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## Recent Decisions

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## RECENT DECISIONS

PROCEDURE — LABOR LAW — REMOVAL OF § 301(A) SUIT DENIED WHEN PLAINTIFF SEEKS INJUNCTION. — On October 31, 1963, four hundred employees, members of Local 25, Marine Division International Union of Operating Engineers, AFL-CIO, ceased work for plaintiff, American Dredging Company. Two collective bargaining agreements, requiring binding arbitration of all disputes and prohibiting all strikes and other suspensions of work, were in effect between Local 25 and plaintiff. Plaintiff brought suit to enjoin Local 25 from striking in violation of its agreement. In an ex parte hearing, the Common Pleas Court of Philadelphia County, Pennsylvania, granted the requested preliminary injunction against Local 25 and its officers. The defendant, Local 25, removed the case to the United States District Court for the Eastern District of Pennsylvania which denied plaintiff's motion to remand to the state court. Subsequently, plaintiff filed a motion for a preliminary injunction in the district court to bring the issue of removal within the scope of a reviewable order.<sup>1</sup> This motion was also denied.<sup>2</sup> Vacating this judgment and remanding the case to the district court with instructions to remand to the state court, the Court of Appeals for the Third Circuit Court *held*: notwithstanding the grant of jurisdiction to any district court of the United States to hear suits for the violation of contracts between employers and labor organizations by § 301(a) of the Taft-Hartley Act,<sup>3</sup> § 4 of the Norris-LaGuardia Act<sup>4</sup> denies such courts the "original jurisdiction" required by § 1441 of the Removal Act<sup>5</sup> to sustain a

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1 An order remanding a case to the state court from which it was removed cannot be appealed. 28 U.S.C. § 1447(d) (1958). However, removability is jurisdictional and can be considered together with an appealable order. *Mayflower Indus. v. Thor Corp.* 184 F.2d 537 (3d Cir. 1950). The denial of a temporary injunction is such an order. 28 U.S.C. § 1292(a) (1958).

2 *American Dredging Co. v. Local 25, Marine Div., Int. Union of Operating Engrs.*, 224 F. Supp. 985 (E.D. Pa. 1963).

3 Section 301(a) of the Labor Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 156, 29 U.S.C. § 185(a) (1958), provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

4 Section 4 of the Norris-LaGuardia Act of 1932, 47 Stat. 70, 29 U.S.C. § 104 (1958), provides in part:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment . . .

5 Section 1441 of the Removal Act of 1948, 28 U.S.C. § 1441 (1958), provides in part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the

motion to remove a suit to a United States district court when an injunction to enforce the "no-strike" provision of a collective bargaining agreement is sought. *American Dredging Co. v. Local 25, Marine Division, International Union of Operating Engineers*, 338 F.2d 837 (3d Cir. 1964), *cert. denied*, 380 U.S. 935 (1965).

Though the problem in *American Dredging* arises from the interplay of three federal statutes, its true genesis is found in the Supreme Court's treatment of § 301(a) of the Taft-Hartley Act. When this legislation was passed, the predominant concern of Congress was to make labor organizations subject to suit in federal courts,<sup>6</sup> since they could not be sued effectively in some state courts.<sup>7</sup> Underlying this purpose was an important policy consideration: unions as well as employers must be held legally accountable for breaching collective bargaining agreements in order to promote the mutual responsibility necessary for industrial peace.<sup>8</sup>

From this apparently simple grant of federal jurisdiction, the United States Supreme Court has developed § 301(a) into the cornerstone of a rapidly expanding federal labor law applicable to collective bargaining agreements. In *Textile Workers Union of America v. Lincoln Mills of Alabama*,<sup>9</sup> the Supreme Court held that, under § 301(a), the federal courts are to fashion a body of substantive labor law for the enforcement of collective bargaining agreements. The Court also observed that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."<sup>10</sup> Subsequently, in declaring that the "present federal policy is to promote industrial stabilization through the collective bargaining agreement,"<sup>11</sup> the Court emphasized the desirability of including "no-strike" provisions in such agreements.<sup>12</sup> The full import of *Lincoln Mills* became more apparent in *Local 174, Teamsters v. Lucas Flour Co.*,<sup>13</sup> holding that substantive principles of federal labor law are controlling in state courts entertaining suits covered by § 301(a). Extending the *quid pro*

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parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

6 S. REP. No. 105, 80th Cong., 1st Sess. 17 (1947); "It is apparent that until all jurisdictions, and particularly the Federal Government, authorize actions against labor unions as legal entities, there will not be the mutual responsibility necessary to vitalize collective-bargaining agreements."

7 At common law, labor unions could not sue or be sued as separate entities. Many courts required that process be served individually upon each member and held that court decrees did not bind union members not present. *E.g.*, *Allis-Chalmers Co. v. Iron Molders Union*, 150 Fed. 155 (E.D. Wis. 1906); *St. Paul Typothetae v. St. Paul Bookbinders' Union*, 94 Minn. 351, 102 N.W. 725 (1905); *Cleland v. Anderson*, 66 Neb. 252, 92 N.W. 306 (1902); S. REP. No. 105, *supra* note 6, at 15-18.

8 S. REP. No. 105, *supra* note 6, at 16: "Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts."

9 353 U.S. 448 (1957).

10 *Id.* at 455.

11 *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960). *Accord*, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960). In all three of these decisions, the Supreme Court compelled the defendants to submit unresolved grievances to arbitration as provided for in collective bargaining contracts.

12 *United Steelworkers v. Warrior & Gulf Nav. Co.*, *supra* note 11, at 578 n.4. See *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 453 (1957).

13 369 U.S. 95 (1962).

quo doctrine of *Lincoln Mills*, the court concluded that any agreement containing a provision for compulsory arbitration of disputes implicitly contained a promise by the union not to strike.

The possibility that the Court would ultimately determine that, under § 301(a), state courts were pre-empted from even entertaining suits for breaches of collective bargaining agreements was unequivocally dispelled in *Charles Dowd Box Co. v. Courtney*.<sup>14</sup> Noting that the purpose of § 301(a) was to increase, not to limit, the availability of forums for the enforcement of collective bargaining agreements, the Supreme Court reasoned that although federal substantive law must be applied for all such suits, state courts exercise concurrent jurisdiction with federal courts.<sup>15</sup>

The scope of this federal substantive law was left very uncertain by *Sinclair Refining Co. v. Atkinson*.<sup>16</sup> There, the Supreme Court ruled that § 4 of the Norris-LaGuardia Act had not been impliedly repealed by § 301(a); and, therefore, federal courts could not grant injunctions to enforce "no-strike" clauses in collective bargaining agreements. As a result of this much criticized decision,<sup>17</sup> the issue adjudicated in *American Dredging* is of utmost significance to the evolving federal law relating to the enforcement of collective bargaining agreements. *Sinclair's* holding applied only to federal courts.<sup>18</sup> Prior to this decision, the authority of state courts to grant injunctive relief in a suit for violation of a "no-strike" clause was clear.<sup>19</sup> And, despite arguments to the contrary,<sup>20</sup> post-*Sinclair* cases affirm the right to such relief in state courts.<sup>21</sup> In *American Dredging*, therefore, allowing removal would have necessarily prevented the plaintiff from obtaining the permanent injunction available in the state court.<sup>22</sup>

The argument against permitting removal and in favor of remanding to the state court is a persuasive one.<sup>23</sup> Emphasizing that state courts have con-

14 368 U.S. 502 (1962).

15 This decision left unanswered the question of exactly what federal substantive law includes.

16 370 U.S. 195 (1962).

17 E.g., Aaron, *The Labor Injunction Reappraised*, 10 U.C.L.A. L. REV. 292, 342-43 (1963); Kovarsky, *Unfair Labor Practices, Individual Rights and Section 301*, 16 VAND. L. REV. 595, 606-09 (1963); Note, 52 CALIF. L. REV. 423, 424-25 (1964). But see Wellington and Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, (1963).

18 "For these reasons, the Norris-LaGuardia Act deprives the courts of the United States of jurisdiction to enter that injunction . . ." 370 U.S. at 203. (Emphasis added.)

19 United Elec. Radio & Mach. Workers of America v. Westinghouse Elec. Corp., 65 F. Supp. 420 (E.D. Pa. 1946); McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal.2d 45, 315 P.2d 322, cert. denied, 355 U.S. 932 (1958); Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n, 382 Pa. 326, 115 A.2d 733, cert. denied, 350 U.S. 843 (1955); General Bldg. Contractors' Ass'n v. Local Union No. 542, 370 Pa. 73, 87 A.2d 250 (1952).

20 See Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 COLUM. L. REV. 1027, 1037 (1963).

21 Radio Corp. of America v. Local 780, International Alliance of Theatrical Stage Employees, 160 So. 2d 150 (Fla. Ct. App. 1964), cert. denied, 169 So. 2d 390 (Fla. 1965); C.D. Perry & Sons, Inc. v. Robilotto, 39 Misc.2d 147, 240 N.Y.S.2d 331 (Sup. Ct. 1963); Shaw Elec. Co. v. International Bhd. of Elec. Workers, 208 A.2d 769 (Pa. 1965).

22 The temporary injunction was granted on November 1, 1963. Hearing on plaintiff's motion to continue the injunction was set for November 6th; however, defendant removed the case on November 4th.

23 In *Dowd Box*, 368 U.S. 502, 514 n.8 (1962), the United States Supreme Court noted the existence of the removal problem presented in *American Dredging* without suggesting a solution. No other court of appeals has adjudicated the question, but the majority of district

current jurisdiction in § 301 suits, the plaintiff is said to have a choice as to which remedial law—state or federal—he wishes to rely upon.<sup>24</sup> Since, on a motion to remove, the complaint is determinative, if it does not present a federal question, removal must be denied.<sup>25</sup> Recognizing that under § 301(a), federal substantive law must be applied, the “federal question” requirement is narrowly interpreted to mean that the complaint must allege a dispute whose resolution depends upon the validity or construction of § 301(a).<sup>26</sup>

The main thrust of the argument against removal concentrates on the meaning of “jurisdiction” as that term is embodied in § 301(a) of the Taft-Hartley Act, § 4 of the Norris-LaGuardia Act, and § 1441 of the Removal Act.<sup>27</sup> A majority of courts considering the problem have concluded that when the plaintiff seeks an injunction barred by the Norris-LaGuardia Act, they lack the “original jurisdiction” required by the Removal Act.<sup>28</sup> The rationale for this conclusion is that “jurisdiction” includes not only the power to take cognizance of the case (which § 301(a) apparently grants), but also the power to grant relief according to the merits of the plaintiff’s cause.<sup>29</sup> And, when an injunction is sought, federal courts are powerless to grant such relief under the Norris-LaGuardia Act. Thus, “the denial of jurisdiction . . . over certain types of injunctive relief would preclude . . . taking cognizance of the action.”<sup>30</sup> If this syllogistic array does not demonstrate that the federal courts lack “original juris-

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courts are in accord with *American Dredging, E.g., Merchant’s Refrigerating Co. of Calif. v. Warehouse Union*, 213 F. Supp. 177 (N.D. Calif. 1963); *Swift & Co. v. United Packinghouse Workers*, 177 F. Supp. 511 (D. Colo. 1959) (remanded suit for injunction, retaining jurisdiction over damage claim); *Castle & Cooke Terminals v. Local 137, Int’l Longshoremen’s Union*, 110 F. Supp. 247 (D. Hawaii 1953). See 1A MOORE, FEDERAL PRACTICE ¶ 0.167, at 1001-10 (1965). *Contra*, *Food Fair Stores, Inc. v. Retail Clerks*, 229 F. Supp. 123 (E.D. Pa. 1964) (in Third Circuit prior to *American Dredging*); *Tri-Boro Bagel Co. v. Bakery Drivers Union*, 228 F. Supp. 720 (E.D. N.Y. 1963); *Fay v. American Cystoscope Makers, Inc.* 98 F. Supp. 278 (S.D. N.Y. 1951).

24 See *Associated Tel. Co. v. Communication Workers*, 114 F. Supp. 334, 337 (S.D. Calif. 1953); *Hat Corp. of America v. United Hatters*, 114 F. Supp. 890, 892 (D. Conn. 1953); 1A MOORE, *op. cit. supra* note 23, at 1010 and cases cited therein.

25 *Pan American Petroleum Corp. v. Superior Court* 366 U.S. 656, 663 (1960); *Castle & Cooke Terminals v. Local 137, supra* note 23, at 249; *Merchant’s Refrigerating Co. of Calif. v. Warehouse Union*, 213 F. Supp. 177 (N.D. Calif. 1963). See 1A MOORE, *op. cit. supra* note 23, at 1002 and cases cited therein. At 472-73, Professor Moore comments as follows:

In an action invoking the original jurisdiction of the district court on the basis that the action is one “arising under,” the federal ground must appear in the complaint well pleaded. This same principle normally applies to removal since it is keyed to original jurisdiction; and there can be no removal on the basis of a federal question presented for the first time in defendant’s petition for removal or in his answer.

