

accepted, a statutorily created right to a jury trial could not withstand a successful due process objection.[61]

The court next rejected all of the appellant's historically grounded contentions:[62] first, that extraordinary complexity rendered a suit equitable in nature, thus making the seventh amendment inapplicable;[63] second, that in some cases complexity alone rendered jury determination unsuitable;[64] and finally, that the chancellor, as part of

61. 631 F.2d at 1078 n.7.

62. *Id.* at 1078-83. Before discussing the merits of the historical arguments, the court stated that its understanding of the relevance of complexity to the fifth amendment to be when "circumstances render the jury unable to decide in a proper manner." *Id.* at 1079. By "proper manner," the court explained that it is presumed by law that a jury will render its verdict by some rational means, although not necessarily with scientific precision. *Id., citing* Schulz v. Pennsylvania R.R., 350 U.S. 523, 526 (1956). The *Japanese Antitrust* court also concluded that the *Ross* footnote was too cursory to indicate that the Supreme Court had announced a new application of the seventh amendment. 631 F.2d at 1080. For a discussion of the *Ross* footnote, *see* notes 28-29 and accompanying text *supra*. The *Ross* footnote, however, was read by the court to indicate that a jury's practical abilities and limitations may limit the range of cases subject to the seventh amendment. 631 F.2d at 1080.

63. 631 F.2d at 1080-81. In so concluding, the court distinguished the equitable accounting cases relied upon by appellants from the instant case, seen by the court as similar to tort actions for damages in which American courts have held that an equitable accounting is not available. *Id., citing* United States v. Bitter Root Dev. Co., 200 U.S. 451, 478-79 (1906) (tort action not within equity's jurisdiction even if accounting necessary) (other citations omitted).

64. 631 F.2d at 1081-83. The court noted that the appellants relied on cases which were deficient in three respects. First, several cases relied upon required more than complexity to confer equity jurisdiction. The appellants had cited a passage from an old English case which purported to be a statement of a pre-merger equity practice that the chancellor would try cases that, because of complexity, could not have been conveniently tried to a jury. *Id.* at 1081, *citing* Clark v. Cookson, 2 Ch. D. 746 (1876). The majority maintained that the cases offered by the appellants which cited the *Clark* passage had a clear basis other than complexity for invoking equity jurisdiction. 631 F.2d at 1081, *citing* Wedderburn v. Pickering, 13 Ch. D. 769 (1879) (plaintiff sought injunction); Garlings v. Royds, 25 W.R. 123 (1876) (plaintiff sought cancellation of note allegedly obtained by fraud).

Second, another case forwarded by the appellants involved issues not properly triable by a common law jury. The appellants cited to a case in which the chancellor exercised jurisdiction because he believed it would be "absurd and monstrous" to send the case to a jury. 631 F.2d at 1081-82, *citing* Blad v. Bamfield, 36 Eng. Rep. 992 (Ch. 1674). The Third Circuit reasoned that the chancellor exercised jurisdiction in that case because it involved matters of international relations, not normally a proper matter for a law court. 631 F.2d at 1082.

Lastly, the court found that one old English case was simply too dubious to be relied upon. The appellants had cited a case in which the chancellor retained jurisdiction upon concluding that a judge was better able to appraise the documentary evidence than a "jury of ploughmen." *Id.* at 1082, *citing* Clench v. Tomley, 21 Eng. Rep. 13, 13 (Ch. 1603). For a further discussion of the validity of *Clench v. Tomley, see* Arnold I, *supra* note 21, at 840-45; Arnold II, *supra* note 21, at 987-88; Campbell & Le Poidevin, *supra* note 21, at 974-85.

his power to govern the boundary between law and equity, would have exercised jurisdiction over an action at law if he considered the jury to be incapable of deciding the case.[65]

The court, however, accepted the appellants' final argument that the due process clause of the fifth amendment prohibits a jury trial if the suit is too complex for a jury to fairly decide.[66] The court reasoned that due process guarantees the presence of a competent fact finder[67] and that a jury which is unable to understand the facts and the law to be applied thereto presents too great a risk of an erroneous decision.[68] The court reasoned further that a court's ability to do basic justice is undermined when a jury is unable to render a rational decision.[69]

In balancing the fifth amendment interest in due process against the seventh amendment guarantee of a right to a jury trial, the court concluded that the loss of the right to jury trial did not implicate concerns as fundamental as did the due process objections.[70] The court reasoned that, while justice was unlikely to be done by a jury unable to understand the case,[71] justice could still be achieved if the judge were to decide the case.[72]

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65. 631 F.2d at 1083. The Third Circuit, being unable to find other courts who had done so, chose not to "pioneer in this use of history." *Id.* at 1083. *But see* Devlin, *supra* note 12, at 107. In analogizing the federal district court judge to the chancellor of 1791, Lord Devlin comments, "if the court denies trial by jury in any case in which it deems 'the practical abilities' to be insufficient, the court will have history on its side." *Id.*

66. 631 F.2d at 1084, 1086. The court admonished that a jury trial demand should be denied on due process grounds only in exceptional cases. *Id.* at 1088. The complexity must be so great that a jury will be unable to "decide by rational means with a reasonable understanding of the evidence and applicable legal rules." *Id.*

67. *Id.* at 1084 & n.14, *citing* Citron v. Arco Corp., 377 F.2d 750 (3d Cir.), *cert. denied,* 398 U.S. 973 (1967). In *Citron,* the court had found that frequent interruption during presentation of the plaintiff's evidence violated the plaintiff's due process rights by making it impossible for the jury to competently decide the case. 377 F.2d at 752-53.

68. 631 F.2d at 1084, *citing* Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 13 (1979) ("The primary value promoted by due process in factfinding procedures is to 'minimize the risk of erroneous decisions.' ").

69. 631 F.2d at 1084.

70. *Id.* at 1084-85.

71. *Id.* at 1084.

72. *Id.* at 1085. In reaching its conclusion, the court recognized that justice is frequently administered without a jury in equitable and maritime actions. *Id.*

In rejecting the appellees' argument that striking the jury demand because of the possibility of an erroneous decision constituted prospective relief, the court reasoned that "the procedural requirements of due process are by their very nature prospective: They are safeguards against the possibility of erroneous and arbitrary deprivations of liberty and property. This feature never has been thought to diminish their importance." *Id.* The court noted that the possibility of juror error where it does not understand the case is anything but remote. *Id.*

The Third Circuit rejected the district court's argument that an irrational verdict can be protected against by the use of the directed verdict and the judgment notwithstanding the verdict,[73] on the ground that these safeguards are inadequate because a "court may not grant . . . these motions if the evidence might reasonably support a verdict for either side." [74]

In response to the district court's appraisal of the desirable qualities which juries bring to the judicial process,[75] the Third Circuit found these qualities to be of no substantial value in very complex cases.[76] As stated by the court, a jury could not be a competent fact finder in complex cases because a long trial, while not only disabling, weeds out prospective jurors with backgrounds helpful in understanding complex matters,[77] and an overwhelming and confusing mass of evidence and technical procedures in complex litigation makes an erroneous decision a significant probability.[78] In contrast, the majority lists as a judge's strengths in handling protracted litigation his ability to preside over long trials without disrupting his personal life,[79] the probability of the judge's familiarity with technical substantive matters and civil litigation procedures,[80] and the judge's ability to use procedural devices and trial techniques to assist him in managing the trial and resolving difficult issues.[81]

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73. *Id.* at 1087.

74. *Id., citing* Patzig v. O'Neil, 577 F.2d 841 (3d Cir. 1978).

75. 478 F. Supp. at 938-42. The district court listed as some of the important qualities that juries bring to the decisionmaking process: 1) black box decisionmaking — where the jury issues a verdict without having to explain or justify its decision — thereby enabling it to do justice, though the result may be at variance with the law, and to draw the line in borderline cases without making the decision appear arbitrary; and 2) the jury serves as a check on judicial power. *Id.*

76. 631 F.2d at 1085. The Third Circuit concluded that a jury doing equity in cases it was unable to understand was nothing more than arbitrary and unprincipled decision making. *Id.* According to the majority, the line-drawing function had little merit where the jury could not understand the evidence or legal rules relevant to the issue. *Id.* Finally, the court concluded that a jury was not an effective check on judicial power where it could not understand the case. *Id.* Rather, the court saw an irrational factfinder as a tool of erratic and arbitrary judicial power. *Id.*

77. *Id.* at 1086, *citing* Note, *The Right to an Incompetent Jury: Protracted Litigation and the Seventh Amendment,* 10 CONN. L. REV. 775, 776-83 (1978).

78. 631 F.2d at 1086.

79. *Id.* at 1087.

80. *Id.*

81. *Id.* Techniques referred to by the court include colloquies with expert witnesses and reopening testimony as to issues on which he finds himself unable to decide. *Id.* Other trial techniques, espoused by the district court in *Boise Cascade,* included review of daily transcripts, flexibility in scheduling trial activities, and review of selected portions of testimony. 420 F. Supp. at 104-05. The *Japanese Antitrust* court suggested that the judge's ability to resolve complex cases be presumed and that inquiry be focused on the jury's abilities. 631 F.2d at 1087.

In recognizing that it may be difficult to ascertain the exceptional case which is too complex for jury determination,[82] the court set out three admittedly imprecise guidelines [83] to assist in that examination: 1) the overall size of the suit, including the length of trial, the amount of evidence and the number of issues requiring individual consideration; [84] 2) the conceptual difficulty of legal issues and the facts relating to those issues; [85] and 3) the difficulty of segregating distinct aspects of the case.[86]

The court suggested that a party will be protected against an erroneous denial of a jury trial by trusting the good faith concerns that district judges have for the right to a jury trial,[87] the availability of a writ of mandamus from the Court of Appeals,[88] and the requirement that the trial judge make explicit findings of complexity in cases where he or she denies the jury demand.[89] In disposing of the case, the court remanded it to the trial court for a determination of the complexity of the case in light of the majority's opinion.[90]

In his dissenting opinion, Judge Gibbons recognized the complexity of the case, but attributed much of it to the consolidation of the two cases.[91] He argued that the majority's treatment of the constitutional issue was unnecessary because, as the cases could be severed and thereby made less complex, the court was considering a "hypothetical construction of a series of procedural rulings." [92] Hence, Judge Gibbons

82. 631 F.2d at 1088. The court explained that, to preserve the right to jury trial, the due process objection should prevail only in situations where the case is so complex that the jury cannot rationally decide the case. *Id.* The court suggested that severance and other methods of reducing complexity should be employed before denying the jury trial demand. *Id.*

83. *Id.* at 1088-89. In recognizing the lack of precision in the guidelines, the court reasoned that, because most of the district judges who will be applying them are genuinely concerned about preserving the jury trial right, the right to jury trial will not thereby be threatened. *Id.* at 1089. For listing of these guidelines, *see* notes 84-86 and accompanying text *infra.*

84. 631 F.2d at 1088.

85. *Id.* at 1088-89. The court noted that the complexity of these matters would be reflected in the amount of expert testimony anticipated and the probable length and detail of jury instructions. *Id.*

86. *Id.* at 1089.

87. *Id.*

88. *Id.* The writ of mandamus is a normal device for ordering a jury trial where one has been wrongly denied. C. WRIGHT, *supra* note 10, § 102, at 516. Abuse of discretion as the standard for the issuance of writ of mandamus is set out in Schlagenhauf v. Holder, 397 U.S. 104, 110 (1964).

89. 631 F.2d at 1089.

