Denver Law Review

Volume 58
Issue 2 *Tenth Circuit Surveys*

Article 20

February 2021

Vol. 58, no. 2: Full Issue

Denver Law Journal

DENVER LAW JOURNAL

VOLUME 58

1980-1981

Published by the
University of Denver
College of Law

DENVER LAW JOURNAL

1981 Volume 58 Issue 2

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FOREWORD

The United States Courts of Appeals are of ever increasing importance in the federal judicial system. The overwhelming caseload of the United States Supreme Court restricts its ability to resolve many inter-circuit conflicts, with the result that more and more a body of circuit law is developing. The practitioner must know the law of the circuit in which a controversy arises.

Economic changes are subtly affecting the Tenth Circuit. The development, for the national good, of the natural resources of the six-state Tenth Circuit, will probably produce many conflicts among national, regional, and local interests. The resolution of these expected controversies will substantially involve the federal courts within the Tenth Circuit. The task of these courts, and of the advocates who appear in them, presents a challenge which may not be ignored.

The foregoing emphasizes the importance of the *Denver Law Journal*'s Annual Survey of the Tenth Circuit decisions. Its critiques enable both lawyers and teachers to keep abreast of decisional trends, to come forward with constructive suggestions, and to contribute to the solution of the problems which are bound to arise. The Survey should be required reading for all federal practitioners—and for all federal judges.

JEAN S. BREITENSTEIN

October 31, 1980

THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CHIEF JUDGE OLIVER SETH

Judge Seth was born in New Mexico in 1915 and grew up in Santa Fe. He received his A.B. degree from Stanford University in 1937 and his LL.B. from Yale in 1940.

During World War II he served as a Major in the U.S. Army and was decorated with the Croix de Guerre. Judge Seth has been a director of the Santa Fe National Bank, chairman of the Legal Committee of the New Mexico Oil and Gas Association, and counsel for the New Mexico Cattlegrowers' Association. He has also been a regent of the Museum of New Mexico and a director of the Santa Fe Boy's Club. In 1962 he was appointed to the United States Court of Appeals for the Tenth Circuit by President John F. Kennedy. He has been Chief Judge since 1977.

JUDGE WILLIAM J. HOLLOWAY, JR.

The son of a former Oklahoma governor, Judge Holloway was born in Hugo, Oklahoma, in 1923. He and his family moved to Oklahoma City in 1927. He served as a First Lieutenant in the Army during World War II. He then returned to complete his undergraduate studies at the University of Oklahoma, receiving his B.A. in 1947. He was graduated from Harvard Law School in 1950.

In 1951 and 1952, Judge Holloway was an attorney with the Department of Justice in Washington, D.C. Afterwards, he returned to private practice in Oklahoma City where he was appointed to the Tenth Circuit by Lyndon B. Johnson. He is a member of Phi Beta Kappa and Phi Gamma Delta.

JUDGE ROBERT H. McWILLIAMS

Judge McWilliams was born in Salina, Kansas in 1916 and moved to Denver in 1927 where he has lived ever since. He received his A.B. and LL.B. degrees from the University of Denver. In 1971, he was awarded an Honorary Doctor of Law degree from the University.

During World War II, Judge McWilliams served in the United States Army and was with the Office of Strategic Services. He has served as a Deputy District Attorney, a Colorado district court judge, and was a member of the Colorado Supreme Court for nine years prior to his appointment to the Court of Appeals.

Judge McWilliams is a member of the Judicial Conference Committee on the Administration of the Criminal Law, Phi Beta Kappa, Omicron Delta Kappa, Phi Delta Phi, and Kappa Sigma. He was sworn in as a Judge of the United States Court of Appeals for the Tenth Circuit in 1970.

JUDGE JAMES E. BARRETT

The son of the late Frank A. Barrett, who served as Wyoming's Congressman, Governor, and U.S. Senator, Judge Barrett was born in 1922 in Lusk, Wyoming. He attended the University of Wyoming for two years prior to his service in the Army during World War II. After the War, he attended Saint Catherine's College at Oxford University. He received his LL.B. from the University of Wyoming in 1949. In 1973 he was given the Distinguished Alumni Award from his alma mater.

Prior to his appointment, Judge Barrett had been involved in private practice in Lusk and had served as County and Prosecuting Attorney for Niobrara County; Town Attorney for the towns of Lusk and Manville; and attorney for the Niobrara County Consolidated School District. In 1967 he was appointed by Governor Stanley K. Hathaway to serve as Wyoming Attorney General and he remained in that position until 1971.

Judge Barrett is a member of the Judicial Conference Subcommittee on Federal Jurisdiction, the U.S. Foreign Intelligence Surveillance Court of Review, and is a trustee of Saint Joseph's Children's Home. He was appointed to the Court in 1971.

JUDGE WILLIAM E. DOYLE

Judge Doyle was born in Denver in 1911 and received his A.B. from the University of Colorado in 1940. He obtained his LL.B. and J.D. degrees from George Washington University. He served as Deputy District Attorney for Denver from 1938 until 1941, a Colorado district court judge in 1948 and 1949, and Chief Deputy District Attorney from 1949 until 1952. During 1959-61 he was a Justice on the Colorado Supreme Court.

Judge Doyle has been a Visiting Professor of Law at the University of Colorado and a Professor of Law at the Westminster College of Law (University of Denver College of Law) in Denver. He is a former Chairman of the Judicial Conference Committee to Implement the Magistrates' Act and is presently a member of the Judicial Conference Committee on the Administration of the Bankruptcy System. He is a member of the Order of the Coif, the Order of Saint Ives, Pi Sigma Alpha, and Phi Alpha Delta.

He was appointed to the Tenth Circuit Court of Appeals in 1971 following ten years as a United States District Judge for the District of Colorado.

JUDGE JAMES K. LOGAN

Judge Logan was born in Quenemo, Kansas, in 1929. He received his A.B. from the University of Kansas in 1952 and was graduated *magna cum laude* from Harvard Law School in 1955. He went on to be U.S. Circuit Judge Walter Huxman's law clerk in 1956 and then practiced with the Los Angeles firm of Gibson, Dunn & Crutcher. He became Dean of the University of Kansas Law School in 1961 and served in the capacity until 1968.

Since 1961 he has been a visiting professor at Harvard Law School, The University of Texas Law School, Stanford University, and the University of Michigan. He was a commissioner for the U.S. District Court from 1964 until 1967 and was a candidate for the U.S. Senate in 1968.

Judge Logan is a Rhodes Scholar, a member of Phi Beta Kappa, Order of the Coif, Beta Gamma Sigma, Omicron Delta Kappa, Pi Sigma Alpha, Alpha Kappa Psi, and Phi Delta Phi. He has co-authored numerous books on estate planning and administration. In 1977 he was appointed to the United States Court of Appeals for the Tenth Circuit.

JUDGE MONROE G. McKAY

Judge McKay was born in Huntsville, Utah, in 1929 and lives in Provo. He was graduated from Brigham Young University in 1957 with high honors. He received his J.D. from the University of Chicago and became the law clerk for Justice Jesse A. Udall of the Arizona Supreme Court in 1960. From 1961 to 1974, Judge McKay was with the firm of Lewis and Roca in Phoenix, taking two years out to serve as Director of the United States Peace Corps in Malawi, Africa. He was a law professor at Brigham Young University from 1974 until he was appointed to the Tenth Circuit Court of Appeals in 1977.

JUDGE STEPHANIE K. SEYMOUR

Judge Seymour was born in Battle Creek, Michigan, in 1940. She graduated from Smith College, *magna cum laude*, in 1962 and earned her J.D. from Harvard Law School in 1965. She was admitted to the Oklahoma bar in 1965.

Judge Seymour has practiced law in Boston, Massachusetts, 1965-1966; in Tulsa, Oklahoma, 1967; and Houston, Texas, 1968-1969. Most recently, she has practiced with the Tulsa firm of Doerner, Stuart, Saunders, Daniel & Anderson from 1971 to 1979. Judge Seymour is a member of Phi Beta Kappa, and the American, Oklahoma, and Tulsa County Bar associations. She served as a bar examiner from 1973 through 1979.

Judge Seymour was appointed to the United States Court of Appeals for the Tenth Circuit by President Carter in 1979.

SENIOR JUDGE JOHN C. PICKETT

Judge Pickett was born in Ravenna, Nebraska, in 1896. He received his LL.B. degree from the University of Nebraska in 1922. In 1920, he was a pitcher for the Chicago White Sox. During World War I, he served as a Second Lieutenant.

From 1935 until 1949, Judge Pickett was Assistant United States Attorney for the District of Wyoming; in 1949, he was United States Attorney. He is a past member of the Judicial Conference and has served as Chairman of the Judicial Conference Advisory Committee on the Administration of the Criminal Law.

Judge Pickett was appointed to the United States Court of Appeals for the Tenth Circuit in 1949 and has been a Senior Judge since January 1, 1966.

SENIOR JUDGE DAVID T. LEWIS

Judge Lewis was born in Salt Lake City, Utah, in 1912. He received his B.A. degree and his J.D. from the University of Utah. In 1971, he was awarded an Honorary Doctor of Laws degree from his alma mater. During World War II, Judge Lewis served in the Criminal Investigation Division of the Army and in 1947-48 he was a member of the Utah Legislature. He was a Utah district judge from 1950 to 1956.

Judge Lewis has been a member of the Judicial Conference of the United States since 1970 and was elected Chairman of the Conference of Chief Circuit Judges in 1974. He was voted the "Judge of the Year" in 1974 by the Utah State Bar Association.

Judge Lewis is a member of the Order of the Coif and Phi Delta Phi. He was appointed to the Tenth Circuit in 1956 by President Dwight D. Eisenhower. He became a Senior Judge on December 3, 1977.

SENIOR JUDGE JEAN S. BREITENSTEIN

Judge Breitenstein was born in Keokuk, Iowa, in 1900. His family moved to Boulder, Colorado, in 1907. After graduation from the University of Colorado, where he received his A.B. in 1922 and LL.B. in 1924, he served as a Colorado Assistant Attorney General from 1925 until 1929. He was an Assistant United States Attorney from 1930 until 1933. Between 1933 and 1954, he practiced law in Denver. In 1954, he became a United States District Judge.

Judge Breitenstein has served as Chairman of the Judicial Conference Committee on Intercircuit Assignments and is a past president of the Denver Law Club.

A member of Phi Beta Kappa, Order of the Coif, and Phi Alpha Delta, Judge Breitenstein holds LL.D. degrees from the University of Colorado and the University of Denver. He was appointed to the Tenth Circuit Court of Appeals in 1957 and became a Senior Judge on July 31, 1970.

SENIOR JUDGE DELMAS C. HILL (Retired)

Judge Hill was born in Wamego, Kansas, in 1906. He received his LL.B. from Washburn College in 1929. From 1929 to 1943 he practiced law in Wamego, serving as an Assistant U.S. Attorney from 1934 to 1936. He was general counsel for the Kansas State Tax Commission from 1937 to 1939 and Chairman of the State Democratic Committee from 1946 to 1948. During World War II he was a Captain in the U.S. Army. In 1945, he assisted in the prosecution of General Yamashita in Manila. He was a U.S. District Judge from 1949 until 1961 when he was appointed to the Tenth Circuit Court of Appeals. Judge Hill became a Senior Judge on April 1, 1977.

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ADMINISTRATIVE LAW

OVERVIEW

The Tenth Circuit Court of Appeals entertained administrative law cases of considerable number and variety during the recent term. In general, the court's treatment of these cases was characterized by the traditional deference to the agencies' underlying decisions, and the court stayed well within the confines of the Administrative Procedure Act's scope of judicial review.[1] Where an agency's interpretation of a pertinent statute was clearly unreasonable, however, or where an administrative record was insufficient to support an agency's findings and conclusions, the court did not hesitate to reverse a decision and remand the matter for further deliberation.

In several of its more notable decisions, the Tenth Circuit undertook constructions of the Government in the Sunshine Act[2] and the Privacy Act.[3] Both statutes are relative newcomers[4] to the realm of administrative law and have not yet been the subjects of substantial litigation. Thus, the Tenth Circuit's analyses of certain of their provisions represent contributions to the limited body of interpretive material. Another noteworthy decision this term considered an association's standing to represent its members in an action challenging the Department of Health, Education and Welfare's sexual equality regulations for athletic programs. The court's ruling may well facilitate the first major attack on these controversial requirements.

This article will survey twenty-seven of the Tenth Circuit's administrative law decisions.[5] Sheer numbers prevent a thorough analysis of each case, but an attempt has been made to comment on questionable results and rulings of special significance.

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES

In *Brice v. Day*[6] the Tenth Circuit rejected the argument that exhaustion of administrative remedies cannot be required when a party seeks to vindi-

1. *See* 5 U.S.C. § 706 (1976).
2. 5 U.S.C. § 552b (1976).
3. 5 U.S.C. § 552a (1976).
4. The Sunshine Act became effective in 1977 and the Privacy Act became effective in 1974.
5. Additional administrative law cases reviewed and decided by the court of appeals during the year but not incorporated into this discussion include: Patterson v. National Transp. Safety Bd., No. 79-1426 (10th Cir., May 27, 1980) (affirmed FAA's suspension of mechanic's certificate); Selman v. Califano, 619 F.2d 881 (10th Cir. 1980) (affirmed district court's affirmance of Social Security Administration's denial of airline pilot's request for classification as independent contractor); Fry Bros. Corp. v. HUD, 614 F.2d 732 (10th Cir. 1980) (held that wage determinations under Davis-Bacon Act are not subject to judicial review); Cowell v. National Transp. Safety Bd., 612 F.2d 505 (10th Cir. 1980) (affirmed FAA's revocation of airman and airman medical certificates); Terry v. National Transp. Safety Bd., 608 F.2d 418 (10th Cir. 1979) (affirmed FAA's suspension of commercial pilot's certificate); David v. Erdmann, 607 F.2d 917 (10th Cir. 1979) (reversed ruling of Bureau of Alcohol, Tobacco & Firearms refusing import permit for pistol that was collector's item). *See also* notes 174 & 205 *infra*.
6. 604 F.2d 664 (10th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980).

cate his constitutional rights in an action for monetary damages. The two petitioners were prisoners at a federal penal institution in Oklahoma. Each had filed suit in district court alleging that overcrowded conditions in the facility subjected them to cruel and unusual punishment[7] in violation of the eighth amendment.[8] The lower court summarily disposed of both cases on the ground that neither prisoner had used the formal procedures for review of prisoners' complaints.[9]

On their consolidated appeal, the petitioners urged that the exhaustion doctrine does not apply to situations where constitutional rights are at stake, at least when the relief requested is monetary compensation. They argued that the available administrative procedure did not provide for such an award; thus, the inadequacy of the administrative remedy obviated the exhaustion prerequisite of judicial action.[10]

The court of appeals relied on two very different grounds to justify its ultimate holding that the petitioners were indeed obliged to exhaust their administrative remedies. In analyzing the claims, the court first observed that the petitioners sought to establish a private right of action for damages under a constitutional amendment, an approach similar to those actions recognized by the United States Supreme Court in *Bivens v. Six Unknown Named Agents*[11] and *Davis v. Passman*.[12] To maintain such an action three criteria must be satisfied. First, the complaining party must assert the violation of a constitutionally protected right. Second, the party must have no means to enforce the right other than through the judiciary. And, finally, the complaining party must demonstrate that monetary relief will satisfactorily redress the alleged constitutional violation.[13]

With these requirements in mind, the Tenth Circuit determined that facts would have to be developed to assess the validity of the petitioners' cause of action. The court of appeals concluded that an administrative inquiry by the Bureau of Prisons would facilitate such a fact-finding process, likening it to discovery in an ordinary civil case. The court explained that this procedure should be utilized before the petitioners could properly seek relief in the courts.[14]

In addition to recognizing the need for an administrative proceeding to evaluate the strength of the petitioners' claims, the court of appeals acknowledged the peculiar nature of the petitioners' status as prisoners.[15] In effect, it deferred to the administrative machinery already in place for the resolution of prisoners' grievances, thereby adhering to previous holdings reflecting a

7. *Id.* at 665.
8. U.S. CONST. amend. VIII.
9. 604 F.2d at 665.
10. *Id.*
11. 403 U.S. 388 (1971) (private damages action recognized for violation of fourth amendment right to freedom from unlawful searches and seizures).
12. 442 U.S. 228 (1979) (private damages action recognized under fifth amendment due process clause, U.S. CONST. amend. V, cl. 3, for alleged sex discrimination).
13. 604 F.2d 2d at 666 (citing Davis v. Passman, 442 U.S. 228 (1979); Bell v. Wolfish, 442 U.S. 520 (1979); Butz v. Economou, 438 U.S. 478 (1978)).
14. 604 F.2d at 666-67.
15. *Id.* at 666.

fervent desire to minimize judicial involvement with prison administration.[16] The court concluded that the orderly and efficient disposition of prisoners' problems required the use of administrative channels. Petitions to a court for relief cannot be "tickets to an immediate confrontation with the guards and supervisors outside the prison and in the courtroom no matter how they are framed."[17] Thus, the Tenth Circuit affirmed the district court's dismissal of the prisoners' complaints. The appellate court added that in such circumstances a trial court would be equally justified in retaining jurisdiction of a case while referring it to prison officials for administrative review before taking further action itself.[18]

II. RIPENESS

An attempt by the Federal Energy Regulatory Commission (FERC) to clarify orders disapproving a natural gas supplier's emergency curtailment plan created further confusion when one of the supplier's customers sought judicial review of the agency's action. In *General Motors Corp. v. FERC*[19] the Tenth Circuit held that an "Order Clarifying Prior Order," issued by the FERC, was not sufficiently "final" to permit review, and the court therefore dismissed the petition before it.[20]

Cities Service Gas Company, the supplier, proposed a restriction on new service connections in anticipation of possible reductions in the quantity of natural gas available to meet its existing customers' demands. The plan provoked a number of hearings and a plethora of orders. Initially, FERC refused to approve the Cities Service proposal because it did not include an index indicating consumers' use requirements as of January 1, 1978.[21] In a second order, the Commission called for further hearings and provided that high priority customers could anticipate continued service connections by their supplier.[22] A subsequent order indicated that the FERC was uncertain whether to require the use index after all but cautioned that the agency might impose an index "as of January 1st"[23] and warned that new connections would be made at the gas distributors' risk.[24]

The FERC detected an air of uncertainty among consumers and suppliers following this third order. Therefore, it issued one additional order denominated "Order Clarifying Prior Order" and announced that any index of requirements ultimately imposed would not incorporate the January date but would be prospective in application.[25] The petitioner, General Motors,

16. *See* Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978); Mower v. Swyhart, 545 F.2d 103 (10th Cir. 1976); Marchesani v. McCune, 531 F.2d 459 (10th Cir. 1976); Rivera v. Toft, 477 F.2d 534 (10th Cir. 1973); Daugherty v. Harris, 476 F.2d 292 (10th Cir. 1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972); Smoake v. Willingham, 359 F.2d 386 (10th Cir. 1966).
17. 604 F.2d at 667.
18. *Id.* at 668.
19. 607 F.2d 330 (10th Cir. 1979).
20. *Id.* at 331.
21. *Id.* at 332.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

objected to this decision, requested a rehearing, and upon denial of the request, appealed from the order.

The Tenth Circuit determined that the challenged order was merely a "segment of ongoing hearings, and relate[d] to a subject not yet decided."[26] Thus, the court concluded that the order was not final and, therefore, was not a proper matter for judicial scrutiny.[27] The Commission had made no decision to exact an index of requirements from Cities Service but had stated only that any index requested would take effect prospectively. "This may be a prehearing indication of [the FERC's] position, but this is not a matter ripe for judicial review."[28]

Additionally, the petitioner challenged the Commission's manner of issuing the clarification order, alleging that FERC could not properly enter such an order without additional hearings. It further contended that the agency had relied on events outside the administrative record to reach its decision.[29] The appellate court refused to sustain these objections, holding that the Commission had authority to change its position on the requirements index and on the applicable dates.[30] It found that the FERC had adequately explained the reasons for the change and concluded that new supporting evidence was unnecessary.[31] "[T]he Commission may act in a pending case without a petition requesting action. The Commission has a continuing duty to consider the consequences of actions it has taken in ongoing proceedings, and to make adjustments it considers to be in the public interest."[32]

III. PRIMARY JURISDICTION

The doctrine of primary jurisdiction endeavors to promote harmony between the judiciary and the administrative agencies. When a claim for relief falls within the jurisdiction of both a court and an agency, the former may suspend its proceedings and refer issues within the agency's authority and expertise to it for resolution. Referral is not mandatory, but it is often done to achieve uniformity in the application of certain statutes and regulations and to utilize an agency's specialized knowledge so that final disposition of a matter will be intelligent and accurate.[33]

In *Sunflower Electric Cooperative, Inc. v. Kansas Power & Light Co.*[34] the Tenth Circuit reviewed the propriety of a district court's invocation of the primary jurisdiction doctrine to justify both its refusal to entertain an antitrust action involving certain public utilities and its referral of the matter to

26. *Id.* at 333.
27. *Id.*
28. *Id.*
29. *Id.* at 332.
30. *Id.* at 333.
31. *Id.* at 334.
32. *Id.*
33. *See generally* United States v. Western Pac. R.R., 352 U.S. 59, 63-65 (1956); Far East Conference v. United States, 342 U.S. 570, 574-75 (1952); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 19.01, .07 (1958); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 19.01 (1976).
34. 603 F.2d 791 (10th Cir. 1979).

the Federal Power Commission (FPC) for resolution. The plaintiff, Sunflower Electric, a cooperative that sold electric energy to its Kansas members, alleged in its complaint that the defendants had unlawfully combined and conspired to monopolize the supply of "firm bulk power." Additionally, it alleged that a contemplated merger of several of the defendant power companies would violate the antitrust laws.[35] The district court perceived a possibility of conflict between a judicial resolution of the merger issue and the FPC's ultimate disposition of the merger application before it.[36] That court also identified a need for the agency's expertise in the matter. Thus, it elected to stay the antitrust action pending the agency's resolution of the merger question.[37]

The Tenth Circuit, however, concluded that the doctrine of primary jurisdiction did not apply to the proceeding. After a lengthy review and analysis of the lower court's opinion,[38] of the underpinnings of primary jurisdiction,[39] and of the leading case law,[40] it reversed the lower court's decision and remanded the case for a trial on the merits.[41] The appellate court's reasoning was based on several considerations. First, it noted that public utilities are not immune from the federal antitrust laws.[42] Next, it examined the extent of the FPC's jurisdiction over the "interstate transmission of electricity" at the time Sunflower Electric commenced its lawsuit.[43] Finding

35. *Id.* at 793. Sunflower Electric based its claims on sections one and two of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976).

36. A public utility may not sell or lease its facilities or merge or otherwise consolidate with another utility until it has obtained the government's approval. *See* 16 U.S.C. § 824b(a) (1976).

37. The district court relied primarily on the Supreme Court's decision in Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973). Among other things, *Ricci* counsels a court to abstain from judicial review when "some facets of the dispute . . . are within the statutory jurisdiction" of an agency. *Id.* at 302.

38. 603 F.2d at 793-95.

39. *Id.* at 795-96.

40. *Id.* at 796-98.

41. *Id.* at 799.

42. The court of appeals relied primarily on the Supreme Court's decision in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). *Ricci* and *Otter Tail* reach different conclusions about the administrative and judicial roles in antitrust actions involving regulated industries, prompting Professor Davis to observe that reconciling the two decisions "seems rather difficult." K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 19.06 (1976).

The source of the conflict stems from a desire to accommodate, to the greatest extent possible, both federal antitrust and other regulatory schemes. The problem is recurring.

> It arises when conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress. Often, but not always, the other regime includes an administrative agency with authority to enforce the major provisions of the statute in accordance with that statute's distinctive standards, which may or may not include concern for competitive considerations.

Ricci v. Chicago Mercantile Exch., 409 U.S. at 299-300.

Ricci advocated deference to an agency's jurisdiction, at least when it is not immediately clear whether the antitrust laws apply to the industry or transaction in question. *Id.* at 301-08. *Otter Tail*, however, in a factual setting involving power companies, held that public utilities are clearly not insulated from antitrust liability and found that the FPC had no authority to provide remedies sufficient to redress the alleged violations. 410 U.S. at 373-74. Under those circumstances there seemed to be no reason for the district court to delay its review of the antitrust claims.

43. 603 F.2d at 798. With the creation of the Department of Energy and the transfer of the FPC's powers to the Federal Energy Regulatory Commission (FERC), the latter agency received additional authority with respect to the transmission of power. *See id.* at 793 n.1. The

that the Commission principally had responsibility for rates and charges[44] and that prior judicial edicts[45] disapproved of its ordering interconnections of facilities or coordinated power development by utilities,[46] the court of appeals concluded that the FPC had clearly "lacked authority to deal with the problems which were present in the district court case . . . . [T]he referral to the Commission was a futile move . . . . [I]t would have been merely a postponement of the day for coming to grips with the monopolizing issue."[47] Thus, the Tenth Circuit concluded that the doctrine of primary jurisdiction was not relevant to the matter; a trial on the merits of the plaintiff's claims could properly proceed. The mere possibility of a conflict between a judicial decision and the agency's disposition of the merger application was not enough to require abstention.[48]

On rehearing, the court of appeals considered the effect of the Public Utility Regulatory Policies Act,[49] which amended the Federal Power Act and increased the FERC's regulatory authority,[50] on its earlier disposition of *Sunflower Electric*. Acknowledging the general rule that a change of law must be given effect in a pending case,[51] the court nevertheless invoked a limitation on the rule that prevents its application if "manifest injustice" might result or if a statute and its legislative history indicate a contrary intent.[52] The court of appeals found that a referral of the case to the FERC would create additional delays and further prolong an already protracted lawsuit.[53]

> At bar Sunflower seeks treble damages . . . , injunctive relief in the form of wheeling and power interconnects, and attorneys' fees. It is possible that it would not be deprived of its rights in this regard if the matter were to be transferred to the Commission. It is certain, however, that they [*sic*] would suffer delay and a hazard of complete denial because a delay of this kind is frequently critical.[54]

In the congressional conference report to the Public Utility Regulatory Policies Act, the Tenth Circuit found expressions of an intention to preserve the courts' jurisdiction over actions involving public utilities that arise under the antitrust laws.[55] This legislative history lent further support to the court of appeals' conclusion that the new law could not be applied in *Sunflower*

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court did not apply the Federal Power Act's amendments that created the broader authority because Congress did not expressly give them retroactive effect. *Id.* at 798.

44. *Id.*

45. *E.g.*, Conway Corp. v. FPC, 510 F.2d 1264 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976). *See also* Richmond Power & Light v. FERC, 574 F.2d 610 (D.C. Cir. 1978).

46. 603 F.2d at 799.

47. *Id.*

48. *Id.* at 798. *See also* Otter Tail Power Co. v. United States, 410 U.S. at 377.

49. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified at 16 U.S.C. §§ 2601-2645 (Supp. III 1979)).

50. *See* note 43 *supra*.

51. 603 F.2d at 800.

52. *Id.* (quoting Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974)).

53. Sunflower Electric instituted the action in 1975. 603 F.2d at 793.

54. *Id.* at 801.

55. "[I]t is not intended that the courts defer actions arising under the antitrust laws pending a resolution of such matters by the Federal Energy Regulatory Commission. . . . [T]he courts have jurisdiction to proceed with antitrust cases without deferring to the Commission for the exercise of primary jurisdiction." H.R. REP. NO. 95-1750, 95th Cong., 2d Sess. 68, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7659, 7802.

Electric to work a referral to the agency even though the FERC could, with its new powers, grant the relief that the plaintiff requested. Thus, there proved to be "no escape from the conclusion that the cause must be heard by the district court."[56]

IV. SCOPE OF AUTHORITY

A. *Price Support Loans*

The plaintiff in *Hiatt Grain & Feed, Inc. v. Bergland*,[57] a class action, challenged the authority of the Secretary of Agriculture to promulgate regulations authorizing price support loans to cooperatives for wheat and feed grains.[58] Relying on the pertinent statutory language and on congressional policy, as well as on the agency's construction of the controlling statute,[59] the Tenth Circuit held that the Secretary had such authority and affirmed the district court's judgment.[60]

The plaintiff argued that the statute authorizing the Secretary of Agriculture to make loans to "cooperators"[61] contemplates that assistance will be given to producers. Hiatt Grain urged that farmers' marketing cooperatives are not producers and, therefore, are not cooperators within the meaning of the controlling law.[62] Observing that cooperatives are merely an aggregation of individual producers[63] and noting that a cooperative must be approved by the Secretary to be eligible for a price support loan,[64] the court of appeals focused on statutory language directing the Secretary to furnish price supports "through loans, purchases, *or other operations*,"[65] and "through the Commodity Credit Corporation *and other means* available to him."[66] In these phrases the court found evidence of sufficient congressional guidance and direction to justify the agency's action. It also pointed to long-standing congressional interest in promoting the use of marketing cooperatives to implement farm programs.[67] In the appellate court's view, this policy, coupled with the express language of the statute, allowed only one conclusion.

Evidence of the agency's construction of the statutory mandate to make price supports available further persuaded the court of the propriety of the Secretary's wheat regulations. Acting on the assumption that it had the requisite authority, the agency had on previous occasions allowed loans to cooperatives for such other commodities as cotton, peanuts, and rice.[68] The court identified these actions as "a clear interpretation demonstrated by parallel

56. 603 F.2d at 802.
57. 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).
58. 602 F.2d at 930.
59. *Id.* at 931-33.
60. *Id.* at 933-34.
61. *Id.* at 931.
62. *See* 7 U.S.C. § 1428b (Supp. III 1979).
63. 602 F.2d at 932.
64. *Id.*
65. 7 U.S.C. § 1441 (1976) (emphasis added).
66. *Id.* § 1421(a) (emphasis added).
67. 602 F.2d at 933.
68. *Id.*

programs,"[69] and, in keeping with the judicial policy of according great weight to an administrative body's construction of the laws it is directed to execute,[70] the court found this evidence sufficient to uphold the challenged regulations.[71] The court of appeals also presumed congressional awareness of the agency's prior conduct with respect to price supports,[72] implying that Congress could have acted to prohibit loans to cooperatives had it disapproved of the practice.

In disposing of the plaintiff's allegation that procedural infirmities attended the promulgation of the regulation,[73] the appellate court noted that the agency had furnished a reasoned decision based on an economic analysis and an impact statement. Furthermore, it had complied with the Administrative Procedure Act's rulemaking requirements.[74] Thus, the regulation was free of defects.

B. *Distribution of Royalty Oil*

Unlike the administrative interpretation of the controlling statute in *Hiatt Grain & Feed*, which the Tenth Circuit found to be consistent with a reasonable interpretation and with congressional directives,[75] the Secretary of the Interior's construction of the O'Mahoney Amendment[76] to the Mineral Lands Leasing Act of 1920[77] was rejected by the court in *Plateau, Inc. v. Department of the Interior*[78] as being inconsistent with the legislative intent.[79] Accordingly, the court of appeals upheld the district court's invalidation of certain regulations enacted by the agency governing the distribution of royalty oil[80] to refineries.[81]

The plaintiff, a small oil refinery, objected to the Secretary's conditioning eligibility for sales of royalty oil on satisfaction of the Small Business Administration's criteria for a "small business enterprise."[82] Plateau argued that Congress had expressly limited recipients to refineries lacking a source for crude oil supplies; thus, any attempt by the agency to impose further restrictions exceeded the scope of its authority.[83]

Following a brief review of the legislative history,[84] the Tenth Circuit sided with the plaintiff, concluding that "the amendment itself identifies the

69. *Id.*
70. *See* Udall v. Tallman, 380 U.S. 1, 4 (1965).
71. 602 F.2d at 934.
72. *Id.* at 933.
73. *Id.* at 934.
74. *See* 5 U.S.C. § 553 (1976).
75. 602 F.2d at 934.
76. Act of July 13, 1946, Pub. L. No. 79-506, 60 Stat. 533 (1946) (codified in 30 U.S.C. § 192 (1976)).
77. 30 U.S.C. §§ 181-263 (1976).
78. 603 F.2d 161 (10th Cir. 1979).
79. *Id.* at 164.
80. According to the appellate court, "[r]oyalty oil is received as in-kind payment for royalties from oil and gas leases on federal lands." *Id.* at 161 n.1. The Secretary of the Interior is authorized to sell such oil to refineries. *Id.* at 161 n.2.
81. *Id.* at 164.
82. *Id.* at 161. *See* 30 C.F.R. § 225.2 (1978); 13 C.F.R. § 121.3-9(a)(1) (1980).
83. 603 F.2d at 163.
84. *Id.*

refineries it is intended to benefit. The challenged regulation goes beyond what Congress authorized."[85] The court rejected the Secretary's claim to broad, unfettered discretion in the administration of the royalty oil program. Noting the variations in the agency's application of the statute, as reflected in regulations promulgated through the years since its enactment,[86] the court advised that "even if the Secretary had followed a consistent pattern of administrative interpretation, to the extent such interpretation might have been inconsistent with the congressional mandate, it would have been unavailing."[87]

C. *Product Effectiveness Standards*

On a question of first impression concerning the Environmental Protection Agency's (EPA) power under the Federal Insecticide, Fungicide, and Rodenticide Act[88] to establish and regulate effectiveness standards for pesticides, the Tenth Circuit rejected the agency's interpretation of its statutory authority and confined it to a limited regulatory scheme. In *S.L. Cowley & Sons Manufacturing Co. v. EPA*[89] the petitioner appealed the EPA's cancellation of the registration of Cowley's Original Rat and Mouse Poison. The EPA justified its action on the ground that the poison did not meet minimum effectiveness standards for rodenticides.[90]

The court of appeals distinguished the agency's legitimate authority to sanction the misbranding and inaccurate labelling of products from the EPA's assumed ability to enforce effectiveness criteria. "[T]he agency has a duty under the statute to insure that the product satisfies" claims of efficacy accompanying it; but, "[n]othing in either the scheme or the specific language hints at a broader standard."[91] In reversing the EPA's cancellation order, the appellate court directed that the registrant manufacturer was entitled to a hearing only on charges of improper labelling.[92]

D. *Transportation Matters*

In *Walker Field, Colorado, Public Airport Authority v. Adams*[93] the Tenth Circuit held that the Secretary of Transportation has broad discretion under the Airport and Airway Development and Revenue Act[94] in granting financial assistance for airport improvements. The plaintiff challenged the Secretary's attempt to require Mesa County and the City of Grand Junction, Colorado to act as sponsors and assume financial obligations for the local airport's construction project. The two political subdivisions refused to cosponsor the venture. The plaintiff airport authority made improvements

85. *Id.* at 164.
86. *Id.* at 163.
87. *Id.* at 164.
88. 7 U.S.C. §§ 135-135k (1976).
89. 615 F.2d 1312 (10th Cir. 1980).
90. *Id.* at 1313.
91. *Id.* at 1314.
92. *Id.*
93. 606 F.2d 290 (10th Cir. 1979).
94. 49 U.S.C. §§ 1701-1742 (1976).

with its own funds, but the government declined to reimburse it without the participation of the City and the County in the grant agreement.[95]

Agreeing with the Secretary of Transportation's contention that he had statutory authority to impose reasonable and necessary terms and conditions on grants made under the Airport Development Act,[96] the district court dismissed the complaint for failure to state a legally cognizable claim.[97] The Tenth Circuit also adopted the Secretary's argument and further pointed to statutory provisions directing the Secretary to insure that sufficient funds are available to cover construction expenses not shared by the federal government.[98] Relying on these broad mandates, the appellate court ignored the airport authority's argument that neither the City nor the County fell within the statutory definition of a sponsor.[99]

The plaintiff, joined by the State of Colorado as *amicus*, also claimed a violation of the constitutional doctrine of intergovernmental immunity, alleging that the Secretary's actions effectively overrode the State's express policy of promoting the financial independence of airport facilities.[100] The court, however, disposed of this argument in short order, citing the federal government's recognized authority to impose conditions on the funds it disburses to the states. Furthermore, the court of appeals found no conflict between the Secretary's requirement and the Supreme Court's instruction in *National League of Cities v. Usery*[101] that financial conditions cannot "displace the States' freedom to structure integral operations in areas of traditional governmental functions."[102]

Judge McKay, in dissent, opined that the majority's insistence that the challenged administrative action imposed "no direct, mandatory terms and conditions" on the state and its subdivisions and the majority's further assumption that the state and its agencies, such as the Walker Field Airport Authority could, by declining federal grants, easily avoid obligations exacted by the federal government,[103] were superficial rationales for the decisions. The dissenting judge noted that few states are financially able to provide all services to their citizens without some federal assistance.

> The possibility of refusing federal grants is often only apparent, not real . . . . When grants have risen to this level of necessity, attached conditions must withstand close constitutional scrutiny similar to that applied in *National League of Cities* to direct regulation of state governmental structure. The federally imposed requirements here fail to survive that scrutiny.[104]

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95. 606 F.2d at 293.

96. The Secretary pointed to statutory language directing him to offer project grants "upon such terms and conditions as [he] considers necessary to meet the requirements of this subchapter and the regulations." 49 U.S.C. § 1719 (1976).

97. 606 F.2d at 294. The district court also found that if a cause of action did in fact exist, the United States Court of Claims had exclusive jurisdiction over it. *Id.*

98. *Id.* at 296.

99. *See id.* at 295-96.

100. *Id.* at 297.

101. 426 U.S. 833 (1976).

102. 606 F.2d at 297 (quoting National League of Cities v. Usery, 426 U.S. at 852).

103. 606 F.2d at 297.

104. *Id.* at 299 (McKay, J., dissenting).

On constitutional grounds and on general principles of federalism, Judge McKay would have reversed the district court's judgment.[105]

In what was probably a last frantic effort, the States of Kansas and Minnesota and the City of Nashville, Tennessee requested judicial assistance to avert the termination of passenger rail service in their respective locales. Their action on appeal, *Kansas v. Adams*,[106] sought reversal of a lower court's dissolution of an order temporarily restraining the cessation of service. To support their position, they urged that the Secretary of Transportation's preparation of a plan for reduction of passenger service violated a number of federal laws,[107] including the National Environmental Policy Act (NEPA)[108] and the Clean Air Act,[109] and was, therefore, improper and unauthorized.

The Tenth Circuit upheld the district court's action and affirmed its denial of a preliminary injunction. After reviewing the language and the legislative history of the Amtrak Reorganization Act of 1979,[110] which incorporated and adopted the Secretary of Transportation's recommendations, the court of appeals concluded that the Congress had closely scrutinized and ultimately ratified the plan and had approved the procedures the agency used to restructure the rail system.[111] In thus lending its imprimatur to the administrative report, the Congress effectively made the plan its own. "[W]e have," the court said, "a direct Congressional decision designing the basic rail system, without the necessity of following [NEPA's procedural provisions]."[112] Mindful of the sacred principle of the separation of powers, the Tenth Circuit refused to inquire further into the wisdom of the surrogate legislative determination.[113]

Even in this era of airline deregulation, it appears from the Tenth Circuit's third transportation decision that air carriers remain subject to some administrative oversight. In fact, the court's holding in *Frontier Airlines, Inc. v. CAB*[114] indicates that the Airline Deregulation Act of 1978[115] implies that with respect to attempted departures from established routes, airlines are still at the mercy of the federal regulators.

Frontier notified the Civil Aeronautics Board (CAB) early in 1979 of its intention to discontinue service to Alamogordo and Silver City, New Mexico. When the ninety-day notice period had elapsed without a replacement carrier having entered the market, the CAB ordered Frontier to continue its

105. *Id.* at 300.
106. 608 F.2d 861 (10th Cir. 1979), *cert. denied*, 445 U.S. 963 (1980).
107. *Id.* at 863-64.
108. 42 U.S.C. §§ 4321-4361 (1976). The other acts and regulations allegedly violated by the Secretary's action were the Amtrak Improvement Act of 1978, Pub. L. No. 95-421, 92 Stat. 923 (1978) (codified in scattered sections of 45 U.S.C.), the National Historic Preservation Act, 16 U.S.C. §§ 470-470t (1976), and certain guidelines issued by the Council on Environmental Quality, 40 C.F.R. §§ 1500.1-1501.4 (1980).
109. 42 U.S.C. §§ 7401-7642 (Supp. II 1978).
110. Pub. L. No. 96-73, 93 Stat. 537 (1979) (codified in scattered sections of 45, 49 U.S.C.).
111. *See generally* 608 F.2d 864-66.
112. *Id.* at 866.
113. *Id.* at 867.
114. 621 F.2d 369 (10th Cir. 1980).
115. Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified in scattered sections of 49 U.S.C.).

service for several additional thirty-day intervals. Even after a new airline offered to establish routes to the two communities, the CAB ordered Frontier to maintain "back-up" service until it could be certain the new carrier was capable of handling the routes. Disgruntled by its inability to ease out of the Alamogordo and Silver City runs, the airline sought judicial review of the Board's "back-up" orders.[116]

Disposing quickly of the CAB's mootness argument[117] and the agency's allegation that Frontier had not exhausted its administrative remedies,[118] the Tenth Circuit proceeded to review the Board's authority under the 1978 Airline Deregulation Act. The court found that concomitant with the agency's express statutory authority to order an airline to serve a route until a replacement carrier steps in[119] is the implied authority to request an airline to provide support service until the new carrier is established on the route. "The statutory grant of the greater implies a grant of the lesser, i.e., the power to compel actual service carries with it the power to order back-up service."[120] The court considered this ruling necessary to effectuate the legislative intent "that no small community shall be left without essential air services, on a continuing basis."[121] As in *Hiatt Grain & Feed, Inc. v. Bergland*[122] the Tenth Circuit found additional support for its decision in the agency's construction of the applicable statute insofar as it was reasonable and comported with the apparent congressional intent.[123]

V. SUFFICIENCY OF THE ADMINISTRATIVE RECORD

Two cases required the Tenth Circuit to consider the need for and sufficiency of an administrative record. *United States v. X-Otag Plus Tablets*[124] involved a challenge to the district court's refusal to remand a case for development of an administrative record. In *Midwest Maintenance & Construction Co. v. Vela*,[125] on the other hand, the inadequacy of the existing record precluded the district court from upholding an agency's decision.

The appellant in the *X-Otag Plus Tablets* case was a pharmaceutical manufacturer of a prescription drug used to relieve muscular pain.[126] The

116. 621 F.2d at 370.

117. "A 30-day order of the type here involved is almost a classic example of a matter which is 'capable of repetition, yet evading review.'" *Id.* (citing Roe v. Wade, 410 U.S. 113, 125 (1973)).

118. In light of the Board's virtual certainty that it had authority to issue back-up orders, "it is very doubtful that the Board would have vacated its back-up orders had a motion for reconsideration been filed." 621 F.2d at 371. Apparently, the court felt that the likely futility of an appeal to the agency exempted Frontier from the exhaustion requirement. *See* American Fed'n of Gov't Employees v. Acree, 475 F.2d 1289 (D.C. Cir. 1973). Additionally, administrative remedies need not be pursued "where the question is solely one of statutory interpretation." 621 F.2d at 371 (citing McKart v. United States, 395 U.S. 185, 197-98 (1969)).

119. *See* 49 U.S.C. § 1389(a)(6) (Supp. III 1979).

120. 621 F.2d at 372.

121. *Id.* at 371-72.

122. *See* 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). For a discussion of *Hiatt Grain & Feed*, see text accompanying notes 57-71 *supra*.

123. 621 F.2d at 372.

124. 602 F.2d 1387 (10th Cir. 1979).

125. 621 F.2d 1046 (10th Cir. 1980).

126. 602 F.2d at 1389.

Food and Drug Administration (FDA) seized a quantity of the drug and instituted condemnation proceedings.[127] It also sought an injunction to prevent shipments of the drug in interstate commerce.[128] To justify these enforcement actions, the government contended that X-Otag Plus was a "new drug" within the meaning of the Food and Drug Act[129] and could not be introduced into interstate commerce until a new drug application or an abbreviated new drug application had been approved by the FDA.[130] The manufacturer had in fact submitted the required applications[131] but had not done so prior to circulating the drug for public consumption.[132]

The district court was called upon to determine whether the FDA's decision to commence an enforcement action by way of condemnation constituted a declaratory order[133] requiring development of an administrative record.[134] That court concluded the FDA's allegation that X-Otag Plus was a "new drug" was not such an order but was, rather, an assertion of probable cause, which was necessary to support the enforcement action.[135]

The Tenth Circuit agreed and affirmed the lower court's refusal to remand the case to the FDA. Crucial to its decision was a finding that the condemnation proceeding had been brought against only one drug manufacturer and involved only a limited quantity of the drug.[136] These circumstances removed it from the realm of a declaratory order and obviated the need for a formal record. The court distinguished *Rutherford v. United States*,[137] which, the appellant urged, required a remand to the FDA, noting that in *Rutherford* the agency had classified laetrile as a "new drug" and banned its distribution without issuing a formal rule or producing a record to support its decision. The court found that the district court had ample evidence to uphold the FDA's assertion that X-Otag Plus was a "new drug" for probable cause purposes, and the appellate court concluded that the manufacturer had had an opportunity at trial to rebut the FDA's case before an injunction or destruction order was issued.[138]

The Tenth Circuit also upheld the trial court's finding that the government had established by a preponderance of the evidence that X-Otag Plus was a "new drug" for purposes of the condemnation proceeding.[139] But, the court of appeals reversed the lower court's destruction order, concluding that

127. The FDA has authority to seize any misbranded or adulterated food, drug, or cosmetic item introduced into interstate commerce. *See* 21 U.S.C. § 334 (1976).

128. *See* 21 U.S.C. §§ 331(d), 332(a) (1976).

129. *Id.* § 321(p)(1).

130. *See id.* § 355(a).

131. 602 F.2d at 1389-90.

132. *Id.* at 1390.

133. The Supreme Court has defined a declaratory order as a "self-operative industry-wide regulation." Abbott Laboratories v. Gardner, 387 U.S. 136, 147 (1967). *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.10 (1958).

134. United States v. X-Otag Plus Tablets, 441 F. Supp. 105, 108 (D. Colo. 1977).

135. *Id.* at 109.

136. 602 F.2d at 1390.

137. 542 F.2d 1137 (10th Cir. 1976).

138. 602 F.2d at 1390.

139. *Id.* at 1391.

the statutory language allowing destruction of condemned articles[140] is "advisory rather than mandatory and clearly implies that the court has some discretion over the time and manner of destruction."[141]

In *Midwest Maintenance & Construction Co. v. Vela*[142] the appellant sought review of a ruling by the Secretary of Labor declaring its ineligibility to bid on government contracts for a three-year period. The appellant corporation was awarded a contract to maintain and repair certain federally owned equipment in several regions in Texas. Federal law requires contractors working for the government to pay wages compatible with those paid to other employees "in the locality"[143] but in no event should compensation fall below the minimum wage[144] provided in the Fair Labor Standards Act.[145] Many government contracts include a wage determination with which a contractor must comply. Midwest had received such a scale for counties adjacent to where it performed its contract, but it had been given nothing to indicate appropriate remuneration in the county where the work was to be done.[146]

As Midwest was nearing completion of the contract, the Department of Labor disclosed that the company had paid its employees less than the amounts specified in the wage determination for the neighboring regions, although it had paid more than the federal minimum wage.[147] Midwest, of course, challenged the agency's attempts to force Midwest to compensate for the alleged underpayments, and the dispute culminated in the filing of an administrative complaint that charged the company with violations of certain sections of the Service Contract Act.[148] An administrative law judge found Midwest liable for underpayments totalling $61,337.24;[149] the administrator of the Wage and Hour Division upheld the decision; and the Secretary of Labor imposed the ineligibility sanction. The district court subsequently affirmed these rulings.[150]

On appeal, the Tenth Circuit rejected the finding that Midwest had waived or relinquished its rights to obtain a clarification of the applicable wage scale by failing to do so in a timely manner. The appellate court also repudiated a finding that the company had taken advantage of competing bidders when the contract was initially awarded. Both conclusions, the court said, lacked support in the administrative record.[151]

The court also had to consider the meaning of "locality" as used in the Service Contract Act[152] because the locality determines the appropriate

140. 21 U.S.C. § 334(d)(1) (1976).
141. 602 F.2d at 1391.
142. 621 F.2d 1046 (10th Cir. 1980).
143. 41 U.S.C. § 351(a)(1), (2) (Supp. III 1979).
144. *Id.* § 351(b)(1).
145. 29 U.S.C. § 206(a)(1) (1976).
146. 621 F.2d at 1047.
147. *Id.*
148. *See* 41 U.S.C. § 351(a)(1), (2) (Supp. III 1979).
149. 621 F.2d at 1048.
150. *Id.*
151. *Id.* at 1049.
152. 41 U.S.C. § 351(a)(1) (1976). *See* text accompanying notes 143-145, *supra.*

wage. Midwest argued that locality meant the place of performance, but the agency disagreed and designated it as the location of the federal contracting facility.[153] The Tenth Circuit attempted to find support for the agency's contention in the record of the proceeding.[154] Observing that neither the administrative law judge nor the wage and hour administrator had discussed the terms of the bid invitation or the contract, the court noted the ambiguities in both documents and chided the government for failing to specify the meaning of "locality."[155] Furthermore, the agency's failure to analyze the contract and to indicate the reasoning underlying its ultimate definition of the word proved fatal. On the basis of the "miserable administrative record"[156] the appellate court refused to decide whether the place of performance or the location of the contracting facility controlled the compensation rate. Thus, the court was unable to alleviate the void created by the absence of appellate decisions on the issue.[157] The Tenth Circuit Court further concluded that the agency had failed to establish a "rational basis" for its decision.[158] Accordingly, the court set aside the ineligibility sanction and remanded the case to the district court with instructions that the matter be returned to the Department of Labor for further proceedings.[159]

VI. ADMINISTRATIVE SEARCH WARRANTS

The United States Supreme Court's decision in *Marshall v. Barlow's, Inc.*[160] indicates that administrative inspections of private premises conducted without warrants violate the fourth amendment's[161] prohibition against unreasonable searches. In conformity with the Court's mandate, and after officers of the Occupational Safety and Health Administration (OSHA) had been denied entry, the Department of Labor obtained a warrant ex parte to search the New Mexico plant of the W & W Steel Company to confirm the existence of unsafe conditions as alleged by an employee. The company subsequently contested the validity of the warrant in *Marshall v. W & W Steel Co.*,[162] charging that the agency had had no authority to obtain the warrant ex parte and without notice. W & W Steel argued that the regulation enabling the Department to secure inspection warrants[163] was invalid. The company asserted that the regulation had been improperly amended by reason of the agency's failure to provide notice of the change and opportunity for comment.[164]

153. 621 F.2d at 1049.

154. The applicable standard for judicial review in this case provided that the agency's finding would be conclusive if supported by a preponderance of the evidence. *Id.* at 1048.

155. *Id.* at 1050.

156. *Id.*

157. *Id.* at 1049.

158. *Id.* at 1051.

159. *Id.*

160. 436 U.S. 307 (1978).

161. U.S. CONST. amend. IV.

162. 604 F.2d 1322 (10th Cir. 1979).

163. 29 C.F.R. § 1903.4 (1979).

164. 604 F.2d at 1325. The regulation was amended in 1978 to define "compulsory process," which the agency is authorized to employ to gain entry to private establishments for inspections, to include ex parte warrants. *See* 29 C.F.R. § 1903.4(d) (1979).

In its review of the matter, the Tenth Circuit observed that the Supreme Court seemed to approve the issuance of ex parte warrants in its *Barlow's* opinion.[165] Having thus briefly considered the constitutionality of ex parte warrants[166] and thereby implicitly holding that the Secretary of Labor could properly procure one, the Tenth Circuit accepted the agency's argument that the challenged amendment was an interpretive rule.[167] As such, it was expressly exempt from the Administrative Procedure Act's notice and comment requirements[168] and was, therefore, validly promulgated.

The court of appeals also agreed that the employee's written complaint and his supplemental written statement together with the OSHA compliance officer's account of his attempts to verify the complaint were sufficient evidence to justify a finding of probable cause to support issuance of the inspection warrant. The court rejected the company's contention that the scope of the warrant was too broad.[169] Accordingly, the Tenth Circuit affirmed the lower court's order holding the W & W Steel Company in contempt and imposing a fine for its repeated refusals to admit an OSHA inspector bearing the search warrant.[170]

VII. COMPULSORY PROCESS

One realm of the administrative scheme in which the judiciary is able to take an active role is that involving the enforcement of compulsory process. Although many agencies have statutory authority to issue subpoenas and summonses,[171] the documents have no independent force.[172] Thus, if a party chooses not to comply with an agency's request for information during the course of a proceeding, the agency must seek judicial assistance to compel submission to its directive.[173]

The Tenth Circuit considered several compulsory process cases during the past year. Significant for their sheer numerosity are those cases the court summarily disposed of involving the enforcement of Internal Revenue Service (IRS) summonses. Three opinions[174] merit brief consideration here be-

165. *See* 436 U.S. at 319-20.

166. 604 F.2d at 1325 n.1.

167. *Id.* at 1325-26. For a discussion of the force and effect of interpretative rules, see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.03 (1958); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.8-.18 (2d ed. 1978).

168. *See* 5 U.S.C. § 553(b) (1976).

169. 604 F.2d at 1326.

170. *Id.* at 1326-27.

171. *See, e.g.*, 12 U.S.C. § 1464(d) (1976) (Federal Home Loan Bank Board); 15 U.S.C. § 79r(c) (1976) (Securities and Exchange Commission); 49 U.S.C. § 1484(b) (1976) (Civil Aeronautics Board); 49 U.S.C. § 1903(b)(1) (National Transportation Safety Board).

172. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3.11, 3.12 (1958).

173. The Administrative Procedure Act authorizes courts to enforce compulsory process and establishes the appropriate standard for review.

> On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

5 U.S.C. § 555(d) (1976).

174. The opinions discussed in this section were ordered by the court to be published. Two additional compulsory process opinions were issued for publication, both of which were consoli-

cause they were the bases for the court's multiple affirmances of the district courts'[175] decisions to enforce the challenged process.

In *United States v. Income Realty & Mortgage, Inc.*[176] and in *United States v. MacKay*[177] the court of appeals relied on two Supreme Court decisions to reject the taxpayers' arguments that the IRS summonses had been issued improperly for the purpose of pursuing tax fraud investigations. The leading case of *United States v. Powell*[178] established, and the case of *United States v. LaSalle National Bank*[179] further refined, the test for ascertaining whether an IRS summons has been issued for the permissible function of determining civil tax liability or for the impermissible purpose of substantiating suspicions of criminal conduct. To justify its use of the summons power, the Service must show that its investigation is being conducted for a legitimate, that is, a civil, purpose; that its request for documents or testimony relates to that purpose; that the information sought is not already in its possession; and that the statutory procedure has been followed.[180] Furthermore, the summons must be issued before the IRS has recommended a criminal investigation by the Department of Justice, and it must appear that the civil liability claims will be pursued as well.[181] Finally, the taxpayer carries the substantial burden of proving that the IRS has instituted compulsory process in bad faith.[182]

On the basis of the record before it, which apparently indicated to the appellate court that the Supreme Court's requirements had been met, the Tenth Circuit concluded in *Income Realty* that the district court had properly ordered enforcement of the summonses at issue. The court of appeals also found insufficient evidence of harrassment to support the taxpayer's charge.[183] Similarly, in *MacKay*, the court carefully reviewed the *Powell* and *LaSalle* decisions[184] and scrutinized the record for evidence that the requisite conditions had been met.[185] Ultimately, it affirmed the district court's judgment enforcing the challenged IRS summons.[186] Despite substantial criminal overtones to the Service's investigation, the court could not conclude that the effort was solely in pursuit of a criminal sanction. "The activities of the

dations of multiple appeals. *See* United States v. Omohundro, 619 F.2d 51 (10th Cir. 1980); United States v. Traynor, 611 F.2d 809 (10th Cir. 1979). Eighteen more enforcement opinions were not issued for publication.

175. The federal court for the District of Colorado was beseiged by these summons challenges. It heard 17 cases. The District of Wyoming and the Western District of Oklahoma were responsible for the balance.

176. 612 F.2d 1224 (10th Cir. 1979).

177. 608 F.2d 830 (10th Cir. 1979).

178. 379 U.S. 48 (1964).

179. 437 U.S. 298 (1978). *See generally* Note, *The Institutional Good Faith Test for Enforcement of an Internal Revenue Service Summons*: United States v. LaSalle National Bank, 56 DEN. L.J. 639 (1979).

180. United States v. Powell, 379 U.S. at 57-58; United States v. LaSalle Nat'l Bank, 437 U.S. at 312.

181. United States v. LaSalle Nat'l Bank, 437 U.S. at 318.

182. *Id.* at 316. "Without doubt, this burden is a heavy one." *Id.*

183. 612 F.2d at 1226.

184. 608 F.2d at 832-33.

185. *Id.* at 833-34.

186. *Id.* at 834.

agents were entirely consistent with the [*LaSalle*] concept that criminal tax fraud charges and civil penalties are interrelated."[187]

In *United States v. Fahey*[188] two taxpayers attempted to prevent enforcement of a summons with the novel contention that the federal government has no constitutional authority to initiate civil suits against United States citizens. Therefore, the taxpayers argued, a court is without jurisdiction to enforce an IRS summons or, apparently, any other agency's compulsory process. The Tenth Circuit's four-paragraph opinion, cited frequently in subsequent enforcement decisions,[189] rejected this admittedly "creative" argument as "frivolous."

The court of appeals also had occasion to consider the exercise of an agency's subpoena power. *NLRB v. Dutch Boy, Inc.*[190] challenged a district court's enforcement of three subpoenas duces tecum issued by the National Labor Relations Board (NLRB). While preparing for hearings on unfair labor practice charges that had been filed against Dutch Boy, the NLRB subpoenaed certain documents belonging to the company. When the latter refused to produce all of the requested materials, the Board sought judicial assistance. Dutch Boy also attempted to enforce a subpoena initially granted it to obtain certain of the NLRB's records, which was subsequently revoked by an administrative law judge. The lower court, however, dismissed Dutch Boy's application for enforcement, asserting that it lacked jurisdiction over the matter.[191]

The Tenth Circuit, affirming the decision below, carefully limited the issues on appeal to those concerning enforcement of the NLRB subpoenas and thwarted Dutch Boy's attempts to interject for review certain alleged procedural irregularities in the administrative law judge's revocation of its subpoena.[192] The court found no fault with the district court's dismissal of the company's claim, holding that a district court has no power "to hear a private application for enforcement of a subpoena."[193] Additionally, the court found evidence in the record indicating that the documents sought by the NLRB satisfied the prerequisites for issuance of a subpoena in that they " 'relate[d] to or touch[ed] the matter under investigation.' "[194] Therefore, it

187. *Id.* at 833. In the course of its analysis, the Tenth Circuit rejected, as contrary to *LaSalle*'s directive, the taxpayers' "somewhat ingenious argument" that the burden of proving bad faith should shift to the government when a taxpayer has shown that the IRS is seeking information for a criminal prosecution. *Id.* at 833.

188. 614 F.2d 690 (10th Cir. 1980).

189. A number of taxpayers in the court's unpublished opinions, perhaps unaware of the *Fahey* decision, raised this argument. *See, e.g.*, United States v. Youmans, No. 79-1437 (10th Cir. Mar. 28, 1980); United States v. Pielstick, No. 79-1885 (10th Cir. Mar. 28, 1980); United States v. Kelderman, No. 79-1873 (10th Cir. Mar. 28, 1980).

190. 606 F.2d 929 (10th Cir. 1979).

191. *Id.* at 931.

192. *See id.* at 933.

193. *Id.* at 932. The appellate court's statement seems broad enough to include any subpoena issued by an agency to a private party. The case cited in support of this proposition, however, holds only that the NLRB's subpoenas may not be enforced by a private party in a district court. Judicial action is appropriate only in a proceeding to review the Board's final order in a matter. *See* Wilmot v. Doyle, 403 F.2d 811, 814-16 (9th Cir. 1968).

194. 606 F.2d at 932 (quoting Cudahy Packing Co. v. NLRB, 117 F.2d 692, 694 (10th Cir. 1941)).

concluded that the lower court had not arbitrarily enforced the Board's subpoenas or abused its discretion and therefore could not be reversed.[195] Dutch Boy also failed in its attempt to assert that the NLRB had issued its subpoenas solely to harrass the company. The court of appeals held that Dutch Boy had not met its burden of establishing the agency's improper purpose.[196]

VIII. GOVERNMENT LARGESSE

An apparent conflict between state and federal welfare laws occasioned the controversy before the Tenth Circuit in *Nolan v. De Baca*.[197] In implementing its plan for the federally funded Aid to Families with Dependent Children program (AFDC), the State of New Mexico promulgated a regulation that reflected an aspect of its community property system. Specifically, the State required one-half of the income earned by the spouse of an eligible child's natural or adoptive parent to be treated as income of the natural or adoptive parent.[198] The spouse's legal obligation to support the child was not a concern. In the Nolans' situation this computation substantially reduced the AFDC payments to the children.[199] Although the mother had no actual income, she was credited with one-half of the sum that her husband, who was her children's nonadoptive stepfather, earned. This constructive income was deemed available to meet the children's needs.

Claiming that New Mexico's regulation blatantly conflicted with the pertinent regulation enacted by the Federal Department of Health, Education and Welfare (HEW), which prohibits consideration, in the calculation of AFDC benefits, of funds available to family members who have no legal duty to support the dependent children,[200] Mrs. Nolan instituted an action against the State's Department of Health and Social Services. She sought an injunction forbidding the agency to enforce the regulation and succeeded in district court. That tribunal found the Supremacy Clause[201] controlling and granted a motion for summary judgment in Mrs. Nolan's favor.[202]

Acknowledging the well-established rule[203] that local AFDC regulations "may not contravene Social Security Act provisions or valid HEW regulations," the Tenth Circuit affirmed the lower court's decision.[204] "Operation of appellant's community property regulation obviously contravenes the federal act and HEW's regulation."[205]

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195. 606 F.2d at 932.

196. *Id.* at 933.

197. 603 F.2d 810 (10th Cir. 1979).

198. *Id.* at 812-13.

199. Before the regulation was adopted their benefits totaled $163.00 per month; after promulgation of the regulation the monthly payments dropped to $2.00. *Id.* at 811.

200. 45 C.F.R. § 223.90(a) (1979).

201. U.S. CONST. art. VI, § 2.

202. *See* 603 F.2d at 811.

203. *See* King v. Smith, 392 U.S. 309, 333 (1968).

204. 603 F.2d at 812-13.

205. *Id.* The Tenth Circuit heard several other cases during the year involving various forms of federal financial assistance to individuals. Edwards v. Califano, 619 F.2d 865 (10th Cir. 1980) and Markham v. Califano, 601 F.2d 533 (10th Cir. 1979), concerned social security benefits. In *Edwards*, the court reversed the district court's affirmance of HEW's denial of child

IX. RIGHTS OF FEDERAL EMPLOYEES

Two cases reviewed by the Tenth Circuit considered the rights of governmental employees under certain federal statutes.[206] Both involved relatively narrow issues.

In *Hurley v. United States*[207] the appellant, making his second appearance before the court of appeals, sought construction of the Back Pay Act,[208] which authorizes payment to a federal employee of all remuneration that he or she would have received had he or she not been the victim of "an unjustified or unwarranted personnel action."[209] He contended that the damages award he received following a determination that he had been unjustifiably transferred from his Federal Aviation Administration post in Texas to a position in Oklahoma should have included his sizeable claim for a per diem travel allowance. Hurley reasoned that during the period of his illegal transfer he was on travel status and, accordingly, was entitled to appropriate compensation.[210]

The court of appeals, however, ruled that the Back Pay Act does not encompass travel expenditures, thereby affirming the district court's denial of the appellant's claim. The statute permits reimbursement only of pay an employee would normally have received in the absence of the government's erroneous action.[211] Finding support in a decision from the United States Court of Claims,[212] which rejected an identical argument, the Tenth Circuit declined the proffered invitation "to engraft a provision that is not a part of the Act."[213]

Resolution of the petitioner's claim in *Phillips v. Merit Systems Protection Board*[214] necessitated an analysis of the application of the Civil Service Re-

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insurance benefits on the ground that the agency had not rebutted the statutory presumption of death arising from the father's unexplained absence of seven years. 619 F.2d at 868. The court affirmed a denial of disability benefits in *Markham*, holding that the evidence sustained a finding that the claimant was not so disabled as to be incapable of engaging in gainful employment. 601 F.2d at 536. Finally, in Gutierrez v. Califano, 612 F.2d 1247 (10th Cir. 1979), the Tenth Circuit reversed the lower court's order declaring a claimant eligible for Black Lung benefits after HEW had reached a contrary decision. The appellate court determined that data relied upon by the lower court to reach its decision had been improperly evaluated and were insufficient to overcome substantial evidence offered by the agency to support its denial of an award. *Id.* at 1249.

206. A third case, Stritzl v. United States Postal Serv., 602 F.2d 249 (10th Cir. 1979), reviewed a discharged federal employee's right to a hearing; it is therefore treated in *Part X: Procedural Due Process, infra* at 231. A fourth decision interpreting federal employees' rights under the Privacy Act, 5 U.S.C. § 552a (1976), is discussed in detail in *Part XII: The Privacy Act, infra* at 238.

207. 624 F.2d 93 (10th Cir. 1980).

208. 5 U.S.C. § 5596 (1976).

209. Federal regulations define "unjustified or unwarranted personnel action" as "an action of commission . . . or of omission . . . which thereby resulted in the withdrawal, reduction, or denial of all or any part of the pay, allowances, or differential . . . otherwise due an employee." 5 C.F.R. § 550.802(c) (1980).

210. 624 F.2d at 94.

211. *Id.* at 94-95.

212. Morris v. United States, 595 F.2d 591 (Ct. Cl. 1979).

213. 624 F.2d at 95.

214. 620 F.2d 217 (10th Cir. 1980).

form Act of 1978.[215] Phillips was removed from his position in the Merchant Marine in 1973. He appealed to the Civil Service Commission, which upheld the action, and to the Board of Appeals and Review, which affirmed the Commission's decision. Subsequently, a federal district court heard the case and remanded it to the Merit Systems Protection Board, successor to the Civil Service Commission,[216] for a new hearing including certain witnesses who had previously been unavailable. Following this hearing the Board affirmed the Commission's initial decision, and Phillips sought review by the court of appeals. The Merit Systems Protection Board, asserting that the appellate court lacked jurisdiction, moved for dismissal.[217]

The Tenth Circuit examined the provisions of the Civil Service Reform Act that authorize judicial review of the Board's final orders in a federal court of appeals. It focused, however, on a savings clause that makes the statute inapplicable to administrative proceedings pending on the statute's effective date. With the assistance of a regulation promulgated by the Merit Systems Protection Board specifying that an agency proceeding is considered pending or "existing" when "the employee has received notice of the proposed action,"[218] the court concluded that the new law did not apply to the case under consideration.[219] The petitioner had been notified of the personnel action before the Reform Act became effective even though the final adverse decision had been rendered after the statute's effective date. Granting the motion to dismiss, the court of appeals explained that Phillips' suit could be initially instituted only in a federal district court or in the court of claims.[220] The Tenth Circuit thus joined five other circuits that have reached a similar conclusion.[221]

X. Procedural Due Process and the Right to a Hearing

In two very different factual settings the Tenth Circuit rejected contentions that requirements of due process and of correct administrative procedure mandated hearings. *Stritzl v. United States Postal Service*[222] involved a discharged federal employee, and *Colorado v. Veterans Administration*[223] concerned the liability of state-supported educational institutions for overpayments of veterans' educational benefits.

Edwin Stritzl, a post office employee, was terminated for poor work habits and low productivity prior to the expiration of his ninety-day probation period. He was discharged without a hearing, and, after unsuccessful attempts to appeal the action through the American Postal Workers Union

215. Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5, 15, 28, 31, 38, 39, 42 U.S.C.).

216. For the court's summary of the 1979 reorganization of the Civil Service Commission, see 620 F.2d at 218.

217. 620 F.2d at 218.

218. 5 C.F.R. § 1201.191(b) (1979).

219. 620 F.2d at 219.

220. *See* 28 U.S.C. §§ 1346, 1491 (1976).

221. The court's ruling conforms with those of the First, Third, Fifth, Eighth, and District of Columbia Circuits. *See* cases cited in 620 F.2d at 219.

222. 602 F.2d 249 (10th Cir. 1979).

223. 602 F.2d 926 (10th Cir. 1979).

and the Civil Service Commission, he filed suit in the District Court for the District of Colorado. He alleged that the conditions of his termination violated the Postal Reorganization Act[224] and the due process clause of the fifth amendment.[225] The trial court rejected Stritzl's arguments, and, on appeal, the Tenth Circuit upheld the judgment for the Postal Service.[226]

The appellate court, in its review of the statutory and constitutional claims, first observed that the federal government has traditionally imposed a probationary status on new employees. During the period of probation an employee's rights are limited, and he or she is subject to termination for good cause without either a hearing or an opportunity to appeal. The court also noted that the postal workers' union acknowledges, and apparently accepts, this "historical fact," for the collective bargaining agreement affords probationary employees no access to the union's grievance procedures.[227]

The court then turned to Stritzl's contention that the Postal Reorganization Act's hearing requirement[228] changed this policy. The statute expressly protects "employment rights,"[229] and the appellate court agreed with the district court that a probationary employee, lacking such rights, cannot be considered a true employee for purposes of the statutory directive.

> We do not regard this statutory language as creating new substantive "employment rights." Specifically, we do not regard the statutory language here relied on as creating a right whereby probationary employees are entitled to receive a hearing before their probationary employment is terminated. If Congress had intended to create such an employment right for probationary employees, it would have said so in clear and understandable language. Congress did not do so, however.[230]

Accordingly, the Tenth Circuit refused to step where Congress had deemed it unnecessary to tread.[231]

In dictum, apparently intended to shed additional light on the Postal Reorganization Act's fair hearing requirement, the court instructed that this provision is limited by other sections of the statute authorizing the inclusion of grievance procedures in collective bargaining agreements.[232] Thus, such procedures may be valid although they conflict with the notion of a fair hearing as contemplated by the Act.[233]

Finally, the Tenth Circuit held that the Postal Service had not deprived Stritzl of a liberty interest by disseminating information about his perform-

224. Pub. L. No. 94-421, 90 Stat. 1303 (1976) (codified in scattered sections of 39 U.S.C.). The act directs that employees be given "an opportunity for a fair hearing on adverse actions." 39 U.S.C. § 1001 (1976).

225. U.S. CONST. amend. V, cl. 3.

226. 602 F.2d at 250-51.

227. *Id.* at 251.

228. 39 U.S.C. § 1001(b) (1976).

229. *Id.*

230. 602 F.2d at 251.

231. *See id.* at 251-52.

232. *Id.* at 252.

233. The court cited a decision from the Seventh Circuit, Winston v. United States Postal Serv., 585 F.2d 198 (7th Cir. 1978), as authority for this proposition.

ance as a postal clerk.[234] Stritzl had argued that the Golden, Colorado post office's release of a negative evaluation of Stritzl's performance to the Littleton, Colorado postmaster violated a liberty interest and required a hearing. The court of appeals ruled, however, that the Postal Service's unfavorable characterization of Stritzl was not comparable to the "badge of infamy" identified by the Supreme Court in *Wisconsin v. Constantineau*[235] nor was it the type of "stigma" the Court contemplated in *Board of Regents v. Roth*.[236] Quoting from one of its 1976 opinions,[237] the Tenth Circuit concluded that Stritzl had failed to establish a liberty interest worthy of constitutional protection. " '[N]othing present in this case indicates appellant has had such a stigma imposed upon him as to foreclose future employment opportunities.' "[238]

In *Colorado v. Veterans Administration*,[239] the State of Colorado attempted to establish its right to a hearing in matters concerning its liability to the Veterans Administration (VA) for excess educational benefits paid by the VA to veterans enrolled in local colleges and universities. In an action brought in the United States District Court for the District of Colorado,[240] the State challenged the constitutionality of a provision of the Educational Assistance Program[241] that authorizes the VA to seek reimbursement from an educational institution for payments made to an ineligible student through some fault or omission attributable to the institution.[242] Additionally, the State contended that the procedure used by the VA to establish liability violated constitutional and statutory hearing requirements.[243]

The district court held the disputed statute constitutionally sound, finding the state's liability "a simple matter of a contractual duty flowing from the school to the state certifying agency to the VA,"[244] which had been incurred when the state agreed to monitor and report on student status as a condition to participation in the benefit program. The trial court ruled that such imposition of liability is rationally related to a legitimate governmental

234. 602 F.2d at 252-53.

235. 400 U.S. 433 (1971).

236. 408 U.S. 564 (1972).

237. Weathers v. West Yuma County School Dist., 530 F.2d 1335 (10th Cir. 1976).

238. 602 F.2d at 253 (quoting Weathers v. West Yuma County School Dist., 530 F.2d 1335, 1339 (10th Cir. 1976)).

239. 602 F.2d 926 (10th Cir. 1979).

240. The district court's decision in this suit is reported in Colorado v. Veterans Administration, 430 F. Supp. 551 (D. Colo. 1977).

241. The Educational Assistance Program is established and administered according to the provisions set forth in 38 U.S.C. §§ 1651-1698, 1700-1766, 1770-1796 (1976). The challenged statute provides that:

> Whenever the Administrator finds that an overpayment has been made to an eligible person or veteran as the result of (1) the willful or negligent failure of an educational institution to report as required . . . to the Veteran's Administration excessive absences from a course, or discontinuance or interruption of a course by the eligible person or veteran, or (2) false certification by an educational institution, the amount of such overpayment shall constitute a liability of such institution, and may be recovered . . . in the same manner as any other debt due the United States.

38 U.S.C. § 1785 (1976).

242. Colorado v. Veterans Administration, 430 F. Supp. at 558.

243. *Id.* at 560.

244. *Id.* at 558.

function,[245] and it also concluded that the practice does not offend the doctrine of intergovernmental immunity.[246] After a consideration of the alleged procedural defects, however, the lower court agreed with the state's contention that the Administrative Procedure Act (APA)[247] required a hearing as a part of the VA's adjudication of a school's liability for overpayments.[248] While acknowledging that the agency had in fact afforded some opportunity for a hearing, the court nevertheless reasoned that "[b]ecause liability determinations against educational institutions are subject to judicial review, . . . those determinations [must] follow the procedures outlined in the Administrative Procedure Act."[249]

Both the State of Colorado and the VA appealed the district court's judgment to the Tenth Circuit, which upheld the finding of constitutionality, agreeing with the lower court's contractual analysis.[250] An amendment[251] to the challenged statute, however, justified—and perhaps necessitated—a modification of the decision on the procedural issue. The appellate court observed that the amendment allows an offset of overpayments against fees owed to an institution as compensation for compliance with the statutory reporting requirements only if a school does not contest the VA's claim or if a court has reviewed and upheld the VA's finding of liability.[252] The court also noted that the VA must sue to collect overpayments it believes are due just as it would sue to collect any other debt.[253] Given this express access to a judicial forum, "the administrative proceedings . . . become somewhat less significant."[254]

The Tenth Circuit found neither an express directive nor a "clear indication" that the applicable statute required an adversary hearing on the record as contemplated by the APA.[255] Stating that the APA creates no hearing rights that do not already exist, the court of appeals concluded that the Act did not apply to the VA's overpayment claims. Satisfied that a collection action would assure the accuracy of the VA's determinations of overpayment liability,[256] the Tenth Circuit modified the district court's judgment to the extent that it imposed on the Veterans Administration the

245. *Id.*

246. *Id.* at 559.

247. 5 U.S.C. §§ 500-559, 701-706 (1976).

248. 430 F. Supp. at 561.

249. *Id.* (citing Wong Yang Sung v. McGrath, 339 U.S. 33, *modified*, 339 U.S. 908 (1950)).