26 See *Gully v. First Nat’l Bank in Meridian*, 299 U.S. 109, 115 (1936); *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912); *Gold-washing and Water Co. v. Keyes*, 96 U.S. 199, 203-04 (1877).

27 In *American Dredging*, however, the Court of Appeals appears to give equal weight to the assertion that the lack of a “federal question” is alone sufficient to deny removal without a consideration of the Norris-LaGuardia Act. 338 F.2d at 843-46.

28 Cases cited note 23 *supra*. Most of the district courts holding that removal must be denied when the plaintiff seeks only injunctive relief but not when he seeks some additional remedy, have accepted this reasoning. See text accompanying notes 55-60 *infra*.

29 *General Inv. Co. v. New York Cent. R.R. Co.*, 271 U.S. 228 (1926).

30 *National Dairy Prods. Corp. v. Heffernan*, 195 F. Supp. 153, 155 (E.D.N.Y. 1961). In this case, the plaintiff sought money damages and an injunction. Remand was denied, and the prayer for damages was dismissed for lack of jurisdiction. The court accepted the theory that it lacked jurisdiction over suits for injunctions only.

diction," at least the existence of such jurisdiction is in doubt, and therefore, the case still must be remanded.<sup>31</sup>

The argument against removal is reinforced by the policy considerations underpinning § 301(a), which was enacted to facilitate the enforcement of labor-management agreements.<sup>32</sup> Such agreements best promote industrial peace when they prohibit strikes and provide for the compulsory arbitration of all disputes.<sup>33</sup> When § 301(a) was passed, Congress considered amending the Norris-LaGuardia Act to allow federal courts to issue injunctions enforcing collective bargaining agreements.<sup>34</sup> Instead, Congress chose to continue having them enforced through the "usual processes of the law,"<sup>35</sup> which included, among other remedies, state court injunctions.<sup>36</sup> Thus, to allow removal would effectively divest state courts of a power impliedly reserved to them by Congress and give the opposite effect to legislation intended to enhance union responsibility.

The last argument offered against removal appeals to the courts' sense of justice. Pointing out that an injunction is the only meaningful remedy to correct an obvious wrong suffered by the plaintiff as a result of the defendant's breach,<sup>37</sup> attention is drawn to the Supreme Court's ruling that a union's promise not to strike is the quid pro quo of an employer's promise to submit all disputes to arbitration.<sup>38</sup> Since the latter is specifically enforceable against the employer,<sup>39</sup> it is anomalous to refuse to enforce the former.<sup>40</sup> Moreover, it is incongruous "to hold, on one hand, that a District Court has original jurisdiction sufficient to grant the removal of a cause and then to hold, on the other, that the cause, once removed, must be dismissed by the District Court for the reason that it lacks jurisdiction of the cause and consequently has no power to grant the relief sought."<sup>41</sup>

The argument in favor of removal is also a strong one. Under the principles enunciated in *Lincoln Mills* and *Lucas Flour*, a suit for the enforcement of a "no-strike" provision in a collective bargaining agreement is necessarily

31 *Patriot-News Co. v. Harrisburg Printing Pressmen*, 191 F. Supp. 568 (M.D. Pa. 1961); *Swift & Co. v. United Packinghouse Workers*, 177 F. Supp. 511 (D. Colo. 1959).

32 See note 8, *supra*.

33 *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

34 93 CONG. REC. 4887-5076, 80th Cong., 1st Sess. (1947).

35 *Ibid.* This phrase was defined by the Second Circuit as apparently meaning "processes in force when the Att was passed." *A.H. Bull S.S. Co. v. Seafarers' Int'l Union*, 250 F.2d 326, 332 (2d Cir.), *cert. denied*, 355 U.S. 932 (1958).

36 At the time of the passage of § 301(a) "state court injunctions formed an important element of the 'usual processes of law.'" Isaacson, *The Grand Equation: Labor Arbitration and the No-Strike Clause*, 48 A.B.A.J. 914, 920 (1962). For a discussion of the types of relief then available in state courts, see S. REP. No. 105, *supra* note 6, at 15-18 and H. R. REP. No. 245, 80th Cong., 1st Sess. 108-09 (1947).

37 Strikes of any significant duration are likely to cause irreparable harm to employers. An award of damages can hardly compensate for loss of goodwill, nor can it return customers who have turned to competitors with more reliable production schedules.

38 *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). See discussion in Stewart, *No-Strike Clauses in the Federal Courts*, 59 MICH. L. REV. 673 (1961).

39 Cases cited notes 9 and 11 *supra*.

40 The contention has been made that to deny employers the right to enjoin violations completely destroys the quid pro quo doctrine enunciated in *Lincoln Mills*. See discussion in Comment, *Quid Pro Quo in Federal Labor Law: Enforcement of the No-Strike Clause*, 1963 WIS. L. REV. 626 (1963).

41 *Walker v. United Mine Workers of America*, 105 F. Supp. 608, 611 (W.D. Pa. 1952).

one brought under federal law.<sup>42</sup> Since federal courts have taken cognizance of federal questions which were necessarily present in a case, though not apparent in the complaint,<sup>43</sup> and since the real nature of the claim asserted is federal, removal must be allowed.<sup>44</sup>

The "jurisdictional" bar of the Norris-LaGuardia Act is confronted by contending that to read § 4 as denying federal courts the right to entertain a suit to enjoin a strike in violation of a bargaining agreement fails to distinguish between jurisdiction and power to grant the relief desired.<sup>45</sup> Accepting the assertion that "jurisdiction" means more than mere authority to take cognizance of a suit, however, even if relief other than an injunction is not prayed for, a district court has power to provide the plaintiff with appropriate legal remedies after a hearing on the merits.<sup>46</sup> Federal courts do, therefore, have the full jurisdiction insisted upon as essential to the existence of original jurisdiction under the Removal Act.<sup>47</sup>

The policy arguments employed by those favoring removal are derived, not so much from the legislative history of § 301(a), as from its subsequent construction by the Supreme Court. As recognized in recent decisions, § 301(a) charged federal courts with the responsibility of developing a single, consistent body of federal labor law.<sup>48</sup> Since injunctive relief is denied litigants in federal courts, it should necessarily be unavailable in any suit for violation of a collective bargaining agreement.<sup>49</sup> At the time of the congressional debates over § 301(a), both the House and the Senate considered and rejected amendments designed to exempt § 301 suits from Norris-LaGuardia's ban on injunctions.<sup>50</sup> Consequently, removal implements federal policy calling for a uniform labor

42 *Food Fair Stores, Inc. v. Retail Clerks*, 229 F. Supp. 123, 127 (E.D. Pa. 1964); *Fay v. American Cystoscope*, 98 F. Supp. 278, 281 (S.D.N.Y. 1951). See Isaacson, *supra* note 36.

43 1A MOORE, *op. cit. supra* note 23, at 1002 and cases cited therein. In *Pocahontas Terminal Corp. v. Portland Bldg. & Constr. Trade Council*, 93 F. Supp. 217, 219, 225 (D. Me. 1950), the court stated:

[It] takes judicial notice of any Federal laws necessarily brought into play by the allegations of the complaint; and it is immaterial that specific reference to such laws may be omitted in the pleading. . . . The test of removal to a Federal court is not what the court must ultimately do with the case under Federal law but whether the Federal law applies to and controls the case by its provisions, as brought into operation by the complaint.

44 See cases cited note 23 *supra*.

45 *American Dredging v. Local 25*, 224 F.Supp. 985, 988 (E.D. Pa. 1963) (district court opinion). See *Food Fair Stores, Inc. v. Retail Clerks*, 229 F.Supp. 123, 127 (E.D. Pa. 1964); *Tri-Boro Bagel Co. v. Bakery Drivers Union*, 228 F.Supp. 720, 724 n. 10 (E.D. N.Y. 1963). CHAFEE, *SOME PROBLEMS OF EQUITY*, 368-74 (1950) (extensive discussion of this distinction).

46 See *American Dredging v. Local 25*, 224 F.Supp. 985, 989 (E.D. Pa. 1964) (district court opinion). FED. R. CIV. P. 54(c) provides that district courts have the power to grant any relief that they deem proper, whether or not the appropriate remedy is specifically prayed for. However, as the Third Circuit notes in *American Dredging*, 338 F.2d 837, 848 (3d Cir. 1964), FED. R. CIV. P. 82 states: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

47 Cases cited note 23 *supra*.

48 *E.g.*, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); *United Steelworkers cases*, *supra* note 11; *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957).

49 *American Dredging*, 338 F.2d 837, 857-58 (3d Cir. 1964) (dissenting opinion); *Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n*, *supra* note 19 at 741 (dissenting opinion); *Aaron, Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 COLUM. L. REV. 1027, 1035-37 (1963).

50 See note 34 *supra*.

law formulated by federal courts, while remand allows state courts to determine much of the law governing labor agreements.

Contentions that the plaintiff would suffer an injustice if removal were allowed are disposed of in light of the above policy considerations. After removal of a suit for an injunction to enforce a "no-strike" clause, a federal court need not dismiss the case for lack of jurisdiction.<sup>51</sup> It may grant specific performance of an arbitration provision,<sup>52</sup> declaratory relief,<sup>53</sup> or money damages.<sup>54</sup> The employer's promise to submit disputes to arbitration and the union's promise not to strike are both enforceable, but national labor policy forbids specific performance of a "no-strike" clause by way of injunction.

In *American Dredging*, the plaintiff sought only injunctive relief,<sup>55</sup> but its general prayer also requested "such other relief as the Court may deem appropriate."<sup>56</sup> Since suits to compel arbitration, for damages, or for declaratory relief are within the jurisdiction conferred upon District Courts by § 301(a), some courts have held that when a suit for an injunction also contains a prayer for damages, removal is permissible.<sup>57</sup> In *American Dredging*, however, the court accepted the plaintiff's argument that the request for "other appropriate relief" was surplusage.<sup>58</sup> Since the court is required to grant any relief it deems proper and just, all prayers for injunctions impliedly include requests for any other available remedies.<sup>59</sup> Thus, when the plaintiff is obviously seeking an injunction, adding a prayer for some other specific relief should not affect a denial of removal.<sup>60</sup>

The ramifications of the holding in *American Dredging* are most significant. First, it will inevitably lead to state courts becoming the preferred forum for adjudicating breaches of "no-strike" clauses in collective bargaining agreements.

51 See *Di Giovanni v. Camden Fire Ins. Ass'n.*, 296 U.S. 64, 69 (1935); *Aaron*, *supra* note 49, at 1045-46. *But see* note 46 *supra*.

52 *E.g.*, *United Steelworkers* cases, *supra* note 11.

53 *E.g.*, *Allied Oil Workers v. Ethyl Corp.*, 341 F.2d 47 (5th Cir. 1965).

54 *E.g.*, *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

55 The strongest evidence for this conclusion is the fact that plaintiff brought two separate actions for damages in the district court. Brief for Appellant, p. 10.

56 *Id.* at 3.

57 The reasoning as to the significance of the addition of a prayer for damages is confusing as well as inconsistent. *H. A. Lott, Inc. v. Hoisting & Portable Eng'rs. Local No. 450*, 222 F. Supp. 993 (S.D. Tex. 1963) held that the inclusion of the damage prayer confers the necessary jurisdiction on the district court to sustain removal, and that removal could also be based upon § 1441(c) of the Removal Act, 28 U.S.C. § 1441(c) (1958). This provision authorizes the removal of "separate and independent" claims that are not removable when sued upon alone, if such a cause of action is joined with an otherwise removable one. *But cf.* *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951). *Contra*, *Crestwood Dairy, Inc. v. Kelley*, 222 F. Supp. 614 (E.D.N.Y. 1963); *Associated Tel. Co. v. Communication Workers*, 114 F. Supp. 334 (S.D. Calif. 1953).

58 *American Dredging*, 338 F.2d 837, 849 (3d Cir. 1964).

59 This conclusion is drawn from Rule 54(c), *supra* note 46, which reads in part: "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

60 1A MOORE, *op. cit.* *supra* note 23, at 1003-04: "The presence of a prayer for damages should not alter the result. If the federal court lacks jurisdiction to grant injunctive relief there should be no removal, for no statute authorizes a single cause of action to be split for removal purposes." See *Aaron*, *supra* note 49, at 1046 n.128. For a discussion of the inapplicability of the doctrine of pendent jurisdiction, see Comment, *Statutory and Contractual Restrictions on the Right to Strike During the Term of a Collective Bargaining Agreement*, 70 YALE L.J. 1366, 1402 n.246 (1961). A full consideration of the problem posed by the addition of a prayer for damages with one for an injunction is beyond the scope of this discussion.