90. *Id.* at 1090. The majority concluded that the district court had only resolved the legal issue presented and had not made an adequate determination as to the specific complexities of the instant case. *Id.*

91. *Id.* at 1091 (Gibbons, J., dissenting). *See* note 1 *supra.*

92. 631 F.2d at 1091 (Gibbons, J., dissenting). Judge Gibbons felt that the proper issue was whether a single claim for relief against a single defendant would be too complex for jury determination. *Id.* He asserted that the

took the position that the axiom that constitutional pronouncements should be avoided unless required should have prevailed.[93]

In the remainder of his dissent, Judge Gibbons agreed with the majority's treatment of the historical[94] and statutory arguments.[95] With respect to the due process argument,[96] however, he would have held that "there is no case in which properly separated claims for relief cognizable at common law would be so complex that trial by jury would amount to a violation of due process."[97] He also expressed a fear that a case-by-case determination of complexity would be basically unreviewable as a matter of course, even with the majority's provision for a pretrial writ of mandamus.[98] Consequently, he would opt for the availability of interlocutory review as a matter of right.[99]

In reviewing the *Japanese Antitrust* decision, it should be noted that, although the majority found no statutory right to a jury trial,[100] there is language in *Ross v. Bernhard* to support a contrary conclusion.[101] However, the court did make the salient observation that if the fifth amendment due process interest outweighed the seventh amendment right to a jury trial, a statutory right to jury trial would have no more success in withstanding the due process considerations.[102]

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false issue decided by the majority was whether, by joinder and consolidation of claims, a case could become so complex that the right to jury trial must yield. *Id.* at 1092 (Gibbons, J., dissenting).

93. *Id.* at 1091-92 n.2 (Gibbons, J., dissenting), *citing* Hagans v. Lavine, 415 U.S. 528, 546-47 (1947); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909).

94. 631 F.2d at 1092 (Gibbons, J., dissenting). For a discussion of the historical arguments, *see* notes 62-65 and accompanying text *supra.*

95. 631 F.2d at 1092 (Gibbons, J., dissenting). For a discussion of the statutory argument, *see* notes 57-61 and accompanying text *supra.*

96. For a discusssion of the due process argument, *see* notes 66-81 and accompanying text *supra.*

97. 631 F.2d at 1093 (Gibbons, J., dissenting). Judge Gibbons commented that his contrariety with the majority was due in part to his perception of the importance of the jury's role in the judicial process. *Id.*

98. *Id.* Judge Gibbons reasoned that in a mandamus proceeding it would be difficult to establish that a judge had abused his discretion in applying the guidelines presented by the majority. *Id.* For a discussion of mandamus, *see* note 88 and accompanying text *supra.* For the guidelines established by the majority, see notes 84-86 and accompanying text *supra.* In the case of a post-trial appeal on the ground that a jury trial was wrongly denied, the dissent maintained that it would be highly unlikely that an appellate court would order a retrial of an otherwise error-free case. 631 F.2d at 1093 (Gibbons, J., dissenting).

99. 631 F.2d at 1093 (Gibbons, J., dissenting). For a discussion of Judge Gibbons' suggestion of interlocutory review as a matter of right, *see* notes 122-23 and accompanying text *infra.*

100. *See* notes 57-61 and accompanying text *supra.*

101. 396 U.S. at 536. *See* note 20 *supra.*

102. *See* text accompanying note 61 *supra.*

Although the Third Circuit's conclusion as to the *Ross* footnote,[103] and the appellants' attempted analogy of a complex antitrust case to an equitable accounting,[104] were consistent with findings made by the Ninth Circuit in *USF*,[105] the two circuits differ respecting the due process issue.[106] It is suggested that their differences are grounded principally in their respective views as to the competency of jurors in complex cases and the degree to which complexity can be reduced.[107] It is thus submitted that the nub of the conflict is simple and direct – if one accepts the premise that, at some point, complexity renders a jury unable to decide the case, then one cannot dispute the Third Circuit's conclusion that due process requires that a particularly complex case can be tried to a judge.[108]

The majority, in acknowledging that its standard for complexity is imprecise,[109] relied on the positive attitudes of district judges regarding the right to jury trial to protect against dilution of the seventh amendment.[110] It is submitted that this imprecise standard will create practical problems in that a district judge's own prejudices toward jury trials may well color his findings with respect to complexity.[111] It must be recognized, however, that this is not a situation in which a court is able to formulate a clear test. Thus, given the guidelines established by the Third Circuit, the district courts will undoubtedly develop patterns by which to determine complexity, perhaps by utilizing the instant case as a paradigm.

With respect to the majority's suggestion that, before denying a jury trial demand on grounds of complexity, efforts, including severance, be made to simplify the case,[112] it is submitted that the ramifications

103. *See* note 62 *supra*. For a more complete discussion regarding the *Ross* footnote, *see* notes 28-29 and accompanying text *supra*.

104. *See* note 63 and accompanying text *supra*.

105. *See* notes 47-48 and accompanying text *supra*. Judge Gibbons, in his dissent, agreed with both the Ninth Circuit and the *Japanese Antitrust* majority regarding the *Ross* footnote and appellant's attempted analogy to an equitable accounting. 631 F.2d at 1092 (Gibbons, J., dissenting).

106. *Compare* notes 49-52 and accompanying text *supra* (*USF*) *with* notes 66-72 and accompanying text *supra (Japanese Electronics)*.

107. *Compare* note 49 and accompanying text *supra (USF) with* notes 75-78 and accompanying text *supra (Japanese Electronics)*.

108. *See* notes 66-69 and accompanying text *supra*.

109. *See* notes 83-86 and accompanying text *supra*.

110. *See* text accompanying note 87 *supra*.

111. This assertion seems reasonable in view of the court's implicit recognition that all judges do not share the same attitudes toward the jury trial right when it suggested that it would rely on the overwhelming number of judges sharing a positive attitude toward this right. 631 F.2d at 1089. Judge Gibbons expressed his concern that a district judge's sympathies or hostilities toward the policies of the lawsuit itself may color his determination of complexity. *Id.* at 1093 (Gibbons, J., dissenting).

112. *See* note 82 *supra*. In emphasizing the need to enhance the jury's capabilities or reduce complexity, the majority advocated utilizing procedures

from such measures will be significant. In addition to the increased burden on already overcrowded courts,[113] which will have to try severed claims of once consolidated cases,[114] one can anticipate the onerous burdens on plaintiffs and defendants who, but for severance, would be litigating multiple claims in the same action. One must also consider the possible collateral estoppel effects where a plaintiff whose claim is severed seeks to assert collateral estoppel against a defendant who has fully litigated that same issue with respect to other severed plaintiffs.[115] Although these concerns may seem to be onerous in terms of the burdens imposed, if considered in light of protecting a constitutional right, it is submitted that there is sufficient justification for them.[116]

In response to the majority's assertion that the judgment notwithstanding the verdict is not an effective safeguard against an erroneous verdict because it may not be granted where the evidence might reasonably support the verdict,[117] it is submitted that an increased utilization of the special verdict[118] or the general verdict accompanied by interrogatories[119] will reveal more specific findings by the jury and

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suggested in the Manual for Complex Litigation. 631 F.2d at 1088. For additional methods of facilitating juror resolution of complex cases, *see* REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES (1979); Janofsky, *supra* note 21, at 850.

113. *See* Kushner v. Winterthur Swiss Ins. Co., 620 F.2d 404 (3rd Cir. 1980). At the appellate level alone in the Third Circuit, each active circuit judge is assigned 275 fully briefed cases per year — increased from the 90 assigned to a circuit judge in 1968. *Id.* at 406.

114. The trial court is permitted to sever trials for purposes of convenience, avoiding prejudice, or economy, always preserving inviolate the right of trial by jury as provided by statute or the constitution. FED. R. CIV. P. 42(b).

115. Offensive use of collateral estoppel occurs where the plaintiff, not a party to a previous action, seeks to preclude a defendant from relitigating an issue which the defendant has defended unsuccessfully in a prior action. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.4 (1979).

For a general discussion of the use of offensive collateral estoppel with respect to common issues by a person not a party to prior litigation, *see id.* at 329-31; Comment, *Offensive Use of Collateral Estoppel Under the Full and Fair Opportunity Test,* XV LAND AND WATER L. REV. 247 (1980); Note, *Collateral Estoppel Applied Offensively Where Plaintiffs Were Not Parties or Privies in the Prior Action,* 63 MARQ. L. REV. 144 (1979).

116. In his dissenting opinion, Judge Gibbons states that "the Bill of Rights . . . are designed to promote values other than efficiency." 631 F.2d at 1091 (Gibbons, J., dissenting).

117. *See* notes 73-74 and accompanying text *supra.*

118. FED. R. CIV. P. 49(a) authorizes the use of special verdicts. It has even been suggested that the use of the special verdict is "salutory and highly desirable in a complex and difficult case." 9 C. WRIGHT & A. MILLER, *supra* note 14, § 2505, at 494.

119. FED. R. CIV. P. 49(b) authorizes the submission of interrogatories in connection with a general verdict. *Id.* This method allows the propriety of

indicate whether it did in fact reach its verdict based on a reasonable and rational understanding of the evidence.

Finally, it is submitted that Judge Gibbons' fear that the district judges' discretion in these matters will go unfettered where a party's recourse for a wrongful denial is by writ of mandamus is well founded.[120] As he notes, where a district court judge follows the guidelines set out by the majority, it will be quite difficult for an appellate court hearing a mandamus request to hold that a trial judge abused his discretion.[121] However, it is questionable whether Judge Gibbons' suggestion that use of an interlocutory appeal as a matter of right[122] would produce a more favorable result. Depending upon whether one categorizes a determination of complexity as a conclusion of fact or a conclusion of law, the standard of review on appeal may be no easier to apply than the abuse of discretion standard.[123]

Aside from the proliferation of litigation with the concomitant burdens and the likelihood of inconsistent determinations of complexity, this decision, although not finding a statutory jury trial right, indicates that statutorily provided, as well as the seventh amendment, rights to jury trial are effectively circumscribed by the due process objections.[124] Another significant effect of the majority's opinion is that parties to complex cases — surely securities, antitrust, patent infringement, and other actions involving highly sophisticated factual or legal concepts — arising in this Circuit are potentially precluded from obtaining a jury trial. Given the nature of today's society with business growing, becoming more complex and subject to increased government regulation, it would seem to be easier than the majority anticipates to find those exceptional cases that are beyond a jury's comprehension. However, in that the majority did stress that means of reducing complexity be utilized before a jury demand be denied on complexity grounds,[125] it is suggested that, if measures are sincerely undertaken to simplify a case, those cases denied jury trial may well be the exception and not the norm.

Looking beyond the impact of the decision in the Third Circuit, however, it seems clear that the ultimate due process issue, on which

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a general verdict to be checked against the jury's answers to the interrogatories. C. WRIGHT, *supra* note 10, § 94, at 465.

120. *See* note 98 and accompanying text *supra.*

121. *See id.* For discussion of mandamus, *see* note 88 *supra.*

122. *See* text accompanying note 99 *supra.*

123. On appeal, findings of fact shall not be set aside unless clearly erroneous. FED. R. CIV. P. 52(a). Conversely, conclusions of law are completely reviewable on appeal. 9 C. WRIGHT & A. MILLER, *supra* note 14, § 2588, at 750.

124. *See* notes 61 & 66-72 and accompanying text *supra.*

125. *See* notes 82 & 112 *supra.*

the Third and Ninth Circuits split,[126] will continue to engender controversy until it is definitively resolved by the Supreme Court.[127]

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126. *See* notes 106-08 and accompanying text *supra.*

127. The Supreme Court has, however, denied certiorari in the *U.S. Financial Securities* case. 446 U.S. 929 (1980).

JUDGMENTS — EQUITABLE ESTOPPEL — AN UNREASONABLE FAILURE TO INTERVENE MAY PRECLUDE OUTSIDERS' SUBSEQUENT LITIGATION OF DECIDED ISSUES.