250. Colorado v. Veterans Administration, 602 F.2d 926, 927 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 663 (1980).

251. GI Bill Improvement Act of 1977, Pub. L. No. 95-202, tit. III, § 304(a)(1), 91 Stat. 1433 (1977) (amending 38 U.S.C. § 1785 (1976)).

252. Prior to its amendment, the statute had authorized the VA to recover overpayments to a school by referring the claim to the General Accounting Office for collection in court and by offsetting the payments against other amounts due the school from the VA. 38 U.S.C. § 1784 (Supp. I 1977).

253. 602 F.2d at 928. *See* 38 U.S.C. § 1785 (Supp. I 1977) (overpayments "may be recovered . . . in the same manner as any other debt due the United States.").

254. 602 F.2d at 928.

255. *See* 5 U.S.C. § 554 (1976).

256. "[T]he section expressly provides for a suit for collection at the end of the administrative road, and there is no setoff for reporting fees any longer . . . . Any right to review the agency determination is during the course of the suit brought by the United States to collect." 602 F.2d at 928-29.

requirement of a hearing.[257]

XI. THE SUNSHINE ACT

The Tenth Circuit had occasion during this past year to construe the Government in the Sunshine Act (the Sunshine Act).[258] In *Hunt v. Nuclear Regulatory Commission*[259] the court of appeals considered the Sunshine Act's applicability to deliberations of the Atomic Safety and Licensing Board (ASLB) and concluded that it does not apply. Thus, meetings[260] of the ASLB need not be open to the public. The decision is especially significant in light of the present controversies attending the use of nuclear power and the structural soundness of existing and proposed nuclear facilities. Additionally, the basis for the court's ruling is instructive because it highlights the value of statutory definitions.

The case had its origin in a request submitted to the Nuclear Regulatory Commission (NRC) by the Public Service Company of Oklahoma for a license to construct a nuclear power plant. During the agency's consideration of the application an internal report prepared by the General Electric Company became relevant to several matters. General Electric had previously contracted with the Public Service Company to furnish the nuclear steam supply system for the proposed power plant, and it was reluctant to disclose the report, which allegedly contained trade secrets. Eventually, however, the company agreed to produce the document on the condition that the sessions of the ASLB at which it was used would be closed to the public.[261]

The appellant, a resident of Tulsa, which is near the site of the proposed facility, challenged in federal district court the decision to hold in camera hearings. His complaint asserted that this practice would violate the Sunshine Act and sought a temporary restraining order as well as permanent injunctive relief.[262] The lower court, however, after a detailed analysis of the legislative history,[263] concluded that the statute does not apply to adjudicatory hearings before the Atomic Safety and Licensing Board.[264] It dismissed the case, and the disappointed plaintiff appealed.

In its opinion affirming the district court's judgment, the Tenth Circuit examined the composition and functions of the NRC and the ASLB, as well as the relationship between the two.[265] The NRC consists of five members who are presidential appointees. It is responsible for processing the applications of utility companies wishing to construct nuclear power facilities, and its staff conducts the initial review of all such applications. Subsequently,

257. *Id.* at 929.
258. 5 U.S.C. § 552b (1976).
259. 611 F.2d 332 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 1084 (1980).
260. The word "meetings" must necessarily be used liberally here, given the court's ultimate construction of the statute. *See* text accompanying notes 266-272, *infra*.
261. 611 F.2d at 333.
262. *Id.*
263. *See generally* Hunt v. NRC, 468 F. Supp. 817, 820-22 (N.D. Okla. 1979).
264. *Id.* at 822.
265. *See generally* 611 F.2d at 334-35.

hearings are conducted by a three-member Atomic Safety and Licensing Board, and, at this stage, the NRC becomes an independent party in the licensing process. The Board is established by the NRC, but it is not a fixed entity; its members are selected from a panel of experts appointed by the Commission, and the composition of any given Board may change from hearing to hearing. Essentially, the ASLB is the Commission's adjudicatory arm.

The court of appeals undertook to discover whether the ASLB is an agency within the meaning of the Sunshine Act. Agencies subject to the open meeting requirements of the statute are those "headed by a collegial body," the majority of whose members are appointed by the President with the Senate's advice and consent.[266] The composition of the ASLB obviously precludes its characterization as such an agency.[267]

The Sunshine Act also encompasses agencies' subdivisions, however, and the lower court went to great lengths to determine whether the statutory language, "subdivision thereof,"[268] referred back to agency or to collegial body. With the assistance of the legislative history, the district court decided that the reference was to collegial body.[269] Were agency not defined in terms of its presidentially appointed fellows, the Board would seem by any ordinary understanding to be a subdivision of the NRC. But, because the ASLB includes no Commission members, it cannot be a subdivision of the collegial body.

The Tenth Circuit agreed with the district court's interpretation of the statute's definition of subdivision[270] and found additional support for the position in the definitions of "meeting" and "member."[271] The former consists of the deliberations of agency members, who are, in turn, defined as those individuals belonging to the "collegial body heading an agency."[272] Only these specific deliberations are open to the public. Whatever else the Atomic Safety and Licensing Board may do, it clearly does not hold "meetings" because it has no "members."

Although the court of appeals found adequate support for the district court's decision in the Sunshine Act itself, it briefly considered the NRC's regulations implementing the statute, which specifically exclude from coverage those "subdivisions" of the "agency" not composed of members of the governing collegial body.[273] It also observed that other agencies have promulgated similar rules.[274] Thus, the court implicitly exercised a form of the traditional judicial deference to an agency's reasonable interpretation of the laws it must execute.[275]

266. 5 U.S.C. § 552b(a)(1) (1976).
267. 611 F.2d at 335.
268. Hunt v. NRC, 468 F. Supp. at 820-21.
269. *Id.* at 821.
270. 611 F.2d at 336 & n.2.
271. 5 U.S.C. § 552b(a)(2), (3) (1976).
272. *Id.* § 552b(a)(3).
273. 611 F.2d at 337.
274. *Id.* at 337 n.3.
275. *See Part IV: Scope of Authority, supra* at 217.

Without having to resort to the Sunshine Act's authorized exemptions,[276] which the court probably would have had to strain to apply,[277] the Tenth Circuit declared that the NRC may properly close meetings of certain of its branches lying beyond the reach of the statute's definitions. Clearly, the Sunshine Act does not expose administrative deliberative processes as completely as might be desired.[278] The Tenth Circuit's opinion in *Hunt* highlights the loopholes, and its close definitional analysis may prove helpful to other agencies seeking solid support for their endeavors to escape the mandate of the Sunshine Act.[279]

Appellant Hunt lost his battle with the NRC on another front as well. When the Chairman of the ASLB panel hearing the Public Service Company's application for a construction permit requested spectators to leave the hearing room prior to the Board's consideration of General Electric's internal report, Hunt and a companion refused to leave. To make their point they chained themselves to the doorframe of the hearing room. The hearing was delayed while a marshall cut the chains and removed the two men, who were ultimately charged and convicted by a magistrate for disrupting government employees in the performance of their official duties.[280] The district court affirmed the conviction, and the defendants appealed.

In *United States v. Rankin*[281] the Tenth Circuit upheld the lower court's judgment. To justify their conduct, the defendants had argued that the Sunshine Act forbade the closure of the ASLB hearing and that, therefore, the federal employees were not performing official duties when conducting—or attempting to conduct—the in camera hearing.[282] The *Hunt* decision disposed of the first part of their contention, but the court of appeals added that even if the defendants had correctly construed the Sunshine Act, they would have had no defense to the charges against them. An individual's good faith belief in the propriety of his or her actions does not excuse conduct that impedes administrative proceedings.[283] "[T]he defense of 'good faith belief' is no defense. The defendants could not thus take the law in their own hands."[284]

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276. *See* 5 U.S.C. § 552b(c) (1976).

277. The statute does, however, allow closed meetings when disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential" is likely to occur. 5 U.S.C. § 552b(c)(4) (1976).

278. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5:44 (2d ed. 1978).

279. The district court found only one other judicial interpretation of the statutory definitions in Philadelphia Newspapers, Inc. v. United States Parole Comm'n, No. 78-1016 (E.D. Pa. Mar. 30, 1978). Hunt v. NRC, 468 F. Supp. at 821. The Pennsylvania court reached a similar conclusion.

280. Hunt and his companion had violated 41 C.F.R. § 101-20.304 (1978).

281. 616 F.2d 1168 (10th Cir. 1980). The facts discussed in the preceding paragraph are set forth in 616 F.2d at 1169.

282. *Id.* at 1169-70.

283. *Id.* at 1170. *See also* United States v. Young, 614 F.2d 243 (10th Cir. 1980); Armstrong v. United States, 306 F.2d 520 (10th Cir. 1962).

284. 616 F.2d at 1170.

XII. THE PRIVACY ACT

It has been suggested that the Privacy Act[285] may not prove to be as universally significant a law as the Freedom of Information Act.[286] But, "[f]or some individuals, for example federal employees concerned about the contents of their personnel files, the Act may provide new rights and remedies of substantial importance."[287] In *Parks v. Internal Revenue Service*,[288] the Tenth Circuit gave substance to this prediction.

The *Parks* plaintiffs, employees of the Internal Revenue Service (IRS), complained to the federal district court in New Mexico that lists of IRS employees who had not purchased government savings bonds were supplied to other IRS employees for use in soliciting additional sales of the bonds. Plaintiffs contended that this disclosure violated the Privacy Act's general prohibition against furnishing "any record which is contained in a system of records" without the consent of the "individual to whom the record pertains."[289] The use made of the lists could not, they argued, be characterized as "routine"[290] and as such be made exempt from the disclosure proscription;[291] nor could the agency establish that its officers and employees needed the lists "in the performance of their duties."[292] The district court was not persuaded, however, and it dismissed the plaintiffs' action after concluding that the disclosure was, in fact, part of a "routine use."[293]

On appeal, the Tenth Circuit reversed the lower court's judgment of dismissal, declaring that the plaintiffs had stated a claim under the Privacy Act sufficient to entitle them to monetary compensation from the agency.[294] The court of appeals found evidence in the statute's legislative history that indicated that by restricting dissemination of personnel records Congress expressly intended to protect federal employees "who do not comply with organization norms and standards" from "internal blacklisting."[295] Furthermore, the appellate court concluded that the agency's use of the lists in question could not be routine, primarily because the IRS had not followed the notice and comment procedure required by the Privacy Act for designating a routine use.[296] Therefore, the Tenth Circuit found that the plaintiffs' claims adequately alleged a violation of the Privacy Act's general proscription against disclosure.

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285. 5 U.S.C. § 552a (1976).

286. 5 U.S.C. § 552 (1976).

287. W. GELLHORN, C. BYSE, & P. STRAUSS, ADMINISTRATIVE LAW, CASES AND COMMENTS 622 (7th ed. 1979).

288. 618 F.2d 677 (10th Cir. 1980).

289. 5 U.S.C. § 552a(b) (1976).

290. A "routine use" is "the use of [a] record for a purpose which is compatible with the purpose for which it was collected." *Id.* § 552a(a)(7).

291. *See id.* § 552a(b)(3).

292. *See id.* § 552a(b)(1).

293. 618 F.2d at 680.

294. *See* 5 U.S.C. § 552a(g)(4) (1976) (allows minimum damage award of $1,000 for intentional or willful violations of the Act).

295. 618 F.2d at 681 n.1 (quoting S. REP. NO. 93-1183, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6916, 6966). Congress specifically cited nonparticipation in savings bond programs as an example of a failure to follow "organizational norms." *Id.*

296. 618 F.2d at 681-82. *See* 5 U.S.C. § 552a(e) (1976).

To be entitled to relief for an allegedly illegal disclosure, a party must also plead that he or she has suffered some "adverse effect" from the circulation of the confidential information.[297] Thus, the court's inquiry was not complete upon its conclusion that the complaint sufficiently alleged a violation of the statute. Noting that the Privacy Act is rooted in the tort of invasion of privacy, the court of appeals reasoned that "the invasion of the right . . . is the essence of the action."[298] Such conduct may not cause pecuniary damage, but mental and psychological harm are foreseeable consequences. Therefore, the appellate court found the plaintiffs' allegations of psychological distress and embarrassment sufficient to establish the requisite adverse effect.[299] That the claims tended to show an injury personal to the plaintiffs necessarily alleviated any standing problem.[300]

Having found the allegations concerning a violation of the Privacy Act and its resultant harmful impact ample to sustain the plaintiffs' cause of action, the Tenth Circuit next considered whether the plaintiffs had adequately contended that the actions of the agency's officials were so intentional and willful as to warrant the award of damages authorized by the statute.[301] Notwithstanding the absence of specific declarations of intentional and willful conduct, the court concluded that the facts which the plaintiffs had alleged permitted an inference of misconduct descending to the prescribed levels of impropriety.[302] While the employees were entitled to seek damages, the court of appeals held that they were not entitled to the injunctive relief which they had requested. Those sections of the Privacy Act authorizing the issuance of injunctions contemplate their use as aids in amending an individual's record and in ordering production of records improperly withheld from a requesting party.[303] The court found no provision permitting injunctions to restrain other violations of the Act. "[W]here . . . the statute provides for certain special types of equitable relief but not others, it is not proper to imply a broad right to injunctive relief."[304]

Several of the district court's holdings in the *Parks* case did survive the Tenth Circuit's scrutiny. Specifically, the court of appeals affirmed the ruling below that certain IRS employees were improperly joined as defendants inasmuch as the Privacy Act only authorizes suits against an agency.[305] In addition, the appellate court agreed that, under the existing circumstances, the National Treasury Employees Union had no standing to sue the IRS, either on its own behalf or for its members.[306]

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297. *See* 5 U.S.C. § 552a(g)(1) (1976).
298. 618 F.2d at 683.
299. *Id.*
300. *Id.*
301. When a court determines that an agency "acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of (A) actual damages . . . but in no case . . . less than the sum of $1,000; and (B) the costs of the action . . . ." 5 U.S.C. § 552a(g)(4) (1976).
302. 618 F.2d at 683.
303. *See* 5 U.S.C. § 552a(g)(2), (3) (1976).
304. 618 F.2d at 684.
305. *Id. See also* 5 U.S.C. § 552a(g)(1) (1976).
306. 618 F.2d at 684-85.

In this case of first impression[307] the Tenth Circuit construed the Privacy Act with an eye toward effectuating Congress' "self-help enforcement program" that encourages litigation by individuals. "[I]t is only through this process that the objects of the Act can be realized."[308] The court strictly enforced the congressional directive to the administrative agencies to publish information about the records they maintain and to give notice and an opportunity for comment on all routine uses of such records. It is clear from the court's opinion that an agency cannot claim routine use as a defense to a challenged disclosure if the use has not been specifically included in the required public notice.[309]

While holding the agencies to a high standard in the use and circulation of the records they maintain, the Tenth Circuit was liberal in its application of the statutory conditions for a damages action. It gleaned from the Act three sets of allegations necessary to shield a complaint from a dismissal motion, but it is apparent from the *Parks* decision that a plaintiff's pleading burden is not heavy. A complaint must first allege a cognizable violation of the Privacy Act. Next, it must contain evidence of some personal detriment to plaintiff arising from the alleged violation. The Tenth Circuit has made it clear that psychological harm qualifies as an "adverse effect," although it remains to be seen both how severe the damage must be to warrant compensation and what financial awards it may yield. And, finally, the complaint must indicate, although it need not specifically allege, that the agency's conduct was willful or intentional. Some evidence that administrative officials knew of the improper disclosure and did nothing to prevent it is likely to suffice. The allegations must reveal the conduct to be something more than mere negligence but less than "premeditated malice."[310] The requirements identified by the court should prove to be useful guidelines to future plaintiffs seeking to vindicate their statutory privacy rights.

In *Parks*, the Tenth Circuit made clear its intention to interpret the Privacy Act "in the spirit which attended its enactment" so as to afford maximum protection for the "very sensitive . . . right of an individual to be free of unnecessary invasions of his privacy."[311] Soon after rendering the *Parks* decision, the court had an opportunity to indulge in construction of another section of the statute. Resolution of the dispute in *Volz v. Department of Justice*[312] required an analysis of an investigatory-materials exemption[313] to the Privacy Act's general mandate that allows an individual access to federal records concerning the individual. In its review, the court of appeals acknowledged and endeavored to uphold the legislative desire to protect the privacy not only of those about whom the federal government collects information but also of those who assist the government in compiling its informa-

307. *Id.* at 679.
308. *Id.* at 685.
309. *Id.* at 681-82.
310. *Id.* at 683.
311. *Id.* at 685.
312. 619 F.2d 49 (10th Cir.), *cert. denied*, 101 S. Ct. 397 (1980).
313. *See* 5 U.S.C. § 552a(j), (k) (1976) (general and specific exemptions to statute's disclosure policy).

tion. As *Volz* indicates, sometimes the interests of the latter group outweigh those of the former.

James Volz was an agent for the Federal Bureau of Investigation (FBI) who was suspended briefly for disciplinary reasons. While probing his conduct, the FBI obtained information from a lawyer acquainted with Volz. The information was provided under an express promise from the agency that it would preserve the informant's confidentiality. Subsequently, the FBI agreed to relinquish to Volz all materials compiled during its disciplinary investigation, and the lawyer informant released the Bureau from its promise as to almost all of the information he had furnished. Volz demanded disclosure of the balance of the lawyer's communications to the FBI but his request was refused. He commenced an action in federal district court under the Privacy Act and obtained an order for the release of the withheld material.[314] On the government's appeal, however, the Tenth Circuit reversed the lower court's decision.[315]

The court of appeals stated the issue in the case to be whether the statutory exemption from disclosure of information furnished under a promise of confidentiality[316] is applicable when "the source of the information is known but the specific confidential information itself is not known to the party seeking disclosure."[317] After observing that the primary purposes of the exemption are to protect the privacy of the government's informants and to encourage the divulging of material, but confidential, information that would otherwise elude the government's grasp, the court concluded that disclosure of information provided by a source whose identity is no longer a secret would, nevertheless, defeat these ends. The court also found that such disclosure would discourage individual cooperation with the agencies as well as deter future voluntary disclosures to requesting parties. Therefore, the court of appeals nullified the order for production.[318]

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314. Like the plaintiffs in *Parks*, Volz availed himself of the statutorily authorized private civil action, *see id.* § 552a(g)(1); unlike those individuals, however, he requested a form of injunctive relief explicitly recognized by the statute. *See id.* § 552a(g)(3)(A).

315. 619 F.2d at 49-50.

316. *Id.* at 50.

317. The head of any agency may promulgate rules . . . to exempt any system of records within the agency from [disclosure] . . . if the system of records is—

. . . .

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, *but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence*, ...

5 U.S.C. § 552a(k)(5) (1976) (emphasis added).

318. 619 F.2d at 50. The court also reversed the district court's award of attorney's fees and costs to the plaintiff, reasoning that he had not "substantially prevailed" to the extent necessary to justify recovery of such expenses. *Id.* The Privacy Act authorizes an assessment against the federal government of fees and costs incurred in obtaining relief from an agency's unlawful refusal to release records if "the complainant has substantially prevailed." 5 U.S.C. § 552a(g)(3)(b) (1976).

Judge Doyle filed an opinion dissenting from the reversal of the attorney's fee award. He enumerated six factors courts are to weigh when determining whether to order the reimbursement of a prevailing party, *see* 619 F.2d at 51 (Doyle, J., dissenting), and observed that the court of appeals had considered none of them in rendering its decision. He expressed a desire to "approve the modest award in the interests of promoting the public interest." *Id.*

The key to the Tenth Circuit's decision lies in its recognition of an "inextricable connection between the source and the substance of a confidential disclosure."[319] But, it appears that in its fervor to promote the objectives of the Privacy Act, the court of appeals neglected the plain language of the exemption.[320] Certainly the source and the information are connected, but the bond may not be "inextricable." The exemption voices concern for the identity of the source;[321] the promise of confidentiality it contemplates seems to extend to that identity and not to the substance of the knowledge furnished. It would seem that material acquires its confidentiality because the informant desires anonymity. Likewise, this special status should change when the donor's identity is known, provided that his or her identity has not been revealed by the agency either deliberately or inadvertently in breach of its promise or has not been otherwise improperly disclosed. Indeed, the source's voluntary release of an agency from its undertaking to preserve confidentiality would seem to indicate a lack of concern for continued secrecy.

The Tenth Circuit's opinion in *Volz v. Department of Justice* effectively precludes a literal reading of the Privacy Act's investigatory materials exemptions and extends the restriction, which should be narrowly construed,[322] beyond its statutory scope. This result may have no substantial effects, but the court's gloss seems clearly at odds with the statute's direction. Under the *Volz* facts, the Tenth Circuit's eagerness to protect privacy is misplaced.[323]

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319. *Id.* at 50.

320. *See* 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (4th ed. 1973).

321. 5 U.S.C. § 552a(k)(5) (1976). For the text of the statute see note 317 *supra.*

322. *See* Nemetz v. Department of the Treasury, 446 F. Supp. 102, 105 (N.D. Ill. 1978).

323. The federal district court in Nemetz v. Department of the Treasury, 446 F. Supp. 102 (N.D. Ill. 1978) emphasized throughout its opinion that protection of the *identity* of a confidential source is the primary focus of the section 552a(k)(5) exemption.

> It is clear on the face of the statute that *only information which would identify the source of confidential information may be exempted by agency regulation.* Thus, the government's argument that all information received under a promise of confidentiality is exempt must be rejected at the outset. To the extent Section 552a(k)(5) applies it *exempts only information which would reveal the identity of the source.*

Id. at 104 (emphasis added). *See also id.* at 106-07. The district court expressly distinguished the Privacy Act's confidentiality exemption from that included in the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(D) (1976), which exempts *all* information obtained from a confidential source. 446 F. Supp. at 104 n.1.

Both the *Nemetz* case, and a recent decision from the Fourth Circuit, Ryan v. Department of Justice, 595 F.2d 954 (4th Cir. 1979), would have an agency seeking to claim a disclosure exemption under the Privacy Act make certain specific showings. In *Ryan*, the court of appeals required evidence that the agency had promulgated rules specifically exempting designated systems of records from the Privacy Act's disclosure provisions. The Fourth Circuit Court also expected explicit evidence of the agency's reasons for invoking a claim of exemption for such records. 595 F.2d at 957-58. *See also* 5 U.S.C. § 552a(j) (1976). The *Nemetz* opinion similarly required promulgation of regulations exempting the records at issue, 446 F. Supp. at 104, and further insisted that "general averments of promises of confidentiality are insufficient" to justify immunity from disclosure under section 552a(k)(5). *Id.* at 105. The narrow scope of the exclusion "requires finding a promise of confidentiality as to each source sought to be withheld." *Id. See also* Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978) (dictum); Mervin v. Bonfanti, 410 F. Supp. 1205 (D.D.C. 1976).

In *Volz*, the Tenth Circuit imposed no similar conditions on the agency's claim for exemption of the information gathered from its "confidential" source.

XIII. STANDING

Although standing lurked as a peripheral issue in *Parks v. Internal Revenue Service*,[324] it created no major obstacle to jurisdiction. The Tenth Circuit did have one opportunity, however, to consider exclusively whether a plaintiff had "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness"[325] necessary to create a case or controversy, which is a constitutional prerequisite of judicial review.[326] Resolution of the customarily difficult standing question was further compounded by the plaintiff's status as an association seeking to vindicate the interests of its members.[327]

In 1976, the National Collegiate Athletic Association (NCAA) brought suit in the United States District Court for the District of Kansas challenging the Department of Health, Education and Welfare's (HEW) controversial regulations[328] that require educational institutions to provide equal athletic opportunities for both male and female students.[329] The NCAA purported to represent both itself and its member institutions; the latter did not join individually in the action. After an extensive review of the extent law of standing as articulated by the Supreme Court in a number of opinions[330] and after a detailed analysis of the NCAA's allegations, the district court dismissed the case.[331] It held that the NCAA lacked standing to challenge the regulations on its own behalf for the principal reason that "the prospect of any injury at all is . . . purely speculative and dependent upon the hypothetical actions" of its member institutions.[332] The court further ruled that

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324. 618 F.2d 677, 633, 685 (10th Cir. 1980). *See Part XII: The Privacy Act, supra* at 238.

325. Baker v. Carr, 369 U.S. 186, 204 (1962).

326. U.S. CONST. art. III, § 2.

327. For a discussion of the problems attending associations' standing, see Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974); Note, *From Net to Sword: Organizational Representatives Litigating Their Members' Claims*, 1974 U. ILL. L.F. 663.

328. 45 C.F.R. § 86.41 (1979).

329. Critics argue that HEW exceeded its authority under title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1976), in promulgating the regulations. The contention is that the agency impermissibly extended the scope of the statute by forbidding sex discrimination not only in educational programs receiving federal financial assistance but also in those programs deemed to be benefiting from funds used by actual recipients. "In HEW's view, the only test of coverage is whether the . . . institution is a recipient of any federal assistance; if so, all activities of the agency come within the provisions of the Act." Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 63 (1976).

Athletic programs are not routinely funded by the government, but the regulations require schools and universities receiving federal benefits in other programs to provide equal opportunities "in any interscholastic, intercollegiate, club or intramural athletics offered . . . and no recipient shall provide any such athletics separately" on the basis of sex. 45 C.F.R. § 86.41(a) (1979). The stakes for noncompliance are high; an institution found to have permitted or condoned sex discrimination may lose its federal financial assistance. *See* 20 U.S.C. § 1682 (1976).

For a detailed discussion of specific ways HEW has allegedly expanded the reach of title IX, see Note, *Title IX Sex Discrimination Regulations: Impact on Private Education*, 65 KY. L.J. 656, 684-88, 689-94 (1977).

330. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

331. NCAA v. Califano, 444 F. Supp. 425, 439 (D. Kan. 1978).

332. *Id.* at 433. The NCAA alleged that the regulations, insofar as they conflicted with the

the association had no standing to sue as a representative of its members because it had not alleged facts sufficient to support a finding of actual or threatened harm to them.[333] Likening the NCAA's action to a request for pre-enforcement judicial review, the district court concluded that

> [j]udicial consideration of the claims . . . would merely embroil the court in abstract disagreement over the scope and validity of the entire Title IX regulatory scheme so far as it relates to athletic programs and activities at the post-secondary educational level. Because the parties have through various possibilities of judicial review an adequate forum for testing the [regulations] in a concrete enforcement situation, the court sees neither a practical need nor a lawful excuse for . . . review of the kind sought here.[334]

To its undoubted chagrin, the district court may well find itself involved in that "abstract disagreement," for on appeal the Tenth Circuit reversed and remanded the decision.[335] Although the court of appeals agreed with the lower tribunal's holding that the NCAA lacked standing to sue on its own behalf,[336] the appellate court concluded that the complaint alleged sufficient facts to confer standing on the association as a representative of its members.[337]

In most instances, an individual or an organization cannot assert the rights of third parties in a legal action. Those parties must protect their interests themselves.[338] The Supreme Court has recognized, however, that in some circumstances, an entity, such as a trade association, may be an appropriate vehicle for vindicating the rights of its members.[339] Accordingly, the Court has developed three conditions that must be met before an association may represent its members in a judicial proceeding. First, it must appear from the facts alleged that the individual members themselves would have standing to sue.[340] It must further appear that "neither the claim asserted nor the relief requested" requires the active participation of an individual member.[341] And, finally, the interests that the association seeks to protect in its suit must be "germane" to the purpose for which it exists.[342]

The Tenth Circuit reviewed the NCAA's allegations in light of these

association's rules, would force members to withdraw from the NCAA or compel the NCAA to change its rules. *Id.* at 431-32.

333. *Id.* at 434-39.

334. *Id.* at 439.

335. NCAA v. Califano, 622 F.2d 1382, 1392 (10th Cir. 1980).

336. *Id.* at 1387.

337. *Id.* In a concurring opinion Judge McKay expressed agreement with the majority's holding that the NCAA had standing as a representative of its members. He submitted, however, that that ruling obviated any need for deciding whether the association could sue in its own right. The section of the court's opinion discussing this issue he termed "mere dictum." *Id.* at 1392 (McKay, J., concurring).

338. Tileston v. Ullman, 318 U.S. 44 (1943).

339. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); Warth v. Seldin, 422 U.S. 490 (1975).

340. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. at 341; Warth v. Seldin, 422 U.S. at 511.

341. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. at 333.

342. *Id.*

three requirements. Turning first to the standing of the members as individuals, the court scrutinized the complaint for evidence that the members had sustained "injury in fact" from the challenged regulations.[343] It rejected the district court's "ungenerous reading" of the pleadings and found that injury to the educational institutions comprising the NCAA could effectively be inferred from the allegations. "Compulsion by unwanted and unlawful government edict is injury *per se*. Certainly the cost of obeying the regulations constitutes injury."[344] The court also found that the schools were harmed insofar as the regulations prevented them "from developing their intercollegiate sports programs as they see fit."[345] The court of appeals saw further evidence of injury in a "change in the status quo" compelled by the regulations.[346] Although the complaint itself included no specific claim of direct injury to the members' rights and interests, the court was willing to find such injury on the basis of the information it did contain.[347]

Because the NCAA challenged a governmental agency's authority, the Tenth Circuit ruled that the members, if they sued individually, would have to satisfy the Administrative Procedure Act's (APA) standing requirement. The APA requires a showing that the complaining party has suffered a "legal wrong" from the agency's action or has been otherwise "adversely affected or aggrieved . . . within the meaning of a relevant statute."[348] The Tenth Circuit adopted the Supreme Court's "zone of interests" test[349] to determine whether the member institutions could qualify under the APA.[350] In a rather strained interpretation, the court determined that the NCAA and its members had an interest in invalidating HEW's regulations, an interest that properly lay within Title IX's instruction to the agencies to implement the prohibition against sex discrimination using rules and regulations "con-

343. " 'Injury in fact' means concrete and certain harm. . . . [I]t must be certain to happen." 622 F.2d at 1386. The court implicitly acknowledged the substantial confusion shrouding the standing doctrine when it observed that "[s]uch injury in fact is the one constant element in the judicial statements about standing." *Id.*

344. *Id.* at 1389.

345. *Id.*

346. *Id.* at 1390.

347. *See generally id.* at 1388-89.

348. 5 U.S.C. § 702 (1976).

349. *See* Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970). Standing concerns "whether the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Id.* at 153.

350. *See generally* 622 F.2d at 1386, 1389-90. The court equated *Data Processing*'s zone of interests analysis with the APA's "adversely affected or aggrieved" requirement. Thus, it concluded that to be aggrieved means to be arguably within the statute's protected zone of interests. *Id.* at 1386. Admittedly, the issue is confused and eludes precise definition, but it seems that the more proper analysis is just the reverse of the court's suggestion; that is, if one can identify the rights and interests that a law is intended to protect and can "arguably" find one's own interests within its reach, then when an agency allegedly violates the statute, one becomes an aggrieved or adversely affected party with standing to sue. To have an interest lying within the statutory zone is not the same as to be aggrieved by an agency's action. Rather, the former is a condition precedent to the latter. *See generally* Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. at 153.

In any event, the Tenth Circuit liberally interpreted the zone of interests requirement, concluding that it would be satisfied if a "sensible relation" could be found "between some subject of the statute and the plaintiff's interest in the outcome of the litigation." 622 F.2d at 1386.

sistent with achievement of the objectives of the statute."[351] The court considered this directive as indicative of a statutory design to protect against unnecessary and unwarranted regulation.[352] Accordingly, the court found that the interest of the NCAA and its members fell within the statute's protective zone. An alleged violation of the statute gave them standing to seek redress.[353]

Having found that the institutional members of the NCAA had sustained actual injury sufficient to entitle them to sue HEW in their own right, the Tenth Circuit next inquired whether the interests at stake in the case related to the NCAA's organizational objectives. Among the association's avowed purposes are the initiation and improvement of intercollegiate athletic programs and the preservation of institutional control of intercollegiate sports.[354] Although the member institutions' interests necessarily extend beyond those of the NCAA to other educational programs, the court found that inasmuch as the litigation attacked regulations affecting sports activities, the members' interests could be deemed compatible with the association's purposes. Therefore, the NCAA was arguably a suitable representative.[355] The court, however, was not willing to assume that the members supported the association's endeavor on their behalf. In fact, it acknowledged that many NCAA member institutions also belonged to the Association for Intercollegiate Athletics for Women (AIAW), which had intervened as a defendant to support HEW's regulations, and the court recognized that the NCAA's litigation goals could be entirely incompatible with the dual members' desires.[356] This potential absence of uniform interests is relevant to the constitutional standing requirement, for if an organization's members do not support its motives but instead align themselves with the opposition, then no case or controversy actually exists, and a court has no authority to exercise its jurisdiction.[357] Thus, the Tenth Circuit imposed a qualification on the test for associational standing, which would in some circumstances compel an organization to identify precisely its members' concerns and to ascertain whether a true identity of interests exists. If this task is not performed, then a court might not be able to determine whether the interests which an association purports to represent are "germane" to its purpose.

> We hold that when an association does not have standing in its own right, and it is not clear which side of the lawsuit the association's members would agree with, one or more of the members

351. 20 U.S.C. § 1682 (1976).

352. *See* 622 F.2d at 1390. In fact, Title IX was enacted to assure women of educational opportunities equal to those available to men. In a broader sense, the statute protects both sexes' interests in equal access to education by attempting to insure that discrimination on the basis of sex does not occur in federally funded educational programs. If anything, the statute endorses additional regulation rather than discouraging it. Perhaps, however, the Tenth Circuit found this connection sufficient to satisfy its "sensible" relationship variation on the zone of interests test. *See* note 350 *supra*.

353. 622 F.2d at 1390.

354. *Id.* at 1391.

355. *Id.*

356. *Id.*

357. *Id.* at 1391-92.

> must openly declare their support of the association stance, and they must do so through those officials authorized to bring suit on their behalf. Moreover, if more members of the association declare *against* the association's position than declare in favor of it, the association does not have standing, for then the parties in the lawsuit most likely would not be adverse.[358]

Apparently, an additional allegation must henceforth appear in complaints filed by organizations seeking to represent the interests of third parties who comprise their membership. Even those that would seem to have standing to sue in their own right would be well advised to allege an identity of interests because it seems impossible to predict when a court will agree with an association's claim of injury in fact. Because the NCAA's complaint included a statement evidencing its members' support for the lawsuit,[359] the NCAA satisfied not only the Tenth Circuit's new requirement but the Supreme Court's test as well. The organization and its constituents were not at odds.

Finally, the appellate court considered whether individual participation of the NCAA's members was necessary to a fair resolution of the controversy. Finding issues of law common to all and observing that the injunctive and declaratory relief requested would, if granted, benefit the members equally, the court concluded that their direct involvement was not essential.[360] Having completed its analysis of the NCAA's claims and their relationship to the standing prerequisites for a representative of third parties' interests, the Tenth Circuit found no bar to the association's maintenance of its suit challenging HEW's athletic regulations. Accordingly, the court of appeals reversed and remanded the district court's decision.[361]

Certainly the two decisions in *NCAA v. Califano* exemplify the flexibility of the third party standing doctrine.[362] Whereas the district court was strict and exacting in its interpretation of the rule and its application to the plaintiff's allegation, the Tenth Circuit Court of Appeals was more generous in its analysis and was willing to infer claims of injury where no specific ones were made. The appellate court's examination of existing standing law does not illuminate this muddled realm, and segments of its reasoning are notably contorted;[363] nevertheless, the Tenth Circuit's identity of interests criterion represents a concrete addition to the law of standing.[364]

The case, however, has a significance apart from this contribution. The Tenth Circuit's holding that the NCAA has standing to bring its action may

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358. *Id.* (emphasis in original).
359. *Id.* at 1392.
360. *Id.*
361. *Id.*
362. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 79-82 (1978).
363. *See* notes 350 & 352 *supra* and accompanying text.
364. A student commentator observed in 1974 that the courts have not often considered how to resolve the problem of competing interests within an organization, which eliminate the organization's efficacy as a true representative of its members. "[O]ffensive use of organizational representation is relatively new and organizations usually use it in safe situations. As the procedure becomes more established, organizations will make less conservative use of it. The courts will then have to consider the permissible limits of the action." Note, *From Net to Sword: Organizational Representatives Litigating Their Members' Claims, supra* note 327, at 671.

facilitate a significant challenge to the validity of the athletic regulations. A federal district court in Ohio found one of HEW's requirements unconstitutional,[365] but there has apparently been no broad attack on the entire regulatory scheme. HEW's employment regulations,[366] purportedly promulgated pursuant to Title IX,[367] have been invalidated by several federal courts[368] on the ground that they exceed the agency's scope of authority under the statute and duplicate rules enacted in accordance with Title VII's[369] mandate. It is not inconceivable that upon close analysis a court would find the controversial athletic regulations similarly excessive.[370] And, certainly, the NCAA seems a logical entity to launch the offensive, if only for the sake of streamlining the litigation.[371]

CONCLUSION

The number of administrative law cases heard during the past year indicates that the federal government has made its presence known and felt within the realm of the Tenth Circuit's jurisdiction. In resolving the myriad controversies generated by governmental actions, the court of appeals adhered to traditional rules and applied established legal principles. Accordingly, its decisions seem sound, if not otherwise notable. The Sunshine and Privacy Act opinions, however, are likely to enhance the relatively meager collection of cases construing and interpreting those statutes. Furthermore, the standing ruling in *NCAA v. Califano* may ultimately have a significant impact on collegiate athletic programs. Only in *Volz v. Department of Justice* does the court seem clearly to have overstepped statutory bounds.

Diane L. Burkhardt

365. Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753 (S.D. Ohio 1978). "To the extent it authorizes recipients of federal aid to deny physically qualified girls the right to compete with boys in interscholastic contact sports, Subsection (b) of 45 C.F.R. 86.41 is violative of the Fifth Amendment and must be held to be unconstitutional." *Id.* at 759.

366. 45 C.F.R. §§ 86.51-.61 (1979).

367. 20 U.S.C. §§ 1681-1686 (1976).

368. *See, e.g.*, Junior College Dist. v. Califano, 455 F. Supp. 121 (E.D. Mo. 1978), *aff'd*, 597 F.2d 119 (8th Cir.), *cert. denied*, 100 S. Ct. 467 (1979); Brunswick School Bd. v. Califano, 449 F. Supp. 866 (D. Me. 1978), *aff'd sub nom.*, Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir.), *cert. denied*, 100 S. Ct. 467 (1979); Seattle Univ. v. United States Dep't of Health, Educ. & Welfare, 16 Empl. Prac. Dec. ¶ 8241 (W.D. Wash. 1978); Romeo Community Schools v. United States Dep't of Health, Educ. & Welfare, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 100 S. Ct. 467 (1979).

369. 42 U.S.C. § 2000e (1976).

370. *See generally* Kuhn, note 329 *supra.*

371. The NCAA has approximately 862 member institutions. 1 ENCYCLOPEDIA OF ASSOCIATIONS (14th ed. N. Yakes & D. Akey eds. 1980). Their participation as plaintiffs could make the proceeding unwieldy and unnecessarily protracted. Structuring the suit as a class action might alleviate some problems, but obtaining class certification would impose additional hurdles. *See* FED. R. CIV. P. 23(c).

ANTITRUST

OVERVIEW

During the past year, the Tenth Circuit Court of Appeals has considered several antitrust issues involving matters at the forefront of antitrust law. Questions such as state action antitrust immunity, the insurance industry's exemption from the antitrust laws, contribution among antitrust violators, and the Sherman Act's jurisdictional reach were all considered by the appellate court during the period of this survey. These issues will be discussed in the context of the decisions that purported to resolve them. In addition, two decisions of lesser importance will be briefly digested.

I. THE SHERMAN ACT VERSUS FEDERALISM: A CLASH BETWEEN GIANTS

A. *Introduction*

The Sherman Act has been called the "Magna Carta of free enterprise,"[1] yet the scope of this central charter of our national economic policy was not defined by Congress when it adopted the Act. The contours of the antitrust laws in general, and the Sherman Act in particular, have been delineated, instead, by the judiciary. On occasion, the antitrust statutes have brushed up against the tenet of federalism. Whether the action of states and their subdivisions come within the purview of the antitrust laws, when governmental acts have an anticompetitive impact, is a question the Supreme Court rarely addressed prior to the 1970's. Although recent decisions of the Court have dealt unsatisfactorily with shaping the contours of state immunity from the antitrust laws, the Court has clearly drawn an immunity template by which to judge state activity. It is the duty of the federal courts to follow Supreme Court pronouncements. In *Community Communications Co. v. City of Boulder*,[2] the Tenth Circuit court was faced with the competing concerns of our national economic policy, on the one hand, and the pressing needs of a municipality to freely carry out its governmental functions, on the other. The Tenth Circuit court rendered a decision in conflict with the Supreme Court's most recent dictates on state immunity from the antitrust laws. The court of appeals may have heard the siren call of the tenth amendment.[3] The Tenth Circuit judges also had to confront critical problems which the Supreme Court has left in the wake of its attempt to define state immunity.

This section of the antitrust survey will attempt to analyze the Tenth Circuit's decision in light of the Supreme Court's recent state antitrust im-

1. United States v. Topco Assocs. Inc., 405 U.S. 596, 610 (1972). The Sherman Act, one of the major pieces of antitrust legislation, is found at 15 U.S.C. § 1 (1976).

2. 630 F.2d 704 (10th Cir. 1980).

3. The tenth amendment proclaims that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

munity decisions. An effort will also be made to briefly explain the problems inherent in the present state immunity doctrine and the pressing need for its change, a need which may have been the driving force behind the decision in *Community Communications Co.*

B. *The Birth of a Doctrine: "State Action" Immunity*

The first antitrust law was passed by Congress in 1890 in response to a growing awareness of the harmful economic consequences apparent in the concentration of economic power in the hands of the few and the mighty.[4] The legislative history of the Act is devoid of any congressional concern with anticompetitive acts of government.[5] A federal court was first faced with the task of determining the scope of the Sherman Act in *Lowenstein v. Evans*.[6] The court held that the state could not be attacked for its monopolistic activities since the state was neither a person nor a corporation amenable to suit.[7] The Supreme Court's decision in *Olsen v. Smith*[8] gave lower courts the first guidelines on state immunity from the federal antitrust law. The *Olsen* Court refused to allow harbor pilots, unlicensed by the state, to attack the state's licensing statute as a restraint on trade. The Court found that Congress had evinced an express desire to allow state regulation of this activity, and that the state's immunity from the antitrust laws would adhere, unless Congress expressed a clear statement to the contrary.[9] In the same year that *Olsen* was decided, it became equally clear that state antitrust immunity is not a transferable gift which a state may bestow on private parties. In *Northern Securities Co. v. United States*,[10] the Court refused to immunize the activities of two railroads, merging in violation of section 1 of the Sherman Act, simply because the railroad's actions were legal under state law. A state cannot impart immunity to private parties by declaring their anticompetitive actions legal.

After the *Northern Securities* decision, no major advance in the state action immunity doctrine occurred for almost forty years.[11] The United States

4. The Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (current version codified at 49 U.S.C. § 1 (1976)), created a commission to prevent rate discrimination by railroads. The next year saw anti-monopoly planks in the platforms of both major political parties. A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 12 (2d ed. 1970). The Fifty-first Congress, in authorizing the Sherman Act, declared itself to be protecting the public interest by attacking "these great trusts, these great corporations, these large moneyed institutions." 21 CONG. REC. 2562 (1898).

5. Parker v. Brown, 317 U.S. 341, 351 (1943).

6. 69 F. 908 (D.S.C. 1895).

7. *Id.* at 911. In Chattanooga Foundry & Pipeworks v. City of Atlanta, 203 U.S. 390 (1906), Justice Holmes declared that a city may sue under the Sherman Act. He interpreted the term "person" in section 8, the general definitions paragraph of the Act, to include municipalities; thus, under section 7 of the Sherman Act (replaced by section 4 of the Clayton Act, 15 U.S.C. § 15 (1976)), the city was deemed to be a person injured in its "business or property" and capable of collecting treble damages.

8. 195 U.S. 332 (1904).

9. *Id.* at 344-45.

10. 193 U.S. 197 (1904).

11. *See* note 7 *supra*. In Georgia v. Evans, 316 U.S. 159 (1942), the Court extended Chattanooga Foundry & Pipeworks v. City of Atlanta, 203 U.S. 390 (1906), to its logical end. The Court held that a state, like a city, was a "person" under section 7 of the Sherman Act and could, therefore, bring an antitrust action against private parties.

Supreme Court did not again address the immunity of states as defendants in an antitrust action until the seminal decision of *Parker v. Brown*.[12] According to the California statute challenged by the plaintiff in *Parker*, a state advisory commission was authorized to supervise a program restricting competition among farmers in order to maintain stable prices along the distributive chain. The plaintiff, a packer and producer of raisins, sought an injunction[13] against the state officials involved in the program, claiming that the state agricultural act was in violation of the Sherman Act. Chief Justice Stone, scrutinizing the legislative history and the language of the Sherman Act, found nothing to suggest

> that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.[14]

The lack of reference to state anticompetitive behavior in the legislative history[15] convinced the Court of the impropriety of expanding the scope of the antitrust laws to encompass state action. The Court found the alleged anticompetitive acts to be no more than the legitimate enactment and enforcement of state legislation. Furthermore, an examination of the federal statute concerning agricultural proration[16] reinforced the Court's view of the antitrust immunity issue. Because the federal act also restricted competition in the marketing of agricultural products, there was no conflict with the state's proration program.[17]

After the *Parker* decision another long hiatus set in before the Court had occasion to consider again the scope of state immunity from the antitrust

12. 317 U.S. 341 (1943). The immunity doctrine born of this decision occasionally will be referred to in this comment as "*Parker* immunity."

13. The injunction was sought pursuant to 15 U.S.C. § 26 (1976).

14. 317 U.S. at 350-51.

15. In Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 420-21 (1978), Chief Justice Burger noted that Congress' silence on the anticompetitive actions of states is not necessarily dispositive of the state immunity issue. In the years immediately surrounding the Sherman Act's passage, the Court had strictly construed the jurisdictional requirement of interstate commerce. Manufacturing, as an isolated activity, was deemed not to constitute interstate commerce and Congress was precluded from regulating it. Kidd v. Pearson, 128 U.S. 1 (1888). States were said to have broad powers to regulate business activities within their borders. United States v. E.C. Knight Co., 156 U.S. 1 (1895). Because of the Court's narrow posture on the jurisdictional reach of the interstate commerce clause, it may have appeared improbable to Congress that the Court would permit suits against the states and their subdivisions for violations of the Sherman Act. Several commentators have also made this criticism. *See, e.g.*, Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U.L. REV. 71, 83 (1974).

16. Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 (1976).

17. 317 U.S. at 354. The Court determined that Congress, in enacting the federal agricultural marketing act, contemplated state programs similar to California's restrictions. Both acts were consistent in that they sought to achieve a parity price, the federal statute expressly and the state program by its effect. Evidence of this consistency of purpose was displayed by a loan agreement between California and the federal Commodity Credit Corporation, which loan was approved by the Department of Agriculture. *Id.* at 356.

laws.[18] *Goldfarb v. Virginia State Bar*[19] provided that opportunity. The Court struck down the state and local bar associations' minimum fee schedules as price fixing violative of section 1 of the Sherman Act. The state bar's defense, that its activities were immune from suit as state action, was not persuasive. The *Goldfarb* Court read *Parker* as requiring a showing that the state, acting as sovereign, had compelled the challenged activities.[20] The defendants, however, could point to no Virginia statute, state court decision, or state supreme court rule that required the minimum fee schedule. The status of the Virginia bar as an appendage of the state[21] did not, of its own force, cloak the bar with immunity from the Sherman Act.

The Court's next reflection on state action antitrust immunity focused not on a state-related entity, as in *Goldfarb*, but concentrated instead on private parties involved in a state program. In *Cantor v. Detroit Edison Co.*,[22] Justice Stevens wrote the majority decision, joined, however, by only four other members of the Court in parts I and III.[23] The private utility, Detroit Edison, which allegedly had unlawfully restrained competition in its sale of electric light bulbs,[24] was held not to be immune from the federal antitrust laws, even though the state regulatory commission had approved of the challenged actions of the utility, and even though the defendant could not discontinue those actions without the state commission's consent. The Court found the following facts to be determinative: the state had expressed no opinion as to the propriety of a utility-sponsored light-bulb program; the responsibility for initiating the light-bulb program belonged to the utility; the market for light bulbs was not a regulated area of the economy; and the light-bulb program was not necessary to the state's regulation of its electric utilities.[25] While the *Cantor* decision does little to clarify the Court's state

18. The Court's decision in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), concerned an issue related to, but distinct from, state antitrust immunity. The Court weighed the validity of a state's economic regulations under the doctrine of preemption. In *Schwegmann*, the Court found Louisiana's Fair Trade Law, LA. REV. STAT. ANN. §§ 391-396 (West 1965) (repealed by 1977 La. Acts No. 709 § 1), to be inconsistent with the Miller-Tydings Amendment to section 1 of the Sherman Act, 15 U.S.C. § 1 (1970) (amended by Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 2, 89 Stat. 801) (repealing Miller-Tydings Amendment). Other decisions peripherally implicating the state action immunity doctrine, before Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), were: Eastern R.R. Presidents' Conference v. Noerr Motor Freight Inc., 365 U.S. 127 (1961); and Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

19. 421 U.S. 773 (1975).

20. *Id.* at 790.

21. The Virginia Bar Association was granted the authority to issue decisions in matters of legal ethics. *Id.* at 791.

22. 428 U.S. 579 (1976).

23. Chief Justice Burger concurred separately because he disagreed with what he interpreted as Justice Stevens' narrow view of *Parker* immunity. He emphasized that state action immunity may extend beyond state officials because the " 'threshold inquiry . . . is whether the *activity* is required by the state acting as sovereign.' " 428 U.S. at 604 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975)) (emphasis added). Justice Blackmun concurred only in the judgment. 428 U.S. at 605-15.

24. The plaintiff, a retail druggist who sold light bulbs, alleged that Detroit Edison's practice of providing free light bulbs to its customers was a tying arrangement. Plaintiff asserted that the utility took advantage of its monopoly in the distribution of electricity to unreasonably restrain competition in the retail light bulb market. *See* section 3 of the Clayton Act, 15 U.S.C. § 14 (1976).

25. 428 U.S. at 600.

action test, it may point to the emphasis on state compulsion in the antitrust immunity doctrine. Detroit Edison, regardless of its status as a public utility, failed to receive immunity because the state had not compelled its challenged actions.

The importance of state compulsion was reemphasized in *Bates v. State Bar of Arizona*.[26] Primarily a decision grounded on first amendment concerns, *Bates* also included an antitrust challenge to the Arizona Supreme Court's disciplinary rule restricting advertising by attorneys. Justice Blackmun, in an opinion distinguishing *Goldfarb* and *Cantor* from *Bates*, held that the Arizona Bar was immune from the antitrust laws. The most cogent factors in the *Bates* analysis were the state supreme court's promulgation and enforcement of the advertising restriction, the important state interest in regulating attorneys, and the Court's acknowledgment that the state, through its supreme court, was the real defendant.

On the eve of one of the most far-reaching decisions in state action jurisprudence, the two most relevant criteria for obtaining *Parker* immunity were that the challenged restraint was "compelled by direction of the State acting as a sovereign,"[27] and that the party seeking immunity was the state or an agency[28] of the state. Only the latter of these considerations was present in *City of Lafayette v. Louisiana Power & Light Co.*[29] The *Lafayette* Court considered the quantum of state involvement in the activities of political subdivisions necessary to qualify them for immunity from the antitrust laws.

The immunity issue arose out of an antitrust counterclaim by a private utility, Louisiana Power and Light Co., against two cities that owned and operated competing electric utilities.[30] The majority decision is reminiscent of *Cantor*, in that only five members of the Court concurred in a segment of this opinion.[31] The majority held that *Parker* immunity is not automatically granted to a city simply because of its status as a subdivision of the state.[32] The holding was more complicated however, because, while Chief Justice Burger acknowledged that municipal status, by itself, was not sufficient to

26. 433 U.S. 350 (1977).

27. Goldfarb v. Virginia State Bar, 421 U.S. at 791.

28. "Agency" in this context is used in a generic sense, to indicate that the entity was created by the state and had no independent significance outside of that relationship.

29. 435 U.S. 389 (1978).

30. The cities, Lafayette and Plaquemine, Louisiana, originally brought suit against Louisiana Power & Light Co. for, *inter alia*, refusing to wheel power and for boycotting the cities, in order to retain sole control over electric bulk power in the area, in violation of sections 1 and 2 of the Sherman Act. "Wheeling of power" means that a utility allows its transmission lines to be used by another. *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). The private utility counterclaimed, alleging that the two cities had violated section 1 of the Sherman Act and section 3 of the Clayton Act by, *inter alia*, using long term supply agreements to exclude competition and requiring customers of Louisiana Power & Light to purchase electricity from the cities if they desired continued water and gas service. 435 U.S. at 392 nn.4-6.

31. Chief Justice Burger again concurred separately, this time only in Part I of Justice Brennan's opinion and in the judgment. 435 U.S. at 418-26.

32. Justice Brennan was concerned that "[i]f municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." 435 U.S. at 408. The Court remanded this case to the district court to determine, according to the Court's state action immunity test, if the city-run public utilities were immune from the antitrust counterclaim.

confer antitrust immunity,[33] the thrust of his concurrence focused on the commercial nature of the cities' actions.[34] The *Lafayette* plurality set out a test for determining *Parker* immunity: The test requires a showing that the challenged activity was "engaged in as an act of government by the State as sovereign, or, by its subdivisions pursuant to state policy to displace competition with regulation or monopoly public service."[35] This test, by using the phrase "pursuant to state policy," appears to incorporate the state "compulsion" test of *Goldfarb*, as the Chief Justice noted.[36] In his concurrence, Chief Justice Burger suggested that he would require more than state compulsion of the challenged restraint; immunity should not adhere unless its absence would foil the state's regulatory scheme.[37] No clear test of state action antitrust immunity emerged from the *Lafayette* decision because of the differing views expressed in the plurality opinion and in the Burger concurrence. No similar ambiguity, however, is found in the Court's most recent antitrust immunity decision.

In the Court's unanimous opinion in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,[38] California's wine pricing system was found to enjoy no immunity from the Sherman Act.[39] Justice Powell explained the Court's understanding of *Parker* immunity. The test for state action antitrust immunity came from the opinion in *Bates*, reconfirmed by the plurality in *Lafayette*: "First, the challenged restraint must be 'one clearly articulated

33. "There is nothing in Parker v. Brown, or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality." 435 U.S. at 418 (Burger, C.J., concurring) (citation omitted).

34. "There is nothing in this record to support any assumption other than that this is an ordinary dispute among competitors in the same market." *Id.* at 419.

35. *Id.* at 413.

36. *Id.* at 425 (Burger, C.J., concurring).

37. *Id.* at 426. Chief Justice Burger's reliance on the municipalities running their own utilities, as opposed to merely regulating private utilities, has led one commentator to interpret the Chief Justice's concurrence as favoring a blanket immunity for state subdivisions whose anticompetitive activities could be categorized as "governmental". *See The Supreme Court, 1977 Term*, 92 HARV. L. REV. 1, 281 (1978).

38. 445 U.S. 97 (1980). Justice Brennan did not participate in the decision of this case. However, since Justice Brennan wrote the plurality opinion in *Lafayette*, it is hardly likely that he would have dissented in *Midcal*.

39. Midcal Aluminum, Inc., a wholesale distributor of wine in California, sought an injunction in the state court of appeals to prevent enforcement of California's wine price-fixing program. Midcal Aluminum, Inc. v. Rice, 90 Cal. App. 3d. 979, 153 Cal. Rptr. 757 (1979). Under CAL. BUS. & PROF. CODE § 24866 (West 1964), vineyards and wine wholesalers were required to set prices through a fair trade contract or post a price list governing the price retailers and consumers had to pay for wine. Anyone in the distributive chain selling below the set price was subject to state sanction. *Id.* § 24880. Midcal sought the injunction after it was charged with violating the state program by the Department of Alcoholic Beverage Control.

The state court of appeals found the wine pricing program to be violative of section 1 of the Sherman Act. The appellate court held that the state department which enforced the wine scheme lacked immunity. Additionally, the state's defense that section 2 of the twenty-first amendment protected the state program was dismissed. *Cf.* Rice v. Alcoholic Beverage Control Appeals Bd., 21 Cal. 3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978) (distilled liquor fair trade law did not confer antitrust immunity). The California Supreme Court declined to hear *Midcal* and the state agency decided against seeking a writ of certiorari from the United States Supreme Court. The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers, sought a writ of certiorari from the Supreme Court as an intervenor.

and affirmatively expressed as state policy;' second, the policy must be 'actively supervised' by the state itself."[40] While the California wine pricing scheme met the state policy criterion, it failed at the second hurdle. The Court saw no evidence of active state supervision. The statutory scheme did not include state review of price schedules or fair trade contracts, nor was it mandated that such schedules and contract terms be set by California. The state merely enforced private agreements.

C. *The Facts in* Community Communications Co. v. City of Boulder[41]

In *Community Communications*, the Tenth Circuit court was faced with an appeal by the defendants from the district court's order[42] of a preliminary injunction against the city. Community Communications Company (CCC) holds a non-exclusive franchise from the City of Boulder to operate a cable television company within Boulder's city limits.[43] There are, at the present time, no other cable franchisees. The permit or franchise issued by the city is actually no more than a contract, enacted in the form of an ordinance. The city council, alleging a reconsideration of its cable television goals, passed an ordinance on December 19, 1979,[44] imposing a ninety-day moratorium on CCC's cable expansion in Boulder. Concurrently, the city revoked and reenacted CCC's franchise to include the moratorium.[45] The city, preparing to seek other applicants for its cable television market, drafted a model ordinance and sought comment from the cable industry. The ordinance was to be negotiated and enacted in lieu of a contract.[46] Subsequent to Boulder's actions, CCC brought suit against the city and against those parties involved in a recently organized cable television corporation,[47] alleging that the enactment of the two new ordinances violated, *inter alia*, section 1 of the Sher-

40. 435 U.S. at 410 (citing 430 U.S. at 362).

41. 630 F.2d 704 (10th Cir. 1980).

42. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035 (D. Colo. 1980).

43. CCC, together with its predecessor, has operated in Boulder since 1964. The city's twenty-year contract with the cable television firm is in the form of an ordinance. Under this ordinance, CCC can string cable over the entire city either for a cable television system or for a community antenna system (CATV). CCC's system is involved in retransmission, not program origination. Since February 1980, CCC has utilized its newly developed satellite capability. Its program content has expanded greatly from its former schedule, which comprised only Denver and Cheyenne television stations. Cable is strung via utility poles, most of which are jointly owned by the Colorado Public Service Company and Mountain Bell Telephone Company. CCC has obtained a license from the utilities to use their poles. *Id.* at 1036.

44. Boulder, Colo. Ordinance 4473 (Dec. 19, 1979).

45. Boulder, Colo. Ordinance 4472 (Dec. 19, 1979).

46. Some of the more interesting features of the model ordinance include:

> the city's right to purchase the cable company, at a price excluding good-will and limited to depreciated investment; the city's right of prior approval of every company contract; rate regulation; the city's right to change rates at any time; a 5% franchise fee (two and one-half times the present fee); a requirement for five leased access channels; a complaint procedure monitored by the city manager, with a liquidated damage provision; a requirement to continually upgrade company facilities to state-of-the-art conditions; and a requirement for renegotiation, at specified intervals, of rate structures, free or discounted service, services provided, programming offered, and human rights.

Community Communications Co. v. City of Boulder, 630 F.2d at 710 (10th Cir. 1980) (Markey, J., dissenting).

47. The other defendants were Boulder Communications Co. (BCC), a partnership, and the individual partners. The plaintiff alleged that BCC conspired with Boulder officials to uni-

man Act.[48]

At the preliminary hearing on the requested injunction, the city defended its conduct on the basis of *Parker* immunity. Boulder asserted that its status as a home rule city, as provided by Colorado's Constitution,[49] made its action in regulating cable television tantamount to action of the state.[50] The district court held that the city lacked immunity from the Sherman Act, and found that CCC could suffer "irrevocable injury" without the requested injunction. The lower court found the city's method of regulating CCC to be dispositive. In light of the *Lafayette* and *Midcal* decisions, the court decided that the city's use of "an offer and acceptance mechanism" was not "characteristic of utility regulation," and therefore, was not a form of government regulation deserving of antitrust immunity.[51] The district court was unimpressed with Boulder's home rule argument. The court found that the regulation of cable television touched upon matters beyond local concern, justifying federal intervention through the application of the Sherman Act. No discovered case law characterized cable television as a matter of local concern.[52]

On appeal to the Tenth Circuit, Chief Judge Seth, speaking for the appellate court,[53] reversed the district court, finding that the city was im-

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laterally alter CCC's franchise based on BCC's desire to become the exclusive city-wide cable television franchisee.

48. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), reads, in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ."

49. COLO. CONST. art. XX, § 6 gives cities in Colorado with a population of at least two thousand people the power to adopt a charter authorizing the city to enact legislation in matters of local concern. Such legislation supersedes any inconsistent state law. Conrad v. City of Thornton, 191 Colo. 444, 553 P.2d 822 (1976). Colorado has a very broad home rule provision:

> From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town and the citizens thereof shall have . . . all other powers necessary, requisite or proper for the government and administration of its local and municipal matters . . . .

COLO. CONST. art. XX, § 6.

50. Presumably, Boulder's authority to contract with companies and regulate cable television within its bounds is based on the Colorado Constitution, which provides authority over "works or ways local in use and extent . . . ." *Id.* at § 1. This provision is made applicable to home rule cities, other than Denver, through art. XX, § 6 of the Colorado Constitution. A cable television system must run cable over public ways to operate.

51. 485 F. Supp. at 1039.

52. On July 1, 1980, after both the district court's preliminary injunction against Boulder and the Tenth Circuit's reversal of that order, the Boulder City Council passed Ordinance 4515. This ordinance became effective August 21, 1980. It permanently limited CCC's right to expand cable television service outside of the one-third of the city it had reached prior to July 1, 1980. On August 5, 1980, in the district court, Judge Matsch again issued a preliminary injunction prohibiting enforcement of the ordinance limiting CCC's growth. *See* Community Communications Co. v. City of Boulder, No. 80-M-62 (D. Colo. filed Sept. 5, 1980) (memorandum opinion).

53. According to CCC, the City of Boulder continually stressed the urgency of a decision from the court of appeals. An initial order, reversing the district court decision, came down one day after the appellate argument. Supplemental Brief of CCC in Support of Petition for Rehearing *en banc* at 2, Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980), *rehearing denied* (Oct. 1, 1980). It is interesting to note that the appellate court characterized the proceedings below as involving a request for a temporary restraining order. Community Communications Co. v. City of Boulder, 630 F.2d at 705 (10th Cir. 1980). The district court, however, clearly considered CCC to have moved for a preliminary injunction. 485 F.

mune from the reach of the Sherman Act. This conclusion was based upon the nature of Colorado's constitutional home rule provisions and a recent Colorado Supreme Court decision, *Manor Vail Condominium Association v. Town of Vail*.[54] The court of appeals held that the *Manor Vail* decision indicated Colorado's acknowledgment of the local nature of cable television regulation.[55] The appellate court reasoned, therefore, that since Boulder's home rule status entitled the city to legislative preeminence in matters of local concern, its promulgation of the challenged ordinances was equivalent to state action. This deduction led Chief Judge Seth to inquire into the city's actions surrounding the enactment of the cable television ordinances to determine whether they met the Supreme Court's pronouncements in *Lafayette* and *Midcal*. In the court's view, Boulder satisfied the two criteria of the state action antitrust immunity test enunciated in *Midcal*: Boulder had "clearly articulated and affirmatively expressed" a policy on cable television through its city council transcripts and through the moratorium ordinance. The policy to halt CCC's growth was "actively supervised by the state," that is, by the home rule city, through enactment and enforcement of the moratorium ordinance. Apparently as dictum, the court of appeals found the "governmental" nature of Boulder's involvement in the cable television business supportive of the city's immunity stance.[56]

Subsequent to the filing of the majority opinion in *Community Communications*, Judge Markey[57] authored a vehement and lengthy dissent. This dissent was grounded upon a first amendment analysis of the city's action which prevented new listeners and the cable television company from connecting.[58] Judge Markey did treat at length the antitrust claim and the

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Supp. at 1036. A preliminary injunction is issued after a hearing where notice has been previously given to the opposing party. In contrast, a temporary restraining order may be issued ex parte, without an adversary hearing. *See* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2947 at 426 (1973).

54. 602 P.2d 1168 (Colo. 1980). In this suit, the plaintiff claimed that Vail's rate structure for its cable television franchise violated the equal protection clause of the fourteenth amendment. The Colorado Supreme Court upheld the rate structure, for it was not "wholly arbitrary" or "invidious discrimination" against the plaintiff, a cable television customer. 604 P.2d at 1172. No challenge appears to have been made to Vail's authority to regulate the cable television franchise, nor was the city's right to grant the franchise contested.

55. Community Communications Co. v. City of Boulder, 630 F.2d at 706-07 (10th Cir. 1980).

56. See Chief Justice Burger's concurrence in *Lafayette*, 435 U.S. at 426, and note 37 *supra* and accompanying text.

57. Chief Judge Markey, of the United States Court of Customs and Patent Appeals, sat by designation. Judge Markey filed a separate dissent more than a month after the majority opinion was handed down.

58. The plaintiff also had asserted a claim based on the first amendment, because of Boulder's restrictions on CCC's ability to reach more listeners. The district court brushed this claim aside, noting that the first amendment issue was not ripe; however, the court cautioned the city that its regulations must be carefully articulated to avoid conflict with the first amendment. 485 F. Supp. at 1040.

The nature of the antitrust section of the Tenth Circuit Survey does not permit an extensive treatment of the serious first amendment concerns raised by Judge Markey. The dissent would have upheld the district court's preliminary injunction because the moratorium on CCC's future growth appeared to be a "prior restraint" on speech. In the context of this decision, a "prior restraint" refers to government repression of intended communication. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). Judge Markey considered CCC's activities in carrying programming signals, as opposed to originating programming, to be en-

immunity defense. Nevertheless, he considered this analysis subordinate to, albeit supportive of, his first amendment views requiring the preliminary injunction to be upheld.[59]

The dissenting opinion focused on the dictates of the majority decision in *Lafayette*. Judge Markey rejected Chief Judge Seth's conclusion that home rule status cloaked Boulder with the mantle of state action, leading to immunity. Whereas the Supreme Court found no automatic immunity for the plaintiff-cities in *Lafayette*,[60] the dissent reasoned that the Tenth Circuit majority's position undermined the Supreme Court's view of state action antitrust immunity. Judge Markey could find no Colorado policy on cable television regulation, nor could he find a state policy of replacing competition in the cable television business with anticompetitive regulation.[61] The dissent, in agreement with the lower court, concluded that cable television did not appear to be solely a matter of local concern in light of the Supreme Court's pronouncement in *United States v. Southwestern Cable Co.*,[62] which stated that cable operators were engaged in interstate commerce. Basically, Judge Markey did not accept the notion that the dictates of federalism, which spawned the *Parker* immunity doctrine, placed home rule cities in the position of sovereign states so as to justify municipal antitrust immunity. This conclusion seemed especially evident where the state offered no guidance or supervision to the city in dealing with the challenged activity.

A final point of difference between the dissent's view and the majority opinion concerned the distinction Chief Justice Burger had mentioned in his concurrence in *Lafayette*, the distinction between governmental and proprietary activity. Chief Judge Seth found that Boulder's *regulation* of cable television, as opposed to the city's actual operation of that industry, supported his immunity view. Judge Markey emphasized that Boulder's regulation of CCC, through an ordinance which was no more than a contract between the city and CCC, was hardly typical of "governmental" activity.[63] Judge Mar-

compassed nonetheless within the protection of the first amendment. Community Communications Co. v. City of Boulder, 630 F.2d at 713 (10th Cir. 1980) (Markey, J., dissenting). The dissent cited the oft-quoted language of Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969), that "[i]t is the right of viewers and listeners . . . which is paramount . . . . [T]he First Amendment [protects the] marketplace of ideas . . . rather than [give] countenance [to] monopolization of that market." *Id.* at 390. The dissent did not find Boulder's police power concern for the public ways or its attempt to find a single cable operator for the city to be tantamount to a compelling governmental interest justifying the first amendment infringement which Judge Markey perceived.

59. The appellate court has the power to affirm a judgment on grounds not necessarily relied on by the court below. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 110.25 [1] (2d ed. 1979).

60. Lafayette and Plaquemine, Louisiana, are not home rule cities, although Louisiana's Constitution does allow a city to adopt a home rule charter. 435 U.S. at 434 n.15 (Stewart, J., dissenting).

61. *In re* Mountain States Tel. & Tel. Co., 73 PUB. U. REP. 3D 161, 175 (1968) (Public Utilities Commission of Colorado refused to regulate cable television until the state legislature takes action to bring cable operators within the jurisdiction of the commission). Colorado currently has no statutes or administrative regulations pertaining to cable television.

62. 392 U.S. 157, 168-69 (1968). The Court found CATV systems to be in interstate commerce and therefore within the regulatory control of the FCC through the Communications Act of 1934, 47 U.S.C. § 153(a) (1976).

63. Judge Markey echoed the district court's position on the city's manner of regulating CCC. See 485 F. Supp. at 1039.

key considered that Chief Justice Burger's *Lafayette* concurrence was overemphasized by the Tenth Circuit court, in disregard of the thrust of both the majority and plurality sections of the Supreme Court's opinion in *Lafayette*.

D. *The Tenth Circuit: Lost in a Supreme Court Labyrinth*

The Tenth Circuit Court of Appeals, in *Community Communications*, reached its conclusion by finding Boulder's home rule status and its lack of direct participation in the operation of the cable television business to be highly significant. Combining these facts with a strained interpretation of the *Manor Vail* decision, the appellate court was able to conclude that Boulder met the two-part test for state action antitrust immunity as set out in the Supreme Court's latest *Parker* immunity decision, *Midcal*. The following analysis will consider the court's reasoning and conclusions.

Community Communications differs from *Lafayette* in two respects: Boulder is regulating rather than operating an industry, and unlike the cities in *Lafayette*, Boulder has home rule status, giving it preeminence in matters of exclusive local concern vis-à-vis the state. Focusing on the doctrine of home rule and Chief Justice Burger's concurrence in *Lafayette*, these factors might appear to justify a result that differs from *Lafayette*. On a closer analysis of these tenets of the Tenth Circuit's decision, however, it is clear that their value in justifying Boulder's antitrust immunity has been greatly overstated.

The appellate court's conclusion, that Boulder's actions in regulating cable television are tantamount to those of the state, is premised on the notion that cable television is solely a matter of local concern. It is only when a home rule city in Colorado legislates on an exclusively local matter that the city has preeminence over contradictory state laws.[64] The court's categorization of the cable television business as an exclusively local matter fails to take note of contradictory case law.[65] Even if it is assumed that such cases are not apposite, the Tenth Circuit's reliance on the Colorado Supreme Court's decision in *Manor Vail* as evidence of the exclusively local nature of cable television regulation is misplaced. In *Manor Vail*, the plaintiff had argued that the city's rate structure for cable television customers denied it equal protection of the laws. Vail's ability to franchise a cable television firm and to set rates was not challenged by the plaintiff and was not mentioned in the opinion. Assuming that the Colorado Supreme Court, in a proper case, would rule that Vail had the power to franchise and set cable television rates, this would not be dispositive of the exclusively local nature of cable television. Colorado has no policy, case law, or statute concerning cable television regulation. Under Colorado law, a home rule city may legislate on matters of *state*

64. *See* note 49 *supra*.

65. *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. 157, 180-81 (1968) (CATV deemed an enterprise within interstate commerce and therefore subject to regulatory authority of the FCC). *Cf.* TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U.S. 556 (1970) (the district court ruled that a CATV system was in interstate commerce; however, under the preemption doctrine, the state statute regulating CATV as a public utility did not conflict with the commerce clause) In *TV Pix*, the lower court commented that CATV's character was more local than national.

and local concern in the *absence* of state law or regulation.[66] Therefore, granting that *Manor Vail* stands for the proposition that Colorado home rule cities may franchise and set rates for cable companies, the decision conclusively proves only the obvious: Colorado has not entered the area of cable television regulation. There is no support for the view that the Colorado court would find inconsistent municipal law to take precedence over an expressed state policy in this area.

Reliance on the *Manor Vail* decision led the Tenth Circuit court to a second misconception. This decision dealt with a *constitutional* challenge to Vail's regulatory behavior; antitrust issues were not involved. In *Community Communications*, Boulder's ability to franchise and set rates for CCC was not in dispute. The issue was whether the city's allegedly anticompetitive conduct was beyond the reach of the Sherman Act. The *Manor Vail* decision gave no guidance on the ability of home rule cities to act in an anticompetitive fashion in regulating cable television.

Home rule status fails to be of conclusive significance for another reason. The *Lafayette* and *Midcal* decisions are inconsistent with a *Parker* immunity view that would allow mere home rule activity to equal state action. In *Lafayette*, the only Supreme Court decision to focus on the antitrust immunity of municipalities, both the majority and the dissent were aware of the doctrine of home rule.[67] However, the Court did not, even in a passing footnote, make any reference to a possible distinction in treatment between home rule cities and those cities with more limited authority. While this negative conclusion is certainly not dispositive, it bears consideration when the *Midcal* Court's latest interpretation of the *Parker* immunity test is examined. The dissent in *Lafayette* had justifiably complained that the plurality's test for antitrust immunity was unclear: that sovereign acts of the states and their subdivisions are immune when they are "*pursuant to* state policy to displace competition."[68] Justice Stewart, dissenting in *Lafayette*, was not certain whether state *authority* suffices or whether state *compulsion* is necessary.[69] If state authority is sufficient, a stronger case for the significance of home rule might be available. But the Supreme Court's most recent antitrust immunity decision, *Midcal*, does not allow a general grant of state authority to provide federal antitrust immunity. Not only must the "challenged restraint . . . be . . . 'clearly articulated and affirmatively expressed as state policy' . . . [but] the policy must be 'actively supervised' by the State *itself*."[70] Within this succinct test, home rule cities can find no comfort. The *Midcal* criteria were created as a template to be placed over the activity of a state as a means of determining antitrust immunity. *Midcal* points to the focus of all the Court's antitrust immunity decisions: the state *itself* must be actively

66. *See* Greeley Police Union v. City Council, 191 Colo. 419, 553 P.2d 790 (1976); Woolverton v. Denver, 146 Colo. 247, 316 P.2d 982 (1961).

67. 435 U.S. at 408 (plurality opinion) (noting that most counties, municipalities and townships have broad authority for general governance). *Id.* at 434-35 n.15 (dissenting opinion) (pointing out that petitioner-cities did not have home rule charters, but that Louisiana has a statutory home rule provision).

68. *Id.* at 435.

69. *Id.*

70. 445 U.S. at 105 (citations omitted)(emphasis added).

involved in the challenged restraint, giving its imprimatur to the allegedly anticompetitive actions. Colorado has made no provision for cable television regulation either in its constitutional provision for home rule or in its statutes and regulations; nor did the Colorado Supreme Court mandate the anticompetitive regulation of cable television in *Manor Vail*, all of which points to a conclusion at odds with the Tenth Circuit.

The Supreme Court's *Midcal* opinion clarifies another point of contention. Chief Justice Burger appears to have abandoned his distinction between governmental activity and proprietary activity. This *8-0* decision contains not a word about such a dichotomy. This is particularly telling because the challenged activities of the State of California in *Midcal* could hardly have been more "governmental". The *Midcal* case involved a state program of authorizing and enforcing wine price schedules and fair trade contracts generated through private agreements.[71] The Tenth Circuit's use of the governmental/proprietary distinction to support its immunity decision in *Community Communications* appears inconsistent with the Supreme Court's present focus.