The employer's primary desire is that work continue for the duration of the contract period.<sup>61</sup> If *American Dredging* is followed, he can achieve this, but only in state courts, and only at the cost of undermining the Supreme Court's declaration that our national labor policy requires the formulation of a uniform labor law by federal courts.<sup>62</sup> Second, if it is true that injunctive relief is such a unique remedy that it constitutes a substantive right in itself,<sup>63</sup> because of the existence of anti-injunction statutes in some states and not in others,<sup>64</sup> not only is it possible that state courts will be determining much labor law relative to collective bargaining agreements, but also some parties to such agreements will have substantive rights denied to others because of their particular place of residence.<sup>65</sup>

Though the consequences of the rule adopted in *American Dredging* are unpleasant, it is submitted that the alternative is even less desirable. Allowing removal will certainly aid in the development of uniformity in our law governing collective bargaining agreements. However, in eliminating the strongest deterrent to the type of contract-breaking strike engaged in by the defendant in *American Dredging*, removal also encumbers that aspect of our national labor policy that has been increasingly fostering industrial peace as a paramount public interest.<sup>66</sup> Enhancing the responsibility of labor unions was merely the means by which Congress, in enacting § 301(a), hoped to further this interest.<sup>67</sup> Thus, the most serious objection to removal is not that it divests state courts of their heretofore recognized right to enjoin strikes in breach of collective bargaining agreements,<sup>68</sup> nor that it deprives employers of the only meaningful relief from such breaches,<sup>69</sup> but that removal impedes the promotion of industrial peace.

This removal problem may become moot if the view expressed in *Ruppert v. Egelhofer*<sup>70</sup> becomes generally accepted. This pre-*Sinclair* decision held that when a collective bargaining agreement confers authority upon an arbitrator to halt a strike in violation of a "no-strike" provision, an employer can obtain judicial enforcement of the arbitrator's order, even though an anti-injunction statute prohibits the court from enjoining the strike directly.<sup>71</sup> The reasons for

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61 See notes 37, 38 *supra* and accompanying text.

62 See cases cited note 48 *supra*.

63 Aaron, *supra* note 49, at 1034-37. *But see* Isaacson, *supra* note 36, 920, suggesting that the uniformity called for is in the interpretation of the meaning of collective bargaining agreements rather than in the remedies available for their enforcement. If this view is correct, the nature of injunctive relief would seem to be immaterial.

64 Approximately one-half of the states have some type of anti-injunction legislation. 1CGH LAB. L. REP., (state law) ¶ 40, 355 (1964). Not all of these statutes, however, bar the issuance of injunctions to enforce collective bargaining agreements. *E.g.*, 43 PA. STAT. ANN. § 206(d) (1964).

65 *But cf.* cases cited note 48 *supra*.

66 See S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947); Leedom, *New Horizons in Labor-Management Relations*, 11 LAB. L. J. 11 (1960).

67 See S. REP. No. 105, *supra* note 66.

68 See notes 34-36 *supra* and accompanying text.

69 See notes 37-38 *supra* and accompanying text.

70 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958).

71 The New York Court of Appeals found the existence of such authority without any express references to it in the bargaining agreement, candidly admitting that such authority was being inferred from the general terms of the agreement. 3 N.Y.2d at 578; 148 N.E.2d at 130; 170 N.Y.S.2d at 787.

allowing such relief are compelling. There is an obvious labor policy strongly supporting an effective arbitration process.<sup>72</sup> Moreover, judicial enforcement of the arbitrator's order would enable both federal and state courts to deny injunctions for violations of "no-strike" provisions and to temper the injustice of such refusals by allowing the parties to contractually empower an arbitrator to issue such orders.<sup>73</sup> Unlike a court injunction, the enforcement of such an order would not be the type of governmental coercion which prompted the anti-injunction provisions of the Norris-LaGuardia Act,<sup>74</sup> but would be the ratification of a mutual grant of authority by parties to a contract. Thus, if this theory, which presents no obstacle to removal,<sup>75</sup> is accepted, "no-strike" clauses can be uniformly enforced by a process which complies with the letter of the Norris-LaGuardia Act and § 301(a) and which supports the policies underlying both.<sup>76</sup>

If the reasoning in *Ruppert* is eventually discredited, and if Congress does not provide a legislative solution,<sup>77</sup> the courts will continue to be confronted with attempts to remove suits for injunctions against strikes in breach of collective bargaining agreements. At the core of this controversy looms the larger question of whether employers should ever have the right to injunctive relief to compel labor unions to adhere to the terms of "no-strike" clauses in collective bargaining agreements. This question cannot be answered until a fundamental policy decision is made: is the interest in establishing a centrally administered, uniform labor law to prevail over the attainment of industrial peace through effective collective bargaining agreements that are equally enforceable

72 *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *Textile Workers of America v. Lincoln Mills*, 353 U.S. 448 (1957).

73 For a discussion of *Ruppert v. Egelhoffer*, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958), and reasons why its principles should be followed by the federal courts, see Note, 39 *IND. L. J.* 387, 392-94 (1964).

74 See Givens, *Section 301, Arbitration and the No-Strike Clause*, 11 *LAB. L. J.* 1005, 1014-15 (1960) (argues for the *Ruppert* approach).

75 Since the district court would be regarded as having the jurisdiction to specifically enforce an arbitrator's order to halt a strike, it would follow that the District Court would have the requisite original jurisdiction to enable the suit to be removed from a state court.

76 Considering that over 90 percent of all collective bargaining agreements contain some explicit restrictions on the right to strike, Note, *Statutory & Contractual Restrictions on the Right to Strike During the Term of a Collective Bargaining Agreement*, 70 *YALE L. J.* 1366, 1374, it is surprising that those who negotiate these agreements have not taken greater advantage of the *Ruppert* precedent by expressly empowering arbitrators to halt a strike in violation of contract. One district court has followed the same reasoning as that employed in *Ruppert*: *New Orleans S.S. Ass'n v. General Longshore Workers*, 49 *L.R.R.M.* 2941 44 *L.C.* ¶ 17575 (E.D. La. 1962). Although this decision was also pre-*Sinclair*, federal courts tend to liberally construe arbitration agreements and the scope of an arbitrator's authority. See cases cited note 72 *supra*. For an indication that *Ruppert* may be followed in at least one other state, see Comment, *Enforcement of No-Strike Clauses in State Courts*, 1963 *U. ILL. L. F.* 495, 499 n.28 wherein a May 20, 1963, decision of the Cir. Ct. of Cook County is said to have enforced an arbitrator's order that a strike in violation of a "no-strike" clause be discontinued. In *Drake Bakeries v. Local 150, American Bakery and Confectionary Workers*, 370 U.S. 254, at 260 n.5 (1960), the United States Supreme Court noted the existence of the *Ruppert* rule without evaluating its applicability in federal courts.

77 There is strong evidence that new legislation in this specific area is very unlikely in the near future. See Aaron *supra* note 49, at 1030. See also Aaron, *The Labor Injunction Reappraised*, 10 *U.C.L.A. L. REV.* 292, 345 (1963) wherein the author suggests that the immediate need is an amendment to § 4 of the Norris-LaGuardia Act to allow courts to issue injunctions in the type of case under discussion. *Cf.* Leedom, *supra* note 66.

against both employers and unions? There are some who suggest that this question is not for the courts to answer.<sup>78</sup> However, in the absence of appropriate legislation, they must make the necessary value judgments.<sup>79</sup> Labor organizations long ago discarded their swaddling clothes. If judicial enforcement of their contractual undertakings not to strike is precluded by the interplay of the three federal statutes herein considered, then labor unions are being overprotected. The use of injunctions in such circumstances is not an abuse at which § 4 of the Norris-LaGuardia Act was aimed.<sup>80</sup> The holding in *American Dredging* facilitates the settlement of labor disputes in a manner which minimizes the likelihood of violence and economic waste, a paramount public interest that should be reflected in any national labor policy. The toll of modern strikes can be extremely heavy, not only for management, but for unions and for the public as well.<sup>81</sup> As one commentator has adroitly observed: "The strike carries with it the dangers inherent in the old and abandoned practice of bloodletting. Enough of it and the patient will surely die. . . . In labor disputes, as in international tensions, there is merit in any device that will keep the belligerents talking while the wheels of industry keep turning."<sup>82</sup>

Paul J. Meyer

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FEDERAL ESTATE TAX — RETENTION OF "POSSESSION OR ENJOYMENT"  
UNDER § 2036 — CONTINUED RESIDENCE IN TRANSFERRED HOME DOES NOT  
REQUIRE INCLUSION IN GROSS ESTATE AS A MATTER OF LAW. — Plaintiffs sued  
to recover refunds of estate taxes paid to the Internal Revenue Service, alleging  
that the Commissioner erroneously and illegally included in their respective gross  
estates property which had been previously transferred by the decedents to their

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<sup>78</sup> See Wellington and Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, 1566 (1963).

<sup>79</sup> Moreover, considering the ramifications of a decision on the question of the removability of a suit to enjoin a strike in breach of contract, see text accompanying notes 61-65 *supra*, the courts must carefully weigh policy considerations, which under the circumstances, should govern over such hypertechnical arguments as those regarding the meaning of "jurisdiction." In adjudicating the issue of removal, even arguments as to congressional intent are pointless; for Congress did not envision the problem when it enacted § 301. See Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635, 637 (1959); Cf. Aaron, *The Labor Injunction Reappraised*, *supra* note 77 at 333, 342 (1963); Kovarsky, *Unfair Labor Practices, Individual Rights and Section 301*, 16 VAND. L. REV. 595, 606-07 (1963).

<sup>80</sup> The anti-injunction provisions of the Norris-LaGuardia Act were passed when labor organizations were struggling for their very existence. The efficacy of the strike, their most powerful weapon, was consistently thwarted by judicial intervention in the form of temporary restraining orders and preliminary injunctions, S. Doc. No. 7, 81st Cong., 2d Sess. 3 (1951). Lacking legislative or judicial standards and guided by their own economic prejudices, federal judges, "in effect, wrote labor policy through *ex parte* orders." Stewart, *supra* note 38, at 676. A major purpose of the Norris-LaGuardia Act was to prevent the *improper* use of injunctions as strike breakers and to encourage the use of such non-judicial processes as arbitration for the settlement of labor disputes. See discussion in *Brotherhood of Railroad Trainmen v. Toledo, Peoria, & Western R.R.*, 321 U.S. 50 (1944). Norris-LaGuardia, therefore, was enacted at a time when the best way to further industrial peace, an extremely important public interest, was to protect labor's right to strike in all cases save where it led to violence. Today, both effective arbitration and industrial peace would be better facilitated if injunctive relief were available in § 301 suits.

<sup>81</sup> The total cost of the 1959 steel strike has been reported as follows: workers, \$1.75 billion in lost wages; industry, \$1.5 billion; and the government, \$1.6 billion. Leedom, *supra* note 66, at 16.

<sup>82</sup> *Id.* at 16, 17.

wives.<sup>1</sup> In both instances, the husband continued to live in the house until his death after deeding it as a gift to his wife. Defendant moved for summary judgment on the grounds that the undisputed facts required inclusion of the property in the gross estate of the decedent under § 2036 of the Internal Revenue Code of 1954.<sup>2</sup> The United States District Courts for the Western District of Tennessee and the Western District of Virginia, in denying the motions for summary judgment, *held*: the undisputed fact that decedent continued to reside in the house after transferring it to his wife is neither sufficient to infer an agreement or prearrangement by the parties to that effect, nor does it, per se, satisfy the "retention of possession or enjoyment" requirement of the statute. *Union Planters National Bank v. United States*, 238 F. Supp. 883 (W.D. Tenn. 1964); *Stephenson v. United States*, 238 F. Supp. 660 (W.D. Va. 1965).<sup>3</sup>

The first federal estate tax was enacted as part of the Revenue Act of 1916.<sup>4</sup> Basically, its objective has been to tax the transmission of property at death. However, estate planners have long recognized the efficacy of inter vivos property transfers as potential tax avoidance devices.<sup>5</sup> Tax advantages accrue to those employing such transfers because:

Any gift [providing it is absolute and irrevocable] made by a client during his lifetime will remove the gift property from his taxable estate at the time of his death with a resultant saving of estate and inheritance taxes. Inasmuch as the making of a gift will reduce the value of the client's taxable estate, the effect will be to remove the gift property from his highest applicable estate tax bracket with consequent maximum saving in estate and inheritance taxes.<sup>6</sup>

Hence, the use of inter vivos transfers normally results in maximum tax savings since the transfer is taxed under the lower gift tax rate rather than under the estate tax.<sup>7</sup> To prevent the taxpayer from circumventing the estate tax, while, at the same time, retaining an interest in the property transferred, "Congress has surrounded the primary tax upon transfers by will and intestacy with

1 It is the taxpayer's burden to prove that the Commissioner's deficiency assessment against the estate was unreasonable. See *Estate of McNichol*, 29 T.C. 1179 (1958).