Society Hill Civic Association v. Harris (1980)

In October 1973, a consent decree was entered into between Octavia Hill Association, a non-profit housing corporation, and a group of its tenants.[1] Under the consent decree, the tenants agreed to surrender possession of their leaseholds in exchange for a promise by the Philadelphia Redevelopment Authority (R.D.A.) to provide homes for permanent relocation in the Society Hill section of Philadelphia.[2] In 1974, when the R.D.A. failed to provide such housing, the tenants filed an action against the R.D.A. and the United States Department of Housing and Urban Development, claiming that these agencies failed to comply with their statutory and constitutional obligations to provide permanent relocation housing.[3] A group of twenty Society Hill property owners sought to intervene in the second suit, contending that the construction of relocation housing in that section of the city would be contrary to various federal laws and regulations.[4] Intervention was denied,[5] and the two agencies and the tenants entered into a second

1. Society Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1049 (3d Cir. 1980). The consent decree was approved in a case captioned Octavia Hill Ass'n v. Hayes, Nos. 73-1594 to 73-1599 (E.D. Pa. Oct. 16, 1973). The Association was formed to rehabilitate certain premises in the Society Hill section of Philadelphia. 632 F.2d at 1049. The 1973 lawsuits were actions in ejectment to force the tenants to leave their homes to make way for the renovation. *Id.*

2. 632 F.2d at 1049. The defendant tenants counterclaimed and named the R.D.A. as a third party plaintiff. The original plaintiff, Octavia Hill, was empowered to begin its redevelopment pursuant to a contractual agreement with the R.D.A. *See* Octavia Hill Ass'n v. Hayes, Nos. 73-1594 to 73-1599 (E.D. Pa. Oct. 16, 1973).

3. Dodson v. Salvitti, No. 74-1854 (E.D. Pa. Sept. 16, 1977), *aff'd mem.*, 571 F.2d 571 (3d Cir.), *cert. denied*, 499 U.S. 883 (1978). The plaintiffs sought relief under the National Housing Act, 42 U.S.C. §§ 1441-1490h (1976); the National Housing and Urban Redevelopment Act of 1968, 42 U.S.C. §§ 1469-1469c (1976); and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655 (1976). *See* Dodson v. Salvitti, 77 F.R.D. 674, 675 (E.D. Pa. 1977) (denial of intervention). In addition, the plaintiffs alleged deprivations of their civil rights and added counts under the Civil Rights Acts, 42 U.S.C. §§ 1983, 2000d and 3601 (1976). *See* 77 F.R.D. at 675.

4. Dodson v. Salvitti, 77 F.R.D. 674, 676 (E.D. Pa. 1977).

5. *Id.* at 677. The property owners sought to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure, which allows for such intervention:

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede

consent decree.[6]

In 1977, a second group of Society Hill residents, the Society Hill Civic Association (Association),[7] filed suit under the review provisions of the Administrative Procedure Act.[8] Advancing many of the same allegations as the applicants for intervention,[9] the plaintiffs challenged the agencies' authority to construct low-income government subsidized housing in their neighborhood.[10] The defendants moved for judgment on the pleadings,[11] contending that the plaintiffs were collaterally estopped

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his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a)(2). The rule also requires that an application for intervention be timely. *Id.* For a discussion of intervention under the federal rules, *see* notes 56-60 and accompanying text *infra*.

Intervention was denied in *Dodson* on two grounds. 77 F.R.D. at 676. First, the court found that the applicants did not allege injuries which would constitute a deprivation of a property right of the type necessary to sustain intervention as of right. *Id.* Second, the court found the application for intervention was untimely because it was made two and one-half years after the initiation of the action, of which the applicants were charged with knowledge. *Id.* at 677.

6. 632 F.2d at 1049. The consent decree was approved in a case captioned Dodson v. Salvitti, No. 74-1854 (E.D. Pa. Sept. 16, 1977). This consent decree provided that the agencies construct new housing to be used as permanent replacement housing for the tenants. 632 F.2d at 1049.

7. Society Hill Civic Ass'n v. Harris, No. 77-3102 (E.D. Pa. June 22, 1979), *rev'd*, 632 F.2d 1045 (3d Cir. 1980). The plaintiff association consisted of various residents of Society Hill, but did not include any of the twenty residents whose motion for intervention had been denied in *Dodson*. 632 F.2d at 1062 (Sloviter, J., dissenting). The second group of residents was represented by the same counsel and presented its complaint to the same judge who had denied intervention to the first group. *Id.* at 1062-63 (Sloviter, J., dissenting).

8. 632 F.2d at 1055. Section 702 of the Administrative Procedure Act provides in pertinent part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1976).

9. *See* 632 F.2d at 1062 (Sloviter, J., dissenting).

10. 632 F.2d at 1049. Plaintiffs contended, *inter alia*, that: new housing could not be constructed unless no suitable existing structures were available, 632 F.2d at 1056; *see* 42 U.S.C. § 4626 (1976); that tenants were not qualified to receive such housing because no federal funds were used to acquire their old homes, 632 F.2d at 1056-57 & n.10; *see* 42 U.S.C. § 4601(6); that the new construction would not comply with existing zoning laws, *see* 24 C.F.R. §§ 880.205 (h), 880.209(a)(13) (1979); and that HUD had forced R.D.A. to consent to the decree, and thereby impermissibly interfered with site selection decisions by local authorities. 632 F.2d at 1058; *see* 42 U.S.C. § 5301-17 (1976).

The Association filed its claim shortly after the final denial of the motion to intervene in the *Dodson* case. 632 F.2d at 1053. *See* note 5 and accompanying text *supra*. In its complaint, the Association contended that it was unaware of the *Dodson* action until late 1976, and was never served with process. *Id.* at 1052. For the purposes of the defendant's motion for judgment on the pleadings, this averment of fact was accepted as true. *Id.* *See* FED. R. CIV. P. 12(c); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 6.17, at 218 (2d ed. 1977).

11. 632 F.2d at 1049. Defendants moved to dismiss under rule 12(c). *Id.* Rule 12(c) provides in pertinent part: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." FED. R. CIV. P. 12(c).

from raising any issues which had been presented by the applicants for intervention.[12] The district court ruled in favor of the defendants, holding that the plaintiffs were precluded from bringing their action;[13] first, because they were in privity with those residents whose application for intervention was adjudged untimely in the earlier litigation,[14] and second, because they had waived their rights to be heard by failing to intervene in the earlier lawsuit.[15]

On appeal, the United States Court of Appeals for the Third Circuit[16] reversed and remanded,[17] *holding* that an unreasonable or unjustified failure to intervene may preclude a later attack on the judgment, but that on the facts as averred, plaintiffs were not estopped by their failure to intervene in the earlier litigation. *Society Hill Civic Association v. Harris,* 632 F.2d 1045 (3d Cir. 1980).

To promote judicial efficiency and economy, the courts have created a body of law which prevents the relitigation of cases or issues which had been resolved in an earlier judicial proceeding.[18] This body of law, loosely referred to as res judicata, includes two separate but related concepts regarding the preclusive effects given to a prior judgment.[19] True res judicata, which is also referred to as claim preclusion,[20] provides that when a court of competent jurisdiction has entered a final judgment on the merits of a case,[21] the parties to the suit, and

12. 632 F.2d at 1048-49.

13. *Id.* at 1049.

14. *Id.* For a discussion of privity, *see* notes 40-48 and accompanying text *infra.*

15. 632 F.2d at 1049. For a discussion of estoppel by failure to intervene, *see* notes 62-69 and accompanying text *infra.*

16. The case was heard by Judges Garth, Rosenn, and Sloviter. Judge Garth delivered the opinion of the court. Judge Sloviter filed a dissenting opinion.

17. 632 F.2d at 1053. The case was remanded so that the district court judge could develop facts on which to apply the appellate court's statement of the law of preclusion. *Id.*

18. *See* Sea-Land Services v. Gaudet, 414 U.S. 573, 578 (1974). The *Gaudet* court stated that the concept of res judicata "rests upon considerations of judicial economy of judicial time." *Id., quoting* Cromwell v. County of Sac, 94 U.S. 351, 352 (1876).

19. *See* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.405[1], at 621 (2d ed. 1980). For an early United States Supreme Court case bifurcating the concept of res judicata, *see* Cromwell v. County of Sac, 94 U.S. 351 (1876).

20. *See* F. JAMES & G. HAZARD, *supra* note 10, § 11.3, at 532-33. In traditional terminology, true res judicata is called merger or bar; in modern terminology, it is called claim preclusion. *Id.* at 532. Because courts continue to use the term "res judicata" to describe the preclusive effects of claim preclusion, that term will be used throughout this note.

21. *See* 1B J. MOORE, *supra* note 19, ¶ 0.405[1], at 622. "True" res judicata is not concerned with the particular issues which were raised or omitted in the earlier action; a party whose cause of action is precluded under this branch of res judicata may not relitigate any claims or defenses which might have been raised in the original action but were not. *See id.* ¶¶ 0.410[1], at 1151, 0.410[2], at 1163.

those in privity with them, are bound as to every matter which was offered and received to sustain or defeat the claim, and as to every admissible matter which might have been offered for that purpose.[22] The term res judicata is used in other contexts to connote the finality ascribed to a prior judicial resolution of an issue[23] between two parties when these parties subsequently litigate a different cause of action.[24] The second situation is more accurately entitled collateral estoppel or issue preclusion.[25] The basic difference between res judicata and collateral estoppel is that the former operates to extinguish entire claims which were, or should have been presented in the original action,[26]

22. *See id.* ¶¶ 0.405[1], at 623-25; 0.409[1], at 1001.

Within the last decade, mutuality has been severely limited or abandoned by some courts as one of the prerequisites for the application of res judicata. *See id.* at ¶ 0.412[1], at 1805; *id.* at 127-28 nn.2 & 10 (Supp. 1980). The doctrine of mutality, which requires that one who asserts the finality of a judgment be either a party or in privity with a party to the suit in which the judgment was rendered, was added to the law of preclusion so that neither party could invoke "the conclusive effect of a[n earlier] judgment unless he would have been bound if the judgment had gone the other way." *Id.* ¶ 0.412, at 1801. *See* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912). In 1971, the Supreme Court approved the abandonment of mutuality in the relatively narrow field of patent litigation when res judicata was invoked defensively — that is, when a defendant averred that the plaintiff had already litigated his case against another party and had lost. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971). Other courts have since adopted the holding of *Blonder-Tongue,* abandoning the mutuality rules as to the defensive use of res judicata in all types of actions. *See* 1B J. MOORE, *supra* note 19, ¶ 0.412[1], at 127-28 n.10 (1980 Supp.). Several courts, however, have refused to abandon the doctrine of mutuality where a person seeks to use a prior judgment offensively — that is, where a person who did not participate in an earlier action seeks to estop his opponent from relitigating an issue which had been resolved *against* that opponent in the earlier action. *See* Note, *Collateral Estoppel: The Changing Role of the Rule of Mutuality,* 41 MO. L. REV. 521, 534-38 (1976). *But see* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (allowing offensive use of S.E.C. decision finding defendant guilty of securities violations).

23. *See* F. JAMES & G. HAZARD, *supra* note 10, § 11.2, at 532-33; 1B J. MOORE, *supra* note 19, ¶ 405[1], at 622. This second branch of res judicata, which is also known as collateral estoppel, deals only with issues actually resolved in prior, but not necessarily identical, lawsuits. *Id.*

24. *See* 1B J. MOORE, *supra* note 19, ¶ 405[1], at 622. The same rules of mutuality apply to collateral estoppel as those applied in true res judicata. *Id.* at ¶ 0.402[1], at 1801. For a discussion of mutuality in cases involving true res judicata, *see* note 22 *supra.*

25. *See* F. JAMES & G. HAZARD, *supra* note 10, § 11.2, at 532-33. Because the courts continue to refer to issue preclusion as "collateral estoppel," the latter term will be used throughout this note.