The Tenth Circuit court seems to have been led astray by focusing on Boulder's ability to regulate cable television in general. The real issue, however, concerned the city's ability to act anticompetitively with impunity. If the issue had been framed in this fashion, Boulder's home rule status and the city's manner of regulating CCC would have taken their proper place as secondary considerations. Under the Supreme Court's two most recent *Parker* immunity decisions, the threshold inquiry should have been whether the challenged anticompetitive policy came from the state. Colorado's silence on the ability of its cities to regulate cable television in an anticompetitive fashion should have been dispositive in this case. The Tenth Circuit's reluctance to follow the Supreme Court's present *Parker* immunity test is understandable, however, when the potential impact of this test upon municipalities, other political subdivisions, and states is considered.[72] The following section will briefly discuss the competing concerns that must be balanced in articulating a test of state action immunity from the antitrust laws.

E. *Federal Expansion Overruns State Sovereignty*

Chief Justice Burger, in his concurrence in *Lafayette*, commented on the ever-expanding concept of interstate commerce with its concomitant effect of extending the reach of the antitrust laws.[73] The point is well taken, in light of the Supreme Court's most recent pronouncement on subject matter juris-

71. *Id.*

72. *See generally* Handler, *Antitrust-1978*, 78 COLUM. L. REV. 1363 (1978); Kennedy, *Of Lawyers, Lightbulbs and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws*, 74 NW. U.L. REV. 31 (1979); Posner, *The Proper Relationship Between State Regulations and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974); *Comment*, National League of Cities *and the* Parker *Doctrine: The Status of State Sovereignty Under the Commerce Clause*, 8 FORDHAM URB. L. J. 301 (1980); Note, *The State Action Antitrust Defense for Local Government: A State Authorization Approach*, 12 URB. LAW. 315 (1980).

73. 435 U.S. at 420-22 (Burger, C.J., concurring).

diction under the Sherman Act. This decision, *McLain v. Real Estate Board of New Orleans, Inc.*, extends the purview of the Sherman Act to any defendant whose effect on interstate commerce is as peripheral as an interstate brokerage receiving out-of-state financing.[74]

The federal expansionist trend has not been limited to the antitrust laws. Cities no longer can assert the good faith immunity defense in suits charging them with violating an individual's civil rights under the fourteenth amendment.[75] Another area of encroachment on the states has occurred through a broad reading of section 1983 of the Civil Rights Act of 1871.[76] The Court has expanded the reach of section 1983 to include private actions against the states for violations of federal statutory law as well as for constitutional infringements.[77]

In the context of congressional expansion into areas once thought to be beyond the reach of the national government, the *Midcal* and *Lafayette* decisions are not remarkable. The present test of state immunity from the antitrust laws, however, fails to strike the proper balance between a national economic policy and the sovereign functions of states and their political subdivisions.

There is little doubt that if every municipality and other political subdivision in this country acted in an anticompetitive manner, motivated by their own sense of self-interest, economic dislocation and subversion of the federal antitrust laws would occur. Justice Brennan's plurality opinion in *Lafayette* expressed a fear of such a distortion of the efficiency of free markets if the immunity doctrine automatically included state subdivisions.[78] Regardless of how one views the scope of the federal antitrust laws, it is the present *test* of state action immunity that fails to consider our federalist system.

The plurality in *Lafayette* did not consider *National League of Cities v. Usery*[79] to be relevant to the issue of municipal antitrust immunity.[80] In *Usery*, a 5-4 majority held that Congress' use of the commerce clause is limited when federal law attempts to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions. . . ."[81] The Court's *Parker* immunity test may conflict with *Usery* when a municipality is sued for anticompetitive behavior in an area that can be considered a "traditional government function." The *Usery* decision demonstrates the inherent problem in the Supreme Court's current thinking on municipal antitrust immunity: compliance with the *Midcal* test may significantly interfere in state and local governmental functioning.

74. 444 U.S. 232, 244 (1980). *See* notes 165-67 *infra* and accompanying text.
75. Owen v. City of Independence, 445 U.S. 622 (1980).
76. 42 U.S.C. § 1983 (1976).
77. Maine v. Thiboutot, 100 S. Ct. 2502 (1980).
78. 435 U.S. at 407-08.
79. 426 U.S. 833 (1976). *Usery* invalidated a federal wage law that provided for a minimum wage for state and local government employees. The Court stated that the added expense of compliance would interfere with the integral operations of the states.
80. 435 U.S. at 412 n.42.
81. 426 U.S. at 852.

As the dissent in *Lafayette* pointed out, the Court's antitrust immunity test does not consider the manner in which states have delegated powers to municipalities.[82] States rarely express an anticompetitive policy or supervise such a policy when they delegate authority to their political subdivisions.[83] Thus, most municipal activities initiated before the *Lafayette* decision will not be immunized under the Court's present test. One effect of the Court's *Midcal* and *Lafayette* tests will be increased state intervention in municipal activities to ensure compliance with the antitrust immunity test.[84] Alternatively, states may refuse initially to share power with the cities, preferring to avoid the intimate involvement in municipal affairs necessary to provide antitrust immunity.[85] The ability of cities to enact programs that are tailored to the special needs of their citizenry, or to react to modern problems with innovative solutions may be hampered by a fear of the federal antitrust laws.[86]

The terror that the treble damages provision[87] produces in the hearts of antitrust defendants will be equally felt by government defendants involved in private antitrust suits. It is conceivable that an antitrust damage award might bankrupt a city.[88] Extremely large damage awards against cities may directly affect the citizenry by reducing local government programs and services.[89] States themselves may suffer financially from antitrust damage awards if they are forced to bail out bankrupt cities, satisfying the cities' judgments.[90]

All of these potential adverse consequences from the Court's present view of *Parker* immunity are illustrative of the problems inherent in balancing the concept of federalism—with its allowance for state sovereignty in our governmental system—against a national economic policy which extolls free market enterprise. Alternatives to the current immunity test as articulated in *Midcal* may lie in an equitable defense[91] to treble damages when a munic-

82. 435 U.S. at 434-38 (Stewart, J., dissenting).

83. *See generally* Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 280-83 (1968).

84. A recent state statute authorizing New York to participate with New Jersey in the organization of industrial development projects reflects the impact of the *Lafayette* decision. The statute specifically authorizes local governmental anticompetitive behavior. N.Y. UNCONSOL. LAWS § 7171(g) (65) (McKinney 1979).

85. *See, e.g.*, Northern Sec. Co. v. United States, 193 U.S. 197 (1904). In *Lafayette*, Justice Stewart commented on the dearth of state legislative history, making it extremely difficult to support an argument of legislative intent to provide municipal immunity. 435 U.S. at 436-37 (Stewart, J., dissenting).

86. On the municipal problems inherent in the Court's present *Parker* immunity doctrine, see Comment, National League of Cities *and the* Parker *Doctrine: The Status of State Sovereignty Under the Commerce Clause*, 8 FORDHAM URB. L.J. 301, 336-42 (1980).

87. 15 U.S.C. § 15 (1976).

88. 435 U.S. at 442 n.1 (Blackmun, J., dissenting). Justice Blackmun pointed out that Louisiana Power & Light Co. sought $540 million in treble damages, amounting to $28,000 per family, equally divided among the residents of Plaquemine and Lafayette, Louisiana.

89. *See Federal Antitrust Immunity: Exposure of Municipalities to Treble Antitrust Damages Sets Limit For New Federalism:* City of Lafayette v. Louisiana Power and Light Co., 11 CONN. L. REV. 126, 140 (1978) [hereinafter cited as *Federal Antitrust Immunity*].

90. "A recent study revealed that the statutes of 15 states provided for a State receiver or state agency to act as a receiver when a local government unit defaults on its financial obligations." ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CITY FINANCIAL EMERGENCIES: THE INTERGOVERNMENTAL DIMENSION 77 (1973).

91. *See Federal Antitrust Immunity*, *supra* note 89, at 142.

ipality is found to have violated the antitrust laws, or in injunctive relief in lieu of damages.[92] Possibly, as Professor Handler has suggested,[93] municipal anticompetitive conduct should be left to the states to handle through state antitrust laws.

However rough the present attempt by the Supreme Court is in striking the balance and articulating a satisfying *Parker* immunity test, it is clear that the test we now have is not ambiguous. The Court and Congress should each be urged to consider the ramifications of the present immunity test. Until such time as a new balance is struck, however, federal courts will have the obligation to adhere to the dictates of *Midcal* and *Lafayette* when confronted with municipalities seeking immunity from the antitrust laws.

II. THE BAR TO THE INSURANCE INDUSTRY'S ANTITRUST EXEMPTION: THE "BOYCOTT EXCEPTION" TO THE MCCARRAN ACT

In *Card v. National Life Insurance Co.*,[94] the Tenth Circuit Court of Appeals waded into an area that lately has received an unusual amount of attention from the Supreme Court: the statutory exemption from the antitrust laws afforded to the insurance industry.[95] The McCarran-Ferguson Act[96] (McCarran Act) excludes from antitrust liability every person or entity in the "business of insurance,"[97] to the extent that their activity is "regulated by state law,"[98] unless such activity is an act of "boycott, coercion or intimidation."[99]

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92. 15 U.S.C. § 26 (1976) provides for injunctive relief. Under Section 26, any party in a private antitrust suit may seek an injunction when injury is alleged under the Sherman or Clayton Acts.

93. Handler, *Antitrust-1978*, 78 COLUM. L. REV. 1363, 1388 n.160 (1978). Professor Handler and the Colorado Attorney General's Office took the same position before the National Commission for the Revision of Antitrust Laws and Procedures. Both expressed the belief that the states should control anticompetitive state action through state antitrust laws. *Id.*

94. 603 F.2d 828 (10th Cir. 1979).

95. *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978).

96. 15 U.S.C. §§ 1011-1015 (1976). The Act provides, in relevant part:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Id. § 1011. The statute continues:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That . . . the Clayton Act, and . . . Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

Id. § 1012. The McCarran Act further provides:

> (b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Id. § 1013.

97. *Id.* § 1011.

98. *Id.* § 1012(b).

99. *Id.* § 1013(b).

Congress passed the McCarran Act in 1945 in response to a precedent-setting decision by the Supreme Court in *United States v. South-Eastern Underwriters Association*,[100] which held, for the first time, that the business of insurance was an activity in interstate commerce.[101] Congress and the dissenting justices in *South-Eastern Underwriters* feared that this extension of federal power under the commerce clause would invalidate state regulation of the insurance industry because of the preemption doctrine.[102] The McCarran Act's main thrust was to allow state regulation and taxation of the insurance industry.[103] The insurance industry exemption from the federal antitrust laws was added as a proviso.[104]

The Tenth Circuit's decision in *Card* did not concern the McCarran Act as a whole; the opinion only discussed the scope of the term "boycott," as used in the Act. Before discussing the phrase "boycott, coercion or intimidation" as contained in the McCarran Act, it should be understood that a defendant in an antitrust suit who asserts the McCarran Act's exemption need only prove that it is indeed in the "business of insurance," and that the activity that has been challenged as a restraint of trade is "regulated by state law." The meaning of both these phrases has been scrutinized by federal courts to determine the scope of such broad language.[105] If a plaintiff is to successfully negate a defendant's McCarran Act antitrust exemption, he must show that the defendant, who has met the McCarran Act's requirements, has boycotted, coerced or intimidated the plaintiff. Such a showing

100. 322 U.S. 533 (1944).

101. The *South-Eastern Underwriters* decision reversed a seventy-five year old precedent established in Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), which had declared insurance not to be "a transaction of commerce." *Id.* at 183.

102. Federal preemption, through the supremacy clause, is imposed sparingly today. State law will be deemed invalid where it conflicts with federal law, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); or when Congress has clearly decided to so occupy an area by regulation that even consistent state law will be declared invalid, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). At the time of the passage of the McCarran Act, the preemption doctrine was thought to have a broader scope than it does today; thus, federal regulation of insurance could have invalidated even consistent state law. *See* Sullivan & Wiley, *Recent Antitrust Developments: Defining The Scope of Exemptions, Expanding Coverage and Refining the Rule of Reason*, 27 U.C.L.A. L. REV. 265, 270-71 (1979) [hereinafter cited as *Recent Antitrust Developments*].

103. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429 (1946).

104. 15 U.S.C. § 1012(b) (1976).

105. In SEC v. National Sec., Inc., 393 U.S. 453 (1969), the Court outlined those activities which fall within the "business of insurance": "[T]he fixing of rates . . . , the selling and advertising of policies . . . , the licensing of companies and their agents . . . , [t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement—these [are] the core of the 'business of insurance.'" *Id.* at 459-60. Recently, in Group & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979), the Court held that petitioner's agreements with pharmacies, to make it attractive for policyholders to patronize pharmacies that limited their profit margins on drug sales, did not qualify as "the business of insurance." For other cases defining this phrase, see Nedrow, *The McCarran Controversy: Insurance and the Antitrust Law*, 12 CONN. L. REV. 205, 210-45 (1980).

The requirement that insurance be "regulated by state law" to avoid antitrust liability, 15 U.S.C. § 1012(b) (1976), is met by a general authorization or prohibition of "certain standards of conduct." California League of Ind. Ins. Producers v. Aetna Cas. & Sur. Co., 175 F. Supp. 857, 860 (N.D. Cal. 1959). A general scheme of regulation which failed to specifically include the defendant's challenged restraint was, nonetheless, said to meet the "regulated by state law" test in Ohio AFL-CIO v. Insurance Rating Bd., 451 F.2d 1178 (6th Cir. 1971).

has been called the "boycott exception"[106] to the McCarran Act.

Before the Supreme Court's decision in *St. Paul Fire & Marine Insurance Co. v. Barry*,[107] the federal courts had been polarized over their interpretation of the boycott language in the McCarran Act. The first federal court to define the boycott language took a narrow view, considering that only the "blacklisting" of insurance companies or agents by a group of insurers was sufficient to meet the boycott exception.[108] Both the Fifth and Ninth Circuits adopted such a view.[109] Other circuits, however, have found that the boycott exception extends to any boycotting conduct that would violate the Sherman Act.[110] The usual definition of a boycott, within the prohibitions of the Sherman Act, is any concerted action to exclude a competitor from the market.[111]

In *Barry*, the Court settled this conflict at its extremes, but left the middle latitudes open to lower court interpretation. The Supreme Court was faced with the issue of whether the McCarran boycott exception applied to disputes between *policyholders* and insurers. Justice Powell, writing for the Court, resoundingly answered in the affirmative.[112] The respondents, plaintiffs below, were physicians who brought a class action suit against the four insurers who carried medical malpractice insurance in the state where the physicians practiced. Allegedly, these insurers had conspired so that three of the companies refused to deal with the physicians; thus, the doctors were forced to seek coverage from the fourth insurer, and that company had changed the rules of coverage to favor insurers.[113] The Court made clear that it was deciding only whether the insurers were acting to "boycott" the physicians within the "boycott exception" to the McCarran Act. There was no issue as to whether the insurers' acts were related to the business of insur-

106. The phrase "boycott, coercion and intimidation" will be referred to merely as the "boycott exception", since courts appear to treat these terms synonymously. *See, e.g.*, United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 535-36 (1944). *See also Recent Antitrust Developments*, *supra* note 102, at 278 n.59.

107. 438 U.S. 531 (1978).

108. Transnational Ins. Co. v. Rosenlund, 261 F. Supp. 12 (D. Or. 1966). This court came to its definition of "boycott" based upon the legislative history. *See* 91 CONG. REC. 1087 (1945) (remarks of Rep. Allen).

109. *See, e.g.*, Meicler v. Aetna Cas. & Sur. Co., 506 F.2d 732 (5th Cir. 1975); Addrisi v. Equitable Life Assurance Soc'y, 503 F.2d 725 (9th Cir. 1974).

110. *See, e.g.*, Proctor v. State Farm Mut. Auto. Ins. Co., 561 F.2d 262 (D.C. Cir. 1977), *vacated for reconsideration in light of* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979), at 440 U.S. 942 (1979); Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841 (2d Cir. 1963) (dictum), *cert. denied*, 376 U.S. 952 (1964).

111. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, § 83 at 229 (1977). A group boycott to exclude a competitor from the market is a per se violation of the Sherman Act. Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). Some activities are considered to be so economically egregious as to be per se unreasonable, and therefore, violative of section 1 of the Sherman Act. United States v. Trenton Potteries Co., 273 U.S. 392, 401 (1927) (price fixing). Not all concerted refusals to accede to the demands of a trader in the market are per se violations of section 1. *E.g.*, Deesen v. Professional Golfers' Ass'n., 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (PGA's rules for participation in golf tournaments, while excluding Deesen, were a reasonable restraint to aid in the management of the professional sport).

112. 438 U.S. at 552-55. Justice Stewart filed a dissent in which Justice Rehnquist joined. *Id.* at 555.

113. *Id.* at 535.

ance, or whether the state regulated that business.[114] Justice Powell defined a boycott in generic terms as "a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target."[115] The Court stated that "the term 'boycott' is not limited to concerted activity against insurance companies or agents or, more generally, against competitors of members of the boycotting group."[116] The Court, however, did stop short of the more expansive reading of the term adopted by some lower courts. The majority held that a "boycott" within the McCarran Act is not synonymous with all activity that constitutes a per se violation of the Sherman Act.[117] Almost as an afterthought, Justice Powell reminded the parties that the threshold inquiry in a charge of boycott is that there is concerted activity; an individual actor alone cannot "boycott." The boycott exception now encompasses concerted action against policyholders. The Court has left unanswered the question of to what extent conduct beyond concerted action against insurers, agents, or policyholders will come within the definition of "boycott."

The Tenth Circuit's recent decision in *Card v. National Life Insurance Co.* is consistent with the Supreme Court's general premise that a boycott is *concerted* activity to withhold "patronage or services from the target."[118] The plaintiffs in *Card*, a general insurance agent and the corporation he headed, charged a life insurance company (National Life), a broker-dealer,[119] and employees of the life insurance firm[120] with a section 1 Sherman Act violation. Card contended that these defendants and National Life's general agents association had conspired together to terminate Card's general agency contract with National Life.[121] The defendants asserted that Card was terminated because he had violated his contract by seeking another general agency agreement with a competing insurer. In the district court, the defendants affirmatively pleaded that the McCarran Act exempted them from Sherman Act liability. The lower court agreed and granted summary judgment for the defendants.[122] The trial court based its conclusion primarily on the plaintiff's failure to show concerted activity aimed at harming

114. *Id.* at 540 n.9.

115. *Id.* at 541.

116. *Id.* at 552.

117. *Id.* at 545 n.18. Business activities that are traditionally considered per se unreasonable and therefore violative of the antitrust laws are: price fixing, horizontal division of markets, resale price maintenance, and group boycotts. 2 E. KINTNER, FEDERAL ANTITRUST LAW § 9.20, at 57-58 (1980).

118. 438 U.S. at 541.

119. Equity Services, Inc., the broker-dealer, was not a party to the appeal. The district court held that Equity Services was not in the business of insurance and could not seek exemption from suit under the McCarran Act. Card v. National Life Ins. Co., No. 74-446 (D. Colo. Dec. 9, 1977) (mem.).

120. Lawrence Leyland, executive vice-president of National Life Insurance Co. and William Ryan, a general agent for National Life Insurance Co., were both dismissed from the suit by the district court's order of August 6, 1974. Brief for Appellee at 2, Card v. National Life Ins. Co., 603 F.2d 828 (10th Cir. 1979).

121. 603 F.2d at 829.

122. The district court and the plaintiffs agreed that, for purposes of the McCarran Act, the defendants were in the "business of insurance" and defendants' activities were regulated by the State of Colorado. *Id.* at 832.

Card;[123] secondarily, the district court found that National Life's termination of Card lacked the qualities of a "boycott": it was not a systematic exclusion from the marketplace.[124]

The court of appeals affirmed the lower court.[125] The Tenth Circuit court placed the main emphasis on the boycott issue rather than on the issue of concerted action. Judge Doyle, speaking for the court, held that under either a narrow view[126] or an expansive view[127] of the meaning of "boycott" in the McCarran Act, the defendants' conduct did not disqualify them from the Act's antitrust exemption.[128] The appellate court confirmed the lower court's view of concerted activity, finding that all of the defendants were a part of National Life Insurance Co.

The court of appeals did not choose to define the scope of the McCarran Act boycott exception. The appellate court viewed this complaint as a breach of contract action. National Life alleged that Card was dismissed for entering into a general agency agreement with another life insurance company in violation of National Life's rules. Judge Doyle did not perceive how Card's termination of employment could amount to a boycott.

The *Card* decision is consistent with other federal court decisions on similar facts.[129] Aside from the issue of the propriety of insurance companies having an exemption from the antitrust laws,[130] the Tenth Circuit's opinion in *Card* upholds the integrity of the meaning of "boycott" in the antitrust lexicon.[131]

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123. The boycott claim focused on National Life, an agent/employee of that firm, and an association of National Life's agents, which was not a named defendant in the suit. The district judge found that among these defendants, there were no two separate parties capable of acting in a concerted fashion. See the discussion of intra-enterprise conspiracy at notes 182-84 *infra* and accompanying text.

124. Brief for Appellee at 19, Card v. National Life Ins. Co., 603 F.2d 828 (10th Cir. 1979).

125. Judge McKay concurred, but only so far as the majority opinion affirmed the district court's conclusion that the defendants had exhibited no concerted action. 603 F.2d at 834.

126. See notes 108-109 *supra* and accompanying text.

127. See note 110 *supra* and accompanying text.

128. 603 F.2d at 832-33.

129. Black v. Nationwide Mut. Ins. Co., 429 F. Supp. 458 (W.D. Pa. 1977), *aff'd*, 571 F.2d 571 (3d Cir. 1978); Blackley v. Farmers Ins. Group, Inc. [1976-2] Trade Cas. 69,787 (D. Utah 1976).

130. See NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, 244-45 (1979) (calling for the repeal of the McCarran Act; anticompetitive activities of insurance companies that are protected by the Act are not considered by the Commission to be essential to the survival of insurance companies).

131. It is interesting to note that, assuming the presence of concerted activity in *Card*, the facts alleged at the preliminary hearing bear considerable similarity to cases where judges have found such behavior to be reasonable. *See, e.g.*, Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). In *Hawaiian Oke*, two distillers, which had used the same distributor and were both dissatisfied with his performance, agreed to terminate his contract and replace him with another distributor. The Ninth Circuit could not find this action unreasonable per se because the distillers had not coerced the terminated distributor's market conduct; the exclusion of competition was merely incidental to the distillers' agreement to transfer their business. Similarly, in Molinas v. NBA, 190 F. Supp. 241 (S.D.N.Y. 1961), the concerted activity of the NBA in excluding Molinas for gambling was not a per se violation, and indeed, was considered reasonable.

A Tenth Circuit decision reminiscent of the facts in *Card*, although in another context, is Farnell v. Albuquerque Publishing Co., 589 F.2d 497 (10th Cir. 1978). In *Farnell*, the plaintiff

III. CONTRIBUTION AMONG ANTITRUST DEFENDANTS

The thorny area of contribution among antitrust violators, with its multidimensional considerations and policy arguments,[132] was broached by the Tenth Circuit court in *Olson Farms, Inc. v. Safeway Stores, Inc.*[133] The issue of contribution among antitrust defendants has been hotly contested of late, both by scholars[134] and by the federal courts.[135] The genesis of this conflict can be traced to the fact that antitrust defendants are subject to joint and several liability for the treble damages possible under section 4 of the Clayton Act.[136] Since Congress has made no provision in regard to contribution in the antitrust laws,[137] defendants in an antitrust litigation have had to

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was fired from his newspaper management position because of insubordination. Farnell had refused to cease selling newspapers independently, in violation of company policy. The court of appeals held that he lacked standing to bring a Sherman Act or a Clayton Act complaint, for under section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), Farnell could not show injury "by reason of" anything in the antitrust laws. For a discussion of the standing requirements for suits under the antitrust laws, see notes 169-70 *infra* and accompanying text.

132. An analysis of the competing policy considerations concomitant to a right of contribution in suits under the antitrust laws is beyond the scope of this survey. Several of these policy concerns will be discussed, however, in the context of the Tenth Circuit's contribution decision. For a significant and thoughtful analysis of the contribution issue in antitrust law, in general, and a critical assessment of the Tenth Circuit's views, in particular, *see* Note, *Contribution and Antitrust Policy*, 78 MICH. L. REV. 890 (1980).

133. [1979-2] Trade Cas. 79,699 (10th Cir. 1979), *rehearing en banc granted*, No. 77-2068 (10th Cir. Dec. 27, 1979) (*Olson Farms I*). A companion case, decided on the same day, achieved the same result. Olson Farms, Inc. v. Countryside Farms, Inc., No. 78-1773 (10th Cir., Nov. 8, 1979) (*Olson Farms II*). *Olson Farms I* stemmed from an antitrust conspiracy suit, alleging that Olson Farms and Oakdell Egg Farms, Inc. had conspired to price-fix and to monopolize the purchase of eggs from fourteen producers. Olson Farms was found liable for damages, but only an injunction issued against Oakdell Farms. The jury verdict was affirmed in Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

Olson Farms II, based on the same complaint as *Olson Farms I*, covered damages subsequently incurred as a result of continued antitrust violations. The defendants in *Olson Farms II* have entered a settlement, accompanied by an order of dismissal with prejudice. Olson Farms II, No. 78-1773, slip op. at 4 (10th Cir. Nov. 8, 1979). The appeal in *Olson Farms II* concerned the district court's dismissal of Olson Farm's cross-claim against Egg Products Co., Snow White Egg Co., Countryside Farms, Inc., and a third-party complaint against Safeway Stores, Inc., all for contribution or indemnity. The court of appeals found the arguments it had set forth in *Olson Farms I* compelling in the companion decision. Judge Holloway, as he did in *Olson Farms I*, concurred only in the denial of indemnity, finding the Eighth Circuit's decision in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979), persuasive on the issue of contribution.

134. *See generally* Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 SW. L. J. 779 (1979); Note, *Contribution Among Antitrust Violators*, 29 CATH. U. L. REV. 669 (1980); Note, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540 (1980); Note, *Contribution Among Antitrust Defendants*, 33 VAND. L. REV. 979 (1980).

135. *Compare* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979) (joint antitrust tortfeasors have a right of contribution) *and* Heizer Corp. v. Ross, 601 F.2d 330, 333 (7th Cir. 1979) (approving of *Professional Beauty Supply* in dictum) *with* Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979), *cert. granted sub nom.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 351 (1980) (contribution unavailable to antitrust violators) *and* Goldlawr, Inc. v. Shubert, 276 F.2d 614, 616 (3d Cir. 1960) (contribution declared unavailable to antitrust violators in dictum).

136. *See* City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906). A violation of the antitrust laws is considered a tort. *See* Vines v. General Outdoor Advertising Co., 171 F.2d 487, 491-92 (2d Cir. 1948) (L. Hand, J.).

137. Unlike the antitrust laws, the federal securities laws provide for contribution in certain instances. *See* The Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f) (1976) (false registration

argue the equity of their position.

Only one federal appellate court has decreed that there exists an equitable right to contribution among antitrust violators. In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*,[138] the Eighth Circuit held that antitrust defendants are entitled to *pro rata* contribution, when, on a case-by-case determination, the trier of fact finds contribution appropriate.[139] The litigation in *Professional Beauty Supply* arose from a section 2 Sherman Act complaint charging National Beauty Supply (National) with attempting or conspiring to monopolize the beauty supplies market. La Maur, Inc., a manufacturer of beauty supplies, was brought into the suit by National on a third-party complaint for contribution. National allegedly prompted La Maur to terminate Professional Beauty Supply's franchise with La Maur and to grant National an exclusive dealership. The district court had dismissed the third-party complaint for contribution based on rule 12(b)(6) of the Federal Rules of Civil Procedure. The appellate court reviewed only this 12(b)(6) dismissal.

The Eighth Circuit court in *Professional Beauty Supply* stressed the fairness that is implicit in a right to contribution[140] and rejected the five arguments La Maur adduced against such a right.[141] These arguments, considered germane by most courts,[142] are: 1) Congress provided for contribution in the securities laws;[143] therefore, congressional silence on the right of contribution in the antitrust laws demonstrates a legislative intent to exclude this right; 2) contribution will cause plaintiffs to lose control of their lawsuits through the defense tactic of impleading numerous third-party defendants; 3) contribution may deter settlement; 4) antitrust litigation is inherently complex and contribution can only further such complexity; and 5) contribution would vitiate the deterrent effect of placing the burden of treble damages on one antitrust violator. The Eighth Circuit court answered these arguments by focusing upon two points. The appellate court asserted that federal courts could handle the added complexity of contribution through the prudent use of severance. Furthermore, the *Professional Beauty Supply* court found that there was no proof that the concentration of the treble damage award on one of several possible violators was any more of a deterrent than spreading damages among all of them.[144]

The Tenth Circuit Court of Appeals has chosen a route different from

statement); The Securities Exchange Act of 1934 § 9(e), 15 U.S.C. § 78i(e) (1976) (willful manipulation of security prices); and The Securities Exchange Act of 1934, § 18(b), 15 U.S.C. § 78r(b) (1976) (filing a misleading statement with SEC). See Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184 (8th Cir. 1979), for cases citing a federal common law right of contribution in specific instances. In addition, for a list of most of the states that have either enacted a right to contribution or promulgated such a right through state court decisions, see Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 Sw. L. J. 779, 786 nn.49-51 (1979).

138. 594 F.2d 1179 (8th Cir. 1979).
139. *Id.* at 1182, 1186.
140. *Id.* at 1185.
141. *Id.* at 1183.
142. *See* note 134 *supra*.
143. *See* note 137 *supra*.
144. 594 F.2d at 1188.

that of the Eighth Circuit. In *Olson Farms I*, the court of appeals affirmed the district court's rule 12(b)(6) dismissal of Olson Farms' request for a declaratory judgment which sought contribution or indemnity[145] from Safeway Stores and others.[146] Olson Farms had been adjudged liable in a price-fixing conspiracy under section 1 of the Sherman Act and for conspiracy to monopolize under section 2[147] of that Act. Oakdell Farms, a co-conspirator, only suffered the issuance of an injunction. Olson Farms, in collusion with many other egg buyers, had induced egg producers to sell eggs to the conspirators at a depressed price. Olson Farms paid a judgment of almost $2.5 million.[148] This figure was obtained by trebling all the damages suffered by the egg producer-plaintiffs, including damages incurred from sales to conspiring buyers *not* party to the suit.[149]

In the Tenth Circuit's decision, the court of appeals considered the three arguments relied on by Olson Farms in seeking a right of contribution: 1) federal decisions have created a common law right to contribution in particular instances;[150] 2) there is a federal common law right to contribution in rule 10b-5 suits;[151] and 3) the Eighth Circuit's decision in *Professional Beauty Supply* mandates a right to contribution.

The appellate court, addressing the contribution issue, found that Olson

145. As an alternative to contribution from its co-conspirators, Olson Farms sought indemnification. The indemnification claim was framed as a demand for the damages Olson Farms had paid that were attributable to its co-conspirators. The Tenth Circuit previously had commented that such a demand was inconsistent with the nature of indemnification—a desire to be compensated for *all* damages. Thomas v. Malco Refiners, Inc., 214 F.2d 884, 885 (10th Cir. 1954). Nonetheless, the Tenth Circuit court addressed the issue of indemnification. A party adjudged liable for damages may seek indemnification if its liability is the result of a legal relationship to the actual wrongdoer. Tortious conduct that is imputed, vicarious, or constructive may give rise to indemnification. *See* United Airlines v. Wiener, 335 F.2d 379, 398-99 (9th Cir. 1964). Olson Farms, as an intentional tortfeasor, with no legal relationship to its co-conspirators, was denied indemnification. [1979-2] Trade Cas. at 79,704.

146. Judge Holloway, in concurrence, did not accept the majority's position on contribution, finding *Professional Beauty Supply* compelling. The damages that Olson Farms had paid amounted to $2,405,580 with accrued interest. When Judge Holloway compared this amount to the damages actually attributable to Olson Farms, $99,656 (trebled, this amounted to $298,968), the inequity in denying contribution became apparent. The other egg buyers involved in the conspiracy were unjustly enriched by the denial of contribution.

147. Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976) makes it unlawful for "[any] person . . . [to] monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . ." *Id.*

148. The judgment was for $1,950,827.23. Olson Farms subsequently paid the judgment, which, with interest, totaled more than $2,400,000.

149. The untrebled amount was calculated by including the damages incurred by the egg producers from sales to Olson Farms, Safeway Stores, Inc., Egg Products Co., Snow White Egg Co., Countryside Farms, Inc., and Gusto Marketing Systems, Inc. The jury whose verdict was upheld in *Cackling Acres* did not specifically find that these other buyers were liable; however, the court of appeals in *Olson Farms I* found such an inference reasonable. [1979-2] Trade Cas. at 79,700 n.4.

150. The court mentioned Olson Farms' reference to Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (unintentional tortfeasor has right of contribution). [1979-2] Trade Cas. at 79,701.

151. In DeHaas v. Empire Petroleum Co., 286 F. Supp. 809 (D. Colo. 1968), *modified on other grounds*, 435 F.2d 1223 (10th Cir. 1970), a federal district court held that a violator of rule 10b-5, 17 C.F.R. § 240.10b-5 (1978), could seek contribution. There is provision for this right in other sections of the securities laws. See note 137 *supra*.

Farms' status as an "intentional" tortfeasor weighed heavily against it.[152] The decision in *Sabre Shipping Corp. v. American President Lines*,[153] which had vigorously denied a right of contribution to an intentional tortfeasor, was a persuasive precedent to the court of appeals. The Tenth Circuit court, in analyzing the majority and dissenting opinions of the *Professional Beauty Supply* decision, was impressed by the substantial competing concerns present in the conflict over contribution. The court further noted that most states that provide a right to contribution among joint tortfeasors do so by statute.

The Fifth Circuit's recent decision in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*[154] paralleled the Tenth Circuit's reflections on the contribution dilemma. This Fifth Circuit holding provided the appellate court with the final impetus to decide to await congressional action, rather than to create by judicial fiat a right of contribution among antitrust violators.[155]

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152. Olson Farms, while claiming that it was a passive antitrust violator, was adjudged guilty of attempting to and conspiring to monopolize; both charges require a showing of specific intent. *See, e.g.*, Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953) (attempt to monopolize); American Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1944), *aff'd*, 328 U.S. 781, 808-09 (1946) (conspiracy to monopolize).

Olson Farms claimed that it was a passive violator because some courts have been willing to allow contribution between unintentional tortfeasors. *E.g.*, Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975). The early common law rule on contribution came from Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799), which denied the right of contribution to an intentional tortfeasor. By the twentieth century, the American courts had, for the most part, glossed over *Merryweather*'s actual holding and denied contribution in both intentional and negligent torts. Union Stock Yards Co. v. Chicago B. & Q.R.R., 196 U.S. 217 (1905). *See* Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 SW. L. J. 779, 781-84 (1979).

153. 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969). Using the term "unintentional" to describe the actions of an antitrust violator is bound to cause confusion. In tort liability, one who acts with intent desires "to bring about a result which will invade the interests of another in a way that the law will not sanction." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 8 at 31 (4th ed. 1971). Obversely, an unintentional or negligent act is done by one who knows the danger to be a foreseeable risk and not a substantial certainty. *Id.* at 32. It is difficult to conceive of an unintentional antitrust violation, especially when section 1 of the Sherman Act is involved; one who conspires, contracts, or combines to restrain trade can hardly be said, as a matter of law, not to know of the harmful effect involved. *See* Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 SW. L. J. 779, 792-93 (1979). *Cf.* Comment, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682 (1978) (the author suggests a right of contribution for unintentional violators of the antitrust laws, but never explains how one can be an unintentional antitrust violator). Possibly, the line of demarcation between unintentional and intentional antitrust violators is drawn at the point where a defendant's conduct is no longer judged by a per se standard and must instead be unreasonable to constitute a violation of the antitrust laws.

154. 604 F.2d 897 (5th Cir. 1979), *cert. granted sub nom.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 351(1980).

155. The Tenth Circuit Court of Appeals granted a petition for a rehearing *en banc* in Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. 79,699 (10th Cir. 1979), in No. 77-2068 (10th Cir. Dec. 27, 1979). The rehearing was held on September 16, 1980.

It appears that the United States Supreme Court will soon decide the issue of contribution among antitrust violators. The Fifth Circuit affirmed, without published opinion, a denial of contribution rights in *In re* Corrugated Container Antitrust Litigation, 606 F.2d 319 (5th Cir.), *aff'g* 84 F.R.D. 40 (S.D. Tex. 1979). A petition for certiorari had been granted *sub nom.* Westvaco Corp. v. Adams Extract Co., 100 S. Ct. 3008 (1980). Subsequently, certiorari was *dismissed*, Westvaco Corp. v. Adams Extract Co., 101 S. Ct. 311(1980). The Court has recently granted, however, the petition for certiorari filed in the *Abraham Construction* case, 604 F.2d 897

IV. INTERSTATE COMMERCE AND THE SHERMAN ACT

The decision in *Crane v. Intermountain Health Care, Inc.*[156] turned upon the jurisdictional requirement of interstate commerce under the Sherman Act.[157] The Tenth Circuit court affirmed[158] the district court's 12(b)(1) dismissal, reasoning that the plaintiff's antitrust complaint failed to disclose that the defendants' restraint had a "substantial effect on interstate commerce."[159]

The plaintiff Crane, a pathologist, complained that the defendants had conspired to prevent him from performing pathological services at Cottonwood Hospital, a facility owned and operated by Intermountain Health Care. In Crane's allegation of boycott, he charged that the defendants had restrained the practice of pathology at the hospital, as well as inhibited his own practice.

The court of appeals based its decision upon a prior Tenth Circuit case involving a similar situation. In *Wolf v. Jane Phillips Episcopal Memorial Medical Center*,[160] the complaint asserted that the plaintiff, an osteopath, and all other local osteopaths had been denied the opportunity to join the medical staff of the local hospitals, and were therefore unable to admit patients to those hospitals. The Tenth Circuit court held that the complaint showed only an insubstantial effect on interstate commerce. The court in *Wolf* considered that the goods and services which the hospitals had purchased in interstate commerce were irrelevant to the plaintiff's showing of Sherman Act jurisdiction. The defendants' alleged actions did not restrain their purchases in interstate commerce, nor was it demonstrated that the plain-

(5th Cir. 1979), *cert. granted sub nom.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 351(1980).

Another contribution case, Northwest Airlines, Inc. v. Transport Workers Union, 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted* 100 S. Ct. 3008(1980), will be decided this term. *Northwest Airlines* raises the issue of contribution in an employment discrimination suit brought under section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1976).

156. [1980-1] Trade Cas. 77,593 (10th Cir. 1980), *rehearing en banc granted*, No. 78-1346 (10th Cir. Sept. 16, 1980).

157. The modern notions of Congress' authority under the commerce clause stem from Wickard v. Filburn, 317 U.S. 111 (1942). From the time of this watershed decision, federal power has been expanded by a broadening of the interpretation of interstate commerce to include activities which have a substantial effect on interstate commerce. The interstate commerce requirement differs between actions brought under the Sherman Act and those brought under the Clayton Act. The Sherman Act speaks to "restraint[s] of trade or commerce among the several states"; thus a substantial effect on commerce meets the Sherman Act's jurisdictional requirement. *See* Hospital Building Co. v. Trustees of Rex Hospital, 435 U.S. 738, 743 (1976). A stricter jurisdictional standard pertains to the Clayton Act, 15 U.S.C. §§ 12-27 (1976), since it encompasses "person[s] or activities [that are] *within the flow* of interstate commerce." Gulf Oil Co. v. Copp Paving Co., 419 U.S. 186, 195 (1974) (emphasis added). Unlike the Sherman Act, the Clayton Act dictates that the Act is violated only when one is engaged in interstate commerce generally, and has restrained trade during the course of interstate commerce. *See* J. VON KALINOWSKI, 16A ANTITRUST LAWS AND TRADE REGULATION, §§ 12.03-12.03[2] (1979).

158. Judge McKay concurred only in the result. Crane v. Intermountain Health Care, Inc., [1980-1] Trade Cas. 77,593, 77,596 (10th Cir. 1980) (McKay, J., concurring).

159. *Id.* When there is an effect on interstate commerce that is substantial and adverse, subject matter jurisdiction under the Sherman Act will attach. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948).

160. 513 F.2d 684 (10th Cir. 1975).

tiff's purchases from interstate commerce had been substantially reduced. The court's conclusion was that the practice of medicine was wholly an intrastate activity.[161]

The Tenth Circuit panel in *Crane* felt that *Wolf* compelled the court to follow precedent until such time as an *en banc* court reconsidered their stance regarding medical services and the Sherman Act's jurisdictional requirement. The court of appeals has decided to reconsider its position in *Crane*,[162] a decision possibly prompted by the Supreme Court's recent opinion in *McLain v. Real Estate Board of New Orleans, Inc.*[163] The *Crane* panel had cited the Fifth Circuit's *McLain* decision, a decision that the Supreme Court subsequently reversed.[164]

In *McLain*, the plaintiffs asserted that various real estate brokers, firms, and trade associations had conspired to fix real estate commissions on the sale of residential property, in violation of section 1 of the Sherman Act. Both the district court and the Fifth Circuit Court of Appeals found the defendants' activities to be local in nature and without a substantial effect on interstate commerce. In reversing the Fifth Circuit, the Supreme Court held that the plaintiffs could show Sherman Act jurisdiction by "demonstrat[ing] a substantial effect on interstate commerce generated by respondents' brokerage activity."[165] The Court concluded that it was unnecessary to show "that the unlawful conduct *itself* had an effect on interstate commerce."[166] The amount of out-of-state funds that flowed into New Orleans to finance residential properties met the interstate commerce test which the Court had enunciated.

The ripples from the *McLain* decision may permit the Sherman Act to extend to almost all business activities. Realistically, the Court's only current limitation on jurisdiction under the Sherman Act is that a defendant whose activities have an insubstantial effect on interstate commerce is beyond the purview of the Act.[167] Considering the Supreme Court's view of the interstate commerce requirement of the Sherman Act, the Tenth Circuit's *en banc* review of *Crane* may possibly lead to a reversal of the panel's decision.

V. CASE DIGESTS

A. *Comet Mechanical Contractors, Inc. v. E. A. Cowen Construction, Inc.*[168]

Section 4 of the Clayton Act[169] is a familiar citation to any party in an

161. The Tenth Circuit court came to the same conclusion in Spears Free Clinic & Hosp. v. Cleere, 197 F.2d 125, 126 (10th Cir. 1952).

162. A rehearing *en banc* was held on September 16, 1980.

163. 444 U.S. 232 (1980).

164. McLain v. Real Estate Bd. of New Orleans, Inc., 583 F.2d 1315 (5th Cir. 1978), *vacated*, 444 U.S. 232 (1980).

165. 444 U.S. at 242.

166. *Id.* (emphasis added).

167. *Id.* at 246.

168. 609 F.2d 404 (10th Cir. 1980).

169. Section 4 of the Clayton Act states:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United

antitrust suit, for it contains the ominous treble damages provision of the antitrust laws.[170] Section 4 also contains the standing requirement for all violations of the Sherman and Clayton Acts.[171] The prerequisite of antitrust standing is that the plaintiff must have been injured in his "business or property *by reason of* anything forbidden in the antitrust laws."[172] While this condition precedent appears simple to apply, federal courts have created a body of antitrust standing law[173] that is the antithesis of this succinct standing statute.[174]

The Tenth Circuit has been consistent in its decisions concerning antitrust standing, always equating the "by reason of" language in section 4 with a proximate cause showing of an antitrust injury.[175] The Tenth Circuit's analytical treatment of antitrust standing, however, has not dissipated the confusion present in this area of the law.

In *Comet Mechanical Contractors, Inc. v. E.A. Cowen Construction, Inc.*,[176] the Tenth Circuit court affirmed the district court's grant of summary judgment to the defendants. The plaintiff, a construction subcontractor, alleged that the defendants had conspired to inflate bids for the construction of public buildings in order to force subcontractors and suppliers to pay a "kickback" to the Governor of Oklahoma. The plaintiff alleged that E.A. Cowen Con-

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States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1976).

170. Section 1 of the Clayton Act, 15 U.S.C. § 12 (1976) defines the "antitrust laws" to include the Sherman Act, 15 U.S.C. §§ 1-7 (1976), and the Clayton Act, 15 U.S.C. §§ 12-27 (1976).

171. 15 U.S.C. § 15 (1976). For the text, see note 169 *supra*.

172. *Id.* (emphasis added).

173. Two main problems in antitrust standing have concerned 1) the type of plaintiff who may bring suit, and 2) the interjection into standing analysis of a proximate cause test based on the section 4 Clayton Act language requiring the injury to occur *"by reason of* anything forbidden in the antitrust laws." 15 U.S.C. § 4 (1976) (emphasis added).

As to the first problem, courts have taken two views. Courts have looked to the "target" of the alleged violation to determine whether the plaintiff is within the "area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). Alternatively, courts have examined the nature of the plaintiff's business or relationship to the defendant. *E.g.*, Pitchford v. PEPI, Inc., 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976) (corporate officer, as an employee of company injured by antitrust violation, lacked standing); Nationwide Auto Appraisers Serv., Inc. v. Association of Cas. & Sur. Cos., 382 F.2d 925 (10th Cir. 1967) (franchisor had no standing to sue for injury to franchise).

The interjection of proximate cause into antitrust standing has led some courts to decide the merits of an antitrust complaint under a standing analysis based exclusively on pretrial information. *E.g.*, Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313 (5th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); Bowen v. New York News, Inc., 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976). The confusion created by this approach has prompted leading authorities in the area to express concern over the analytical techniques employed. Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 835-40 (1977).

174. *See generally* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977); Tyler, *Private Antitrust Litigation: The Problem of Standing*, 49 U. OF COLO. L. REV. 269 (1978); Comment, *Standing to Sue Under Section 4 of the Clayton Act: Direct Injury, Target Area, or Twilight Zone*, 47 MISS. L.J. 502 (1976).

175. *See* Jones v. Ford Motor Co., 599 F.2d 394 (10th Cir. 1979); Farnell v. Albuquerque Publishing Co., 589 F.2d 497 (10th Cir. 1978); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Nationwide Auto Appraisers Serv., Inc. v. Association of Cas. & Sur. Cos., 382 F.2d 925 (10th Cir. 1967).

176. 609 F.2d 404 (10th Cir. 1980).

struction, the successful bidder, had granted Comet Mechanical Contractors, the plaintiff, a subcontract by oral promise, then reneged when Comet refused to contribute to the kickback. The district court stated that the plaintiff lacked standing to sue; the court of appeals agreed.[177]

The Tenth Circuit court conceded that Comet had been injured in its "business or property" as that term is defined in section 4 of the Clayton Act. The plaintiff lacked standing, however, because it could not meet the "by reason of" requirement of section 4, a test that the court had articulated in *Reibert v. Atlantic Richfield Co.*[178] The *Reibert* court created two conjunctive requirements that plaintiffs must satisfy in order to comply with the "by reason of" language of section 4: "1) there [must be] a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of the damage; and 2) . . . the illegal act [must be] linked to a plaintiff engaged in activities intended to be protected by the antitrust laws."[179] The court of appeals determined that Comet had failed to meet the second prong of the *Reibert* test. Comet failed this test for two reasons. The plaintiff was not a bidder in the relevant market, which the appellate court defined as the market in general construction contracts. The court further held that even in the subcontract market, the alleged bribe was unrelated to an antitrust violation. No allegation of a conspiracy to restrain competition in securing subcontracts had been made.

The aspect of Comet's complaint which, of its own force, should have been fatal to the plaintiff's cause was the lack of a nexus between the alleged request for money to further a bribe and any substantive violation of the antitrust laws. It appears that the complaint failed to state an antitrust violation. The court's focus on standing only obscures and confuses the merits of the case. The Tenth Circuit is not alone in this approach to standing.[180] Nonetheless, there is a need for all circuits to reevaluate their antitrust standing doctrines—to separate substantive law from standing requirements—so that neither fatally intertwines with the other.

B. *Skyview Distributing, Inc. v. Miller Brewing Co.*[181]

The Tenth Circuit Court of Appeals treated the issue of concerted action under section 1 of the Sherman Act in *Skyview Distributing, Inc. v. Miller Brewing Co.* The appellate court reversed the district court's 12(b)(6) dismissal, finding that the complaint adequately alleged a combination or conspiracy in restraint of trade within section 1 of the Sherman Act. Skyview had been a distributor of Miller's beer, while also carrying other brands. The plaintiff alleged that Miller, under a plan to eliminate beer distributors carrying beer other than Miller's, induced Skyview into another market, created a new distributorship, Star Distributing Company, and eventually supplanted the plaintiff with Star. Skyview asserted that this plan restrained trade, by allowing Miller to fix prices, and extended Miller's market control,

177. *Id.* at 406-07.
178. 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973).
179. 609 F.2d at 406 (quoting 471 F.2d at 731).
180. *See* notes 173-74 *supra*.
181. 620 F.2d 750 (10th Cir. 1980).

by depriving its competitors of local distributors for their beers. The Tenth Circuit noted that the district court dismissed the complaint because the lower court had determined that the plaintiff's injuries occurred before Star Distributing was created. If this were true, Miller Brewing's actions were unilateral, and unilateral anticompetitive behavior does not violate section 1 of the Sherman Act.[182] The court of appeals, however, determined that Star's creation three days before Miller Brewing terminated Skyview's distributorship provided "ample time for a conspiracy in restraint of trade to come into being."[183] The appeals court felt that it was not necessary to explore the nature of the relationship between Miller Brewing and Star Distributing to determine whether they were separate entities who could conspire in violation of section 1; apparently, this was assumed.[184]

The court of appeals read Skyview's complaint as alleging more than the mere substitution of a distributor. Generally, a producer may with impunity replace its distributor with another according to its business needs.[185] Star's takeover was alleged to be in furtherance of an anticompetitive plan, however, and thus was sufficient to withstand a 12(b)(6) motion.[186]

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182. Under section 1 of the Sherman Act, the unilateral actions of a business, even if harmful to competitors, are not unlawful. "[C]ontract[s], combination[s] or conspirac[ies] in restraint of trade . . ." are prohibited by section 1; none of these activities can be accomplished by one entity. Albrecht v. Herald Co., 390 U.S. 145, 149 (1968). The unilateral substitution of one distributor for another does not violate section 1. *See* Scanlan v. Anheuser-Busch, 388 F.2d 918 (9th Cir.), *cert. denied*, 391 U.S. 916 (1968).

183. 620 F.2d at 752.

184. The Tenth Circuit did not elaborate on the nature of the association between Miller and Star, other than to state that the plaintiff alleged that "Miller Brewing Company caused the Star Distributing Company to be formed for the express purpose of eventually taking over Skyview's distributorship . . . ." 620 F.2d at 752.

Two or more associated corporations will not automatically be considered so closely linked that they could not, as a matter of law, conspire as separate entities. The Supreme Court has declared that "common ownership and control does not liberate [corporations] from the impact of the antitrust laws . . . ." Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951) (parent and wholly-owned subsidiary found to have conspired). Apparently, the Second Circuit has carved out an exception to the Court's views in *Kiefer-Stewart* when affiliated companies do not compete with each other. Beckman v. Walter Kidde & Co., 316 F. Supp. 1321, 1326 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972). *But see* Cromar Co. v. Nuclear Materials Equip. Corp., 543 F.2d 501, 511-12 (3d Cir. 1976) (mere presence of two legally distinct corporations is sufficient for a conspiracy). The bounds of an "intra-enterprise" conspiracy that will satisfy the concerted action requirement of section 1 of the Sherman Act has never been distinctly demarcated. *See generally* 16 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION, § 6.01[2] (1979 & Supp. 1980); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977).

Based on the dearth of evidence available on the Miller Brewing-Star Distributing relationship, a decision that, as a matter of law, Miller and Star could not have conspired would have been precipitous. Miller and Star are not competitors; if the lower court, on remand, were to accept the Second Circuit's view of conspiracy, summary judgment for the defendants might be appropriate. *See* 16 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION, § 6.01[2]e (1979).

185. Craig v. Sun Oil Co., 515 F.2d 221, 223 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976); Feddersen Motors, Inc. v. Ward, 180 F.2d 519, 522 (10th Cir. 1950). *See generally* Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

186. *See* Natrona Serv., Inc. v. Continental Oil Co., 435 F. Supp. 99, 110 (D. Wyo. 1977), *aff'd*, 598 F.2d 1294 (10th Cir. 1979).

COMMERCIAL LAW

OVERVIEW

Bankruptcy filings were at record levels in 1980[1] so it is no surprise that appeals from bankruptcy decisions dominate the commercial area of the Tenth Circuit survey. As of September 1, 1980, there were 3,888 bankruptcies filed at the United States Bankruptcy Court for the District of Colorado alone, and filings were higher in the other districts of the Tenth Circuit.[2] Bankruptcy cases outnumbered all other types of commercial cases during the period of this survey,[3] but all of the appeals were decided under the now largely superseded Bankruptcy Act.[4] To be useful to the practicing attorney this comment will suggest how the bankruptcy decisions would have differed had they been made under the new Bankruptcy Code,[5] and references to the new Code will be provided in the footnotes. Additionally, this comment will review a banking law appeal from Utah and will summarize bankruptcy decisions that would remain unchanged under the Bankruptcy Code.[6] Finally, it will consider other cases in commercial law.

I. PRIORITY IN BANKRUPTCY

The policy of the bankruptcy laws is to distribute the bankrupt estate equally among the various creditors. For reasons of policy and fairness, however, Congress has established a system of priorities requiring higher ranking claims to be satisfied in full before lower ranking claims are satisfied at all. The priority in bankruptcy given to a corporation created by Congress was the concern in *Turner v. Tennessee Valley Authority*.[7]

In *Turner*, the Tenth Circuit held that the Tennessee Valley Authority (TVA), a corporation created by Congress, was entitled to the governmental priority given by statute. The bankrupt, Agricultural Business Company, Inc., owed the TVA money for fertilizer that the TVA had produced and sold to it. TVA claimed that it fell within the statutory provision[8] giving priority to entities of the United States.[9] The trustee in bankruptcy objected to granting a priority to the TVA because he felt that the debt owed to the

1. Wall St. J., Aug. 28, 1980, at 1, col. 5; Rocky Mtn. News, Aug. 11, 1980, at 83-84.

2. Interview with JoAnn Vigir, Intake Deputy Clerk, and Sharon Howard, Supervising Clerk, Bankruptcy Court, Denver, Colorado (Sept. 17, 1980).

3. This survey runs from June 1, 1979 to May 31, 1980.

4. 11 U.S.C. §§ 1 to 1200 (1976).

5. *Id.* §§ 101 to 1501 (Supp. III 1979). The new Code was enacted as Pub. L. No. 95-598, 92 Stat. 2549 (1978), on November 6, 1978 and became effective on October 1, 1979.

6. 11 U.S.C. §§ 101 to 1501 (Supp. III 1979).

7. 613 F.2d 783 (10th Cir. 1980) (decided under the Bankruptcy Act).

8. The old Bankruptcy Act, 11 U.S.C. § 104(a) (1976), provided that "[t]he debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be . . . (5) debts other than for taxes owing to any person, including the United States, who by the laws of the United States is entitled to priority." The new Bankruptcy Code, 11 U.S.C. §§ 501 to 510 (Supp. III 1979), does not contain a comparable provision.

9. 613 F.2d at 784.

TVA was not a debt owed to the government.[10]

The court of appeals was not persuaded by the trustee's argument that *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*[11] established that the TVA could not claim that it was a part of the federal government.[12] The court distinguished *Turner* from *Sloan Shipyards* with the observation that the sole stockholder of the TVA is the United States Government while the stockholders of the United States Shipping Board Emergency Fleet Corporation could include private persons.[13] Confining *Sloan* to its facts, the court noted that in *United States v. Remund*[14] the Farm Credit Administration, an unincorporated administrative unit of the United States Government, was entitled to priority in bankruptcy.

The test the court alluded to for determining whether a corporation is a governmental entity is based upon the government's control over the corporation, the purpose of the corporation, and the government's responsibility for the corporation's actions.[15] The government is permitted to carry on its operations through corporations,[16] and, as the Tenth Circuit noted, other courts have referred to the TVA as an "instrumentality of the United States,"[17] as "an administrative arm of the executive department,"[18] and as "a wholly owned government corporation . . . the United States in action."[19] The court stated that unless the statute creating the TVA expressly denied it priority status, then the priority existed.[20]

Under the old Bankruptcy Act, the order of priority was 1) costs and expenses of administration,[21] 2) wages and commissions of claimants,[22] 3) reasonable costs and expenses incurred by creditors in certain situations,[23] 4) taxes due the United States, a state, or a subdivision of the state,[24] 5) debts, other than taxes, owed to any person, including the United States, who by federal law is entitled to priority.[25] Non-tax debts owed to the government fell within a separate statutory provision, which specifically gave priority to entities of the United States Government.[26]

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10. *Id.* at 785. 31 U.S.C. § 191 (1976) provides that if a person indebted to the United States becomes insolvent, "the debts due the United States shall be first satisfied." *See* note 26 *infra*.

11. 258 U.S. 549 (1922).

12. 613 F.2d at 785.

13. *Id.* at 786.

14. 330 U.S. 539 (1947).

15. 613 F.2d at 786 (quoting Cherry Cotton Mills v. United States, 327 U.S. 536, 539 (1946)).

16. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).

17. Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 134 (1938).

18. Morgan v. TVA, 115 F.2d 990, 994 (6th Cir. 1940).

19. Ramsey v. United Mine Workers, 27 F.R.D. 423, 425 (E.D. Tenn. 1961).

20. 613 F.2d at 787.

21. 11 U.S.C. § 104(a)(1) (1976).

22. *Id.* § 104(a)(2).

23. *Id.* § 104(a)(3).

24. *Id.* § 104(a)(4).

25. *Id.* § 104(a)(5).

26. 31 U.S.C. § 191 (1976) provides that

> Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his

Under the new Bankruptcy Code, a governmental entity, such as the TVA, is not given priority in bankruptcy.[27] The Code has altered the order of priorities and now includes administrative expenses first[28] together with statutory fees and charges assessed against the bankrupt's estate.[29] Second priority is given to unsecured claims for debts incurred after the commencement of an involuntary bankruptcy proceeding but before appointment of a trustee and entry of the order for relief,[30] that is, during the so-called "involuntary gap."[31] The third priority is for unsecured claims for wages, salaries, or commissions.[32] Fourth are unsecured claims for contributions and payments to employee benefit plans,[33] and fifth priority is given to the unsecured claims of individuals[34] who, prior to the commencement of the case, deposited money with the bankrupt for the purchase, lease, or rental of property or the purchase of services for their personal, family, or household use.[35] The unsecured tax claims of federal, state, and local governments have sixth priority.[36]

When enacting the Code, Congress specifically omitted claims of the United States for debts due and owing. It then amended the law giving priority to such debts[37] to exclude its application to the Bankruptcy Code.[38] Therefore, a claim by a governmental entity, such as the TVA, does not have priority under the Code.

II. THE DISCHARGE OF MEDICAL MALPRACTICE DEBTS

The Tenth Circuit addressed the issue of whether bankruptcy is an alternative to medical malpractice insurance in *Franklin v. First National Bank of Albuquerque*.[39] An osteopathic surgeon had a medical malpractice judgment taken against him by default. He subsequently instituted bankruptcy proceedings and listed as dischargeable debts the judgment entered against him in the prior medical malpractice action. The "creditors" objected to the dis-

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debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

27. *See* 11 U.S.C. § 507 (Supp. III 1979).

28. *Id.* § 507(a)(1).

29. Bankruptcy court costs are an example of such fees. *See generally* 28 U.S.C. §§ 1911-1929 (1976 & Supp. II 1978).

30. 11 U.S.C. § 507(a)(2) (Supp. III 1979).

31. *Id.* § 502(f) (Supp. II 1978). For a discussion of the "involuntary gap," see COLLIER ON BANKRUPTCY §§ 502.06, 549.02, -.06 (15th ed. 1979).

32. 11 U.S.C. § 507(a)(3) (Supp. III 1979).

33. *Id.* § 507(a)(4). According to the legislative history, this section overrules United States v. Embassy Restaurant, Inc., 359 U.S. 29 (1958), and falls into line with the realities of modern labor contract negotiations. H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 357-58 (1977).

34. Neither partnerships nor corporations are included in this category.

35. 11 U.S.C. § 507(a)(5) (Supp. III 1979).

36. *Id.* § 507(a)(6). Taxes due generally include income taxes, property taxes, withholding taxes, employment taxes, and excise taxes, but not fines or penalties which do not represent compensation for actual pecuniary loss. *Id.*

37. *See* 31 U.S.C. § 191 (1976). *See also* note 26 *supra*.

38. 31 U.S.C. § 191 (Supp. II 1978) was amended by Pub. L. No. 95-598, 92 Stat. 2549 (1978), on November 6, 1978 to provide that "[t]he priority established under this section does not apply . . . in a case under Title 11."

39. 615 F.2d 909 (10th Cir. 1980).

charge of the debts under the Bankruptcy Act.[40] There is no indication whether the judgment against Franklin was based upon a contract,[41] tort,[42] or hybrid[43] theory. The bankruptcy judge held that the state court record was ambiguous as to one plaintiff, an adult, and unambiguous as to the other plaintiff, a child.[44] Thus, the bankruptcy judge, without going behind the record, found Franklin's conduct to be willful and malicious and concluded that the debt was not dischargeable as to the guardian of the minor. The judge also ordered an evidentiary hearing to evaluate the doctor's conduct as to the minor's mother.[45] The district court affirmed the bankruptcy court.

Both courts relied on *Raley v. Nicholas*[46] in deciding that the court should be confined to a review of the judgment and record of the prior state court proceedings and not take additional evidence. *Nicholas* was overruled, however, by *Brown v. Felsen*,[47] wherein the Court held that the bankruptcy court is not confined to a review of the judgment and record in the prior state court proceedings when considering the discharge of respondent's debt.[48] Thus, in *Franklin* the Tenth Circuit Court of Appeals reversed and remanded the matter, ordering the bankruptcy court to look behind the record of the state court proceeding to consider the conduct of the physician.[49]

The court of appeals never had the opportunity to consider the important issue concerning the dischargeability in bankruptcy of a physician's malpractice debts. Under both the Bankruptcy Act[50] and the new Bankruptcy Code[51] a debt for an injury arising from the willful and malicious conduct of the debtor toward another is not dischargeable in bankruptcy. "Willful," according to the legislative history of the new Code means "deliberate or intentional."[52] The term malicious is not defined in the legislative

40. 11 U.S.C. § 35(a) (1976). Under the new Bankruptcy Code, the objection would be based upon 11 U.S.C. § 523(6) (Supp. III 1979), which states that there is no discharge from a debt arising from "willful and malicious injury by the debtor to another entity or to the property of another entity." While fraud was hinted at in the decision, *see* 615 F.2d at 910, the fraud discussed by the Bankruptcy Code does not appear to be the type of fraud which would be the basis of a malpractice suit, that is, fraud in the concealment. 11 U.S.C. § 523(4) (Supp. III 1979) provides no discharge for debts arising from fraud or defalcation while acting in a fiduciary capacity.

41. W. PROSSER, THE LAW OF TORTS § 32 (4th ed. 1971). *See, e.g.*, Brown v. Moore, 247 F.2d 711 (3d Cir. 1957). *But see* Kennedy v. Parrott, 243 N.C. 355, 90 S.E.2d 754 (1956) (physician's agreement to accept individual as patient does not create contract in ordinary sense of term but creates status or relationship).

42. A tort action is based upon a doctor's negligent breach of duty to his patient.

43. A hybrid tort-contract action most often sounds in tort. *See* Brown v. Moore, 247 F.2d 711 (3d Cir. 1957); Noel v. Proud, 189 Kan. 6, 367 P.2d 61 (1961).

44. 615 F.2d at 910.

45. *Id.*

46. 510 F.2d 160 (10th Cir.), *cert. denied*, 421 U.S. 1012 (1975).

47. 442 U.S. 127 (1979). For a comment on Brown v. Felsen, see Overview, *Commercial Law, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 165, 165-66 (1980).

48. 442 U.S. at 138-39.

49. 615 F.2d at 911.

50. 11 U.S.C. § 35(a) (1976).

51. *Id.* § 523(4) (Supp. III 1979).

52. H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 365, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5963, 6320.

history,[53] but in a legal sense a willful injury and a malicious injury are nearly identical.[54] The legislative history does not address the discharge of medical malpractice judgments.

The exceptions to discharge are related to actions in tort and not to breaches of contract.[55] The malpractice action, however, must be framed as an intentional tort because debts for injuries caused by negligent, careless, and unintentional behavior are apparently not within the discharge exception for willful and malicious injuries.[56] A malpractice judgment can be brought within the exception by showing that the injury resulted from an intentional disregard of a duty owed to the patient,[57] which includes abandonment and assault. Gross negligence is the equivalent of an intentional wrong under the exception to discharge, where it is defined as a willful disregard of the rights of others.[58]

Imagine the following scenario. Based upon the pleadings and judgment in the trial court, a physician is found guilty of "unintentional" malpractice. Rather than pay the judgment creditor, the physician declares bankruptcy, has his malpractice debts discharged, and leaves the injured creditor with a useless malpractice judgment. Thus, the Bankruptcy Code leaves an outlet for a physician who is adjudged liable to a patient for malpractice; instead of paying the creditor the physician might have the debt discharged in bankruptcy.

This opportunity for evasion conflicts with the policy of helping those who have been injured by the intentional or unintentional mistakes of physicians. A malpractice suit is the best method a person has to remedy a wrong that a physician has committed.[59] Nothing in the Bankruptcy Code can be interpreted to prevent the discharge of debts incurred for unintentional malpractice torts or breaches of contracts with patients. Therefore, in a malpractice suit the complaint ought to be drafted in terms of an intentional tort or gross negligence so that when a judgment is rendered against the physician, the debt will not be dischargeable in bankruptcy.

III. BRANCH BANK OR DRIVE-IN FACILITY

In *Utah v. Zions First National Bank*[60] the court of appeals found that a

53. *Id.*

54. *See* MacLean v. Scripps, 52 Mich. 214, 17 N.W. 815 (1883); Rea v. Motor Ins. Corp., 48 N.M. 9, 144 P.2d 676 (1944).

55. Allen v. Lindeman, 164 N.W.2d 346 (Iowa 1969).

56. 11 U.S.C. § 523(6) (Supp. III 1979). *See In re* Byrne, 296 F. 98 (2d Cir. 1924); Robinson v. Early, 248 Cal. App. 2d 19, 56 Cal. Rptr. 183 (1967); Panagopulos v. Manning, 93 Utah 198, 69 P.2d 614 (1937).

57. Flanders v. Mullin, 80 Vt. 124, 66 A. 789 (1907) (doctor who intentionally injures a patient in a way not essential to the operation performs a willful and malicious act in the required sense).

58. Saueressig v. Jung, 246 Wis. 82, 16 N.W.2d 417, 419 (1944). Additionally, wrongful death judgments are not dischargeable.

59. S. KLAW, THE GREAT AMERICAN MEDICINE SHOW 95-109 (1975). *See* S. JONAS, HEALTH CARE DELIVERY IN THE UNITED STATES (1977). *But see* H. LEWIS & M. LEWIS, THE MEDICAL OFFENDERS 264-65 (1970) (malpractice suits may be good for plaintiffs, but they are expensive to the doctor and the insurer); D. STROMAN, THE MEDICAL ESTABLISHMENT AND SOCIAL RESPONSIBILITY 161-82 (1976).

60. 615 F.2d 903 (10th Cir. 1980).

national bank had established a branch bank in violation of both state[61] and federal[62] law by maintaining a drive-in facility 271 feet from the bank's main structure. While the court was careful to follow precedent by not allowing the national bank to maintain the drive-in facility, the decision is not necessarily the correct one, for it perhaps lessens the competitiveness of the Zions First National Bank in the banking market of Ogden, Utah.

Utah is a state which allows limited branch banking.[63] That is, in first class cities, those with 100,000 or more people,[64] branch banking is permitted.[65] In second class cities, however, which, like Ogden, have between 60,000 and 100,000 people, branch banking is not authorized if a bank is already in the community. An exception is allowed if the existing bank is attempting to establish a branch by taking over another bank in the community.[66]

The Comptroller of the Currency ruled initially that Zions could legally establish a *drive-in facility* on Zions' corner property.[67] The appellate court, however, gave no weight to the Comptroller's ruling, finding instead that Zions' drive-in facility was actually a branch bank and not permitted by state or federal law.[68] "Branch" is defined identically under Utah and federal law.[69] The court found that Zions' drive-in facility was a branch bank under Utah law. Since this "branch bank" was not contiguous to the main bank structure, as state law required, nor within the exception established by the Utah Commissioner of Financial Institutions allowing a facility to be maintained immediately across the street from a bank if it is connected to the banking house by a pneumatic tube or other means of transmission,[70] the court reasoned that the facility was an unauthorized branch bank. Specifically, the court was influenced by the presence of structures between the main bank and the facility, although the bank apparently had built the facility as near to the bank as possible.

The court of appeals used the correct definition of a branch bank[71] but incorrectly found that the bank's drive-in facility was a branch bank. It relied on *First National Bank v. Dickinson* in which the Supreme Court had said that a branch bank is "any place for receiving deposits or paying checks or lending money apart from the chartered premises."[72] In *Dickinson*, the Court had ruled that an armored car similar to a "mobile drive-in" facility

61. UTAH CODE ANN. § 7-3-6 (1953).
62. 12 U.S.C. § 36(c), (f) (1976).
63. *See* Gup, *A Review of State Laws on Branch Banking*, 88 BANKING L.J. 675 (1971).
64. UTAH CODE ANN. § 20-1-1 (1953).
65. *Id.* § 7-3-6.
66. *Id.*
67. 615 F.2d at 905.
68. *Id.*
69. UTAH CODE ANN. § 7-3-6 (1953). 12 U.S.C. § 36(f) (1976) provides that
> the term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

70. UTAH CODE ANN. § 7-3-6 (1953).
71. *Id.*
72. 396 U.S. 122 (1969).

and a receptacle for money located one mile from the bank were branch banks and, therefore, were not permitted by Florida law. However, in separate dissents, Justices Stewart and Douglas argued with the majority's rationale,[73] stating that the practices of the facilities in question were not those of a branch bank and that the Comptroller's decision should not be overturned, absent overriding reasons. The Tenth Circuit believed that the facts in *Dickinson* applied to *Zions*, which led the appellate court to its conclusion that the drive-in facility was a branch bank.[74]

The appellate court erred in finding that the Utah drive-in facility was a branch bank. Although the differences between a branch bank and drive-in facility are not easily distinguished, they do exist.[75] A branch bank offers complete banking services including receiving deposits, cashing checks, and lending money. Drive-in facilities, on the other hand, which are commonly used by banks, are only for depositing money and cashing checks; they do not lend money. Furthermore, drive-in facilities often stay open beyond regular banking hours as a convenience to customers.

The Tenth Circuit applied the branch bank rule too harshly. The court did recognize that the *Dickinson* rule should not be rigidly or mechanically applied.[76] Other factors "such as the distance separating the main bank from the added facility, the presence or absence of intervening structures . . . and *the availability of other locations* for attached expansion may be considered."[77] In *Zions*, the facts indicated that the bank was unable to establish a facility on its own property and could not purchase surrounding property for a facility.[78] Therefore, Zions established the facility on property located as near the bank as possible.[79] The court maintained a rigid stance by not considering Zions' efforts to purchase contiguous property[80] and incorrectly noted that the other factors cited in *Dickinson* were not in Zions' favor.[81]

While it is true that electronic banking facilities are considered branch banks under the federal statutory definition,[82] the Zions facility was not an electronic banking facility. Therefore, decisions in electronic facility situations are not as sufficiently analogous to Zions' situation as the court of appeals believed.[83]

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73. *Id.* at 138.

74. 615 F.2d at 906.

75. *See, e.g.*, NEB. REV. STAT. § 8-157 (Reissue 1977), in which the Nebraska Legislature prohibited branch banks but allowed auxiliary teller offices (drive-in facilities). These are what the Zions First National Bank apparently maintained.

76. 615 F.2d at 906.

77. *Id.* (emphasis added). *See* Nebraskans for Independent Banking, Inc. v. Omaha Nat'l Bank, 530 F.2d 755 (8th Cir.), *vacated and remanded*, 426 U.S. 310 (1976) (remanded in light of new state legislation).

78. 615 F.2d at 904.

79. *Id.* at 904-05.

80. *Id.* at 906.

81. *Id.*

82. State Banking Bd. v. First Nat'l Bank, 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); Independent Bankers Ass'n of America v. Smith, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976). *See also* Illinois v. Continental Ill. Nat'l Bank & Trust Co., 535 F.2d 176 (7th Cir. 1976); Missouri v. First Nat'l Bank, 538 F.2d 219 (8th Cir.), *cert. denied*, 429 U.S. 941 (1976). *See Banking Decisions, CBCTs as Branch Banks*, 94 BANKING L.J. 159 (1977).

83. 615 F.2d at 906.

Finally, and perhaps most importantly, the court erred by stressing that Zions' branch would violate the doctrine of competitive equality[84] established by the McFadden Act.[85] Zions' facility perhaps increased competition in the Ogden market area and should have been approved as a matter of public policy. Obviously, if other national and state banks in Ogden can maintain drive-in facilities and Zions cannot, Zions will be at a competitive disadvantage. Competition is important in formulating banking policy,[86] and despite objections to branch banking,[87] certain types of branch banking increase competition.[88] The Tenth Circuit would have been in line with modern banking policy if it had allowed Zions to maintain the drive-in facility, unless doing so would have given Zions an unfair advantage over its competitors.[89]

The distinction between Zions' drive-in facility and an actual branch bank is slight, but Zions' facility must have improved the bank's competitiveness in the Ogden market. Therefore, the court, in recognizing the competitive equality doctrine, could properly have found for Zions.

IV. THE SELLER'S RIGHT OF STOPPAGE UNDER THE U.C.C.

An interesting interplay between the Uniform Commercial Code (U.C.C.), the bankruptcy laws, and certain liens against the government occurred in *In re Murdock Machine & Engineering Co.*,[90] where a conflict arose between the United States Government and Ramco Steel, two creditors of the Murdock estate. Specifically, *Murdock* addressed the unique question of whether a seller may stop delivery of goods under section 2-705 of the U.C.C. as against a good faith purchaser for value.

On May 13, 1975, Murdock, a Utah corporation, filed a petition seeking to be adjudged bankrupt. On May 22, Ramco, without knowledge of Murdock's petition, made its last shipment of steel to Murdock. All steel was sold on credit to Murdock, delivery F.O.B. Buffalo, New York, the place of shipment. Upon learning of the bankruptcy petition on May 23, 1975, Ramco stopped delivery of steel held in Indiana; another delivery was stopped on

84. *Id.* at 907. Some maintain that national banks, which have venue wherever they are located are at a competitive advantage. *See* Citizens & Southern Nat'l Bank v. Bougas, 434 U.S. 35 (1977); Bell & Work, *National Banks in Courts: Unequal Protection*, 94 BANKING L.J. 484 (1977). *See also* Dunne, Citizens & Southern Nat'l Bank v. Bougas: *Closing the Gap*, 95 BANKING L.J. 307 (1978).

85. Pub. L. No. 69-639, 44 Stat. 1224 (1927) (codified in scattered sections of 12 U.S.C.). According to J. WHITE, BANKING LAW (1976), "[t]he McFadden Act of 1927 established 'competitive equality' between national banks and state banks which were members of the Federal Reserve system by allowing both to establish 'inside' branches—within the municipality of their main banking facilities—in those states that permitted branch banking." *Id.* at 478.