2 INT. REV. CODE OF 1954, § 2036: TRANSFERS WITH RETAINED LIFE ESTATES.

(A) General Rule — The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death —

(1) the possession or enjoyment of, or the right to the income from, the property . . .

3 It is to be noted that the only result to date in *Stephenson* has been a denial of the Government's motion for summary judgment. This is not made particularly clear by the court's opinion. In *Union Planters*, the jury did not find the necessary implied agreement to sustain the inclusion of the property in the gross estate.

4 Revenue Act of 1916, ch. 463, §§ 1-901, 39 Stat. 765. According to § 202(B), the value of a decedent's gross estate included "a transfer . . . intended to take effect in possession or enjoyment at or after his death." Revenue Act of 1916, ch. 463, § 202(B), 39 Stat. 777-78.

5 See Markovits, *The Fate of Inter Vivos Transfers Under Internal Revenue Code Section 2036*, 7 THE TAX COUNSELOR'S Q. 395 (1963).

6 BARTON, ESTATE PLANNING UNDER THE 1954 CODE § 10.08, at 115 (1959); see generally §§ 10.01-10.10.

7 BARTON, *op. cit. supra* note 6, § 10.09 at 116.

a periphery of protective taxes upon inter vivos transfers, which might otherwise be utilized to avoid the tax."<sup>8</sup>

The judicial development of § 2036 indicates a significant lack of consistency in its application.<sup>9</sup> The *ad hoc* approach in interpreting this section has seriously handicapped estate planners in their quest for certainty and predictability.<sup>10</sup> The original enactment of the federal estate tax embodied "a transfer . . . intended to take effect in possession or enjoyment at or after his death."<sup>11</sup> It was virtually an accepted fact that this wording was to be interpreted as including transfers with retained life estates.<sup>12</sup> However, in 1930, the Supreme Court dealt a serious blow to the future of the estate tax when it held, in *May v. Heiner*,<sup>13</sup> that a grantor's retention of the use and income from property transferred to a trust did not require an inclusion of the property in his gross estate. The belief that the Court would limit this decision to "secondary life estates"<sup>14</sup> was dispelled a year later when the Court handed down three *per curiam* decisions which extended *May v. Heiner* to "primary" life estates reserved by the grantor.<sup>15</sup> Congress quickly responded to remedy the potentially disastrous effect these decisions would have on revenues to be derived from the estate tax by enacting the Joint Resolution of March 3, 1931<sup>16</sup> (the predecessor of § 2036) which closed the obvious tax avoidance device. Two minor changes, attempting to clarify the joint resolution, appeared in the Revenue Act of 1932.<sup>17</sup> Since then, no significant changes have been made in the substance of § 2036.

The confusion presently bearding this area has been, to a large extent, caused by the lack of specificity of the statute. One author has suggested that the tests of taxability "could have been made specific as applied to certain common fact situations."<sup>18</sup> The problem areas have centered around the interpretation of the words "retained," "possession," "enjoyment," and "right to the income" which appear in the statute.<sup>19</sup> The Commissioner's attempt, in the principal cases, to include the transferred property in the gross estate on the sole basis of continued residence therein represents another stride in his quest to broaden the interpretation of § 2036.<sup>20</sup>

Until 1949, taxpayers enjoyed moderate success in their attempts to upset deficiencies under the predecessor of Section 2036, in situations where

8 LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES 15 (1st ed. 1956).

9 Compare *Fidelity-Philadelphia Trust Co. v. Smith*, 241 F.2d 690 (3d Cir. 1957) with *State Street Trust Co. v. United States*, 263 F.2d 635 (1st Cir. 1959).

10 Comment, 60 MICH. L. REV. 631, 636 (1962). See Zissman, *Problem Areas in The Estate Tax*, 41 TAXES 875 (1963).

11 Statute cited note 4 *supra*.

12 See 74 CONG. REC. 7198 (1931) (remarks of Representative Hawley); *cf. Nichols v. Coolidge*, 274 U.S. 531 (1927).

13 281 U.S. 238 (1930).

14 Markovits, *supra* note 5, at 396.

15 *McCormick v. Burnet*, 283 U.S. 784 (1931); *Morsman v. Burnet*, 283 U.S. 783 (1931); *Burnet v. Northern Trust Co.*, 283 U.S. 782 (1931).

16 46 Stat. 1516 (1931).

17 Revenue Act of 1932, ch. 209, § 803, 47 Stat. 279. See H.R. REP. NO. 708, 72d Cong., 1st Sess. 46 (1932). The committee reports do not indicate that Congress intended to effect an application of the statute beyond life trusts.

18 Covey, *Section 2036—The New Problem Child of The Federal Estate Tax*, 4 THE TAX COUNSELOR'S Q. 121, n.1 (1960).

19 Statute cited note 2 *supra*.

20 Markovits, *supra* note 5, at 395.

the Commissioner did not prove express retention. Courts, apparently, were unwilling to find that there was an implicit agreement between the parties, even though they may have been closely related individuals.<sup>21</sup>

The courts' recent tendencies to accept the Government's interpretation of what constitutes "retention of possession and enjoyment" forewarned estate planners that the arguments propounded by the Commissioner in *Union Planters* and *Stephenson* were in the offing. Specifically, in support of the motions for summary judgment,<sup>22</sup> the defendant alleged that the undisputed fact that the decedent continued to live in the residence until his death compelled the court to find that there existed an express or implied agreement between the grantor and his wife retaining such a right in the grantor which made the residence includible; or, in the alternative, that the continued residence by the grantor until his death is a sufficient basis to include the transferred property in the gross estate irrespective of whether an agreement to that effect must be inferred.<sup>23</sup>

To bolster his contentions, the Commissioner relied almost exclusively on four significant cases.<sup>24</sup> The first of these, *Commissioner v. Estate of Church*,<sup>25</sup> may well be considered the point at which § 2036 began to expand beyond its previously narrow confines. The Court did not restrict itself to the exigencies of the factual situation presented, but "also enunciated a broad philosophy of taxation under Section 2036. . . ."<sup>26</sup> Mr. Justice Black, speaking for the majority and referring to the Court's prior decision in *Helvering v. Hallock*,<sup>27</sup> stated:

. . . [A]n estate tax cannot be avoided by any trust transfer except by a bona fide transfer in which the settlor, absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property. After such a transfer has been made, the settlor must be left with no present legal title in the property, no possible reversionary interest in that title, and no right to possess or to enjoy the property then or thereafter. In other words such a transfer must be immediate and out and out, and must be unaffected by whether the grantor lives or dies. . . . "It thus sweeps into the gross

21 Markovits, *supra* note 5 at 400. See also *Burrill v. Shaughnessy*, 71 F. Supp. 99 (N.D.N.Y. 1947).

22 The Commissioner's desire to prevail as a matter of law is more readily appreciated when one considers his evident lack of success with juries. This is exemplified by the inordinate number of times juries have found for the taxpayer under § 2035—Gifts in Contemplation of Death—in spite of the difficult burden on the taxpayer to overcome the statutory presumption provided therein.

23 *Stephenson v. United States*, 238 F. Supp. 660 (W.D. Va. 1965); *Union Planters National Bank v. United States*, 238 F. Supp. 883, 884 (W.D. Tenn. 1964).

24 *Commissioner v. Estate of Church*, 335 U.S. 632 (1949); *Skinner's Estate v. United States*, 316 F.2d 517 (3d Cir. 1963); *Estate of McNichol v. Commissioner*, 265 F.2d 667 (3d Cir.), *cert. denied*, 361 U.S. 829 (1959); *Harter v. United States*, 48 Am. Fed. Tax. R. 1964 (N.D. Okla. 1954). Brief for Defendant, pp. 8-16, *Stephenson v. United States*, 238 F. Supp. 660 (W.D. Va. 1965); Brief for Defendant, pp. 9-17, *Union Planters National Bank v. United States*, 238 F. Supp. 883 (W.D. Tenn. 1964). The Commissioner used virtually the same brief in both cases. Subsequent citations to the defendant's brief will refer to the pagination in the *Stephenson* brief. Several of the cases which will be discussed subsequently in this article have arisen under the predecessors of INT. REV. CODE OF 1954, § 2036. For simplicity, succeeding references will be to the present statutory provision.

25 335 U.S. 632 (1949). Decedent irrevocably transferred stocks to a trust but required the trustee to pay him the income for life. *Estate of Church* now applies to post-1932 transfers.

26 Markovits, *supra* note 5, at 400-01.

27 309 U.S. 106 (1940).

estate all property the ultimate possession or enjoyment of which is held in suspense until the moment of the decedent's death or thereafter. . . . Testamentary dispositions of an *inter vivos* nature cannot escape the force of this section by hiding behind legal niceties contained in devices and forms created by conveyancers."<sup>28</sup>

In *Harter v. United States*,<sup>29</sup> the court refused to agree with the taxpayer's contention that the retained interest must be provided for in the instrument of transfer or that the retained interest be one that could be enforced over the objections of the transferee. In *Estate of McNichol v. Commissioner*,<sup>30</sup> decedent conveyed income-producing real property to his children. Contemporaneously, he made an oral agreement with them retaining the right to the income from the transferred properties for his lifetime. In upholding the Commissioner's inclusion of the properties in the decedent's gross estate, the court held that the collection of rents by the decedent constituted a factual "enjoyment" of the properties. "Enjoyment as used in the death tax statute is not a term of art, but is synonymous with substantial present economic benefit."<sup>31</sup> The court indicated that its decision was not to be construed as extending beyond those factual situations where an agreement existed.<sup>32</sup> *Estate of McNichol* significantly broadened the scope of § 2036 when the court, in reference to *Estate of Church*, stated:

But as we read the decision its bite goes deeper; and the opinion constitutes a sweeping and forthright declaration that technical concepts pertaining to the law of conveyancing cannot be used as a shield against the impact of death taxes when in fact possession or enjoyment of the property by the transferor — and more particularly his enjoyment of the income from the property — ceases only with his death.<sup>33</sup>

The Commissioner conceded that *Estate of Church*, *Harter*, and *Estate of McNichol* were distinguishable upon their facts from *Union Planters* and *Stephenson*, but at the same time, he urged that their principles were clearly apposite. He acknowledged that these precedents were primarily concerned with retention of a "right to the income from the property" and not the retention of "possession or enjoyment" which constituted the basis for inclusion in *Union Planters* and *Stephenson*.<sup>34</sup>

In light of *Estate of McNichol's* broad interpretation of "possession or enjoyment," it is not surprising to find the court in *Skinner's Estate v. United States*<sup>35</sup> take an additional step in the direction of an all-inclusive definition of

28 *Commissioner v. Estate of Church*, 335 U.S. 632, 645-46 (1949).

29 48 Am. Fed. Tax. R. 1964 (N.D. Okla. 1954); *accord*, *Jane S. Greene v. United States*, 237 F.2d 848 (7th Cir. 1956).

30 265 F.2d 667 (3d Cir. 1959), *cert. denied* 361 U.S. 829 (1959).

31 *Id.* at 671.

32 *Id.* at 671 n. 6.

33 *Id.* at 673.

34 Brief for Defendant, Comm'r of Int. Rev., pp. 8, 9, 12. The Commissioner has apparently misinterpreted the basis for the decision in *Estate of McNichol*. Although the controlling factors are somewhat less than obvious, it does appear rather clear that the court found a "retention of enjoyment"; see, e.g., *Covey, Section 2036—The New Problem Child of The Federal Estate Tax*, 4 THE COUNSELOR'S Q. 121, 127-32 (1960); 60 MICH. L. REV. 660, 663-64 (1962).

35 316 F.2d 517 (3d Cir. 1963).

§ 2036. The Third Circuit, fully aware "that to some degree at least it was breaking new and perhaps dangerous ground . . ."<sup>36</sup> upheld an *inference* of a secret prearrangement between the settlor and the trustee retaining the "enjoyment" within the meaning of § 2036. The court displayed a willingness to infer a prearrangement comparable to that in *Estate of McNichol* on the basis of uninterrupted receipt of the income by the settlor plus a "scintilla of additional evidence."<sup>37</sup> At the same time, the court did not fail to mention its awareness of the burden this decision would place upon the taxpayer in avoiding the inference of secret prearrangements when income had been received for life.