26. *See, e.g.,* Morris v. Jones, 329 U.S. 545, 550 (1947) (final judgment on claim in one state precludes relitigation in another forum, regardless of whether claims were potentially severable); Dore v. Kleppe, 552 F.2d 1369, 1374 (5th Cir. 1975) ("[t]he general rule is that a final judgment is conclusive on the parties as to all questions of fact and law relevant to the same cause of action which were or could have been litigated in the prior proceeding."). *See also* F. JAMES & G. HAZARD, *supra* note 10, § 11.8, at 541-44; 1B J. MOORE, *supra* note 19, ¶ 0.410[2], at 1163-67. Under this rule, any claim which properly forms a part of the cause of action must be raised or is forever precluded. *Id.*

while the latter precludes the redetermination of only those issues which are common to the two separate claims or lawsuits and which were fully and necessarily resolved by the earlier judgment.[27]

A prerequisite to the operation of either res judicata or collateral estoppel is a prior final judgment.[28] Collateral estoppel may only be invoked to preclude relitigation of a contested issue which was fully treated or necessarily resolved as an integral component of the decision ultimately reached in the prior action.[29] On the other hand, because res judicata operates on an entire claim, the final judgment need not be "on the merits" of the substantive contentions forwarded.[30] Res

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The problem which faces courts, practitioners and legal scholars is defining "cause of action" for res judicata purposes. F. JAMES & G. HAZARD, *supra*, § 11.7, at 540. For a modern attempt to define the dimensions of a claim or cause of action, *see* RESTATEMENT (SECOND) OF JUDGMENTS § 61 (Tent. Draft No. 5, 1978).

27. *See, e.g.*, Lawler v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955) (collateral estoppel bars litigant from contesting only "issues actually litigated and determined in the prior suit"); International Ass'n of Mach. & Aero. Workers v. Nix, 512 F.2d 125, 131 (5th Cir. 1975) (although consecutive causes of action are distinct, issues "necessarily litigated and actually decided in the first suit are barred"). *See also* F. JAMES & G. HAZARD, *supra* note 10, § 11.16, at 563-64; 1B J. MOORE, *supra* note 19, ¶ 0.443[4], at 3915; notes 23-25 and accompanying text *supra*. Unlike res judicata, collateral estoppel "does not preclude inquiry into matters that might have been but actually were not put in issue and determined in the former action." F. JAMES & G. HAZARD, *supra*, § 11.16, at 563. This general rule, however, is qualified. *Id.* If the issue formed part of a claim which was, or should have been raised in an earlier lawsuit, and the issue was decided or necessarily should have been decided in order to reach the original verdict, the issue is foreclosed. *See* 1B J. MOORE, *supra* note 19, ¶ 0.443[3], at 3903.

28. *See* G. & C. Merriam Co. v. Saalfield and Oglivie, 241 U.S. 22, 28 (1916) ("only a final judgment is *res judicata* as between the parties"); Gilbert v. Braniff Int'l Corp., 579 F.2d 411 (5th Cir. 1968) (judgment which was not final has no preclusive effect). *See also* F. JAMES & G. HAZARD, *supra* note 10, § 11.4, at 533. ("[t]he judgment must ordinarily be a firm and stable one, the 'last word' of the rendering court — a 'final' judgment"); RESTATEMENT (SECOND) OF JUDGMENTS § 41, Comment a (Tent. Draft No. 1, 1973).

29. *See* F. JAMES & G. HAZARD, *supra* note 10, § 11.16, at 563-64. "Where issue preclusion is involved between the same parties as those to the original suit, the one who claims its benefit (proponent) must show that the very fact or point now in issue was, in the former action, 1) litigated by the parties; 2) determined by the tribunal; and 3) necessarily so determined." *Id.* *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 1, 1973).

Rules have been formulated to deal with several problems which frequently arise in determining which issues were actually decided. *See generally*, 1B J. MOORE, *supra* note 19, ¶ 0.443, at 3901-29. For example, if an issue was actually contested, but the trier of fact made no express findings, that issue is finally decided only if the outcome of the case hinged on its resolution. *Id.* at 3195. Thus, if the victorious party litigated several theories or issues, but the court did not state which, if any, were accepted, none of these issues are finally decided. *Id.* If, however, the court expressly rests its judgment on alternate sufficient grounds, that judgment precludes relitigation of issues material in the support of either ground. *Id.* at 3921.

30. *See* 1B J. MOORE, *supra* note 19, ¶ 0.405[1], at 622. "[T]he underlying policy of res judicata is not restricted to a valid judgment that deals solely with the merits; it extends to, and includes matters in abatement, such as

judicata does not, however, preclude a party from further litigating issues which formed the basis of the original lawsuit, or from redefining his case and commencing a second action after a final judgment of abatement.[31]

A second prerequisite for both forms of preclusion is that the party against whom preclusion is sought [32] had an opportunity to present his case to the original court.[33] In the case of *Hansberry v. Lee*,[34] the Supreme Court cast this rule in terms of a constitutional requirement, finding that the alteration of a litigant's rights by means of earlier proceedings to which he was not a party, and of which he had neither formal notice nor an opportunity to be heard, was a denial of due process.[35]

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jurisdiction of the subject matter, federal jurisdiction, jurisdiction over the res, jurisdiction over the defendant, venue, and related matters." *Id.* ¶ 0.405[5], at 655-56 (footnotes omitted). A final decision of abatement — for example, a determination that the statute of limitations has tolled, that the court has no jurisdiction, or that the complaint was improperly drafted — precludes a party from resubmitting that complaint. *See id.* at 659-92. However, unless a decision in abatement is deemed to be on the merits, or where such dismissal necessarily determines the underlying merits of a claim, the litigant is free to pursue his action in another court or under a different theory. *See id. See also* Richardson v. United States, 465 F.2d 844 (3d Cir. 1972), *cert. denied,* 410 U.S. 955 (1973) (plaintiff was not precluded from seeking mandamus in action where no jurisdictional amount was required despite dismissal of an earlier action against the same defendant where jurisdictional amount was required but not satisfied).

31. *See* Richardson v. United States, 465 F.2d 844 (3d Cir. 1972), *cert. denied,* 410 U.S. 955 (1973); note 30 *supra.*

32. For a discussion of the parties against whom preclusion can be invoked, *see* note 22 *supra.*

33. *See* Makiriw v. Rinard, 336 F.2d 333 (3d Cir. 1964) (parties to an action have a right to an opportunity to appear and be heard; if these rights were not previously granted, collateral estoppel is inapplicable).

34. 311 U.S. 32 (1940). In *Hansberry,* the plaintiffs sought to enforce a restrictive covenant in a deed. *Id.* at 37-38. The contract was valid only if a specified percentage of landowners signed it, and the defendants claimed that the requisite number had not signed. *Id.* at 38. The plaintiffs claimed that the validity of the contract had been proved in earlier litigation and contended that the defendants were estopped from interposing their defense. *Id.* Since the defendants had not been parties to the earlier litigation, the Court held that the plaintiffs were precluded from raising collateral estoppel. *Id.* at 39-46.

35. *Id.* at 40-41. The Court stated:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statutes of the United States . . . prescribe . . . ; and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.

Id. (citations omitted).

There are several traditionally recognized exceptions to the *Hansberry* rule.[36] First, a litigant's interests may have been advanced by a representative party in the earlier action.[37] This exception has historically been limited to narrowly drawn situations;[38] a party is not deemed to have been represented by an earlier litigant unless the relationship between the two is contractual, fiduciary, established by law, or specially recognized by the court.[39]

A second general exception to the *Hansberry* rule is commonly called privity.[40] Where privity exists, the precluded litigant is deemed to have had his day in court vicariously because of either a close relationship to, or an identity of interest with, the original litigant.[41] It has been stated that there is no set rule for determining when a relationship between two entities will be sufficient to give rise to a finding of privity;[42] rather, such a determination must be made based upon the facts and circumstances of each case.[43] Courts have been

36. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 111, Comment a (Tent. Draft No. 4, 1977); 1B J. MOORE, *supra* note 19, ¶ 0.411[1], at 1251-59.

37. *See* Kersh Lake Dist. v. Johnson, 309 U.S. 485, 489-91 (1940) (all holders of certificates of land ownership represented by individual holders in litigation declaring land free and clear of taxes); Expert Elec. Co. v. Levine, 554 F.2d 1227, 1233 (2d Cir.), *cert. denied,* 434 U.S. 903 (1977) (individual contractors' interests held to be represented by their trade association in earlier litigation); F. JAMES & G. HAZARD, *supra* note 10, § 1127, at 585-90; 1B J. MOORE, *supra* note 19, ¶ 0.411[1], at 1254; RESTATEMENT (SECOND) OF JUDGMENTS §§ 84 & 85 (Tent. Draft No. 2, 1975).

38. *See* F. JAMES & G. HAZARD, *supra* note 10, § 11.22, at 575-76.

39. RESTATEMENT (SECOND) OF JUDGMENTS §§ 84 & 85 (Tent. Draft No. 2, 1975). Section 84 of the Restatement confers representative status in persons contracting for such status. *Id.* Section 85 lists the following relationships as also conferring such status: trustee-beneficiary; agency; fiduciary manager of property; citizen and governmental authority entrusted to protect his rights; and class representative in a class action. *Id.*

40. *See* 1B J. MOORE, *supra* note 19, ¶ 0.411[1], at 1251-59.

41. *See generally* Comment, *The Expanding Scope of the Res Judicata Bar,* 54 TEX. L. REV. 527 (1976); Note, *Collateral Estoppel of Nonparties,* 87 HARV. L. REV. 1485 (1974). *See also* 1B J. MOORE, *supra* note 19, ¶ 0.411[1], at 1252-53.

42. *See* Chicago, Rock Island & Pac. Ry. v. Schendel, 270 U.S. 611, 618 (1926). In *Schendel,* the Court stated that there are no set tests to determine privity; rather the courts must make an ad hoc determination based on the facts and circumstances of each case. *Id.* This form of analysis, coupled with the modern blurring of the theory of privity itself, has lead one commentator to note that privity is more a term used to describe a court's conclusion than one which illuminates its analysis: "[P]rivity states no reason for including or excluding one from the estoppel of a judgment. It is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata." Comment, *supra* note 41, at 529, *quoting* Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), *cert. denied,* 340 U.S. 865 (1950). For a discussion of the modern blurring of the theory of privity, *see* note 43 *infra.*

43. *See* Chicago, Rock Island & Pac. Ry. Co. v. Schendel, 270 U.S. 611, 618 (1926). In *Schendel,* the Court noted that the rules of privity are not rules of form but rules of substance. *Id.* Thus, even though under state law there

split in recent years over the boundaries of privity.[44] Several courts have expanded the concept to include parties whose only interrelationship is the fact that they seek to achieve the same ends in separate lawsuits against a single litigant.[45] Other courts continue to adhere to a

was no legal relationship between administrators appointed in different states, the federal court should properly have looked beyond the formal arrangement to determine that they, in fact, represented the same interests. *Id.* at 620-23.

Despite the apparent ad hoc manner of determining privity, legal commentators have attempted to formulate categories of situations in which privity will be found. *See, e.g.,* 1B J. MOORE, *supra* note 19. One such classification scheme, reflecting the traditional notions of privity, finds three such categories. *Id.* First, where two parties "share a concurrent relationship to the same right of property"; second, where they share a "successive relationship to the same right of property"; and third, where both parties are representatives of the interests of the same person. *Id.* ¶ 0.411[1], at 1255.

A second classification scheme, reflecting the recent growth of the concept of privity, finds four categories: first, between persons who "share a substantial identity of interests with parties to the prior suit;" second, between persons who "exercised control over the original action;" third, between persons who "were represented as part of a class;" and fourth, between persons who "have a successive interest in the litigated property right." Comment, *supra* note 41, at 529-33.

As might be inferred from the latter classification scheme, the distinctions between the concepts of privity, representation, and equitable preclusion have been diluted in recent years. *See id.* at 530. For a discussion of equitable preclusion, *see* notes 62-77 and accompanying text *infra*. The American Law Institute, recognizing this dilution, and finding that privity is more of an ultimate conclusion than a functional test, has advocated an abandonment of the concept altogether. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 111, Comment a (Tent. Draft No. 4 (1977)).

44. *See* notes 45-47 and accompanying text *infra*.

45. *See, e.g.,* Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), *cert. denied,* 423 U.S. 908 (1975); Aluminum Co. of Am. v. Admiral Merchants Motor Freight, Inc., 486 F.2d 717 (7th Cir.), *cert. denied,* 414 U.S. 1113 (1973); Proctor & Gamble Co. v. Byers Transp. Co., 355 F. Supp. 547 (W.D. Mo. 1973), *aff'd sub nom.,* Western Elec. Co. v. Burlington Truck Lines, 501 F.2d 928 (8th Cir. 1974).

