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Recent Developments: New Hampshire v. Piper: Opens Doors to Bar Admission

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The court distinguished the case *sub judice* from *Jensen, supra. Jensen* involved the loss of control of an automobile allegedly due to a defect in the steering mechanism where the only evidence produced was the plaintiffs' testimony that he heard the tires squeal. The court stated that the plaintiffs in *Jensen* failed to negate other causes of the accident.

In the area of products liability, involving the theories of strict liability and implied warranty of merchantibility, the holding in this case has the potential to provide a "windfall" to plaintiffs. The practical effect of the decision will be to shift the essential burden of proof to the defendant. As it stands now, the plaintiff is required to testify that he bought the product and that he did not misuse or alter the product, thus, effectively shifting to the defendant the burden of proving that the causal effect of the accident was not produced by the defendant.

The decision has further eroded the rule of *caveat emptor.* With regard to strict liability, it now appears that in order to reach the jury, who most often will side with the injured plaintiff, evidence of an accident which injured the plaintiff is needed; coupled with the plaintiff's *heartfelt assurances* that he did not misuse, alter or even touch the product (i.e., "all of a sudden, it just blew up") will be sufficient proof. This case takes the position that a plaintiff's testimony will not be self-serving. It may be too much to ask of an injured party.

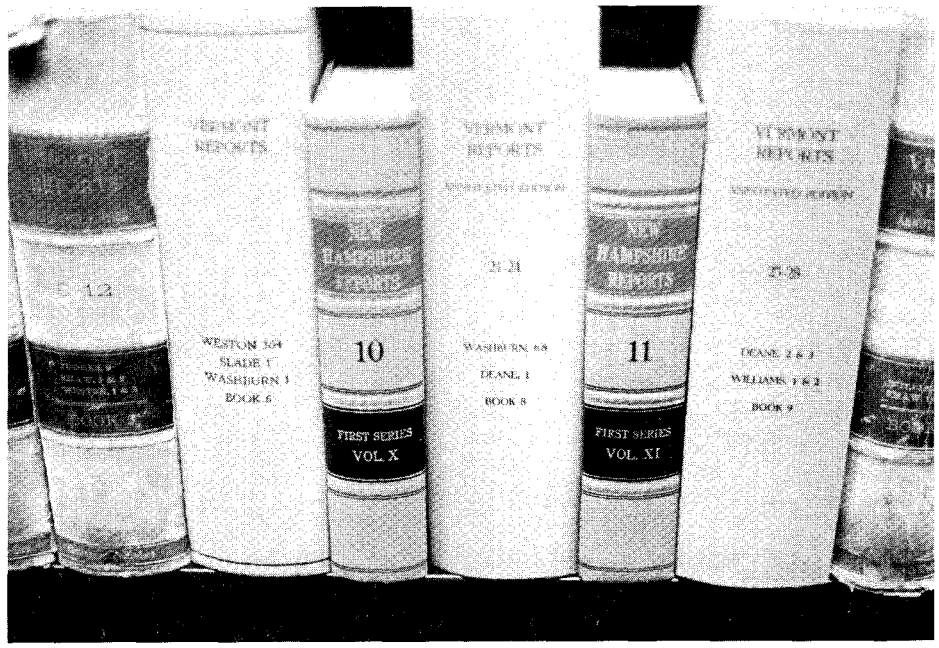
–Kevin L. Beard

New Hampshire v. Piper: OPENS DOORS TO BAR ADMISSION

In *Supreme Court of New Hampshire v. Piper*, 105 S.Ct. 1272 (1985), the United States Supreme Court held that New Hampshire Supreme Court Rule 42, which limits bar admission to state residents, violated the privileges and immunities clause of the United States Constitution, article IV, section 2, clause 1. By this ruling, the Court has affected the residency requirements for lawyers in at least twenty-seven states. Low, *Lawyer Residency Requirement Axed by Supreme Court*, The Daily Record, Mar. 12, 1985 at 4, col. 3. However, Maryland is not one of the states affected by this ruling. *See*, e.g., Rule 10 of Rules Governing Admission to the Bar of Maryland (deleted Jan. 22, 1982).