It should be noted that the decisions in both *Estate of McNichol* and *Skinner's Estate* involved a retention of the "enjoyment" from income producing properties. It is suggested that deciding *Estate of McNichol* and *Skinner's Estate* on this basis rather than upon the retention of a "right to the income" was not commensurate with the intent of Congress. The legislative history of § 2036 indicates that the language "possession and enjoyment" was to be limited to nonincome producing property.<sup>38</sup> In addition, despite the doubts expressed in both cases as to the requirement that some prearrangement exist prior to a finding of retention, neither court was willing to abandon this concept. Hence, the Commissioner could present no case in support of his alternative contention in *Union Planters* and *Stephenson*.<sup>39</sup>

However, with respect to the evidence necessary to infer a prearrangement, there are decisions that have apparently gone beyond the holding in *Skinner's Estate*.<sup>40</sup> A recent decision extended the scope of implied prearrangements to a factual situation which parallels *Union Planters* and *Stephenson*. The jury in *Peck v. United States*<sup>41</sup> found an *implied agreement*, retaining the grantor's right to continue to live on the property, between the grantor and grantee (mother and son) *on the basis of the mother's continued residence in the house*. This appears to be the Commissioner's only success on this precise issue to date. However, the very fact that this question was determined by the jury indicates that this case does not support the defendant's contention in *Union Planters* and *Stephenson* that the issue be summarily decided. Essentially, the holding in *Union Planters* is that the determination of whether or not an agreement existed, which would be a sufficient basis to include the residence in the gross estate, is a question for the trier of fact.

The *Stephenson* decision noted the distinctions between the cases submitted as persuasive by the Commissioner and the fact situation in question: "In each of the cases urged by the government . . . there is a specific and tangible retained benefit-income from the transferred property, either real or personal. In each of the government's cases the courts found agreements relating to retention, either

36 *Id.* at 520.

37 1962 WIS. L. REV. 708, 711.

38 See H.R. REP. NO. 1412, 81st Cong., 1st Sess. 5 (1949).

39 Brief for Defendant, *supra* note 24; *accord*, *Clark v. United States*, 209 F. Supp. 895 (D. Colo. 1962); *Estate of Bullock*, 19 CCH Tax Ct. Mem. 1080 (1960).

40 See *Fitzsimmons v. United States*, 222 F. Supp. 140 (E.D. Wash. 1963); *Estate of Tomec*, 40 T.C. 134 (1963).

41 CCH 1965 Fed. Est. & Gift Tax Rep. (65-2 U.S. Tax Cas.) ¶ 12,333 (M.D. Ga. May 4, 1965).



implied, inferred or apparent."<sup>42</sup> A much closer factual relation was found to those cases the plaintiff urged in support of his position.<sup>43</sup> Both *Estate of Burr*<sup>44</sup> and *Estate of Weir*<sup>45</sup> involved transfers of houses from husband to wife and continued residence by the husband. Neither case held that the decedent had retained an interest in the property. The court conceded that two of the cases supporting the plaintiff are ". . . somewhat blunted by the chronologically subsequent decisions in *Church* and the cases following it."<sup>46</sup> However, Judge Michie went on to say: ". . . [A]s I have already noted, these opinions [the Government's supporting cases] do not deal with the situation presented to me. Burr is much closer to the facts here than any of the cases cited in favor of the government."<sup>47</sup>

It is submitted that the case development in this area indicates that the Commissioner will not cease his endeavors to broaden the purview of § 2036 until virtually every transfer, including those in which the benefits derived by the transferor are obviously incidental, is subject to the estate tax. The merit of the Government's position must be seriously questioned when one considers how frequently estate planners have employed the type of transaction which was involved in *Union Planters* and *Stephenson* and the fact that there are no cases that have included the property in the gross estate on the basis of continued residence per se.<sup>48</sup>

The application of § 2036 to the circumstances in *Union Planters* and *Stephenson* raises the very serious question of whether gifts can be effected where there is any subsequent enjoyment of the gift property. There are a number of valid objectives which inspire people to make gifts.<sup>49</sup> This type of transaction has traditionally been used to protect the grantees (usually wife and children) from financial loss resulting from the grantor's business ventures. Justice Reed, dissenting in *Estate of Church*, stated:

Legislation indicates a purpose to promote gifts as a desirable means for early distribution of property benefits. In reliance upon a long-settled course of legislative and judicial construction, donors have made property arrangements that should not now be upset summarily with no stronger

42 *Stephenson v. United States*, 238 F. Supp. 660, 667 (W.D. Va. 1965).

43 *Estate of Weir*, 17 T.C. 409 (1951); *Estate of Burr*, 4 CCH Tax Ct. Mem. 1054 (1945); *Estate of Scheide*, 6 CCH Tax Ct. Mem. 1271 (1947) (the value of gifts to grantor's wife not included in decedent's gross estate where wife used income to pay household expenses); cf. *Estate of Flynn*, 3 CCH Tax Ct. Mem. 1287 (1944) (no retention of "possession or enjoyment" where the grantee (donor's wife) deposited the income from the transferred property in a joint bank account to which the grantor had access); *Estate of E. L. Green*, 4 CCH Tax Ct. Mem. 286 (1945) (the fact that some of the income from the transferred property was used to support transferor does not prove that grantor reserved the income for life); *Estate of Sessoms*, 8 CCH Tax Ct. Mem. 1056 (1949) (the possibility that some of the income might be used by the grantee (wife) for herself or as guardian for the children, does not justify the inclusion of such a trust in the decedent's estate).

44 4 CCH Tax Ct. Mem. 1054 (1945).

45 17 T.C. 409 (1951).

46 *Stephenson v. United States*, 238 F. Supp. 660, 666 (W.D. Va. 1965).

47 *Ibid.*

48 One author, discussing *Burr*, which the court found analogous to the situation at bar, stated: "The case is cited here only as an example of the lengths to which the Treasury will go." MONTGOMERY, FEDERAL TAXES—ESTATES, TRUSTS AND GIFTS 549 (1951-52).

49 See generally BARTON, *op. cit. supra* note 6 § 10.02 at 107-08.

reasons for doing so than that former courts and the Congress did not interpret the legislation in the same way as this Court now does.<sup>50</sup>

Several auxiliary questions would arise as a result of sustaining the Commissioner's inclusions in *Union Planters* and *Stephenson*. For example, it is quite probable that a husband will, in some way, "enjoy" the gifts he has made to his wife. Namely, the furniture in the home, the family automobile and even gifts of jewelry and furs that the husband gives his wife are likely to be "enjoyed" by the husband.<sup>51</sup> How far would the concept of "retained enjoyment" be extended?

It is submitted that the problem, which is essentially one of statutory interpretation, should be resolved by Congress. ". . . [C]lients who appreciate the fact that Congress has seen fit to provide the estate tax game for their amusement . . . would prefer it if the stakes were a little lower and the rules a little clearer."<sup>52</sup> It is suggested that Congress respond as it did to the Supreme Court's ruling in *May v. Heiner*. Then, the threatened loss of revenue inspired legislative intervention. Now, the preservation of the dignity and stability of the tax system should be an equally strong motivation. Rule-making by judicial interpretation has its limits; such rules tend to be confined to the exigencies of the particular case. Frequently the effect is to confuse rather than to clarify. The burden now rests on Congress.

JOSEPH P. MARTORI

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TORTS — APPLICABILITY OF THE DOCTRINE OF ASSUMPTION OF RISK GREATLY LIMITED IN MICHIGAN. — Plaintiff and defendant were hunting ducks from a small, flat-bottomed boat. The boat was surrounded on three sides by cattails. The plaintiff and defendant, who often hunted from the same location, customarily stood in order to better fire over the cattails. While standing in the boat, defendant aimed at a duck which veered to his right just as he was ready to fire. As he fired, defendant fell out of the boat, his second shot striking the plaintiff in the left leg which was subsequently amputated. The trial judge refused defendant's request to charge the jury as to assumption of risk. On appeal, the Michigan Supreme Court *held*: the doctrine of assumption of risk is applicable only to cases in which an employment relationship exists between the parties, and to cases where there has been an express contractual assumption of risk. *Felgner v. Anderson*, 375 Mich. 23, 133 N.W.2d 136 (1965).

The doctrine of assumption of risk emerged at common law in master-servant cases, with *Priestley v. Fowler*<sup>1</sup> providing the greatest impetus to its development.<sup>2</sup> The doctrine emerged with a dual nature. In one sense, it was used to deny recovery to an employee injured by a hazard inherent in his work when

50 *Commissioner v. Estate of Church*, 335 U.S. 632, 652-53 (1949).

51 Brief for Plaintiff, pp. 15-16, *Stephenson v. United States*, 238 F. Supp. 660 (W.D. Va. 1965); Brief for Plaintiff, pp. 6-7, *Union Planters National Bank v. United States*, 238 F. Supp. 883 (W.D. Tenn. 1964).

52 Zissman, *Problem Areas in The Estate Tax*, 41 TAXES 875 (1963).

1 3 M. & W. 1, 150 Eng. Rep. 1030 (Ex. 1838).

2 PROSSER, TORTS 450 n.3 (3d ed. 1964).

the employer had in no way been negligent in the duty owed his employee. In this sense, the phrase "assumption of risk" was used simply to convey the idea that the employer was not at fault and therefore not liable. In its second sense, it was used when the employer had breached the duty of care he owed his employee. The employer escaped liability because the employee, with notice of such negligence, "assumed the risk" by accepting it or continuing the employment.<sup>3</sup> Eventually, the doctrine was extended to other types of negligence cases.<sup>4</sup> Ample authority that this broader usage of the doctrine is proper may be found.<sup>5</sup> Bohlen's statement, reflecting the typical view, is: ". . . [t]he principle that one who has voluntarily encountered a known danger cannot recover from the creator thereof . . . [is not limited to cases] . . . brought by workmen against their employers. . . . It is not in any way founded upon anything peculiar to the relation of master and servant. . . ."<sup>6</sup> A general statement of the modern doctrine is: "a plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."<sup>7</sup>

The doctrine first appeared in Michigan in *Michigan Central R. R. v. Leahey*,<sup>8</sup> which relied heavily on early English and American cases. All of the cases involved attempts by a servant to hold his master liable for injuries allegedly attributable to the negligence of a fellow servant. The court, in *Felgner*, concluded: "From a consideration of the authorities cited [in the *Leahey* case] it is evident that the doctrine of assumption of risk as first promulgated in Michigan was a doctrine for use only in cases involving the master-servant relationship."<sup>9</sup> The court continued: "While continuing to apply the doctrine properly to cases arising from the employment relationship . . . regrettably this Court subsequently failed to restrict its use only to such cases."<sup>10</sup>

Three other uses of the doctrine to which the term was incorrectly extended are: as a virtual synonym of contributory negligence;<sup>11</sup> in place of stating the defendant was never negligent;<sup>12</sup> and to enlarge a law violator's duty, particularly when he was the defendant.<sup>13</sup> The court, in *Felgner*, recognized that the

3 See, e.g., *Tiller v. Atlantic Coast L. R.R.*, 318 U.S. 54, 68-69 (1943); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 49-50, 155 A.2d 90, 93 (1959).

4 See, e.g., *Miner v. Conn. River R.R.*, 153 Mass. 398, 26 N.E. 994 (1891); *Campion v. Chicago Landscape Co.*, 295 Ill. App. 235, 14 N.E.2d 879 (1938). The Massachusetts court, in *Miner*, stated: "Independently of any relation of master and servant there may be a voluntary assumption of the risk of a known danger, which will debar one from recovering compensation in case of injury to person or property therefrom, even though he was in the exercise of due care." 153 Mass. at 402-03, 26 N.E. at 995.

5 E.g., *Columbia Amusement Co. v. Rye*, 288 Ky. 179, 184, 155 S.W.2d 727, 729 (1941); *Fay v. Thrasher*, 77 Ohio App. 179, 186, 66 N.E.2d 236, 240 (1946); *Hunn v. Windsor Hotel Co.*, 119 W.Va. 215, 218, 193 S.E. 57, 58 (1937).

6 Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906).

7 RESTATEMENT (SECOND), TORTS § 496(a) (1965).

8 10 Mich. 193 (1861).

9 *Felgner v. Anderson*, 375 Mich. 23, 39, 133 N.W.2d 136, 145 (1965).

10 *Ibid.*

11 E.g., *Hemington v. Hemington*, 221 Mich. 206, 190 N.W. 683 (1922); *Cook v. Johnson*, 58 Mich. 437, 25 N.W. 388 (1885).

12 E.g., *Schnepf v. Andrews*, 333 Mich. 509, 53 N.W.2d 355 (1952); *Heller v. Chicago R.R.*, 109 Mich. 53, 66 N.W. 667 (1896).