86. *See* M. MAYER, THE BANKERS (1974).

87. *Id.* at 87. *See* H. BARGER, MONEY, BANKING, AND PUBLIC POLICY 239-42 (2d ed. 1968).

88. De novo branch banking, for example, requires those interested in opening branch banks to start new institutions rather than acquire established banks. *See* H. BARGER, *supra* note 87.

89. The modern trend is to allow branch banking. *See* J. WHITE, BANKING LAW (1976).

90. 620 F.2d 767 (10th Cir. 1980).

June 11, 1975. The steel was shipped to an Indiana warehouse and ultimately reshipped to Utah.

Unknown to Ramco, Murdock intended to use the steel to fulfill a contract with the United States. The contract between Murdock and the United States contained a title-vesting clause providing that title to Murdock's materials vested in the United States immediately upon Murdock's receipt of the materials.[91] Thus, the United States claimed that Ramco's statutory right to stop delivery of the steel in transit was exercised subject to the title that had vested in the United States immediately after Murdock had acquired title to the steel at the point of shipment.[92] Ramco argued that since Murdock did not obtain possession of the steel, the United States did not acquire title.[93] According to the court of appeals, the United States, in effect, urged that the Uniform Commercial Code not be followed. Additionally, the United States claimed that it had a lien on the property by virtue of having taken title. The court, however, felt that Ramco had obtained the first lien; that is, under the Uniform Commercial Code, Ramco's lien attached immediately when Murdock filed for bankruptcy.[94] Title could not have vested in the government until the steel was shipped from Buffalo, New York.[95]

Ramco argued that its lien on the steel or the proceeds derived from it remained valid, even if the title had vested in the government, citing *Armstrong v. United States*[96] and *United States v. Alabama*[97] to support its contention. The government analogized to the principle that no creditor can obtain a lien against a public work to which the United States has taken title

91. The title-vesting clause in the Murdock-United States contract reads:

> Immediately upon the date of this contract, title to all parts; materials; . . . acquired or produced by the contractor (Murdock) and allocated or properly chargeable to this contract under sound and generally accepted accounting principles and practices shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the contractor and properly chargeable to this contract as aforesaid, shall forthwith vest in the Government upon said acquisition, production, or allocation.

Id. at 769.

92. *Id.* Under U.C.C. § 2-401(2), "F.O.B." means that title passes at the time and place of shipment, which was Buffalo, New York in this instance.

93. 620 F.2d at 769.

94. *Id.* at 770. U.C.C. § 2-702(1) provides: "Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article." U.C.C. § 2-705(1) provides: "The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent." Generally, to stop delivery a seller must establish that the buyer is insolvent within one of the three tests established in U.C.C. § 1-201(23). Matsushita Elec. Corp. of America v. Sonus Corp. 362 Mass. 246, 284 N.E.2d 880 (1972). U.C.C. § 1-201(23) provides: "A person is 'insolvent' who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law."

95. 620 F.2d at 770.

96. 364 U.S. 40 (1960) (state-created materialman's lien, which attached to a privately owned vessel under construction for the government, remained valid after title vested in the government).

97. 313 U.S. 274 (1941) (while lands owned by the United States cannot be taxed by the state, as far as prior state tax liens are concerned the United States stands in no different position from other purchasers of land who take the land after the tax date).

without the government's consent.[98] However, this rationale did not support the government's position, for the liens in *Ansonia* were against public works while in *Murdock* the liens were against personal property.[99] Thus, the United States obtained title to Murdock's steel subject to Ramco's right to withhold possession.[100]

Advancing a public policy argument, the court of appeals noted that in *United States v. Kimbell Foods, Inc.*[101] the Supreme Court held that the priority of private liens and liens arising from the lending programs sponsored by the Small Business Administration and the Federal Housing Administration is to be determined by state priority rules. Although *Kimbell* is expressly limited to federal claims arising from these government loans,[102] the Tenth Circuit found *Kimbell* persuasive. The court recognized that businessmen must be able to rely on codified rights and duties.[103] Additionally, the government should not be allowed greater rights than others in the marketplace. Further, state commercial laws do not frustrate government programs, and sellers should not be required to investigate every sale to see if the government is lurking in the background with a superior right.[104] The court observed that the government could easily have worked within the framework of state laws to ensure its receipt of the steel.[105] Like large businesses, the government can work within the idiosyncracies of each state's commercial code.[106]

The government urged that it was a good faith purchaser for value. But, the court distinguished Ramco's stoppage of goods before Murdock received them from section 2-702(3) of the U.C.C.,[107] which limits a seller's right to reclaim goods by the rights of a good faith purchaser for value.[108] A good faith purchaser is not so explicitly protected from a seller's right of stoppage, however.[109] Therefore, the seller's right to stop goods in transit[110] is effective even if title has passed to the buyer.[111]

The court of appeals then reduced *Murdock* to a seldom litigated issue: whether a seller may stop delivery of goods under section 2-705 of the Uniform Commercial Code as against a good faith purchaser for value. The

98. *See* United States v. Ansonia Brass & Copper Co., 218 U.S. 452 (1910).
99. 620 F.2d at 771.
100. *Id.*
101. 440 U.S. 715 (1979).
102. *Id.* at 740.
103. 620 F.2d at 772.
104. *Id.*
105. *Id.*
106. *Id.*
107. U.C.C. § 2-702(3) provides: "The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them."
108. *See* U.C.C. § 2-403 (discussion of good faith purchasers).
109. 620 F.2d at 774.
110. Stoppage *in transitu* is defined as "[t]he act by which the unpaid vendor of goods stops their progress and resumes possession of them, while they are in course of transit from him to the purchaser, and not yet actually delivered to the latter." BLACK'S LAW DICTIONARY 1273 (5th ed. 1979).
111. Amoco Pipeline Co. v. Admiral Crude Oil Corp., 490 F.2d 114 (10th Cir. 1974).

court found only one relevant case[112] in which a federal district court held that until delivery of the goods, the rights of a good faith purchaser for value are subject to the seller's right of stoppage. The Tenth Circuit concluded that delivery of the goods to a bailee constitutes a delivery. Since the government did not contend that the steel had been delivered to it and since the bailee, the Indiana warehouse, asserted that Murdock did not have physical or constructive possession of the goods in the warehouse, the steel in question was never delivered to either Murdock or the government.

As an aside, the court speculated that the steel might have been consigned under non-negotiable straight bills of lading.[113] Even under the federal statute which deals with bills of lading, however, the government was subject to Ramco's right of stoppage.[114] The Court also noted that the equitable right of stoppage *in transitu* defeated the rights of good faith purchasers for value.[115] Finally, since Ramco was unaware of Murdock's transfers to the government, it could not possibly have acquiesced in the government's purchase. Such acquiescence would have made applicable the official comments to section 2-705 of the U.C.C., which indicate that receipt of the goods by a subpurchaser acquiesced in by the seller bans the seller's stoppage of goods in transit.[116]

V. CASE DIGESTS

A. *Admiralty Liens in the Tenth Circuit*

It has always seemed likely that a case involving admiralty liens would not appear in the Tenth Circuit, but such a case did surface during the past term in an appeal from an Oklahoma bankruptcy decision. In *Riffe Petroleum Co. v. Cibro Sales Corp.*,[117] Riffe was the debtor in possession in a chapter 11 bankruptcy proceeding, filed on June 2, 1978, in Oklahoma. On June 5,

112. Ceres, Inc. v. ACKI Metal & Ore Co., 451 F. Supp. 921 (N.D. Ill. 1978).

113. 620 F.2d 774. The court said:

> The provisions of the Code concerning documents of title support our conclusion that a good faith purchaser for value does not cut off the seller's right to stop delivery of goods in transit. Goods in transit, and 'in the possession of a carrier or other bailee' (U.C.C. § 2-705(1)), invariably are consigned under a document of title, such as a bill of lading. There was evidence in this case that the steel was consigned under non-negotiable straight bills of lading.

114. 49 U.S.C. § 119 (1976) provides that

> Where an order bill has been issued for goods no seller's lien or right of stoppage *in transitu* shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

49 U.S.C. § 109 (1976) provides that

> A bill may be transferred by the holder-by-delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill can not be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right.

Thus, even if the government were a transferee of the straight bills of lading covering the steel, it would be subject to Ramco's right of stoppage. 620 F.2d at 775.

115. 620 F.2d at 775. *See, e.g.*, Branan v. Atlanta & W.P.R. Co., 108 Ga. 70, 33 S.E. 836 (1899); Pattison v. Culton, 33 Ind. 240 (1870).

116. 620 F.2d at 775.

117. 601 F.2d 1385 (10th Cir. 1979).

1978, the district court entered a stay order. In October of 1977, a subsidiary of Riffe had entered into a maritime contract for a vessel and also contracted to have its oil supplied by Cibro. Cibro delivered the fuel oil but was never paid. On June 16, 1978, Cibro, having received notice of the bankruptcy stay order, filed, as a listed creditor of the estate, a complaint in rem in a New Jersey court to enforce its maritime lien for furnishing bunker oil to Riffe's vessel. The ship was seized on June 17, 1978, but the cargo remained on the ship. Cibro did not apply to the bankruptcy court in Oklahoma for a modification of the stay order, but Riffe knew of the seizure. A New Jersey judge ruled that the seizure did not violate the bankruptcy stay order. The cargo was eventually released when the exporter, Shell Curaçao, paid the Cibro bill, taking in return an assignment of Cibro's claim.

The Oklahoma judge held Cibro and its attorneys in contempt of court for violating the stay order; it levied various penalties against them and ordered Cibro's officers and other attorneys to show cause for their failure to follow the court's orders. The Tenth Circuit granted a stay of the contempt judgment until the final disposition of the case.

Conflicts exist between admiralty and bankruptcy law.[118] A bankruptcy stay order enjoins action against property owned or in possession of the debtor.[119] However, the parties in *Riffe Petroleum* entered into a time charter agreement, which "is a contract for a special service to be rendered by the owners of the vessel" who agree to carry goods in a ship in which the charterer has no interest.[120] This is distinguishable from a contract to lease the vessel[121] in which the lessee, the charterer, in effect becomes the owner of the ship for the length of the charter.[122]

A maritime lien allows a ship to keep moving in commerce but prevents it from sailing away to escape its debts.[123] The Maritime Lien Act[124] grants a lien on a vessel for necessaries supplied, including fuel oil; the lien arises automatically upon the furnishing of necessaries and has priority over mortgages or purchasers without notice.[125] The vessel is a distinct entity responsible for its own debts,[126] and a suit brought to enforce a maritime lien is brought as an in rem proceeding in the district where the vessel is located.[127] Thus, the New Jersey proceeding was strictly against the ship.[128]

The Tenth Circuit noted that Riffe's subsidiary was a time charterer and not the vessel's owner; had this not been the situation, the stay order

118. 601 F.2d at 1389. *See, e.g.*, Biele, *Maritime Liens Arising Out of Collision*, 51 TUL. L. REV. 1134, 1151-52 (1977); Landers, *The Shipowner Becomes a Bankrupt*, 39 U. CHI. L. REV. 490 (1972).

119. Under the Bankruptcy Code the applicable provision is 11 U.S.C. § 362 (Supp. III 1979).

120. 601 F.2d at 1389 (quoting Leary v. United States, 81 U.S. (14 Wall.) 607, 610 (1871)). *See* Bergan v. International Freighting Corp., 254 F.2d 231 (2d Cir. 1958).

121. 601 F.2d at 1389.

122. Marr Enterprises, Inc. v. Lewis Refrigeration Co., 556 F.2d 951, 957-58 (9th Cir. 1977).

123. 601 F.2d at 1389.

124. 46 U.S.C. § 971 (1976).

125. Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 12 (1920).

126. 601 F.2d at 1389.

127. Platoro Ltd. v. Unidentified Remains of a Vessel, 508 F.2d 1113, 1115 (5th Cir. 1975).

128. 601 F.2d at 1389.

would probably have been enforceable.[129] While the bankruptcy court has exclusive jurisdiction over the debtor and its property, wherever located,[130] the debtor must have title or possession for the property to be within the court's jurisdiction.[131] Riffe's subsidiary operated under a time charter agreement and had neither title to nor possession of the vessel. Ownership of the cargo was of no importance because the shipowner, not Cibro, prevented the unloading of the cargo.[132] "Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate,"[133] for a debtor's property may be affected by admiralty proceedings, which do not constitute a claim against the property.[134] Furthermore, although the court did not mention it in the opinion, a court of admiralty has exclusive jurisdiction of an action to enforce a maritime lien.[135] Absent a claim, the contempt proceedings could not continue.[136]

Finally, the court of appeals dispelled the argument that Cibro had obtained a preference. There was no proof that Cibro had filed a claim, and Shell Curaçao had paid Cibro's bill in return for an assignment of Cibro's claim against Riffe.[137] Thus, the court concluded that the stay order had not been violated, and it dismissed the case.

B. *Abuse of Discretion in the Bankruptcy Court*

In *Security National Bank v. Turner*[138] the bank held a security interest in the property of the bankrupts, the Ocobocks, and received $34,000 from the sale of their business. Two months later the Ocobocks filed for bankruptcy, and two claims were submitted against the estate. The bank was listed as a creditor, but it made no claim. The trustee, upon receiving the bankruptcy court's permission to act as his own attorney, sued the bank, asserting that it had obtained a preference by receiving funds two months prior to the filing of the bankruptcy petition.

After negotiations with the trustee, the bank sent to him a check for $8,000 and a "Release and Settlement Agreement" in which the bank relinquished any right it might have to file a claim against the estate. Shortly thereafter, the trustee objected to the two claims that had been filed and presented to the bankruptcy court an application for approval of the settlement with the bank, an application for his attorney's fees, and a final report showing a positive balance of $8,436.84. Notice of a meeting of creditors was sent to the bank, but not to the bank's counsel.

Less than one month later, the bankruptcy judge sustained the trustee's objections to the two claims, approved both the attorney's fees and the re-

129. *See id.* at 1390.
130. Under the Bankruptcy Code the applicable provision is 28 U.S.C. § 1471(e) (Supp. II 1978).
131. Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 481 (1940).
132. 601 F.2d at 1390.
133. *Id.* (quoting Callaway v. Benton, 336 U.S. 132, 142 (1949)).
134. 601 F.2d at 1390.
135. Hercules Co. v. The Brigadier General Absolom Baird, 214 F.2d 66 (3d Cir. 1954).
136. *Id.*
137. 601 F.2d at 1390-91.
138. 608 F.2d 1358 (10th Cir. 1979).

port of the trustee, and awarded the surplus to the bankrupts. The court subsequently approved the settlement agreement with the bank. One week later the bank learned that the objections had been sustained, and it appealed the bankruptcy court's decision. The district court affirmed, citing no proof of error in the bankruptcy court.

The bank claimed a legal error because it was the sole creditor of the estate.[139] The court of appeals said that compromises achieving unjust results amount to abuses of discretion and should be set aside.[140] A bankruptcy court is a court of equity,[141] and equitable principles govern its jurisdiction.[142] In *Turner* the results were unjust because the bank had settled with the understanding that other allowable claims existed.[143] Since the bankruptcy court and the trustee knew there would be no other allowable claims and the settlement would create a surplus,[144] the Tenth Circuit found that the bankruptcy court had abused its discretion by allowing the bankrupts to receive a windfall of over $6,000.[145] Therefore, it reversed the orders of the bankruptcy court.

C. *Proof of Personal Ownership in Bankruptcy Proceedings*

Despite a lower court's finding that a corporate officer lacked credibility, the Tenth Circuit Court of Appeals held, in *In re White House Decorating Co.*,[146] that documentary evidence which the officer presented established the title to personal property found on the bankrupt's premises in the officer personally and not in the bankrupt corporation. Therefore, the personal property was not subject to the bankruptcy proceedings.

The court gave "great weight" to the bankruptcy court's conclusion that the testimony of the company's president lacked credibility.[147] The president had presented uncontradicted documentary evidence, however, establishing that he himself owned the personal property in question, which consisted of three boats.[148] Although owners sometimes abuse the closely-held corporation,[149] unless a contention is made that the corporate form should be disregarded so that creditors can reach personal assets or that a fraud was perpetrated on the creditors, once a claimant establishes ownership, it becomes the trustee's burden to prove the asset should remain in the bankrupt's estate.[150] In *White House*, the trustee failed to produce evidence contradicting the officer's documents.[151] The court noted that the boats had

139. *Id.* at 1360.
140. *Id.* (quoting Albert-Harris, Inc. v. Woodward, 313 F.2d 447, 449 (6th Cir. 1963)).
141. American Employers Ins. Co. v. King Resources Co., 556 F.2d 471 (10th Cir. 1977).
142. Bank of Marin v. England, 385 U.S. 99, 103 (1966).
143. 608 F.2d at 1360.
144. *Id.* at 1361.
145. *Id.*
146. 607 F.2d 907 (10th Cir. 1979).
147. *Id.* at 909.
148. *Id.* at 911.
149. *Id.* at 910.
150. *Id.* at 911.
151. *Id.* at 910.

been purchased more than ten years before the litigation,[152] making it difficult to account for all pertinent documents; but, it disregarded the trustee's handicap in having incomplete corporate records at his disposal[153] because of the considerable weight it gave to the documentary evidence. Thus, the boats remained in the personal possession of the corporate president, immune from bankruptcy proceedings.

D. *Security Interests in Insurance Proceeds*

In *Brown v. First National Bank*[154] the Tenth Circuit Court of Appeals considered the question of whether proceeds of insurance carried on collateral are proceeds of collateral within the meaning of section 9-306(1) of the Oklahoma Uniform Commercial Code.[155] In 1974, the Browns, owners of a paint and gift store, gave the bank a security interest in all of the goods and merchandise belonging to the business, including additions to and substitutions for collateral. The bank took the interest as security for a note that the Browns executed in its favor for over $36,000 and for future advances. The security interest was perfected.

In the agreement the Browns covenanted to insure the collateral with policies written for the benefit of the debtor and the bank. They obtained insurance to cover a loss of inventory by fire, but only the Browns were named insureds;[156] no clause designated the bank as payee.

The business was later destroyed by fire, and the Browns received $25,000 from the insurance company. The bank went to court and recovered this amount in October 1976. On December 1, 1976, the Browns were adjudicated bankrupts. The trustee sued the bank, claiming that its acquisition of the insurance check was a transfer by the insolvent Browns to an unsecured creditor within four months of filing the voluntary petition in bankruptcy and was, therefore, a voidable preference.[157] The district court reversed the bankruptcy court and held that the bank had a continuously perfected security interest in the insurance proceeds, which satisfied the requirements of the U.C.C. The Tenth Circuit affirmed that finding.

Section 9-306(1) of the Uniform Commercial Code, as adopted in Oklahoma, provides that "proceeds" includes "whatever is received when

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152. *Id.*

153. *Id.* at 911. Under the Bankruptcy Act the failure to keep and turn over records could be a bar to a discharge in bankruptcy. 11 U.S.C. § 32(c)(2)(1976). Further, failure to maintain records can work against the bankrupt when the trustee has the burden of proof. 607 F.2d at 911. The Bankruptcy Code provides that the court will not grant a discharge if

> the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

11 U.S.C. § 727(a)(3) (Supp. III 1979).

154. 617 F.2d 581 (10th Cir. 1980).

155. OKLA. STAT. ANN. tit. 12A, § 9-306 (West 1963). For a discussion of insurance on collateral as proceeds within the U.C.C., see Henson, *Insurance Proceeds as "Proceeds,"* 18 CATH. U.L. REV. 453 (1969).

156. 617 F.2d at 582.

157. 11 U.S.C. § 107 (1976). Ninety days is the time limit for establishing a voidable preference under the Code. 11 U.S.C. § 547(f) (Supp. III 1979).

collateral or proceeds is sold, exchanged, collected or otherwise disposed of."[158] Oklahoma's courts had not considered the question of whether proceeds of insurance on collateral are proceeds within the meaning of the Code, and other courts were divided on the issue.[159] Therefore, the Tenth Circuit had to decide how the Oklahoma Supreme Court would decide the question.

The trustee argued first that insurance proceeds arising from the destruction of collateral are outside the U.C.C. because section 9-104(g) indicates that article 9 precludes treatment of proceeds of insurance on collateral as proceeds of collateral under section 9-306.[160] Next, he maintained that Oklahoma accepted the personal contract theory of insurance, which establishes that insurance payments arise from a personal contract and not from a contract running with the property.[161] Finally, the trustee urged that a literal reading of the section establishes that proceeds arise only from the voluntary disposition of property and not from the involuntary disposition of property, such as loss to fire.[162]

Cognizant of the revision of the Uniform Commercial Code, making insurance on collateral proceeds within the meaning of section 9-306(1),[163] the Tenth Circuit rejected the plausible arguments presented by the trustee. First, the court stated that section 9-104(g) applies only to the creation of security interests in the insurance policy itself.[164] In *Brown* the bank was asserting an interest in the moneys already paid, not in the policy. Second, the court noted that an exception to the personal contract of insurance theory arises if the mortgagor promises to insure the property for the mortga-

158. OKLA. STAT. ANN. tit. 12A, § 9-306 (West 1963).

159. *See, e.g.*, Quigley v. Caron, 247 A.2d 94 (Me. 1968); Universal C.I.T. Credit Corp. v. Prudential Inv. Corp., 101 R.I. 287, 22 A.2d 571 (1966) (insurance proceeds paid for a loss are not proceeds within the term proceeds under § 9-306(1) of the Uniform Commercial Code).

In 1972, however, the U.C.C. was revised to include the following provision: "proceeds includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss of damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement." The addition was intended to overrule cases holding that proceeds of insurance on collateral are not proceeds of the collateral. Now insurance payable by reason of loss to the collateral is proceeds if payable to the party to the security agreement. *See* U.C.C. § 9-306, Comment 1 (1972) which provides that the purpose of the new sentence is to make clear that insurance proceeds from a casualty loss are proceeds within the meaning of this section. *See, e.g.*, PPG Indus., Inc. v. Hartford Fire Ins. Co., 531 F.2d 58 (2d Cir. 1976); Insurance Management Corp. v. Cable Services of Fla., Inc., 359 So.2d 572 (Fla. Ct. App. 1978); First Nat'l Bank v. Merchant's Mut. Ins. Co., 89 Misc. 2d 771, 392 N.Y.S.2d 836 (1977), *aff'd*, 65 App. Div. 2d 59, 410 N.Y.S.2d 679 (1978).

At the time of this decision, Oklahoma had not revised its U.C.C. to reflect this change. OKLA. STAT. ANN. tit. 12A, § 9-306 (West 1963). Of the other states in the Tenth Circuit, only New Mexico has not made the change in its commercial code. N.M. STAT. ANN. § 55-9-306 (1978). All other states in the Tenth Circuit have amended their commercial codes to reflect this important change. *See* COLO. REV. STAT. § 4-9-306 (Supp. 1979), KAN. STAT. ANN. § 84-9-306 (Supp. 1979), UTAH CODE ANN. § 70A-9-306 (Supp. 1979), and WYO. STAT. § 34-21-935 (1977).

160. 617 F.2d at 583.

161. *Id.*

162. *Id.* at 584.

163. *See* note 159 *supra*.

164. *See* Paskow v. Calvert Fire Ins. Co., 579 F.2d 949 (5th Cir. 1978).

gee's benefit. Even if the insurance proceeds are not made payable to the mortgagee, the mortgagee acquires an equitable lien on the proceeds to the extent of indebtedness.[165] Under this exception the lien is superior to the interests of the mortgagor's other creditors. Since the Browns had insured the property for the bank's benefit, the court of appeals believed the Oklahoma courts would not utilize the contract theory of insurance to deny the bank its protection. Finally, the court, liberally construing the U.C.C., felt that a literal reading of section 9-306 did not distinguish between voluntary and involuntary dispositions of collateral.[166] Therefore, it affirmed the district court's decision that insurance proceeds from the fire loss of collateral were proceeds payable to the bank.

E. *Improper Use of Credit Reports*

In *Heath v. Credit Bureau of Sheridan, Inc.*[167] the plaintiff, Charles Heath, brought suit against the Credit Bureau of Sheridan, Inc. for allegedly preparing and delivering a "consumer report" to Heath's union. Heath claimed that the credit bureau should have known that the union was requesting the report to embarrass, humiliate, and discredit him, all of which are improper purposes under the Fair Credit Reporting Act.[168] The Tenth Circuit held that the plaintiff had stated a claim for relief against the credit bureau because it appeared that the bureau might have known, when it delivered the report, that the union had requested it for an impermissible purpose.[169] The credit bureau was not necessarily liable to Heath, however, for it could reasonably assume that the agency requesting the information would use the report for the represented, proper purpose.[170] Thus, the court found necessary a further inquiry into the credit bureau's knowledge of the purpose for the request.[171]

The Tenth Circuit did reverse the trial court's ruling on the credit bureau's failure to open its files to Heath.[172] According to the appeals court, the lower court had dismissed Heath's claim because it believed jurisdiction depended upon the existence of a consumer report.[173] The Fair Credit Reporting Act, however, requires consumer reporting agencies to disclose, at a consumer's request, the information in its files and the names of recipients of that information. Nowhere does the statute limit the request to consumer reports.[174] Thus, Heath had properly invoked the jurisdiction of the trial court, and this issue was remanded for a determination whether the bureau had in fact failed to open its files to Heath. Finally, the appellate court

165. Frensley Bros. Lumber Co. v. Fireman's Fund Ins. Co., 104 Okla. 8, 229 P. 598 (1924); Smith & Furbush Mach. Co. v. Huycke, 72 Okla. 30, 177 P. 919 (1919).
166. 617 F.2d at 584.
167. 618 F.2d 693 (10th Cir. 1980).
168. 15 U.S.C. §§ 1681-1693 (1976).
169. 618 F.2d at 697.
170. *Id.* at 696.
171. *Id.* at 697.
172. *Id.*
173. *Id.*
174. *See* 15 U.S.C. § 1681 (1976).

dismissed Heath's claim against all union defendants except the credit bureau because Heath failed to establish the only statutorily supportable claim, which was that they had obtained the information from the credit bureau under false pretenses.[175]

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175. 618 F.2d at 697.

CONSTITUTIONAL LAW AND FEDERAL STATUTORY RIGHTS

OVERVIEW

In the area of constitutional law, a majority of the cases decided by the Tenth Circuit Court of Appeals stemmed from civil rights actions, under either Title VII of the Civil Rights Act of 1964 or section 1983 of the Civil Rights Act of 1871. Other constitutional issues presented to the appellate court this past year included Indian rights, laetrile availability, the commerce clause, and abortion funding.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The Tenth Circuit Court of Appeals decided a number of cases during the 1979-80 term involving allegations of violations of Title VII of the Civil Rights Act of 1964.[1] The court used this opportunity to clarify and refine its position in several areas unique to Title VII. Due to a multiplicity of issues in a number of the cases, the decisions are discussed under headings corresponding to the relevant issue of the case.

A. *The Prima Facie Case*

The central issue in each of the cases discussed in this subsection was whether the claimant had established a prima facie case under the test enunciated by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[2] Each Title VII case decided by the Tenth Circuit during the recent year which included a major discussion of the *McDonnell Douglas* test was included in the survey to assist the Tenth Circuit practitioner in understanding the court's application of the prima facie standards to a variety of fact situations.

In *Romero v. Union Pacific Railroad*,[3] the Tenth Circuit court reversed a decision of a district court which had ruled that the plaintiff, a Mexican-American, had not established a prima facie violation of Title VII. Upon motion for summary judgment, the trial court had dismissed the plaintiff's discrimination charge because the court found that the plaintiff was not qualified for the job.[4] The Tenth Circuit court, in an opinion written by Judge Seymour, held that there was sufficient contradictory evidence in the record to warrant a further inquiry. Evidence was offered to show that Ro-

1. 42 U.S.C. §§ 2000e to 2000e-16 (1976).

2. 411 U.S. 792 (1973). The Court, in the *McDonnell Douglas* decision, held that a plaintiff establishes a prima facie claim of a Title VII violation by showing: (i) that he belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open, and the employer continued to seek applications from persons of complainant's qualifications. *Id.* at 802.

3. 615 F.2d 1303 (10th Cir. 1980).

4. The trial court found that Romero was not qualified for reinstatement to his former position because he had not participated satisfactorily in a drug and alcohol rehabilitation program sponsored by the employer. *Id.* at 1306.

mero was qualified for the job and that Romero had been the subject of discrimination by his employer.[5] The appellate court reasoned, therefore, that the motion for summary judgment should have been denied. The Tenth Circuit agreed with the district court in declaring that the *McDonnell Douglas* standards apply both to an accusation of discrimination on the basis of national origin and to a charge of employer retaliation against an employee for filing a discrimination suit. Additionally, the court of appeals held that a plaintiff's triumph in a discrimination suit is not a prerequisite to the successful prosecution of the charge of illegal retaliation.[6] The Tenth Circuit accordingly refused to uphold the lower court's grant of summary judgment on the issue of retaliation, finding that because the issue was primarily one of intent and motive,[7] it was not an issue properly disposed of upon motion for summary judgment.

In *Ray v. Safeway Stores, Inc.*,[8] the Tenth Circuit Court of Appeals agreed with the district court's finding that the complainant, a black man, had established a prima facie case under the *McDonnell Douglas* standards. The trial court, in adopting the findings of an appointed master, concluded, however, that the employer had articulated a valid business purpose for Ray's discharge.[9] The trial court reasoned that Safeway, therefore, had countered the prima facie test established by Ray.[10] Judge Seymour, writing for the court of appeals, decreed that whereas the plaintiff had failed to introduce any evidence to show that the business reason articulated by the employer was a mere pretext for discrimination,[11] the discrimination charge filed by Ray should be dismissed.[12]

In *Thornton v. Coffey*,[13] the plaintiff had established a prima facie claim of racial discrimination by the Oklahoma National Guard because of the Guard's refusal to hire Thornton, a black, for a position with the State's Equal Employment Office (EEO). The Guard contended that Thornton

5. Although there was evidence that Romero had participated satisfactorily in the employer's rehabilitation program, it had taken 15 months to reinstate Romero to his former position. In contrast, a white employee who had participated in the employer's program had been reinstated in 120 days. *Id.* at 1309.

6. 615 F.2d at 1307 (citing Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977)).

7. *Id.* at 1309 (citing Jeffries v. Harris County Community Action Ass'n, 425 F. Supp. 1208 (S.D. Tex. 1977) and Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307 (S.D. Ohio 1976)).

8. 614 F.2d 729 (10th Cir. 1980).

9. Safeway alleged that Ray had been discharged for insubordination. Ray had refused to accept a job assignment change which was necessitated by a personality conflict between Ray and another employee. *Id.* at 730.

10. The *McDonnell Douglas* Court held that once a prima facie claim of discrimination has been established, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S. at 802.

11. Under the *McDonnell Douglas* test, if a court is satisfied that the employer has countered the prima facie claim by articulating a valid business reason for the employee's rejection, the burden shifts to the plaintiff to prove that the business reason offered by the employer is merely a pretext for discrimination. *Id.*

12. The appellate court suggested that the plaintiff could have established that the business excuse was a mere pretext for discrimination by showing that white employees, in substantially similar circumstances, were treated differently than Ray, or by showing that the employer had a general policy and practice of treating black employees differently than white employees. 614 F.2d at 731.

13. 618 F.2d 686 (10th Cir. 1980).

was not qualified for the position, and, in the alternative, the Guard asserted that the person hired for the job outranked Thornton. The Tenth Circuit Court of Appeals, in an opinion written by Judge Seymour, rejected the employer's contention that Thornton was unqualified for the position.[14] The court also rejected the business purpose excuse articulated by the Guard—that the appointment was based on a ranking system. The Guard had used a rating procedure which the court found, under the *Griggs* test,[15] to be in violation of Title VII.

In *EEOC v. Fruehauf Corp.*,[16] the court of appeals upheld the decision of the district court which had determined that the EEOC failed to establish a prima facie case against the employer. The employer had alleged, and the trial court agreed, that the aggrieved employees were not qualified for the disputed position of shop foreman. Judge McWilliams, writing for the Tenth Circuit court, conceded that the EEOC had established a prima facie case under the *McDonnell Douglas* standards. Because Judge McWilliams found that the applicants were not qualified for the position of shop foreman,[17] he affirmed the decision of the trial court.

The plaintiff in *Hernandez v. Alexander*[18] had established a prima facie case of national origin discrimination, but because the employer had articulated a valid business reason for the denial of Hernandez' promotion, the trial court granted judgment for the employer. The employer, the United States Army, stated that Hernandez had been denied the promotion because the person promoted had "broader" qualifications than Hernandez. Chief Judge Seth, writing for the appellate court, declared that the trial court had applied the correct standard in requiring the employer merely to *articulate* a reason for the promotion denial. The court of appeals stressed the importance of the statements made by the Supreme Court in *Trustees of Keene State College v. Sweeney*[19] because of the Court's emphasis on the *articulation* of business reasons as compared with *proof* of the absence of a discriminatory motive.[20] The Tenth Circuit opinion contained no discussion of whether Hernandez attempted to establish that the reason articulated by the employer was a mere pretext for discrimination.

In *Fitzgerald v. Sirloin Stockade, Inc.*,[21] the plaintiff had established a prima facie case of sex discrimination. The employer argued that the trial court erred in its finding of a prima facie case because the plaintiff had failed to establish that a vacancy existed or that she was qualified for a position.[22]

14. The evidence in the record demonstrated that Thornton had received favorable officer efficiency ratings while he was in the Army, Thornton's academic record showed that he had specialized in areas particularly well-suited as background for the EEO position, and Thornton's application for the EEO position listed impressive credentials for the job. 618 F.2d at 690.

15. Griggs v. Duke Power Co., 401 U.S. 424 (1971); *see* note 28 *infra*.

16. 609 F.2d 434 (10th Cir. 1979).

17. The appellate court's analysis is confusing. The court assumed that a prima facie case was established. The court subsequently found, however, that one of the requisite elements of a prima facie case, under the *McDonnell Douglas* test, was not satisfied. 609 F.2d at 435-36.

18. 607 F.2d 920 (10th Cir. 1979).

19. 439 U.S. 24 (1979).

20. 607 F.2d at 923.

21. 624 F.2d 945 (10th Cir. 1980).

22. The employer argued that there was no position open for the female employee because

The Tenth Circuit Court of Appeals, in an opinion written by Judge Doyle, rejected both of the employer's arguments. The appellate court noted that there had been numerous occasions when the employer had asked the plaintiff to perform responsible duties. Nevertheless, the employer continually refused to promote the plaintiff to positions commensurate with her duties when a job opening occurred. Although the court was reluctant to conclude that the employer had instituted a pattern and practice of discrimination against women,[23] Judge Doyle was convinced that there had been numerous specific acts of discrimination by the employer against the individual plaintiff.

In *Wittenbrink v. Western Electric Co.*,[24] the Tenth Circuit Court of Appeals affirmed the district court's ruling which held that the plaintiff had not been discriminated against by her employer on the basis of sex. The trial court found that the discrimination charge was based on the plaintiff's sense of frustration with the lack of upward mobility in her job and that the employer had not denied her a promotion because of her sex.[25] Relying on an earlier Tenth Circuit decision,[26] Judge Barrett determined that the plaintiff had not established a prima facie case of a Title VII violation merely because a qualified male employee was promoted rather than plaintiff. Absent any evidence of discriminatory *intent* by an employer to deny a female employee a promotion, the fact that a qualified man is promoted over a qualified woman is not sufficient grounds to sustain a claim of sexual discrimination.

B. *Policies Which Perpetuate Pre-Act Discrimination*

In *Thornton v. Coffey*,[27] the Tenth Circuit court ruled that a rating procedure used by the Oklahoma National Guard, when measured under the *Griggs* test,[28] violated the requirements of Title VII. The Guard had argued that Thornton was denied the EEO job position because the person who was hired outranked him. The rating procedure used by the Guard favored applicants who were full time civilian employees. As no black officer had ever been a full time civilian employee of the Guard, and since the person hired for the position had been a full time Guard employee since 1956, the court of appeals found that the rating procedure used by the Guard fell squarely within the *Griggs* prohibition. The court concluded that the procedure perpetuated the discriminatory impact of the prior legal segregation of the Guard.[29]

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there had been a lateral transfer of another worker into the vacancy. The employer also argued that the plaintiff was not as well qualified as the person who had filled the position. *Id.* at 954.

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

24. No. 78-1737 (10th Cir. June 7, 1979) (not for routine publication).

25. *Id.*, slip op. at 6.

26. Olson v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976).

27. 618 F.2d 686 (10th Cir. 1980); *see* notes 13-15 *supra* and accompanying text.

28. Griggs v. Duke Power Co., 401 U.S. 424 (1971). *Griggs* held that employment practices, procedures, or tests which are neutral on their face cannot be maintained if they operate to freeze the status quo of prior discrimination. *Id.* at 430.

29. The Oklahoma National Guard was segregated by law until 1958.

In *United States v. Lee Way Motor Freight, Inc.*,[30] the Tenth Circuit court held that, under the *Griggs* test,[31] an employer's no-transfer rule violated Title VII. The employer's no-transfer policy forbade city drivers from transferring to a line or over-the-road driver position.[32] Finding that the employer had engaged in a pattern and practice of discrimination against blacks who had requested an over-the-road position,[33] the court of appeals held that the no-transfer policy impermissably locked blacks into city driver positions. The appellate court concluded, therefore, that the no-transfer policy of the employer perpetuated pre-Act discrimination in violation of the *Griggs* mandate.

The employer argued that the *Griggs* test was inapplicable in light of the two recent Supreme Court pronouncements in *United Air Lines, Inc. v. Evans*[34] and *International Brotherhood of Teamsters v. United States*.[35] The employer contended that the Supreme Court in these cases carved out two exceptions to the holding in *Griggs* and that the no-transfer policy of the trucking firm fell within the exceptions. The Tenth Circuit court rejected the argument, stating that "[t]here is not the slightest indication in *Evans* that the Supreme Court intended to overrule or disassociate itself from the decision in *Griggs*."[36] The court of appeals further noted that the Supreme Court had limited the application of its *Teamsters* decision to bona fide seniority systems. The court of appeals concluded that the no-transfer policy of the employer fell outside the scope of this limited exception.[37]

C. *A Pattern and Practice of Discrimination*

In *United States v. Lee Way Motor Freight, Inc.*,[38] the government introduced considerable evidence of the employer's company-wide discrimination against blacks. The government attempted to establish "a pattern and practice of discrimination" in order to set up the evidentiary presumption enunciated in the *Teamsters* case.[39] In the *Teamsters* decision, the Supreme Court explained that once a pattern and practice of discrimination is established, the rejection of an applicant of the class discriminated against creates the inference that an employer is pursuing a discriminatory hiring policy. The burden then shifts to the employer to establish that the individual applicant was denied employment for lawful reasons.[40]

The Tenth Circuit, agreeing with the district court, held that the gov-

30. 625 F.2d 918 (10th Cir. 1979).

31. *See* note 28 *supra*.

32. There was testimony indicating that the over-the-road drivers were paid more than the city drivers.

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

34. 431 U.S. 553 (1977). The *Evans* Court held that a discrimination charge which is not timely filed with the EEOC is considered to be equivalent to a pre-1964 act of discrimination, and, therefore, the charge has no legal effect.

35. 431 U.S. 324 (1977). The *Teamsters* Court held that bona fide seniority systems are protected from Title VII application under § 703(h) of the Act, 42 U.S.C. § 2000e-2(h).

36. 625 F.2d at 928.

37. *Id.*

38. *Id.*

39. International Bhd. of Teamsters v. United States, 431 U.S. at 359 n.45.

40. *Id.* at 364.

ernment had established the *Teamsters* evidentiary presumption. The court reasoned that since there was sufficient evidence in the record to support the trial court's finding, the employer was rightly found to have established a pattern and practice of discrimination against blacks. The appeals court ruled that the trial court had not erred in granting relief to the claimants without first requiring the government to prove instances of specific acts of discrimination.[41]

D. *Discrimination Charges Against Unions*

In *Romero v. Union Pacific Railroad*,[42] the Tenth Circuit court remanded the case to the trial court for an evidentiary determination of whether the employees' union was involved in the alleged national origin discrimination and retaliation practices of the employer. Considering the fact that union members had made retaliatory statements against Romero and the fact that the union worked closely with the employer in the employer's drug and alcohol rehabilitation program, the court of appeals held that there was sufficient contradictory evidence in the record to warrant reversal of the trial court's grant of the union's motion for summary judgment. In so doing, the appellate court relied on precedential decisions from other circuits wherein the courts of appeals have recognized the important role that labor organizations play in the enforcement of Title VII.[43]

E. *Title VII and the Equal Pay Act*

In *Fitzgerald v. Sirloin Stockade, Inc.*,[44] the Tenth Circuit Court of Appeals refused to apply the standards of the Equal Pay Act.[45] Although the trial judge had made a mistaken reference to the Equal Pay Act in his findings, the appellate court dismissed the employer's attempt to assert the Act on appeal. Application of the Equal Pay Act would have allowed the employer to request a jury trial. A right to a jury trial does not exist in cases brought exclusively under Title VII. Adjudication under the Equal Pay Act also would have allowed the employer to raise certain standards not available in Title VII cases.[46] The court rejected the employer's attempt to raise the Equal Pay Act because the trial court had proceeded consistently under Title VII.

In *Lemons v. City and County of Denver*,[47] the Tenth Circuit Court of Appeals, in an opinion written by Chief Judge Seth, rejected an attempt by

41. 625 F.2d at 930.

42. 615 F.2d 1303 (10th Cir. 1980).

43. *See* Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978) (labor organizations have an affirmative duty to insure employer compliance with Title VII); Gray v. Greyhound Lines, 545 F.2d 169 (D.C. Cir. 1976); Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979 (D.C. Cir. 1973) (a union may be held responsible for the discriminatory practices of the employer if the union takes no action to prevent those practices).

44. 624 F.2d 945 (10th Cir. 1980).

45. 29 U.S.C. § 206(d) (1976).

46. The Equal Pay Act standards, however, are applied in Title VII actions when the issue of discriminatory compensation arises.

47. 620 F.2d 228 (10th Cir.), *cert. denied*, 101 S. Ct. 244 (1980).

several nurses to restructure Denver's classification and pay plan. The nurses sought to adjust their wages so that their benefits would no longer be linked to the salaries of other nurses in the metropolitan community.[48] The nurses alleged that since most nurses are women, the prevailing low wages of nurses in the community reflected an historic pattern of discrimination against women. Furthermore, the Denver nurses argued that whereas the classification and pay plan of the city reflected the low community wages for nurses, the city's plan discriminated against them. The court of appeals rejected the nurses' claim, stating that the wage disparity articulated by the nurses was not the type of employment disparity contemplated by Congress in enacting Title VII and the Equal Pay Act.[49] The court declared that an employee can prevail under these acts only upon showing a differential in pay between persons doing equal work. The employee must further demonstrate that the differential is based on an unlawful reason. This is the "equal pay/equal work" concept. As the nurses were attempting to link their job classifications to employment categories requiring entirely different skills,[50] the court found that they merited no relief under either Title VII or the Equal Pay Act.

F. *Affirmative Action Plans*

In *United States v. Lee Way Motor Freight, Inc.*,[51] the Tenth Circuit Court of Appeals overturned a discretionary ruling of the trial court which had held that the facts of the case did not warrant the imposition of an affirmative action plan. Recognizing the broad discretion granted to the district courts under Title VII, the appellate court nonetheless ruled that the employer's history of racial discrimination mandated institution of affirmative action. The court enunciated five factors to be considered in determining whether affirmative relief should be granted. A trial court should consider: 1) whether there has been a long history of racial discrimination by the employer or the union; 2) whether the history of the employer's attempts to end racial discrimination by increasing minority hiring and promotion is relatively short; 3) whether there was any significant change in the employer's policies before the government filed suit; 4) whether the employer was recalcitrant in voluntarily taking action to correct the imbalances created by past discrimination; and 5) whether there was any significant improvement in the employer's practices.[52] Given the concentration of blacks in low paying, less desirable jobs at Lee Way Motor Freight, and given the reluctance of the employer to alter his employment practices despite two major lawsuits,[53] the

48. The nursing classification and pay plan of Denver placed city nurses on a parity with other nurses in the community. *Id.* at 229.

49. As a result of the Bennett Amendment, Title VII mirrors certain provisions of the Equal Pay Act with respect to discriminatory pay differentials. 42 U.S.C. § 2000e-2(h) (1976).

50. The nurses wanted their job classification to be linked to a city classification described as "General Administrative Series". 620 F.2d at 229.

51. 625 F.2d 918 (10th Cir. 1979).

52. *Id.* at 944.

53. These two major lawsuits were the instant case, 625 F.2d 918 (10th Cir. 1979), and Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

appellate court believed that affirmative relief was warranted.

G. *Subject Matter Jurisdiction*

In *Romero v. Union Pacific Railroad*,[54] the Tenth Circuit Court of Appeals ruled that the omission of a defendant's name from an EEOC charge does not require automatic dismissal of a subsequent Title VII action.[55] Recognizing that the timely filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to the institution of a lawsuit,[56] the court of appeals stated that "complaints to the EEOC must be liberally construed in order to accomplish the purposes of the Act."[57] As the Tenth Circuit was confronted with this issue for the first time, the court of appeals referred to four factors listed in the Third Circuit case of *Glus v. G.C. Murphy Co.*[58] as pertinent to an evaluation of a complainant's failure to name a party before the EEOC. The Tenth Circuit court instructed the trial court to consider: 1) whether the role of the unnamed party could be ascertained through reasonable efforts by the complainant at the time that the EEOC complaint is filed; 2) whether, under the circumstances, the interests of a named party are so similar to the interests of the unnamed party that, for the purposes of obtaining voluntary conciliation and compliance, it would be unnecessary to include the unnamed party in the proceedings; 3) whether the party's absence from the EEOC proceedings resulted in actual prejudice to the interest of the party; and 4) whether the unnamed party has in some way represented to the complainant that the party's relationship with the complainant is to be through the named party.[59] As this jurisdictional question was one of first impression, the case was remanded to the trial court for a reconsideration of the case in light of the *Glus* criteria.

H. *Timely Filing of Discrimination Charges*

In *Trujillo v. General Electric Co.*,[60] the Tenth Circuit court recognized that an EEOC district director has the implicit authority to rescind a notice of right to sue.[61] The court thereby preserved the plaintiff's discrimination charge, which charge would not have been considered as timely filed with the EEOC had this implicit authority not been acknowledged.

The defendant employer filed a motion to dismiss the Title VII claim because Trujillo's suit had not been filed within ninety days of the initial notice of right to sue.[62] The EEOC district director had notified Trujillo of

54. 615 F.2d 1303 (10th Cir. 1980).

55. The issue on appeal was whether the failure of the complainant to name the individual defendants in the charge brought to the EEOC precluded the district court from exercising jurisdiction as to the individual defendants. *Id.* at 1311.

56. *Id. See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

57. 615 F.2d at 1311.

58. 562 F.2d 880, 888 (3d Cir. 1977).

59. 615 F.2d at 1311-12.

60. Nos. 79-1071 & 79-1072 (10th Cir. May 29, 1980).

61. 42 U.S.C. § 2000e-5(f)(1) (1976) provides that the EEOC or the Attorney General shall notify a Title VII claimant of his right to sue where the Commission or the Attorney General decides that there is no cause to press a claim on the individual's behalf.

62. A Title VII claimant who has been notified of his right to sue by the EEOC or by the

his right to sue, but subsequently revoked this notice because of efforts to attempt a conciliation of the parties. When conciliation failed, the district director issued a second notice of right to sue. Trujillo had filed his claim within ninety days of the second EEOC notice, but not within ninety days of the original notice of the right to sue. The employer claimed that it was error to allow Trujillo to bring his Title VII claim after the initial ninety days had lapsed. General Electric argued that the district director is not authorized by statute to rescind a notice of right to sue and, subsequently, to issue a second notice.

In reliance upon a recent decision of the Fifth Circuit,[63] Judge McWilliams, writing for the court, reasoned that a district director has an implied authority to issue a second notice of right to sue. The judge declared that because the district director is authorized to reconsider a determination of "no cause",[64] the director has the analogous authority to rescind a notice of right to sue. To require the EEOC to conciliate within the limitations of the initial ninety day period would severely restrict the conciliation efforts. Judge McWilliams concluded, therefore, that the statutory ninety day time limit should be calculated from the date of the EEOC's second notice of right to sue.

In *Wilkerson v. Siegfried Insurance Agency, Inc.*,[65] the Tenth Circuit court ruled that the plaintiff had not timely filed her discrimination charges because she had not filed within the statutory period. The court of appeals held that the event which triggers the statutory period is the last day that the employee works. The date on which the employee ceased receiving severance pay or other extended benefits was deemed to have no legal significance.[66] The court of appeals relied upon a case decided by the Third Circuit, *Bonham v. Dresser Industries, Inc.*[67] The tribunal was persuaded by the *Bonham* court, which noted that if the statutory period during which a Title VII claimant must bring a claim were allowed to begin to run at the time the employee is taken off the payroll, rather than at the date when the employment relationship actually terminates, the employer would be penalized for granting severance pay and other extended benefits.[68]

I. *Discovery*

The court of appeals remanded the case of *Weahkee v. Norton*[69] to the district court to permit discovery which the trial court had denied the plaintiff. In a most unusual turn of events, the plaintiff sued his employer, the EEOC, alleging discrimination on the basis of the employee's national ori-

Attorney General must file his claim within 90 days of receipt of such notice. 42 U.S.C. § 2000e-5(f)(1) (1976).

63. Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241 (5th Cir. 1980).

64. 29 C.F.R. § 1601.21(b) (1979).

65. 621 F.2d 1042 (10th Cir. 1980).

66. The employee argued that her charge was timely filed because it was filed within 90 days of her removal from the company's payroll. *Id.* at 1044.

67. 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

68. 621 F.2d at 1044.

69. 621 F.2d 1080 (10th Cir. 1980).

gin. The EEOC had invoked a privilege defense in the trial court, claiming that provisions in the Privacy Act[70] and in the Freedom of Information Act[71] precluded claimant's requested discovery. Claimant had sought to obtain certain personnel files of EEOC employees. In denying the privilege claims of the Commission, the appellate court reaffirmed the extensive scope of discovery in a Title VII action.[72]

J. *Remedies*

In *Thornton v. Coffey*,[73] the Tenth Circuit court overturned the district court's order which required that the Oklahoma National Guard reinstate the plaintiff and retroactively promote him to the military rank of major. While recognizing the wide variety of discretionary powers afforded trial courts in fashioning appropriate relief,[74] the appellate court cautioned that courts must strike a balance between their authority to grant remedies and the judicial policy of nonintervention in internal military matters.[75] The court of appeals concluded that the remedial powers of the district courts do not extend to the ordering of military promotions. The court noted that the remedy was particularly inappropriate because the claimant failed to exhaust the administrative remedies available to him.

In *Fitzgerald v. Sirloin Stockade, Inc.*,[76] the court of appeals upheld the decision of the trial court which granted an award of "front pay" rather than reinstatement. The Tenth Circuit determined that where the evidence in the record establishes an atmosphere of hostility towards the plaintiff, reinstatement is not a precondition to the award of front pay. Because the evidence indicated that a working relationship between the employee and the employer would be impossible, the appellate court upheld the remedy of the trial court.[77]

In *United States v. Lee Way Motor Freight, Inc.*,[78] an issue analogous to the issue raised in the *Fitzgerald* case was considered by the Tenth Circuit Court of Appeals. The court, concurring with the report of an appointed master, held that a probationary period is not a prerequisite to an award of back pay where the claimant has a valid reason for refusing an offer of employment by the defendant employer. The appellate court reasoned that a mandatory probationary period could invite harassment by the employer, harassment designed to encourage the claimant to leave before the probationary period

70. 5 U.S.C. § 552a(b)(11) (1976) requires that a court order be obtained prior to the release of government personnel files.

71. 5 U.S.C. § 552(b)(6) (1976) exempts disclosure of personnel and medical files which "would constitute a clearly unwarranted invasion of personal privacy."

72. 621 F.2d at 1082 (citing Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975) and EEOC v. University of New Mexico, 504 F.2d 1296 (10th Cir. 1974)).

73. 618 F.2d 686 (10th Cir. 1980).

74. *Id.* at 691. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

75. 618 F.2d at 691. *See* Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953).

76. 624 F.2d 945 (10th Cir. 1980).

77. The court relied upon evidence which showed that the employer had questioned the loyalty of the plaintiff, had reduced the plaintiff's work responsibilities, and had inserted memoranda concerning her poor attitude in her personnel file. *Id.* at 957.

78. 625 F.2d 918 (10th Cir. 1979).

concluded. The court was concerned that employers could thereby induce claimants to forego the conditional back pay award.[79]

The court, in the *Lee Way* decision, aligned itself with other federal judicial circuits which have ruled that a Title VII claimant is entitled to a back pay award calculated from the date of injury until the time when remedial relief is actually realized.[80] The Tenth Circuit court rejected the argument of the employer who claimed that this test would penalize the employer where lengthy court proceedings are involved. The court countered that because the purpose of Title VII is to make whole aggrieved claimants, any hardship which may result from lengthy court proceedings should fall upon the "wrongdoing employer."[81] The appellate court added, however, that the two-year statute of limitations governing the award of back pay should commence to run on the date when the discrimination charge is filed with the EEOC under section 706(g) of the Act,[82] rather than from the date of the government's suit. If the statute began to run on the date of the government's suit, it could work a hardship on claimants because the government may file charges only upon a showing of a pattern and practice of discrimination by an employer.[83]

K. *Mitigation of Damages*

In *United States v. Lee Way Motor Freight, Inc.*,[84] the Tenth Circuit court indicated a preference for the individual approach rather than the "best man" or "average man" approaches to the mitigation of damages question.[85] Under the latter approaches, the group of employees is held to the standard of the most successful claimant ("best man") or the average claimant ("average man") in determining whether the individual claimant exercised reasonable diligence to mitigate damages as required by the Act.[86] Lee Way Motor Freight argued that it had satisfied the employer's burden of showing lack of reasonable diligence by the individual claimants who did not satisfy the standards of either the "best man" or "average man" approach. The appellate court rejected the employer's attempt to apply these standards, preferring to analyze the good faith mitigation efforts of the claimants on an individual basis.[87]

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79. *Id.* at 938.

80. *Id.* at 933. (citing EEOC v. Enterprise Ass'n. Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977); Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); James v. Stockham Valves & Fittings, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978)).

81. *Id.* at 931.

82. 42 U.S.C. § 2000e-5 (1976).

83. 42 U.S.C. § 2000e-6(e) (1976).

84. 625 F.2d 918 (10th Cir. 1979).

85. The individual approach recognizes the efforts of an individual to mitigate damages rather than the actions of a similarly situated group. The "best man" approach imputes the interim earnings of the most successful claimant to other claimants similarly situated. The "average man" approach imputes the average of the interim earnings to those claimants whose interim earnings are below average. *Id.* at 937.

86. 42 U.S.C. § 2000e-5(g) (1976).

87. 625 F.2d at 938 (quoting NLRB v. Madison Courier, Inc., 472 F.2d 1307 (D.C. Cir. 1972)).

L. *Interest on Back Pay Awards*

In *Weaver v. United States*,[88] the Tenth Circuit Court of Appeals reversed the judgment of the district court, which had ordered the federal government, as the defendant employer, to pay interest on a back pay award. The reviewing court ruled that because there was no express language in the 1972 amendment[89] to Title VII authorizing the award of back pay interest to federal employees, the lower court was mistaken in awarding interest to claimants. The appeals court reasoned that absent express congressional consent to the award of interest to claimants, the award was precluded, based on the theory of sovereign immunity.

M. *Attorneys Fees*

In *EEOC v. Fruehauf Corp.*,[90] the Tenth Circuit court overturned the trial court's award of attorneys fees to the successful defendant.[91] The appeals court ruled that the trial court had abused its discretion by awarding attorneys fees to the defendant. The appellate tribunal emphasized that there was insufficient evidence to warrant a finding that the action was frivolous, unreasonable, or without foundation in its inception.[92]

In *Booker v. Brown*,[93] the court of appeals held that a claimant, who had prevailed on the merits in his discrimination charge before the Civil Service Commission, but who was denied compensation for attorneys fees in the administrative proceeding, had standing, as an aggrieved person under Title VII,[94] to bring an action in the district court to enforce his right to attorneys fees. The appellate court relied upon a number of cases, decided in other circuits, which have recognized that the award of attorneys fees is appropriate for services rendered by a claimant's attorney before an administrative agency.[95]

II. SECTION 1983 OF THE CIVIL RIGHTS ACT OF 1871

During the past term the Tenth Circuit Court of Appeals was presented with a number of cases wherein there was a claimed violation of section 1983 of the Civil Rights Act of 1871.[96] The claimants alleged violations of constitutional rights by individuals acting under color of law. A significant issue concerned the availability of good faith as a defense to unconstitutional action of a local governmental body.[97] Other questions arising under section

88. 618 F.2d 685 (10th Cir. 1980).

89. 42 U.S.C. § 2000e-16 (1976). This 1972 addition to the statute brought federal employees within the coverage of Title VII.

90. 609 F.2d 434 (10th Cir. 1979).

91. 42 U.S.C. § 2000e-5(k) (1976) provides that reasonable attorneys fees may be awarded to the prevailing party in a Title VII action.

92. 609 F.2d at 436 (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)). A prevailing defendant in a Title VII proceeding is to be awarded attorneys fees *only* when the court finds that the plaintiff's action was frivolous, unreasonable, or without foundation. *Id.*

93. 619 F.2d 57 (10th Cir. 1980).

94. 42 U.S.C. § 2000e-16(c) (1976).

95. 619 F.2d at 60.

96. 42 U.S.C. § 1983 (1976 & Supp. III 1979).

97. Bertot v. School District No. 1, 613 F.2d 245 (10th Cir. 1979).

1983 included the definition of "acts under color of law", the substantive basis for section 1983 liability, and the interrelationship between state common law remedies and the federal statutory remedies provided by the Civil Rights Act.

A. *The Effect of the Presence of Good Faith*

In *Bertot v. School District No. 1*,[98] the most significant section 1983 decision of the term, the Tenth Circuit court delineated the scope of municipal liability following the Supreme Court decision of *Monell v. Department of Social Services*.[99] In the *Monell* decision, the Supreme Court held that municipalities are not entitled to an absolute immunity when sued under section 1983.[100] The Supreme Court, however, left the task of defining the scope of any remaining immunity to the lower federal courts.

In its *Bertot* opinion, the Tenth Circuit Court of Appeals declared that good faith was not available to the school district[101] as a defense in an action for back pay under section 1983.[102] Judge McKay, writing for the majority, analyzed the history of the Civil Rights Act and the common law immunities, noting that the common law did not provide the same qualified good faith immunity for public *bodies* as it did for public *officials*.[103] The judge explained that the personal immunity doctrine for public individuals, acting in good faith, is based on two concerns. If an individual in public office fears personal financial liability because of a mistake in judgment, even though made in good faith, he or she will be deterred from exercising independent, forceful judgment. The chilling effect on the decision making process is considered a detriment to the long term public interest.[104] Furthermore, there is fear that qualified persons will hesitate to seek public office if there is the risk of personal liability.[105] The Tenth Circuit court found that these concerns were not equally applicable when liability is placed on a school board.[106] Judge McKay implied that the imposition of section 1983 liability will not hinder the decision process of the school board members because no board members will suffer personal financial loss as a result of mistaken judgment. As a governmental entity, the school board's damage awards will be assessed against the school board's treasury. The court of appeals evidently considered that the risk of depleting the board funds would not adversely affect the independent judgments of school board members to the same degree as would the threat of personal financial loss. The court of appeals emphasized

98. *Id.*
99. 436 U.S. 658 (1978).
100. *Id.* at 701, 713-14.
101. In the *Monell* decision, the Supreme Court noted that there was no distinction between municipalities and school boards for purposes of suit under section 1983. *Id.* at 696.
102. The court of appeals explained that an award of back pay is an element of equitable relief. The presence of good faith cannot preclude the grant of an equitable remedy. 613 F.2d at 250. Judge Barrett in his dissent, however, questioned the majority's labeling of back pay as a form of equitable relief instead of as compensatory damages. *Id.* at 255.
103. *Id.* at 248.
104. *Id.* at 249.
105. *Id.*
106. *Id.*

that when rights as important as those guaranteed by the first amendment are violated by the government, it is preferrable to have the costs of the violation spread among the taxpayers rather than to have the injured victim bear the total burden of the unconstitutional action.[107]

Chief Judge Seth and Judge Barrett, dissenting, expressed concern about the ramifications of the majority's decision. Chief Judge Seth reasoned that as the school board was merely a group of individual officials acting collectively, any immunities available to the board members as individuals should be available to them as a unit.[108] Because the majority's decision required the board to correctly predict judicial interpretation of constitutional rights, Chief Judge Seth argued that board members should not have been held to a standard higher than that of good faith in making such difficult predictions.[109] Judge Barrett expressed concern for the potential financial repercussions of the imposition of section 1983 liability on municipalities which have acted in good faith.[110]

The majority's reasoning in the *Bertot* decision was subsequently affirmed by the Supreme Court's opinion in *Owen v. City of Independence*.[111] In the *Owen* case, the Supreme Court reversed the Eighth Circuit[112] and held, as did the Tenth Circuit, that good faith is not available to municipalities as a defense in suits claiming constitutional violations under the Civil Rights Act of 1871.

In another case involving the good faith of the defendant, *Love v. Mayor of Cheyenne*,[113] the Tenth Circuit court held that the prevailing party in a civil rights action is entitled to an award of attorneys fees under section 1988 of the Civil Rights Act[114] unless there is a showing of special circumstance which would render the award unjust. The plaintiffs had successfully challenged the constitutionality of a city ordinance,[115] but they were denied attorneys fees. The trial court found that because the defendants had acted in good faith, an award of attorneys fees would be unjust.[116] The court of appeals reversed, holding that attorneys fees under section 1988 are not contingent upon a showing of good or bad faith. The reviewing court concluded that the presence of good faith is not a special circumstance rendering unjust an award of attorneys fees.[117]

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107. *Id.* at 252.
108. *Id.* at 253 (Seth, C.J., dissenting).
109. *Id.*
110. *Id.* at 254-56 (Barrett, J., dissenting).
111. 445 U.S. 622 (1980).
112. Owen v. City of Independence, 589 F.2d 335 (8th Cir. 1978). In its *Bertot* opinion, the Tenth Circuit court specifically rejected the reasoning of the Eighth Circuit's *Owen* decision. 613 F.2d at 250.
113. 620 F.2d 235 (10th Cir. 1980).
114. 42 U.S.C. § 1988 (1976).
115. The ordinance required that persons obtain a permit prior to distributing religious material from door to door. The permits were issued by the sheriff who had unbridled discretion in approving or disapproving the applications. 620 F.2d at 236.
116. *Id.*
117. *Id.* *See also* Hutto v. Finney, 437 U.S. 678 (1978).

B. *Acting Under Color of Law*

In *Brown v. Chaffee*,[118] the plaintiff brought a civil rights action against several attorneys who had defended him in a prior lawsuit and against Sheriff Chaffee, the plaintiff's co-defendant in the prior lawsuit. Brown and Chaffee, who was Brown's supervising officer, had been defendants in a civil rights action in which Brown was found liable for actual and punitive damages. Chaffee had been exonerated. Brown brought the subsequent action, claiming that he had received inadequate representation of counsel at the previous trial. Brown alleged that although his interests had conflicted with Chaffee's, the two police officers were represented by the same attorneys until three months before trial.[119] Brown alleged that he was not informed of the conflict, that evidence favorable to his defense was suppressed, and that the attorneys and Chaffee had conspired to deprive him of a fair trial.[120]

The Tenth Circuit Court of Appeals affirmed the trial court's dismissal of the defendants, holding that attorneys do not act under color of law merely by representing public officials in private litigation. The appellate court also ruled that Sheriff Chaffee's defense of his personal lawsuit did not constitute state action. Brown, therefore, had no cause of action against defendants under section 1983.[121]

In *Norton v. Liddel*,[122] the court of appeals considered whether a private individual had acted under color of law in conspiring with a state official who was immune from section 1983 liability. Sheriff Liddel and an assistant district attorney filed an information charging that the plaintiffs had unlawfully incited to riot.[123] Plaintiffs alleged that Sheriff Liddel and the assistant district attorney had conspired to bring the charges in retaliation for plaintiff's lawful exercise of constitutional rights.

In an opinion written by Judge Barrett, the Tenth Circuit court held that an assistant district attorney is absolutely immune from lawsuits challenging the exercise of his prosecutorial discretion, even if his official actions were "undertaken maliciously, intentionally, and in bad faith."[124] The court of appeals found that Sheriff Liddel, although a public official, had acted in his capacity as a private citizen when he provided the district attorney's office with facts to support the charges filed against the plaintiffs. Judge Barrett determined, however, that Sheriff Liddel's status as a private citizen did not put an end to the section 1983 inquiry. A private citizen who conspires with a government official to violate another citizen's constitutional rights may be deemed to be acting under color of law so as to make him liable under section 1983.[125] The conspiracy may implicate the private citizen even if the official coconspirator is immune from suit under section

118. 612 F.2d 497 (10th Cir. 1979).
119. *Id.* at 500.
120. *Id.* at 500-01.
121. *Id.* at 501.
122. 620 F.2d 1375 (10th Cir. 1980).
123. *Id.* at 1377.
124. *Id.* at 1379 (citing Imbler v. Pachtman, 424 U.S. 409 (1976) and Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977)).
125. *Id.* at 1381.

1983.[126] A sufficient nexus between the immune state official and the private citizen must be established, however, by an examination of their concerted action in the advancement of the conspiracy.[127] Applying this test, the appellate court ruled that the plaintiffs had established a sufficient nexus between Sheriff Liddel and the assistant district attorney so as to warrant a conclusion that Sheriff Liddel acted under color of law in advising the district attorney about plaintiffs' activities. Judge Barrett concluded, therefore, that the trial court's grant of defendant's motion for summary judgment was incorrect.[128]

C. *Basis for Liability*

In actions under section 1983, public officials cannot be held liable, on the basis of *respondeat superior*, for the constitutional torts of inferiors. They can, however, be held liable for the failure to properly train and supervise their subordinates when such failure results in constitutional violations. In *McClelland v. Facteau*,[129] the plaintiff brought suit under section 1983, claiming to be the victim of an illegal arrest. The defendants included the chief of the New Mexico State Police and the police chief of Farmington, New Mexico. The trial court granted summary judgment as to the two police chiefs, and the plaintiff appealed.[130]

McClelland claimed that the police chiefs had breached their duty to adequately train and supervise the officers within their control. In an opinion written by Judge Logan, the Tenth Circuit court recognized that a breach of duty could form the basis of a section 1983 action provided that there is an affirmative link between the omission or act of the official charged and the misconduct of subordinates which precipitated the complaint. The appellate court noted that, at trial, there had been no disputed issues of fact regarding the training of the offending police officers,[131] but there were issues of fact concerning the performance of the defendant police chiefs in supervising their subordinates.[132] The judgment of the district court was reversed, and the case was remanded to the trial court for further proceedings on the issue of supervision.[133]

In *Serna v. Manzano*,[134] two deputy sheriffs filed a section 1983 civil rights action against their employer, the sheriff, claiming that he had discharged them in retaliation for the exercise of their first and fourteenth

126. *Id.* at 1380.
127. *Id.*
128. *Id.* at 1380-82.
129. 610 F.2d 693 (10th Cir. 1979).
130. *Id.* at 695. The three other defendants, the arresting officers, reached a settlement with the plaintiff.
131. Both defendant police chiefs presented evidence demonstrating that the training afforded the arresting officers was proper. This evidence was not contested by the plaintiff. *Id.* at 697.
132. *Id.*
133. *Id.* at 698.
134. 616 F.2d 1165 (10th Cir. 1980).

amendment rights to engage in political activities.[135] The Tenth Circuit court affirmed the district court's finding that the discharge was proper. The court of appeals reasoned that the dismissal was not based on the political behavior of the deputies, but rather it was grounded upon the fact that the accompanying activities[136] had disrupted the efficient operation of the sheriff's office.[137]

D. *Effect of State Law on Section 1983 Actions*

A Wyoming school teacher, seeking an award of damages under section 1983, was barred by Wyoming's two year statute of limitations.[138] In *Spiegel v. School District No. 1.*,[139] the plaintiff alleged that the statute of limitations was inapplicable because: 1) his claim was for a penalty, and the statute created an express exception for penalty or forfeiture actions; 2) his action was not based on a federal statute; and 3) the two year period had not run because his action was originally commenced in state court within the two year period, which tolled the running of the state statute of limitations.[140]

In an opinion written by Judge McKay, the Tenth Circuit court briefly considered and then dismissed the plaintiff's first two assertions. The appeals court found that the action was indeed based on a federal statute, section 1983. Judge McKay further explained that a claim for punitive damages does not transform a civil suit into a penalty claim. The court of appeals also rejected plaintiff's claim that his action in state court tolled the running of the statute. The plaintiff had argued that the statute should toll because he was required by law to exhaust state remedies prior to bringing the section 1983 action.

Relying on two Supreme Court decisions, *McNeese v. Board of Education*[141] and *Monroe v. Pape*,[142] the Tenth Circuit court reasoned that because section 1983 actions supplement the remedies available under state law, a plaintiff is not required to exhaust all possible state remedies prior to bring-

135. Deputy Sturdevant had decided to challenge Sheriff Manzano in the next election, and Deputy Serna was acting as Sturdevant's campaign manager. *Id.* at 1166.

136. *Id.* The deputies had taped conversations which occurred in the sheriff's office for use in the political campaign. Other employees were aware of the taping which created an atmosphere of tension and distrust in the office.

137. The Tenth Circuit court applied the balancing test enunciated by the Supreme Court in Pickering v. Board of Educ., 391 U.S. 563 (1968). The appeals court weighed the right of a public employee to freedom of expression in matters of public concern against the right of the state to supervise its employees so as to provide efficient public service.

138. 2 WYO. STAT. ANN. § 1-3-115 (1977) provides that "[a]ll actions upon a liability created by a federal statute, other than a forfeiture or penalty, for which no period of limitations is provided in such statute, shall be commenced within two (2) years after the cause of action has accrued."

139. 600 F.2d 264 (10th Cir. 1979).

140. Spiegel had successfully challenged his discharge in a state administrative proceeding which was affirmed by the Wyoming Supreme Court. The plaintiff was reinstated to his former position and he was in federal court only to seek damages under 40 U.S.C. § 1983 and 28 U.S.C. § 1331(a). *Id.* at 265.

141. 373 U.S. 668 (1963).

142. 365 U.S. 167 (1961), *overruled on other grounds*, Monell v. Department of Social Servs., 436 U.S. 658 (1978).

ing the federal action.[143] The court of appeals recognized that the *McNeese* and *Monroe* decisions were limited to some extent by *Huffman v. Pursue, Ltd.*,[144] a case wherein the Supreme Court expressed concern for the comity principle. Judge McKay stated, however, that in this case the court need not determine the applicability of the *Huffman* rule because Spiegel did not bring his federal action until after the state proceedings were terminated.[145] *Huffman* bars a federal 1983 action only where there is a pending state proceeding which concerns the same matter that is the subject of the federal action.

The reasoning of the court avoided the issue presented. Spiegel argued that if he had brought his section 1983 action while the state proceedings were pending, his action would have been barred by *Huffman*. Yet, by waiting until the state proceedings terminated, Spiegel's suit was barred by the statute of limitations. The court refused to decide the hypothetical situation, stating that Spiegel should have attempted to bring the federal action earlier which would have allowed the court to decide the applicability of the *Huffman* rule.[146]

In *Clappier v. Flynn*,[147] the district court awarded the plaintiff damages under two theories of liability, one theory based upon common law negligence, the other theory based upon a deprivation of rights under section 1983. The Tenth Circuit court disallowed the double recovery because the legal theories alleged were merely alternative theories providing for identical relief.[148]

The plaintiff in the *Clappier* case had been arrested and placed in the Laramie County jail in Wyoming, where he was mistreated by the other prisoners.[149] Clappier brought suit against the local sheriff, alleging common law negligence for the sheriff's failure to operate the jail in accordance with the Wyoming Constitution and statutes.[150] Plaintiff's second claim, based on section 1983, alleged that the sheriff was guilty of cruel and unusual treatment in violation of the eighth amendment.[151] The trial court submitted two verdict forms to the jury, authorizing recovery on each of the claims.

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143. 600 F.2d at 266.

144. 420 U.S. 592 (1975). The *Huffman* Court required claimants to exhaust previously initiated state proceedings prior to bringing a section 1983 action. *See also* Juidice v. Vail, 430 U.S. 327 (1977); Trainor v. Hernandez, 431 U.S. 434 (1977); Younger v. Harris, 401 U.S. 37 (1971).

145. 600 F.2d at 267.

146. *Id.* at 267 n.7.

147. 605 F.2d 519 (10th Cir. 1979).

148. *Id.* at 529. *See also* Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

149. Clappier was arrested on the evening of May 13, 1975, and it was not until May 16, 1975, that he was brought from his cell for photographing and fingerprinting. During the period between May 13 and May 16, he suffered repeated beatings and rapes inflicted by other prisoners. Clappier was released on May 16, after the suspension of his $25.00 fine for breach of the peace. He was taken to Fitzsimmons Army Hospital in Denver where he remained for over four weeks receiving treatment for his injuries, which included a broken jaw. 605 F.2d at 522-24.

150. *Id.* at 524. Since Clappier was a resident of Minnesota, federal jurisdiction was based on diversity of citizenship. His claim for relief was $75,000.

151. *Id.* at 524-25.

While the Tenth Circuit had previously decided,[152] and reaffirmed, that double recovery, for both negligence and constitutional torts, could not be permitted, the more difficult problem presented by this case was how the appellate court should amend the trial court's jury instructions. Wyoming follows the comparative negligence doctrine[153] in determining the amount of a defendant's liability whereas comparative negligence is not to be considered in section 1983 actions. The Tenth Circuit court recommended that special interrogatories be submitted to the jury. If the jury should find the defendant liable solely on the negligence claim, then the award should be reduced in proportion to the plaintiff's contributory negligence. If the liability should be based solely on the section 1983 claim, then the full amount of the assessed damages should be awarded to the plaintiff regardless of the plaintiff's contributory negligence. Finally, if liability was found to be based on both theories, the section 1983 action would prevail, and the plaintiff would receive the total award of damages.[154]

The court of appeals reversed the district court's decision concerning the degree of proof required to establish a section 1983 violation. The trial court had instructed the jury that the test of whether the plaintiff suffered cruel and unusual punishment in violation of the eighth amendment was "whether the assault, as determined by you, is sufficiently severe in the circumstances to shock the conscience of a reasonable person."[155] The Tenth Circuit court held that the proper instruction for a jury considering a claim of cruel and unusual punishment, where there is an act of omission, is that there must be a showing of "exceptional circumstances and conduct so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to basic fairness."[156]

III. INDIAN RIGHTS

A. *Preferential Treatment Is Not Reverse Discrimination*

In *Livingston v. Ewing*,[157] the Tenth Circuit Court of Appeals held that a New Mexico policy which permitted Indians to display and sell arts and crafts on the grounds of designated public buildings, but which prohibited non-Indians from doing the same, was constitutionally valid. The plaintiffs, non-Indians seeking to sell jewelry in the restricted area, challenged a policy of the Board of Regents of the New Mexico Museum at Sante Fe[158] and a resolution of the city of Sante Fe[159] which authorized the exclusionary practices.

152. Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

153. Defendant had charged that Clappier was negligent for failing to report his beatings to the authorities at the jail. 605 F.2d at 524.

154. *Id.* at 530.

155. *Id.* at 533.

156. *Id. See also* Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974).

157. 601 F.2d 1110 (10th Cir. 1979).