In *Piper*, the appellee, Kathryn Piper, a resident of a town in Vermont, which was located about 400 yards from the New Hampshire border, passed the New Hampshire bar examination in 1980. She was informed by the New Hampshire Board of Bar Examiners, however, that before she could practice law in the state of New Hampshire she would have to become a resident of New Hampshire pursuant to New Hampshire Supreme Court Rule 42. Appellee requested from the Clerk of the New Hampshire Supreme Court a dispensation from the residency requirement, explaining that her personal situation negated the convenience of becoming a New Hampshire resident. The Clerk denied appellee's request. Piper than petitioned the New Hampshire Supreme Court for permission to become a member of the bar. The New Hampshire Supreme Court denied her request. The appellee filed the present action in the United States District Court for the District of New Hampshire. The court ruled in 1982 that the New Hampshire residency requirement violated the privileges and immunities clause. *New Hampshire v. Piper*, 539 F. Supp. 1064 (D.N.H. 1982). The Court of Appeals for the First Circuit affirmed the ruling. *New Hampshire v. Piper*, 723 F.2d 110 (1st Cir. 1983).

The Court in *Piper* begins by discussing the intent of the privileges and immunities clause. The clause, according to the Court, was intended to "fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). Consequently, it is "[o]nly with respect to those 'privileges' and 'immunities' bearing on the vitality of the nation as a single entity that a State must accord residents and nonresidents equal treatment." *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978). Therefore, the privileges and immunities clause only protects fundamental rights.



The Court determined that practicing law is a fundamental right protected by that clause. First, one of the purposes of the clause is "to create a national economic union." *Piper*, 105 S.Ct. at 1276. Since "the practice of law is important to the national economy," it is a fundamental right which is protected. *Piper*, 105 S.Ct. at 1277. Second, the practice of law is a fundamental right because in cases where "unpopular federal claims" are raised "representation by nonresident counsel may be the only means available for the vindication of federal rights." *Piper*, 105 S.Ct. at 1277.

In addition, the Court noted that the practice of law does not involve an exercise of state power as in *In re Griffiths*, 413 U.S. 717 (1973), justifying a residency requirement. *Piper*, 105 S.Ct. at 1278. Instead, a lawyer is a private businessman and not "an 'officer' of the State in any political sense." *Piper*, 105 S.Ct. at 1278.

Although the Court determined that practicing law is a fundamental right, the state can still discriminate against nonresidents where: "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper*, 105 S.Ct. at 1279. The Court determined, however, that New Hampshire did not show substantial reasons that were substantially related to the state's objective to discriminate against nonresident attorneys. First, "[t]here is no evidence to support the State's claim that nonresidents might be less likely to keep abreast of local rules and procedures." *Piper*, 105 S.Ct. at 1279. Second, "there is no reason to believe that a nonresident lawyer will conduct his practice

in a dishonest manner. The nonresident lawyer's professional duty and interest in his reputation should provide the same incentive to maintain high ethical standards as they do for resident lawyers." *Piper*, 105 S.Ct. at 1279. Furthermore, the Supreme Court of New Hampshire "has the authority to discipline all members of the bar, regardless of where they reside." *Piper*, 105 S.Ct. at 1279. Third, the argument that a nonresident attorney will not be available for court proceedings is unsound because

> in those cases where the nonresident counsel will be unavailable on short notice, the State can protect its interests through less restrictive means. The trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who will be available for unscheduled meetings and hearings.

Piper, 105 S.Ct. at 1280.

Fourth, the contention that nonresident lawyers will not "do their share of *pro bono* and volunteer work" is not necessarily true. *Piper*, 105 S.Ct. at 1280. A nonresident lawyer could be "required to represent indigents and perhaps to participate in formal legal-aid work." *Piper*, 105 S.Ct. at 1280.