13 E.g., *Samuelson v. Olson Trans. Co.*, 324 Mich. 278, 36 N.W.2d 917 (1949); *Winckowski v. Dodge*, 183 Mich. 303, 149 N.W. 1061 (1914).

doctrine of assumption of risk had been applied to cases other than employment cases "without valid precedential authority for doing so,"<sup>14</sup> and said, in regard to the three above misapplications of the term: "[T]he traditional concepts of contributory negligence are more than ample to present that affirmative defense to establish negligent acts."<sup>15</sup> Further, when the term is used in place of stating the defendant was never negligent, "[C]learly, the doctrine of assumption of risk has no utility in such context, nor do we presume that our judicial predecessors intended by the use of the language 'assumed the risk,' to suggest that the doctrine of assumed risk was being applied. . . ."<sup>16</sup> "Language other than that of assumption of risk easily can be found to describe the enlarged scope of the duty of due care imposed upon one who voluntarily violates statutory or common law standards of due care."<sup>17</sup> The Michigan Supreme Court, feeling that use of the term in the above three situations was not based on precedent and "add[ed] nothing to modern law except confusion"<sup>18</sup> greatly limited future use of the doctrine by declaring it valid only in cases involving employment relationships or cases where there has been an express contractual assumption of risk.<sup>19</sup>

The Michigan court's emasculation of the doctrine adds to the mounting criticism surrounding the assumption of risk doctrine. Critics of the doctrine feel that less confusing, more accurate, and hence more equitable decisions would result if the problem areas often disposed of under assumption of risk were considered instead under the concepts of duty and contributory negligence. The doctrine, its critics claim, "serves no purpose which is not fully taken care of by the other doctrines; that it adds only duplication leading to confusion; and that it results in some denial of recovery in cases where it should not be denied."<sup>20</sup>

Is the critics' claim that part of the cases now disposed of under assumption of risk should be distributed to the concept of contributory negligence valid? The proponents of this distribution point out that "[C]ontributory negligence may consist not only in a failure to discover or appreciate a risk which would be apparent to a reasonable man, or an inadvertent mistake in dealing with it, but also in an intentional exposure to a danger of which the plaintiff is aware."<sup>21</sup> Thus, when a defendant has violated his duty to a plaintiff, and the plaintiff, aware of the defendant's breach of duty, unreasonably chooses to expose himself to the risk, he has merely been contributorily negligent.

Opponents of distributing a part of the doctrine of assumption of risk to the concept of contributory negligence raise several objections. They note that whether a plaintiff has assumed a risk depends on a subjective standard — the plaintiff must appreciate the risk and voluntarily choose to encounter it — while the question of whether a plaintiff has been contributorily negligent depends

14 *Felgner v. Anderson*, 375 Mich. 23, 45, 133 N.W.2d 136, 148 (1965).

15 *Id.* at 56, 133 N.W.2d at 154.

16 *Id.* at 43, 133 N.W.2d at 147.

17 *Id.* at 56, 133 N.W.2d at 154.

18 *Id.* at 46, n.7, 133 N.W.2d 136, 148 n.4 (citing James, *Assumption of Risk*, 61 *YALE L.J.* 141, 169 (1952)).

19 *Felgner v. Anderson*, 375 Mich. 23, 133 N.W.2d 136 (1965).

20 PROSSER, *op. cit. supra* note 2, at 453 ('summarizes critics' arguments).

21 *Id.* at 434. See *Chisenall v. Thompson*, 363 Mo. 538, 252 S.W.2d 335 (1952); RESTATEMENT (SECOND), TORTS § 466 (1965).

on failure to meet an objective standard — that of the reasonable man.<sup>22</sup> Proponents of distribution correctly answer, however, that while assumption of risk depends on a subjective standard, those assumptions of risk which also fall below the objective standard *are* contributorily negligent actions, and could therefore be properly distributed to that concept.<sup>23</sup> As for those assumptions which do not fall below the objective standard, advocates of distribution treat them under the second concept: the concept of duty.

Another objection made to partially treating assumption of risk under the concept of contributory negligence is that while assumption of risk is a valid and sufficient defense both where the defendant is strictly liable,<sup>24</sup> and where his conduct has been wilful, wanton or reckless,<sup>25</sup> ordinary contributory negligence is not a defense where such conditions exist.<sup>26</sup> Proponents counter with the argument that “plaintiff has deliberately subjected himself to the danger created by defendant’s reckless conduct. Plaintiff’s conduct may be treated as on the same level or plane as defendant’s conduct and therefore a proper bar on this basis.”<sup>27</sup> And, “[S]imilar reasoning can be applied to the case of strict liability being imposed on the defendant. . . .”<sup>28</sup> Prosser, after declaring that contributory negligence, consisting merely of inadvertence or carelessness, is not a defense against strict liability, says:

At the same time, the defense which consists of voluntarily and unreasonably encountering a known danger, and in negligence cases passes more or less indiscriminately under the names of contributory negligence and assumption of risk, will, in general, relieve the defendant of strict liability. Here, as elsewhere, the plaintiff will not be heard to complain of a risk which he has encountered voluntarily, or brought upon himself with full knowledge and appreciation of the danger. . . . [t]he kind of contributory negligence which consists of voluntary exposure to a known danger, and so amounts to assumption of risk, is ordinarily a defense.<sup>29</sup>

The proponents of partial distribution of assumption of risk, so that consideration of the problem area will, in part, be made under the concept of contributory negligence, appears to be advocating a sound measure. Likewise, the Michigan Supreme Court is on sound ground in agreeing with the advocates of distribution:

[T]here is no need to engraft concepts of assumption of risk upon contributory negligence. . . . Assumption of risk should not again be used in this

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22 See, *e.g.*, *Schrader v. Kriesel*, 232 Minn. 238, 45 N.W.2d 395 (1950); *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943); PROSSER, *op. cit. supra* note 2, at 454.

23 Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5, 12-13 (1961).

24 See, *e.g.*, *Arthur v. Merchants’ Ice & Cold Storage Co.*, 173 Cal. 646, 161 P. 121 (1916); *Cooper v. Portner Brewing Co.*, 112 Ga. 894, 38 S.E. 91 (1901).

25 See, *e.g.*, *Pierce v. Clemens*, 113 Ind. App. 65, 46 N.E.2d 836 (1943); *Evans v. Holsinger*, 242 Iowa 990, 48 N.W.2d 250 (1951).

26 See, *e.g.*, *Burke v. Fischer*, 298 Ky. 157, 182 S.W.2d 638 (1944); *Kasanovich v. George*, 348 Pa. 199, 34 A.2d 523 (1943).

27 Wade, *supra* note 23, at 13. See *Brown v. Barber*, 26 Tenn. App. 534, 174 S.W.2d 298 (1943).

28 Wade, *supra* note 23, at 14. See generally HARPER & JAMES, *TORTS* § 22.7 (1956).

29 PROSSER, *op. cit. supra* note 2, at 539.

State as a substitute for, or as a supplement to, or as a corollary of, contributory negligence. . . . [T]he traditional concepts of contributory negligence are more than ample to present that affirmative defense to establish negligent acts.<sup>30</sup>

As noted above, those in favor of distributing assumption of risk do not feel that every problem previously disposed of by utilization of the doctrine should now be treated under the concept of contributory negligence. They do assert, however, that those problems which cannot be distributed to contributory negligence can and should be treated under the concept of duty. There are several facets to this proposed utilization. The first is that assumption of risk is often used where the true explanation of the defendant's nonliability is that he either had no duty toward the plaintiff, or that he did not breach the duty he did have.<sup>31</sup> No duty was breached because the defendant's conduct did not fall below the law's requirement of conducting oneself so as not to cause unreasonable risks of harm to others. Nonliability follows irrespective of any assumption of risk on the part of the plaintiff.<sup>32</sup> An example of the "non-breach of duty" situation is where a licensee-plaintiff has been harmed by an obviously dangerous condition on the defendant's land. Here, because no duty has been breached, the defendant will not be liable.<sup>33</sup> Note the underlying factors of such a decision and how assumption of risk properly enters the case: it is not negligence to carry on an activity if the utility outweighs the risk.<sup>34</sup> If the risk is obvious, it is reasonable to expect the licensee to appreciate the risk and take steps to reduce it. The reasonableness of this expectation reduces the risk, so that its creation is not negligence. If a particular plaintiff should fall below the standard of the reasonable man reacting to the risk, it does not make the defendant's conduct negligent, for the plaintiff has fallen below the very standard on which the defendant's conduct has been adjudged to be nonnegligent.<sup>35</sup> In such cases, where the probability of informed choice enters to reduce the risk because of the reasonable expectation that the plaintiff will guard against the risk, it is incorrect to "speak of the plaintiff's having 'assumed the risk,' as if some independent legal principle, distinct from the nonnegligence of the defendant, was operating to defeat liability."<sup>36</sup> The Michigan Supreme Court in *Felgner*, recognizing the correctness of this argument, agreed that "[C]learly, the doctrine of assumption of risk has no utility in such context. . . ."<sup>37</sup>

There is a second aspect to the argument which calls for assumption of risk to be partially distributed to the concept of duty. Here the defendant's breach of duty is not considered independently of the plaintiff. Rather, the particular plaintiff's reaction to the risk created by the defendant becomes the determining

30 *Felgner v. Anderson*, 375 Mich. 23, 50, 56, 133 N.W.2d 136, 150, 153-54 (1965).

31 HARPER & JAMES, *op. cit. supra* note 28, at § 21.1.

32 *Id.* at § 16.1.

33 See, e.g., *Standard Oil Co. of Ind. v. Meissner*, 102 Ind. App. 552, 200 N.E. 445 (1936); *Cook v. 177 Granite St.*, 95 N.H. 397, 64 A.2d 327 (1949).

34 *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); PROSSER, *op. cit. supra* note 2, at 152; Terry, *Negligence*, 29 HARV. L. REV. 40, 42-43 (1915).

35 See Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 19-20 (1961).

36 *Id.* at 19.

37 *Felgner v. Anderson*, 375 Mich. 23, 43, 133 N.W.2d 136, 147 (1965).

factor. Such is the case where the defendant's actions would constitute a breach of duty to the one harmed by the breach except that the particular plaintiff involved consented to the risk. Here, nonliability for a harm befalling one who has consented to the risk is not a settled question.<sup>38</sup> However, nonliability to one who consents is certainly a respectable view held by many courts and writers.<sup>39</sup> The attitude reflected in the field of intentional torts by the familiar principal *volenti non fit injuria* — to one who is willing, no wrong is done — is also present in the field of negligence. "Here, as elsewhere, the plaintiff will not be heard to complain of a risk which he has encountered voluntarily, or brought upon himself with full knowledge and appreciation of the danger."<sup>40</sup>

Accepting the view that nonliability should result when consent to the risk has been given, the question arises as to how this conclusion should be expressed. This is where the advocates of distribution enter. Rather than have this conclusion expressed by the doctrine of assumption of risk, they would express the conclusion of nonliability by saying that the defendant has no duty to one who fully appreciates the risk and voluntarily encounters it, or to one who objectively manifests his awareness and willingness to incur the risk.<sup>41</sup> When the plaintiff's consent occurs before the defendant's act and when the consent is known to the defendant, he has been relieved of his duty to the plaintiff, and his subsequent action is not unreasonable.<sup>42</sup>

The proponents of distribution, however, do not limit their efforts to the situation where the consent occurs before the defendant's act and so influences the defendant. They also maintain that reasonable consent to a risk which occurs *after* its creation, which would be negligence if not consented to, likewise relieves the defendant of his duty to the plaintiff.<sup>43</sup> The difference between the situation where the proponents advocate distribution to the concept of contributory negligence and this situation, where distribution to the concept of duty is advocated, is that while the risk created by the defendant in each case is an unreasonable one, in the former situation the consent to the risk was unreasonable, while in the latter situation the consent to the risk is reasonable.<sup>44</sup> A reasonable act by the plaintiff will not constitute contributory negligence, and so this type of an assumed risk is distributed to the concept of duty. The defen-

38 See R. Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108, 109 (1961); *contra*, PROSSER, *op. cit. supra* note 2, at 539.

39 See, e.g., *White v. McVicker*, 216 Iowa 90, 246 N.W. 385 (1933); *Gover v. Central Vt. Ry.*, 96 Vt. 208, 118 Atl. 874 (1922); PROSSER, *op. cit. supra* note 2, at 538; Bohlen, *supra* note 6, at 16-18.

40 PROSSER, *op. cit. supra* note 2, at 539.

41 Bohlen, *supra* note 6, at 16: "Where . . . one voluntarily acts . . . his knowledge of the risks inherent to his action . . . disproves the existence of any duty on the part of the creator of the danger to remove it. . . ." "Voluntary subjection to a known risk negatives the existence of any duty on the defendant's part by the breach of which he could be a wrongdoer." *Id.* at 18.