158. *Id.* at 1111. The state policy allowed the area under the museum portal to be used for merchandise display for arts and crafts handmade by Indians.

159. *Id.* at 1111-12. The city resolution prohibited sales by persons other than Indians within 50 feet of any established business which sold Indian handcrafted jewelry.

The aggrieved merchants' claim was based on the equal protection clause of the fourteenth amendment. The New Mexico officials, and the intervening Indians, responded that there was a rational basis for the preferential treatment. Defendants noted that the state and city officials knew of the unique historical and cultural aspects of the city and of the Indian heritage. In affirming the district court, the Tenth Circuit court found that the classification was permissible under the preferential treatment of Indians section of the Civil Rights Act of 1964.[160] The court of appeals concluded that because the business area was "on or near an Indian reservation" within the meaning of the statute, the state action giving preferential treatment to Indians was lawful.[161]

B. *Tribal Sovereignty*

In *Joe v. Marcum*,[162] the Tenth Circuit court held that the Navajo Indian Tribe is a sovereign entity possessing the right of self-government, including the right to prohibit garnishment of Indians who live and work on reservations. The wages of Tom Joe, a Navajo living and working on a reservation in New Mexico, were garnished because of Joe's failure to repay a loan from the United States Life Credit Corporation.[163] A writ of garnishment, seeking twenty-five percent of Joe's weekly salary, was served on Joe's employer.

Joe sought declaratory and injunctive relief in the United States District Court for the District of New Mexico claiming that the local court lacked the jurisdictional authority to garnish Indian wages and that the garnishment was a deprivation of property without due process of law.[164] Writing for the Tenth Circuit court, Judge McWilliams noted that the Navajo Tribe has an extensive system of self-government, including a judicial system consisting of district courts, a court of appeals, and a supreme court.[165] The judge recognized that the tribal code provides a means for enforcing judgments, a means other than garnishment. As garnishment is a statutory remedy permitted in some jurisdictions and prohibited in others, the appeals court reasoned that the Navajo Tribe, like any other independent state, had the right to accept or reject garnishment as a post-judgment remedy.[166]

160. 42 U.S.C. § 2000e-2(i) (1976) provides that nothing in the 1964 Civil Rights Act should be seen as applying to any business or enterprise on or near an Indian reservation because of preferential treatment given to a person because he or she is an Indian living on or near a reservation.

161. 601 F.2d at 1115-16. The appeals court also found that claimants had failed to establish reverse discrimination within the meaning of *Bakke*, 438 U.S. 265 (1978). *Id.*

162. 621 F.2d 358 (10th Cir. 1980).

163. *Id.* at 360.

164. On appeal, the defendant claimed that the federal court did not have jurisdiction, but the Tenth Circuit court disagreed, finding that Joe had several bases for invoking federal jurisdiction, including 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1343, 42 U.S.C. § 1983, the commerce clause and the treaty clause. *Id.* at 361.

165. *Id.*

166. *Id.* at 361-62.

IV. CASE DIGESTS

A. *Laetrile Availability*

The case of *Rutherford v. United States*[167] appeared, for the third time,[168] before the Tenth Circuit Court of Appeals this term, after a reversal and remand by the Supreme Court.[169] The final issues before the Tenth Circuit court were: 1) whether terminally ill cancer patients have a constitutional right to privacy which allows them to take whatever treatment they desire, regardless of the Food and Drug Administration (FDA) classification; 2) whether the proponents of laetrile had met the necessary premarketing procedures of the FDA; and 3) whether laetrile comes under the grandfather provisions of the FDA legislation.[170] Chief Judge Seth, writing for the appeals court, answered each of these questions in the negative, apparently finalizing the protracted litigation.[171]

B. *The Commerce Clause*

The State of Oklahoma, in its second attempt,[172] failed to convince the Tenth Circuit Court of Appeals to uphold a section of the Oklahoma Waste Disposal Act[173] in *Hardage v. Atkins*.[174] The Oklahoma law prohibited the shipment of controlled industrial waste into Oklahoma unless the state of origin had standards for the disposal of industrial waste which were substantially similar to those of Oklahoma. A further requirement was that the state of origin must have entered into a reciprocity agreement with Oklahoma.

The Tenth Circuit Court of Appeals previously had held that the mandatory reciprocity clause of the statute violated the commerce clause.[175] On subsequent appeal, Oklahoma argued that the provision requiring the state of origin to have standards similar to those of Oklahoma differed from the mandatory reciprocity requirement and should, therefore, be held constitutional. Judge Doyle, writing for the court, disagreed. Reasoning that

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167. 616 F.2d 455 (10th Cir.), *cert. denied*, 101 S. Ct. 336 (1980).

168. *See* Rutherford v. United States, 582 F.2d 1234 (10th Cir. 1978); Rutherford v. United States, 542 F.2d 1137 (10th Cir. 1976).

169. United States v. Rutherford, 442 U.S. 544 (1979). For a discussion of the Supreme Court decision see *United States Supreme Court Review of Tenth Circuit Decisions, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 337, 341-43 (1980).

170. 21 U.S.C. § 321(p)(1) (1976).

171. 616 F.2d at 457. The case was remanded to the district court without directions or any indication as to what issues remained to be decided.

172. Oklahoma originally sought to have the statute validated in Hardage v. Atkins, 582 F.2d 1264 (10th Cir. 1978).

173. OKLA. STAT. tit. 63, § 2764 (Supp. 1978) states:

> The [Controlled Industrial Waste Management Section] shall disapprove any plan which entails the shipping of controlled industrial waste into the State of Oklahoma, unless the state of origin has enacted substantially similar standards for controlled industrial waste disposal as, and has entered into a reciprocity agreement with, the State of Oklahoma. The determination as to whether or not the state of origin has substantially similar standards for controlled industrial waste disposal is to be made by the Director of the [Controlled Industrial Waste Management Section], and all reciprocity agreements must be approved and signed by the Governor of Oklahoma.

174. 619 F.2d 871 (10th Cir. 1980).

175. Hardage v. Atkins, 582 F.2d 1264 (10th Cir. 1978).

Oklahoma may not force other states to enact legislation as a means of avoiding economic isolation, the judge found that both statutory provisions imposed a mandatory scheme in violation of the commerce clause.[176]

C. *Abortion Funding*

A Utah statute,[177] which permitted public assistance funds to be used for abortions only if the life of the mother was endangered, was ruled unconstitutional in *D.R. v. Mitchell*.[178] The trial court found that the Utah statute was constitutional, reasoning that the law merely articulated the standard for determining whether an abortion was therapeutic or nontherapeutic.[179] The trial court noted that such classifications had been upheld in several Supreme Court cases.[180] The Tenth Circuit Court of Appeals, in an opinion written by Chief Judge Seth, disagreed with the district court, stating that "therapeutic" must be equated with "medically necessary" and that there may be any number of circumstances which, although not life endangering, may be medically necessary to preserve the health of the mother.[181]

In view of the recent Supreme Court decision of *Harris v. McCrae*,[182] however, the *Mitchell* decision is of questionable precedential value. In the *Harris* decision, the Supreme Court upheld the federal Hyde Amendment,[183] which is similar in language to the Utah statute, except that the Hyde Amendment permits federal funds to be used for abortions in cases of rape as well as when the life of the mother is endangered. The Supreme Court held also that states are not required by the constitution to provide public funding for abortions.[184]

Mary H. Hurley
Charles E. Stuart

176. 619 F.2d at 873.

177. UTAH CODE ANN. § 55-15a-3 (Supp. 1979) provides:

> The department shall not provide any public assistance for medical, hospital or other medical expenditures or medical services to otherwise eligible persons where the purpose of such assistance is for the performance of an abortion, unless the life of the mother would be endangered if an abortion is not performed.

178. 617 F.2d 203 (10th Cir. 1980).

179. 456 F. Supp. 609 (D. Utah 1978).

180. Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

181. 617 F.2d at 205.

182. 100 S. Ct. 2671 (1980).

183. Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979). *See also* Pub. L. No. 96-86, § 118, 93 Stat. 662 (1979).

184. 100 S. Ct. at 2685.

CRIMINAL LAW AND PROCEDURE

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OVERVIEW

During the period covered by this survey, the usual host of cases in the field of criminal law and procedure was decided by the Tenth Circuit Court of Appeals.[1] The discussion which follows is a sampling of the more significant and interesting cases, but, even then, only a brief review will be possible. It is the goal of this survey to furnish the practitioner with introductory

1. The Tenth Circuit Court of Appeals reviewed over 225 cases on criminal law and procedure. Over ninety of the opinions were published.

material in significant areas of the criminal field, thereby providing the reader with guidance for further research.

I. FOURTH AMENDMENT

A. *Standing*

In *United States v. Rios*,[2] one of the issues confronting the Tenth Circuit was whether the defendant Rios had standing to object to an allegedly illegal search and seizure. Rios was charged with conspiracy to commit various federal drug offenses, possession of heroin with intent to distribute, and the actual distribution of heroin. He sought to suppress the seized heroin on the basis that the search warrant's supporting affidavit contained significant misrepresentations. Rios asserted that the search warrant was thereby deficient for lack of probable cause.[3]

In an opinion written by Judge Holloway, the Tenth Circuit court noted that the proponent of a motion to suppress has the burden of establishing standing to assert a fourth amendment claim.[4] Initially, Rios had claimed standing as the legal owner of the mobile home where the questioned search took place. He actually had sold the home and was no longer in possession thereof, but he had retained legal title pursuant to the purchase agreement.[5] The Tenth Circuit observed that "bare legal ownership" did not support Rios' standing claim.[6] While intricate analysis of legal and equitable ownership may be important in the area of property law, a distinction between legal and equitable ownership becomes meaningless in fourth amendment claims, unless viewed in terms of a legitimate expectation of privacy.[7] The court of appeals found that no privacy interest was created by Rios' use of the mobile home nor by any pendent legal rights which he may have possessed in the home.[8]

Rios successfully contended that he had standing to object to the search because of the "automatic standing rule," which purportedly confers standing on a defendant to assert a fourth amendment claim when the criminal charge involves a possessory offense.[9] Since Rios was charged with possession of heroin, the Tenth Circuit turned to the merits of his claim. The court addressed the issue of whether the search warrant was defective.

Although the warrant had authorized the search of four closely situated

2. 611 F.2d 1335 (10th Cir. 1979). Also decided within this survey period was United States v. Montgomery, 620 F.2d 753 (10th Cir. 1980) (similar facts).

3. 611 F.2d at 1343.

4. *Id.* at 1344 (quoting Rakas v. Illinois, 439 U.S. 128, 130-31 n.1 (1978)).

5. Rios had sold the home to a co-defendant. Thereafter, Rios neither lived there, nor kept any personal effects there, nor had a key. Legal title was to be transferred only after all payments were made.

6. 611 F.2d at 1345.

7. Rakas v. Illinois, 439 U.S. 128, 143 (1978) (fourth amendment does not recognize "arcane distinctions developed in property and tort law"); Jones v. United States, 362 U.S. 257, 266 (1960) (fourth amendment analysis should not be guided by subtle property law distinctions).

8. 611 F.2d at 1345.

9. Jones v. United States, 362 U.S. 257 (1960). *But see* Rakas v. Illinois, 439 U.S. 128 (1978) (government may be able to contest defendant's standing in possessory offense).

structures,[10] it did not specify independent probable cause justifying a search of each structure. While one affidavit and one warrant may sanction the search of several places, probable cause must be shown for each location to be searched.[11] In the present case, however, the court of appeals considered that the buildings identified in the affidavit were but a single place, because they were all used for one individual's residence or business. The court concluded, therefore, that separate probable cause would not be required for each structure.[12]

Rios was more successful in challenging the affidavit by claiming that the affiant had made material and intentional misrepresentations. At trial, the defendant offered to prove that the alleged criminal activity, which formed the basis of probable cause, had not occurred at either the place searched or at any of the other structures listed in the warrant. The district court had found no reason to proceed beyond the face of the affidavit and had refused to hold an evidentiary hearing on the matter.[13] The Tenth Circuit reversed on this point, holding that, in view of the substantial offer of proof made and the significant questions raised, a hearing should have been conducted to decide the issue.[14]

The Tenth Circuit ruling in *Rios* is undeniably correct in all of its aspects. It should be noted, however, that the automatic standing rule, which allowed Rios to object to the search, has been limited by the Supreme Court's decision in *United States v. Salvucci*.[15] In *Salvucci*, the Court held that "defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated."[16] As a result, the current standing test permits a defendant to assert a fourth amendment violation only when he can demonstrate a legitimate expectation of privacy in the place where the allegedly illegal search or seizure occurred.[17] If the *Salvucci* standard had been applied in *Rios*, the defendant likely would have lacked standing since the court had determined that the challenged search was neither at his home nor in a structure in which Rios had a privacy interest.[18]

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10. The buildings were a warehouse, a garage, a camping trailer, and a mobile home.

11. United States v. Olt, 492 F.2d 910 (6th Cir. 1974). *See* State v. Ferrari, 80 N.M. 714, 460 P.2d 244 (1969).

12. 611 F.2d at 1347 (dictum). *See generally* Williams v. State, 95 Okla. Crim. 134, 240 P.2d 1132 (1952).

13. 611 F.2d at 1348.

14. *Id.* (citing Franks v. Delaware, 438 U.S. 154 (1978)). *See* Comment, Franks v. Delaware: *Granting the Right to Challenge the Veracity of Search Warrant Affidavits*, 45 BROOKLYN L. REV. 391 (1979).

The Tenth Circuit reversed on two additional grounds, finding 1) that it was error by the trial court not to give a limiting instruction concerning the admissibility of a co-conspirator's statements, 611 F.2d at 1339-41, and 2) that an improper closing argument had been made by the prosecution, *id.* at 1341-43.

15. 100 S. Ct. 2547 (1980). *See also* United States v. Montgomery, 621 F.2d 753 (10th Cir. 1980) (critiquing the automatic standing rule).

16. 100 S. Ct. at 2549. *See* Alderman v. United States, 394 U.S. 165, 174-75 (1969).

17. 100 S. Ct. at 2551 n.4. *See* Rakas v. Illinois, 439 U.S. 128, 140-48 (1978).

18. *See also* Rawlings v. Kentucky, 100 S. Ct. 2559 (1980) (defendant did not have reasonable expectation of privacy in a companion's purse); United States v. Salvucci, 100 S. Ct. at 2555 (remanding for a determination of whether defendant had privacy expectation in mother's home). *But see* United States v. Wilson, 536 F.2d 883 (9th Cir. 1976) (defendant had fourth

B. *Probable Cause*

In *United States v. Diltz*,[19] the Tenth Circuit was faced with the factual determination of whether there was probable cause to justify making the defendant a "target" of a wiretap.[20] The supporting affidavit declared that the main purpose of the wiretap was the acquisition of incriminating evidence on a suspect named Bremson. The defendant, Diltz, was mentioned only as one person with whom Bremson had been in contact over the phone. Based in part on the evidence obtained from the wiretap, the defendant, Diltz, was indicted and convicted of illegal drug distribution. Diltz argued that he had always been a putative target and, since he had not been named as such, no probable cause was shown to justify the wiretap involving him.[21]

The Tenth Circuit court confined itself to the government's sixty-one page affidavit to determine if there was probable cause to believe that the defendant was engaged in illegal activities. The court concluded, in a rather confusing opinion, that the evidence was "inconsequential and inconclusive in establishing anything more than suspicions" that Diltz was engaged in criminal activity.[22] The court stated that the present standard for probable cause is

> the test which is set forth in *Brinegar* [*v. United States*] requiring that the facts and circumstances within the officer's knowledge based on reasonably trustworthy information be sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed, ... Sometimes it is said that it is a reasonable ground for belief of guilt, although less than evidence to justify conviction.[23]

The Tenth Circuit observed that hearsay may support the finding of

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amendment rights in suitcase left in a friend's apartment); United States v. Harwood, 470 F.2d 322 (10th Cir. 1972) (defendant had fourth amendment rights in containers left in a friend's attic).

19. 622 F.2d 476 (10th Cir. 1980).

20. The wiretap was instigated pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976).

21. 622 F.2d at 476-78. A person who has been the subject of a wiretap has four basic rights under the Act: 1) the right to refuse to answer questions by the grand jury which are based on illegally seized evidence; 2) the limited right to inspect intercepted communications; 3) the right to move to suppress illegally obtained evidence; and 4) the right to recover civil damages for violation of title III. 18 U.S.C. §§ 2515, 2518(8), 2518(10)(a), 2520 (1976).

Defendant also claimed that the warrant was defective because of mistaken name identification. Throughout the affidavit, the government had referred to the defendant as Robert Diamos. Only later was it discovered that Robert Diltz was the same man. The court of appeals dismissed defendant's contention that this name confusion rendered the wiretap illegal. It found that the government had no reason to believe that Diltz and Diamos were the same man, and that the name confusion had no effect on the determination of probable cause under the affidavit. 622 F.2d at 479, 483.

22. 622 F.2d at 480. The majority opinion curiously dismissed United States v. Donovan, 429 U.S. 413 (1977), as irrelevant. *Donovan* had held that a failure to name all persons required by statute was not an automatic constitutional violation requiring suppression of evidence. 429 U.S. at 436-40 (construing 18 U.S.C. § 2518(1)(b)(iv) (1976)).

23. 622 F.2d at 481. *See* Brinegar v. United States, 338 U.S. 160 (1949). With respect to search warrants, it has been said that "probable cause for a search warrant is nothing more than a reasonable belief that the evidence sought is located at the place indicated by the law enforcement officer's affidavit." United States v. Williams, 605 F.2d 495, 497 (10th Cir.), *cert. denied*, 444 U.S. 932 (1979).

probable cause but emphasized that "[w]hat is needed are facts that speak out as to the existence of probable cause. Whether the evidence is hearsay is not significant, but if it is hearsay, it should be factual, relevant and also trustworthy."[24] Since the government's supporting affidavit was based on insufficient factual material, it failed to meet the test for probable cause.[25]

In *United States v. Matthews*,[26] two of the many fourth amendment issues present also involved the determination of probable cause. Military police became suspicious of the defendant, Matthews, when they noticed his car on the military base. The car had military license plates, yet it was not painted like a military car. During questioning, the police specifically asked for the customary military "log book" which should have matched the license plates. Matthews could not produce such a book. He did produce car registration, but the registration was for a Chevrolet, and the car in question was a Ford. The defendant then was taken, with the car, to the military police station for additional questioning.[27]

The Tenth Circuit noted that police custodial detentions must be based on probable cause, regardless of whether they technically constitute an arrest.[28] The court found that there were sufficient grounds to justify the military police in reasonably believing that an offense was being, or had been, committed.[29] The court of appeals found that probable cause was present in that Matthews' civilian car bore military plates, a military log book corresponding to the plates was absent, and the registration which Matthews produced was for a different make of car.[30]

In *Matthews*, the Tenth Circuit court also addressed the question of whether probable cause existed so as to justify a search of the car. Matthews' car was searched for evidence of ownership at the time of his custodial interrogation at the military police station. The court of appeals noted that for a warrantless search to be proper, there must be both probable cause and exigent circumstances.[31]

The appellate court observed that the probable cause requirement was satisfied "when the officers conducting the search have 'reasonable or probable cause' to believe that they will find an instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search."[32] The court found probable cause for a search in the same facts which supported the probable cause for arrest. The court also found an exigent circumstance in the fact that the car was in a relatively public area, a military base, where it was vulnerable to being taken. The search was further justi-

24. 622 F.2d at 483. *See, e.g.*, People v. Quintana, 183 Colo. 81, 514 P.2d 1325 (1973); People v. Leahy, 173 Colo. 339, 484 P.2d 778 (1970).

25. 622 F.2d at 483.

26. 615 F.2d 1279 (10th Cir. 1980).

27. *Id.* at 1281, 1283.

28. *Id.* at 1284. *See* Dunaway v. New York, 442 U.S. 200, 215 (1979) (probable cause is needed whenever the magnitude of an intrusion reaches a "crucial" level, regardless of the intrusion's label under state law). *See also* Payton v. New York, 445 U.S. 573 (1980).

29. 615 F.2d at 1284. *See* text accompanying note 23 *supra*.

30. 615 F.2d at 1284.

31. *Id.* at 1287.

32. *Id.* (citing Dyke v. Taylor Implement Co., 391 U.S. 216, 221-22 (1968)).

fied in that it preserved evidence and safeguarded the car's contents for the true owner.[33] Consequently, all evidence used by the government in the defendant's trial was deemed to have been obtained legally and was therefore not suppressible.

In *United States v. Coker*,[34] the defendant, Coker, was arrested and indicted for unlawfully possessing marijuana with the intent to distribute. The Tenth Circuit was presented with the task of determining whether Coker's warrantless arrest was supported by probable cause.

Police had discovered marijuana growing in a federal game reserve. The police were told by informants that defendant was planning to harvest the marijuana the following day. While both informants were considered reliable, neither had personal knowledge of this information, but instead were relying on the reports of others. The police watched the marijuana patch and observed Coker in the general vicinity. Although freshly cut marijuana was found the next day, Coker was never seen at the patch. The police subsequently spotted Coker's truck, being driven by Coker's wife, with the defendant as a passenger. When Coker saw the police, he ducked down in the seat in an attempt to avoid being seen. The police stopped the truck and found that Coker was wet from the waist down and covered by plants, stickers, and seeds. While the plant debris was not characteristic of any specific area of the wildlife refuge, there was a river running through the refuge near the marijuana patch. The police placed Coker under arrest.[35]

The Tenth Circuit affirmed the trial court's finding that the government had not met its burden of showing probable cause for the warrantless arrest.[36] The government failed to present sufficient evidence to support the informants' rumor.[37] There was also no direct evidence linking the defendant to the cut marijuana or even to the marijuana patch.[38] Since a prudent person would not be warranted in believing that Coker was committing an offense, the court held that there was no probable cause to support the arrest.

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33. *Id.* at 1287-88.

34. 599 F.2d 950 (10th Cir. 1979).

35. *Id.* at 951-53.

36. *See* United States v. Watson, 423 U.S. 411 (1976) (warrantless felony arrest may be made on probable cause alone); Draper v. United States, 358 U.S. 307 (1959) (lawfulness of arrest depends on probable cause).

37. Informant information can form the basis of probable cause only if both the informant and his source are shown to be reliable. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). *See* United States v. Williams, 605 F.2d 495 (10th Cir.), *cert. denied*, 444 U.S. 932 (1979); Livermore, *The* Draper-Spinelli *Problem*, 21 ARIZ. L. REV. 945 (1979). Since, in this case, the informants themselves received only hearsay information about Coker, the government did not meet the second prong of the test.

38. The opinion summarized the important facts in this manner:

> Defendant was stopped because he ducked down in the car; he was arrested because he had been seen in the general area of the marijuana patch, because the condition of his person indicated he had been in the general area of the marijuana patch, and because rumor had linked him to the patch.

599 F.2d at 952. *But see id.* at 953-54 (McWilliams, J., dissenting) (asserting that the facts did support a finding of probable cause).

C. *Warrantless Searches*

1. Personal Container Searches

In *United States v. Meier*,[39] the defendant, Meier, was arrested for driving while intoxicated. Meier was taken to jail, and his car was towed to a storage warehouse. Later, the car was searched and a backpack was found. The police, without first obtaining a search warrant, searched the backpack and discovered marijuana inside. The defendant was charged with unlawful possession of a controlled substance.[40] On appeal, Meier asserted that his fourth amendment rights were violated by the warrantless search of his backpack.

The inherent mobility of cars has been considered an exigent circumstance, permitting a warrantless search.[41] When a suitcase or a backpack is seized, however, the exigency of mobility is not present since the police exercise exclusive control and dominion over the item.[42] In such a case, the courts, in determining whether there has been a fourth amendment violation, will look at the degree of the defendant's expectation of privacy in the container seized.[43] The Tenth Circuit, per Judge McWilliams, saw this case as the factual equivalent of *Arkansas v. Sanders*,[44] where a warrantless search of a suitcase was held to be in violation of the Constitution. The Tenth Circuit explained that the definitive mark of containers with a high expectation of privacy are those which function "as a repository for personal items when one wishes to transport them."[45] A backpack was found not significantly dissimilar to a suitcase, and, therefore, the warrantless search was deemed to have violated the fourth amendment.

In *United States v. Kralik*,[46] the Tenth Circuit, per Judge Breitenstein, decided the issue of whether a search warrant is required for the search of a closed container located within another closed container. In this case, the police had obtained a search warrant based upon probable cause that there was a shotgun in the trunk of a car owned and used by a convicted felon. The police opened the car's trunk but found no gun. They did, however, find a closed suitcase. When the police opened the suitcase, they discovered the shotgun underneath some clothing. The defendant argued that although there was a search warrant for the car, there were no exigent circumstances excusing the police from obtaining another warrant for a search of the suitcase.[47]

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39. 602 F.2d 253 (10th Cir. 1979).

40. *See* 21 U.S.C. § 841(a) (1976).

41. Chambers v. Maroney, 399 U.S. 42, 51 (1970) (warrantless search of an automobile justified because of inherent mobility of the car and possibility that evidence within the car may disappear); United States v. Roberts, 583 F.2d 1173, 1178 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1080 (1979) (warrantless search of automobile justified by its inherent mobility when suspect observed placing package of drugs inside). *See* Colorado v. Bannister, 101 S. Ct. 42 (1980).

42. 602 F.2d at 255.

43. *See* United States v. Chadwick, 433 U.S. 1, 12 (1977) (higher degree of privacy expected in contents of double-locked footlocker taken from trunk of car than in car itself).

44. 442 U.S. 753 (1979).

45. 602 F.2d at 255 (citing Arkansas v. Sanders, 442 U.S. 753, 762 (1979)).

46. 611 F.2d 343 (10th Cir. 1979), *cert. denied*, 445 U.S. 953 (1980).

47. *Id.* at 345.

The Tenth Circuit held that only one warrant was needed for both the car and the suitcase. The court distinguished *Arkansas v. Sanders*[48] and *United States v. Chadwick*[49] by noting that the searches challenged in those cases were conducted without any search warrant at all. In the instant case, there was a valid warrant authorizing the search of the car. The court of appeals also rejected defendant's contention that a warrant, to withstand judicial scrutiny, must precisely identify all things to be searched, that is, both a car and a suitcase when such items are to be searched. An additional warrant was declared not to be necessary "for each container within a larger container when the warrant covers the search of the larger for a specified item."[50]

In *United States v. Rengifo-Castro*,[51] the defendant's vehicle was stopped by the border patrol at some distance from the Mexican border. Neither the defendant, who initially claimed Panamanian citizenship, nor a passenger, had a passport. Later, both individuals claimed to be from Columbia. They were taken to a nearby office for further questioning. In the office, each suspect was "directed to identify his suitcase, open it, and sit back down."[52] A search of the defendant's open suitcase uncovered cocaine, and subsequently, he was convicted of unlawful possession with intent to distribute.

The Tenth Circuit court found that the warrantless search of the suitcases violated the defendant's fourth amendment rights. The court noted that a person has a reasonable expectation of privacy in his personal luggage.[53] The appellate court reasoned that since the border agents had complete control over the suitcases, there were no exigent circumstances justifying the warrantless search, even if there had been probable cause.[54] The defendant's conviction was reversed.[55]

2. Airplane Searches

The defendant in *United States v. Gooch*[56] contended that his conviction for unlawful possession of marijuana was based upon illegally seized evi-

48. 442 U.S. 753 (1979).

49. 433 U.S. 1 (1977). *See* note 43 *supra*.

50. 611 F.2d at 345. *See* W. LAFAVE, SEARCH AND SEIZURE § 4.10(b) (1978) (warrant sufficiently describing premises need not particularly describe receptacles therein where personal effects may be found).

51. 620 F.2d 230 (10th Cir. 1980) (per curiam).

52. *Id.* at 232.

53. *Id.* at 233. Defendant had a legitimate expectation of privacy because he had not been stopped at the border checkpoint. *Cf.* Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (border searches of vehicles without probable cause or consent invalid anywhere but at the border or its functional equivalent). Of course, if this had been a border search, the border patrol would have had the authority to search the defendant's luggage on less than probable cause. *See* 8 U.S.C. § 1357(c) (1976). *See also* Torres v. Puerto Rico, 442 U.S. 465, 472-73 (1979) (dictum) (searches of personal baggage required to determine if belongings are entitled to enter the country).

54. 620 F.2d at 232. *But see* United States v. Nevarez-Alcantar, 495 F.2d 678 (10th Cir.), *cert. denied*, 419 U.S. 878 (1974) (border patrol agent, not at the border, permitted to conduct a warrantless search of a suitcase on probable cause). While *Nevarez-Alcantar* apparently is inconsistent with the present case, the probable explanation for the holding is that it was decided before *Chadwick* and *Sanders*. *See* notes 42-44 *supra* and accompanying text.

55. 620 F.2d at 233.

56. 603 F.2d 122 (10th Cir. 1979).

dence. Defendant's airplane had been detected by radar and tracked by United States Customs officials. When the plane landed, the defendant jumped out and began running away, as the plane turned to take off. The plane was stopped, and the defendant and the pilot were arrested. The subsequent warrantless search of the plane resulted in the discovery of over 1,100 pounds of marijuana.

In its opinion, the Tenth Circuit noted that it was the government's burden to justify a warrantless search.[57] The police had claimed that they observed, through an open door, "several large bags and smelled marijuana coming from the interior of the airplane."[58] The government argued that this was sufficient probable cause to justify a search under the *Chambers v. Maroney* rule.[59]

The Tenth Circuit agreed. The *Chambers* decision held that the inherent mobility of automobiles constitutes an exigent circumstance which permits a warrantless search, if the search is based on probable cause.[60] The Tenth Circuit had previously held that the exigent circumstances exception is equally applicable to airplanes, because of the lesser expectation of privacy and extreme mobility associated with an airplane.[61]

The court of appeals also addressed the search of the bags found in the plane. The court observed "that the sacks which contained the marijuana were mere cargo rather than personal luggage."[62] Since no affirmative steps were taken to isolate the cargo, the court assumed that there was a lesser degree of privacy expected in the bags containing marijuana than in a briefcase, which also had been searched.[63] The Tenth Circuit, therefore, upheld this warrantless search and affirmed its findings in a short opinion issued after rehearing.[64]

3. Controlled Delivery Searches

United States v. Andrews[65] was a significant opinion with regard to "controlled delivery" searches and seizures. The facts indicated that a man presented a package to an airline cargo service in Miami and requested that it be shipped to Denver. The airline employee, suspicious of the manner in which it was wrapped, opened the package.[66] He found cocaine inside and

57. *Id.* at 124 (citing Chimel v. California, 395 U.S. 752, 762 (1969)); United States v. Jeffers, 342 U.S. 48, 51 (1951).

58. 603 F.2d at 123.

59. 399 U.S. 42 (1970). *See* United States v. Soto, 591 F.2d 1091, 1099 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979) (probable cause existed to justify search of a heavily-loaded van stopped near area of smuggling activities when odor of marijuana was detected).

60. 399 U.S. at 51. *But see* Judge McKay's comment: "To the extent that mobility rather than privacy is the key in this area, it is troubling that inherent as opposed to actual mobility is determinative." 603 F.2d at 125 n.3. *See also* Colorado v. Bannister, 101 S. Ct. 42 (1980).

61. United States v. Sigal, 500 F.2d 1118 (10th Cir.), *cert. denied*, 419 U.S. 954 (1974).

62. 603 F.2d at 125. *See* Arkansas v. Sanders, 442 U.S. 753 (1979).

63. 603 F.2d at 126. The Tenth Circuit invalidated the briefcase search. *Id.* at 125-26.

64. *Id.* at 126.

65. 618 F.2d 646 (10th Cir.), *cert. denied*, 101 S. Ct. 84 (1980). *See also* United States v. Gibbons, 607 F.2d 1320 (10th Cir. 1979) (similar facts).

66. The airline employee was suspicious because packages sent by corporations normally were packed in cardboard boxes, personalized with a printed corporation trademark. This

notified the police. The police called a Denver agent of the Drug Enforcement Administration (DEA), and it was decided that the Miami police would remove a small quantity of cocaine, reseal the package, and send it to Denver. When the package arrived in Denver, the DEA agent took custody of it. The next morning, defendant Andrews presented himself to claim the package. The DEA agent, posing as an airline employee, took Andrews aside, and told him that he knew that drugs were inside the package and that he wanted money in return for not telling the police. Andrews paid, took the package, and was arrested when he left the airport building. The agent retrieved the package and removed the cocaine.

Andrews was charged with possession of a controlled substance.[67] He moved to suppress the evidence on the grounds that the package was opened without a search warrant, in violation of his fourth amendment rights. The trial court suppressed the evidence, and the government took an interlocutory appeal. Since the initial search was purely private, not subject to fourth amendment protection,[68] the basic issue was whether the reopening of the package after Andrews' arrest was a continuation of the first legal search or a new, second search.[69] Andrews argued that the latter was the case, claiming that he had a reasonable expectation of privacy in the package after it was delivered to him.

The Tenth Circuit, in a well reasoned opinion by Judge Barrett, held that the series of actions constituted a single search, legal at its inception.[70] *United States v. Ford*,[71] a case with similar facts,[72] was cited in support of the majority opinion. The *Ford* court had held that an authorization to ship contraband was an initial act of police dominion and control, dominion which was maintained continuously by close surveillance until physical possession was reasserted after the arrest.[73] The *Andrews* majority found the same official dominion and control to be present.[74] The court of appeals also discounted the existence of any privacy expectation after the DEA agent

package identified the sender as a corporation but was wrapped in brown paper with all designations handwritten. 618 F.2d at 648.

67. *See* 21 U.S.C. § 841(a)(1) (1976).

68. The fourth amendment protects against unreasonable governmental intrusions, not against the acts of private individuals, unless they are working as government agents. Burdeau v. McDowell, 256 U.S. 465, 474 (1921). Therefore, a search made by a common carrier, on its own initiative, does not come within the ambit of the fourth amendment. United States v. Gibbons, 607 F.2d 1320 (10th Cir. 1979) (search by airline employee not governmental action); United States v. Ford, 525 F.2d 1308 (10th Cir. 1975); United States v. Pryba, 502 F.2d 391 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975); People v. Benson, 176 Colo. 421, 490 P.2d 1287 (1971) (seizures by non-governmental personnel not suppressible).

69. 618 F.2d at 651.

70. *Id.* at 654.

71. 525 F.2d 1308 (10th Cir. 1975).

72. An airline employee, in California, discovered heroin in a package addressed to Oklahoma City. Police in both jurisdictions cooperated in tracing the package and arresting the defendant when he claimed it. *Id.* at 1311.

73. The *Ford* court emphasized that the airline officials could not have shipped the contraband without government authorization. *Id.*

74. A different situation would have arisen if the government had lost control of the package. Instead of simply retrieving the package when Andrews was arrested, the government agents would have had to have made a new intrusion into Andrews' privacy. Such an intrusion would have required a warrant or an exception to the warrant requirement.

informed the defendant that he knew the package contained drugs.[75] Since the whole transaction was but one search, the district court's grant of the motion to suppress was reversed.[76]

In an equally thoughtful opinion, Judge Seymour dissented from the majority's analysis and from the previous holding in *Ford*. The judge reasoned that it was incongruous for the majority to hold that the cocaine was in the "dominion and control" of the police when Andrews was charged with a crime of possession.[77] Furthermore, Judge Seymour disagreed with the proposition that a search conducted "by different police in a different state at a different time" could be a continuation of a previous search.[78] Finally, Judge Seymour noted that "certainly an individual's expectation of privacy in a sealed package is as legitimate as his expectation of privacy in an unlocked suitcase."[79] She argued that this privacy expectation was evident from the fact that Andrews actually paid money to the DEA agent to keep the information private.[80] Judge Seymour concluded that the motion to suppress should have been upheld.

4. Open Field—Curtilege

United States v. Carra[81] arose from a situation where a state narcotics agent had information that land leased by the defendant, Carra, contained a substantial crop of marijuana. The agent observed that the marijuana was growing within a fenced area behind the defendant's home. One of the questions confronting the Tenth Circuit court on appeal was whether there was an illegal search and seizure when the agent picked and left with a marijuana leaf.[82] The agent testified that the leaf was protruding through the fence at the time it was seized. The court, per Judge McKay, held that the

75. 618 F.2d at 652. It is questionable whether a stranger's knowledge of the contents of an otherwise personal container would destroy one's reasonable expectation of privacy. A better analysis, producing the same result in this case, might be that Andrews had a lesser expectation of privacy by using a public carrier to transport his package. *Cf.* Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (use of motor vehicles on public thoroughfares creates an expectation of privacy which is less than the privacy expected in homes).

76. 618 F.2d at 654.

77. *Id. See* note 57 *supra* and accompanying text.

Compare Jones v. United States, 362 U.S. 257, 263-64 (1960) (government may not assert that defendant possessed illegal goods for conviction and simultaneously deny such possession for fourth amendment protections) *with* United States v. Salvucci, 100 S. Ct. 2547, 2552 (1980) (prosecution may charge defendant with criminal possession and nevertheless deny that defendant has standing to claim fourth amendment violation). *See also* United States v. Jackson, 588 F.2d 1046 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979) (constructive possession of a controlled substance need not be exclusive; government must prove defendant's dominion and control over the drug); United States v. Martinez, 588 F.2d 495 (5th Cir. 1979) (constructive possession may be joint or exclusive).

78. 618 F.2d at 655. *But see* United States v. DeBerrey, 487 F.2d 448, 451 n.4 (2d Cir. 1973).

79. 618 F.2d at 655 (citing Arkansas v. Sanders, 442 U.S. 753 (1979)). *See* Walter v. United States, 100 S. Ct. 2395 (1980) (sealed package in mail); United States v. Chadwick, 433 U.S. 1, 16 (1977) (foot locker); United States v. Gooch, 603 F.2d 122, 125-26 (10th Cir. 1979) (briefcase).

80. 618 F.2d at 648, 655-56.

81. 604 F.2d 1271 (10th Cir.), *cert. denied*, 444 U.S. 994 (1979).

82. On the basis of the plucked marijuana leaf, a warrant was obtained for a more thorough search of the house and yard. Firearms were found, and the defendant was convicted of

search was not illegal because the leaf was in an "open field," outside of the "curtilege" of the house.[83]

The Tenth Circuit did not cite any authority for its holding,[84] and the analysis in *Carra* disregards the Supreme Court's observation that the "fourth amendment protects persons, not places."[85] While the open fields-curtilege dichotomy and the reasonable expectation of privacy standard may produce similar results, this is not always true. For example, if a person allows marijuana to grow on his front porch, certainly the marijuana is within the curtilege of his house, but he could not have the reasonable expectation that a passerby would not observe his plants.[86] Conversely, if marijuana were growing in an open field, hundreds of yards from the nearest farmhouse, with fences prohibiting one's view and "No Trespassing" signs posted, a search warrant would be needed since the occupants of the land had taken all reasonable precautions to protect their privacy in that area.[87] It is apparent, therefore, that the terms "curtilege" and "open field" cannot be used "in some talismanic sense or as a substitute for reasoned analysis."[88]

Unfortunately, the Tenth Circuit did not make a specific determination of whether Carra had a reasonable expectation of privacy that was violated by the picking of the marijuana leaf. Such an analysis would have required resolving such issues as whether the marijuana could have been seen from adjoining lands and whether the landlord's permission justified the agent's entry on property leased by the defendant.

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illegal possession of firearms and for making false statements in the acquisition of a firearm. *See* 18 U.S.C. §§ 922(h)(1), 924(a) (1976).

83. 604 F.2d at 1272-73.

84. *Cf.* Hester v. United States, 265 U.S. 57 (1924) (fourth amendment protection does not extend to open fields); Care v. United States, 231 F.2d 22 (10th Cir. 1955) (fourth amendment applies to buildings within the curtilege, but not to open fields).

85. Katz v. United States, 389 U.S. 347, 351 (1967). *See* United States v. Salvucci, 100 S. Ct. 2547, 2552-53 (1980); Rakas v. Illinois, 439 U.S. 128, 143 (1978); Jones v. United States, 362 U.S. 257, 266 (1960).

86. United States v. Miller, 589 F.2d 1117 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979).

87. *See* W. LAFAVE, SEARCH AND SEIZURE § 2.4(a) (1978) (citing Commonwealth v. Janek, 242 Pa. Super. 380, 363 A.2d 1299 (1976)).

88. United States v. Gooch, 603 F.2d 122, 126 (10th Cir. 1979). *See* note 7 *supra* and accompanying text. *See generally* W. LAFAVE, SEARCH AND SEIZURE § 2.3(d) (1978) where it is stated that:

> One of the virtues of *Katz v. United States* is that it makes it apparent that the curtilege concept should not be employed to arbitrarily limit the reach of the Fourth Amendment's protections. Under *Katz*, it is a search to violate "the privacy upon which [one] justifiably relied," and unquestionably a person can have such an expectation of privacy as to garages and barns and the like even when they are not in "close proximity" to his dwelling.

II. FIFTH AMENDMENT

A. *Custodial Interrogation of a Juvenile*[89]

In *United States v. Palmer*,[90] defendant Palmer, a seventeen-year old juvenile was convicted, under the Juvenile Delinquency Act,[91] of aiding and abetting an assault on a car and its occupants. Palmer and his friends had attacked a car by smashing the windows and headlights, slashing the tires, and beating the car body with pipes. The car's driver was stabbed to death while several other occupants were seriously injured.[92]

The following day, a policeman appeared at Palmer's home and told his mother that Palmer would be picked up after school for questioning. According to Palmer's mother, the policeman also said that she could not be present at the questioning. The policeman testified that the mother gave permission to the police to question her son. Later that same day, the policeman tried again to contact the mother but was unsuccessful. The mother did not try to reach her son. During the questioning of the defendant, the mother was not present. Defendant Palmer refused to sign a waiver of his *Miranda* rights, but he did make a statement.[93]

The general issue confronting the Tenth Circuit concerned the competency of a minor to make, without the guidance of a parent or attorney, an intelligent and voluntary waiver of his constitutional rights. The Tenth Circuit, per Judge Breitenstein, observed that "admissibility of statements obtained during custodial interrogation requires 'inquiry into the totality of the circumstances surrounding the interrogation.' "[94] The court concluded that Palmer's waiver was made knowingly and voluntarily, and it upheld the admissibility of the policeman's testimony regarding Palmer's statement.[95] The Tenth Circuit was swayed by the fact that *Miranda* rights were read to Palmer, that he understood them, and that he did not request a lawyer or his mother's presence at the questioning.

Judge McKay dissented. He noted that for a waiver of constitutional

89. Within this survey period, the Tenth Circuit enumerated the basic factors it will look to when analyzing whether "interrogation" took place in a custodial or non-custodial setting. "These factors are 1) whether there is probable cause to arrest, 2) the subjective intent of the police, 3) the subjective belief of the defendant, and 4) the focus of the investigation." United States v. Clay, No. 77-2009, slip op. at 35 (10th Cir. June 9, 1979).

90. 604 F.2d 64 (10th Cir. 1979).

91. 18 U.S.C. §§ 5031-5042 (1976).

92. 604 F.2d at 65.

93. *Id.* at 66. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

94. 604 F.2d at 67 (citing Fare v. Michael C., 442 U.S. 707 (1979)). The Supreme Court has listed the many factors to be considered in determining the voluntariness of a juvenile's waiver, including the age, education, background, and intelligence of the minor, the juvenile's capacity to understand the warning given, and his appreciation of the consequences of waiving constitutional rights. 442 U.S. at 725. *See also* West v. United States, 399 F.2d 467 (5th Cir. 1968); State v. Hinkle, 206 Kan. 472, 479 P.2d 869 (1971).

95. 604 F.2d at 67. The Supreme Court, in Fare v. Michael C., 442 U.S. 707 (1979), held that although a juvenile's request to see his probation officer did not invoke his fifth amendment rights, a request for an attorney did call forth such rights. 442 U.S. at 718-22. The Tenth Circuit did not mention whether a request for a parent is comparable to a request for a probation officer or to a request for an attorney. *But see, e.g.*, COLO. REV. STAT. § 19-2-102(3)(c)(I) (1973) (requiring parent's or attorney's presence during police questioning of juvenile). *See generally* People v. Patrick Steven W., 104 Cal. App. 3d 615, 163 Cal. Rptr. 848 (1980).

safeguards to be valid, a defendant must have the capacity to execute a knowing and intelligent waiver,[96] and he argued that "incapacity should be presumed in the case of a minor."[97] Judge McKay thought that the government had failed to meet its burden of showing the requisite mental capacity, thus rendering defendant's statement inadmissible.[98]

B. *Due Process*

1. Pre-Indictment Delay

In *United States v. Comosona*,[99] the Tenth Circuit had to decide whether the due process clause of the fifth amendment was violated considering the fact that the defendant was indicted 435 days after the crime was committed.[100] The Tenth Circuit held that it was appropriate to apply a balancing test in cases of pre-indictment delay. In balancing the rights of the defendant against the tardy actions of the state, the following elements must be evaluated:

> First, there must be demonstration of actual prejudice to the defendant resulting from the delay. Generally, such prejudice will take the form of either a loss of witnesses and/or physical evidence or the impairment of their effective use at trial. Second, the length of delay must be considered. Finally, the Government's reason for the delay must be carefully considered.[101]

The court also set out the method of proof:

> Upon a *prima facie* showing of fact by a defendant that the delay in charging him has actually prejudiced his ability to defend, and that this delay was intentionally or purposefully designed and pursued by the Government to gain some tactical advantage over or to harrass him, the burden of going forward with the evidence shifts to the Government. Once the Government presents evidence showing that the delay was not improperly motivated or unjustified, the defendant then bears the ultimate burden of establishing the Government's due process violation by a preponderance of the evidence.[102]

Since Comosona failed to show any prejudice to his ability to defend as a

96. *See* Miranda v. Arizona, 384 U.S. 436, 475-76 (1966) (defendant needs to know his legal rights and understand the consequences of waiver for the waiver to be knowing and voluntary).

97. 604 F.2d at 68.

98. *See* Commonwealth v. Webster, 466 Pa. 314, 353 A.2d 372 (1975) (the younger the age of the minor, the greater is the government's responsibility to provide counseling by a parent or an attorney).

99. 614 F.2d 695 (10th Cir. 1980). Also decided within this survey period was United States v. McManaman, 606 F.2d 919 (10th Cir. 1979) (five month delay, during which witness died, not prejudicial).

100. The sixth amendment right to a speedy trial does not vest until a person has been arrested or indicted. United States v. Lovasco, 431 U.S. 783 (1977); United States v. Marion, 404 U.S. 307 (1971). Therefore, protection against pre-indictment delay is governed by statutes of limitations and by the due process clause of the fifth amendment. *Id.* at 322-24.

101. 614 F.2d at 696. It has been stated that a defendant must show actual and substantial prejudice to establish a due process violation. *See, e.g.*, United States v. Blevins, 593 F.2d 646 (5th Cir. 1979); United States v. Ramos, 586 F.2d 1078 (5th Cir. 1978).

102. 614 F.2d at 696-97.

result of the pre-indictment delay, his efforts to make a prima facie showing of a due process deprivation were unavailing.[103] His conviction was affirmed.

2. Deprivation of Life and Liberty

The due process claims which arose in *Yanez v. Romero*[104] stemmed from a confrontation between defendant and police officers. Upon observing defendant, Yanez, enter a service station restroom, the police burst into the restroom and found a used hypodermic needle and fresh needle marks on the arm of Yanez. Yanez was arrested and transported to a hospital, where he refused a police request to give a urine sample until threatened with catheterization. Based on evidence obtained from the urine sample, Yanez was convicted of unlawful possession of morphine. After challenging his conviction through all possible state forums, Yanez sought a writ of habeas corpus in federal court.

Defendant's first contention was that he had been criminally punished because of his status as a drug addict, in violation of the Supreme Court's ruling in *Robinson v. California*.[105] The *Robinson* Court held that while possession of narcotics was punishable, drug addiction was a disease and, as such, could not be made a crime.[106] Judge Doyle, writing for the Tenth Circuit, compared the *Robinson* ruling with the Supreme Court's decision in *Powell v. Texas*,[107] in which the Court upheld a conviction based on a public drunkenness statute. Judge Doyle concluded that the conviction in this case was more similar to *Powell* than to *Robinson*, and, therefore, valid.[108]

Defendant's second contention was that the production of the urine sample violated his fifth amendment rights under the rule of *Rochin v. California*.[109] In the *Rochin* case, evidence of narcotics was obtained by the forcible pumping of the defendant's stomach. The Tenth Circuit characterized *Rochin* as an extraordinary case, restricted to its set of facts.[110] Instead, the court of appeals found this case more akin to *Schmerber v. California*,[111] where

103. *Id.* at 697. For examples of other unsuccessful attempts to show prejudice as a result of pre-indictment delay see United States v. Radmall, 591 F.2d 548 (10th Cir. 1978) (loss or "dimming" of memory); United States v. Francisco, 575 F.2d 815 (10th Cir. 1978) (unavailability of witnesses); Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978) (death of victim); United States v. Smyth, 556 F.2d 1179 (5th Cir.), *cert. denied*, 434 U.S. 862 (1977) (loss of evidence).

The length of pre-indictment delay seems to have little effect on the grant or denial of a due process claim. Courts have denied claims when the delay has been one year, Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978), three years, United States v. Bursten, 560 F.2d 779 (7th Cir. 1977), and four years, United States v. Radmall, 591 F.2d 548 (10th Cir. 1979). A due process claim has been dismissed in a case where the government had waited to file charges until only a few hours before a five year statute of limitations would have run, United States v. Parker, 586 F.2d 422 (5th Cir. 1978).

104. 619 F.2d 851 (10th Cir. 1980).

105. 370 U.S. 660 (1962).

106. *Id.* at 666.

107. 392 U.S. 514 (1968).

108. 619 F.2d at 852. Based on evidence from the urine sample, Yanez was convicted, not for the status of addiction, but for possession of morphine. *Id.* at 851.

109. 342 U.S. 165 (1952).

110. 619 F.2d at 854.

111. 384 U.S. 757 (1966).

the Supreme Court upheld the unconsented withdrawal of blood on the basis of the existence of probable cause to arrest. In distinguishing *Rochin*, the Tenth Circuit noted that the urine sample demand and the arrest in the present case were based on the solid ground of probable cause.[112] Since there was probable cause to arrest and since there was no actual use of catheterization, the admissibility of the evidence was sustained.[113]

Judge McKay, in a vigorous dissent, found that the threat of catheterization violated all canons of decency and fairness. He stated that "it would astound me if our law approved official threats of the type of indecencies condemned in *Rochin*, while disapproving only actual consummation of the threatened indignities."[114]

Yanez exemplifies the inherent conflict between *Rochin* and *Schmerber*. In all three cases, there had been probable cause to search. The police in *Rochin* had observed pills being swallowed, in *Schmerber* they had observed drunkenness, and in *Yanez* the police had observed a used hypodermic needle and fresh needle marks. In all three cases, the police had obtained evidence of a crime by using intrusive medical procedures without the truly voluntary consent of the defendant.

The factors distinguishing *Rochin* from *Schmerber* may be found in Justice Frankfurter's statement that the facts in *Rochin* represented "conduct that shocked one's conscience."[115] The totality of the shocking circumstances in *Rochin* included the police entrance into the defendant's home without a warrant, the forcible entrance into the defendant's bedroom while he and his wife were in bed, and the pumping of his stomach to retrieve pills wanted as evidence. Although the police may have had probable cause to arrest the defendant and an exigent circumstance in the need to preserve evidence, this probable cause had arisen from a violation of basic constitutional rights.[116]

In contrast, the totality of the circumstances in *Schmerber* were not as offensive or shocking. There was no violation of a highly held privacy right, for defendant was in the hospital immediately after, and as a result of, his car accident. The police arrested defendant shortly after he committed the crime of driving while intoxicated. The medical procedure for withdrawing blood is significantly less offensive than pumping one's stomach.

Yanez lies somewhere between *Rochin* and *Schmerber*. In *Yanez*, the police burst into a public restroom and, like the situation in *Rochin*, probably violated defendant's justifiable expectation of privacy.[117] Unlike the case in

112. 619 F.2d at 854.

113. *Id.* at 855-56.

114. *Id.* at 856 (McKay, J., dissenting).

115. 342 U.S. at 172.

116. Perhaps the result in *Rochin* also can be reached by applying the later developed "fruit of the poisonous tree" analysis. Any evidence obtained by the "shocking" conduct of pumping Rochin's stomach might also have been suppressible because it was acquired as a direct result of a patently illegal entry into Rochin's home. *See* Wong Sun v. United States, 371 U.S. 471, 484-87 (1963). *See also* Payton v. New York, 445 U.S. 573 (1980) (warrant needed to enter a suspect's home to make felony arrest).

117. *See* Katz v. United States, 389 U.S. 347 (1967); People v. Triggs, 8 Cal. 3rd 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973), *overruled on other grounds*, People v. Lilienthal, 22 Cal. 3d 891,

Rochin, however, the privacy expected in a public restroom is not the same as that expected in one's own bedroom. And while catheterization is as offensive as stomach pumping, unlike the *Rochin* situation, in *Yanez* there was only a threat to use a catheter.[118] Truly then, this case is a hybrid of the *Rochin-Schmerber* fact pattern and perhaps the only resolution available in such a case is each judge's determination of what "shocks" his legal and personal conscience.

III. SIXTH AMENDMENT

A. *Effective Assistance of Counsel*

In *Dyer v. Crisp*,[119] the Tenth Circuit, in an *en banc* decision, held that effective assistance of counsel is accomplished when a criminal "defense counsel exercises the skill, judgment and diligence of a reasonably competent defense attorney."[120] Judge Doyle, writing for the court, noted that all of the circuits, save the Second[121] and Tenth,[122] had abandoned the "sham, farce, and mockery" test[123] for the stricter "reasonably competent" test.[124] The Tenth Circuit in this case decided that the more stringent standard would better fulfill the sixth amendment's guarantee of effective assistance of counsel.

While the new test is stated clearly in this opinion, its proper procedural application in the Tenth Circuit remains an open question. Some circuits have ruled that once the defendant presents a prima facie case showing attorney ineffectiveness, prejudice to the defendant is presumed, and the bur-

587 P.2d 232, 150 Cal. Rptr. 910 (1978); State v. Bryant, 287 Minn. 205, 177 N.W.2d 800 (1970); W. LAFAVE, SEARCH AND SEIZURE § 2.4(c) (1978) (surveillance of a closed restroom constitutes a fourth amendment search).

118. The majority opinion stated that catheterization "is nevertheless an undesirable practice which ultimately is likely to produce a fact situation which will be ruled shocking and unlawful." 619 F.2d at 854.

119. 613 F.2d 275 (10th Cir.), *cert. denied*, 445 U.S. 945 (1980). The sixth amendment's guarantee of right to assistance of counsel means right to effective assistance. McMann v. Richardson, 397 U.S. 759, 770-71 (1970).

Also during this survey period, the Tenth Circuit decided *Brown v. Schiff*, which held that, for the purpose of an ineffective assistance of counsel claim, court-appointed attorneys do not act under the color of state law as required in section 1983 actions. 614 F.2d 237 (10th Cir. 1980). *See* 42 U.S.C. § 1983 (1976). In addition, the Tenth Circuit ruled that a Kansas recoupment statute, which provided that criminal defendant's were liable for the fees of court-appointed counsel, was unconstitutional. Olson v. James, 603 F.2d 150 (10th Cir. 1979). *See also id.* at 155 (guidelines for reviewing recoupment statutes).

120. 613 F.2d at 278. *See, e.g.*, Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233 (1979); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); Gard, *Inadequate Assistance of Counsel-Standards and Remedies*, 41 MO. L. REV. 483 (1976); Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. DeCoster, 93 HARV. L. REV. 752 (1980); Note, *Current Standards for Determining Ineffective Assistance of Counsel; Still a Sham, Farce or Mockery?*, 1979 SO. ILL. UNIV. L.J. 132. *See also*, Dear, *Adversary Review: An Experiment in Performance Evaluation*, 57 DEN. L.J. 401 (1980).

121. *E.g.*, Rickenbacker v. Warden, 550 F.2d 62, 65 (2d Cir. 1976), *cert. denied*, 434 U.S. 826 (1977). *See* Brinkley v. Lefevre, 621 F.2d 45, 47-48 (2d Cir. 1980) (Weinstein, J., dissenting and advocating reversal of the farce and mockery standard).

122. *E.g.*, Gillihan v. Rodriguez, 551 F.2d 1182 (10th Cir.), *cert. denied*, 434 U.S. 845 (1977).

123. *See, e.g.*, Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

124. 613 F.2d at 276-78.

den shifts to the government to show the lack of prejudice.[125] Other circuits require that the defendant prove both incompetence of counsel and resulting prejudice.[126] The procedures applicable to the new test in the Tenth Circuit will have to await future opinions.[127]

B. *Juvenile's Right to Trial by Jury*

In *United States v. Duboise*,[128] the Tenth Circuit held that a juvenile is not entitled to a jury trial under the Juvenile Delinquency Act.[129] The defendant, Duboise, an Indian boy of sixteen, was charged with the murder of a teenage acquaintance. Although the defendant did not request to be tried as an adult, he did make a motion for a jury trial. The motion was denied, and the federal district court judge found Duboise to be delinquent. On appeal, the defendant claimed that his right to a jury trial could not be waived by his simply electing to be tried in accordance with the Juvenile Delinquency Act.[130]

As originally enacted, the Act contained an express provision precluding jury trial; the current Act merely says that a juvenile will be tried as such unless the youth requests to be tried as an adult.[131] In *McKiever v. Pennsylvania*,[132] the United States Supreme Court held that due process did not require a jury trial in state juvenile delinquency proceedings.[133] The Court, however, has never decided specifically whether the federal government could preclude jury trial in Delinquency Act proceedings.

The Tenth Circuit ruled that *McKeiver*, nevertheless, controlled the outcome of the case.[134] The *McKeiver* opinion indicated that a jury was not a prerequisite to accurate factfinding, and that the informal nature of juvenile proceedings might be better suited to protecting and rehabilitating youthful offenders.[135] In addition to agreeing with the Supreme Court's rationale,

125. United States v. DeCoster, 624 F.2d 196 (D.C. Cir.), *cert. denied*, 444 U.S. 944 (1979); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).

126. Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979); United States v. Bad Cob, 560 F.2d 877 (8th Cir. 1977); United States v. Johnson, 531 F.2d 169 (3d Cir.), *cert. denied*, 425 U.S. 997 (1976); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974).

127. For a helpful and specific delineation of the various standards of conduct, which give structure and meaning to the "reasonably effective assistance" test, *see* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (approved draft 1970).

128. 604 F.2d 648 (10th Cir. 1979).

129. 18 U.S.C. §§ 5005-5042 (1976).

130. 604 F.2d at 648-50.

131. Federal Youth Corrections Act, ch. 645, 62 Stat. 857 (1948) (current version at 18 U.S.C. § 5032 (1976)). Section 5032 also provides that the Attorney General may, by motion, transfer the juvenile's case to state court for criminal prosecution, provided that the case involves a juvenile, over sixteen, who has committed a major felony.

132. 403 U.S. 528 (1971).

133. The decision in *McKiever* did not change statutory or case law providing jury trials in juvenile proceedings. Most states in the Tenth Circuit do furnish juveniles with the possibility of a jury trial. *See* COLO. REV. STAT. § 19-1-106(4) (1973); KAN. STAT. ANN. § 38-808(a) (Supp. 1979); OKLA. STAT. tit. 10, § 1110 (Supp. 1979); WYO. STAT. § 14-6-223(c) (1977). *See also* Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968). *But see* UTAH CODE ANN. § 78-3a-33 (1953) (jury not provided).

134. 604 F.2d at 652.

135. 403 U.S. at 543-48.

the Tenth Circuit noted that the Act left defendant the option of being tried as an adult, with a jury.[136] The court held that there was therefore no right to a jury trial under the Juvenile Delinquency Act.[137]

C. *Jury Prejudice*

In *United States v. Greer*,[138] the Tenth Circuit held that juror contact with a United States Marshal required reversal of a defendant's conviction. At a recess during defendant Greer's trial, a juror asked a marshal a question on sentencing in an unrelated case. During another recess, the juror and the marshal continued the conversation and discussed sentencing under the Federal Youth Corrections Act (FYCA) in general.[139] Apparently, upon overhearing this dialogue, a second juror asked a general question as to the applicability of the FYCA to yet another unrelated case, to which the marshal responded that the FYCA did apply.[140]

These conversations were reported by another juror to the trial judge, who immediately held an evidentiary hearing on the matter.[141] It was determined that six of the jurors did not know of the conversation, three jurors remembered hearing some generalized comments on the FYCA but not in reference to defendant Greer, and the remaining three jurors had participated in the conversation with the marshal.[142] The trial court found that the conversations did not prejudice Greer in any manner, but the judge gave cautionary instructions to the jury.[143] The defendant was later convicted of federal drug violations.

The Tenth Circuit, per Judge McKay, reversed the trial court and remanded for a new trial. Judge McKay noted the fundamental importance of an impartial jury. He cited the Supreme Court case of *Remmer v. United States*[144] to the effect that "[a]ny private contact with jurors during trial about the matter pending before them is 'presumptively prejudicial.' "[145]

Under the *Remmer* ruling, the government has the burden of showing that third party contact with a juror was harmless to the defendant.[146] This procedure is difficult to apply when considered with Federal Rule of Evi-

136. 604 F.2d at 651-52.

137. *Accord*, United States v. Hill, 538 F.2d 1072 (4th Cir. 1976); United States v. Torres, 500 F.2d 944 (2d Cir. 1974); United States v. Salcido-Medina, 483 F.2d 162 (9th Cir.), *cert. denied*, 414 U.S. 1070 (1973); United States v. King, 482 F.2d 454 (6th Cir.), *cert. denied*, 414 U.S. 1076 (1973); Cotton v. United States, 446 F.2d 107 (8th Cir. 1971).

138. 620 F.2d 1383 (10th Cir. 1980). This case may have limited precedential value in light of the fact that each judge on the panel wrote a separate opinion.

139. *See* 18 U.S.C. §§ 5005-5042 (1976).

140. 620 F.2d at 1384.

141. The failure to question a jury when there is a reasonable belief of the presence of prejudice may be a denial of the sixth amendment right to trial by an impartial jury. *See* Aston v. Warden, 574 F.2d 1169 (4th Cir. 1978). *See generally* United States v. Wood, 299 U.S. 123, 145-146 (1936).

142. 620 F.2d at 1389-90 (Holloway, J., dissenting).

143. *Id.* at 1390.

144. 347 U.S. 227 (1954).

145. 620 F.2d at 1385 (citing Remmer v. United States, 347 U.S. at 229). *See also* United States v. Gigax, 605 F.2d 507 (10th Cir. 1979).

146. 347 U.S. at 229.

dence 606(b).[147] Rule 606(b) essentially states that jurors are not allowed to testify to any matter, statement, or component of their deliberation process.[148] This prohibition of juror testimony as to the juror's state of mind when combined with the analysis used in *Remmer*, prompted Judge McKay to conclude that the "presumption of prejudice cannot be overcome once a jury has reached its verdict."[149]

Judge Doyle concurred with the result in *Greer* but he felt that the presumption of prejudice was a rebuttable presumption, not a conclusive one.[150] The judge found that the trial court in this case had violated rule 606(b).[151] Judge Doyle read this rule as allowing only juror testimony as to whether there had been prejudicial information, and not, as the trial judge permitted, evidence as to its effect on the jury.[152] This type of testimony required reversal.

Judge Barrett dissented. He emphasized that the trial judge was in the best position to determine what is prejudicial to the jury, and his findings in these matters should be given great weight and deference.[153] Judge Barrett felt that the trial judge's findings were supported in this case. In his discussions with the jurors, the marshal had never referred to the defendant or to the possible sentence Greer might receive if found guilty. In addition, the jurors were specifically instructed and admonished that sentencing was exclusively the court's function and was not to be considered in arriving at their verdict.[154] Judge Barrett argued that the majority decision discarded ninety years of Supreme Court precedent.[155] The dissenting judge pointed

147. Once an extrinsic influence on the jury has been reported, it is proper for the judge to presume that it is prejudicial and to conduct a hearing. *See* Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978) (hearing should be held immediately upon learning of an intrusion). Since rule 606(b) prohibits inquiry into the *actual effect* of the influence, the judge must evaluate the irregularity and determine whether it would probably have a prejudicial effect sufficient to require requiring a mistrial. Miller v. United States, 403 F.2d 77, 83 n.11 (2d Cir. 1968). *See* note 148 *infra*. A trial judge cannot examine the mental processes of the jurors, but he can receive evidence on the existence of conditions or events which may show prejudice. Maddox v. United States, 146 U.S. 140, 149 (1892) (juror may testify as to the *existence* of any extraneous influence although not as to how that influence operated on his mind).

148. FED. R. EVID. 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

149. 620 F.2d at 1385.

150. *Id.* at 1386.

151. *See* note 148 *supra* and accompanying text.

152. 620 F.2d at 1387 (Doyle, J., concurring).

153. *Id.* at 1388.

154. *Id.* at 1389. *See* United States v. Jones, 554 F.2d 251, 252 (5th Cir.), *cert. denied*, 434 U.S. 866 (1977) (trial judge's repeated instructions to the jury not to talk about the case, among themselves or with others, negated any prejudice which may have arisen when juror attempted to question marshal).

155. *Id.* at 1391. *See* Maddox v. United States, 147 U.S. 140, 150 (1892) (communications between jurors and third persons are forbidden, "unless their harmlessness is made to appear").

out that if the conclusive presumption of prejudice standard were the court's holding, the Tenth Circuit would be the only federal circuit so holding.[156]

IV. PRISONERS' RIGHTS

A. *Right to Parole*

In *Shirley v. Chestnut*,[157] the Tenth Circuit considered the claims of a group of inmates from various Oklahoma prisons. The inmates asserted that due process was ignored when they were denied parole. Specifically, the inmates sought declaratory and injunctive relief to the effect that due process "requires published criteria for parole release, access to adverse material in inmate files, [the] right to subpoena witnesses at the [parole] hearing, and written reasons for the denial of parole."[158] The Tenth Circuit found that these claims were comparable to those presented in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*[159] and, therefore, the court of appeals applied the principles articulated in that case.

In *Greenholtz*, the Supreme Court found that the Nebraska law outlining parole standards codified a liberty interest protectable by due process.[160] The Nebraska statutes entitle each inmate to a parole review every year. At the hearing, the inmate may present any oral or written evidence and may be represented by counsel. The parole board interviews the inmate and reviews his record. Thereafter, the Nebraska parole board must release an eligible prisoner unless it finds at least one of four statutory reasons for denying parole. If denied parole, the prisoner is given a written explanation.[161]

Although this statutory scheme created a legitimate expectation of parole, entitled to due process protection,[162] the Supreme Court emphasized that the Nebraska system of parole was unique. "Whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis."[163] The important issue, therefore, in *Shirley v. Chestnut* was the evaluation of the rights and procedures provided in the Oklahoma parole system.

The Oklahoma statutes provide for automatic review of each inmate on or before the expiration of one-third of his term.[164] At the parole hearing, the inmate may present evidence and be represented by counsel. Unlike the Nebraska system, however, the Oklahoma statutes do not provide that the parole board "shall" release a prisoner "unless" a statutorily designated reason is found; nor does the Oklahoma parole system require specific criteria to be considered.[165] "The Board's only statutory guidance in the exercise of its

156. *See, e.g.*, Llewellyn v. Stynchcombe, 609 F.2d 194 (5th Cir. 1980); United States v. Winkle, 587 F.2d 705 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979).

157. 603 F.2d 805 (10th Cir. 1979) (per curiam).

158. *Id.* at 806.

159. 442 U.S. 1 (1979).

160. *Id.* The Supreme Court, however, held that the Nebraska statutes provided, of themselves, sufficient due process protections. *Id.* at 13-16.

161. *Id.* at 4-5; NEB. REV. STAT. § 83-1-114(1) (1971).

162. *Cf.* Wolff v. McDonnell, 418 U.S. 539 (1974) (prisoner with cognizable liberty interest entitled to procedural due process).

163. 442 U.S. at 12.

164. OKLA. STAT. tit. 52, § 332 (1971).

165. *Id. See generally* Dye v. United States Parole Comm'n, 558 F.2d 1376 (10th Cir. 1977)

discretion is that it act as the public interest requires, and the sole existing statutory criteria dictate only the time of parole consideration."[166] Because of these distinctions, the Tenth Circuit found that, unlike *Greenholtz*, the Oklahoma parole statute did not create a constitutionally cognizable liberty interest, protected by due process, and the court of appeals denied the relief sought by the inmates.[167]

B. *Access to the Courts*

In the case of *Battle v. Anderson*,[168] the Tenth Circuit reviewed the question of whether furnishing prisoners with a law library but denying them access to civilian legal advisors violated the mandates of *Bounds v. Smith*.[169] The Supreme Court, in *Bounds*, held that a prison system must provide prisoners with reasonable access to a law library or to persons trained in the law.[170] Such access was deemed necessary to fulfill the due process requirement that persons have adequate, effective, and meaningful representation in the courts.[171]

Since prison riots in 1973, the federal district court has supervised the resolution of such issues as over-crowding, sanitation, fire-safety, water, ventilation, and sewage systems within the Oklahoma penal system. This appeal was a product of a district court finding, pursuant to *Bounds*, that prisoners' constitutional right of access to the courts is a desirable and necessary goal; a goal usually neglected in the state's penal system.[172] The district court had ordered that both an adequate library system and competent civilian advisors were necessary "to insure inmates the means to frame and present legal issues effectively for judicial consideration."[173] The petitioner contended on appeal that while the law libraries were adequate, a system of civilian legal advisors had not been provided. As a result, the illiterate or legally ignorant prisoners had to rely on "jailhouse lawyers," who may practice chicanery in one form or another.[174]

The Tenth Circuit, per Judge Barrett, was unable to resolve the issue because the requirement of civilian legal assistants was apparently abandoned, or at least modified, by a later order of the trial judge.[175] Because this order was unclear, the Tenth Circuit remanded the case for additional findings of fact.[176]

(parole commission can consider factors which would be unconstitutional if considered by a court of law). *But cf.* Morrissey v. Brewer, 408 U.S. 471 (1972) (due process protection applies to parole revocation).

166. 603 F.2d at 807.

167. *Id.*

168. 614 F.2d 251 (10th Cir. 1980). *See also* Battle v. Anderson, 594 F.2d 786 (10th Cir. 1979).

169. 430 U.S. 817 (1977).

170. *Id.* at 828. *See* Johnson v. Avery, 393 U.S. 483, 485 (1969) (access of prisoners to the court system must not be obstructed).

171. *See* Wolff v. McDonnell, 418 U.S. 539 (1974).

172. Battle v. Anderson, 457 F. Supp. 719, 739 (E.D. Okla. 1978).

173. *Id.*

174. 614 F.2d at 255.

175. *Id.* at 256.

176. *Id.*

Both Judges McKay and Doyle concurred, offering possible guidelines for the district court. They indicated that consideration should be given to the dangers inherent in affording jailhouse "writ writers" unreasonable control over their fellow inmates and suggested the use of volunteer assistants from the legal community as an alternative.[177]

In *Harrell v. Keohane*,[178] the Tenth Circuit was confronted with the issue of whether a prisoner is denied access to the courts when denied access to free photocopying. The Oklahoma Bureau of Prisons had promulgated three procedural options for inmate copying. Harrell claimed that he could not comply with any of the options: he could not afford to pay the ten cents per copy that the prison charged; he could not have friends or family do the copying because they were also poor; and he could not adequately reproduce the needed complex documents with a typewriter and carbon paper.[179]

The Tenth Circuit, following the mandate of *Bounds v. Smith*,[180] found that "[r]easonable regulations are necessary to balance the legitimate interests of inmate litigants with budgetary considerations and to prevent abuse."[181] The appellate court's ruling, denying free access to a photocopying machine, was in accordance with a previous holding which held that prison inmates do not have an unrestricted right to free postage or use of a typewriter.[182]

The court of appeals also summarily dismissed appellant's contention that the limited seating capacity of the prison law library denied court access. Appellant did not claim deprivation of a legal right because of the lack of space, nor did he assert that there were insufficient legal materials in the crowded library.[183] Since appellant was deemed not to be prejudiced in any manner, the Tenth Circuit court dismissed his claim.

C. *Availability of Federal Habeas Corpus Relief*

In *Sanders v. Oliver*,[184] the Tenth Circuit considered the question of what constitutes an "opportunity for full and fair litigation" of fourth amendment claims in state court. When an unconstitutional search or seizure is claimed, a federal court may grant habeas corpus relief to a state prisoner only if he has been denied the opportunity to fully and fairly litigate his claim in the state forum.[185]

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177. *Id.* at 259.

178. 621 F.2d 1059 (10th Cir. 1980) (per curiam).

179. *Id.* at 1060.

180. 430 U.S. 817 (1977) (one month wait for use of library deemed not to be a violation of prisoner's right of access to the courts).

181. 621 F.2d at 1061.

182. Twyman v. Crisp, 584 F.2d 352, 359 (10th Cir. 1978). *But see* Jones v. Diamond, 594 F.2d 997, 1024 (5th Cir. 1979) (when only prison procedure available to inmates is ordering books from county law library, prisoners are denied free access to courts); Williams v. Leeke, 584 F.2d 1336, 1340 (4th Cir. 1978) (forty-five minute limitation on use of law library restricts meaningful access).

183. 621 F.2d at 1061.

184. 611 F.2d 804 (10th Cir. 1979), *cert. denied*, 101 S. Ct. 90 (1980).

185. This standard was first articulated in Stone v. Powell, 428 U.S. 465, 494 (1976). The holding in *Stone* essentially stated that federal courts will not entertain claims involving a denial of fourth amendment rights "where the state has provided an opportunity for full and fair

Defendant Sanders was convicted by the State of Kansas for possessing marijuana with the intent to sell.[186] Before trial he sought to suppress the marijuana, which was seized in his house pursuant to a search warrant. At the preliminary hearing, Sanders proved that the warrant's supporting affidavit was riddled with false statements. Despite these findings, the magistrate court held that the affidavit was still sufficient to support the probable cause needed for the warrant. A further evidentiary hearing on the matter was denied by the trial court.[187]

After his conviction in state court, Sanders exhausted all of the possible state procedural remedies, going so far as to seek a rehearing of his certiorari petition by the United States Supreme Court.[188] Sanders then filed the present habeas corpus action in federal district court, asserting again that the affidavit was inaccurate and insufficient to support the search warrant. The federal district court held that Sanders had already received the opportunity for full and fair litigation of his fourth amendment claim and therefore denied his petition for federal habeas corpus relief.[189] Sanders appealed the decision to the Tenth Circuit, arguing that "the *refusal* by the trial court to hear testimony concerning factual assertions in the affidavit denied him an opportunity for full and fair litigation."[190]

Chief Judge Seth, writing for the court, first noted that both the state district and supreme courts had held that the affidavit information was sufficient to support the search warrant, even after the inaccuracies were removed.[191] The Tenth Circuit agreed, however, with the federal district court that the governing issue was whether the petition for federal habeas corpus relief was barred by *Stone v. Powell*.[192] The Tenth Circuit split its consideration of this issue by dividing the standard into two parts: first, the "oppportunity," and second, "full and fair" litigation.

The definition for the requisite "opportunity" to litigate fourth amendment claims was an issue left open by the Supreme Court decision of *Stone v. Powell*. In this case, the Tenth Circuit interpreted "opportunity" as mean-

litigation" of the claim. *Id.* at 494. For recent commentaries on the meaning of this standard, *see* Note, *Habeas Corpus After* Stone v. Powell: *The "Opportunity For Full And Fair Litigation" Standard*, 13 HARV. C.R.-C.L. L. REV. 521 (1978); Note, *The 'Opportunity' Test of* Stone v. Powell: *Toward a Predefinition of Federal Habeas Corpus*, 23 VILL. L. REV. 1095 (1978); Note, *Applying* Stone v. Powell: *Full and Fair Litigation for Fourth Amendment Habeas Corpus Claims*, 35 WASH. & LEE L. REV. 319 (1978).