In *Aerojet,* a local government was precluded from litigating the propriety of a conveyance of land where the transferor had previously resisted that transfer in court. 511 F.2d at 713. The parties were deemed to be in privity simply because neither wished the transferee to obtain the land, and in spite of the fact that the original party had failed to raise the grounds set forth by the second. *Id.* at 719-20.

In *Proctor & Gamble,* the trial court relied on several other criteria in addition to the similarity of the interest between the parties. 355 F. Supp. at 557. The court first noted that the parties to both suits belonged to an association formed to advance, and which actually had represented, their interests before a local government agency. *Id.* at 556-57. *See also* Expert Elec., Inc. v. Levine, 554 F.2d 1227 (2d Cir.), *cert. denied,* 434 U.S. 903 (1977) (individual contractors bound by judgment against their trade association). The *Proctor & Gamble* court then noted that both groups were represented by the same counsel. 355 F. Supp. at 557-58. *See also* Cauefield v. Fidelity & Cas. Co., 378 F.2d 876 (5th Cir.), *cert. denied,* 389 U.S. 1009 (1967); Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 396 F. Supp. 678 (N.D. Tex. 1975), *aff'd,* 546 F.2d 2184 (5th Cir.), *cert. denied,* 434 U.S. 832 (1977). Finally, the *Proctor & Gamble* court found that the party seeking preclusion was an administrative agency whose determinations, to be effective, must be freed from the uncertainty resulting from unlimited collateral attacks. 355 F. Supp. at 557. *See also* United States

more traditional concept of privity which requires a legal or quasi-legal relationship between the parties in addition to an identity of claims.[46] Finally, some courts, following the lead of the American Law Institute,[47] have abandoned the concept of privity altogether.[48]

The final class of exceptions to the rule of *Hansberry v. Lee* estops the litigant who had not been a party to the earlier action, but who, during the pendency of that action, had acted in a manner which "justly should result in his being denied opportunity to relitigate the matters previously in issue." [49] One such mode of conduct is a failure to intervene in the earlier case when intervention was possible.[50]

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v. Burlington Truck Line, Inc., 356 F. Supp. 582, 588 (W.D. Mo. 1973); Vestal, *Res Judicata/Preclusion: Expansion,* 47 S. CAL. L. REV. 357, 367-68 (1974).

For a general discussion of the new interpretation which courts are giving privity, *see* Vestal, *Claim Preclusion and Parties in Privity:* Sea-Land Services v. Gaudet *in Perspective,* 60 IOWA L. REV. 973 (1975); Comment, *supra* note 41.

46. *See, e.g.,* Consumers Union of the United States v. Consumer Prod. Safety Comm'n, 590 F.2d 1209 (D.C. Cir. 1978), *rev'd on other grounds sub nom.,* GTE Sylvania, Inc. v. Consumers Union of the United States, 445 U.S. 375 (1980) (neither similarity of purpose, similarity of claim, nor proponent's position as an administrative agency justify a finding of privity).

47. *See* note 43 *supra.*

48. Instead of relying on privity, some of these courts follow a "same claim" rationale in which the litigant is precluded from litigating the same cause of action against the same defendant. *See, e.g.,* Cauefield v. Fidelity and Cas. Co., 378 F.2d 876 (5th Cir.), *cert. denied,* 389 U.S. 1009 (1967) (preclusion applied to prevent cemetery owner from being subjected to multiple actions by various plot owners); *In re* Air Crash Disaster near Dayton, Ohio, 350 F. Supp. 757 (S.D. Ohio 1972), *rev'd sub nom.,* Humphreys v. Tahn, 487 F.2d 666 (6th Cir. 1973) (preclusion of claim which was similar to those litigated in earlier multi-district litigation suit).

49. RESTATEMENT (SECOND) OF JUDGMENTS § 111, Comment a (Tent. Draft No. 4, 1977). The Restatement includes in its list of such conduct: controlling the original litigation; allowing the use of one's name as a party; and agreeing to be bound by the litigation. *Id. See also* American Safety Flight Systems v. Garrett Corp., 528 F.2d 288, 289 (9th Cir. 1975) (participating non-party may be precluded if he has right to participate and control suit or defense); Simons v. Maryland Cas. Co., 353 F.2d 608, 612 (5th Cir. 1965) (person who took over, financed, and directly participated in defense of another was bound by the outcome of that suit).

The conduct which results in preclusion under this class of exceptions to *Hansberry* must satisfy two criteria. First, the parties to the original action must rely on the conduct as a representation that the outsider intends to be bound by the judgment. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 111, Comment b (Tent. Draft No. 4, 1977). Second, the original parties' reliance must be reasonable and justified. *Id.* In the leading case of Souffront v. Compagnie des Sucreries, the United States Supreme Court stated:

> The persons for whose benefit, to the knowledge of the court and of all the parties to the record, litigation is being conducted cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one, who prosecutes or defends a suit in the name of another to establish and protect his own right . . . and who does this openly to the knowledge of the opposing party is as much bound by the judgment . . . as he would be if he had been a party to the record.

217 U.S. 475, 486-87 (1910).

50. *See, e.g.,* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968) (owner of automobile potentially precluded by failure to intervene in

The federal rules for consolidating actions, particularly the joinder [51] and intervention [52] rules, reflect a concern for the outsider who may be affected by the outcome of a dispute between two named parties.[53] If an outsider's ability to protect his interests would be

earlier action against driver's estate); Penn-Central Merger and N.W. Inclusion Cases, 389 U.S. 486 (1968) (issues resolved in earlier case in which all parties had opportunity to participate are binding on all such parties to second action. *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 88(3) (Tent. Draft No. 2, 1975); notes 62-69 and accompanying text *infra.*

While a failure to participate in an action seems diametrically opposed to the other conduct which produces preclusion — participation in the prior action, allowing the use of one's name in a prior action, or controlling the prior suit — the concepts of res judicata and intervention as of right have traditionally been linked. *See* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1907, at 484-92 (1972). Prior to 1966, a court was required to grant the application for intervention only if the applicant would be bound, in a res judicata sense, by the outcome of the ongoing action, and only if his interests were not already represented. *See* Sam Fox Pub. Co. v. Unied States, 366 U.S. 683, 694 (1961). Of course, if the outsider was not a party, and was unrepresented by a named party, he could not be bound. *See* 7A C. WRIGHT & A. MILLER, *supra,* at 484-85. If his interests would be represented, he would be bound and would fail to qualify for intervention. *See id.* In recognition of this "Catch 22", the rules were amended in 1966. *See* Kaplan, *Continuing Work of the Civil Committee: Amendments of the Federal Rules of Civil Procedure (I)* 81 HARV. L. REV. 356, 400 (1967). For a discussion of the current rules of intervention of right, *see* notes 56-60 and accompanying text *infra.*

51. *See* FED. R. CIV. P. 19 & 20.

52. *See* FED. R. CIV. P. 24.

53. *See* FED. R. CIV. P. 19(a) & 24(a)(2). Rule 19(a) provides in pertinent part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

FED. R. CIV. P. 19(a).

Rule 24(a)(2) provides in pertinent part:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a)(2).

These rules were amended in 1966 to protect not only those who would be affected in a res judicata sense but also to protect those whose "ability to protect their interests would be impaired." *See* Kaplan, *supra* note 50, at 400. The 1966 amendments have been read most expansively by some courts which find that the mere *stare decisis* effect of an action might affect an applicant's interest to the degree necessary to satisfy the requirement. *See, e.g.,* Blake v. Pallan, 544 F.2d 947 (9th Cir. 1977); Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th

impaired by the decision in an ongoing action, or if his absence would mean that the dispute between the named parties would not be finally resolved, it is the duty of the named parties, or of the court, if feasible,[54] to join him in that action.[55] If, under these circumstances, the outsider is not so joined, he may apply for intervention as of right[56] and the court, with limited exceptions,[57] must permit intervention.[58]

The rules also provide for permissive joinder, a procedural mechanism by which named parties may subject outsiders, whose ability to protect their rights would otherwise not be affected by their action, to one final judgment if a common question of fact and law is presented.[59] Concomitantly, outsiders who desire a single resolution of a common

Cir. 1967). With this enhanced opportunity to participate, several commentators believe, came an increased duty for outsiders to intervene or face the consequences of res judicata. *See, e.g.*, F. JAMES & G. HAZARD, *supra* note 10, § 11.31, at 598-99; McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 718-19 (1976).

54. FED. R. CIV. P. 19(a). Joinder would be inappropriate or impossible if the additional party would destroy the court's jurisdiction or if service upon that party were impossible. *Id.* *See* 7 C. WRIGHT & A. MILLER, *supra* note 50, § 1607, at 59-65.

55. FED. R. CIV. P. 19(a). The duty to join all potentially affected outsiders rests on the parties and the courts for two reasons. First, it is the parties who would be subjected to multiple actions and inconsistent obligations if the absentees remained unjoined. *See* White Hall Bldg. Corp. v. Profexray, 387 F. Supp. 1202, 1207 (E.D. Pa. 1974). Second, since the outsiders' rights may be affected by the judgment in which they had no opportunity to participate, their due process rights may be violated. *See* Osborne v. Campbell, 37 F.R.D. 339, 342 (D. W. Va. 1965).

56. *See* FED. R. CIV. P. 24(a)(2).

57. *See id.* The court need not allow intervention of right if the application was "untimely" or if the applicant's interests are adequately represented by a named party. *Id.*

Normally, the denial of intervention, of itself, does not give rise to a res judicata or collateral estoppel effect as to the merits of the claim. *See* Brown v. Wright, 137 F.2d 484, 487-88 (4th Cir. 1943). However, the question which was decided in the denial of the motion — for example, that the application was untimely, that the court had no jurisdiction or that the intervenors stated no cause of action — is a final judgment entitled to preclusive effect. *See* Brotherhood of Locomotive Firemen and Enginemen v. Seaboard Coast Line R.R., 413 F.2d 19, 23-24 (5th Cir.), *cert. denied*, 396 U.S. 963 (1969).

58. *See* FED. R. CIV. P. 24(a)(2).

59. *See* FED. R. CIV. P. 20(a). Rule 20(a) provides in pertinent part:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of these persons will arise in the action. All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect or arising out of the same transaction, occurrence, or series of transactions or occurrences if any question of law or fact is common to all defendants will arise in the action.

Id.

issue, may petition for permissive intervention.[60] As their titles indicate, these rules are designed for convenience, rather than the protection of the parties and outsiders.[61]

The Supreme Court, in *Provident Tradesmens Bank & Trust Co. v. Patterson*[62] — a case which decided shortly after the intervention rules were amended in 1966[63] — suggested that a failure to join an earlier action might give rise to preclusion by collateral estoppel.[64] The *Provident Tradesmens* Court considered a case in which the Third Circuit had vacated the district court decision because the parties failed to join an outsider, Dutcher, as an indispensible party under Rule 19.[65] Finding that Dutcher was not an indispensible party, the Supreme Court, in dicta, stated that his failure to intervene might result in his being collaterally estopped should he later attempt to litigate the issues considered in the first case.[66] Dutcher's failure to intervene in *Provident Tradesmens* could be characterized as egregious,[67] and accordingly, the *Provident Tradesmens* Court did not mention any due process concerns in stating that his failure to intervene might be preclusive.[68]

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60. *See* FED. R. CIV. P. 24(b)(2). Rule 24(b)(2) provides, in pertinent part: "Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common." *Id.*

61. *See* 7 C. WRIGHT & A. MILLER, *supra* note 50, § 1652, at 265; *Id.* § 1912 at 552-53.

62. 390 U.S. 102 (1968). In *Provident Tradesmens,* the estates of several persons killed in an automobile accident separately sued the estate of the negligent driver. *Id.* at 104. The owner of the car, Dutcher, was not joined as a defendant in the Provident Tradesmens' action. *Id.* The other cases in which Dutcher was named as a defendant had not gone to trial when the Court addressed the case. *Id.* Dutcher would have been liable only if he established that the driver of the car had no permission from Dutcher to use the vehicle. *Id.* at 105-06.