Justice Rehnquist dissented in *Piper*, arguing that there are substantial reasons why a state would discriminate against nonresident lawyers. First,

> the State has a substantial interest in creating its own set of laws responsive to its own local interests, and it is reasonable for a State to decide that those people who have been trained to analyze law and policy are better equipped to write those state laws and adjudicate cases arising under them. The State therefore may decide that it has an interest in maximizing the number of resident lawyers, so as to increase the quality of the pool from which its lawmakers can be drawn.

Piper, 105 S.Ct. at 1283.

Second, since lawyers play an important role in the formation of state policy, "they should be intimately conversant with the local concerns that should inform such policies." *Piper*, 105 S.Ct. at 1283. Third, the state may have an interest in having resident attorneys "bring their useful expertise to other important functions that benefit from such expertise and are of interest to state governments – such as trusteeships, or directorships of corporations or charitable organizations, or school board positions, or merely the role of the interested citizen at a town meeting." *Piper*, 105 S.Ct. at 1283. Fourth, a state does have a substantial interest in assuring that there not be a delay in litigation due to nonresident lawyers. *Piper*, 105 S.Ct. at 1285.

The Court in *Piper* has promulgated a rule which will cause the amendment of, if not the abolition of, residency requirements for lawyers in at least twenty-seven states. The fears of Justice Rehnquist, however, do not seem to be sound. Nonresident lawyers have represented clients, with the permission of the courts, on a *pro hac vice* basis for years. By allowing attorneys to practice on a regional or national level, this ruling will permit the public to have a freer hand in selecting competent legal counsel.

– Sam Piazza

California v. Carney: A MAN'S MOBILE HOME IS NOT HIS CASTLE

In *California v. Carney*, 105 S.Ct. 2066 (1985), the Supreme Court of the United States held that federal narcotics agents did not violate the fourth amendment when they conducted a warrantless search based on probable cause of a mobile home parked in a public parking lot. In so doing, the Court, for the first time applied the "automobile exception" to a fully mobile motor home.

Federal narcotics agents had reason to believe that Carney was exchanging marijuana for sex in a motor home parked in a lot in downtown San Diego. The defendant was observed downtown as he approached a youth and accompanied him back to the motor home. When the youth emerged he was stopped by the agents who then learned that he had received marijuana in return for allowing Carney sexual contacts. The officers persuaded the youth to return to the motor home and knock on the door. When Carney stepped out the agents identified themselves and without a warrant or consent, one agent entered and observed marijuana and drug paraphernalia. A subsequent search of the motor home at the police station revealed additional marijuana.

After unsuccessful attempts to have the evidence discovered in the motor home suppressed, the defendant pleaded *nolo contendre* to possession of marijuana for sale. The California Court of Appeal affirmed (*People v. Carney*, 117 Cal. App. 3d 36, 172 Cal. Rptr. 430 (1981)), but the California Supreme Court reversed *People v. Carney*, 34 Cal. 3d 597, 194 Cal. Rptr. 500, 668 P.2d 807 (1983), holding the "automobile exception" inapplicable to a motor home.

Chief Justice Burger, author of the Court's opinion, began by reviewing the "automobile exception" to the general rule that a warrant must be secured before a search is undertaken. *Carney*, 105 S.Ct. at 2068. This exception to the warrant requirement had its genesis in *Carroll v. United States*, 267 U.S. 132 (1925). The Court justified the lesser degree of protection of privacy interests in an automobile by relying principally on the ready mobility of the automobile.

"However, although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception." *Carney*, 105 S.Ct. at 2069. Because one has a lesser expectation of privacy in one's automobile than one's home, the warrant requirement is relaxed notwithstanding the mobility of the vehicle. *Cady v. Dombrowski*, 413 U.S.

433 (1973). "These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways." *Carney*, 105 S.Ct. at 2069.

The Court was now forced to characterize the motor home as either an automobile or a home. "While it is true that the [defendant's] vehicle possessed some, if not many of the attributes of a home, it is equally clear that the vehicle falls clearly within the exception laid down in *Carroll* . . ." *Carney*, 105 S.Ct. at 2070. The Chief Justice noted that the motor home was readily mobile and subject to extensive regulation – the two justifications underlying the "automobile exception." However, the Chief Justice made a third observation; "the vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle." *Id.* at 2070. This may