186. State v. Sanders, 222 Kan. 189, 563 P.2d 461 (1977).

187. 611 F.2d at 806.

188. The complete and orderly procedure Sanders followed was: 1) he filed a motion to suppress the seized evidence at the preliminary hearing in the magistrate court; 2) he filed a pretrial motion to suppress; 3) he submitted a motion for new trial in the state district court; 4) he took an appeal to the Kansas Supreme Court; 5) he filed a motion for rehearing by the Kansas Supreme Court; 6) he submitted a petition for writ of certiorari to the United States Supreme Court; 7) he petitioned for rehearing to the United States Supreme Court; 8) he filed a petition for habeas corpus relief in federal district court; 9) he sought a rehearing by the federal district court; and 10) he submitted a certificate of probable cause for appeal to the Tenth Circuit. *Id.* at 806-07.

189. *Id.* at 807.

190. *Id.* at 808 (emphasis in original). *See* text accompanying note 187 *supra*.

191. *Id.* at 807.

192. 428 U.S. 465 (1976). *See* note 185 *supra* and accompanying text.

ing the "procedural opportunities to raise a claim, and it includes a full and fair hearing."[193] This definition indicates that the *Stone* standard is basically a procedural adequacy one, requiring the opportunity for an actual hearing, in some form, on the claim.[194] The Tenth Circuit ruled that the evidentiary hearing in the state magistrate court provided this "opportunity."[195]

The court also decided that the evidentiary hearing constituted a "full and fair" hearing under the requirement of *Stone*.[196] The opinion noted that the defendant's examination of the affiant took up some sixty pages of the evidentiary hearing transcript, and that the warrant was the principal issue at trial.[197] The Tenth Circuit concluded that "one complete and unrestricted evidentiary hearing with subsequent review by the state courts of the issue and the facts so developed would seem sufficient under *Stone*."[198]

V. CRIMINAL LAW AND STATUTORY INTERPRETATION

A. *False Statements and the "Exculpatory No" Defense*

In *United States v. Fitzgibbon*,[199] defendant Fitzgibbon was convicted of violating the federal false statement statute.[200] Fitzgibbon had traveled from Canada to Denver by airplane and, upon arrival, he was greeted by customs officials with various forms which needed to be filled out. One form question inquires as to whether the traveler is entering the United States with more than $5,000. Fitzgibbon checked the "no" box and also gave a negative response when questioned by a customs official about importing money. When the official observed him to be hesitant and nervous, Fitzgibbon was searched, and over $10,000 was found in his boots. After being convicted for willfully making a false statement to a government agency, the defendant filed a habeas corpus petition, arguing that he was denied effective assistance of counsel because an "exculpatory no" defense was not raised at trial.[201]

The "exculpatory no" defense provides that a negative response, of it-

193. 611 F.2d at 808.

194. *See* Johnson v. Meachem, 570 F.2d 918 (10th Cir. 1978) (defendant's waiver of hearing opportunity barred habeas corpus review).

195. 611 F.2d at 808.

196. *Id. See* Gamble v. Oklahoma, 583 F.2d 1161 (10th Cir. 1978) (evidentiary hearing and at least a colorable application of correct fourth amendment constitutional standards required); O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977) (consideration of disputed facts by fact-finding court and the availability of appeal required).

197. 611 F.2d at 808.

198. *Id.* Judge McKay concurred in the result. He felt that the court should have simply affirmed the state court finding that the remaining truthful allegations in the affidavit supported probable cause. Under this analysis, the *Stone* question would need not have been addressed. *Id.*

199. 619 F.2d 874 (10th Cir. 1980).

200. 18 U.S.C. § 1001 (1976). The section provides:

> Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

201. 619 F.2d at 875.

self, cannot serve as proof of the intent needed to convict under the federal false statement statute.[202] The federal statute was designed to prevent the perpetration of intentional frauds which hinder government agencies in fulfilling their administrative duties.[203] In cases similar to Fitzgibbon's, courts have upheld the "exculpatory no" defense on the ground that defendant's negative response may only indicate an intention to enter the country with more than $5000, which is not a crime.[204] Without specifically informing defendants of the statutory requirements, it is almost impossible to prove that false statements are intended to frustrate government functioning. For example, an immigrant may make untruthful customs statements only because of the mistaken belief that currency over $5000 would be confiscated.[205]

In this case, the Tenth Circuit found that Fitzgibbon completely understood that completion of the form was required prior to entry into the United States, and that "the false statements he made were designed to conceal information relevant to the administrative process."[206] The court noted that prominent posters advised incoming travelers of the obligation to report currency over $5000, and that the custom's form clearly stated that false statements were punishable by law.[207] In addition, the Tenth Circuit held that the reporting requirement did not violate Fitzgibbon's fifth amendment right against self-incrimination.[208] If defendant had reported correctly the currency amount, he would not have committed any crime. His habeas corpus petition was therefore denied.

B. *Weapons Used in Bank Robbery*

In *United States v. Lucas*,[209] the defendant, Lucas, was convicted of bank robbery. On appeal, Lucas asserted that there was insufficient evidence to support the finding that the robbery was committed by "force and violence, or by intimidation."[210] Upon entering the bank, Lucas brandished a toy gun and demanded money. Every teller followed standard bank instructions not to take any action or to respond in any way to a bank robber's directions. While all of the tellers eventually noticed that the pistol was a toy, a few

202. *Id.* at 876. *See* Note, *Fairness In Criminal Investigations Under the Federal False Statement Statute*, 77 COLUM. L. REV. 316 (1977).

203. 619 F.2d at 877-78. *See* Bryson v. United States, 396 U.S. 64 (1969); United States v. Bramblett, 348 U.S. 503 (1955).

204. United States v. Schnaiderman, 568 F.2d 1208 (5th Cir. 1978); United States v. Granada, 565 F.2d 922 (5th Cir. 1978).

205. *See* United States v. Granada, 565 F.2d at 926..

206. 619 F.2d at 880.

207. *Id.*

208. *Id.* at 881.

209. 619 F.2d 870 (10th Cir. 1980).

210. 18 U.S.C. § 2113(a) (1976). The section reads in part:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association. . . .
>
> . . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

testified that they were frightened, shaken, or quite concerned about the obviously stressful situation.[211] The Tenth Circuit court found that this testimony constituted "objectively intimidating facts," facts which were sufficient to support the jury's conclusion that the "intimidation" element was satisfied.[212]

In *United States v. Shannahan*,[213] the defendant was charged under the same bank robbery statute applied in *Lucas*.[214] Defendant, Shannahan, had given a bank drive-up teller a bag which contained what appeared to be dynamite, together with a note demanding money. Believing that the defendant did have dynamite, the teller gave him several hundred dollars. Shannahan later was convicted of bank robbery by force. The issue on appeal was whether the elements of "a dangerous weapon or device" which "puts in jeopardy the life of any person" during a bank robbery were satisfied by the use of the two fake sticks of dynamite.[215]

Shannahan asserted that since the dynamite was not real, it was not capable of putting the life of a person in jeopardy, and the prosecution, therefore, failed in establishing its burden of proof. The Tenth Circuit, per Judge Pickett, noted that some jurisdictions have held that the prosecution must show that the weapon had an actual capability to cause death or physical harm.[216] Other jurisdictions, including the Tenth Circuit, have held that it is sufficient if the weapon or device *appeared* dangerous, putting the robbery victim in reasonable apprehension of death or serious bodily injury.[217] In *Shannahan*, the court reaffirmed this latter construction, stating that the test was one of a subjective state of danger, that is, what the reasonable victim believes the danger to be, rather than what is the actual capability of the weapon used.[218]

C. *Interstate Transportation of a Forged Security*

In *United States v. Sparrow*,[219] defendant Sparrow was convicted on two counts of interstate transportation of a falsely made or forged security.[220] The security involved in the first count was an original Oregon certificate of

211. 619 F.2d at 870-71.
212. *Id.* at 871.
213. 605 F.2d 539 (10th Cir. 1979).
214. 18 U.S.C. § 2113(a) (1976). For the text of the statute, see note 210 *supra*.
215. 605 F.2d at 540. *See* 18 U.S.C. § 2113(d):

> Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

216. *See, e.g.*, United States v. Cobb, 558 F.2d 486 (8th Cir. 1977); Bradley v. United States, 447 F.2d 264 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 567 (1972).
217. *See, e.g.*, United States v. Waters, 461 F.2d 248 (10th Cir.), *cert. denied*, 409 U.S. 880 (1972); United States v. Beasley, 438 F.2d 1279 (6th Cir.), *cert. denied*, 404 U.S. 866 (1971).
218. 605 F.2d at 542.
219. 614 F.2d 229 (10th Cir. 1980).
220. 18 U.S.C. § 2314 (1976) states, in pertinent part:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited . . . .
>
> . . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

title for an automobile which defendant had transported from Utah to Idaho. The security in the second count was a duplicate certificate which was sent from Oregon to Utah.

The facts were somewhat complicated. Sparrow bought a used Cadillac in Utah with a bank loan. The bank recorded its lien on the back of the original certificate of title, which had been issued in Oregon. Sparrow then went to Idaho, where he obtained a clear title to the car by submitting a different version of the Oregon certificate, on which Sparrow was listed as both owner and lienholder. Sparrow returned to Utah and exchanged the Cadillac for a compact car and cash. He reported the Cadillac as stolen and filed a claim with his insurance company. Sparrow proceeded to apply for a duplicate Oregon certificate of title and transfer, which was issued in his name and sent to the Utah bank as lienholder.[221]

The defendant challenged the first count of his conviction, contending that the government did not present evidence demonstrating the interstate transportation element of the crime. Although there was a strong indication that defendant had presented an altered certificate of title in Idaho, there was no showing that the alteration had taken place in Utah. In fact, defendant argued that there was a legal presumption that a forged instrument was forged in the location where it was first found in its changed state.[222]

The Tenth Circuit, per Judge Barrett, rejected defendant's argument. Instead, the court of appeals found that the essence of the statutory offense was the fraudulent scheme, and that the interstate transportation element was included "solely to afford federal jurisdiction."[223] The appellate court noted that Sparrow's continued possession of the altered title was not questioned and that the document was the focus of his interstate scheme to defraud.[224] The interstate transportation element was satisfied because the fraudulent scheme "had both its *origin* and *consummation*" in another state and the "interstate movement of the certificates of title was, at all times, the central means of accomplishing the criminal design."[225]

The second count charged that Sparrow had caused a duplicate title certificate to be sent from Oregon to the bank in Utah, "knowing the same to have been falsely made, forged and altered."[226] Sparrow contended that at all times, including its travel between states, the duplicate title was genuine, and not a forgery. The Tenth Circuit noted that the words "forged" and "falsely made" had been interpreted to include "spurious or fictitious"

The defendant was also convicted of submitting a false bank statement. 18 U.S.C. § 1014 (1976). This count was not appealed.

221. 614 F.2d at 230.

222. *See, e.g.*, United States v. Owens, 460 F.2d 467, 469 (5th Cir. 1972).

223. 614 F.2d at 232. *See* United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971).

224. 614 F.2d at 232-33.

225. 614 F.2d at 233. *But see id.* at 235-36 (McKay, J., dissenting) (criminal statutes must be strictly construed and interstate transportation must be proved as an essential element of the crime).

226. *Id.* at 230.

execution of documents genuine on their face.[227] The court found that Sparrow knew that the duplicate title, purporting to show that he was the owner of the Cadillac, "*could not be genuine* inasmuch as he no longer owned the vehicle and had not owned it for several months."[228] The court of appeals affirmed Sparrow's conviction.[229]

D. *Theft From Interstate Commerce*

In *United States v. Luman*,[230] the defendant, Luman, was charged with and convicted of stealing goods which were in interstate commerce.[231] The goods consisted of a truckload of automobile tires, shipped from Wisconsin to Tulsa, Oklahoma. The consignee did not sign the delivery receipt because there was not enough time to unload all of the tires and verify the contents. The consignee's employees, however, broke the seal of the trailer, removed the packing slip, and padlocked the trailer, retaining the key. The trailer was taken by the defendant during the night.[232]

The main issue confronting the Tenth Circuit was whether the tires were still in interstate commerce at the time of the theft. The Tenth Circuit said that "no single event can be isolated as the point at which chattels lose their character as an interstate shipment and become an intrastate shipment or inventory."[233] The court reviewed the decisions of other jurisdictions,[234] noting that a consignee's acceptance and exercise of custody over goods renders them intrastate in character.[235] In this case, however, both factors were not present: while the consignee had taken custody of the tires, he had not accepted delivery.

In reviewing the facts, the Tenth Circuit noted that the testimony of both the carrier and the consignee demonstrated that neither regarded the delivery as completed nor the goods as under the control or care of the consignee.[236] The appellate court also observed that, at the time of the theft, the tires remained on the trailer, separated from the consignee's inventory. Furthermore, the court noted that the employees had not signed the delivery receipt. The Tenth Circuit concluded that this was a sufficient factual basis

227. *Id.* at 234 (quoting United States v. Crim, 527 F.2d 289 (10th Cir. 1975), *cert. denied*, 425 U.S. 905 (1976); and United States v. Williams, 498 F.2d 547 (10th Cir. 1974)).

228. *Id.* (emphasis in original).

229. *Id.*

230. 622 F.2d 490 (10th Cir. 1980).

231. *See* 18 U.S.C. § 659 (1976) which states, in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any . . . motor truck, or other vehicle . . . with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property . . . .
>
> . . . .
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both.

232. 622 F.2d at 491.

233. *Id.* at 492.

234. *E.g.*, United States v. Cousins, 427 F.2d 383 (9th Cir. 1970); Chapman v. United States, 151 F.2d 740 (8th Cir. 1945); O'Kelley v. United States, 116 F.2d 966 (8th Cir. 1941).

235. 622 F.2d at 493.

236. *Id.* at 493-94.

for the jury to find that the goods were in interstate commerce at the time of the theft.[237]

Judge Holloway dissented, remarking that the federal government should have allowed this crime to be prosecuted in state court. Judge Holloway concluded, from the pertinent facts, that "effective possession and control of the tires" was in the consignee.[238] The judge rejected any notion that uncompleted paperwork could be considered a salient factor in the distinction between interstate and intrastate commerce. He asserted, instead, that the sole factor to be considered was who had actual dominion and control over the property.[239]

E. *Lesser Included Offenses*

In *United States v. Pino*,[240] the defendant Pino, an Indian, was convicted of involuntary vehicular manslaughter while on an Indian reservation. The evidence showed that Pino was driving home after drinking with a few friends. He collided with a disabled car, killing the driver who had been making repairs under the hood.[241] Pino argued on appeal that he was wrongfully denied a jury instruction on the lesser included offense of careless driving.

The Tenth Circuit, per Judge Holloway, first noted that the Supreme Court decision in *Keeble v. United States*[242] declared that a defendant is entitled to an instruction on a lesser included offense if the evidence is such as to permit a jury to rationally find him guilty of the lesser offense and to acquit him of the greater offense.[243] The prosecution contended that in the Tenth Circuit, the applicable standard provides that an instruction is proper only when a lesser included offense is such that " 'it is impossible to commit the greater without having first committed the lesser.' "[244] Since involuntary manslaughter may be committed independently of the careless driving of an automobile, the government argued that the instruction request was properly denied by the trial court.

The Tenth Circuit court impliedly rejected its former test. The court of appeals held that a defendant is entitled to a lesser included offense instruction when evidence which is necessary and offered to prove the greater offense establishes the lesser offense.[245] This standard was viewed as a practical one; its application is to be determined by the offense charged and by the evidence developed at trial.[246] The court concluded that the prosecution's case in *Pino* had established all of the elements of a careless driving

237. *Id.* at 493.
238. *Id.* at 494 (Holloway, J., dissenting).
239. *Id.* at 494-95.
240. 606 F.2d 908 (10th Cir. 1979).
241. 606 F.2d at 910-14.
242. 412 U.S. 205 (1973) (an Indian prosecuted under the Major Crimes Act of 1885 is entitled to a lesser included offense instruction). *See also* FED. R. CRIM. P. 31(c).
243. 412 U.S. at 212-14.
244. 606 F.2d at 915 (relying on Larson v. United States, 296 F.2d 80, 81 (10th Cir. 1961)).
245. 606 F.2d at 916 (citing with approval United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971)).
246. *Id.*

charge, and therefore, the defendant was entitled to a jury instruction on the lesser included offense of careless driving.[247]

In *United States v. Chapman*,[248] the Tenth Circuit ruled that a defendant is only entitled to an instruction on a lesser included offense when the evidence reasonably supports such a theory. The defendant, Chapman, was convicted of premeditated murder.[249] Witnesses testified that Chapman had driven his truck to a house where the victim was located, that Chapman had called the victim over to the truck, and that after a short discussion, Chapman shot the victim with a sawed-off shotgun.[250] Chapman claimed that the shooting was an accident and his attorney tendered an instruction for the lesser included offense of voluntary manslaughter. The trial court refused the request because it felt that the evidence did not justify a lesser included offense instruction.[251]

The Tenth Circuit court ruled that the trial court did not commit error. The court of appeals stated that the decision whether to give an instruction on a lesser included offense is within the sound discretion of a trial court.[252] The court cited *Keeble v. United States*[253] for the proposition that an instruction need not be given when the evidence does not rationally support defendant's theory.[254] Chapman's own testimony indicated that the shooting was an accident, that he was happy at the time of the shooting, and that he had only wanted to scare the victim. The majority of the court felt that this testimony dispelled the notion that the shooting was done in the heat of passion, an element required in the crime of voluntary manslaughter.[255]

Judge Holloway dissented. Chapman had also testified about previous disputes with the victim and about being drunk and being taunted immediately prior to the shooting. Judge Holloway felt that this was evidence to support a voluntary manslaughter instruction.[256] He argued that a trial court has no discretion to refuse an instruction if there is some evidence to support a lesser included offense, even when the evidence is weak or contradicted by other testimony.[257]

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247. *Id.* at 916-17.

248. 615 F.2d 1294 (10th Cir. 1980).

249. *See* 18 U.S.C. § 1111 (1976) (murder); *id.* § 1153 (offenses committed within Indian country).

250. 615 F.2d at 1295-96.

251. *Id.* at 1298.

252. *Id.*

253. 412 U.S. 205 (1973). *See* note 242 *supra* and accompanying text.

254. 615 F.2d at 1299. *See* United States v. Thompson, 492 F.2d 359, 362 (8th Cir. 1974) (listing the dispositive factors of a lesser included offense).

255. 615 F.2d at 1300. The court commented that if the defendant had not testified, he might have persuaded the trial court to give a voluntary manslaughter instruction. *Id.*

256. *Id.* at 1302-03 (Holloway, J., dissenting).

257. *Id.* at 1301 (citing United States v. Swallow, 511 F.2d 514, 523 (10th Cir.), *cert. denied*, 423 U.S. 845 (1972)).

The main distinction between the majority and the dissenting opinions seems to be the individual judge's opinions as to the quantum of factual proof necessary to support a lesser included offense instruction. Simply stated, the majority felt that the trial judge may deny, as a matter of law, a lesser included offense instruction when there is not enough evidence for the jury to rationally conclude that the lesser offense was committed. Alternatively, the dissenting judge believed that if there is some evidence to support the defendant's claim, the jury, not the trial judge, should decide whether a lesser included offense is merited by the facts.

VI. TRIAL MATTERS

A. *Discovery*

In *United States v. Bump*,[258] the defendant, Bump, requested discoverable information under rule 16(a) of the Federal Rules of Criminal Procedure. In response to the government's reciprocal request under rule 16(b),[259] Bump's attorney disclosed that he intended to introduce a charge card receipt for an airplane ticket and hotel registration records showing that the defendant was out of town during the time of the alleged conspiracy.[260] These documents were never produced. At trial, Bump testified as to his alibi but did not mention any supporting evidence. During cross-examination, the prosecutor used the attorney's earlier representation of documentary evidence, and its apparent nonexistence, for impeachment purposes. Bump contended, on appeal, that this line of questioning was an impermissible intrusion into confidential statements made between attorney and client, that it deprived him of the effective assistance of counsel, and that it made him a witness against himself in violation of the fifth amendment.[261]

The Tenth Circuit, per Judge Logan, quickly dismissed the attorney-client privilege contention. The court observed that even when a privilege exists with regard to a statement made between a client and his attorney, the privilege is waived once the statement is revealed to a third party.[262] Since Bump failed to demonstrate that the disclosures made by his attorney were without his consent, he did not uphold his burden of proving that the communication was privileged.[263]

The Tenth Circuit examined Federal Rule of Criminal Procedure 16(b) for a disposition of defendant's other claims. The court of appeals had diffi-

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258. 605 F.2d 548 (10th Cir. 1979). Also within this survey period the Tenth Circuit decided United States v. Gallagher, 620 F.2d 797 (10th Cir. 1980) (Federal Rule of Criminal Procedure 17(b) does not require a trial court to grant a defendant's motion for the subpoena of a witness where the witness would only provide cumulative testimony).

259. FED. R. CRIM. P. 16(b) provides, in part:

> (1) Information Subject to Disclosure.
>
> (A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.
>
> . . . .
>
> (2) Information Not Subject to Disclosure.
>
> Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

260. 605 F.2d at 550.

261. *Id.*

262. *See* Wilcoxon v. United States, 231 F.2d 384, 386 (10th Cir.), *cert. denied*, 351 U.S. 943 (1956) (client's statement made to attorney, with intent that it be communicated to others, is not privileged).

263. 605 F.2d at 551. *See, e.g.*, United States v. Ponder, 475 F.2d 37, 39 (5th Cir. 1973) (defendant failed to carry burden of proving that evidence was privileged).

culty in determining whether the representations of Bump's attorney were nondiscoverable statements under rule 16(b)(2) or whether they were discoverable documents under rule 16(b)(1)(A).[264] The appellate court skirted this issue by assuming that the discovery rule required Bump's attorney to disclose his client's statements concerning what the documents purported to prove.[265] Relying on analogous Supreme Court precedents,[266] the court of appeals held that the forced disclosure did not violate Bump's rights to be protected against self-incrimination and to effective assistance of counsel.[267]

The Tenth Circuit also found that the government's use of the representations of defendant's attorney was not prejudicially unfair.[268] The representations were used only for impeachment when defendant took the stand. The court of appeals compared this situation, involving discovered evidence, to that where statements obtained in violation of constitutional rights are used for impeachment purposes. The Supreme Court, in *Harris v. New York*,[269] held that evidence suppressed because of a fifth amendment violation may be used to impeach a defendant's exculpatory testimony. Similarly, the Tenth Circuit has held that discovered evidence could be used for impeachment purposes even if the defendant has not specifically utilized it in his defense.[270]

As mentioned earlier,[271] the Tenth Circuit did not decide whether rule 16(b) requires disclosure of a defendant's statements concerning document relevancy as well as the documents themselves. Under rule 16(b), a defendant, after requesting discovery under rule 16(a), must permit inspection of documents which he intends to introduce at trial.[272] In this case, however, the defendant apparently had no exculpatory document within his "possession, custody or control" at the time of the rule 16(b) request.[273] If and when these exculpatory documents were found, the defendant would have been required to disclose them immediately.[274] Until the time when the actual documents are in the attorney's hands, any attorney-client communications as to their existence and potential use at trial should be nondiscoverable.[275] In view of the *Bump* decision, defense attorneys would be wise not to

264. *See* note 259 *supra* for text of FED. R. CRIM. P. 16(b).

265. 605 F.2d at 551.

266. United States v. Nobles, 422 U.S. 225, 235 (1975) (forced pre-trial disclosure applies only to evidence that defendant intends to introduce at trial and applies only when defendant makes discovery request); Williams v. Florida, 399 U.S. 78 (1970) (state rule, which required defendant to disclose intention to rely upon alibi defense, declared to be constitutional).

267. 605 F.2d at 552.

268. *Id.*

269. 401 U.S. 222 (1971).

270. 605 F.2d at 552. *See also* United States v. Havens, 100 S. Ct. 1912 (1980) (evidence suppressed as fruit of unlawful search and seizure may be used to impeach false testimony offered on cross-examination); United States v. McManaman, 606 F.2d 919 (10th Cir. 1979) (evidence suppressed, because obtained in violation of right to counsel, may be used to impeach false testimony).

271. *See* text accompanying notes 264-65 *supra*.

272. *See* note 259 *supra* for the text of FED. R. CRIM. P. 16(b).

273. FED. R. CRIM. P. 16(b)(1)(A). *See* note 259 *supra*.

274. FED. R. CRIM. P. 16(c).

275. *See id.* 16(b)(2). *See* note 259 *supra*.

Clearly, the purported evidence showing that Bump was in St. Louis at the time of the conspiracy constituted an alibi. Although this evidence was revealed pursuant to rule 16(b),

voluntarily disclose the existence of exculpatory documents unless certain that they will be used at trial. If the documents are not found, or, when found, are not used as evidence, the representations of their existence may prejudice the client by providing the prosecution with impeachment ammunition.

B. *Judge Recusal*

In *United States v. Gigax*,[276] one of the issues before the Tenth Circuit court was whether the district court judge should have recused himself because of personal prejudice against the defendant. The defendant, Gigax, was convicted of willfully making false statements on the Internal Revenue Service's W-4 form, where he claimed twenty-one allowances and exemptions. The defendant alleged that the judge had made statements, at the post-conviction hearings, which displayed personal prejudice against the defendant and against tax protesters in general.[277]

The Tenth Circuit, per Judge Barrett, began its analysis by comparing the two federal statutes pertaining to judge recusal.[278] Section 144 essentially states that, ten days before trial, an affidavit may be filed relating facts which demonstrate a personal prejudice, by the judge, for or against one of the parties in the case.[279] When a trial judge is presented with an affidavit under section 144, he must accept as true the facts alleging personal prejudice.[280] It is the challenged judge who then determines whether the factual allegations are legally sufficient to justify recusal.[281] Section 455, on the other hand, states that a judge, on his own initiative, must recuse himself when a reasonable man may question his impartiality.[282] The Tenth Circuit

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rather than as an alibi under rule 12.1, an argument could be made that a reasonable interpretation would apply provision (f) of rule 12.1 in either case. Rule 12.1(f) states that "evidence of an intention to rely upon alibi defense, later withdrawn; or of statements made in connection with such intention, is not admissible in any civil or criminal proceedings against a person who gave notice of the intention." FED. R. CRIM. P. 12.1(f). The Tenth Circuit, however, found similar statements admissible in this case on the grounds that although rule 16 was amended at the same time as rule 12.1, the "inadmissible" language was not included in the former. 605 F.2d at 552. Bump's statements, however, could not have been protected under rule 12.1(f) since he retained his alibi defense when testifying.

276. 605 F.2d 507 (10th Cir. 1979).

277. *Id.* at 513.

278. *Id.* at 510-12. *See* 28 U.S.C. §§ 144, 455 (1976 & Supp. II 1978).

279. Apparently, this remedy was not used by the defendant, for the alleged personal prejudice did not become apparent until the post-conviction hearings.

The Tenth Circuit has enforced strict compliance with the provisions of 28 U.S.C. § 144. Scott v. Beams, 122 F.2d 777 (10th Cir. 1941), *cert. denied*, 315 U.S. 809 (1942); Freed v. Inland Empire Ins. Co., 174 F. Supp. 458 (D. Utah 1959).

280. *See* Mitchell v. United States, 126 F.2d 550, 552 (10th Cir.), *cert. denied*, 316 U.S. 702 (1942).

281. United States v. Ritter, 540 F.2d 459 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976). *See* Note, *Disqualification of a Federal District Judge for Bias—The Standard under Section 144*, 57 MINN. L. REV. 749 (1973).

282. *See* Note, *Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. § 455*, 71 MICH. L. REV. 538 (1973).

The judge must determine whether a reasonable person would believe that a personal, as opposed to a judicial bias, existed. Judicial bias is simply an opinion on the law or facts developed during trial and is not sufficient to require disqualification of a judge. In contrast, personal bias stems from an extrajudicial source, such as a racial prejudice, and results in a decision

concluded that, under both statutes, the appropriate standard to be used is "whether a reasonable person would have questioned the district judge's impartiality," for the appearance of impartiality is virtually as important as the fact of impartiality.[283]

The alleged prejudicial conduct arose after the trial, at sentencing and bond hearings. The Tenth Circuit observed that a trial court judge has wide and almost unrestricted discretion during post-conviction hearings.[284] The judge may consider all of the pertinent circumstances relating to the defendant's background and the nature of the crime.[285] The Tenth Circuit believed that the trial judge in *Gigax* was only exercising this broad discretion, albeit in an aggressive manner. The court of appeals concluded that " '[a] judge cannot be disqualified because he believes in upholding the law, even though he says so with vehemence.' "[286]

C. *Trial Court Discretion*

In *United States v. Taylor*,[287] the Tenth Circuit was asked to review a discretionary order of the trial court. The district court had refused to grant a mistrial after a police officer testified, in front of the jury, that he had previously "worked a case on" defendant Taylor. The judge found it sufficient to exclude the evidence and to instruct the jury to disregard the testi-

based on irrelevancies. *See* United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. Hall, 424 F. Supp. 508 (W.D. Okla. 1975), *aff'd*, 536 F.2d 313 (10th Cir. 1976). *See also* Davis v. Cities Service Oil Co., 420 F.2d 1278 (10th Cir. 1970).

283. 605 F.2d at 512. *See* Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977); United States v. Hall, 424 F. Supp. 508 (W.D. Okla. 1975). If the allegations of bias and prejudice are merely the selfish and subjective opinions of a few, the judge has a duty not to disqualify himself. *See generally* Laird v. Tatum, 409 U.S. 824, 837 (1972); United States v. Bray, 546 F.2d 851 (10th Cir. 1976); United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977); Antonello v. Wunsch, 500 F.2d 1260 (10th Cir. 1974). When a judge's conduct might reasonably be questioned as motivated by bias or prejudice, it is mandatory that the judge recuse himself even if he holds a good faith belief that he could conduct an impartial proceeding. Blizard v. Fielding, 454 F. Supp. 318 (D. Mass. 1978), *aff'd sub nom.*, Blizard v. Frechette, 601 F.2d 1217 (1st Cir. 1979).

284. 605 F.2d at 512. *See* 18 U.S.C. § 3577 (1976) (no limitation on information concerning "background, character, and conduct" for sentencing convicted defendant); United States v. Tucker, 404 U.S. 443, 446-47 (1972) (no limitation on either the source or kind of information which can be considered by a sentencing judge). *But see* United States v. Thompson, 483 F.2d 527, 529 (3d Cir. 1973) ("[u]nder § 144 a defendant is entitled to trial before a judge who is not biased against him at any point of the trial and, indeed, most importantly, at sentencing."). *See also* Williams v. New York, 337 U.S. 241, 246-52 (1949) (discussion of different evidentiary rules governing trial and sentencing procedures).

Judicial prejudice exhibited during trial is treated differently. In *Hayes v. National Football League*, the court stated that "when a trial judge makes hostile remarks in the presence of a jury the courts use entirely different criteria to determine their prejudicial effect, reversal being premised upon the prejudicial effect upon the jury, rather than the personal bias or prejudice possessed by the judge." 463 F. Supp. 1174, 1182 (C.D. Cal. 1979).

285. 605 F.2d at 513-14. *See* United States v. Ochs, 595 F.2d 1247, 1262 (2d Cir. 1979) (sentencing judge's consideration of defendant's general character and prior record is permissible); United States v. Hayes, 589 F.2d 811, 827 (5th Cir. 1979) (consideration of defendant's background is within the judge's discretion).

286. 605 F.2d at 514 (quoting Knapp v. Kinsey, 232 F.2d 458 (6th Cir.), *cert. denied*, 352 U.S. 892 (1956)). *See also* Montgomery v. United States, 344 F.2d 955 (10th Cir. 1965) (sentencing judge may use forceful and emphatic language).

287. 605 F.2d 1177 (10th Cir. 1979).

mony.[288] The Tenth Circuit, per Judge Logan, noted that great deference is accorded to such a determination since the trial judge is in the best position to measure the impact of improper evidence on the jury.[289] The court of appeals enumerated the major factors to be considered in determining the necessity of a mistrial after impermissible remarks upon a defendant's criminal record:

> Mistrial is most likely to become necessary when the evidence is admitted, indicates on its face that defendant has been guilty of a prior crime, and the evidence plays a prominent part in the conduct of the trial. Conversely, prejudicial error is least likely to occur when the evidence is excluded, the jury is instructed to disregard it, and the reference is both vague and passing in nature.[290]

The court concluded that, in light of the fact that there was no further reference to the prior case involving Taylor, the short and insignificant nature of the remark, the cautionary instruction given to the jury, and the more than adequate evidence to sustain the conviction, there was no error.[291]

D. *Guilty Pleas*

In *Sena v. Romero*,[292] the defendant Sena petitioned for federal habeas corpus relief on the basis that his guilty plea in state court was uninformed, involuntary, and lacking a factual basis; all in violation of the Supreme Court decision in *Boykin v. Alabama*.[293] The *Boykin* Court held that due process requires that a plea of guilty be voluntary and intelligent since the plea involves the waiver of several constitutional rights.[294] While a fixed procedure need not be followed, the trial judge does have the affirmative duty to make an on the record examination of the accused to insure that he completely comprehends the consequences of his guilty plea.[295]

In *Sena*, the federal district court had ordered that an evidentiary hearing be held before a magistrate since the state court transcript was deficient, if not totally silent, on the guilty plea issue.[296] Although there was conflict-

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288. *Id.* at 1178.

289. *Id.* at 1179. *See* Lakeside v. Oregon, 435 U.S. 333, 341-42 (1978) (trial judge responsible for conducting fair trial); United States v. Evans, 542 F.2d 805 (10th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977) (mistrial order is within sound discretion of trial court).

290. 605 F.2d at 1179.

291. *Id. See* United States v. Cline, 570 F.2d 731, 736-37 (8th Cir. 1978); United States v. Dorn, 561 F.2d 1252, 1257 (7th Cir. 1977).

292. 617 F.2d 579 (10th Cir. 1980).

Also within this survey period, the Tenth Circuit held that a defendant's motion, made before sentencing, to withdraw his plea of guilty must be examined carefully and liberally. The court of appeals reversed a trial court's denial of the motion since there was no hearing on the plea withdrawal, and no reasons for denying the request were stated. United States v. Hancock, 607 F.2d 337 (10th Cir. 1979). *See* FED. R. CRIM. P. 32(d). *See also* Dorton v. United States, 447 F.2d 401, 411-12 (10th Cir. 1971).

293. 395 U.S. 238 (1969).

294. *Id.* at 242.

295. *Id.* at 243 (a waiver of constitutional rights cannot be presumed from a silent record); Carnley v. Cochran, 369 U.S. 506 (1962). *See also* McCarthy v. United States, 394 U.S. 459 (1969). *But cf.* United States v. Eaton, 579 F.2d 1181 (10th Cir. 1978) (defendant need not be informed of collateral consequences of a guilty plea).

296. 617 F.2d at 580.

ing evidence as to the adequacy of the trial court's inquiry into Sena's desire to plead guilty, the magistrate concluded that the defendant had failed to meet his burden of proof and that the preponderance of the evidence demonstrated that defendant's plea was voluntarily and knowingly made. The federal district court adopted these findings and denied the habeas corpus petition.[297]

The Tenth Circuit, per Judge Logan, reversed on the issue of burden of proof. The court of appeals held that, where there is a silent record, the burden is on the government to make "an affirmative showing" that the guilty plea and waiver of the defendant's constitutional rights were "knowingly, voluntarily and intelligently made."[298]

E. *Sentencing*

In *United States v. Klusman*,[299] the main issue presented was whether a judge's recollection of a defendant's earlier conviction is an improper consideration in sentencing. The trial judge remembered placing Klusman on probation for a previous drug offense. Before pronouncing sentence, the judge told the defendant that he was unsure of "what it is going to take to convince you that the drug business isn't a profitable business."[300]

The defendant's first conviction was as a juvenile and was subsequently set aside pursuant to the Federal Youth Corrections Act (FYCA).[301] Klusman argued that any subsequent consideration of this "expunged" conviction violated the statute. The government contended that the FYCA was intended to facilitate rehabilitation of youthful offenders and not to interfere with judicial discretion in subsequent sentencing matters.

The Tenth Circuit, per Judge Doyle, found it unnecessary to decide the issue of expungement. The court of appeals expressed doubt as to whether setting aside a conviction under the FYCA is the equivalent of expungement,[302] but Judge Doyle asserted that even if it is, there is no right to ex-

297. *Id.* at 581.

298. *Id. See* Boykin v. Alabama, 395 U.S. 238, 242 (1969); United States v. Pricepaul, 540 F.2d 417, 423-24 (9th Cir. 1976) (nothing more than a silent record is needed to shift the burden of proof to the government). *But cf.* Stinson v. Turner, 473 F.2d 913, 915-16 (10th Cir. 1973) (record indicating a voluntary and intelligent plea need not show express waiver of each constitutional right).

299. 607 F.2d 1331 (10th Cir. 1979). Within this survey period, the Tenth Circuit also decided United States v. Haney, 615 F.2d 907 (10th Cir. 1980) (judge may not commit defendant convicted under the Federal Youth Corrections Act, 18 U.S.C. § 5010(b) (1976), and also impose a special parole term provided in 21 U.S.C. § 841(b)(1)(A) (1976)), and United States v. Sisneros, 599 F.2d 946 (10th Cir. 1979) (failure to advise the defendant of special parole term is only a technical violation when the total sentence imposed is less than the maximum sentence which the court had told defendant he might receive).

300. 607 F.2d at 1333.

301. 18 U.S.C. § 5021 (1976). *See* United States v. Arrington, 618 F.2d 1119 (5th Cir. 1980); United States v. Purgason, 565 F.2d 1279 (4th Cir. 1977); United States v. Fryer, 545 F.2d 11 (6th Cir. 1976).

302. 607 F.2d at 1334. *See* United States v. Doe, 556 F.2d 391 (6th Cir. 1977) (FYCA provides a "unique shield" from prejudicial effects of conviction, but does not provide for expungement); United States v. McMains, 540 F.2d 387 (8th Cir. 1976). *See also* cases cited in note 301 *supra*.

punge a judge's memory.[303] The broad sentencing discretion vested in a trial judge permits consideration of relevant facts within his personal knowledge.[304] The court of appeals concluded that the judge "could be mindful of the prior conviction in the present circumstances."[305]

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303. 607 F.2d at 1334.

304. Judge Doyle also noted that the less than maximum sentence imposed reflected no prejudicial effect from the previous conviction. *Id.* at 1333. *See generally* United States v. Eaton, 579 F.2d 1181, 1183 (10th Cir. 1978); United States v. Green, 483 F.2d 469 (10th Cir.), *cert. denied*, 414 U.S. 1071 (1973).

305. 607 F.2d at 1334. *Cf.* Roberts v. United States, 445 U.S. 552 (1980) (no limitations, including consideration of defendant's lack of cooperation with the government, should be placed on sentencing considerations). *But cf.* United States v. Tucker, 404 U.S. 443, 447-49 (1972) (due process forbids trial court reliance on unconstitutional convictions in sentencing decisions).

EVIDENCE

THE SPOUSAL TESTIMONIAL PRIVILEGE AFTER *TRAMMEL V. UNITED STATES*

INTRODUCTION

On March 10, 1976, Otis Trammel, Jr., was indicted, along with two others, in the Federal District Court for the District of Colorado for importing heroin into the United States from Thailand and the Philippine Islands,[1] and for conspiracy to import heroin.[2] The indictment also named six persons as unindicted coconspirators, including the defendant's wife, Elizabeth Ann Trammel. When Elizabeth Trammel was granted "use" immunity in exchange for her testimony,[3] Otis Trammel moved to sever his case from the other two defendants.[4] He claimed that he would be prejudiced in a joint trial as the government was planning to call his wife as a witness. Otis Trammel asserted that he had not waived his privilege to bar adverse spousal testimony.[5] The trial court denied Trammel's motion to sever, stating that since the wife's testimony did not concern confidential communications, the spousal testimonial privilege was not available.[6]

Elizabeth Trammel testified extensively at the trial and, based exclusively on this testimony, Otis Trammel was convicted as charged.[7] The Tenth Circuit Court of Appeals, in a split decision, upheld the ruling of the trial court, concluding that the spousal testimonial privilege did not preclude "the voluntary testimony of a spouse who appears as an unindicted coconspirator under a grant of immunity from the Government."[8]

The Supreme Court granted certiorari[9] to reconsider *Hawkins v. United States*,[10] a case in which the High Court's pronouncement on the spousal testimonial privilege conflicted with the Tenth Circuit's holding in *Trammel*. The Court affirmed Trammel's conviction, not on the grounds espoused by the court of appeals, but on the same rationale that it had rejected twenty-two years earlier in *Hawkins*. The Court in *Trammel* modified the spousal testimonial privilege so that today the witness spouse alone has the privilege

1. 21 U.S.C. § 952(a) (1976) and 18 U.S.C. § 2 (1976).
2. 18 U.S.C. § 371 (1976).
3. 18 U.S.C. § 6002 (1976). Use immunity precludes the *use* of testimony or other compelled information, or the use of any information derived from such testimony or other compelled information, in a criminal prosecution of the witness. Kastigar v. United States, 406 U.S. 441, 453 (1972). Transactional immunity, in contrast, accords full immunity to the witness from *prosecution* for the offense to which the compelled testimony relates. *Id.*
4. Trammel v. United States, 445 U.S. 40 (1980).
5. *Id.*
6. Petition for Writ of Certiorari at 28, Trammel v. United States, 445 U.S. 40 (1980) (Hearing on Motion to Sever).
7. Trammel v. United States, 445 U.S. 40, 43 (1980).
8. United States v. Trammel, 583 F.2d 1166, 1168 (10th Cir. 1978).
9. Trammel v. United States, 440 U.S. 934 (1979).
10. 358 U.S. 74 (1958).

to refuse to give adverse testimony.[11] In so doing, the Court completed a 400-year evolution of the privilege. It brought the privilege into conformance with other testimonial privileges and struck a better balance between the social value of preserving marital harmony and the public's right to every person's evidence.

This comment will examine the evolution of the spousal testimonial privilege and its modification by the Court in *Trammel*. An analysis and critique of the factors relied upon by the Court in striking the new balance between the competing interests will follow. The comment will conclude with an examination of a major problem the courts will encounter in attempting to apply the *Trammel* version of the spousal testimonial privilege.

I. EVOLUTION OF THE MARITAL PRIVILEGE

A. *Origins of the Privilege*

The history of the spousal testimonial privilege is shrouded in "tantalizing obscurity."[12] There is no certain record as to the precise time of its origin or as to the thought process by which it evolved.[13] The earliest reported case in which the privilege was explicitly stated is *Bent v. Allot*,[14] an 1580 decision wherein the accused was allowed to prevent his spouse from testifying against him. The court, however, held that this privilege would be waived if the defendant permitted his spouse to take the stand to testify favorably.[15]

By the time of Coke's *Commentarie Upon Littleton*,[16] in 1628, the testimonial privilege had evolved into two complementary rules. The English courts were holding that a witness was both incompetent to testify in favor of a spouse and was privileged not to testify adversely.[17] The spousal incompetency rule was based upon the rationale that favorable spousal testimony was not trustworthy due to the common interests of a husband and wife who were considered but "two souls in one flesh."[18]

During the mid-1800's,[19] the spousal incompetency rule was statutorily abolished in most states when common interest was no longer considered a basis for disqualification.[20] These statutes, however, either expressly, or by judicial interpretation, retained a privilege for confidential communications.[21] Unlike the broad spousal testimonial privilege, this testimonial privilege extends only to confidential *communications* between husband and wife

11. 445 U.S. at 53.

12. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2227, at 211 (McNaughton rev. 1961).

13. *Id.*

14. 21 Eng. Rep. 50 (Ch. 1580).

15. *Id.*

16. L. COKE, A COMMENTARIE UPON LITTLETON 6b (1628).

17. Note, *Marital Testimony and Communication Privileges: Improvements and Uncertainties in the Courts*, 9 U. CAL. D. L. REV. 569, 570 (1976).

18. L. COKE, *supra* note 16, *quoted in* J. WIGMORE, *supra* note 12, § 2227, at 212.

19. This abolition did not occur in the federal courts until Funk v. United States, 290 U.S. 371 (1933).

20. J. WIGMORE, *supra* note 12, § 2333, at 645.

21. *Id.*

during the marriage and can be invoked even after death[22] or divorce.[23] The policy behind the confidential communications privilege is to promote the free interchange of confidences necessary for mutual understanding and trust.[24] There had been no need for a separate confidential communications privilege until this time because such information had been adequately protected by the all-encompassing spousal incompetency or testimonial privilege rules.[25]

There are two major justifications proffered for the spousal testimonial privilege.[26] The first justification is that the privilege fosters family harmony and avoids the marital dissension which would allegedly result from the admission of adverse testimony.[27] This rationale was originated by Lord Coke in 1628 and has become the leading modern day justification for the privilege.[28] The second reason advanced is that there is a natural repugnancy in compelling a husband or wife to be the means of the other's condemnation.[29] These justifications have been criticized on the premise that the privilege extends to marriages beyond salvation,[30] while at the same time, it does not extend to other family members whose testimony will be equally repugnant.[31]

Although the spousal testimonial privilege has been severely criticized,[32] it has survived, virtually intact, throughout the years.[33] It has been

22. Merlin v. Aetna Life Ins. Co., 180 F. Supp. 90, 91 (S.D.N.Y. 1960).

23. Pereira v. United States, 347 U.S. 1, 6 (1954).

24. *See* Wolfle v. United States, 291 U.S. 7, 14 (1934).

25. *Id.* See discussion in Note, *The Husband-Wife Testimonial Privilege in the Federal Courts*, 59 B.U.L. REV. 894, 896 (1979) [hereinafter cited as *Testimonial Privilege*].

26. Every current argument for the privilege had appeared in England by the early 1800's. Unfortunately, these reasons usually confused the spousal testimonial privilege with the confidential communications privilege or the spousal incompetency rule. Only the two reasons discussed in the text have any arguable merit. J. WIGMORE, *supra* note 12, § 2228, at 214-16.

27. *Id.*

28. In Hawkins v. United States, 358 U.S. 74, 77 (1958), the Court stated that "such a policy was necessary to foster family peace . . . ." This rationale was also the basis for Judge McKay's dissent in United States v. Trammel, 583 F.2d 1166, 1173 (10th Cir. 1978).

29. Wyatt v. United States, 362 U.S. 525, 535 (1960) (Warren, C.J., dissenting); J. WIGMORE, *supra* note 12, § 2228, at 217; Brief for Respondent at 15 n.10, Trammel v. United States, 445 U.S. 40 (1980).

30. *See, e.g.*, United States v. Walker, 176 F.2d 564 (2d Cir.), *cert. denied*, 338 U.S. 891 (1949).

31. J. WIGMORE, *supra* note 12, § 2228, at 217 n.2. Forcing a child to testify against his parents would be equally undesirable, yet the common law privilege does not extend, and never has extended to any family members other than the spouse. *Id.*

32. Professor McCormick claims that the privilege is "an archaic survival of mystical religious dogma." C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 66, at 145 (2d ed. 1972). Dean Wigmore claimed that the privilege was "the merest anachronism in legal theory and an indefensible obstruction to truth." J. WIGMORE, *supra* note 12, § 2228, at 221.

> One of the earliest critics of the privilege was Jeremy Bentham who stated:
>
> Let us . . . grant to every man a license to commit all sorts of wickedness, in the presence and with the assistance of his wife: let us secure to every man in the bosom of his family . . . a safe accomplice: let us make every man's house his castle; and . . . let us convert that castle into a den of thieves.

5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 332, 340 (1827), *quoted in* J. WIGMORE, *supra* note 12, § 2228, at 218.

33. The spousal testimonial privilege is not absolute and has long been subject to exceptions. The privilege will not apply when the witness spouse is the victim of the crime, Wyatt v. United States, 362 U.S. 525 (1960); or if the crime is against the spouse's property, Herman v. United States, 220 F.2d 219, 226 (4th Cir. 1955); or if the crime is committed against the child

retained in some form by a majority of the jurisdictions in the United States today.[34] The first indication that the privilege was not inviolable appeared in the Federal Rules of Criminal Procedure, which declared that the application of all privileges should be governed by common law principles "in light of reason and experience."[35] Some federal courts began to question the continuing viability of the privilege and used the "reason and experience" guideline as a basis for its modification.[36] Other courts felt inclined to await explicit guidance from the Supreme Court,[37] or Congress.[38]

B. *The* Hawkins *Precedent*

In 1958, the Supreme Court appeared to settle the controversy in *Hawkins v. United States*.[39] In *Hawkins*, the Court unequivocally reaffirmed the applicability of the spousal testimonial privilege in federal courts. The Court asserted that there was no reason why the privilege "based on the persistent instincts of several centuries should now be abandoned."[40] The Court in *Hawkins* stated that the value of the privilege in promoting marital harmony "has never been unreasonable and is not now."[41] The Court, however, made no attempt to determine if this policy would be advanced by the application of the privilege in the *Hawkins* case. Such a conclusion would have been unlikely as it was questionable whether there was any harmony in the Hawkins marriage to preserve.[42]

The government, in *Hawkins*, did not argue for the abolition of the testimonial privilege, but simply urged its modification in light of "reason and experience." The government maintained that the privilege should belong solely to the witness spouse.[43] This revision would permit the witness spouse to waive the privilege and testify if he or she should so choose. The Court explicitly rejected this argument, claiming that there was no valid distinction between "voluntary" and "compelled" testimony in this context. "The basic reason the law has refused to pit wife against husband or husband against wife in a trial . . . was a belief that such a policy was necessary to

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of either spouse, United States v. Allery, 526 F.2d 1362 (8th Cir. 1975); or if the marriage is fraudulent, Lutwak v. United States, 344 U.S. 604 (1953).

34. See listing as to how each state treats the spousal testimonial privilege in Trammel v. United States, 445 U.S. 40, 48-49 n.9 (1980).

35. FED. R. CRIM. P. 26, Pub. L. No. 76-675, ch. 445, 54 Stat. 688 (1940). This provision was deleted when the Federal Rules of Evidence became effective on July 1, 1975. *See* FED. R. CRIM. P. 26 and Amendment Notes, 18 U.S.C.A. (West 1975).

36. *See, e.g.*, United States v. Yoder, 80 F.2d 665 (10th Cir. 1935).

37. Brunner v. United States, 168 F.2d 281, 283 (6th Cir. 1948).

38. United States v. Walker, 176 F.2d 564 (2d Cir.), *cert. denied*, 338 U.S. 891 (1949). See discussion in *Testimonial Privilege*, *supra* note 25, at 898-99.

39. 358 U.S. 74 (1958).

40. *Id.* at 79. Justice Stewart, in his concurrence, was more skeptical. He stated that "[s]urely 'reason and experience' require that we do more than indulge in mere assumptions, perhaps naive assumptions, as to the importance of this ancient rule to the interests of domestic tranquility." *Id.* at 81-82 (Stewart, J., concurring).

41. *Id.* at 77.

42. The defendant's wife, a prostitute, had been living apart from the accused for several years, under an assumed name. At one point in his testimony, the defendant referred to Mrs. Hawkins as his "ex-wife." *Id.* at 82 n.4 (Stewart, J., concurring).

43. Brief for Respondents, Hawkins v. United States, 358 U.S. 74 (1958).

foster family peace . . . ."[44] and family peace would be disturbed as much, if not more so, by voluntary testimony.[45] The Court conceded that if one spouse were willing to testify against the other, there was a strong indication that the marriage was in disrepair. The Court went on to state, however, that many broken homes could be salvaged "provided no unforgivable act [was] done by either party."[46] In the Court's opinion, adverse testimony, either voluntary or compelled, would constitute such an "unforgivable act." While the Court acknowledged that the rule was open to modification under the "reason and experience" guideline, that guideline, in the Court's opinion, did not justify granting the privilege solely to the testifying spouse.[47]

C. *Congressional Response*

Fifteen years after *Hawkins*, Congress attempted to legislate a compromise on the spousal testimonial privilege dispute in the proposed Federal Rules of Evidence.[48] Proposed rule 505 provided that the accused in a criminal proceeding would have a privilege to prevent his spouse from testifying against him, subject to certain exceptions.[49] The Advisory Committee rejected the suggestion from the Department of Justice and Senator McClellan that the testifying spouse be made the sole holder of the privilege. In the Committee's judgment, "[t]he willingness of the testifying spouse is not . . . complete support for the conclusion that the marriage is past saving since there may be temporary pressures brought to bear."[50]

Unaccountably, the proposed rules did not provide for a confidential communications privilege. This absence caused a tremendous furor among legal scholars because the confidential communications privilege, unlike the spousal testimonial privilege, was generally accepted. One writer, criticizing the proposed rules, claimed that Congress had "adopted the wrong form of the wrong privilege, and [gave] it to the wrong spouse."[51]

Rather than jeopardize the passage of the rest of the rules, Congress substituted the current rule 501 which simply states that all testimonial privileges are to be "governed by the principles of the common law as they may

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44. 358 U.S. at 77.

45. *Id.*

46. *Id.* at 78.

47. While Justice Stewart was more inclined to believe that "reason and experience" warranted the requested change in the privilege, he felt that *Hawkins* was not the proper case for the modification. There was a question as to the voluntariness of the wife's testimony. *Id.* at 82-83 (Stewart, J., concurring). See discussion in text accompanying notes 99-108, *infra*.

48. 56 F.R.D. 183 (1973).

49. Proposed Fed. R. Evid. 505, 56 F.R.D. 183, 244-47 (1973). The proposed privilege did not apply to (1) crimes against the spouse or the children of either spouse, (2) matters occurring prior to the marriage, or (3) proceedings in which the spouse is charged with importing aliens for prostitution purposes in violation of 8 U.S.C. § 1328 (1976), or with violation of the Mann Act, 18 U.S.C. §§ 2421-2424 (1976).

50. 2 WEINSTEIN'S EVIDENCE ¶ 505 [01], at 505-6 to 505-7 (1980). This was the principal reason, given in a memorandum by Edward W. Cleary, Reporter for the Advisory Committee of the Federal Rules of Evidence, for rejecting this suggestion. *Rules of Evidence: Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 57-58 (1973).

51. M. Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353, 1381 (1973).

be interpreted by the courts . . . in the light of reason and experience."[52] The spousal testimonial privilege was thus left just where Congress had found it—governed by "reason and experience" as defined on a case-by-case basis.[53]

The purpose of the proposed rules was to provide uniformity among the federal courts. Rule 501, however, just as its predecessor in the federal criminal procedure rules, resulted in conflicting decisions. Courts utilized the reason and experience guideline of rule 501 to carve out exceptions to the privilege when both spouses jointly participated in a crime,[54] or when the marriage at issue appeared to be fraudulent or beyond preservation.[55] These exceptions evidenced the reluctance of the courts to impede the fact-finding process by applying a testimonial privilege of questionable validity.

II. *TRAMMEL V. UNITED STATES*

A. *Procedural History*

Trammel v. United States[56] is a prime example of the creativity employed by the courts to rationalize the admission of adverse spousal testimony over a defendant's objection. In the *Trammel* case, the district court, the Tenth Circuit Court of Appeals, and the United States Supreme Court all allowed admission of the spouse's hostile testimony. Significantly, each court found its own justification for so doing.

The district court apparently confused the spousal testimonial privilege with the confidential communications privilege. The court adjudged that the defendant Trammel could not prevent his wife from testifying about his criminal activities because the information was deemed not to be confidential.[57] The Tenth Circuit Court of Appeals affirmed the district court and held that the spouse's testimony was admissable, but for reasons other than those advanced by the district court.[58] The Tenth Circuit court held that there is an exception to the spousal testimonial privilege when the witness spouse is an unindicted coconspirator testifying under a grant of immunity.[59] The court of appeals further stated that the defendant's privilege did not "override" his spouse's grant of immunity and, therefore, *in light of reason*

52. FED. R. EVID. 501.

53. *See* S. REP. NO. 1277, 93d Cong., 2d Sess. 11, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7059; H.R. REP. NO. 650, 93d Cong., 2d Sess. 8, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7082; 120 CONG. REC. 40891 (1974) (remarks of Rep. Hungate).

54. United States v. Van Drunen, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974).

55. United States v. Cameron, 556 F.2d 752 (5th Cir. 1977); United States v. Fisher, 518 F.2d 836 (2d Cir.), *cert. denied*, 423 U.S. 1033 (1975).

56. 445 U.S. 40 (1980).

57. Petition for Writ of Certiorari at 28, Trammel v. United States, 445 U.S. 40 (1980) (transcript of hearing on defendant's motion for severence before Chief Judge Winner of the Federal District Court for the District of Colorado).

58. 583 F.2d 1166 (10th Cir. 1978). The court made it clear that the marital relationship spawns two distinct privileges—the spousal testimonial privilege and the confidential communications privilege—and that only the former was involved in the instant case. *Id.* at 1171 (McKay, J., dissenting). For a further analysis of the Tenth Circuit's reasoning, see Overview, *Criminal Law and Procedure, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 229, 260 (1980).

59. 583 F.2d at 1168.

and experience, her adverse testimony could properly be admitted.[60]

The Supreme Court granted certiorari[61] to reconsider its decision in *Hawkins v. United States*.[62] The differing rationales of the district court and of the court of appeals were indicative of the confusion and doubts which all of the courts were experiencing in applying the spousal testimonial privilege. Congress' attempt to legislate the privilege had failed[63] and the courts' application of the "reason and experience" guideline was producing inconsistent results.[64] The time was ripe for the Supreme Court to provide further guidance.

B. *The Government's Position*

The government advanced two arguments in support of its position. The United States urged the Court to affirm the decision of the court of appeals and hold that the spousal testimonial privilege does not apply when the husband and wife are joint participants in crime.[65] The government claimed that the rehabilitating aspect of the marriage is lost when both wife and husband are involved in a crime. The application of the privilege therefore would abuse the relationship it was designed to protect.[66] The United States asserted that an exception in this case was necessary in order to bring the spousal testimonial privilege into conformance with other testimonial privileges.[67]

The second argument espoused by the government was the bold assertion that the time had come to reconsider the *Hawkins* decision and award the testimonial privilege solely to the witness spouse.[68] This contention apparently surprised both the petitioner and the *amicus curiae*.[69] While both of these parties presented very cogent arguments as to why the exception relied upon by the court of appeals should not be upheld, neither addressed the government's second argument. This omission proved to be a crucial mistake.

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60. *Id.* (emphasis added). Judge McKay severely criticized this rationale in his dissent, stating that the immunity statutes are irrelevant and afford no basis for fashioning a new exception to the privilege. *Id.* at 1172 (McKay, J., dissenting).

61. 440 U.S. 934 (1979).

62. 358 U.S. 74 (1958).

63. *See* text accompanying notes 48-55, *supra*.

64. *Compare* United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978) *with* United States v. Lilley, 581 F.2d 182 (8th Cir. 1978).

65. Brief for Respondents at 25-29, Trammel v. United States, 445 U.S. 40 (1980). The government did not argue that a grant of immunity had to be involved. The government felt that the married couple's joint participation in a crime was sufficient to justify an exception to the spousal testimonial privilege.

66. *Id.* at 26.

67. Joint participation in a crime creates an exception to the confidential communications privilege, United States v. Mendoza, 574 F.2d 1373 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978); and to the attorney-client privilege, Clark v. United States, 289 U.S. 1, 15 (1933) (dictum); *In re* Doe, 551 F.2d 899, 901 (2d Cir. 1977); Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 342 (5th Cir. 1972); United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); United States v. Hoffa, 349 F.2d 20, 37 (6th Cir. 1965).

68. Brief for Respondents at 16-25, Trammel v. United States, 445 U.S. 40 (1980).

69. The Michigan Bar Association Standing Committee on Civil Procedure was granted leave to file a brief as *amicus curiae*. Trammel v. United States, 442 U.S. 939 (1979).

C. *The Holding in* Trammel

The Supreme Court recognized that the government's supplemental argument, that the spousal testimonial privilege should belong to the testifying spouse, had been expressly rejected in *Hawkins*. The Court, nevertheless, claimed that the caveat in *Hawkins*,[70] coupled with the language and the congressional intent behind rule 501 of the Federal Rules of Evidence,[71] confirmed its authority to reconsider the continued vitality of the *Hawkins* rule in light of "reason and experience."[72]

As further justification for a reconsideration of *Hawkins*, the Court pointed out that the trend in state law is toward divesting the accused of the privilege to bar adverse spousal testimony. The number of jurisdictions that recognize the privilege has decreased from thirty-one in 1958 to twenty-four in 1980.[73] A conclusion regarding the trend in state law, however, would not be accurate without an examination of the states' confidential communication statutes as well. These statutes are often broader in scope than the federal definition of "confidential communication."[74]

Having found sufficient cause to reconsider *Hawkins*, the Court went on to hold that

> "reason and experience" no longer justify so sweeping a rule as that found acceptable by the Court in *Hawkins*. Accordingly . . . the existing rule should be modified so that the witness spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying.[75]

III. ANALYSIS OF THE COURT'S RATIONALE

A. *Reason and Experience Re-examined*

The *Trammel* Court modified the spousal testimonial privilege on the pretext that it was no longer tenable in light of "reason and experience." Specifically, the Court claimed that the spousal testimonial privilege was broader in scope than the other testimonial privileges, that the ancient foundations for the privilege had long since disappeared, and that the willingness of one spouse to testify against the other was a reliable indication that the marital relationship was in disrepair. As Justice Stewart cogently pointed

70. In *Hawkins*, the Court stated that "this decision does not foreclose whatever changes in the rule [as] may eventually be dictated by 'reason and experience.'" 358 U.S. at 79.

71. Congress intended that Fed. R. Evid. 501 was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis." 120 CONG. REC. 40891 (1974) (statement of Rep. Hungate), *quoted in* Trammel v. United States, 445 U.S. 40, 47 (1980).

72. The petitioner claimed that the Court was without authority to reconsider *Hawkins*, as 28 U.S.C. § 2076 (1976) states that no rule "creating, abolishing, or modifying a privilege shall have . . . force or effect unless . . . approved by act of Congress." The Court dismissed this contention as inconsistent with the congressional intent behind Fed. R. Evid. 501. 445 U.S. at 47 n.8.

73. 445 U.S. at 48.

74. Many of the states' statutes regarding confidential communications are broad enough in scope to allow the accused to exclude adverse spousal testimony which would not fall within the federal definition of "confidential communication." See discussion in *Testimonial Privilege*, *supra* note 25, at 914-15.

75. 445 U.S. at 53.

out in his concurrence, reason and experience had not changed since *Hawkins*. The Court simply accepted the argument it had rejected in 1958.[76] An examination of the majority's reasoning demonstrates the accuracy of Justice Stewart's perception.

The Court claimed that the spousal testimonial privilege is in marked contrast to all other testimonial privileges as it is not limited to confidential communications. Instead, the spousal testimonial privilege permits the accused to exclude *all* adverse testimony.[77] While true, this distinction had not developed since *Hawkins* was decided.[78] Furthermore, it is invalid to compare the spousal testimonial privilege with testimonial privileges designed to promote confidence and trust between the parties. The cultivation of confidence and trust is not the primary purpose of the spousal testimonial privilege, nor was it ever purported to be. The principal purpose of the spousal testimonial privilege is to foster family harmony and to avoid the marital dissension which would result from "pitting" one spouse against the other in a trial.[79] To limit the spousal privilege to confidential communications would not further the goal of family harmony, and would moreover render the spousal privilege superfluous since confidential communications are independently privileged.[80] Apparently, the Court was aware of the infirmity of this comparison for, even after the *Trammel* modification, the privilege extends to *all* adverse spousal testimony. The post-*Trammel* spousal testimonial privilege encompasses adverse testimony relating to both actions and confidential communications. The significant difference after *Trammel* is *who* may invoke or waive the privilege.

The Court stated that the "ancient foundations for so sweeping a privilege have long since disappeared."[81] As Justice Stewart pointed out in his concurrence, however, these foundations disappeared long before 1958 and "this disappearance certainly did not occur in the few years that have elapsed between the *Hawkins* decision and this one."[82] It is also questionable whether the "ancient foundations" referred to by the Court ever pertained to this particular privilege.[83]

The Court's final basis for modifying *Hawkins* was its conclusion that, if one spouse is willing to testify against the other, there is a clear indication that the relationship is in disrepair. The Court reasoned that there is thus

76. *Id.* (Stewart, J., concurring).

77. *Id.* at 51.

78. This distinction has existed since the privilege was created some 400 years ago. To state that this distinction makes a difference in light of "reason and experience" in 1980, but not in 1958, overestimates the credulousness of the American public.

79. Hawkins v. United States, 358 U.S. 74, 77 (1958). See discussion in text accompanying notes 26-31, *supra*.

80. The confidential communications privilege already excludes this information. The Court made it clear that the confidential communications privilege was not at issue in the instant case. 445 U.S. at 45 n.5.

81. *Id.* at 52.

82. *Id.* at 54 (Stewart, J., concurring).

83. The Court was referring to Lord Coke's statement that the husband and wife were but "two souls in one flesh." See text accompanying notes 16-18, *supra*. This early rationale, however, supported the spousal disqualification for incompetency rule, not the privilege of the accused to prevent adverse spousal testimony.

very little marital harmony to be preserved by the privilege.[84] In *Hawkins v. United States*, the Court had stated that:

> the Government argues that the fact a husband or wife testifies against the other voluntarily is strong indication that the marriage is already gone. Doubtless this is often true. But not all marital flareups . . . are permanent. . . . [S]ome apparently broken homes can be saved provided no unforgivable act is done by either party. Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.[85]

It is noteworthy that the *Trammel* Court repudiated this reasoning without citation to the *Hawkins* decision.

A proper analysis of *Trammel* cannot be based upon the changing circumstances between 1958 and 1980. Any attempt to justify the *Trammel* decision on the ground that "reason and experience" has evolved since the *Hawkins* opinion was handed down will falter. The *Trammel* opinion is a de novo analysis by the Supreme Court and the Court's rationale must be examined independently of *Hawkins*. As Justice Stewart stated, any attempt to reconcile the *Hawkins* and *Trammel* opinions would be of "greater interest to students of human psychology than to students of law."[86]

B. *Balancing of Interests*

The Court in *Trammel* re-examined the balance between society's interest in preserving marital harmony and the public's right to every man's evidence. The Court prefaced this discussion by stating that every privilege impedes the pursuit of justice and will be recognized only to the extent that it promotes "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."[87]

The importance of preserving marital harmony is generally accepted.[88] The criticism of the rule has usually centered on whether the spousal testimonial privilege, as it existed prior to *Trammel*, sufficiently promoted that goal.[89] Permitting the accused to invoke the privilege fostered abuse because the privilege was often claimed when there was, in fact, no marital harmony to preserve. Too often the privilege was claimed to protect the defendant rather than the marriage.[90] Ironically, a prime example of this abuse was demonstrated in *Hawkins v. United States*.[91] In *Hawkins*, the Court upheld the right of the accused to invoke the privilege even though the defendant's wife, a prostitute, had been living apart from him for several years under an as-

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84. 445 U.S. at 52.

85. 358 U.S. at 77-78.

86. 445 U.S. at 54 (Stewart, J., concurring). Justice Stewart was paraphrasing a similar sentiment of Justice Jackson, as stated in Zorach v. Clauson, 343 U.S. 306, 325 (1951).

87. 445 U.S. at 50 (quoting Elkins v. United States, 364 U.S. 206, 234 (1960)).

88. Wigmore, however, claimed that the defendant's marital harmony should not be placed above society's need for the truth. J. WIGMORE, *supra* note 12, § 2228, at 216-18.

89. *See, e.g.*, *Testimonial Privilege*, *supra* note 25, at 912-15.

90. When Elizabeth Trammel was questioned whether divorce was contemplated, she testified that her husband had said that "I would go my way and he would go his." 445 U.S. at 42 n.1. This does not comport with the theory that Otis Trammel was concerned with his marital harmony.

91. 358 U.S. 74 (1958).

sumed name. At one point in his testimony, the defendant had referred to her as his "ex-wife."[92]

Aware of the privilege's abuses, the Supreme Court concluded that the privilege, in its present form, did not sufficiently promote the goal of preserving marital harmony so as to justify its burden on society's need for probative evidence.[93] Concluding that the spousal testimonial privilege was inappropriate, the Court was presented with the problem of modifying the privilege so as to allow more testimony into evidence while, at the same time, still fostering family peace. There were three alternatives. The Court could have: 1) abolished the privilege; 2) requested the courts to balance, in each case, the need for the evidence against the possible adverse impact on the marriage; or 3) awarded the privilege to the witness spouse alone.[94]

Abolition of the privilege would involve the type of policy decision that is properly left to the legislature. This approach was the one taken by all the states which have modified or abolished the privilege.[95] The individual balancing approach would be too difficult to apply and conducive to the generation of conflicting results.[96] In addition, this approach would put the defendant in the objectionable position of having to establish the "worth" of his marriage before the privilege could be invoked.

The most viable alternative was to grant the testimonial privilege to the witness spouse alone. This modification will enhance the opportunity for the introduction of probative evidence into testimony, will avoid the onerous judicial inquiry into the "worth" of a marriage, and will promote a uniform application of the spousal testimonial privilege throughout the federal judicial system. The advantages of this rule are substantial. Moreover, there is no reason to suspect that family peace will be jeopardized by the Court's empowering the witness spouse to decide whether he or she will testify. As one commentator has stated,

> if the rationale for the privilege is one of avoiding marital dissension, then the only spouse able to make a decision to testify on the basis of whether the marriage is worth saving is the *witness* spouse; the accused is understandably unlikely to be able to put aside his or her strong personal interest in suppressing adverse testimony, and would be likely to invoke the privilege regardless of marital considerations.[97]

The witness spouse is in a better position than either the accused or the court to decide whether the marriage is worth saving and what effect, if any, adverse testimony will have on the relationship. The *Trammel* modification also minimizes society's "natural repugnancy" in witnessing the condemnation of one spouse by the other. Society is less likely to be offended if the witness

92. *Id.* at 82 n.4 (Stewart, J., concurring).

93. 445 U.S. at 53.

94. *See Testimonial Privilege*, *supra* note 25, at 913-19, for a further discussion of the possible alternatives.

95. *Id.* at 915.

96. *Id.* at 917. "Because the harm that might be caused to the marriage would be difficult to show, while the need for evidence easy to show, any balancing would be illusory at best." *Id.*

97. M. Reutlinger, *supra* note 51, at 1384 (emphasis in original).

spouse has voluntarily chosen to testify.[98] A trial court should respect, therefore, any decision by the witness spouse to voluntarily testify. The key determination, however, is whether the testimony is indeed voluntary.

C. *Determining Voluntariness*

The Court's reasoning in *Trammel* is based upon the assumption that the witness spouse's testimony will be voluntary. If this is indeed the situation in every case, the grant of the privilege solely to the witness spouse will result in an ideal balance of the competing interests. If, however, a witness spouse is pressured into testifying, the privilege will become an absurdity, as the marital relationship will be subject to the whim of the prosecutor. This possibility was recognized by Justice Stewart in *Hawkins*, wherein he stated that

> such a rule [the witness spouse privilege] would be difficult to administer and easy to abuse. Seldom would it be a simple matter to determine whether the spouse's testimony were really voluntary, since there would often be ways to compel such testimony more subtle than the simple issuance of a subpoena, but just as cogent.[99]

In *Hawkins*, the witness spouse had been imprisoned and was released under a three thousand dollar bond. The bond, however, was conditioned upon her appearance in court as a witness for the government. As Justice Stewart observed, "these circumstances are hardly consistent with the theory that [the witness'] testimony was voluntary."[100]

The situation in the *Trammel* case was strikingly similar. Elizabeth Trammel was given immunity on the condition that she testify against her husband.[101] The government conceded that she would be in danger of losing her freedom if she refused to testify.[102] When the witness spouse is placed in a position where he or she must choose between the marriage and freedom, it would be difficult for any trial court to conclude that the testimony is voluntary.[103] The Court in *Trammel* summarily dismissed the voluntariness issue with the conclusory statement that the witness spouse's testimony was not rendered involuntary by the fact that she chose to testify only after a grant of immunity and assurances of lenient treatment.[104] In light of the circumstances, the voluntariness of Elizabeth Trammel's testimony is highly suspect. The voluntariness issue certainly deserved a more thorough analysis by the Court.

Notwithstanding this imperfection, the Court's *Trammel* decision is to be commended. It is imperative, however, that the federal district courts adopt precautions to ensure that the witness spouse's testimony is, in fact, volunta-

98. *Id.* at 1385.

99. 358 U.S. at 83 (Stewart, J., concurring).

100. *Id.*

101. 445 U.S. at 42.

102. The government, in its brief, stated that the invocation of the privilege by the accused could place the witness in danger of losing her freedom. Brief for Respondent at 20-21, Trammel v. United States, 445 U.S. 40 (1980).

103. This was the principle reason why the Advisory Committee on the Federal Rules of Evidence rejected the suggestion that the witness spouse be the sole holder of the privilege. *See*, note 50 *supra* and accompanying text.

104. 445 U.S. at 53.

rily given. An examination of the jurisdictions which have adopted the witness spouse privilege indicates that the states have been able to effectively deal with this problem.[105] The precautions generally followed by these jurisdictions include the requirement that the trial judge make an independent determination that the witness spouse is aware of the privilege not to testify, and that the witness spouse has knowingly and voluntarily waived that privilege.[106] This bench determination should be made outside of the presence of the jury,[107] and neither party should be permitted to comment to the jury regarding the invocation of the privilege.[108]

Undoubtably, many occasions will arise where the witness spouse will feel pressured to testify, for a variety of reasons. If the federal district courts adopt precautions to ensure the voluntariness of testimony, both the marital relationship and the rights of the accused should be adequately protected. While the voluntariness of spousal testimony is a serious question, and deserves consideration more thorough than that afforded it by the Court in *Trammel*, the voluntariness determination requirement is not a fatal flaw in the *Trammel* modification of the spousal testimonial privilege.

CONCLUSION

The Court, in its *Trammel* decision, has completed a 400-year evolution of the spousal testimonial privilege. By granting the privilege solely to the witness spouse, the Court has struck a more equitable balance between society's interest in preserving marital harmony, on the one hand, and the public's right to every person's evidence, on the other. In addition, the Court has silenced the major critics of the testimonial privilege who had argued that a marriage in which one spouse is willing to testify against the other is beyond salvation,[109] and that the accused should not be "consulted in determining whether justice shall have its course against him."[110]

As with most solutions, however, the Court has raised new problems. Unless it can adequately be shown that the witness spouse's testimony is indeed voluntary, the spousal testimonial privilege will become a mere charade. The prosecutor, with his abilities to pressure a witness spouse, will be in the position of deciding whether a particular marriage is "worthy" of the privilege. The prosecutor's dominance is compounded when the husband and wife have jointly participated in a crime. Through the use of prosecutorial discretion and immunity, the government can put great pres-

105. *See, e.g.*, Postom v. United States, 322 F.2d 432 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 917 (1964); Taylor v. State, 25 Ala. App. 408, 147 So. 647 (1933); People v. Lankford, 55 Cal. App. 3d 203, 127 Cal. Rptr. 408 (1976); People v. Marsh, 270 Cal. App. 2d 365, 75 Cal. Rptr. 814 (1969); Carroll v. State, 147 Ga. App. 332, 248 S.E.2d 702 (1978); Broome v. State, 141 Ga. App. 538, 233 S.E.2d 883 (1977); Commonwealth v. Stokes, 374 N.E.2d 87 (Mass. 1978).