63. *See* notes 50 & 53 and accompanying text *supra.*

64. 390 U.S. at 114. *See also* Penn-Central Merger and N.W. Inclusion Cases, 389 U.S. 486, 504-06 (1968); 1B J. MOORE, *supra* note 19 ¶ 0.411[1], at 114 n.10 (1980 Supp.); Note, *Preclusion of Absent Defendants to Compel Intervention,* 79 COLUM. L. REV. 1551, 1562 (1979).

For a case illustrating an earlier application of this doctrine, in admiralty cases, *see* Cummins Diesel Mich., Inc. v. The Falcon, 305 F.2d 721 (7th Cir. 1962) (nonparty with notice who failed to intervene was bound by judgment).

65. 390 U.S. at 104, *citing* FED. R. CIV. P. 19.

66. 390 U.S. at 114. The Court stated: "[I]t might be argued that Dutcher should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene. We do not now decide whether such an argument would be correct under the circumstances of this case." *Id.*

67. *See id.* at 104-06. Dutcher was the owner of the car involved in the accident, his insurer was made a party defendant, and he was a witness on the insurance company's behalf. *Id.*

68. *See id.* For a discussion of the due process issues which might be presented should a failure to intervene operate as estoppel, *see* McCoid, *supra* note 53, at 718-19. This commentator finds a denial of due process only where

The Supreme Court's suggestion that a failure to intervene might give rise to preclusion by collateral estoppel has not attracted many adherents.[69] However, many courts have adopted the apparent rational of *Provident Tradesmens* — that subsequent challenges to judgments by those who do not exercise their procedural rights will not be permitted[70] — under a theory called equitable preclusion.[71] This theory of preclusion focuses not only upon a litigant's failure to take advantage of his opportunity to participate in the earlier action,[72] but

the plaintiff had no notice of the original action or where he was deprived of his opportunity to be adequately heard. *Id.* For a discussion of the due process concerns triggered by any preclusion of non-parties, *see* notes 34-35 and accompanying text *supra.*

69. For cases which have adopted the suggestion of *Provident Tradesmens, see* Treasure Salvors, Inc. v. Unidentified, Wrecked, and Abandoned Sailing Vessel, 459 F. Supp. 507, 513 (S.D. Fla.), *aff'd,* 569 F.2d 330 (5th Cir. 1978) (state which failed to intervene in original action should be precluded from relitigating question in its own action); Prate v. Freedman, 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd,* 569 F.2d 1294 (2d Cir. 1978), *cert. denied,* 436 U.S. 922 (1979) (plaintiffs' collateral challenge disallowed after having declined to accept an opportunity to intervene).

On the other hand, several courts have unequivocally stated that a *mere* failure to intervene would not result in estoppel. *See, e.g.,* McGhee v. United States, 437 F.2d 995, 1000 (Ct. Cl. 1971); Show-World Center, Inc. v. Walsh, 438 F. Supp. 642, 648 (S.D.N.Y. 1977); Proctor & Gamble v. Byers Trans. Co., 355 F. Supp. 547, 557 (W.D. Mo. 1973), *aff'd sub nom.,* Western Elec. Co. v. Burlington Truck Line, 501 F.2d 928 (8th Cir. 1974).

70. *See, e.g.,* NAACP v. New York, 413 U.S. 345, 366-68 (1973) (collateral challenge of judgment forbidden when challengers waited for years, and when challenge would inconvenience original parties); Smith v. Missouri Pac. R.R., 615 F.2d 683, 684 (5th Cir. 1980) (employees not permitted collateral attack on judgment when they had declined opportunity to participate in action); Black & White School Children v. School Dist. of Pontiac, 464 F.2d 1030, 1030 (6th Cir. 1972) (collateral challenge impermissible if intervention rights not exhausted); Construction Indus. Combined Comm. v. International Union of Operating Engineers, 67 F.R.D. 664, 665 (E.D. Mo. 1975) (collateral challenge impermissible if other procedural avenues remain open).

71. For a discussion of equitable preclusion, *see* F. JAMES & G. HAZARD, *supra* note 10, § 11.31, at 598-99. Professors James and Hazard list the following elements as requisites for the invocation of equitable preclusion:

> (1) There had been a prior action involving the same claim or affecting the same property as is involved in the second action; (2) The party seeking to maintain the second action knew of the first action and could then have asserted the claim he now seeks to assert, either by intervening in the first action or by bringing in as a pary [*sic*] thereto the person against whom he now asserts his claim; (3) The person against whom the claim is asserted in the second action was apparently relying on the first action to be dispositive of the controversy out of which the claim arises; and (4) The party asserting the claim in the second action knew, or reasonably should have known, of that reliance.

Id. at 598.

72. *Id.* § 11.31, at 598. *See, e.g.,* Aerojet-General Corp v. Askew, 511 F.2d 710 (5th Cir.), *cert. denied,* 423 U.S. 908 (1975) (local government precluded from litigating propriety of conveyance of land where transferor had previously resisted that transfer in court); Howe Coal Co. v. Prairie Coal Co., 362 F. Supp. 1117, 1124 (W.D. Ark. 1973) (person who failed to assert rights in judicial proceedings bound by the outcome of those proceedings).

also upon the propriety of his refusal,[73] and the original litigants' reliance upon the impression of the finality given to the earlier judgment by the non-litigant's failure to join.[74] In the Third Circuit this concept was approved when, without opinion, the court affirmed the district court's opinion in *Oburn v. Shapp*[75] which stated that the rule of *Hansberry v. Lee* protects only those persons who were not given opportunity to participate in the action whose outcome they subsequently challenged.[76] Because the *Oburn* litigants were still able to join the original action, the district court denied them the opportunity to subsequently attack the order.[77]

Against this background, the Third Circuit addressed the issue of whether the *Society Hill* plaintiffs were precluded from asserting their claims.[78] The court began its analysis by stating the general rule that no person may be bound by a judicial determination to which he was not a party.[79] Dismissal of the plaintiffs' action, according to the court, would be a denial of due process unless one of the exceptions to this general rule was applicable.[80]

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73. F. JAMES & G. HAZARD, *supra* note 10, § 11.31, at 598. *See, e.g.*, Christianson v. Farmers Ins. Exchange, 540 F.2d 472, 474 (10th Cir. 1976) (insurance carriers with notice of lawsuit and with no reason not to join acquiesced to judgment in that suit); RESTATEMENT (SECOND) OF JUDGMENTS § 111, Comment b (Tent. Draft No. 4, 1977).

74. F. JAMES & G. HAZARD, *supra* note 10, § 11.31, at 598. *See, e.g.*, Eyman v. Marsa Development Corp., 301 F. Supp. 931, 932-33 (1969) (litigant who failed to elect remedies under Securities Act action produced justifiable reliance that separate suit would not be commenced); RESTATEMENT (SECOND) OF JUDGMENTS § 111, Comment b (Tent. Draft No. 4, 1977).

75. 70 F.R.D. 549 (E.D. Pa.), *aff'd mem.*, 546 F.2d 418 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977). In *Oburn*, non-minority police officers sued officials of the state of Pennsylvania, contending that state employment practices, as enforced through a court-ordered consent decree, discriminated against white males. *Id.* at 550-51.

76. 70 F.R.D. at 552. The court stated: "Hansberry stands for the proposition that a stranger to a prior suit, who lacks any opportunity to timely contest the validity of the final judgment rendered in that prior suit, may not be bound by the prior judgment . . . ." *Id., citing Hansberry v. Lee*, 311 U.S. 32 (1940).

77. 70 F.R.D. at 552. Because the original order was in the form of an injunction, the issuing court retained jurisdiction and the plaintiffs were entitled to apply for intervention. *Id.*

78. 632 F.2d at 1049-53. The court addressed the question of estoppel by failure to intervene in the text of the opinion. *Id.* Estoppel by privity was addressed in a footnote. *Id.* at 1050 n.4. The majority did not address the issue of estoppel by representation. For a general discussion of these types of estoppel, *see* notes 37-39, 40-48, & 49-68 and accompanying text *supra*.

79. 632 F.2d at 1049-53, *quoting* Hansberry v. Lee, 311 U.S. 32, 40-41 (1940). The court quoted *Hansberry* to illustrate the due process concerns which inhere in cases where nonparties are alleged to be precluded by prior actions. *See* 632 F.2d at 1050. For a discussion of the due process questions where estoppel by failure to intervene is claimed, *see* McCoid, *supra* note 53, at 718-19. For the quote excerpted by the court, *see* note 35 *supra*.

80. 632 F.2d at 1050, *citing* Consumers Union of the United States v. Consumer Prod. Safety Comm'n, 590 F.2d 1209 (D.C. Cir. 1978), *rev'd on other*

The court then summarily considered the relationship between the attempt to intervene in the prior suit and the plaintiffs' challenge to the decree ultimately reached in that suit.[81] While the court noted that the parties to the previous action, whose attempt to intervene had been denied as a result of their failure to present a timely application, would be precluded from relitigating their contentions,[82] it refrained from determining whether the earlier applicants and the plaintiffs before it were in privity.[83] Instead, the court concluded that, because the original applicants had no opportunity to present the merits of their claim, the plaintiffs could not be barred regardless of whether they were in privity with the parties to the first action.[84]

The court next addressed the question of whether the plaintiffs were estopped from raising their contentions because they had failed to intervene in the prior action.[85] The court attempted to answer this question by using a balancing test in which the interests in the finality of an earlier judgment were weighed against the unfairness or lack of due process to the collateral challengers, should their action be precluded.[86] The interests in protecting an individual's due process rights,

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grounds sub nom. GTE Sylvania, Inc. v. Consumers Union of the United States, 455 U.S. 375 (1980).

81. 632 F.2d at 1050 n.4. The court addressed the dissent's arguments that plaintiffs should be bound because of their relationship to the applicants for intervention in the 1974 action between the tenants and the R.D.A. *Id. See id.* at 1063-66 (Sloviter, J., dissenting). For a discussion of the prior action, *see* notes 3-6 and accompanying text *supra.*

82. 632 F.2d at 1052. The court reached this conclusion under its formulation of a rule of equitable estoppel which precludes those whose failure to intervene is unreasonable and unjustified. *Id. See* notes 85-94 and accompanying text *infra.*

83. 632 F.2d at 1050 n.4. The court did not determine whether the plaintiffs were in fact in privity with the original applicants for intervention, although it strongly suggested that they were. *Id.* The defendants did not attempt to advance preclusion on a privity theory; surprisingly, privity entered the case as an issue when raised by plaintiffs. *See id.* at 1064 (Sloviter, J., dissenting).

84. 632 F.2d at 1050 n.4. The court stated:

> [W]e do not claim, as the dissent contends, that the Association escapes the res judicata bar simply because it was not a party to the *Salvitti* suit. Rather, we conclude that the Association is not barred by *res judicata* because the other property owners were *denied* intervention and did not have an adjudication on the merits of the issues raised by the plaintiffs in this case. Therefore, the district court in the present case adjudicated the Association's legal rights on the basis of a prior suit in which the Association's interests went entirely unrepresented.

Id. (emphasis by the court).