42 R. Keeton, *Assumption of Risks in Products Liability Cases*, 22 LA. L. REV. 122, 163 (1961): "[c]onsent to risk bears on the quality of defendant's conduct if the consent is communicated to the defendant prior to the occurrence of his conduct. If the proposition that assumption of risk negates duty is limited to this situation, it is unobjectionable."

43 *Ibid.* (stating opponent's theory).

44 The voluntary incurring of a known risk can, of course, be reasonable. See, e.g., *White v. McVicker*, 216 Iowa 90, 246 N.W. 385 (1933); *Gover v. Central Vt. Ry. Co.*, 96 Vt. 208, 118 Atl. 874 (1922).

dant is said to have no duty when the risk has been reasonably incurred, and thus there is no liability.<sup>45</sup>

The objection to this is that nonliability is expressed by saying there is no duty. The effect is to greatly limit the concept of duty. When the defendant has acted without knowing there would be consent, he has been unreasonable in creating the risk. The unreasonable nature of his act is not changed when the plaintiff subsequently consents. The true explanation of defendant's nonliability is the plaintiff's participation in causing the harm. To say in this situation that defendant simply had no duty greatly limits the concept of duty as it is presently used. The test of duty will no longer be whether the conduct of the defendant was such that unreasonable risk was created, but will also depend on what the plaintiff did subsequently.<sup>46</sup>

Distributing the "subsequent consent to risk" situation, formerly treated under the assumption of risk doctrine, to the concept of duty will also necessitate a major procedural change in the law. The burden of providing that assumption of the risk occurred will shift from the defendant to the plaintiff. Based on our present concept of duty, such a change is unjust. Under this concept, the plaintiff's burden of proving a breach of duty has always been satisfied by showing that the defendant's conduct was such that an unreasonable risk had been created; and if the defendant wished to defend himself by pointing out that the plaintiff had subsequently assumed the risk, he was obliged to raise this as an affirmative defense.<sup>47</sup> Perhaps the inequity of causing such a shift in the burden is more clearly brought into perspective by comparing the situation with that where assumption of risk was distributed to the concept of contributory negligence. In both instances, the defendant's conduct was unreasonable. In both situations, the plaintiff's assumption of the unreasonable risk occurred after the risk was created. The difference is that in the case of contributory negligence, incurring the risk was unreasonable; in the case where the doctrine is distributed to the concept of duty, incurring the risk was reasonable (which, because it could not be foreseen at the time of the defendant's creation of the risk, made the defendant's creation of the risk unreasonable and, of course, could not therefore make the creation of the risk reasonable when the consent did occur). In both situations, then, creation of the risk was unreasonable and nonliability ensued only because of plaintiff's subsequent participation. In the case of the affirmative defense of contributory negligence, most states place the burden of proof on the defendant,<sup>48</sup> and advocates of distribution are properly content to let the distributed doctrine be an affirmative defense; but in the case where the doctrine cannot be distributed to the concept of contributory negligence only because the plaintiff's participation is not negligent, they are

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45 Implicit, of course, in the entire discussion of "assuming risks" is that the assumption is a voluntary one. An assumption of risk made to protect a legal right or to avert harm is not considered voluntary and thus a defendant would not be relieved of the liability of his unreasonable creation of the risk when the assumption of risk was for this purpose.

46 See Keeton, *supra* note 42, at 160-66.

47 See, e.g., *Frederick v. Goff*, 251 Iowa 290, 100 N.W.2d 624 (1960); *Goldberg v. Norton Co.*, 335 Mass. 605, 141 N.W.2d 377 (1957).

48 HARPER & JAMES, *op. cit. supra* note 28, at § 22.11; PROSSER, *op. cit. supra* note 2, at 426.



willing to have the affirmative defense of assumption of risk be assimilated into the concept of duty. This unjustly changes the nature of the law. It is submitted that the Michigan Supreme Court's changing of this particular facet of the assumption of risk problem is an unwise alteration.

While the court greatly limited the doctrine, it was allowed to survive in cases where an employment relationship exists between the parties, and where there has been an express contractual assumption of risk. Considering the merits of these exceptions, it appears that where there has been an express contractual assumption of risk, the true basis of nonliability is that the courts are simply enforcing a valid contract. To treat the situation as though an independent and distinct doctrine entitled "assumption of risk" were operating adds nothing and could result in confusion and error.

The justification for allowing the doctrine to remain where an employment relationship exists between the parties is that it merely follows precedent. However, one of the same objections applicable to the general use of the doctrine is also applicable here. That objection is that the doctrine is utilized where the true basis of nonliability is that the defendant never breached his duty of care. The cases forming the early common law of Michigan used the term "assumed the risk" to indicate that the employee "assume[d] the natural and ordinary risks incident to [his employment]. . . ."49 Clearly this is but another manner of stating that the defendant-employer had not breached his duty. It is submitted that this specific use of the language of assumption of risk in master-servant cases should not be considered part of the formal doctrine of assumption of risk, just as the Michigan court stated it was not a part of the formal doctrine of assumption of risk in cases not involving a master-servant relationship.<sup>50</sup> However, the court, in *Felgner*, stated that the doctrine first was used in just such a "no-duty" situation,<sup>51</sup> and then cited cases involving "no-duty" situations.<sup>52</sup> It then approved use of the doctrine of assumption of risk in employment cases based on this precedent. This would seem to indicate approval of having the doctrine apply to "no-duty" situations — a situation where the court, in referring to the general applicability of the doctrine, correctly stated that the formal doctrine of assumption of risk had no utility.<sup>53</sup>

One other state has completely re-evaluated the doctrine of assumption of risk. New Jersey has declared the doctrine to be ". . . banished from the scene."<sup>54</sup> Less sweeping attacks have been made by abolishing the doctrine in limited areas, such as workmen's compensation acts.<sup>55</sup> Statutes apportioning damages between plaintiff and defendant have also resulted in the doctrine's elimination.<sup>56</sup> For example, Wisconsin sought to apportion damages with a comparative negligence statute,<sup>57</sup> but this intent was frustrated by the doctrine of assumption of risk

49 *Michigan Cent. R.R. v. Leahey*, 10 Mich. 193, 202 (1861).

50 See text accompanying notes 30 to 36 *supra*.

51 *Michigan Cent. R.R. v. Leahey*, 10 Mich. 193, 202 (1861).

52 *Felgner v. Anderson*, 375 Mich. 23, 37, 133 N.W.2d 136, 144 (1965).

53 *Felgner v. Anderson*, 375 Mich. 23, 39, 133 N.W.2d 136, 147 (1965).

54 *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 274, 196 A.2d 238, 240-41 (1963).

55 PROSSER, *TORTS* 461 (3d ed. 1964).

56 See *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54 (1943); *McConville v. State Farm Mut. Auto Ins. Co.*, 15 Wis.2d 374, 113 N.W.2d 14 (1962).

57 WIS. STAT. ANN. § 331.045 (1958).

because it is a complete defense to a negligence action. Wisconsin solved its problem by declaring that in the automobile guest passenger case, the "guest's assumption of risk . . . is no longer a defense separate from contributory negligence."<sup>58</sup> The Wisconsin court recognized that the doctrine includes the situation where incurring the risk was not unreasonable, and that the assimilation of the doctrine into contributory negligence destroys this facet of the doctrine.<sup>59</sup> They were willing to make this sacrifice only to preserve the value of the comparative negligence statute.

The Wisconsin decision points out the one area in which this writer feels that distribution of the doctrine is not to be recommended.<sup>60</sup> This area covers the situation where the plaintiff's assumption of risk is not unreasonable, is voluntary, and occurs subsequent to the defendant's creation of the unreasonable risk. Here, based on the limited concept of duty which would result if distribution of the doctrine were made to the concept of duty, the distinct and independent principle of assumption of risk is required.

The doctrine has, however, been shown to be soundly eliminated when it merely covers a true case of contributory negligence or a case in which the defendant has not been negligent. The doctrine in these cases merely hides the true basis on which the decision should rest, and in the confusion that is introduced, only injustice is promoted. The Michigan court's decision in *Felgner v. Anderson* recognizes that a "wisely pruned"<sup>61</sup> doctrine of assumption of risk is desirable. The court, however, has wielded the pruning shears too ruthlessly.

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VENUE — MOTOR VEHICLE ACCIDENT CASES AND THE NEW FEDERAL VENUE PROVISION. — Plaintiff insurance company brought an action in the United States District Court for the Western District of Virginia to compel contribution from defendants for one half of the amount paid by the plaintiff to settle an automobile accident claim in the Virginia state courts. The plaintiff was a citizen of New York and the defendants were citizens of Georgia and Virginia.<sup>1</sup> The central issue was the propriety of venue under the newest provision of the federal venue statutes: "A civil action on a tort claim arising out of the manufacture, assembly, repair, ownership, maintenance, use, or operation of an automobile may be brought in the judicial district wherein the act or omission complained of occurred."<sup>2</sup> Defendants contended the action was improperly

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58 *McConville v. State Farm Mut. Auto Ins. Co.*, 15 Wis.2d 374, 376, 113 N.W.2d 14, 16 (1962).

59 *Id.* at 377, 113 N.W.2d at 17.

60 This recommendation applies to those states without comparative negligence statutes.

61 R. Keeton, *supra* note 42, at 166.

1 Service was made on the defendants under the provisions of the Virginia statute providing for service upon nonresident motorists: VA. CODE ANN. § 8-67.1 (1957). The constitutionality of applying the provision to a defendant who was a resident of Virginia at the time the cause of action arose but who subsequently became a nonresident was determined by the court in its decision.

2 28 U.S.C. § 1391(f) (Supp. V, 1964).

brought under this section since contribution was not a "tort claim" within the meaning of the statute.<sup>3</sup> In a sound opinion which relied exclusively on federal principles for its conclusion, the court *held*: venue was proper as the contribution action was a "civil action on a tort claim" falling within the purview of the section. *North River Ins. Co. v. Davis*, 237 F. Supp. 187 (W.D. Va. 1965).<sup>4</sup>

Section 1391(f) was added to the federal venue statutes to settle a venue problem of long standing: could a diversity action, arising out of a motor vehicle accident in state *X*, be brought in the federal district court in state *X* embracing the accident site, although neither the plaintiff nor the defendant resided therein?<sup>5</sup> Although the clear wording of § 1391(a)<sup>6</sup> did not permit such venue, the United States Supreme Court, in *Neirbo Co. v. Bethlehem Corp.*,<sup>7</sup> supplied the basis for a doctrine which circumvented the statute and held such venue proper. The *Neirbo* case held that the defendant Delaware corporation, in complying with New York law by appointing an agent in the state for service of process,<sup>8</sup> had waived the protection of the federal venue statute and could be sued in the Southern District of New York although neither the plaintiff nor the defendant resided in that district. The decision rested upon the proposition that venue was a personal privilege which could be waived.<sup>9</sup> This was coupled with the theory that the appointment of the agent was not limited to service in the *state* courts but extended to service in the *federal* courts sitting in the state and thus constituted an implied waiver of the federal venue statute.<sup>10</sup>

Subsequently, this concept of an implied waiver of the federal venue provision by compliance with state law requiring a nonresident to appoint an agent

3 The court quickly put aside the possibility of the action's being brought under 28 U.S.C. § 1391(a) (1958) as this was clearly not the judicial district wherein all the plaintiffs or all the defendants resided; and it denied any chance of venue under 28 U.S.C. § 1391 (c) (1958) by relying on the holding in *Robert E. Lee & Co. v. Veatch*, 301 F.2d 434 (4th Cir.), *cert. denied*, 371 U.S. 813 (1962).

4 This case is one of three to date which have dealt with 28 U.S.C. § 1391(f) (Supp. V, 1964) and is the first to illustrate some of the possibilities of the provision. *Seay v. Kaplan*, 35 F.R.D. 118 (S.D. Iowa 1964), merely allowed application of the provision to a case begun before its passage and *Smith v. Konsak*, 230 F. Supp. 308 (E.D. Pa. 1964), denied a motion to dismiss for improper venue in the light of the new section. Neither decision entailed a noteworthy interpretation of the provision.

5 Among the obvious advantages of such venue were: availability of service against the defendant; the convenience of witnesses; less expense than bringing suit in the defendant's state. These were over and above the reasons for desiring a federal forum in the first place.

6 "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district *where all plaintiffs or all defendants reside*." 28 U.S.C. § 1391(a) (1958). (Emphasis added.)

7 308 U.S. 165 (1939).

8 N.Y. GEN. CORP. LAW § 210 (1964) demanded that a nonresident corporation appoint such an agent before it began doing business in the state.