106. *See, e.g.*, People v. Lankford, 55 Cal. App. 3d 203, 210, 127 Cal. Rptr. 408, 412 (1976); Commonwealth v. Stokes, 374 N.E.2d 87, 96 n.9 (Mass. 1978).

107. Postom v. United States, 322 F.2d 432 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 917 (1964); Broome v. State, 141 Ga. App. 538, 233 S.E.2d 883 (1977); Commonwealth v. Stokes, 374 N.E.2d 87 (Mass. 1978).

108. Holyfield v. State, 365 So. 2d 108 (Ala. App.), *cert. denied*, 365 So. 2d 112 (Ala. 1978).

109. C. MCCORMICK, *supra* note 32, § 66, at 145.

110. J. WIGMORE, *supra* note 12, § 2228, at 216-17.

sure on one spouse to testify against the other. Although this problem raises serious complications for trial courts, it can effectively be dealt with if the courts take precautionary measures to ensure the voluntariness of testimony. The courts have successfully dealt with the voluntariness determination in other areas.[111] There is no reason to believe that the courts will have any more difficulty in determining the voluntariness of spousal testimony.

Dennis C. Keeler

111. Voluntariness requires an "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

FEDERAL PRACTICE AND PROCEDURE

OVERVIEW

The recent decisions of the Tenth Circuit Court of Appeals should promote no major changes in the area of federal practice and procedure. In the past term, the court interpreted several federal rules, made some clarifications in the area of jurisdiction, and demonstrated that it will closely supervise the discretionary actions of the federal district courts. This article presents a survey of the court's most significant decisions in the field.

I. TRIAL COURT SUPERVISION

The most important decisions of the Tenth Circuit in this area pertained to the appellate court's supervision of the activity of the district courts. Specifically, the court addressed the appropriateness of a writ of mandamus as a tool to supervise the district courts' discretion, the proper scope of a pre-trial order, and the abdication of judicial responsibility through verbatim adoption of one party's findings of fact or via an unwarranted reference to a special master.

A. *Review under Rule 21(a) of the Federal Rules of Appellate Procedure*

There are three methods of obtaining appellate review. The most common approach is an appeal under 28 U.S.C. section 1291.[1] This route, however, is restricted to "final orders" of the district court[2] and precludes appeal which is "tentative, informal or incomplete."[3] The purpose of this rule is to avoid piecemeal review.[4]

The second method of review is through an appeal under 28 U.S.C. section 1292(b).[5] This method allows for the appeal of orders, not final for purposes of section 1291, which the district court is willing to certify for appeal.[6]

The third, a seldom used procedure for appellate review, is through a writ of mandamus under the All Writs Act.[7] The Supreme Court has made it clear that mandamus is not a substitute for the appeal procedure under section 1291 or section 1292(b).[8] It is an extraordinary writ and will only be

1. 28 U.S.C. § 1291 (1976).
2. *Id.*
3. Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 546 (1949).
4. *Id.* Lack of jurisdiction is an exception to the "final order" rule. Daiflon, Inc. v. Bohanon, 612 F.2d 1249, 1253 (10th Cir. 1979), *rev'd on other grounds*, 49 U.S.L.W. 3368 (U.S. Nov. 17, 1980) (No. 79-1895).
5. 28 U.S.C. § 1292(b) (1976). *See* FED. R. APP. P. 21(a).
6. The district judge may certify an order for appeal if he is of the opinion that there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b) (1976).
7. 28 U.S.C. § 1651(a) (1976). *See* FED. R. APP. P. 21(a).
8. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). *See also* Daiflon, Inc. v. Bohanon, 49 U.S.L.W. 3368 (U.S. Nov. 17, 1980) (No. 79-1895).

granted when the petitioner has established that his right to the writ is "clear and indisputable"[9] and that the district court's action was so extraordinary that it evidenced arbitrariness and clear abuse of discretion.[10]

The Tenth Circuit was petitioned for a writ of mandamus in *State Farm Mutual Auto Insurance Co. v. Scholes*[11] and in *Daiflon, Inc. v. Bohanon*.[12] In the former case, the petition was denied; in the latter case it was granted in part.

In *Scholes*, State Farm Insurance Company appealed from the district court's dismissal of its declaratory judgment action. State Farm was seeking a judicial declaration relieving it of any further obligation to defend Scholes, an insured of State Farm, on the grounds that Scholes had violated various clauses in the insurance contract.[13] The district court ordered the action dismissed without prejudice pending state proceedings which involved the same parties, the same facts and identical issues.[14] For purposes of review, the court of appeals treated the dismissal without prejudice as the equivalent of a stay of proceedings.[15]

As a preliminary matter, the court of appeals stated that an appeal under section 1291 was not the proper procedure for review in this case. While certain appellate courts have held otherwise,[16] the Tenth Circuit stated that the district court's decision to stay the proceedings was not a "final order" for purposes of appellate jurisdiction and that mandamus would be the appropriate remedy.[17] Despite this procedural defect, the circuit court was willing to treat State Farm's "appeal" as an "application for leave to file a petition for writ of mandamus pursuant to the All Writs Act."[18] This act of benevolence proved to be illusory, however, as the court went on to deny State Farm's application, stating that "the district court was clearly justified in staying proceedings before it pending final determination . . . in state court."[19]

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9. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 662 (1978); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953).

10. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953).

11. 601 F.2d 1151 (10th Cir. 1979).

12. 612 F.2d 1249 (10th Cir. 1979), *rev'd*, 49 U.S.L.W. 3368 (U.S. Nov. 17, 1980) (No. 79-1895).

13. 601 F.2d at 1153.

14. *Id.*

15. The district court stated that "[t]he practical effect of such a stay [of proceedings] would be indistinguishable from a dismissal without prejudice in this case." *Id.* at 1155 (quoting the district court's opinion). The majority did not address this distinction because it was not raised by the parties. *Id.* at 1156 n.3. Judge Logan, in his concurrence, disagreed. A dismissal without prejudice is different from a stay of proceedings; a stay eliminates any statute of limitations problem and "leaves the judge free to reconsider his decision to defer or to take other action." *Id.* at 1156 (Logan, J., concurring).

16. *See* Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092 (9th Cir. 1976); Drexler v. Southwest Dubois School Corp., 504 F.2d 836 (7th Cir. 1974) (en banc); Druker v. Sullivan, 458 F.2d 1272 (1st Cir. 1972).

17. 601 F.2d at 1154 (citing Pet Milk Co. v. Ritter, 323 F.2d 586, 588 (10th Cir. 1963)). It is questionable whether this classification had any effect on the outcome of the case. Judge Logan believed that an appeal was the proper procedure since he treated the dismissal without prejudice as a "final order", yet he still agreed with the result reached by the majority. *Id.* at 1156 (Logan, J., concurring).

18. 601 F.2d at 1154.

19. *Id.* at 1155.

The circuit court relied on *Will v. Calvert Fire Insurance Co.*,[20] wherein the United States Supreme Court stated that "[i]t is . . . well settled that a district court is 'under no compulsion to exercise [its] jurisdiction' "[21] and that the decision to stay proceedings is "largely committed to the 'carefully considered judgment' . . . of the district court."[22] Based on this authority, Judge Barrett, writing for the circuit court's majority, went on to hold that State Farm's right to have its declaratory judgment action heard was not "clear and indisputable."[23] On the contrary, the district court was clearly justified in its actions because simultaneous prosecution of the case in state and federal court would result in wasteful duplication of counsel, courts, litigants and witnesses.[24]

Daiflon, Inc. v. Bohanon[25] was an antitrust action in the District Court for the Western District of Oklahoma. The jury returned a verdict of $2.5 million in favor of the plaintiff Daiflon. The trial judge denied the defendant's motion for a judgment notwithstanding the verdict. Instead, the judge vacated the jury verdict and granted a new trial on all issues.[26] The trial judge appeared to have based his ruling on the excessive award of damages and on the wrongful admission of unidentified exhibits into evidence.[27] Daiflon petitioned the circuit court to issue a writ of mandamus[28] to prohibit any further proceedings except as necessary to enter judgment on the verdict.[29]

The Tenth Circuit, through Judge Doyle, acknowledged that there are only three circuit court cases in which mandamus has been invoked to review a lower court's order for a new trial.[30] Despite this sparse precedent, Judge Doyle held that mandamus would be proper when

> there is a disregard for proper procedure, or misuse of judicial power in the trial [court constituting] a clear abuse of discretion. If it is found that there was a plain or clear error in the judge's evaluation of the facts and that the granting of the new trial was gross or excessive to the extent that it is extraordinary, it would seem that

20. 437 U.S. 655 (1978).

21. *Id.* at 662 (quoting Brillhart v. Excess Ins. Co., 316 U.S. 491, 494 (1942)).

22. *Id.* at 663 (quoting Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 818 (1976)).

23. 601 F.2d at 1155.

24. *Id.* The stay was further justified because the state court obtained jurisdiction long before the federal court did, no issue of federal law was involved, and the state action would resolve all of the issues arising out of the transaction. *Id.*

25. 612 F.2d 1249 (10th Cir. 1979), *rev'd*, 49 U.S.L.W. 3368 (U.S. Nov. 17, 1980) (No. 79-1895).

26. Daiflon, Inc. v. Allied Chem. Corp., No. 72-483-B (W.D. Okla. 1979) (attached as Exhibit A to Daiflon, Inc. v. Bohanon, 612 F.2d at 1261). Although the district court did not formally vacate the judgment, the court of appeals felt that this was a mere "oversight". Daiflon, Inc. v. Bohanon, 612 F.2d at 1252.

27. 612 F.2d at 1252.

28. 28 U.S.C. § 1651(a) (1976); FED. R. APP. P. 21(a).

29. 612 F.2d at 1251. An order granting a new trial is not a "final order" for § 1291 purposes. Kanatser v. Chrysler Corp., 199 F.2d 610, 615 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953).

30. 612 F.2d at 1257. *See* Peterman v. Chicago, Rock Island & Pacific R.R., 493 F.2d 88 (8th Cir.), *cert. denied*, 417 U.S. 947 (1974); Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2d Cir. 1971); Kanatser v. Chrysler Corp., 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953).

vacating the order granting the new trial would be permissible.[31] Using this standard, the circuit court went on to grant supervisory mandamus on the issue of liability but declined to vacate the trial court's order as to damages.[32] The circuit court's reason for granting mandamus on the issue of liability was that the trial judge offered no "rational basis" for vacating the verdict as to liability of respondent.[33] Ordering a new trial on liability invaded the province of the jury and denied the plaintiff's seventh amendment rights.[34]

On the issue of damages, however, the court of appeals was less willing to interfere. Since the trial court heard the evidence in its entirety, it was in a better position to judge this issue. "[S]ubject only to the limitation of the Seventh Amendment the trial court's discretion is most full and complete when the court is considering a factual question such as damages."[35] Thus, even though the court of appeals was not necessarily in agreement with the trial court's determination,[36] the appeals court was unwilling to vacate that section of the trial court's order granting a new trial on the issue of damages.

Daiflon is notable because it is only the fourth case wherein a federal appeals court agreed to issue a writ of mandamus to review a lower court's order granting a new trial. The case is also important for sharpening the distinction between liability and damages with regard to the scope of the trial court's discretion. The court implied that mandamus will seldom, if ever, be issued in the latter case. On the issue of liability, however, the court of appeals will be less inclined to defer to the trial court's discretion. In summary, the Tenth Circuit has indicated that it will supervise the lower courts, by extraordinary writs if necessary, to ensure against any abuse of discretion.

B. *Adherence to Pre-Trial Orders*

In *Trujillo v. Uniroyal Corp.*,[37] the district court rejected tendered evidence and jury instructions on the grounds that they deviated from the pre-trial order.[38] The action was a strict liability claim against Uniroyal for the manufacture and sale of a tire which caused injury to the plaintiff when it exploded during mounting. The defendant claimed that the plaintiff's injury was caused by his own misuse in attempting to mount a 16-inch tire on a 16.5-inch rim.[39] The pre-trial order which set out the plaintiff's claim stated that the tire was defective and that Uniroyal was liable under the rule of strict liability.[40] Shortly before trial the defendant learned that the plain-

31. 612 F.2d at 1255.
32. *Id.* at 1260.
33. *Id.*
34. *Id.*
35. *Id.* at 1259.
36. *Id.* at 1260. The circuit court referred to possible misconceptions by the trial judge of some of the facts related to damages.
37. 608 F.2d 815 (10th Cir. 1979).
38. *Id.* at 816.
39. The plaintiff testified that he thought he was working with a 16-inch rim. *Id.* at 817.
40. New Mexico has adopted the rule of strict liability as set out in Restatement (Second) of Torts § 402A (1965). *See* Fabian v. E.W. Bliss Co., 582 F.2d 1257, 1260-61 (10th Cir. 1978).

tiff planned to base liability on a "failure to warn" theory. The defendant claimed that the plaintiff was trying to change the theory of the case and deviate from the pre-trial order.[41] The trial court agreed and excluded the proffered evidence on that issue. The jury found for the defendant.

The Tenth Circuit, in an opinion by Judge McKay, stated that if parties deviate from a properly drawn pre-trial order, the trial court may exclude the evidence.[42] A proper pre-trial order is one that sharpens and simplifies the issues and represents a complete statement of the parties' claims.[43] If, however, "an adverse party is content with a boilerplate pretrial order, it cannot later demand that the trial court enforce it as though it were a specific and meaningful narrowing of the issues."[44] Since the "rule of strict liability" in New Mexico includes the lack of adequate warning, the court of appeals correctly found that the evidence relating to that issue could not be excluded.[45]

The case is important in two respects. First, the court announced a judicial policy that procedural devices are to be liberally construed in order to avoid dismissing otherwise meritorious lawsuits on technicalities.[46] This rule of construction is to apply to all pretrial procedural tools and not just to the pleadings.[47] Second, the case is yet another example of the Tenth Circuit's willingness and determination to supervise its district courts.

C. *Findings of Fact*

The mechanical adoption of one litigant's proposed findings of fact without adequate evidentiary support is an abdication of the judicial function. This was the holding of the Tenth Circuit in *Ramey Construction Co. v. Apache Tribe*.[48] The trial court in *Ramey* adopted verbatim the defendant's proposed findings of fact and conclusions of law without citation to any legal authority.[49]

Rule 52 of the Federal Rules of Civil Procedure requires the trial judge to make findings of fact and conclusions of law. This rule has two purposes. First, the procedure fosters care on the part of the trial judge "in considering

41. 608 F.2d at 817. Strict liability in New Mexico includes liability for failure to warn. *See* Skyhook Corp. v. Jasper, 90 N.M. 143, 560 P.2d 934 (1977). Therefore, it is unclear why the defendant felt that this was a change of theory unless prior communications between the parties had led defendants to believe that the plaintiffs were limiting their claim to the manufacturing or design aspects of strict liability. The court of appeals opinion sheds no light on this issue.

42. 608 F.2d at 817, *citing* Southern Pac. Transp. Co. v. Nielson, 448 F.2d 121, 125 (10th Cir. 1971).

43. *See* Christenson, *The Pre-Trial Order*, 29 F.R.D. 362 (1960).

44. 608 F.2d at 818. The court easily distinguished two cases cited by the defendant wherein the pre-trial orders were specific and narrowly drawn. *See* Rigby v. Beech Aircraft Co., 548 F.2d 288 (10th Cir. 1977); Rodrigues v. Ripley Indus., Inc., 507 F.2d 782 (1st Cir. 1974).

45. Had the pre-trial order limited the claim to manufacturing or design defects, the district court would have been correct in excluding the evidence related to the failure to warn. Southern Pac. Transp. Co. v. Nielson, 448 F.2d 121 (10th Cir. 1971).

46. 608 F.2d 815, 818 (10th Cir. 1979).

47. *Id.*

48. 616 F.2d 464 (10th Cir. 1980).

49. The only changes by the trial court were in grammar, in the wording (but not substance) of one conclusion of law, and in a citation to the Federal Rules of Civil Procedure. In addition, the last proposed conclusion of law was dropped as unnecessary. *Id.* at 466.

and adjudicating the facts in the dispute."[50] Second, it allows for meaningful review in that the appellate court can determine the trial court's "discerning line for decision."[51]

The court of appeals stated that the trial court may have performed its judicial functions; the court could not tell from the record. The trial court dismissed complex factual allegations and legal theories in a conclusory manner without citation to authority.[52] Certain issues did not receive even summary treatment by the trial court. Without explicit reference in the record, the court of appeals was unable to determine if the trial court had considered the issues.[53]

The most glaring example of the inadequacy of verbatim adoption was evidenced by the trial court's rejection of the plaintiff's theory of damages. The trial court adopted a conclusion of law consisting of five reasons for rejecting the proposed theory; each reason was separated by the phrase "and/or."[54] Presumably, the defense intended the trial court to accept some or all of the suggested reasons and then delete the appropriate conjunction. However, the deletion was not made. "While a court may properly phrase its conclusions in the alternative, this conclusion as adopted [was] merely tentative."[55]

The court of appeals acknowledged that the trial court should have the aid of the parties in its decision-making. Reliance on one party's proposed findings of fact and conclusions of law would have been permissible if the trial court had taken some steps to ensure that it had fulfilled its function. Specifically, the trial court could have 1) had the parties exchange proposals and object to the counterproposals with appropriate fact and law references,[56] 2) annotated the proposals with references to documentary evidence and testimony,[57] or 3) heard oral arguments following submission of the proposals to ensure judicial scrutiny.[58] None of these safeguards were employed.

While the circuit court noted that the trial court did not act in a judicially irresponsible manner,[59] it made clear that the verbatim adoption of

50. *Id.* at 466-67 (quoting Featherstone v. Barash, 345 F.2d 246, 249 (10th Cir. 1965)). This procedure also defines what is being decided for purposes of estoppel and res judicata for future cases. 345 F.2d at 249.

51. *Id.* at 466 (quoting G.M. Leasing Corp. v. United States, 514 F.2d 935, 940 (10th Cir. 1975), *modified on other grounds*, 429 U.S. 338, *cert. denied*, 435 U.S. 923 (1977)).

52. *Id.* at 467.

53. There was no reference in the record to Ramey's claim for interest on money which was admittedly due but improperly retained or to the Tribe's claim of sovereign immunity. *Id.* at 467-68.

54. *Id.* at 467.

55. *Id.*

56. *Id.* at 468 (citing Heterochemical Corp. v. United States Rubber Co., 368 F.2d 169 (7th Cir. 1966)).

57. *Id.* (citing Schnell v. Allbright-Nell Co., 348 F.2d 444 (7th Cir. 1965), *cert. denied*, 383 U.S. 934 (1966)).

58. *Id.* (citing Halliburton Co. v. Dow Chem. Co., 514 F.2d 377 (10th Cir. 1975)).

59. The court of appeals denied plaintiff's request to remand the case to another judge. Comments by the trial court which the plaintiff felt were indicative of inadequacy were merely "self-deprecating modesty and, given the volume of evidence, simple realism." *Id.* at 469, 469 n.7.

the proposed findings of fact and conclusions of law did not fulfill the judicial function. The case was remanded and the trial court was ordered to make new and significantly more detailed findings to give the court of appeals and the parties a fuller explanation of the basis for the decision.[60]

D. *Reference to Special Master*

The Tenth Circuit addressed the propriety of a reference to a Special Master pursuant to rule 53(b)[61] in *Polin v. Dun & Bradstreet, Inc.*[62] The trial court issued two orders of reference which bestowed extraordinary powers on the Special Master. The Special Master was empowered to hear evidence, make findings of fact which would be final, conduct a trial, and recommend judgment which the trial court promised to follow.[63] The result of these orders was "to confer upon the Special Master all of the power that the trial court enjoyed and perhaps more."[64] Following a pre-trial conference, the Special Master granted the defendant's motion for summary judgment. This judgment was confirmed that same day by the trial judge in a one-sentence ruling.[65]

The circuit court, per Judge Doyle, reversed the judgment, stating that this was a complete abdication of the judicial function.[66] Approval of this action would "fly in the face of Rule 53(b)"[67] which states that reference "shall be the exception and not the rule."[68] References to a Special Master will only be approved where exceptional circumstances are shown.[69] The Supreme Court has stated that neither congestion of the docket nor complexity nor length of trial will suffice to warrant a reference.[70] In the instant case, there were no circumstances that would warrant a reference to a Special Master.[71]

In those cases where exceptional circumstances warrant a reference to a Special Master, the Master's report is merely evidence which the jury can disregard.[72] In the instant case, even though a jury trial was contemplated,

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60. *Id.* at 469.

61. Rule 53(b) provides:

> A reference to a master shall be the exception and not the rule. In actions to be tried to a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

FED. R. CIV. P. 53(b).

62. No. 78-1648 (10th Cir. Feb. 25, 1980).

63. *Id.*, slip op. at 2-3.

64. *Id.*, slip op. at 3 n.2.

65. *Id.*, slip op. at 1-2.

66. *Id.*, slip op. at 10.

67. *Id.*

68. FED. R. CIV. P. 53(b), *supra* note 61.

69. Bartlett Collins Co. v. Surinam Navig. Co., 381 F.2d 546, 550-51 (10th Cir. 1967).

70. LaBuy v. Howes Leather Co., 352 U.S. 249, 259 (1967). The Court, in *LaBuy*, did concede that a complex accounting was an element that might permissibly be referred to a Special Master. *Id.*

71. The appellate court recognized that Judge Barrow, the trial judge, was in failing health at the time of reference. The proper procedure, however, would have been to transfer the case to another district judge. No. 78-1648, slip op. at 10.

72. Some commentators suggest that a reference to a Special Master would rarely be ap-

the Special Master was empowered to make final findings of fact and to enter a binding judgment. Such an order was not only an abdication of the judicial function but it also invaded the province of the jury and denied to the plaintiff his seventh amendment rights.

Through these decisions, the Tenth Circuit has emphasized that it is going to take the time and effort to supervise the district courts. The court of appeals will not hesitate to intervene to protect the interests of the parties if it finds that the trial court abused its discretion.

II. FEDERAL JURISDICTION

A. *Subject Matter Jurisdiction*

The Tenth Circuit, in *Naisbitt v. United States*,[73] ruled that the federal courts do not have jurisdiction under the Federal Tort Claims Act for claims arising out of intentional torts committed by government employees. The plaintiffs, victims of intentional torts committed by two off-duty airmen, sued the government under the Act and claimed in their suit that the government had been negligent in its supervision of the airmen. The district court granted the government's motion to dismiss based on section 2680(h)[74] of the Act. Under this section, the government retains its immunity when the liability claim arises from intentional torts. Immunity is waived in the Act, however, for negligence claims.

The Tenth Circuit, in an opinion written by Judge Doyle, upheld the district court's dismissal of the claim.[75] The appellate court gave support to the lower court's interpretation of section 2680(h) which allows a negligence claim against the government when an intentional tort has been committed by a non-employee, such as an inmate in a federal prison, whom the government has a duty to supervise. This interpretation bars a negligence claim when the tort has been committed by a government employee. This employee/non-employee distinction, Judge Doyle noted, was first articulated by the Second Circuit in *Panella v. United States*[76] and has been adopted in most subsequent decisions.

> It is believed that [this distinction] stems from the proposition that where the employee has committed a tortious intentional act, even though it is not with the approval of his employer, the government, nevertheless, he is so closely connected with the government that the intentional act is imputed to the government. Since the gov-

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propriate in a non-jury trial as the Special Master and not the court would in fact decide the case. *See, e.g.*, 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2605 (1971).

73. 611 F.2d 1350 (10th Cir.), *cert. denied*, 101 S. Ct. 240 (1980).

74. 28 U.S.C. § 2680(h) (1976) provides that the waiver of immunity shall not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . ."

75. The trial court reasoned that, although based on negligence, the plaintiffs' claims were, by their character, intentional torts. Where the government is sued for failure to supervise non-employees, the sole basis of the government's liability is negligent supervision. Here, negligence was an alternate theory, not the sole basis of the liability claim.

76. 216 F.2d 622 (2d Cir. 1954).

> ernment has waived liability only in negligence cases in accordance with § 2680(h), an attempt to establish liability on a negligence basis is indeed an effort to circumvent the retention of immunity provided in § 2680(h).[77]

A strong thread running through a number of cases, Judge Doyle summarized, is a recognition of this governmental immunity when the tortfeasor is a government employee. The two airmen were government employees; application of section 2680(h) therefore barred the plaintiff's claims.[78]

The Tenth Circuit found that federal jurisdiction was present in a declaratory judgment action concerning an insurance policy with a $10,000 limit in *Farmers Insurance Co. v. McClain*.[79] The defendants had asserted that, under 28 U.S.C. section 1332, district courts only have jurisdiction when "the matter in controversy *exceeds* the sum or value of $10,000, exclusive of interest or costs."[80] Because the insurance policy was limited to $10,000, Farmers claimed that the plaintiff had not met the statutory requirement for federal court jurisdiction.

Judge McWilliams, writing for the Tenth Circuit, reasoned that the costs and interest excluded from the jurisdictional amount by the statute were only those which might be allowed in connection with the federal action. Farmers' potential liability, however, would include both the costs of defending the claim in the state court proceeding and the costs which might be assessed against the insured. These additional obligations would be considered part of the maximum limit of Farmers' liability and therefore would cause the amount in controversy to exceed $10,000. The opinion cited numerous cases which have held that costs incurred or incurrable in state proceedings could be considered as a part of the amount in controversy for federal jurisdictional limits.[81] Farmers' obligations under the policy might cause the company to incur some expenses in connection with the pending state court proceeding; thus, the jurisdictional limit was met.

The Tenth Circuit made law out of dictum by holding in *Hackney v. Newman Memorial Hospital, Inc.*[82] that the appointment of a fiduciary who has a substantial beneficial interest in existing litigation is immune from a challenge for diversity jurisdiction purposes. The plaintiff, a resident of Colorado, was appointed the successor administratrix of her deceased mother's estate. In this capacity she commenced a wrongful death action in the District Court for the Western District of Oklahoma. Shortly afterwards, the plaintiff moved to Oklahoma. The trial court dismissed the wrongful death action on the grounds that the plaintiff had been appointed administratrix in violation of 28 U.S.C. section 1359. This "anti-collusion" statute denies jurisdiction when a party has been "improperly or collusively made or joined to invoke the jurisdiction of such court."[83] The trial court's holding was

77. 611 F.2d at 1355.
78. *Id.* at 1356.
79. 603 F.2d 821 (10th Cir. 1979).
80. 28 U.S.C. § 1332 (1976) (emphasis added).
81. 603 F.2d at 823.
82. 621 F.2d 1069 (10th Cir.), *cert. denied*, 101 S. Ct. 397 (1980).
83. "A district court shall not have jurisdiction of a civil action in which any party, by

based on a finding that the primary purpose of the plaintiff's appointment was to invoke federal jurisdiction.

In reversing the trial court's dismissal, Judge Logan cited the leading case of *McSparran v. Weist*[84] wherein the Third Circuit had construed the words "improperly or collusively" to prohibit the joinder of "a nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest in the dispute or controversy."[85] The courts, following the *McSparran* interpretation of section 1359, have found the appointment of "straw parties" as fiduciaries solely for the purpose of gaining diversity jurisdiction to be collusive but have implied in dictum that collusion would not be present if the appointee had a substantial relationship to the litigation.

Declaring that the "instant case tests the dictum,"[86] Judge Logan, writing for the appellate court, reasoned that the plaintiff, a beneficiary entitled to a portion of the proceeds from the wrongful death action, had a real, substantial stake in the litigation. Thus, she was not a straw party collusively and improperly appointed. The challenge to her appointment failed and the district court was deemed to have jurisdiction to hear the suit that the plaintiff had commenced. Chief Judge Seth, in concurrence, noted that the "primary purpose" test used by the trial court does not apply the "improper and collusive" statutory standard. While motive and intent are elements to be considered in a determination of the collusive and improper standard, "[a] motive or intent to secure federal jurisdiction does not of itself defeat jurisdiction."[87]

B. *Personal Jurisdiction*

The minimum contacts standard of *International Shoe Co. v. Washington*[88] was cited in two Tenth Circuit cases involving personal jurisdiction.

Schreiber v. Allis-Chalmers Corp.[89] involved the transfer of a products liability action from a Mississippi to a Kansas federal district court. The plaintiff, a citizen of Kansas, had been injured in Kansas while working on a rotobaler manufactured by the defendant. Plaintiff brought suit in Mississippi, basing federal jurisdiction on diversity of citizenship. The defendant, a Delaware corporation headquartered in Wisconsin and qualified to do business in Mississippi for many years, sought a change of venue to Kansas. The case was transferred to the Kansas federal district court which was bound, as the transferee court, to apply the state law of the transferor court.[90] The

assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359 (1976).

84. 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969).

85. 402 F.2d at 873.

86. 621 F.2d at 1071.

87. *Id.*

88. "It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there." 326 U.S. 310, 320 (1945).

89. 611 F.2d 790 (10th Cir. 1979).

90. Van Dusen v. Barrack, 371 U.S. 612, 639 (1964).

Kansas district court granted summary judgment to the defendant on alternate theories. The trial court first held that the Mississippi court did not have jurisdiction to hear the case because the Mississippi statute violated federal due process. The statute provided that a foreign corporation doing business in Mississippi is subject to suit regardless of where the cause of action accrued.[91] In the alternative, the trial court asserted that if the Mississippi court did have jurisdiction, the action was barred by Kansas' two-year statute of limitations for tort and warranty claims.

On appeal, the Tenth Circuit, per Judge McWilliams, reversed the summary judgment order, finding that the assumption of jurisdiction by the Mississippi court did not offend federal due process. The court of appeals cited a Ninth Circuit decision[92] which had reviewed the authorities on the minimum contacts requirement and had concluded that if a foreign corporation's activities in the forum state are "continuous and systematic," it could be served in causes of action unconnected to forum activities. In answer to the trial court's contention that jurisdiction was prohibited due to the recent Supreme Court ruling in *Shaffer v. Heitner*,[93] the court of appeals distinguished the quasi-in-rem action in that case from the personal jurisdiction question of the instant case, noting that the Court in *Shaffer* had held that jurisdiction could be maintained in a state court proceeding if the minimum contacts standard of *International Shoe* had been met.[94] Allis-Chalmers had been conducting continuous and systematic, although limited, parts of its general business in Mississippi. Therefore, the state statute authorizing jurisdiction over such a foreign corporation when the cause of action had accrued in another state did not violate federal due process standards. Furthermore, the court held that Mississippi's six-year statute of limitations for tort and warranty claims would control because the Kansas federal court was obligated to follow Mississippi law as it presently existed.[95]

Minimum contacts with the forum state sufficient to establish personal jurisdiction were found lacking in *Burke v. Tom McCall & Associates*.[96] The plaintiff, a resident of New Mexico, brought suit in New Mexico federal district court against California and Texas employment agencies, alleging age discrimination under a provision of the Age Discrimination in Employment Act of 1967.[97] The defendants, both of whom had been contacted by the plaintiff by mail, filed motions to dismiss claiming a lack of personal jurisdiction. Neither firm conducted business in New Mexico nor contacted any potential employers in the state on the plaintiff's behalf. The trial court granted the defendants' motion to dismiss.

On appeal, Judge Doyle, writing for the Tenth Circuit, affirmed the

91. MISS. CODE ANN. § 79-1-27 (1972). The trial court felt that Shaffer v. Heitner, 433 U.S. 186 (1977), prohibited a state from opening its courts to a proceeding against a foreign corporation when the cause of action accrued from events arising in another state.

92. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977).

93. 433 U.S. 186 (1977).

94. 611 F.2d at 794.

95. *Id.*

96. No. 79-1145 (10th Cir. Aug. 21, 1979).

97. 29 U.S.C. § 216(b) (1976).

trial court's finding of a lack of personal jurisdiction. Because the cause of action arose under a federal law, the federal standard for jurisdiction set out in *International Shoe Co.* was applicable. "Under *International Shoe Co.* it is necessary for the plaintiff to demonstrate that the defendant had substantial contact with the state."[98] Because there had been no transaction of business by either defendant in New Mexico, neither fairness nor due process would permit personal jurisdiction to attach by the mere receipt of a letter.

C. *Appellate Jurisdiction*

The Tenth Circuit restricted appellate jurisdiction in class action suits in *Bowe v. First of Denver Mortgage Investors*[99] by holding that dismissal of a complaint for failure to prosecute does not permit appellate review of a trial court's order denying certification of the class action. The plaintiff in *Bowe* filed a class action suit alleging violations of the Securities and Exchange Act,[100] the Colorado Securities Act[101] and fraud. The district court denied the motion for certification of the class action and the plaintiff appealed. In dismissing the appeal, the Tenth Circuit determined that the order denying certification did not constitute a final judgment subject to review nor did it satisfy the "death knell"[102] or collateral order[103] exceptions to 28 U.S.C. section 1291,[104] the final judgment rule. On remand, the plaintiff again sought, but failed, to obtain class certification. The trial court dismissed the plaintiff's individual complaint for failure to prosecute. The plaintiff once again appealed to the Tenth Circuit, alleging that the dismissal of her complaint constituted a final judgment, making the lower court's order denying certification reviewable on appeal.[105]

Judge Doyle, writing for the court, agreed that the dismissal for failure to prosecute was a final judgment. However, the matter to be reviewed on appeal was the trial court's dismissal of the complaint and *not* the order denying class certification.[106] Judge Doyle asserted that review of a decertification order, which is interlocutory in nature, would conflict with the *Livesay* doctrine. In *Livesay*,[107] the Supreme Court held that a district court's pre-

98. No. 79-1145, slip op. at 5.

99. 613 F.2d 798 (10th Cir. 1980).

100. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. 78jjj(c) (Supp. III 1979).

101. COLO. REV. STAT. § 11-51-123 (1973).

102. The "death knell" exception to the final judgment rule allowed the appeal of an order denying class certification if such order was likely to sound the "death knell" of the litigation. This would occur when a plaintiff seeking representative status would find it economically difficult, without the incentive of a potential group recovery, to pursue his complaint to final judgment; such a plaintiff could seek appellate review of the denial of class certification. *See* Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

103. In order to qualify for the collateral order exception, enunciated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), an interlocutory order must determine conclusively the disputed question, it must resolve an issue which is separate from the merits of the claim, and it must be effectively unreviewable on appeal from a final judgment.

104. "The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1976).

105. 613 F.2d at 799.

106. *Id.*

107. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

judgment order denying certification of a class action was not appealable under the final judgment rule of section 1291. The Supreme Court opinion ended the circuit courts' use of the "death knell" exception, by which parties denied class certification could obtain appellate review if the order was likely to sound the "death knell" for the litigation. The Supreme Court opposed further use of the exception because the "death knell" doctrine authorized indiscriminate interlocutory review of decisions made by the trial judge and "defeat[ed] one vital purpose of the final-judgment rule—'that of maintaining the appropriate relationship between the respective courts.' "[108]

The claim of the class representative in the *Bowe* case, Judge Doyle concluded, was not distinguishable from the claim in *Livesay*. To permit appellate review of the order denying certification merely because the plaintiff's individual complaint had been dismissed for failure to prosecute would circumvent the clear mandate of *Livesay*. Judge Doyle reasoned that any plaintiff desirous of appellate review could simply allow dismissal of his claim for class representation on the grounds of failure to prosecute. If review of the dismissal included review of the order denying certification, an intolerable loophole to *Livesay* would be created.

Judge Doyle noted that the Ninth Circuit had reached a similar conclusion in *Huey v. Teledyne, Inc.*[109] He recognized the hardship which strict application of this rule would place on plaintiffs for whom denial of class action review terminated the litigation. Nonetheless, the *Livesay* doctrine, which represents further difficulties for plaintiffs seeking class action representation,[110] compelled the Tenth Circuit court to conclude that they were without authority to review "the class issue . . . .at this preliminary stage . . . notwithstanding that the individual case of the class representative stands dismissed."[111]

An appeal cannot be taken from a federal magistrate's order for entry of a final judgment, the Tenth Circuit held in the *per curiam* decision of *Harding v. Kurco, Inc.*[112] The district court had ordered consolidated actions brought under the Fair Labor Standards Act and referred them to the United States Magistrate for trial. The parties, pursuant to the district court's local rule 17(a), which required that stipulations for trial to a magistrate include review procedures, stipulated that the magistrate's judgment would be final and directly appealable to the court of appeals. Following the trial, the defendants appealed from the judgment which was entered for the plaintiffs on the magistrate's direction and order.

In dismissing the appeal, the Tenth Circuit court cited the Federal Magistrates Act, which authorizes the assignment to a magistrate of only those additional duties that are not inconsistent with the Constitution and laws of the United States. The district judge retains supervisory power over the magistrate's decisions and is ultimately responsible for that decision.

108. *Id.* at 476.
109. 608 F.2d 1234 (9th Cir. 1979).
110. *See also* Comment, *Federal Jurisdiction—Class Actions—Orders Relating to Class Certification Not Appealable Under 28 U.S.C. § 1291 Prior to Final Judgment*, 49 MISS. L.J. 973 (1978).
111. 613 F.2d at 802.
112. 603 F.2d 813 (10th Cir. 1979).

Thus, the court of appeals concluded that "the discretionary authority to direct entry of a final judgment is a fundamental and exclusive power of an Article III judge."[113] The magistrate's order was vacated and the appeal dismissed without prejudice so that district court review would be facilitated.

An appeal from a district court judgment interpreting oil and gas pricing regulations promulgated by the Federal Energy Administration (FEA) was dismissed by the Tenth Circuit for lack of jurisdiction, in *Oklahoma Association of Energy Consumers & Producers v. FEA*.[114] The plaintiff association asserted that the issue before the trial court was FEA adherence to proper procedures in the promulgation of regulations, thus giving the circuit court jurisdiction over the appeal. The government moved to dismiss the appeal, contending that the Temporary Emergency Court of Appeals (TECA) had exclusive appellate jurisdiction in this matter.

In dismissing the appeal, the Tenth Circuit established that the district court's jurisdiction was based on the provisions of the Economic Stabilization Act. The Supreme Court, in *Bray v. United States*,[115] held that all appeals arising under this Act were within the exclusive jurisdiction of the TECA. The trial court's determination dealt with "exactly the types of regulations on oil and gas pricing . . . that the TECA was established to handle."[116] The court of appeals rejected a Second Circuit opinion[117] allowing a bifurcated appeal to both a circuit court and to the TECA, declaring that "[t]here is little to be gained . . . other than mass confusion, by the promoting of simultaneous circuit-court-TECA appeals."[118]

As the question of ripeness affects subject matter jurisdiction, the court may raise the issue sua sponte at any time, the Tenth Circuit ruled in their denial of jurisdiction in *In re Grand Jury, April, 1979*.[119] A federal grand jury had issued subpoenas duces tecum to the defendant. While motions to quash the subpoenas were being heard, the grand jury indicted the defendant. The government then applied for issuance of pre-trial subpoenas, requesting the same documents sought by the grand jury. The district court had not ruled upon the government's application for pre-trial subpoenas at the time of this government appeal from a lower court ruling which partly sustained and partly overruled the motions to quash the grand jury subpoenas.

The defendant argued, on appeal, that the grand jury's indictment, which came without the grand jury first obtaining the requested documents, mooted the subpoena issue. The government, however, contended that it had applied for issuance of pre-trial subpoenas and believed that the defendants would raise the same defenses to their subpoenas as were raised to the enforcement of the grand jury subpoenas. Thus, the government asserted

113. *Id.* at 814.
114. No. 79-1847 (10th Cir., Oct. 23, 1979).
115. 423 U.S. 73, 74 (1975).
116. No. 79-1847, slip op. at 4.
117. Coastal States Marketing, Inc. v. New England Petroleum Corp., No. 79-7330 (2d Cir., Aug. 1, 1979).
118. No. 79-1847, slip op. at 5.
119. 604 F.2d 69 (10th Cir. 1979).

that the issues presented were "capable of repetition, yet evading review."[120]

Judge Barrett's Tenth Circuit opinion rejected both of these arguments, but he dismissed the appeal for want of ripeness, an issue which the court of appeals may raise voluntarily because it affects the court's subject matter jurisdiction. The court declined to issue an advisory opinion on the propriety of the government's subpoena applications, declaring that "it is preferable to defer decision of the constitutional issues raised until there is an actual, concrete need to decide them."[121] Although the appellate court recognized that the defendants were likely to raise the same defenses to the government's subpoenas when issued, the court decided to delay resolution of the question until a time closer to the disputed event.

D. *Removal Jurisdiction*

Parties who seek removal to federal court are not estopped from challenging that court's jurisdiction on appeal, the Tenth Circuit ruled in *Hudson v. Smith*.[122] The district court, however, had the authority to remand a separate and independent claim while retaining a non-removable cause of action.

In *Hudson*, the plaintiff, assignee of a third party's interest in a corporation, brought suit in Oklahoma state court. The first claim sought damages for breach of contract; the second claim sought dissolution of the corporation formed by the contract under an Oklahoma statute which provided for dissolution when there was a deadlock in corporate ownership. The state court granted the defendant's petition for removal to federal district court; the plaintiff then moved to remand the action to the state court. The federal district court remanded the claim for dissolution to state court but retained the breach of contract claim pursuant to 28 U.S.C. section 1441.[123] This statute gives the district court the discretion either to try or to remand separate and independent causes of action which have been joined with non-removable claims. Trial on the breach of contract claim resulted in a jury verdict for the plaintiffs. Defendants appealed, claiming that the federal district court to which they sought removal now lacked jurisdiction. Defendants charged that both causes of action should have been remanded to the state court.

Judge McWilliams' opinion rejected the argument that a party who petitions for removal to a federal court and then loses his case in that court is estopped from seeking remand to a state court. The decision rested on the authority of *American Fire & Casualty Co. v. Finn*.[124] Instead, the judge looked to the provisions of section 1441(c) to determine if the plaintiff's two causes

120. *Id.* at 72.
121. *Id.*
122. 618 F.2d 642 (10th Cir. 1980).
123. 28 U.S.C. § 1441 states:
> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

124. 341 U.S. 6 (1951).

of action were separate and independent, thus giving the district court discretionary authority to remand the dissolution claim but retain the breach of contract action. In determining that the two claims were indeed separate and independent, the appellate court reasoned that the outcome of the breach of contract claim would not affect the question of whether the corporation's ownership was deadlocked. Because the dissolution action would be pursued regardless of who prevailed in the contract claim, the trial court properly held that the two claims were separate and independent and properly retained the contract claim.

III. FEDERAL RULES OF CIVIL PROCEDURE

A. *Rule 15(b)—Amendments to Conform to the Evidence*

In *In re Santa Fe Downs, Inc.*,[125] the Tenth Circuit declared that under the minimum procedural requirements of rule 15(b), a plaintiff's suit may be dismissed from court when the pleadings contain an incorrect statutory citation.[126] This is particularly true when the plaintiff's legal theory is reliant upon the statute miscited.[127]

In the original complaint, the trustee of the bankrupt, Santa Fe Downs, claimed that defendants' mortgages were void under a section of the Bankruptcy Act unrelated to consensual liens.[128] Therefore a showing of the lienholders' knowledge of the insolvency was not required. The court, through Judge McKay, declared that defendant mortgagees properly objected when Santa Fe Downs' trustee sought to introduce evidence of the mortgagees' knowledge of insolvency.[129]

The deficiencies in the trustee's complaint were repeatedly noted. Because the trustee failed to amend the pleadings, and because rule 15(b) makes no provision for automatic amendment when proper objections are made to the admission of evidence,[130] the Tenth Circuit determined that the bankruptcy court committed reversible error in refusing the mortgagees' motion for dismissal on the grounds that the plaintiff's presentation of evidence failed to show a right to relief.[131] Underlying the appellate court's determination in the case was its recognition that while the Federal Rules of Civil Procedure may have abolished full fact pleading, the rules must accommo-

125. 611 F.2d 815 (10th Cir. 1980).

126. *Id.* at 816.

127. *Id.*

128. The trustee's complaint stated that the suit was brought to declare liens null and void pursuant to § 67(a)(1) of the Bankruptcy Act, 11 U.S.C. § 107(a)(1) (1976), (current version at 11 U.S.C. §§ 349(b), 457(b), (d), 551 (Supp. III 1979)), which is directed at liens obtained by attachment, judgment, levy, or other equitable process or proceedings. 611 F.2d at 816.

129. 611 F.2d at 816.

130. FED. R. CIV. P. 15(b), in relevant part, reads:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby *and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.*

(emphasis added).

131. FED. R. CIV. P. 41(b).

date a defendant by requiring that he be given some notice of the case against him.[132] Therefore, plaintiff's error in citation of a statute essential to the claim for relief was more than a mere technical error. Dismissal of the suit during the trial would not have constituted the tyranny of formalism which rule 15(b) seeks to prevent.[133]

B. *Rule 56—Summary Judgment*

St. Louis Baptist Temple, Inc. v. FDIC[134] provided the Tenth Circuit with an opportunity to reiterate that, in considering a motion for summary judgment, a district court may take judicial notice sua sponte of its own records and the records of other courts—if called to the court's attention by the parties—to determine the existence of a genuine issue of material fact.[135] The appeal arose from the Colorado District Court's entry of summary judgment for the defendant FDIC in an action brought by St. Louis Baptist Temple, Inc. (Temple). Temple challenged the validity of a sheriff's sale in satisfaction of a judgment debt. The judgment had been rendered against Soldiers of the Cross, Inc. (Soldiers) and Goff Memorial Library (Goff), which Temple alleged to be its predecessors in title. The suit, originally brought in the district court of Jefferson County, Colorado, was removed to the federal district court by the FDIC. It challenged the validity of the sale for insufficiency of publication and inadequacy of the sale price. Temple, on appeal, contended that the district court erred in granting summary judgment based on judicial notice of records from an earlier litigation and appeal involving the same tract of land.

The Tenth Circuit, through Judge Barrett, reasoned that court records are verifiable with certainty and may be judicially noticed when brought to the attention of the court by the parties.[136] The records of the earlier case and appeal were properly considered by the district court because they were directly relevant to the determination of the existence of a genuine issue of a material fact. The prior litigation and affirmance by the Tenth Circuit established that Soldiers and Goff were estopped collaterally from attacking both the judgment and the sheriff's deed, and the related doctrines of *res judicata* and collateral estoppel applied against the plaintiff, Temple. Since the plaintiff was attempting to litigate the same issues "the second time around,"[137] utilization of judicial notice, whether requested or not,[138] was considered especially appropriate.

132. 611 F.2d at 816.
133. *Id.* at 817.
134. 605 F.2d 1169 (10th Cir. 1980).
135. *See* Ginsberg v. Thomas, 170 F.2d 1 (10th Cir. 1948).
136. 605 F.2d at 1172.
137. In its memorandum opinion in civil action no. C-4227, the district court noted that Soldiers, Goff, and the president of Temple, Reverend Bill Beeny, were closely connected in identity. The court stated that "this is the second time around for defendant's counsel and for Rev. Bill Beeny who quarterbacked the case for defendants." *Id.* at 1174.
138. *Id.* at 1174-77.

C. *Rule 60(a)—Relief from Judgment or Order—Clerical Mistakes*

A district court's inadvertent mistake in ordering a party guilty of civil contempt to pay $1200 compensatory damages, when evidence indicated that the figure should have been $12,000, properly fell under the scope of rule 60(a)'s provision allowing sua sponte correction of errors arising from oversight or omission,[139] so the Tenth Circuit held in *Allied Materials Corp. v. Superior Products Co.*[140] The appellant, Superior Products, was found to have violated a consent decree by making false and misleading representations about joint sealant which Allied had contracted to provide for construction of an addition to Stapleton Airport in Denver. Superior Products contended on appeal that the trial court could not amend its findings on its own motion.[141]

In rejecting Superior Products' contention that the district court's mistake triggered the application of rule 52(b), which rule would have required that the court's amendment be preceded by the parties motion for amendment, the Tenth Circuit court defined the following boundary between the rules under discussion: rule 52(b) will apply if the court *intended* to say, write, or record the words which are the subject of the amendment and later finds them to be wrong; rule 60(a) will apply if the error in speech, writing, or recordation was not what the court intended.[142] The mistake involved in *Allied Materials*, which the court described as an inadvertent removal of one zero in the judgment order, was clearly of the rule 60(a) variety. Therefore, the district court was found to have made no error in correcting the omission on its own initiative.[143] While the appellee, Allied Materials, prevailed on the procedural issues involving the federal rules, the court of appeals accepted Superior Products' contention that the $12,000 compensatory damages award was not supported by the evidence. The court of appeals offered Allied the choice of an award of $7,000, as the amount of damages supported by the evidence, or a retrial of the case on the issue of damages.[144]

D. *Rule 60(b)—Relief from Final Judgment Due to Mistake, Inadvertence, Excusable Neglect, or Newly Discovered Evidence*

In a decision upholding a district court's denial of a rule 60(b) motion[145] for relief from a default judgment, *C.I.T. Corp. v. Allen*,[146] the Tenth

139. FED. R. CIV. P. 60(a) reads, in relevant part:
Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

140. 620 F.2d 224 (10th Cir. 1980).

141. Superior argued on appeal that rule 52(b), not rule 60(a), applied. *Id.* at 225-27. FED. R. CIV. P. 52(b) states: "*Upon motion of a party* made not later than ten days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." (emphasis added).

142. The court of appeals repeated this distinction as it was set forth in Kelley v. Bank Bldg. & Equip. Corp., 453 F.2d 774, 778 (10th Cir. 1972).

143. 620 F.2d at 226.

144. *Id.* at 226-28.

145. The rule states, in part:
On motion and upon such terms as are just, the court may relieve a party or his legal

Circuit extensively quoted prior decisions to emphasize that the grant of a motion to set aside a judgment is within the sound discretion of the trial court. The trial court's determination will not be disturbed in the absence of a showing of abuse.

Defendant Allen had defaulted on two promissory notes secured by using heavy construction equipment as collateral. Upon Allen's default, the balance had been accelerated, the equipment had been repossessed by C.I.T., and, following public sales of the equipment, C.I.T. obtained, by default, a deficiency judgment against the defendant. Over six weeks after being served, and some twenty days after the district court's entry of the default judgment in favor of C.I.T., Allen filed his original answer. Seven days later, he filed a motion to set aside the default judgment alleging that his failure to respond was the result of excusable neglect. He also stated that he had a meritorious defense because the construction equipment was sold below its fair market value. Subsequently, Allen submitted additional memoranda alleging that C.I.T. had allowed a third party to use the repossessed equipment prior to sale, that the third party had damaged the equipment, and that the equipment was sold in damaged condition. Relying on its 1978 decision in *In re Stone*,[147] the Tenth Circuit stated that for a successful motion to set aside a default judgment under rule 60(b), not only must the movant demonstrate justifiable grounds such as mistake, inadvertence, surprise or excusable neglect, but the movant must also show the existence of a meritorious defense.[148] While Allen may have made out a case for excusable neglect, the Tenth Circuit held that he failed to elaborate the facts as sufficiently as required by *In re Stone*[149] to permit the trial court to judge whether the defense would have been meritorious. The court of appeals noted that Allen's later assertions about third-party damage to the equipment were "predicated on rank hearsay."[150] Furthermore, he never asserted that he was not in default, that C.I.T. repossessed the equipment in an improper manner, or that C.I.T. acted in excess of its rights conferred under the notes and security agreements.[151]

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representative from a final judgment, order or proceeding for the following reasons: 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b); 3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; 4) the judgment is void; 5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or 6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b). For another case dealing with rule 60(b), see notes 163-79 *infra* and accompanying text.

146. No. 79-1637 (10th Cir., Dec. 10, 1979).

147. 588 F.2d 1316 (10th Cir. 1978). This case details the law controlling the granting of motions for relief from default judgments.

148. No. 79-1637, slip op. at 5.

149. 588 F.2d at 1319.

150. No. 79-1637, slip op. at 6-7.

151. *Id.* at 7.

E. *Rule 60(b)—Modification of Consent Decree*

In *EEOC v. Safeway Stores, Inc.*,[152] seventeen individual union members intervened in an unfair employment practices action to seek modification of the original parties' consent decree. The Tenth Circuit prescribed two channels through which such a consent decree may be modified. First, rule 60(b) may be applied to grant relief when a final judgment is shown to be void, when it is shown that prospective application would no longer be equitable, or when there is any other reason justifying relief. Second, the continuing jurisdiction of equity empowers a court to modify a decree upon a showing of changed circumstances.[153]

The consent decree agreed upon by the EEOC, various labor unions, and Safeway altered the seniority system for all of Safeway's employees. The intervenors argued that the decree did not comport with the purpose of Title VII of the Civil Rights Act of 1964[154] because it discriminated against employees who had transferred positions before the decree became effective.[155] In dismissing these contentions and affirming the district court's denial of intervenors' motion for modification, the Tenth Circuit stated that, absent a showing of abuse of discretion, a trial court's ruling on a rule 60(b) motion will not be disturbed, that a consent decree may vary from the statutory confines of the original action in order to encourage voluntary settlements, and that rule 60(b) is not designed "to allow modification of a consent decree merely because it reaches a result which could not have been forced on the parties through litigation."[156] While the appellate court admitted that a consent decree may be altered upon a showing of changed circumstances which produce hardship so extreme and unexpected as to make the decree oppressive, it found no abuse of discretion in the district court's determination; there was no evidence of substantial change in the facts underlying the decree and the interpretation of the order.

Finally, in response to the intervenors' assertion that modification of the decree was compelled by the Supreme Court case of *International Brotherhood of Teamsters v. United States*,[157] decided after the decree was entered, the Tenth Circuit cited its 1958 decision of *Collins v. City of Wichita*[158] and the Third Circuit's decision of *Mayberry v. Maroney*.[159] In *Collins*, a change in the judicial view of an established rule of law was not deemed to be an extraordinary circumstance justifying relief under rule 60(b).[160] According to the Third Circuit in *Mayberry*, the power to alter decrees may not be based merely on "precedential evolution."[161] Finally, the court in the instant case held that

152. 611 F.2d 795 (10th Cir. 1979).
153. *Id.* at 799. *See* FED. R. CIV. P. 60(b), *supra* note 145.
154. 42 U.S.C. § 2000(e) (1976).
155. In the court's words: "[Intervenors'] seniority status was adversely affected by the enhanced seniority of post-decree transferees, many of whom had no more claim to Title VII protection than intervenors." 611 F.2d at 798.
156. *Id.* at 800.
157. 431 U.S. 324 (1977).
158. 254 F.2d 837 (10th Cir. 1958).
159. 558 F.2d 1159 (3d Cir. 1977).
160. 254 F.2d at 839.
161. 558 F.2d at 1164.

although there may be some situations where a change in the law would warrant modification of an injunctive decree, under no circumstances would modification based on judicial clarification be allowed to undo the effects of past enforcement or to jeopardize the seniority of employees who had transferred positions in reliance on the decree.[162]

IV. FEDERAL-STATE RELATIONS

The Tenth Circuit addressed the unusual situation of a federal court enjoining a state court proceeding in *Brown v. McCormick*.[163] Three years after the plaintiff obtained a default judgment in federal court, the defendants sought to relitigate the issues in state proceedings. The plaintiff unsuccessfully defended on the basis of *res judicata*. He then instituted this action in the federal district court seeking to enjoin the state proceedings under 28 U.S.C. section 2283.[164] The defendants responded with a motion for relief of judgment under rule 60(b) of the Federal Rules of Civil Procedure.[165] The district court denied the rule 60(b) motion and enjoined the defendants from proceeding with their action in the state court.

The Tenth Circuit affirmed. The opinion involved a two-part analysis. The court had to determine if the earlier default judgment could withstand a rule 60(b) attack and, if so, whether an injunction was permissible under 28 U.S.C. section 2283. Rule 60(b) is an extraordinary procedure which permits the court to grant relief from its judgment upon a showing of good cause.[166] The rule is not a substitute for appeal but instead concerns matters which were not raised and considered by the court in reaching its judgment.[167]

As a basis for the rule 60(b) motion, the defendants claimed 1) that the federal court had lacked personal and subject matter jurisdiction; 2) that they were denied due process by virtue of rule 37 sanctions;[168] 3) that the default judgment was obtained by fraud on the court; and 4) that the default judgment was in excess of the pleadings.[169]

The court of appeals agreed with the district court that these contentions were without merit. The claims of lack of personal jurisdiction and fraud on the court were summarily dismissed.[170] The Tenth Circuit found that subject matter and diversity were addressed and resolved by the trial

162. 611 F.2d at 801.

163. 608 F.2d 410 (10th Cir. 1979).

164. 28 U.S.C. § 2283 (1976) states that "a court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

165. FED. R. CIV. P. 60(b)(4) permits a court to relieve a party from a final judgment if the judgment is void.

166. *See* 6A J. MOORE, FEDERAL PRACTICE, ¶ 60.02 (2d ed. 1979); 7 *id.* ¶ 60.19.

167. *See* Daily Mirror, Inc. v. New York News, Inc., 533 F.2d 53 (2d Cir.), *cert. denied*, 429 U.S. 862 (1976).

168. FED. R. CIV. P. 37.

169. 608 F.2d at 413.

170. *Id.* at 413, 414.

court prior to the entry of default judgment[171] and that the rule 37 sanctions were appropriate in light of the defendant's "dilatory tactics."[172] Finally, the default judgment was deemed not to have exceeded the scope of the complaint.[173]

Having found the default judgment to be valid, the appellate court then determined that the injunction against further state proceedings was proper. The anti-injunction statute[174] provides that federal courts cannot normally interfere with state court proceedings. However, an injunction by the federal court to "protect or effectuate its judgment" is an exception to this general rule.[175] The court of appeals, per Chief Judge Seth, found that the exception applied in this case; *res judicata* and collateral estoppel operated to preclude relitigation.[176] The *Younger-Huffman*[177] doctrine of abstention based on the principle of federalism did not apply as "[n]either Supreme Court case involved *res judicata* principles or the situation where a party armed with his valid federal judgment exhausted state appellate review."[178]

The injunction issued by the district court under 28 U.S.C. section 2283 extended to claims not actually litigated in the initial action. Chief Judge Seth, however, held that this was valid. These claims arose from the same underlying transaction and as a compulsory counterclaim, they too were subject to the injunction.[179] Once it was determined that the prior default judgment obtained in federal courts was valid and that the state proceedings sought to relitigate the same issues, the district court was obligated to issue the injunction. The integrity of the federal judiciary would allow no less.

V. STATUTE OF LIMITATIONS

A. *Malpractice Actions: Statute Does Not Run Until Claim Accrues*

In *Zeidler v. United States*,[180] the conservator of the mentally incompetent plaintiff brought a malpractice action in 1976 under the Federal Tort Claims Act.[181] Zeidler's conservator alleged that lobotomy operations per-

171. *Id.* at 413-14. Having been addressed by the district court, these issues were not considered proper grounds for a rule 60(b) motion.

172. *Id.* at 414.

173. This controversy centered on whether certain grazing lands were part of the Z-Bar-T Ranch. The district court found that they were because the evidence showed such was the intent of the parties. *Id.* at 414-15.

174. 28 U.S.C. § 2283 (1976).

175. *Id.*

176. 608 F.2d at 416.

177. *See* Younger v. Harris, 401 U.S. 37 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

178. 608 F.2d at 416. *Younger* concerned a state criminal prosecution. Harris claimed the statute under which California was prosecuting him unconstitutionally abridged his freedom of speech. The Supreme Court declared that the principles of federalism prohibited federal interference in the state proceeding, barring extraordinary circumstances. *Huffman* applied this rationale in a civil case. However, it was a civil obscenity case with criminal ramifications. Additionally, Pursue, Ltd. had not exhausted its state remedies, a necessary component under *Younger*. Neither case dealt with a situation so clearly covered by the statute.

179. *Id.* The "pending action" exception to this rule only applies when the counterclaim was the subject of a pending state action when the federal suit was instigated.

180. 601 F.2d 527 (10th Cir. 1979).

181. 28 U.S.C. § 2401(b) (1976).

formed in 1947 and 1948 by the government to control Zeidler's conduct while he was a Veterans Administration Hospital patient rendered him incompetent and should not have been performed. The district court concluded that insanity was a disability for which the statute of limitations could not be tolled;[182] therefore, from the face of the complaint, any action was barred by the two-year statute of limitations applicable to the section of the Federal Tort Claims Act under which the action had been brought.[183]

The Tenth Circuit Court of Appeals reversed and remanded on the grounds that the trial court, in rendering a final disposition based on the pleadings, made the improper assumption that Zeidler's complaint was based on insanity leading to the automatic running of the statute. Instead, the appellate tribunal contended, the main thrust of the plaintiff's action was malpractice, under which claim the statute could have been tolled.[184] In medical malpractice actions, the claim accrues when the claimant has a reasonable opportunity to discover the essential elements of a possible cause of action.[185] The case was therefore remanded for a determination as to whether Zeidler knew or should have known that he suffered injury.

Judge Logan, in his dissent, criticized the majority's conclusion based on the insanity-malpractice dichotomy as a "distinction without a difference."[186] If Zeidler had been mentally incapacitated *before* the operation then the claim would have been barred by the statute of limitations; if the alleged malpractice had *caused* the incompetency, then the result would have been observable by family and friends following the operation and the statute would have commenced running. As Judge Logan intimated in his dissent, *Zeidler* is a difficult case contested in the realm of limitations of actions. The plaintiff seemed to argue that it was a tort to perform the lobotomies, not that they were negligently done, and that the defendant government should be judged from hindsight after thirty years of advancements in medical science. The currency of the standard of judgment would be a logical foundation supporting the running of the statute of limitations.

B. *Vindicating Public and Private Rights Under Federal Statutes: State Statutes of Limitations Do Not Apply*

The Tenth Circuit Court of Appeals determined in *Marshall v. Intermoun-*

182. *See* Casias v. United States, 532 F.2d 1339, 1342 (10th Cir. 1976).

183. 28 U.S.C. § 2401(b) (1976), which, according to the trial court, contained the applicable statute of limitations reads:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

The administrative claim, required by 28 U.S.C. § 2675(a), was filed and denied. 601 F.2d at 528.

184. The court extensively cited Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977), where plaintiff was able to bring a malpractice action thirteen years after an operation because there was a material factual issue as to when the plaintiff had been able to discover the injury.

185. 601 F.2d at 529 n.1, 530 (citing Ciccarone v. United States, 486 F.2d 253, 256 (3d Cir. 1973)).

186. *Id.* at 533.

tain Electric Co.[187] that when an action is brought by the government to enforce private as well as public rights, state statutes of limitations will not bar the action even though no period of limitations is provided in the operative federal statute. The Secretary of Labor filed the complaint in this case almost twenty-six months after an Intermountain employee, Edward Cavaliere, had been discharged for filing safety-related complaints with Intermountain. The Secretary's suit, in which the government sought an injunction against future violations of section 11(c) of the Occupational Safety and Health Act (the Act)[188] and reinstatement and backpay for Cavaliere, was dismissed by the district court on the ground that the action was barred by Colorado's two-year statute of limitations for federal causes of action.[189]

In reversing the district court's dismissal of the action, the court of appeals noted that a state limitations period will not be applied to an action brought by the federal government to vindicate *public rights* or *public interests* absent a clear showing of contrary congressional intent.[190] Furthermore, the court stated that there is no suggestion of congressional intent to adopt state statutes of limitations in the Act itself;[191] and that section 11(c) of the Act is designed to ensure reporting of violations rather than vindication of private interests.[192] The court relied on the Supreme Court's decision in *Occidental Life Insurance Co. v. EEOC*[193] to find a new rule applicable to cases in which the plaintiff seeks to vindicate a hybrid of private and public interests; in *Intermountain Electric* the original action had been brought to vindicate public rights but the primary immediate effect would be relief for private individuals. Under the new rule, state statutes of limitations are inapplicable even though the federal statute provides no period of limitations. However, in situations where the public and private interests are combined, the doctrine of laches may be applied to protect the defendant against unreasonable delay in the commencement of the action.[194]

The *Intermountain Electric* decision appears to reach a sympathetic conclusion in extending indefinitely the period within which the public interest may be vindicated. However, it does not acknowledge that the equitable and elastic doctrine of laches fails to protect, in as certain a manner as statutory periods of limitations, the ability of defendants to prepare for trial in the

187. 614 F.2d 260 (10th Cir. 1980).

188. 29 U.S.C. § 660(c) (1976). Subsection 1 provides that employees may not be discharged or in any way discriminated against for filing a complaint pursuant to the Act or for in any way exercising rights afforded by the Act. Under subsection 2, provision is made for the filing of complaints with the Secretary of Labor.

189. COLO. REV. STAT. § 13-80-106 (1973) reads:

> Actions under federal statutes. All actions upon a liability created by a federal statute, other than for a forfeiture or penalty for which actions no period of limitations is provided in such statute, shall be commenced within two years or the period specified for comparable actions arising under Colorado law, whichever is longer, after the cause of action accrues.

190. 614 F.2d at 262.

191. *Id.*

192. *Id.*

193. 432 U.S. 355 (1977). The *Occidental* decision is analyzed and applied by the Tenth Circuit Court of Appeals as the principal support for the new rule. 614 F.2d at 262-63.

194. 614 F.2d at 263 n.8.

increasing variety of hybrid situations, such as administrative cases, where public and private interests are combined.

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LABOR LAW

OVERVIEW

The Tenth Circuit Court of Appeals' opinions in the area of labor law during the past year dealt with fairly standard issues. The court's decisions were, generally, in conformity with settled principles of law. This survey will examine the Tenth Circuit's labor law cases as an aid to the practitioner in the field. Particularly noteworthy are the labor law decisions wherein the Tenth Circuit court departs from the traditional analysis.

I. NATIONAL LABOR RELATIONS ACT—LABOR MANAGEMENT RELATIONS ACT[1]

A. *Protected Concerted Activity*

In *NLRB v. Modern Carpet Industries, Inc.*,[2] three maintenance employees were discharged after refusing to work with lead which they believed to be dangerous. The lead had been obtained from a hospital which used it to store radioactive materials. When asked to check the lead for radioactivity, the supervisor on the job replied that an unnamed person had assured him that the material was safe.[3] The employees were unsuccessful in their repeated attempts to obtain the name of the person who reportedly had said that this substance was safe. When these workers continued to refuse to work with the material, they were fired.[4]

The Tenth Circuit Court of Appeals upheld the decision of the National Labor Relations Board (Board), which had determined that the company violated section 8(a)(1) of the National Labor Relations Act (NLRA) (Act)[5] by firing the three employees.[6] The court found that the discharge of the men was based solely upon their refusal to work with what they believed to be dangerous material. Such action on the part of employees has been held to be concerted activity for the purpose of mutual aid or protection, activity explicitly allowed employees in section 7 of the Act.[7] Whether an employee's good faith belief in the existence of dangerous working conditions is enough to bring his refusal to work within the protection of section 8(a)(1) of the Act depends upon the facts of each case.

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1. 29 U.S.C. §§ 141-144, 151-169, 171-188 (1976).
2. 611 F.2d 811 (10th Cir. 1979).
3. *Id.* at 813.
4. *Id.*
5. 29 U.S.C. § 158(a)(1) (1976) provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their right to self-organization or any other protected activity.
6. 611 F.2d at 815.
7. 29 U.S.C. § 157 (1976) provides that employees have the right to self-organization, to form, join, or aid labor organizations, to bargain collectively, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection. *See also* 611 F.2d at 813.

In *Gateway Coal v. United Mine Workers*,[8] the United States Supreme Court held that a good faith fear of the existence of abnormally dangerous working conditions was not sufficient to allow workers to refuse to work.[9] In that case, however, the employees were members of a union and were working under a valid collective bargaining agreement.[10] The Court held that the employee's refusal to work was a violation of an implicit no-strike clause in the agreement.[11] Other cases involving similar activity by unorganized workers have held differently.[12]

In the *Modern Carpet* opinion, there was no mention of whether the discharged employees were union members. The court discussed *NLRB v. Washington Aluminum Co.*,[13] another United States Supreme Court case, in which unorganized employees who had walked off the job in protest of frigid working conditions were held to be engaged in protected activity.[14] In the *Modern Carpet* decision, the Tenth Circuit emphasized the good faith belief of the workers in determining whether their action was protected. In light of the company's refusal to name its source of information about job safety, the court felt justified in sustaining the Board's conclusion that the workers, in refusing to work with the lead, acted out of a genuine fear for their health.[15]

B. *Discrimination Based Upon Union Membership*

In *NLRB v. Borg-Warner Corp.*,[16] the Tenth Circuit court upheld the Board's finding that an employer violated section 8(a)(1) and (3) of the NLRA[17] when he withdrew existing employment benefits because of union activities on the part of employees.[18] In this case, six test technicians had

8. 414 U.S. 368 (1974).

9. *Id.* at 386-87 (the fear must be based upon objective facts).

10. *Id.* at 374.

11. *Id.* at 387. Union members are not always denied such protection. *See* NLRB v. Belfry Coal Corp., 331 F.2d 738 (6th Cir. 1964) (per curiam), *enforcing* 139 N.L.R.B. 1058 (1962) (two miners refusing to work in area "dangered off" by state mine inspector); G.W. Murphy Indus., Inc., 183 N.L.R.B. 97 (1970) (employees walking off job because of excessive smoke and heat); Associated Divers & Contractors, Inc., 180 N.L.R.B. 62 (1969) (workers refusing to work because of unsanitary conditions on barge); Atleson, *Threats to Health and Safety: Employee Self-Help Under the NLRA*, 59 MINN. L. REV. 647 (1975); 7 AKRON L. REV. 508 (1974); 86 HARV. L. REV. 447 (1972).

12. *See generally* NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (section 7 of NLRA protects employees with no bargaining representative); Trustees of Boston Univ. v. NLRB, 548 F.2d 391 (1st Cir. 1977) (NLRA protection extends to unorganized employees); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345 (3d Cir. 1969), *cert. denied*, 397 U.S. 935 (1970) (protection for concerted activities extends to non-union employees); Ashford & Katz, *Unsafe Working Conditions: Employee Rights Under the Labor Management Relations Act and the Occupational Safety & Health Act*, 52 NOTRE DAME LAW. 802 (1977); Johnson, *Protected Concerted Activity in the Non-Union Context: Limitations on the Employer's Rights to Discipline or Discharge Employees*, 49 MISS. L.J. 839 (1978).

13. 370 U.S. 9 (1962).

14. *Id.* at 14-15.

15. 611 F.2d at 814-15.

16. 608 F.2d 1344 (10th Cir. 1979).

17. 19 U.S.C. § 158(a)(1), (3) (1976). For an explanation of § 158(a)(1), *see* note 5 *supra*. Section 158(a)(3) provides that it will be an unfair labor practice for an employer to discriminate in hiring or tenure of employment, or any term or condition of employment because of union membership.

18. 608 F.2d at 1347.

enjoyed an early-in, early-out option whereby they could come to work early in the morning, and subsequently leave the job early that afternoon.[19] This option was not a plant-wide practice. When it became known to management that four of these six technicians were active in a union organizing campaign, their supervisor was told to keep a watch on them at all times and to try to keep them from going into other areas of the plant to speak to other workers.[20] As a result of this directive, the practice of early-in, early-out was discontinued so as to prevent the possibility of the technicians being in the plant at a time when the supervisor was not present.[21]

The court, in agreement with the Board, found that this change in practice was a direct result of the technicians' union activities. The NLRA clearly states that it is an unfair labor practice for an employer to restrain employees from exercising their right to self-organization.[22] Because the employer altered the conditions of employment in response to employees' union activities,[23] a prima facie violation of the NLRA existed.[24] Finding substantial evidence in the record to support the Board's decision, the court ordered reinstatement of the early-in, early-out practice.[25]

In *U.S. Soil Conditioning v. NLRB*,[26] the Tenth Circuit court was asked to review, and to deny enforcement of, an order of the Board concerning reinstatement of an employee. The employer argued before the Board that the employee was discharged because he took an unauthorized extra week of vacation.[27] The Board, however, found that the reason for the employee's discharge was his union activity.[28]

On appeal, the court looked to the record as a whole. Recognizing the Board's expertise in this area,[29] the court refused to prevent enforcement of the Board's order because there was substantial evidence in the record to support the Board's decision.[30] The court noted that the law requires the judiciary to uphold an administrative decision where substantial evidence supporting the administrative determination exists in the record.[31] Therefore, the court felt compelled to uphold the Board.

The issue involved in *Cartwright Hardware Co. v. NLRB*[32] was whether the actions of an employer resulted in a constructive discharge of three union employees. Cartwright, the employer, notified the union involved that it

19. *Id.* at 1346 n.4.
20. *Id.* at 1347 n.5.
21. *Id.* at 1347.
22. 29 U.S.C. § 157 (1976). *See* note 7 *supra*.
23. 29 U.S.C. § 158(a)(1), (3) (1976).
24. 608 F.2d at 1345 n.3.
25. *Id.* at 1349 n.10.
26. 606 F.2d 940 (10th Cir. 1979).
27. *Id.* at 942.
28. *Id.* at 948. *See* note 17 *supra*.
29. 606 F.2d at 948.
30. *Id.*
31. *Id.* at 943-45. 29 U.S.C. § 160(e) (1976) instructs a court to consider the Board's findings as conclusive if supported by substantial evidence in the record. *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); NLRB v. Central Mach. & Tool Co., 429 F.2d 1127 (10th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971).
32. 600 F.2d 268 (10th Cir. 1979).

would no longer operate a union shop.[33] Having received no response from the union, Cartwright drafted wage and benefit proposals for the period following the expiration of the collective bargaining agreement then in existence.[34] The three union members on the job resigned, claiming constructive discharge by Cartwright. The Board found that Cartwright had violated section 8(a)(1), (3), and (5) of the NLRA.[35] On appeal, the Tenth Circuit supported the Board's findings of several violations,[36] but reversed the Board as to the verdict of constructive discharge.[37]

The court stated that a constructive discharge occurs "when an employer makes working conditions so intolerable as to force an employee to resign."[38] For such a discharge to be in violation of the Act,[39] the employer must have been motivated by a desire to discourage union activity or membership and, in addition, the employee's resignation must have been caused by intolerable conditions created by the employer.[40] Reviewing the record, the court found no evidence to show an antiunion animus on the part of Cartwright. Furthermore, the appellate court concluded that the employees had resigned, not because of any intolerable conditions created by Cartwright, but because of a certain "secret" provision of the union's bylaws. The employees and union leaders were convinced that this provision of the union's bylaws precluded union members from working in an open shop.[41] The court found no evidence indicating that Cartwright knew of this secret provision *before* notifying the union of his intention to run an open shop.[42]

Having earlier decided that Cartwright had evidenced no antiunion animus, the court emphasized that the employees resigned not because of Cartwright's proposals, but because of a provision in their own union's bylaws.[43] As these bylaws were something over which Cartwright had no control, the court ruled that it could find no constructive discharge of the union employees.

In *NLRB v. Pepsi-Cola Bottling Co.*,[44] the Tenth Circuit was presented with several issues. The labor dispute involved in this case arose when negotiations between employees and the predecessor employer reached an impasse, leading the employees to strike. The strike was later determined to be

33. *Id.* at 269.

34. *Id.*

35. 29 U.S.C. § 158(a)(1), (3), (5) (1976). Section 158(a)(5) provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.

36. The court upheld the Board with respect to the Board's findings of Cartwright's "refusal to bargain with the Union, its direct bargaining with employees, its unilateral institution of changed terms and conditions of employment, and its withdrawal of recognition from the Union." 600 F.2d at 270 (footnotes omitted).

37. *Id.*

38. *Id.* at 270, 272 n.7.

39. The discharge of an employee because of his union activity or membership is violative of 29 U.S.C. § 158(a)(3) (1976).

40. 600 F.2d at 270.

41. *Id.* at 271.

42. *Id.* at 273.

43. *Id.* at 272.