85. *Id.* at 1050-51. For a discussion of preclusion caused by a failure to intervene, *see* notes 62-77 and accompanying text *supra.*

86. 632 F.2d at 1050-51, *citing* Oburn v. Shapp, 70 F.R.D. at 552. For a discussion of *Oburn, see* notes 75-77 and accompanying text *supra.* For a discussion of the due process requirements of notice and the opportunity to be heard, *see* Hansberry v. Lee, 311 U.S. at 40-41; notes 34 & 35 and accompanying text *supra.* The *Society Hill* court also recognized that the finality of earlier judgments is important to the original litigants whose later conduct is to be

represented by *Hansberry*, were, according to the court, nearly absolute.[87] However, the court cited *Oburn* [88] to illustrate the proposition that the right to be heard need only be offered once.[89] If this opportunity was not utilized, the competing interest in the finality of judgments might preclude a collateral challenge.[90]

While the court had no adjudicated facts to which its balancing test could be applied,[91] two general rules were announced. First, the court stated that no collateral challenges would be permitted if the challenger still retained the opportunity to intervene in the original action.[92] Second, if the opportunity to intervene had been presented, but had not been utilized, the recipient would be precluded if his failure to intervene was unjustified or unreasonable.[93] While the court did not elaborate on the factors which would lead to a finding of unreasonable or unjustified failure,[94] it held that, on the facts as averred by the

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premised upon the outcome of that litigation. 632 F.2d at 1050-51. Thus, the availability of collateral challenge should be limited to the extent consistent with due process and *Hansberry*. *Id.*

87. 632 F.2d at 1050.

88. *Id.* at 1051, *citing* 70 F.R.D. at 552. For a discussion of *Oburn*, *see* notes 75-77 and accompanying text *supra*.

89. 632 F.2d at 1051, *citing* 70 F.R.D. at 552. For an excerpt of the *Oburn* opinion quoted by the court, *see* note 76 *supra*.

90. 632 F.2d at 1051.

91. *Id.* at 1048. The case was on appeal from the district court's granting of plaintiff's motion for a judgment on the pleadings. *Id.* *See* FED. R. CIV. P. 12(c); note 11 *supra*. Thus, the court viewed the case in the light most favorable to the plaintiff. *Id.*

92. 632 F.2d at 1051. Thus, the court adopted the holding of *Oburn v. Shapp* as a defined rule of collateral estoppel. The *Oburn* court had decided that *Hansberry* does not guarantee the right to a collateral attack unless all other procedural avenues to participate were foreclosed. 70 F.R.D. at 552. Thus, collateral attack was denied when intervention in the original action remained possible. *Id.* For a discussion of *Oburn*, *see* notes 75-77 and accompanying text *supra*. In addition, the court cited Black & White Children v. School Dist. of Pontiac, 464 F.2d 1030, 1031 (6th Cir. 1972); McAleer v. American Tel. & Tel. Co., 416 F. Supp. 435, 438 (D.D.C. 1976) as cases in which the same result and rule had been reached. 632 F.2d at 1051. For a discussion of the rules which these cases represent, *see* text accompanying note 70 *supra*.

In the *Society Hill* case, the court noted that the judge who approved the consent decree in the 1974 case had not retained jurisdiction. 632 F.2d at 1051-52. Thus it was impossible for the plaintiffs to intervene in that action. *Id.* Moreover, the stipulation in the consent decree which allowed the parties to return to that court was an inadequate substitute as there was no guarantee that the court's jurisdiction would be further invoked. *Id.* Thus, it was impossible for the plaintiffs to intervene in the original action, and they could not be precluded under this rule. *Id.*

93. 632 F.2d at 1052. The *Society Hill* court delivered its conclusion without citation to *Provident Tradesmens*. *Id.* For a discussion of *Provident Tradesmens*, *see* notes 62-68 and accompanying text *supra*. Neither did the court expressly cite to the concept of equitable preclusion. For a discussion of equitable preclusion, *see* notes 69-77 and accompanying text *supra*.

94. *See* 632 F.2d at 1052. The court did note that, on the facts which would have been presented by the applicants for intervention in the 1974 lawsuit —

plaintiff,[95] including lack of actual knowledge of the original suit until it had neared completion, and a prompt filing of the complaint,[96] the test was not satisfied.[97] Since such averred facts must be accepted as true,[98] the defendants' motion for judgment on the pleadings[99] had been improperly granted,[100] and the case was remanded to the district court to develop the facts indicating whether plaintiffs' conduct was, in fact, reasonable and justified.[101]

In her dissent, Judge Sloviter claimed that the majority's decision "undermined the fundamental principle of finality of judgments" because it might permit one group of litigants to attack a judgment after an earlier, nearly identical group had failed.[102] Judge Sloviter challenged the majority's findings regarding collateral estoppel on three specific grounds.[103] First, she stated that since the plaintiffs were in privity with the applicants for intervention whose action was terminated in a valid judgment, their action was precluded.[104] Second, she stated

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actual knowledge of the pendency of the action for two and one half years coupled with a willful failure to join — the "unjustified and unreasonable" test would have been met. *Id.*

The court, in its hypothetical application of its rule to the would-be intervenors, made no distinction between those whose intervention would be as of right and those who would qualify only for permissive intervention; these applicants had been held not to qualify for intervention of right by the district court. *See* Dodson v. Salvitti, 77 F.R.D. 674, 676 (E.D. Pa. 1977); note 5 *supra*. For a discussion of intervention under the federal rules *see* notes 56-58 & 60 and accompanying text *supra*. Nor did the court expressly mention reliance upon the finality of the original judgment, either as a factor to ascertain reasonableness, or as a component of the balancing test upon which it is premised. For a discussion of the reliance factor as viewed by other courts, *see* note 74 and accompanying text *supra*.

95. 632 F.2d at 1052. *See* note 91 *supra*.

96. 632 F.2d at 1052.

97. *Id.*

98. *See* FED. R. CIV. P. 12(c); note 11 *supra*.

99. *Id.*

100. 632 F.2d at 1053.

101. *Id.* Thus, the new rule, as announced by the court, was made potentially applicable to the plaintiffs.

102. 632 F.2d at 1061 (Sloviter, J., dissenting).

103. *Id.* at 1061-68 (Sloviter, J., dissenting). *See* notes 104-107 and accompanying text *infra*.

104. *Id.* at 1064 (Sloviter, J., dissenting). Judge Sloviter began her discussion by citing the development of the more liberal concept of privity. *Id.* at 1063 (Sloviter, J., dissenting), *citing* F. JAMES & G. HAZARD, *supra* note 10 § 11.23 at 576; *See* Note, *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 818, 855-56 (1952). For a discussion of the modern view of privity, *see* note 45 and accompanying text *supra*. The dissent noted that both the applicants and the original plaintiffs were represented by the same attorney, both sought to advance the same claims, and both represented the same interests. 632 F.2d at 1064 (Sloviter, J., dissenting). *See* notes 45 & 47 and accompanying text *supra*. However, rather than applying the expanded concept of privity to the facts of the case, Judge Sloviter focused upon the plaintiffs' admission of privity. 632 F.2d at 1064. (Sloviter, J., dissenting). Finding privity, the dissent believed that the decision in the earlier case would bind the plaintiffs as well. *Id.*

that because the plaintiffs' interests had been represented by the earlier applicants for intervention, the preclusion of the original parties similarly barred the plaintiffs from asserting their contentions.[105] Finally, Judge Sloviter stated that the plaintiffs' failure to intervene had already been found to be unreasonable when the district court determined that the original applicants' motion for intervention was untimely.[106] Assuming that the plaintiffs' motion to intervene would likewise have been viewed as dilatory, Judge Sloviter deemed that the plaintiffs fell within the class of litigants whose actions were precluded due to their unreasonable failure to intervene.[107]

It is submitted that the *Society Hill* court's analysis was marred by a misconception of the law of res judicata and privity.[108] Specifically, it is suggested that the court committed a fundamental error by refusing to determine whether the plaintiffs were in privity with the applicants for intervention.[109] The issues of fact regarding the reasonableness of the first group of neighborhood residents' failure to intervene were fully litigated in the district court[110] and their resolution formed part of a final judgment which that group of residents is forever barred from relitigating.[111] Thus, if the *Society Hill* plaintiffs were in privity, they too would be bound by the facts which the Third Circuit found adequate to estop the first group of residents and a remand to ascertain the propriety of the plaintiffs' failure to intervene

105. 632 F.2d at 1064 (Sloviter, J., dissenting). Although there was no express authorization to provide representation, Judge Sloviter found that the plaintiffs' interests had been represented in the earlier case, relying upon cases which have been discussed as advancing the "same claim" rationale. *Id.* For a discussion of the representative theory of preclusion, *see* notes 37-39 and accompanying text *supra*. For a discussion of other cases which have held that a non-party is precluded from raising the same claim, *see* note 43 and accompanying text *supra*.

106. 632 F.2d at 1065-67 (Sloviter, J., dissenting). *See* Dodson v. Salvitti, 77 F.R.D. 674 (E.D. Pa. 1977); note 5 *supra*. For a discussion of the res judicata effect of a denial of intervention, *see* note 57 *supra*.

107. 632 F.2d at 1066-67 (Sloviter, J., dissenting). For the test adopted by the majority, *see* note 93 and accompanying text *supra*.

108. *See* 632 F.2d at 1050 n.4. For a discussion of the rules of privity, *see* notes 40-48 and accompanying text *supra*. For a discussion of the law of res judicata, *see* notes 18-35 and accompanying text *supra*.

109. 632 F.2d at 1050 n.4. While the court suggested that, under more modern cases, privity might be found, privity was not deemed to be relevant because the applicants for intervention never presented the merits of their claims. *Id., citing* Aluminum Co. of Am. v. Admiral Merchants Motor Freight, Inc., 486 F.2d 717 (7th Cir.), *cert. denied,* 414 U.S. 1112 (1973). *See* note 45 and accompanying text *supra*.

110. *See* 77 F.R.D. at 677; note 5 *supra*.

111. 77 F.R.D. at 677. For a discussion of the preclusive effect of judgments in abatement, *see* notes 29-30 and accompanying text *supra*. The issue of reasonableness, and the determination of the facts necessary to support its resolution are foreclosed, despite the trial court's basing its denial of intervention on two independent grounds. *See* note 31 *supra*.

would be proper only if the court had actually determined that no privity existed.[112]

Absent the Third Circuit's adoption of the Supreme Court's suggestion in *Provident Tradesmens*,[113] that an unreasonable failure to intervene in an ongoing action might preclude a subsequent attack of the judgment,[114] neither the applicants for intervention[115] nor the *Society Hill* plaintiffs would be precluded from bringing their own suit.[116] It is submitted that the substance of this rule,[117] if read in conjunction with both the facts of the case[118] and the rationale used in its formulation,[119] is merely a restatement of a branch of the larger concept of equitable preclusion.[120] As in traditional equitable preclusion analysis,[121] the court based its rule on a balancing test which weighs the interest in the finality of judgments against the unfairness resulting from preclusion,[122] the propriety of the outsider's conduct being the determinative factor in that balancing test.[123] It is probable that, on remand, facts may be ascertained which would justify the application of the doctrine of equitable preclusion.[124] Thus, if future

112. For a discussion of the preclusive effects of a judgment on privies to the action, *see* notes 40-48 and accompanying text *supra*.

113. 390 U.S. at 114. For a discussion of *Provident Tradesmens*, *see* notes 62-68 and accompanying text *supra*.

114. 632 F.2d at 1052. For a discussion of this rule as stated by the *Society Hill* court, *see* notes 93-97 and accompanying text *supra*. For a discussion of the reception of this rule in other jurisdictions, *see* note 69 *supra*.

115. The applicants for intervention would not be precluded because the final decision in their case established only that their application for intervention was untimely and that they did not qualify for intervention as of right. *See* note 5 *supra*. Thus, this was a judgment of abatement and the applicants would normally be free to commence a different action. *See* notes 30-31 and accompanying text *supra*. However, the facts as conclusively determined by the trial court, indicated that they would be precluded under the court's formulation of the rule of preclusion for failure to intervene, despite the failure to present the merits of their claim. *See* note 57 *supra*.

116. The *Society Hill* plaintiffs may be subject to the rule if the district court, on remand, determines that their failure to intervene was unjustified or unreasonable. *See* note 101 and accompanying text *supra*.

117. *See* 632 F.2d at 1052. For a discussion of the court's articulation of its rule, *see* notes 93-97 and accompanying text *supra*.

118. *See* 632 F.2d at 1049-50; notes 1-12 & 124 and accompanying text *supra*.