9 *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 168 (1939) (citing *Panama R.R. v. Johnson*, 264 U.S. 375, 385 (1952)) : "By a long line of decisions, recently reaffirmed, it is settled that such a provision merely confers on the defendant a personal privilege which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters a general appearance before or without claiming his privilege." For a collection of recent cases, see *Brandt v. Olson*, 179 F. Supp. 363, 371 (N.D. Iowa 1959). The later legislative declaration of this is found in 28 U.S.C. § 1406(b) (1958).

10 Under the holding in *Neirbo*, the waiver extended to *all* the districts in the state and the plaintiff was apparently free to choose among them. Whether, under the implied waiver fiction as it developed in the motor vehicle accident cases, all the districts in the accident state were open to the plaintiff is unclear. Apparently, the issue never arose since plaintiffs invariably chose the district which encompassed the site of the accident. See cases cited note 11 *infra*.

for service within the state was carried over to the question of the propriety of venue in the accident state in a motor vehicle diversity case between parties residing in states other than that in which the accident occurred. A long line of district court opinions, relying on the *Neirbo* decision either directly or indirectly, held that such venue was proper.<sup>11</sup> These opinions reasoned that: (1) by driving on the highways of the state, the defendant had appointed an agent for service of process within the state under the applicable state nonresident motorist service statute;<sup>12</sup> and (2) the appointment of such an agent is a waiver of the federal venue provision. While these cases differed factually from *Neirbo* because they concerned individuals rather than corporations and involved an implicit rather than an express appointment of an agent, they represented the majority view on the question until 1953.<sup>13</sup>

In that year, the issue was directly presented to the United States Supreme Court in *Olberding v. Illinois Central R.R.*<sup>14</sup> Plaintiff Illinois corporation brought suit in a Kentucky federal district court to recover for property damage resulting from the alleged negligence of an Indiana resident while driving in Kentucky. The defendant challenged the propriety of venue in Kentucky as neither he nor the plaintiff was a resident of that district. The Court held venue improper, saying:

The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a "liberal" construction. . . . [T]o conclude . . . that the motorist, who never consented to anything and whose consent is altogether immaterial, has actually agreed to be sued and has thus waived his federal venue rights is surely to move in the world of Alice in Wonderland. The fact that a nonresident motorist who comes into Kentucky can, consistent with the Due Process Clause of the Fourteenth Amendment, be subjected to suit in the appropriate Kentucky state court has nothing whatever to do with his rights under 28 U.S.C. § 1391(a).<sup>15</sup>

Although *Olberding* overruled the long line of decisions holding such venue to be proper,<sup>16</sup> *Neirbo* was distinguished on the grounds that it contained an express appointment. While it was still possible for the defendant to expressly

11 *E.g.*, *Falter v. Southwest Wheel Co.*, 109 F. Supp. 556 (W.D. Pa. 1953); *Archangeau v. Emerson*, 108 F. Supp. 28 (W.D. Mich. 1952); *Kostamo v. Brorby*, 95 F. Supp. 806 (D. Neb. 1951); *Burnett v. Swenson*, 95 F. Supp. 524 (W.D. Okla. 1951); *Urso v. Scales*, 90 F. Supp. 653 (E.D. Pa. 1950); *Stale v. Dennis*, 62 F. Supp. 73 (D. Md. 1945); *Krueger v. Hider*, 48 F. Supp. 708 (E.D. S.C. 1943).

12 *E.g.*, IND. ANN. STAT. § 47-1043 (1965); MICH. COMP. LAWS § 257.403 (Supp. 1961); VA. CODE ANN. § 8-67.1 (1950). These statutes were designed to give residents of the state recourse in state courts for accidents caused by out-of-state motorists by providing that the mere act of driving on the state highways and roads constituted an appointment of a state official as the nonresident's agent for the service of process within the state. The constitutionality of these statutes was determined in *Hess v. Pawlowski*, 274 U.S. 352 (1927). All states and the District of Columbia, excepting Alaska, have had such statutes. For a collection of the statutes of 48 states and the District of Columbia, see *Knoop v. Anderson*, 71 F. Supp. 832 (N.D. Iowa 1947) and HAWAII REV. LAWS ch. 230 § 33 (Supp. 1963).

13 The minority view was represented by: *McCoy v. Siler*, 205 F.2d 498 (3d Cir. 1953); *Martin v. Fischbach Trucking Co.*, 183 F.2d 53 (1st Cir. 1950); *Walters v. Plyborn*, 93 F. Supp. 651 (E.D. Tenn. 1950).

14 346 U.S. 338 (1953).

15 *Id.* at 340, 341.

16 Cases cited note 11 *supra*.

waive venue objections, the plaintiff could no longer resort to the implied waiver fiction previously afforded under the nonresident motorist statutes in such cases.<sup>17</sup> He was left with one of three courses if he wished to pursue his action: he could sue in the federal district court in his own state;<sup>18</sup> he could sue in the federal district court in the state of the defendant;<sup>19</sup> or, he could sue in the state courts where the accident occurred. Each of these alternatives had its attendant difficulties, the result being the severe impairment of the plaintiff's cause:

The first of these possibilities is ordinarily precluded by an inability to obtain service on the defendant; normally, the second would subject the plaintiff to additional expense and difficulty. In respect to the third alternative, the federal court may be preferable for many reasons, such as the uniform and relatively simpler procedure and less crowded court calendars.<sup>20</sup>

Further, the plaintiff was faced with the anomaly that if the action were brought in the state court, the defendant would have the option of removing the suit to the federal district court embracing the situs;<sup>21</sup> yet, if the suit were initiated there without the defendant's consent, venue would be improper. The net effect was to hand the defendant a dilatory tactic if sued in the accident state.<sup>22</sup> If he were sued in the state court, he could petition for removal. If sued in the federal district court therein, he could challenge venue.

Section 1391(f) was the legislative solution to the plaintiff's problem;<sup>23</sup> but the extent of the resolution is not clear. The *apparent* congressional intent was to restore pre-*Olberding* case law, permitting venue in the federal district court in the accident state regardless of the defendant's intention.<sup>24</sup> However, it is difficult to state conclusively that this was the congressional intent since the available legislative history pertains to an original and much broader form of the bill that was passed.<sup>25</sup> There is no direct commentary on the final, amended version. This leaves any statement as to legislative purpose open to question, no matter how strong the evidence in any one direction.

The provision itself does not answer the question. It is drafted in such a way as to permit judicial interpretation and application that may make it quite distinctive. While the effect of the statute in many cases will be merely to codify

17 *E.g.*, *Heiss v. Nielsen*, 132 F. Supp. 541 (D. Neb. 1955); *Drapkin v. Keene*, 128 F. Supp. 182 (S.D.N.Y. 1955); *Weber v. Threlkel*, 126 F. Supp. 98 (D. Wyo. 1954); *Cooke v. Ford Motor Co.*, 122 F. Supp. 644 (W.D. Mo. 1954).

18 28 U.S.C. § 1391(a) (1958).

19 *Ibid.*

20 Note, 31 N.C.L. REV. 339, 342 (1953). A specific illustration of the first difficulty is found in *Drapkin v. Keene*, 128 F. Supp. 182 (S.D.N.Y. 1955).

21 28 U.S.C. § 1441(a), (b) (1958). Removal by the defendant is taken to be a waiver of any objection to venue. *Lee v. Chesapeake & Ohio Ry.*, 260 U.S. 653 (1923).

22 Keefe, *Venue and Removal Jokers in the New Federal Judicial Code*, 38 VA. L. REV. 569 (1952).

23 28 U.S.C. § 1391(f) (Supp. V, 1964).

24 "I assume it was drafted with a view to simplifying trial procedure in tort cases, such as in the case of a motorist from Maine and one from Utah, for example, who might collide in Florida. The bill passed by the Senate would settle the jurisdiction where the witnesses were readily available." 109 CONG. REC. 20829 (1963) (remarks of Senator Russell).

25 The original version was: "A civil action on a tort claim may be brought in the judicial district wherein the act or omission complained of occurred." 109 CONG. REC. 12154 (1963).

pre-*Olberding* law,<sup>26</sup> there is the possibility that the provision will be found to be *narrower* in at least one respect. Under the implied waiver fiction and the usage of the nonresident motorist statutes, the defendant need only have been driving on the state roads, whether in an automobile, a truck, on a motorcycle, a motorbike or similar vehicle. For some inexplicable reason,<sup>27</sup> § 1391(f) uses the word, "automobile." The question, of course, will be whether the courts will regard this in a generic sense, applying the provision to cases involving motor vehicles in general, or whether the courts will take the word in its specific sense and restrict application to accident cases involving automobiles. While the former conclusion would be in keeping with an intent to broaden venue,<sup>28</sup> the fact that the Congress moved from a broader to a narrower form of the bill lends credence to the conclusion that a more restrictive law was desired.

But if there is the possibility that the statute may be less applicable in this one area than the previous case law, there is an even greater possibility that it will be found to be more extensive in other areas. The words of the section which can be interpreted to go beyond claims arising from the *defendant's driving of a motor vehicle on public roads* — a necessary factor to the application of the implied waiver fiction — may supply the basis for extending venue beyond the factual situations of the pre-*Olberding* cases. By eliminating the need to employ the implied waiver fiction, the mechanics of the state nonresident motorist statutes and the analogy to the *Neirbo* case are now unnecessary to achieve accident state venue. Thus, requirements of nonresident motorist statutes will not be the limits of accident state venue in a diversity claim arising out of an automobile accident. Where, for example, many of the nonresident motorist statutes speak of operation on the "highways of the state" or employ similar phrases and may not be applicable to operation solely on private roads or property, § 1391(f) has no such limitation. Again, in contrast to the usage of the nonresident motorist statutes, the present provision does not specify that the *defendant* need be driving at all. It is conceivable, then, that a case involving a defendant pedestrian whose negligence caused a plaintiff motorist to have an accident would fall under the statute since "operation" is not restricted to the defendant. Further, it may not be necessary that either plaintiff or defendant be driving. One example would be the case of a guest in a car suing, not the driver, but the owner. This would be true if the "act or omission complained of" be taken not to be the owner's act of turning the car over to the driver — which may not have taken place in the accident state — but the act of the driver that caused the accident.

Under the new provision, it may be possible to obtain accident state venue against a nonaccident state repairer or manufacturer who was in some way re-

26 Cases cited note 4 *supra*.

27 As pointed out, the lack of commentary clouds many aspects of the statute.

28 The addition of the proposed new subsection to section 1391 would promote a simple and orderly administration of justice by permitting tort suits to be brought in the place where the witnesses are ordinarily most conveniently available. . . . The interest of justice would be best served by enlarging the present provisions of the venue statute and permitting those who have a cause of action in tort to assert their claims in the judicial district where the act or omission complained of occurred.

sponsible for the accident. This too will depend on a holding that the "act or omission complained of" is that which immediately caused the accident—for instance, the blowing out of a faulty tire—rather than a holding that it is that act in a distant state which produced the faulty tire.

Though not as well drafted as it might have been, if the provision continues to receive a liberal construction by the courts<sup>29</sup> and if the problem of service can be met, the possibility of obtaining venue in the federal district court in the accident state for claims arising from motor vehicle accidents of every kind should be greater than ever before.<sup>30</sup> A court which considers the fact that Congress began work on this statute with an intention of broadening venue,<sup>31</sup> and which weighs the unclear reasons for withholding accident state venue against the many obvious advantages it would have for plaintiffs and witnesses, can be expected to interpret this statute with liberality.

The problem of service is more irksome. Under the Federal Rules,<sup>32</sup> service may be made either as provided by federal legislation or in accord with the law of the state in which the federal court sits. In all the motor vehicle accident cases cited in this discussion, service was made under the applicable state non-resident motorist service statutes. If, as suggested, this new provision is to permit venue in situations not falling under such service statutes, authorization for service will have to be found under other laws. If such is not found, the practical effect of the provision may be at best no greater than that of the implied waiver fiction. But barring these difficulties, the statute should provide more plaintiffs than ever before a more advantageous trial site and should "provide the opportunity to spread throughout the district courts across the nation many of the actions rising out of motor vehicle cases."<sup>33</sup>

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29 *North River Ins. Co. v. Davis*, 237 F. Supp. 187 (W.D. Va. 1965). While this is only a single case, the court does take a broad approach and the decision may set the pattern for future cases.

30 If there is one area in which the courts could most readily write of this provision with a wide brush, it would be in holding "automobile" to be generic. The equity of the statute would seem to demand such a conclusion.

31 S. REP. No. 620, *supra* note 28.

32 FED. R. CIV. P. 4(d)(7).

33 H.R. REP. No. 385, 88th Cong., 1st Sess. 2 (1963).