119. *See* 632 F.2d at 1050; note 86 and accompanying text *supra*. The court reasoned that the need for finality of judgments outweighed the due process interests when the party had failed to intervene. *Id.*

120. For a discussion of the equitable preclusion theory of estoppel, *see* notes 71-77 and accompanying text *supra*.

121. For a discussion of the elements of equitable preclusion, *see* note 71 *supra*.

122. *See* 632 F.2d at 1050; note 86 and accompanying text *supra*.

123. *See* 632 F.2d at 1050-53; notes 93-97 and accompanying text *supra*.

124. *See* 632 F.2d at 1049-50. Under an equitable preclusion analysis, the facts must reveal the existence of two similar actions and an unused procedural avenue for the inclusion of the subsequent challengers in the original action.

courts look to the entire case to determine whether the rule should be invoked, the results reached in subsequent cases will not be revolutionary.[125]

On the other hand, it is submitted that rather than formulating rules having the appearance of black letter law[126] which might result in mechanical application,[127] the court should have given lower courts additional guidance on how the balancing test should be applied.[128] The court failed to define unreasonable or unjustified in any meaningful way.[129] Further, in weighing the interest in the finality of judg-

See note 71 *supra*. The facts must also indicate that the failure to use the opportunity to consolidate created a justifiable reliance, on the part of the original parties, that the judgment reached is unassailable. *Id.* In *Society Hill*, it is submitted, these facts could be found to exist. The existence of two similar actions and, as determined by the district court, the procedural opportunity to participate, if such was promptly utilized, is unquestionable. *See* 632 F.2d at 1049-50. Moreover, the parties to the *Society Hill* case could reasonably assume that the decision reached in their case was unassailable, having successfully averted a challenge mounted by one group of residents which possibly would be deemed to have represented all Society Hill residents. *See id.*

125. It is submitted that the results reached in future cases in which the court's mode of analysis is used will mirror those used in an equitable preclusion analysis, a modern privity analysis, or a same claim analysis. *See, e.g.*, Aluminum Co. of Am. v. Admiral Merchants Motor Freight, Inc., 486 F.2d 717, 721 (7th Cir.), *cert. denied*, 414 U.S. 1113 (1973) (motor carriers who had not joined agency determination of their rights precluded from challenging that ruling under "privity" analysis); Cauefield v. Fidelity & Cas. Co., 378 F.2d 876 (5th Cir.), *cert. denied*, 389 U.S. 1009 (1967) (preclusion under same claim analysis applied to prevent multiple actions by separate cemetery plot owners raising the same contentions).

126. *See* 632 F.2d at 1050-53. The court premised its initial holding upon its balancing test. *Id.* at 1050. However, it is submitted that the court announced its rules as if its balancing of those competing interests could produce no other results but those rules, regardless of the facts of the individual case. *See id.* at 1052.

127. *See* F. JAMES & G. HAZARD, *supra* note 10, § 11.31 at 598-99; RESTATEMENT (SECOND) OF JUDGMENTS § 111, Comment b (Tent. Draft No. 4, 1977). Preclusion of a party who was not a privy to an original action and whose interests were not represented in that action would result in those interests going completely unrepresented. *See* Hansberry v. Lee, 311 U.S. at 40-41; notes 34-35 and accompanying text *supra*. Because such a lack of representation would run counter to *Hansberry* and the due process clause, it is submitted that the preclusion should be ordered only after the court has ascertained that the nonparty's conduct clearly constitutes a waiver of his due process right to be heard on the facts of his specific case.

128. *See* 632 F.2d at 1050-53; notes 94-97 and accompanying text *supra*. The court neither specified those facts which might indicate preclusion nor indicated that it was dealing with an unusual fact situation; *e.g.*, one where the subsequent challengers followed an unsuccessful attempt to intervene mounted by a nearly identical group. *See id.* Thus, it is suggested, due to this lack of express recognition of the unusual fact pattern, later courts may apply the rule in future cases where these, or similar facts would not be present and where preclusion, at least under current theories, would not be appropriate. For a criticism of the implications of such potential applications, *see* notes 131-46 and accompanying text *infra*.

129. *See* 632 F.2d at 1050-52. The court, rather than defining the elements of its test, merely applied that test to two essentially hypothetical situations.

ments, the court failed to utilize the concept of reliance, traditional in equitable preclusion analysis,[130] which requires that the parties to the action justifiably rely upon the outsider's conduct in order to give rise to a cognizable interest in the finality of the judgment.[131]

It is submitted that the failure to emphasize and define the balancing test might lead to applications of the rule, not only to outsiders whose conduct invoked reliance on the unassailability of a judgment, but also to outsiders, including would-be permissive intervenors, whose only "conduct" was a decision that their cause of action was sufficiently unrelated to the original suit that they could properly delay the initiation of their own suit until the first was resolved.[132] While the latter application might result in increased judicial economy, it is suggested that, in addition to interfering with the right to initiate and control one's own lawsuit,[133] such preclusion squarely contradicts the assump-

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Id. *See* notes 95-97 and accompanying text *supra*. The court illuminated its rule merely by stating that the original applicants, who failed to intervene after actual notice of two and one-half years, for the purpose of delay, would be guilty of unreasonableness, but that plaintiffs, who claimed no actual notice and alleged a prompt filing of their action to avoid delay, would not. 632 F.2d at 1052-53.

130. *See* notes 49 & 74 and accompanying text *supra*.

131. *See* 632 F.2d at 1052. While both Professors James and Hazard and the *Restatement* specifically list conduct by the non-participant which can and does produce reliance by the parties on the finality of the judgment rendered in their case as an element of equitable preclusion, the *Society Hill* court, in its test, required only "unjustified and unreasonable" conduct. *Id.* *See* F. JAMES & G. HAZARD, *supra* note 10 § 11.31 at 598-99; RESTATEMENT (SECOND) OF JUDGMENTS § 111, Comment b (Tent. Draft No. 4, 1977). However, the facts of the *Society Hill* case might indicate that the original parties could have relied upon the failure of the first group of intervenors as indicating that their judgment was not susceptible to challenge. Thus, the court may have implicitly considered a reliance element in its "unreasonable and unjustified" test. *See* note 124 and accompanying text *supra*.

132. While this "conduct" may be characterized as letting the first group of litigants 'test the water' or arrange lawsuits in order to get several chances to litigate against one defendant, it is suggested that these tactics, when used by those whose suits are relatively unrelated to the subject matter of the ongoing action, were given legitimacy by the Federal Rules of Civil Procedure. *See* notes 135-46 and accompanying text *infra*.

133. *See* Note, *supra* note 64, at 1569-70. The author stated:

> Another basic constraint on the use of preclusion procedure to compel intervention — and one relevant in every case — is the traditional policy favoring the plaintiff's control over the time, place, and scope of his suit. This convention assures fairness to plaintiffs by allowing them to present and conduct their case in the circumstances they consider most favorable to their interests. It also serves policies of judicial efficiency and repose since it maximizes the possibility that a potential plaintiff might find satisfaction of his grievances without resort to the courts. Thus, in determining the propriety of use of the preclusion procedure, courts must balance the need for consolidation against the harm caused plaintiffs by forcing the intervention of a disputant not included in the original suit and the effect of forced intervention on the orderly efficient administration of justice.

Id. at 1569 (footnotes omitted).

tions built into the federal rules of procedure.[134]

Under the current rules, it is the duty of the parties or the court to join any persons who might be bound by a decision reached in an action.[135] Those who are not joined may presume that they will not be bound by the judgment and the original parties have no reason to assume that the outsiders' claims are foreclosed by their suit.[136] Yet a mechanical application of the court's rule without consideration of the reliance element would not only result in the preclusion of these outsiders, despite the fact that they were not joined, but would also shift the burden of joining all potentially affected outsiders from the original parties and the court to the outsiders themselves.[137]

Moreover, a reflexive application of the rule to permissive intervenors[138] seems to squarely contradict the distinction which the rules draw between outsiders whose ability to protect their interests would be impaired by the suit, and those whose interests would not be so affected.[139] Permissive intervenors may rely on the fact that their interests are so unrelated to the ongoing action that they lose nothing by failing to intervene and that they might benefit by pursuing a separate action which focuses only upon their interests.[140] Concomitantly, the original parties have no reason to assume that such an outsider surrendered his claim merely because he did not opt to intervene in their action.[141] Indeed, if the final resolution of all disputes involving a common question of law or fact[142] were important to the original parties, joinder, under Rule 20,[143] is an available device. Yet

134. For a discussion of the rules of civil procedure, *see* notes 51-61 and accompanying text *supra.*

135. *See* FED. R. CIV. P. 19(a); notes 53-55 and accompanying text *supra.*

136. *See* 7 C. WRIGHT & A. MILLER, *supra* note 50, § 1602, at 20-21; notes 51-61 and accompanying text *supra.*

137. It is submitted that the parties to the original suit, who originally had the responsibility to join the outsider, reaps the benefit of the outsider's failure to intervene since the outsider is now precluded from bringing his own suit.

138. *See* FED. R. CIV. P. 24(b); note 60 *supra.* The *Society Hill* case may be viewed as precedent for applying its rules to permissive intervenors. *See* note 94 *supra.*

139. *See* FED. R. CIV. P. 24(a)(2). The rules of joinder and intervention are bifurcated so that those whose interests would be impaired by separate actions must be joined, or if applying for intervention, must be admitted. *See* notes 51-60 and accompanying text *supra.* Those who are not so tied may intervene, or may be joined only if the parties or the outsiders desire resolution. *See* notes 59-60 and accompanying text *supra.*

140. *See* notes 59-60 and accompanying text *supra.*

141. *Id.*

142. *See* FED. R. CIV. P. 20, 24(b)(2).

143. FED. R. CIV. P. 20. *See* note 59 and accompanying text *supra.* Of course, the defendant may not use permissive joinder to compel all potential claimants to join as plaintiffs, though, it is submitted that an indiscriminate application of the court's rule could achieve the same results by forcing permissive intervention.

an indiscriminate application of the rule to would-be permissive intervenors would result in these outsiders being bound by actions which, by definition, should not impair their ability to protect their rights.[144] It is submitted that this is a perversion of the assumptions built into the federal rules which will result in an offensive use of preclusion which would estop a total stranger to a prior suit by one who had been successful in that action – a type of offensive preclusion which, because of *Hansberry* [145] and a recognition of an individual's right to a personal action, has never been sanctioned.[146]

Since the court did not emphasize the rationale for its new rule,[147] it is submitted that the future application of that rule depends upon how closely the case is read by subsequent courts. If these courts rely upon the facts and tests used by the Third Circuit, in addition to studying other current authorities, it is submitted that the rule will be applied only to outsiders who, by their conduct, have clearly waived their *Hansberry* rights.[148] If, however, subsequent courts view the case as announcing a black letter rule which is to be mechanically applied, claimants will be forced into multiparty litigation, a result clearly not encouraged or sanctioned by the rules of procedure [149] or *Hansberry*.[150] While this speaks well for judicial economy and the interest in the finality of judgments, it is submitted that future claimants will be forced to waive their rights to initiate and control their own actions or be precluded, contrary to *Hansberry*, by an action to which they were not parties merely because they failed to intervene in that action which, according to the rules, cannot affect their ability to maintain separate actions.[151]

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144. *See* note 60 and accompanying text *supra*. It is submitted that an indiscriminate application of the court's rule might lead to the elimination of the distinction between of right and permissive intervention. Present permissive intervenors might rightfully argue that their failure to intervene would result in their being bound by the adjudication, thus qualifying them for of right intervention.

145. Hansberry v. Lee, 311 U.S. 32 (1940). *See* notes 34-35 and accompanying text *supra*.

146. For a discussion of the applications of offensive preclusion, *see* note 22 *supra*.

147. *See* notes 126-31 and accompanying text *supra*.

148. For a discussion of *Hansberry*, *see* notes 34-35 and accompanying text *supra*.

149. *See* notes 135-44 and accompanying text *supra*.

150. *See* notes 34-35 and accompanying text *supra*.

151. *See* notes 59-61 and accompanying text *supra*.