44. 613 F.2d 267 (10th Cir. 1980).

an economic one, and therefore, not an unfair labor practice strike.[45] After the strike, the employees filed for reinstatement but found that all of their jobs had been filled. They were told by the predecessor employer to fill out new applications. This employer then sold his business. The successor refused to bargain with the union, claiming doubt that the union represented the majority of employees.[46]

The union filed charges against the predecessor employer, alleging that by requiring the employees to fill out new applications for reinstatement, the predecessor employer had discriminated against the strikers.[47] The Board found that this application requirement, in effect, treated the strikers as new workers, denying them their rights as continuing employees.[48] On appeal, the Tenth Circuit court reviewed the record but could not find sufficient evidence to uphold the Board's ruling.[49] Rather, the court found that the predecessor employer's request that the strikers make a formal application for reinstatement to their jobs was not necessarily evidence that these workers were being treated as new, rather than as continuing employees.[50]

The union also filed charges against the successor employer,[51] claiming that the successor employer was guilty of both an unlawful refusal to bargain and discrimination in hiring. As the union had been certified as the bargaining representative of employees only four months prior to the sale of the business to the successor employer, the court upheld the Board's order to bargain. The Tenth Circuit court restated the general principle that a certification should be honored for a reasonable time, usually for a term of one year.[52] Though a certification may be challenged within the one year period if there are unusual circumstances, the court asserted that the change in ownership of a company is not sufficient grounds for a challenge to the certification, particularly when the successor employer hires a majority of his predecessor's employees.[53] Therefore, since the successor employer in this case carried forward a majority of his predecessor's workers, he did have a duty to bargain with the union.

In respect to the discrimination in hiring charge against the successor employer, though the Board held for the union,[54] the Tenth Circuit court

45. *Id.* at 270.

46. *Id.*

47. *Id.* at 271. Treating returning strikers as new employees would be discrimination against the employees in violation of 29 U.S.C. § 158(a)(1) (1976).

48. 613 F.2d at 272.

49. *Id.*

50. *Id.* at 271. *See also* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967) (economic strikers retain their status as employees unless and until they find other regular employment that is substantially the same).

51. 613 F.2d at 270.

52. *Id.* at 272; *see* Brooks v. NLRB, 348 U.S. 96 (1954) (recognizing the doctrine announced in Celanese Corp., 95 N.L.R.B. 664 (1951), that a union certified by the NLRB as a bargaining representative enjoys an irrebuttable presumption of majority status for one year after certification); Terrell Mach. Co., 173 N.L.R.B. 1480 (1969), *enforced in* 427 F.2d 1088 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); Morales, *Presumption of Union's Majority Status in NLRB Cases*, 29 LAB. L.J. 309 (1978).

53. 613 F.2d at 270, 272.

54. *Id.* at 273.

found that due process of law required a different result.[55] When the discrimination charge was considered at the Board hearing, the union's claims centered upon the successor's refusal to reinstate *unfair labor practice* strikers.[56] It was later determined, however, that the strikers were *economic* strikers.[57] The court felt, therefore, that the parties had not had the opportunity to present appropriate evidence to either support or defend a charge of discrimination in hiring.[58] Since the Board had found for the union on this count, the court denied the Board's order of enforcement against the successor employer on the grounds that due process was denied the employer on the discrimination in hiring charge.[59]

In *Osteopathic Hospital Founders Association v. NLRB*,[60] the Tenth Circuit upheld the decision of the Board, finding that the hospital in question had violated section 8(a)(1), (3), and (5) of the NLRA.[61] The hospital clearly had violated section 8(a)(3) of the Act by refusing to promote one employee, and by refusing to hire two other persons, based solely upon the individuals' status as union members.[62] Other issues presented in the appeal included the hospital's refusal to bargain with the union and the propriety of the bargaining unit represented by the union.

The hospital discharged all the members of the stationary engineers employee unit after an unlawful refusal by the union to perform work.[63] After the discharge, the hospital replaced the members of this bargaining unit and claimed that the hospital was no longer obligated to bargain with the union. The hospital asserted that it had a good faith doubt as to whether the union continued to represent a majority of the members of the stationary engineers unit.[64] The Board reasoned, and the court affirmed, that even if a good faith doubt existed,[65] the incumbent union had a presumption[66] of majority status for the life of the collective bargaining agreement.[67] Since the agreement had two remaining months at the time the hospital withdrew its recognition, the hospital's refusal to bargain was illegal.[68]

As for the hospital's challenge to the legitimacy of the bargaining unit, the court agreed with the Board that the hospital failed to make its objections at the appropriate time. Though the unit was indeed a mixed unit,[69] the unit was determined by the Board more than two years before the con-

55. *Id.* at 275.
56. *Id.* at 273.
57. *Id.*
58. *Id.* at 274.
59. *Id.* at 275. The court stated that the parties, especially the employer, lacked sufficient notice to prepare for such a charge. *Id.*
60. 618 F.2d 633 (10th Cir. 1980).
61. 29 U.S.C. § 158 (a)(1), (3), (5) (1976).
62. 618 F.2d at 637-38.
63. *Id.* at 637 n.3.
64. *Id.* at 638.
65. Here, there was no "good faith" doubt, since any loss in the union's majority status was at least partly attributable to the unfair labor practices of the hospital. *Id.* at 638-39.
66. *Id.* at 638.
67. *Id. See also* note 52 *supra*.
68. 618 F.2d at 638.
69. A mixed unit is one which contains both professionals and nonprofessionals.

troversy arose. The court noted that the time of unit determination was the proper time for the hospital to challenge the unit's makeup.[70] Since the hospital did not pursue its challenge at that time, the court refused to allow a protest at the later date.[71] Thus, the unit was ruled appropriate.

C. *Duty to Bargain*

In *Newspaper Printing Corp. v. NLRB*,[72] the Tenth Circuit upheld an order of the Board which required an employer to bargain with an employee's union. The employer and the union had reached an impasse on the issue of a collective bargaining agreement's definition of the bargaining unit represented by the union.[73] Since the employer had insisted upon his suggested changes in the definition, to the point of impasse, both the Board and the court of appeals found that the employer was in violation of section 8(a)(5) of the Act.[74]

The court decided that the employer's insistence in changing the scope of the bargaining unit was a violation of the section 8(a)(5)[75] requirement that an employer bargain collectively with the representative of his employees. Section 9(a)[76] requires an employer to recognize the union as the bargaining agent of all employees in the appropriate unit.[77] The court pointed out that the union cannot bargain as to mandatory subjects of bargaining[78] without knowing whom it is representing.[79] The court further noted that the definition of the bargaining unit is not one of those areas subject to mandatory bargaining.[80] The court concluded that an unyielding insistence on a point of permissive bargaining is a violation of section 8(a)(5).[81] The court, therefore, upheld the Board's order directing the employer to bargain.[82]

An employer may be estopped from denying an association with a multiemployer bargaining unit if his actions imply membership.[83] Recently, however, the Tenth Circuit, in *NLRB v. J.D. Industrial Insulation Co.*,[84] overturned a finding of the Board which held that an employer had "engaged in

70. 618 F.2d at 640.
71. *Id.* at 641.
72. 625 F.2d 956 (10th Cir. 1980).
73. *Id.* at 961.
74. 29 U.S.C. § 158(a)(5) (1976). *See* note 35 *supra*.
75. 29 U.S.C. § 158(a)(5) (1976).
76. *Id.* § 159(a).
77. 625 F.2d at 963.
78. 29 U.S.C. § 159(a) (1976) provides for mandatory bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.
79. 625 F.2d at 963; *see* McQuay-Norris Mfg. Co. v. NLRB, 116 F.2d 748 (7th Cir.), *cert. denied*, 313 U.S. 565 (1940).
80. 625 F.2d at 963; *see* Newport News Shipbuilding & Dry Dock Co. v. NLRB, 602 F.2d 73 (4th Cir. 1979); National Fresh Fruit & Vegetable Co. v. NLRB, 565 F.2d 1331 (5th Cir. 1978).
81. 29 U.S.C. § 158(a)(5) (1976).
82. 625 F.2d at 965; *see* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).
83. NLRB v. Southwestern Colo. Contractors Ass'n, 379 F.2d 360 (10th Cir. 1967); Vin James Plastering Co., 226 N.L.R.B. 125 (1976).
84. 615 F.2d 1289 (10th Cir. 1980).

a course of conduct consistent with membership"[85] in a multiemployer bargaining unit. The Board observed that the employer had attended meetings of the association, had discussed proposed contract terms during negotiations, had paid dues to the association for three months, and had engaged in other activities suggestive of membership. In light of these activities, the Board found that the employer was "estopped from avoiding the responsibilities of association membership."[86] The employer was found to be in violation of section 8(a)(5) of the NLRA[87] for refusing to bargain with the union involved.

On appeal to the Tenth Circuit, the court reviewed the evidence presented to the Board and found that the facts dictated a different result. The court stressed that the employer had never applied for membership in the association, had never paid its initiation fee, and had never given written authority for the association to bargain with the union on his behalf.[88] Consequently, the court reasoned that there could be no basis for finding that an implied contract existed between the employer and the association.

Finding that no contract existed, the court turned to an examination of the doctrine of estoppel. Estoppel being an equitable principle, the court contended that equity warranted a determination that the employer should not be held bound in a situation where both sides had acted in an ambiguous manner. In this case, neither the employers' association nor the union ever attempted to have the employer clarify his position in regard to his purported association membership. In addition, the court noted that detrimental reliance, a necessary element of equitable estoppel, was not present in this situation because the union members who worked for the employer were receiving the same benefits they would have received had they been working under a negotiated collective bargaining agreement.[89] The court distinguished several of the cases relied upon by the Board, concluding that these holdings were inapposite as concerning situations in which it had not been necessary to rely upon the principles of estoppel.[90] In conclusion, the court held that since section 8(a)(5) of the Act[91] applies only in a situation involving a valid collective bargaining agreement, the employer did not violate the NLRA.[92]

At issue in *Western Distributing Co. v. NLRB*[93] was whether an employer's good faith doubt of a union's majority status is sufficient to allow a successor

85. *Id.* at 1291.
86. *Id.*
87. 29 U.S.C. § 158(a)(5) (1976).
88. 615 F.2d at 1292.
89. *Id.* at 1293.
90. *Id.* The court stated that the Board had relied upon cases decided on the basis of equitable estoppel principles, although the theory was never fully discussed in those opinions. *See* NLRB v. R.O. Pyle Roofing Co., 560 F.2d 1370 (9th Cir. 1977); NLRB v. Associated Shower Door Co., 512 F.2d 230 (9th Cir.), *cert. denied*, 423 U.S. 893 (1975); NLRB v. Southwestern Colo. Contractors Ass'n, 379 F.2d 360 (10th Cir. 1967); Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952); Vin James Plastering Co., 226 N.L.R.B. 125 (1976).
91. 29 U.S.C. § 158(a)(5) (1976).
92. 615 F.2d at 1294.
93. 608 F.2d 397 (10th Cir. 1979).

employer[94] to refuse to bargain with the union. While, in general, a successor employer[95] does have a duty to bargain with the representative of the employees,[96] a good faith doubt as to the union's majority status is a defense to an unfair labor practice charge,[97] if that doubt is founded upon a rational basis in fact.[98]

After a hearing, the Board ruled that the employer was a successor employer and that he had a duty to bargain with the union from the date of the merger.[99] Reversing the Board, the Tenth Circuit court felt it unnecessary to determine whether the employer was a successor employer.[100] Instead, the court argued that even if the employer were a successor employer, no duty to bargain would exist unless, and until, the union made a formal request to bargain.[101] In this case, no formal request to bargain was made until more than four months after the merger.[102] The court further asserted that the employer's good faith doubt of the union's majority status should be judged in relation to the timing of the formal request. Under the facts of this case, the court held that, at the time the request to bargain was made, there had been a sufficient change in the bargaining unit to support the employer's claims of good faith doubt.[103]

In *NLRB v. Roger's I.G.A., Inc.*,[104] the Tenth Circuit, affirming a Board decision, ruled that once an employer voluntarily recognizes a union as the bargaining representative of employees, the union enjoys a presumption of majority status unless, and until, the employer acquires a good faith, reasonable doubt of that status, which doubt is grounded upon a rational basis in fact. Both the union and the employer involved in this case had agreed to withdraw from their longstanding relationship[105] with a multiemployer bargaining association. After this withdrawal, however, Roger's refused to bargain with the union, claiming a good faith doubt about the union's majority status. The Board found that Roger's refusal to bargain was a violation of section 8(a)(1) and (5) of the Act,[106] thus ruling that the union's presumptive majority status survived the employer's withdrawal from the bargaining as-

94. Whether Western Distributing Co. was in fact a successor employer was not decided here. *Id.* at 399.

95. A successor employer is one which maintains a "substantial continuity of identity in the business." John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964). The successor employer also has a "substantial continuity in the identity of the work force." Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 263 (1974). *See* 608 F.2d at 399.

96. *See* NLRB v. Burns Int'l Security Servs., 406 U.S. 272 (1972) (new employer hiring employees of predecessor employer has duty to bargain with union).

97. 608 F.2d at 399.

98. *Id.*

99. *Id.* at 398.

100. *Id.* at 399.

101. *Id. See also* NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939); NLRB v. Eagle Material Handling, Inc., 558 F.2d 160 (3d Cir. 1977); NLRB v. Albuquerque Phoenix Express, 368 F.2d 451 (10th Cir. 1966).

102. The NLRB decreed that a duty to bargain arose at the time of the merger. The court, however, adjudged that a duty to bargain was imposed only upon the union's formal request to bargain. 608 F.2d at 399.

103. *Id.* at 400.

104. 605 F.2d 1164 (10th Cir. 1979).

105. *Id.* at 1165.

106. 29 U.S.C. § 158(a)(1), (5) (1976).

sociation.[107]

Upon appeal, the Tenth Circuit court agreed with the Board's reasoning and found that Roger's voluntary acceptance of the union as the bargaining representative of its employees created a presumption of the union's majority status.[108] The rationale for this presumption is based on the more fundamental premise that employers will normally act in accordance with the law. Since recognition of a union with less than majority status is an unfair labor practice,[109] it is presumed that any union recognized by an employer will have met the requisite majority status. The court then explained that the Board favors continuation of bargaining relationships after a withdrawal from a bargaining association[110] so as to discourage employers from quitting such associations.[111] To rebut the presumption that the union's majority status survived the withdrawal, the employer "must show a good faith belief, sustained by *objective facts*, that majority status did not survive . . . ."[112] Because Roger's failed to meet this standard of proof, the court decreed that the employer was obligated to bargain with the union.[113]

A violation of section 8(a)(1) and (5) of the NLRA,[114] because of noncompliance with a collective bargaining agreement, was asserted in *Arco Electric Co. v. NLRB*.[115] Though Arco was never a member of a multiemployer bargaining association, it did bind itself to contracts made between a bargaining association and an Arco employees' union.[116] Arco also engaged in conduct which, in the opinion of the Board, estopped the company from repudiating its current employment contract with the employees' union.[117]

The Tenth Circuit court, in upholding the Board's decision, reviewed the various claims of Arco and found them devoid of merit. Arco had argued that financial hardships necessitated its noncompliance with certain of the contract terms. The court, however, reasoned that "economic need does not justify contract repudiation."[118] Arco had also urged that the repudiation was justified because of the company's good faith doubt about the continued majority status of the union.[119] Arco's voluntary recognition of the union as the bargaining representative of its employees raised a presumption of majority status.[120] Though Arco may have been able to justify its refusal to bargain as based upon a good faith doubt of majority status, backed by a

107. 605 F.2d at 1165.
108. *Id.*
109. *Id. See also* International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann), 366 U.S. 731 (1961).
110. 605 F.2d at 1165 (citing NLRB v. Tahoe Nugget, Inc., 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979)).
111. 605 F.2d at 1166. The court also noted that the employees' freedom of choice in representation is not disturbed as they may demand a decertification election.
112. *Id.* (emphasis added).
113. *Id.*
114. 29 U.S.C. § 158(a)(1), (5) (1976).
115. 618 F.2d 698 (10th Cir. 1980).
116. Arco had bound itself to these contracts for 15 years. *Id.* at 698-99.
117. *Id.* at 699.
118. *Id.* at 700.
119. *Id.*
120. *See* NLRB v. Roger's I.G.A., Inc., 605 F.2d 1164 (10th Cir. 1979).

rational basis for that belief, such reasoning does not justify repudiation of a contract that had already been negotiated.[121] The court warned that grave consequences would follow a decision which approved the unilateral repudiation of an existing contract merely because of a good faith doubt as to majority status.[122] After dismissing several other Arco arguments, the court ruled that Arco was bound by the contract to collectively bargain.[123]

When one employer succeeds another in essentially the same business,[124] the successor employer has a duty to consult with the bargaining representative of the retained employees.[125] In some cases, however, the determination of a duty to bargain must await a successor employer's hiring of a "full complement"[126] of employees so as to allow the employer to determine if the union actually represents a majority of the employees.[127] The "full complement" question was placed before the Tenth Circuit Court of Appeals in the case of *NLRB v. Pre-Engineered Building Products, Inc.*[128] Pre-Engineered Building Products, Inc. (company) assumed control over a plant two weeks after it had been closed down by the prior owner. When the company's predecessor was in full operation, the work force consisted of forty-one employees. Upon its acquisition of the plant, the company hired four employees, all of whom had been employees of the predecessor.[129] The company was summoned before the Board when it refused to bargain with the union representing those employees. The Board found that the company was a successor employer and that it thus had a duty to bargain with the union.[130]

On appeal of its case to the Tenth Circuit, the company argued that the Board erroneously refused to consider evidence pertaining to the change in the composition of the plant's work force. The company further averred that at the time of the Board's hearing, the company had not yet hired a full complement of workers.[131] The appellate court agreed with the company's contention that the Board acted precipitously in finding a duty to bargain. The major legal problem, according to the court, was determining at what point in time the composition of the work force was to be examined so as to ascertain the union's majority status. The court balanced the need to protect the employees' right to speedy representation against the need to insure that the representation truly reflects the wishes of a majority of the employees.[132] The court asserted that it is also necessary to take into account the employer's need to build up, to an efficient operating level, a business which

121. 618 F.2d at 700.
122. Majority status did, however, exist here. *Id.*
123. *Id.*
124. *See* note 95 *supra.*
125. NLRB v. Burns Int'l Security Servs., 406 U.S. 272 (1972).
126. The duty to bargain with the union may not become apparent until after the new employer has hired a full complement of workers. *Id.* at 295.
127. 29 U.S.C. § 159(a) (1976) requires that the bargaining agent must represent a majority of the employees in the unit.
128. 603 F.2d 134 (10th Cir. 1979).
129. *Id.* at 136.
130. *Id.* at 135.
131. *Id.*
132. Pacific Hide & Fur Depot, Inc. v. NLRB, 553 F.2d 609, 612-13 (9th Cir. 1977).

may have been defunct when taken over.[133]

The court determined that the Board should have considered all factors in deciding whether the company was a successor employer bound to bargain with the preexisting bargaining representative. Therefore, the order of the Board was denied enforcement and the case was remanded to allow the Board to hear further evidence on the issue of whether the company actually had acquired a full complement of workers. The Board was further instructed to decide whether, at the time of the company's refusal to bargain, the union represented a majority of that work force.[134]

D. *Exhausting Union Remedies*

When workers are represented by a collective bargaining agreement which provides grievance procedures to channel employee complaints, the employees are expected to follow the internal procedures before seeking the aid of outside factfinders, such as the courts.[135] The requirement that internal procedures be exhausted may be excused, but only in certain extraordinary circumstances.[136] In *Varra v. Dillon Cos.*,[137] the Tenth Circuit court was asked to consider a case in which an employee sued both her union and her employer without first complying with all of the internal union grievance procedures. The employee had initially filed a grievance with the union. After investigating the claim, the union decided not to carry the grievance to arbitration, a procedure permitted by the collective bargaining agreement. The employee, however, claimed that the union's decision was "arbitrary and capricious."[138] She therefore brought suit against the union, alleging that the union had breached its duty of fair representation. The employee filed suit against the employer as well, charging breach of the collective bargaining agreement.[139]

The Tenth Circuit court ruled that the lawsuit was premature. The court noted that the union's constitution provided a means by which an employee could appeal a union official's decision within the structure of the union.[140] Although in certain circumstances an employee need not exhaust internal union remedies,[141] the court found none of the exceptions to the exhaustion requirement applicable. Thus, the court held that the employee could not sue the union until those procedures provided in the union's constitution had been followed.[142]

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133. 603 F.2d at 136.
134. *Id.*
135. Imel v. Zohn Mfg. Co., 481 F.2d 181 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).
136. The employee need not exhaust internal procedures if it would be futile to do so, *id.* at 183; if the union wrongfully prevented access, Vaca v. Sipes, 386 U.S. 171, 185-86 (1967); if the union and the employer have engaged in racial discrimination, Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 330-31 (1969); or if the remedies have not provided for redress of the grievance involved, Fruit & Vegetable Packers Local 760 v. Morley, 378 F.2d 738, 745 (9th Cir. 1967).
137. 615 F.2d 1315 (10th Cir. 1980).
138. *Id.* at 1316.
139. *Id.*
140. *Id.*
141. *See* note 136 *supra*.
142. 615 F.2d at 1317.

The court of appeals also examined the suit against the employer. The employer had argued that the employee's failure to exhaust the union remedies was a defense to the employee's allegations against employer. Although the court recognized that some jurisdictions do not permit an employer to raise employee's failure to exhaust union remedies as a defense,[143] the Tenth Circuit decided that such a defense should be available to the employer.[144] Because the employee's suit against the employer was based upon its claims against the union,[145] the court declared that proof of the union's breach was a prerequisite to a judicial finding against the employer.[146] Thus, the employee could not succeed in its suit against either the union or the employer until all of the union's internal remedies had been exhausted.[147]

E. *Arbitration*

The courts have long recognized the federal policy favoring arbitration as the primary method for the settlement of disputes arising under collective bargaining agreements.[148] The preference for arbitration is evidenced by the fact that the courts have held an employer bound to arbitrate an underlying dispute even when the union has breached a no-strike clause of an agreement.[149] In *Reid Burton Construction, Inc. v. Carpenters District Council*,[150] however, the Tenth Circuit decided that an employer may legitimately refuse to arbitrate if the union's conduct is such as to establish an equitable defense to an arbitration demand.

The court of appeals noted that the right to arbitration, like any other contract right, may be waived.[151] Looking to the facts surrounding the case,[152] the court emphasized that the union had not asked for a stay of the court proceeding nor had it sought an order for arbitration. The union merely raised the arbitration clause as one of several defenses in its answer to the charges.[153] Furthermore, the union participated in pretrial hearings and

143. *Compare* Winter v. Local 639, Int'l Bhd. of Teamsters, 569 F.2d 146 (D.C. Cir. 1977); Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977); Orphan v. Furnco Constr. Corp., 466 F.2d 795 (7th Cir. 1972); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972); Brady v. TWA, Inc., 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969) *with* Aldridge v. Ludwig-Honold Mfg. Co., 385 F. Supp. 695 (E.D. Pa. 1974), *cert. denied*, 423 U.S. 937 (1975); Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974); Imbrunnone v. Chrysler Corp., 336 F. Supp. 1223 (E.D. Mich. 1971); Harrington v. Chrysler Corp., 303 F. Supp. 495 (E.D. Mich. 1969). *See also* Note, *The Exhaustion of Internal Union Remedies as a Prerequisite to Section 301 Actions Against Labor Unions and Employers*, 55 CHI.-KENT L. REV. 259 (1979).

144. The national labor policy favors private resolution of disputes. The court felt that this policy was advanced by its decision allowing employers to raise this defense. 615 F.2d at 1317-18.

145. *See* Vaca v. Sipes, 386 U.S. 171 (1967).

146. 615 F.2d at 1318. *See also* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

147. 615 F.2d at 1318.

148. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

149. *See* Packinghouse Workers v. Needham Packing Co., 376 U.S. 247 (1964).

150. 614 F.2d 698 (10th Cir. 1980).

151. *Id.* at 702.

152. This case had been heard at the trial court level, appealed, remanded, and appealed again. *Id.* at 700-01.

153. The employer charged the union with breach of a no-strike clause. *Id.* at 699-700.

discovery without seeking a stay or order for arbitration.[154] On appeal, the union claimed that its delay did not constitute a waiver of its right to arbitration because the employer suffered no prejudice as a result of its actions.[155] The court, through an examination of the facts, determined that the union's actions did result in a waiver.[156] The court found that the employer was prejudiced by the burdens of trial preparation.[157] Based upon these conclusions, the appellate court ruled that the employer was relieved of his contractual obligation to arbitrate.

In *Painters Local Union No. 171 v. Williams & Kelly, Inc.*,[158] the Tenth Circuit upheld an arbitrator's award as clearly within the authority of the arbitrator. A collective bargaining agreement between an employer and union provided that the employer would hire seventy-five percent of its work force from the local labor pool. It was provided that the remainder of the laborers would come from employer's work force in California.[159] The senior local employee entitled to work on the job was not hired. This employee filed a grievance against the employer. Upon a hearing before an arbitrator, it was determined that the employer had violated the agreement. The local employee was awarded back pay and fringe benefits.[160]

On appeal to the Tenth Circuit court, the employer alleged that whereas the arbitrator was limited to deciding whether there had been a contract violation, the arbitrator exceeded his authority by awarding back pay.[161] The court rejected this argument, noting that courts may not review the merits of an arbitrator's award which is within the scope of a collective bargaining agreement.[162] In addition, if an arbitrator's decision is within the bounds of the contract, the courts will recognize a broad arbitral discretion in fashioning an appropriate remedy.[163] As the employer attacked the arbitrator's remedy but did not challenge the underlying finding that a violation of the agreement had occurred, the court deferred to the decision of the arbitrator.[164]

Conversely, in another arbitration case, *Operating Engineers Local 670 v. Kerr-McGee Refining Corp.*,[165] the Tenth Circuit court refused to enforce an arbitrator's award on the basis that the arbitrator had overstepped his authority. The collective bargaining agreement involved in this case pronounced that the use of false statements to obtain sick leave benefits would

154. *Id.* at 703 n.8.
155. *Id.* at 702.
156. *Id. See also*, Cornell & Co. v. Barber & Ross Co., 360 F.2d 512 (D.C. Cir. 1966), *aff'g* 242 F. Supp. 825 (D.D.C. 1965).
157. 614 F.2d at 703.
158. 605 F.2d 535 (10th Cir. 1979).
159. Although the employer's home base was California, the agreement arose from a job to be performed in Colorado. *Id.* at 536.
160. *Id.* at 537.
161. *Id.* at 538.
162. *Id. See also* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).
163. 605 F.2d at 538; *see* Campo Machining Co. v. Local Lodge No. 1926, 536 F.2d 330, 333 (10th Cir. 1976).
164. 605 F.2d at 538.
165. 618 F.2d 657 (10th Cir. 1980).

constitute grounds for discharge.[166] An employee who took off from work, claiming sick leave, presented the employer with a falsified doctor's note. Soon thereafter, the employee was dismissed for "using false statements to obtain sick leave, *and* a history of excessive absenteeism."[167] The employee's union challenged the dismissal and the matter went to arbitration.

The arbitrator ruled that the employee should be reinstated. The arbitrator reasoned that as the employer had given two reasons for the discharge,[168] unless both charges were supported by evidence, the dismissal was improper. Although there was sufficient evidence to support the charge that the employee had made false statements, the company had presented no evidence to support its allegation of excessive absenteeism. Consequently, the arbitrator found for the employee.[169]

The employer argued, on appeal, that the arbitrator had exceeded his authority.[170] The court agreed. The reviewing court explained that an arbitrator's award may not be contrary to the express terms of the collective bargaining agreement.[171] The arbitrator recognized that the employee had violated the sick leave provisions of the contract, yet he seemingly ignored those terms in his decision. The provisions of the bargaining agreement clearly provided for the discharge of an employee guilty of making false statements. Finding that the arbitrator had no authority to "add to" the terms of the contract by also requiring proof of the excessive absenteeism,[172] the court vacated the arbitrator's award.

II. HYBRID JURISDICTION

In *Richins v. Southern Pacific Co.*,[173] the Tenth Circuit was presented with a case involving dual jurisdiction. Railroad employees charged that their employer was guilty of a violation of a collective bargaining agreement. These employees filed an additional claim against their union, alleging breach of the duty of fair representation. The federal district court dismissed the action upon the ground that the employees had failed to exhaust their administrative remedies before the National Railroad Adjustment Board (Adjustment Board).[174]

The Tenth Circuit court ruled that the district court could entertain the case under a hybrid jurisdiction. This hybrid jurisdiction was made neces-

166. *Id.* at 658.

167. *Id.* (emphasis added).

168. The two reasons given to explain the discharge were the employee's use of false statements to obtain sick leave and the excessive absenteeism. *Id.*

169. *Id.* at 658-59.

170. *Id.*

171. *See* Fabricut, Inc. v. Tulsa Gen. Drivers, 597 F.2d 227, 229 (10th Cir. 1979); Mistletoe Express Serv. v. Motor Expressmen's Union, 566 F.2d 692, 695 (10th Cir. 1977).

172. 618 F.2d at 659-60.

173. 620 F.2d 761 (10th Cir. 1980).

174. *Id. See also* Union Pac. R.R. v. Sheehan, 439 U.S. 89, 94 (1978) (minor disputes go to the Adjustment Board, not to the courts); Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978) (no suit permitted until the exhaustion of remedies through National Railway Adjustment Board); Note, *Labor Law—Preemption Doctrine and Exhaustion of Administrative Remedies Under the Railway Labor Act*—Magnuson v. Burlington Northern, Inc., 52 TEMP. L.Q. 198 (1979).

sary by the fact that, although the Adjustment Board had jurisdiction over the employees' charge against the railroad,[175] it lacked jurisdiction over the unfair representation claim against the union.[176] The court was unwilling to split the two complaints. Hearings by both the Adjustment Board and the district court would result in an undesirable duplication of effort, since the contract in dispute applied to both claims.[177]

Although some courts have argued that the Adjustment Board should have the authority to hear hybrid cases,[178] the Tenth Circuit Court of Appeals held that, absent express authorization from the Supreme Court or Congress, the Adjustment Board should not be given such broad power.[179] Because the appellate court felt that the federal courts should not relinquish fair representation cases, the court declared that the district court should take jurisdiction over both the case against the railroad and the case against the union.

III. FAIR LABOR STANDARDS ACT[180]

The Fair Labor Standards Act of 1938 (FLSA)[181] applies to certain "enterprises" defined by statute.[182] In *United States v. Elledge*,[183] the Tenth Circuit was asked to determine if a day care facility came under the coverage of FLSA. FLSA explicitly states that preschools, elementary schools, and secondary schools are covered by the Act. Although other enterprises are defined,[184] the statute, unfortunately, does not give a definition of the term "preschool."[185] The business in question was described as a day care facility, providing toys, meals, outdoor play, and occasional field trips, mainly for children of working mothers. The school had no certified teachers, and no lesson plans or progress reports were prepared.[186] The operator of the business argued that the facility was simply a day care center, not a preschool. The Secretary of Labor, however, asserted that the enterprise was a preschool subject to FLSA requirements.

The court looked to the legislative history of FLSA, but could find no guidelines to aid in the determination of whether a given facility is a preschool. The court noted that the Ninth Circuit, in considering the same question, held that operations "essentially custodial in nature"[187] for the

175. 620 F.2d at 762.
176. *Id.* at 762-63.
177. *Id.* at 763.
178. *See, e.g.*, Goclowski v. Penn Central Transp. Co., 571 F.2d 747 (3d Cir. 1978).
179. 620 F.2d at 763.
180. 29 U.S.C. §§ 201-219 (1976).
181. *Id.*
182. *Id.* § 203(s)(5) includes as enterprises: "a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education . . . ."
183. 614 F.2d 247 (10th Cir. 1980).
184. 29 U.S.C. § 203(v), (w) (1976).
185. The term "preschool" was added to the statute by amendment. Education Amendments of 1972, Pub. L. No. 92-318, § 906(b)(2), (3), 86 Stat. 375 (codified in 29 U.S.C. § 203(s)(5) (1976)).
186. 614 F.2d at 249.
187. Marshall v. Rosemont, Inc., 584 F.2d 319, 321 (9th Cir. 1978).

purpose of providing day care for children of working mothers were not preschools regulated by FLSA. The Tenth Circuit, however, rejected the Ninth Circuit precedent and instead looked to the common meaning of the word "preschool."[188] The court emphasized that expert testimony supported the contention that children can learn simply through exposure to other children and adults.[189] The appellate court considered the humanitarian and remedial purposes of the FLSA and decided that, in order to carry out the purposes of the legislation, the term "preschool" must be given a broad interpretation.[190] Accordingly, the court held that an operation which is open only for custodial purposes falls under the coverage of the FLSA.

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188. 614 F.2d at 250.
189. *Id.*
190. *Id.* at 251.

LANDS AND NATURAL RESOURCES

OVERVIEW

As the United States enters the fuel-scarce 1980's, national attention centers on the energy-rich West. Vast amounts of coal, oil, natural gas, uranium, and oil shale lie untapped in the region encompassed within the Tenth Circuit's jurisdiction. Full-scale development of these minerals will significantly strain existing environments. Many mineral deposits occur on federal lands subject to numerous federal environmental and multi-use statutes. Preserving valuable park and wilderness areas while extracting a sufficient amount of energy fuels presents both a challenge and a dilemma. As the pace of mineral development quickens, legal conflicts will develop between and among producers, distributors, carriers, environmental groups, Indian tribes, private land owners, and federal, state, and local governments.

Increasingly, these disputes are being litigated in the federal courts. During the past year, the Tenth Circuit Court of Appeals decided nineteen cases involving natural resources issues. Several of the cases were of major importance. Issues associated with the use and control of Indian lands were addressed in six Tenth Circuit decisions. A Tenth Circuit case wherein the court of appeals upheld the right of Indian tribes to place a severance tax on minerals removed from reservation lands, if upheld by the United States Supreme Court, will greatly increase tribal revenues for those tribes located on mineral-rich lands. Attempts to alter the terms of existing natural gas contracts also occupied the court's time. In a decision with potentially far-reaching consequences, the Tenth Circuit cleared the way for coal slurry pipeline companies to obtain rights of way across railroad lands.

This survey will examine the rationale employed by the Tenth Circuit in deciding these natural resource issues. A more extended analysis will accompany the discussion of those decisions of major significance.

I. INDIAN LANDS

A number of important issues relating to Indian lands and Indian rights were presented to the Tenth Circuit Court of Appeals during the past term. The right of executive-order reservation tribes to impose mineral severance taxes upon non-Indians, state criminal jurisdiction over Indian hunting and fishing activities on trust lands, the effect of anti-alienation statutes on allotted lands, the scope of responsibility of the Secretary of the Interior under the Southern Paiute Judgment Distribution Act, the necessity of joining the United States in municipal easement condemnations of reservation lands, and the jurisdiction of state courts to determine Indian water rights were among the plethora of legal issues addressed by the court during the past year.

A. *Validity of Indian Severance Taxation*

Perhaps the most significant public lands decision of the Tenth Circuit was *Merrion v. Jicarilla Apache Tribe*,[1] a case wherein the court upheld the right of Indian tribes to impose a mineral severance tax on non-Indians producing oil and gas from leases on executive-order reservation lands.[2] This holding will, in all probability, allow Indian tribes on mineral-rich reservations to vastly increase their revenues.

Merrion, under federal leases, produced oil and gas from wells located on the Jicarilla Apache tribe's reservation in northern New Mexico. In 1976, the Jicarilla Tribal Council passed an ordinance imposing a severance tax on all oil and gas extracted and removed from the reservation. The ordinance was passed pursuant to a revised tribal constitution adopted in 1968,[3] which, in turn, was adopted under authority granted by the Indian Reorganization Act of 1934 (1934 Act).[4] After the ordinance was approved by the Secretary, Merrion and other federal oil and gas lessees with wells on the reservation sought declaratory and injunctive relief in the United States District Court for the District of New Mexico. These lessees brought the action in order to prohibit enforcement of the tax.

After a hearing on the merits, the trial court issued a preliminary injunction prohibiting enforcement of the tax, declaring it illegal and unconstitutional. The lower court could find no express congressional authority for the tax and determined that there was no inherent sovereign power in the tribe to impose the tax. Furthermore, the trial court held that the tax was an unconstitutional burden on interstate commerce and that the tribal tax had been preempted by an express congressional grant of authority to New Mexico to impose severance taxes on oil and gas production within executive-order reservations under provisions of section 398c of Title 25 of the United States Code.[5]

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1. 617 F.2d 537 (10th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3208 (U.S. Oct. 6, 1980) (No. 80-11).

2. The tax is imposed at the time of severance, is payable monthly, and is assessed per million Btu of natural gas and per barrel of crude oil taken off the reservation. Oil and gas used as royalty payment to the tribe is exempt from the tax. *Id.* at 539.

3. Article XI, section 1(e) provides:

> Taxes and Fees. The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes, and fees on non-members of the tribe doing business on the reservation.

(quoted in 617 F.2d at 539).

4. 25 U.S.C. § 476 (1976) provides, in part:

> Any Indian tribe or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult members residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe.

5. 617 F.2d at 540. 25 U.S.C. § 398c (1976) provides:

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is authorized and directed to cause such taxes to be paid out of the tribal

Upon the tribe's appeal to the Tenth Circuit, the court, per Judge Logan, addressed the following three issues: 1) whether sovereign immunity precluded suit against the tribe;[6] 2) whether the tribe possessed inherent power to impose the severance tax;[7] and 3) whether the tax violated the commerce clause.[8]

The preliminary jurisdictional issue was discussed first. Noting that sovereign immunity generally prevented suit against the Indian tribes absent their consent,[9] the court of appeals found that the Jicarilla Apache tribe had expressly waived its immunity in a provision of a recently passed tribal ordinance. Under the 1934 Act, broad powers of self government were granted to the tribes, powers broad enough to allow them to waive their immunity. To deny the tribe this right of waiver would, the appellate court reasoned, contradict both the terms and the intent of the 1934 Act. Moreover, the court concluded that by approving the ordinance, the Secretary had ratified the waiver provisions contained therein; therefore, the express waiver of immunity found in the tribal ordinance was valid.[10]

After disposing of the jurisdictional question, the court of appeals addressed the crucial issue of the case—whether executive-order reservation tribes possess *inherent* power to impose a mineral severance tax on non-Indians operating on reservation lands. The court stated that "the case . . . presents the bald issue of an Indian tribe's taxing power without benefit of reservations of authority in a treaty."[11]

The Tenth Circuit court discussed the problems posed by the quasi-sovereign status of the Indian tribes. Certain powers are denied to the tribes because exercise of these powers would in some way infringe on the superior rights of the United States. Thus, the Indian tribes have no right to independently transfer land,[12] to deal with foreign nations,[13] or to assert criminal jurisdiction over non-Indians.[14] The court of appeals, however, found that the tribe's enactment of the mineral severance tax did not interfere with any federal right. The federal taxing power remained unscathed since the United States could "tax non-Indians or Indians within the reservation whether or not the Tribe levies this tax."[15] Neither did the tax violate the protection afforded by the fifth and fourteenth amendments, because, according to the court of appeals, the tax was not so severe as to constitute a deprivation of property.[16]

The remaining aspect of this issue, and the central one, was whether

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funds in the Treasury: *Provided*, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

6. 617 F.2d at 540.
7. *Id.* at 541.
8. *Id.* at 544.
9. *E.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940).
10. 617 F.2d at 540.
11. *Id.* at 543.
12. Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).
13. The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 9, 17-18 (1831).
14. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
15. 617 F.2d at 542.
16. *Id.*

taxation is one of those inherent powers surrendered by Indian tribes when they acquire their quasi-sovereign status. While recognizing that recent Supreme Court decisions have limited the inherent powers of the tribes because of the current dependent status of Indians,[17] the Tenth Circuit pointed out that the test employed by the Supreme Court in making these determinations was not based upon the degree of a tribe's dependency, but rather the Court examined whether the exercise of a certain power by the tribes would interfere with the sovereignty of the United States. If dependency were the test, the court of appeals reasoned, then consistency would dictate that the tribes exercise no powers over either non-members or members, ultimately conditioning the very existence of the tribes upon congressional approval. This would reduce the tribes to private, voluntary associations, a status expressly rejected by the Court in *United States v. Mazurie*.[18]

In finding that taxation is an inherent power retained by the Indian tribes, the Tenth Circuit relied upon Supreme Court decisions which have held that territoriality is one of the sovereign powers which the Indian tribes have not surrendered. The court of appeals concluded that this fact justified the imposition by the tribes of a tax on the extraction and removal of minerals by non-Indians from Indian territory.[19]

The court of appeals focused on section 16 of the 1934 Act, which section recognized generally the sovereign powers of the tribes. Noting that Congress was aware of the holding in *Buster v. Wright*,[20] wherein the Court had affirmed the right of the Creek Nation to impose a tax on non-Indians doing business on its reservation, the Tenth Circuit found implicit congressional approval of the Indian taxing power because no express provisions limiting the taxing power had been included in the 1934 Act.[21] Further support for this interpretation was found in an opinion by the Solicitor of the Department of Interior, issued shortly after passage of the 1934 Act. Com-

17. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. Wheeler, 435 U.S. 313 (1978).

18. 419 U.S. 544 (1975).

19. *E.g.*, Williams v. Lee, 358 U.S. 217 (1959); Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

20. 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). The court of appeals had held:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.

Id. at 950.

Other cases upholding the right of tribes to impose taxes on non-Indians doing business within Indian reservations include Morris v. Hitchcock, 194 U.S. 384 (1904) (grazing tax); Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), *cert. denied* 358 U.S. 932 (1959) (non-Indian cattle grazing lessee cannot raise constitutional claims of deprivation of property without due process of law because Indian tribes are not states or other political subdivisions of the United States); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 99 (8th Cir. 1956) ("Inasmuch as it has never been taken from it, the defendant Oglala Sioux Tribe possesses the power of taxation [on the privilege of grazing livestock] which is an inherent power incident of its sovereignty.").

21. 617 F.2d at 544.

menting on section 16, the Solicitor stated that "chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation."[22] The court of appeals reasoned that this contemporaneous interpretation of the meaning of section 16, by the agency charged with its enforcement, should be given great weight.[23]

After finding that the tribe had an inherent power to tax mineral lessees doing business on the tribe's reservation, the Tenth Circuit addressed the trial court's finding that the tax violated the commerce clause. In rejecting the trial court's conclusion that the tax was discriminatory because it did not apply to oil and gas royalty production transferred to the tribe, the court of appeals pointed out the purposeless and self-defeating nature of the imposition of a tribal tax on its own resources.[24] In addition, the court found that no burden was imposed upon interstate commerce by the severance tax *per se*. In support of this conclusion, the Tenth Circuit noted a line of cases which have held that a tax on local activity, levied before a product enters the stream of interstate commerce, is not categorically subject to commerce clause restrictions.[25]

It was more difficult for the court of appeals to justify the tax as not imposing a multiple burden on interstate commerce, since the State of New Mexico also taxes the oil and gas produced on the Jicarilla reservation. The court divided this issue into two questions: 1) whether New Mexico's tax interfered with the United States interest in allowing the tribe to enact its tax, and 2) whether Congress had preempted the tribe's power to tax oil and gas lessees by expressly granting to the states the power to tax lessees on executive-order reservations under section 398 of Title 25.[26] It is significant that the court of appeals declined to consider the first issue. Moreover, the manner in which the question was phrased indicates that, if the issue is raised in subsequent litigation, the appellate court may find that state severance taxes on minerals extracted from Indian lands are an unconstitutional intrusion into the federal government's power to regulate Indian affairs.[27]

22. 55 Interior Dec. 14, 46 (1934). *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 142 (1942), wherein the author states that "one of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed."

23. 617 F.2d at 544.

24. *Id.* at 545.

25. *E.g.*, Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923).

26. 617 F.2d at 546.

27. For a discussion which concludes that states do not have the power to preempt Indian mineral taxation, *see* Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. PA. L. REV. 491 (1975). The author argues that state taxation of Indian reservation mineral lessees is invalid because: 1) it reduces the income to the tribe, thereby impairing its ability to function as a governmental entity; and 2) it interferes illegally with the tribe's sovereign right to impose taxes. *Id.* at 507. *But see* Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949), wherein the Court held that states could tax oil company income derived from mineral production activities on reservation leaseholds, even though it might interfere with tribal royalty payments. *See also* Agua Caliente Band of Mission Indians v. County of Riverside, 306 F. Supp. 279 (C.D. Cal. 1969), *aff'd* 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972), wherein a state possessory interest tax on non-Indians was upheld even though it imposed a burden on the tribe's only source of income.

Though recognizing the express language in section 398 authorizing state taxation,[28] the court of appeals reasoned that, by not specifically prohibiting Indian taxation of the minerals, Congress did not preempt the power of executive-order Indian reservation tribes to enact severance taxes.[29] In reaching this conclusion, the appellate court followed the well-settled principle that statutes affecting Indians are to be construed so that ambiguities are resolved in their favor.[30]

The court of appeals inferred that because Congress failed either to explicitly permit or to prohibit the levying of Indian severance taxes, Congress did not consider the issue at the time of the enactment of section 398. The court also employed this reasoning to support its conclusion that the provision in section 398c, for royalty and bonus payments to Indians through the leasing process, was not meant to preclude the enactment of a severance tax by executive-order tribes.[31] The crucial part of the 1934 Act, according to the majority, was the section allowing Indians to determine for themselves what leasing regulations to enact.[32] The court noted that the Department of the Interior had implemented this provision in its leasing regulations.

Two lengthy and vigorous dissents were filed by Chief Judge Seth and Judge Barrett. Chief Judge Seth's analysis centered upon the particular history of the Jicarilla tribe and its nomadic nature.[33] Because of this, Chief Judge Seth reasoned that the Jicarillas never exercised the territoriality which he felt would have justified the imposition of the tax.[34] He noted that the historical sovereign in this geographic area was Mexico, which ceded the territory to the United States in the 1848 Treaty of Guadalupe Hidalgo. Although the treaty provided for certain previously existing property rights, the Jicarilla tribe was not mentioned among those with claims to the land. Chief Judge Seth distinguished the nomadic Jicarilla tribe from the settled Pueblo Indians and noted that the creation of the Jicarilla reservation by executive order did not bestow any territorial rights upon the tribe. The chief judge concluded that the tribe's property rights were no different from

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28. *See* note 5 *supra* for the text of section 398c.

29. In British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), the Court held that section 398c applied to unallotted tribal trust lands and that "Congress assents to taxation by the State of the production of oil and gas through a lease given under [section 398c's] provisions." *Id.* at 166. The Court, however, had determined earlier in the decision that the reservation was of congressional origin, rather than a creature of executive order. Since section 398c pertains specifically to executive-order reservations, the Court may have misapplied the statute. In addition, the *British-American* Court did not reach the issue of the exclusivity of the state tax.

30. *E.g.*, Bryan v. Itasca County, 426 U.S. 373 (1976) (citing Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976) and Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)).

31. 617 F.2d at 547-48.

32. 25 U.S.C. § 396b (1976) provides, in part:

> [T]he foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to *lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe* . . . .

(emphasis added).

33. 617 F.2d at 551 (Seth, C.J., dissenting).

34. *Id. But see* the concurring opinion of Judge McKay, in which he states that the concept of tribal sovereignty is not dependent on the exercise of territorial rights. *Id.* at 549.

those of any other socio-economic group[35] and, therefore, the 1934 Act did not create a status in the tribe which had not existed previously. Although conceding that the 1934 Act granted to the tribes power over the internal and social relations of tribal members, such as criminal jurisdiction and inheritance distribution, Chief Judge Seth stated that these rights did not include the independent power to tax as a sovereign nation.[36]

Judge Barrett, in his dissent, emphasized that the Jicarilla reservation was created by executive order and that there were, therefore, no treaty rights involved in the Jicarillas' attempt to exercise taxing powers. Judge Barrett noted that past cases which upheld the power of the tribes to enact taxes on non-Indian activities were based on specific grants in individual treaties, statutes, or agreements. Since there had been no express grant of taxation authority to the Jicarilla tribe, the judge argued that a "balancing of interests" test had to be applied.[37] Judge Barrett then interpreted section 398c as demonstrating a clear congressional intent to reserve to state and local governments the right to levy and collect taxes on production from oil and gas wells within executive-order Indian reservations.[38]

The Tenth Circuit decision in *Merrion v. Jicarilla Apache Tribe* has the potential of allowing any Indian tribe to enact severance taxes on mineral production within reservations created by executive order or by treaty. Since the Tenth Circuit court found sufficient legal justification for the imposition of a severance tax by tribal governments on executive-order reservations, despite express statutory provisions granting to the states the power to tax mineral production on these lands, there is little doubt that similar taxes enacted by tribes living on treaty-created reservations, which reservations do not have corresponding statutory provisions permitting state severance taxes, will be upheld.[39]

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35. This statement appears to be at odds with the Supreme Court decision in United States v. Mazurie, 419 U.S. 544, 557 (1975), wherein the Court stated that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *See also* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973); United States v. Kagama, 118 U.S. 375, 381-82 (1886) ("[Indian tribes are] a separate people, with the power of regulating their internal and social relations"); Worcester v. Georgia, 31 (6 Pet.) 515, 557 (1832) ("[T]he several Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.").

36. 617 F.2d at 553-54.

37. *Id.* at 557-59 (Barrett, J., dissenting).

38. For a discussion of congressional history relative to section 398c, *see* Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. PA. L. REV. 491, 520 n.175 (1975). *See also* Comment, *Tribal Power to Tax Non-Indian Mineral Lessees*, 19 NAT. RESOURCES J. 969, 989-90 (1979), which discusses the confusing congressional history of section 398. It is interesting to note that the authors of these two comments come to completely opposite conclusions regarding congressional intent over executive-order Indian reservation tribal power to tax mineral lessees.

39. There are several current federal district court cases on this issue. However, the tribe involved in these cases is a treaty reservation tribe—the Navajos. *See, e.g.*, Phillips Petroleum Co. v. Navajo Tribe of Indians, No. 79-0153 (D. Utah, filed Mar. 15, 1979); Salt River Project Agricultural Improvement and Power Dist. v. Navajo Tribe of Indians, No. 78-352 (D. Ariz., filed July 11, 1978).

See also Ames, *Tribal Taxation of Non-Indian Mineral Lessees: An Undefined Inherent Power*, 6 J. CONTEMP. L. 55 (1979). Ames argues that the power to tax mineral lessees on reservation land is an inherent power of tribal sovereignty.

The weakest part of the majority's opinion appears to be in its conclusion that the express congressional grant of authority to the states to tax mineral production on executive-order reservations did not preempt tribal taxation of the same production.[40] The *Merrion* decision places oil and gas and other mineral lessees operating on Indian reservations in the economically disadvantageous position of paying severance taxes on the same mineral production to both the state and Indian governmental bodies. This double taxation may become so onerous as to constitute either an unconstitutional taking of property or an undue burden on interstate commerce.

A related, and as yet unanswered question, which will likely arise in future litigation, is whether a *state* severance tax on Indian reservation minerals is an unconstitutional intrusion on the powers of the federal government. In the *Merrion* case, the federal government had specifically granted to the states the authority to tax oil and gas production from the Jicarillas' executive-order reservation. If a state were to tax mineral production from Indian reservations created by treaty, in which case section 398 would not apply, the state might be guilty of unduly burdening interstate commerce. A challenge to the state's taxation would arise if the double taxation provided a stumbling block to the continued mining or drilling on Indian lands.[41]

B. *Municipal Easement Condemnation of Indian Lands*

In *United States v. City of McAlester*,[42] the Tenth Circuit Court of Appeals held that the United States was not a necessary party to the city's 1903 watershed basin easement condemnation of Choctaw and Chickasaw reservation lands. The court, however, remanded the case to the federal district court for reconsideration of whether the city's present use of the easement was consistent with watershed basin purposes.[43]

The City of McAlester had condemned 2,535.8 acres of Indian lands in

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> The doctrine of Indian sovereignty means little if a tribe has no revenues to carry out its plans. This is especially true with the Navajo, whose population is undereducated and underemployed. . . . If a tribe is to govern itself, it is essential that taxation be one of the powers which is retained.

Id. at 64. This reasoning was adopted by Judge McKay in his concurring opinion. Judge McKay asserted that "it simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes." 617 F.2d at 550 (McKay, J., concurring).

40. *See* note 38 *supra*.

41. The Solicitor of the Department of Interior recently issued an opinion concerning New Mexico's taxation of the royalties accruing to the Jicarilla tribe from oil and gas production on reservation land. The opinion states that § 398 prescribes that executive-order reservation tribes are to be treated the same as treaty reservation tribes. Furthermore, he asserted that, pursuant to an earlier opinion explaining that tribal royalties from oil and gas production on treaty reservations in Montana could not be taxed by the state, "taxation of production on Jicarilla Apache tribal lands from leases made under the 1938 Leasing Act is not authorized by § 398c. . . . Thus, New Mexico may not tax royalties received by the Jicarilla Apache Tribe from 1938 Act leases." [1979] 6 INDIAN L. RPTR. H-4. This opinion, however, was specifically limited to Indian royalties and did not address New Mexico's right to impose severance taxes on the lessees themselves.

42. 604 F.2d 42 (10th Cir. 1979).

43. *Id.* at 55.

1903 for use as a "watershed and basin and [for] erecting, maintaining, and using a waterworks system," without joining the United States in the condemnation proceeding.[44] In 1950, the encumbered tribes filed a quiet title suit against the city and moved to join the United States. The United States was dismissed from the suit because it had not consented to be sued.[45] The easement condemnation was subsequently ruled valid by the district court,[46] which held that the Tenth Circuit decision of *Choctaw and Chickasaw Nations v. Seitz*[47] was controlling. In 1975, the United States brought a second quiet title action on behalf of itself and as the trustee of Indian lands. The government argued that because the United States was an indispensable party to the original 1903 action, the city's failure to join the United States rendered the 1903 condemnation decision invalid. The federal district court ruled against the United States,[48] a three-judge Tenth Circuit panel reversed,[49] and, upon grant of a rehearing *en banc*, the panel decision was overturned.[50]

The issues presented on appeal were: 1) whether the United States was an indispensable party to the 1903 condemnation; 2) whether section 11 of the Curtis Act authorized the condemnation; and 3) whether the city had made improper use of the easement for non-watershed purposes.[51]

The Tenth Circuit acknowledged that the Non-Intercourse Act of 1834[52] prevented any conveyance of Indian land without the consent of the United States.[53] The court pointed out, however, that this restriction had been significantly modified by subsequent legislation. Under provisions established by the Dawes Commission of 1893,[54] the United States gave its broad consent to the alienation of Indian lands without requiring specific prior approval by the federal government. Furthermore, section 11 of the Curtis Act allowed incorporated cities adjacent to reservation lands to condemn "lands actually necessary for public improvements, regardless of tribal lines."[55] Also, the Atoka Agreement of 1897, between the Dawes Commission and the Choctaw and Chickasaw nations, which was incorporated as section 29 of the Curtis Act,[56] gave United States consent for the tribes to

44. City of South McAlester v. Choctaw and Chickasaw Nations, No. 3293 (C.D. Ind. Terr. 1903).

45. 604 F.2d at 58.

46. Choctaw and Chickasaw Nations v. City of McAlester, No. 2781—Civil (E.D. Okla. Sept. 10, 1952).

47. 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952).

48. United States v. City of McAlester, 410 F. Supp. 848 (E.D. Okla. 1976).

49. The panel decision is reprinted at the conclusion of the *en banc* decision. 604 F.2d at 57. Judges McWilliams and Doyle dissented from the majority opinion and continued to adhere to the panel decision. *See* Overview, *Lands and Natural Resources, Fifth Annual Tenth Circuit Survey*, 56 DEN. L.J. 517, 524-26 (1979).

50. 604 F.2d at 55.

51. *Id.* at 45.

52. 25 U.S.C. § 177 (1976) provides, in part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

53. 604 F.2d at 47.

54. 27 Stat. 612, 645 (1893).

55. Curtis Act of 1898, ch. 517, 30 Stat. 495, 498.

56. *Id.* at 505-13.

alienate their lands.

The Tenth Circuit Court of Appeals relied on section 2 of the Curtis Act to justify its conclusion that the United States was not a necessary party to the 1903 condemnation.[57] The majority of the court inferred that the legislature's failure to expressly mandate the inclusion of the United States as a necessary party demonstrated a congressional belief that the federal government was not an indispensable party in an action affecting tribal property.[58] The court concluded that the specific provisions of the Curtis Act, permitting the alienation of Indian lands without joinder of the United States, controlled over the more general provisions of the Non-Intercourse Act.[59]

In rejecting the government's argument that the condemnation provisions of section 11 pertained only to allotted lands, the court focused on the express language of the Curtis Act, which granted condemnation authority to "all towns and cities . . . [and] all lands, regardless of tribal lines . . . ."[60] The court was satisfied that this language demonstrated that municipal condemnation actions are not limited to allotted lands. Although the condemnation provisions of section 11 deal principally with allotted lands, the court pointed out that some of the section's provisions also refer to certain types of unallotted lands.[61] The court concluded that although the provision for condemnation proceedings had been included within section 11, Congress did not intend thereby to limit condemnation actions to allotted lands.[62]

The United States claim that Congress had breached its fiduciary duty as trustee of Indian lands, by allowing condemnation of unallotted lands without the government's prior, specific consent, was also rejected. The court found the 1953 decision of *Choctaw and Chickasaw Nations v. Atoka*,[63] in which the court had allowed the condemnation of unallotted Indian lands, to be controlling on this point. Further support for the court's reasoning was found in provisions of section 11, which established certain procedural requirements for municipal condemnation actions, such as the guarantee of the right to a jury trial and the designation of territorial federal district court judges to preside over condemnation actions. These procedural safeguards indicated, to the majority of the court, that the United States had not breached its fiduciary duties.[64]

Although the court of appeals affirmed the district court's decision, the case was remanded for a further hearing on the issue of whether the city had violated the purpose of the original easement. The city had leased some of

57. 604 F.2d at 49. Section 2 of the Curtis Act made Indian tribes necessary parties to any action affecting tribal property. 30 Stat. 495 (1898).

58. 604 F.2d at 50.

59. *Id.* at 49.

60. 30 Stat. 498 (1898).

61. *Id.* at 497-498. Certain provisions of the Curtis Act reserved from allotment those lands used for churches, schools, parsonages, charitable institutions, and burial grounds.

62. 604 F.2d at 50.

63. 207 F.2d 763 (10th Cir. 1953).

64. 604 F.2d at 51.

the easement lands for private uses.[65] The court noted that whether these non-municipal activities were a departure from the necessary or incidental purposes of the watershed easement was a question to be decided under Oklahoma law.[66]

Judges McWilliams, Doyle, and McKay subscribed to the earlier panel decision.[67] The unanimous three-judge panel had held that whereas the condemnation provisions in the Curtis Act appeared in section 11, and whereas this section dealt exclusively with allotted lands, unallotted lands were not included in those Indian lands subject to condemnation.

C. *State Court Jurisdiction Over Indian Reserved Water Rights*

The jurisdictional authority of state courts to determine the status of Indian reserved water rights was affirmed by the Tenth Circuit Court of Appeals in *Jicarilla Apache Tribe v. United States*.[68] In addition, the court confirmed the propriety of United States representation of Indian federal reserved water rights interests in state water rights adjudications. The right of a tribe to independently intervene to protect tribal water rights was also advanced.[69]

In an action filed in state district court, New Mexico sought a general water rights adjudication of all the water rights and uses of the San Juan River system.[70] As the action involved the determination of federally reserved water rights, including Indian reserved water rights, the United States was joined as a defendant. The United States attempted to remove the case to federal district court. Furthermore, the federal government sought to dismiss that part of the suit designating the United States as the fiduciary representative of all Indian reserved rights, claiming conflicts of interest.[71] The United States District Court for the District of New Mexico remanded the case to the state district court for a determination of all water rights claims, including the Indian claims. The federal district court mandated that the United States continue to represent Indian interests.[72]

The Jicarilla Apache tribe subsequently filed suit in federal district

65. *Id.* at 52. These private uses included farming, hunting, fishing, grazing, and recreational uses.

66. *Id.* at 55. The court held that the test used by the trial court, *i.e.*, whether the present uses were *inconsistent* with the watershed easement, was improper. The appropriate test, under Oklahoma law, was whether the uses were "incident or necessary to the reasonable and proper enjoyment of the easement." Hudson v. Lee, 393 P.2d 515, 518-19 (Okla. 1964).

67. 604 F.2d at 57-64. The panel decision was authored by the honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

68. 601 F.2d 1116 (10th Cir.), *cert. denied*, 100 S. Ct. 530 (1979). The McCarran Amendment, 43 U.S.C. § 666(a) (1976), in which the United States consented to joinder in any state proceeding involving the general adjudication of water rights, provided the statutory basis for the court's holding.

69. 601 F.2d at 1127.

70. Reynolds v. United States, No. 75-184 (Dist. Ct. San Juan County, filed Mar. 13, 1975).

71. 601 F.2d at 1118. The United States implied that whereas the Apaches, the Navajos, and the Utes all had reserved water rights claims involved in the litigation, it could not adequately represent each tribe's interest. *Id.* at 1120.

72. *Id.*

court, seeking both a general adjudication of water rights on the Navajo River system and injunctive relief against the United States to protect the tribe from an alleged violation of the Upper Colorado River Compact.[73] The tribe asserted that the United States diversion of water from the Chama-Rio Grande River system through the San Juan-Chama Project exceeded the amount of water that could beneficially be used by the appropriating parties.[74]

The State of New Mexico argued that the adjudication of all federally reserved water rights should be conducted in one forum. The state also asserted that the United States was the real party in interest in any litigation involving Indian reserved water rights. The federal district court suggested to the tribe that a bifurcation of the reserved rights issue and the interstate compact issue would facilitate a hearing on the transmountain diversion aspects of the case. The tribe rejected the court's suggestion.[75] The federal district court then dismissed the entire case for lack of subject matter jurisdiction.[76]

On appeal to the Tenth Circuit, the central issue before the court was whether the McCarran Amendment[77] had effectively repealed the jurisdictional disclaimer contained in the New Mexico Enabling Act[78] and in the state constitution.[79] Through the language in section 2 of the New Mexico Enabling Act, the people of New Mexico renounced the right to divest the title to any property "held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States."[80] The enabling act further provided that the disclaimer was irrevocable without the consent of *both* the Congress and the people of New Mexico.[81] These

73. *Id.* at 1119.

74. *Id.* The appropriators had contracted with the Secretary of the Interior for said waters.

75. *Id.* at 1121.

76. *Id.* at 1123.

77. 43 U.S.C. § 666(a) (1976). The pertinent portion of the McCarran Amendment provides:

> (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a water system or other source . . . . The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances.

Id.

78. New Mexico Enabling Act of 1910, ch. 310, 36 Stat. 557, 558-559. Section 2 of the New Mexico Enabling Act provides, in part:

> [T]he people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States.

Id.

79. N.M. CONST. art. 21, § 2. The wording is similar to the language of the Enabling Act, *see* note 78 *supra*.

80. 36 Stat. 558-559 (1910).

81. *Id.* The state relinquishment of authority over the public domain contained in the New Mexico Enabling Act is consistent with similar disclaimers found in the enabling acts of other public land states. L. MALL, PUBLIC LAND AND MINING LAW at 3-6 (1979).

provisions were codified in the state constitution.[82]

The Tenth Circuit court recognized the express wording of the enabling act and the state constitution, but nevertheless concluded that there presently exists no exclusive federal jurisdiction over Indian water rights disputes.[83] The court of appeals relied upon the legislative history of the McCarran Amendment, which the court felt demonstrated a congressional determination that all federal water rights should be settled in one forum. The Tenth Circuit court reasoned that the language of the McCarran Amendment and the congressional rationale for its enactment pointed toward an implicit modification of the New Mexico Enabling Act.[84] In addition, the Tenth Circuit Court of Appeals found that the decisions of *New Mexico v. Aamodt*[85] and *Colorado River Water Conservancy District v. United States*[86] were controlling. These earlier cases expressly held that state courts have jurisdiction to determine Indian reserved water rights. The court also found implicit support for its conclusion in *United States v. District Court*,[87] a case wherein the Supreme Court had spoken of non-Indian and Indian reserved rights without any suggestion of a distinction between the two for purposes of McCarran Amendment jurisdiction.

Together with its McCarran Amendment reasoning, the Tenth Circuit court adjudged that whereas the disclaimer provisions in the New Mexico Enabling Act pertained only to *proprietary interests* in Indian lands, the enabling act's limitations did not apply to general water rights adjudications. The court of appeals analogized this New Mexico case to the situation which confronted the Supreme Court in *Kake Village v. Egan*.[88] *Kake Village* arose as the result of Alaska's attempt to regulate the fishing practices of Indians residing in Alaskan incorporated communities. The Supreme Court ruled that despite jurisdictional disclaimer provisions in the Alaska Enabling Act, the state had authority to regulate Indian fishing activities.[89] The Tenth Circuit suggested, on the basis of *Kake Village*, that so long as state regulation of Indian rights does not interfere with property rights granted to the Indians by the United States, or impair the ability of Indian tribes to govern themselves, the state regulations will not constitute a breach of enabling act restrictions.[90] As state adjudication of Indian reserved water rights was deemed not to interfere with the Jicarilla Apache tribe's self-governance or to impair a property right granted to the Indians by the United States, the Tenth Circuit found that New Mexico jurisdiction attached.[91]

82. N.M. CONST. art. 21 § 2.
83. 601 F.2d at 1130.
84. *Id.* at 1131.
85. 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).
86. 424 U.S. 800 (1976). The Supreme Court declared that "the state court had jurisdiction over Indian water rights under the [McCarran] Amendment." *Id.* at 809.
87. 401 U.S. 520 (1971).
88. 369 U.S. 60 (1962).
89. *Id.*
90. 601 F.2d at 1135.
91. *Id.* A third foundation for the court's holding was the basic principle that Congress may delegate its supervisory authority over the Indian tribes. United States v. New Mexico, 590 F.2d 323, 328 (10th Cir. 1978), *cert. denied*, 100 S. Ct. 63 (1979). The court of appeals found that the McCarran Amendment served as a specific congressional delegation of jurisdictional author-

The court of appeals' distinction between Indian proprietary rights, to which the enabling act restrictions purportedly apply, and other Indian property rights, is a sound one. Because Indian reserved water rights, as Alaskan native fishing rights, fall into the latter category, state jurisdiction over the Indian water rights would be appropriate even if the enabling act was not modified by the McCarran Amendment. Rather than limiting itself to this analysis, however, the court emphasized the modification of the enabling act by subsequent congressional actions and Supreme Court decisions. The court never squarely addressed the tribe's contention that the McCarran Amendment did not repeal the disclaimer of the enabling act.[92] The language of the enabling act and of the state constitution clearly provides that the state's relinquishment of jurisdiction over Indian property rights can be reversed only with the consent of *both* the United States and the people of New Mexico.[93] The court adduced no evidence of state approval of the modification and, therefore, the court apparently assumed that Congress may effectively alter the terms of state enabling acts and state constitutions through unilateral action. That the result of the court of appeals' decision in this case was to increase the authority of the New Mexico state government does not minimize the significance of this declaration.

The ancillary issue of whether the federal government or the Indian tribes are the appropriate defendants in Indian reserved water rights litigation also was addressed by the Tenth Circuit in *Jicarilla Apache Tribe v. United States*.[94] The court affirmed that "the United States is the proper party defendant in *any* general water rights adjudication proceeding, whether brought in federal court or state court, relating to federally created water rights, including those reserved for use by Indian tribes."[95] The appellate court noted, however, that this rule does not preclude the affected Indian tribes from obtaining private counsel to guarantee against any possible conflict of interest.[96] Since the Jicarilla Apache tribe had pending water rights claims against the United States, and as several Indian tribes were affected by the New Mexico general water rights adjudication, this case provided a good example of the need for this independent right of intervention.

D. *Distribution of Appropriation Funds to Individual Tribal Members*

In *Whiskers v. United States*,[97] the central issue was whether the funding and distribution schemes enacted by Congress, as compensation for lands taken from the Southern Paiute Nation, created a trust to be administered by the Secretary of the Interior. The case arose because Chloe Whiskers, a member of the Southern Paiute tribe potentially eligible to receive benefits under the distribution scheme, failed to register for her share of the funds

ity to New Mexico. 601 F.2d at 1135. This analysis, however, begs the question of whether New Mexico had accepted this delegation of authority.

92. 601 F.2d at 1130.
93. *Id.* at 1128.
94. *Id.* at 1127.
95. *Id.*
96. *Id.*
97. 600 F.2d 1332 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 1028 (1980).

within the period prescribed by the Secretary.[98] When her delayed request for funds was denied, Chloe Whiskers brought an action in the United States District Court for the District of Utah, seeking damages against the United States. Whiskers alleged breach of trust and statutory duties and claimed an unconstitutional taking of her property.[99]

The Tenth Circuit Court of Appeals, affirming the decision of the district court, held that the Southern Paiute Judgment Distribution Act (the Distribution Act)[100] neither expressly nor implicitly created a trust relationship between the Secretary and potential recipients of the benefits.[101] Although the court concurred with Whiskers' contention that, absent clear congressional intent to the contrary, a trust relationship is created when the word "trust" is used in an appropriations statute, the appellate tribunal found that neither the Second Supplemental Appropriations Act (the Appropriations Act)[102] nor the Distribution Act mentioned the creation of a trust. Congress nowhere stated that the Southern Paiute funds created by these acts should be held in trust pending distribution of the funds. The Distribution Act instructed the Secretary to establish procedures by which the department could determine those persons eligible for the payments. In failing to meet the enrollment deadline promulgated by the Secretary, Whiskers and all other Indians in her position were precluded from fund distribution.

The principle argument urged by Whiskers was that section 725s of Title 31 mandates that funds appearing on government records, including Indian monies, are to be classified by the Treasury Department as trust funds.[103] The court of appeals acknowledged that the statutory language appeared to include those funds appropriated by Congress for the Paiutes. The court asserted, however, that a closer analysis of the statute revealed that the funds referred to in section 725s were limited to a narrow category of monies set aside for Indians. The appeals court declared that only income resulting from the leasing of certain Indian lands originally reserved for agencies and schools was to be included in the section 725s trust funds.[104] The trust monies are to be spent by Indian schools and agencies. The Appropriation and Distribution Acts' grant to the Southern Paiute Nation, as a fund appropriated in settlement of Indian claims, was deemed not to fall within the narrow category of trust funds described in section 725s.[105]

The relationship between the United States government and the Indian tribes may be characterized as a fiduciary one. The court of appeals found,

98. *Id.* at 1334.
99. *Id.*
100. Pub. L. No. 90-584, 82 Stat. 1147 (1968) (codified at 28 U.S.C. § 1346 (1976)).
101. 600 F.2d at 1339.
102. Pub. L. No. 89-16, tit. iv, 79 Stat. 108 (1965).
103. 31 U.S.C. § 725s(a)(20) (1976) provides:
(a) The funds appearing on the books of the Government . . . shall be classified on the books of the Treasury as trust funds. . . . [including]
(20) Indian moneys, proceeds of labor, agencies, schools, and so forth (5t301).
104. 600 F.2d at 1336, *citing* 78 Cong. Rec. 8242 (1934) (remarks of Rep. Griffin) and Hearing on H.R. 9410 before the Subcommittee on Permanent Appropriations of the House Appropriations Committee, 73d Cong., 2d Sess., 255, 258 (1934).
105. 600 F.2d at 1336-37.

nevertheless, that the test enunciated in *United States v. Testan*,[106] requiring an allegation of substantive statutory violations in actions against the United States, had not been met by Whiskers' claim of a fiduciary breach. In *Testan*, the Supreme Court had concluded that the Tucker Act,[107] the statute under which Whiskers had claimed standing to bring the damages suit, was not of itself a grant of jurisdiction. Claims under the Tucker Act must be supported by a charge that a specific federal statute, affording compensation by the United States for damages sustained, pertains to the case.[108] As the Tenth Circuit court could find no statutory, regulatory, or constitutional impropriety in the Secretary's failure to hold Whiskers' funds in trust, the court concluded that there could be no violation of a substantive right, and that certainly there was no specific congressional mandate to compensate persons in Whiskers' situation.

Whiskers also had argued that the express language in *Cheyenne-Arapaho Tribes v. United States*[109] mandated the classification of all judgments of the Indian Claims Commission, under which the Appropriation Act and the Distribution Act had been legislated, as trust funds. The court of appeals distinguished the *Cheyenne-Arapaho* decision on the basis that "specific congressional legislation had declared the funds in *Cheyenne-Arapaho* to be held in trust."[110] The court noted that there was no similar language in the acts relied upon by Whiskers. The court of appeals summarily disposed of Whiskers' fifth amendment taking claim, reasoning that since the Distribution Act provided for group claims, as opposed to providing individual property rights, Whiskers "had no constitutionally recognizable . . . property rights in the undistributed fund of which [she] could have been deprived in violation of the Fifth Amendment."[111]

By strictly construing the Appropriation and Distribution Acts, the Tenth Circuit Court of Appeals indicated an unwillingness to infer a trust relationship between Indian tribal members and the Secretary of the Interior, even where the Secretary is charged with distributing compensation funds granted by the Indian Claims Commission and subsequently approved by Congress. If individual tribal members are to preserve the right to compensation awards, even in the face of the Secretary's improper administration of the tribal funds, specific language decreeing the creation of a trust relationship must be included by Congress in the appropriations acts. Without specific statutory language, applicants qualified for federal compensation who do not strictly adhere to procedures established by the Secretary will be precluded from subsequent damage claims against the United States.

E. *Anti-Alienation Clause of the General Allotment Act*

Whether the anti-alienation clause of the General Allotment Act (Act)

106. 424 U.S. 392 (1976).
107. 28 U.S.C. § 1346(a) (1976).
108. 424 U.S. at 398.
109. 512 F.2d 1390, 1392 (Ct. Cl. 1975).
110. 600 F.2d at 1337.
111. 600 F.2d at 1338-39.

runs with the land or is limited to the original allottee was the issue which confronted the Tenth Circuit in *Oklahoma Gas & Electric Co. v. United States*.[112] The court of appeals held that alienation restrictions on allotted land run with the land and are not personal to the individual allottee.[113]

William Robedeaux, an Otoe Indian, was granted an allotment of Otoe reservation land under the General Allotment Act of 1907. He subsequently conveyed his allotted land, by deed, in 1950, to his son Willis. Willis entered into an agreement with the Oklahoma Gas and Electric Company to exchange the allotted land for other land. The exchange was approved by the Secretary of the Interior. Allotted land is held in trust by the United States and is not subject to encumbrances by creditors for debts incurred by the allottee prior to issuance of the final patent.[114] Red Rock Co-op, a judgment creditor of Willis, asserted a lien on the proceeds of the condemnation of the land and objected to the transfer agreement entered into by Willis as interfering with Red Rock Co-op's rights as a judgment creditor.[115]

The Tenth Circuit, in upholding Willis' right to exchange the allotted land, noted that although Willis was technically a grantee rather than an heir, he was, for practical purposes, an heir to his father's allotted land and as such subject to the same restrictions. The appellate court relied upon the holding of *Stevens v. Commissioner*,[116] a case wherein the Ninth Circuit had concluded that the Indian lands tax exemption applied to allotted land purchased by another Indian. The Ninth Circuit had noted the federal policy of encouraging the consolidation of larger blocks of land by Indians for purposes of economic viability. Because the protective provisions in the Act applied to the Indian transferee of allotted lands in *Stevens*, even though the transferee was not an heir, the Tenth Circuit court reasoned that it was congressional policy to extend the Act's anti-alienation provisions to grantees as well as to heirs. Therefore, judgment creditors such as Red Rock Co-op cannot assert liens on transferred allotted lands prior to patent.

F. *Indian Trust Lands Included in the Term "Indian Country"*

The issue facing the appellate court in *Cheyenne-Arapaho Tribes v. Oklahoma*[117] was whether the Assimilative Crimes Act[118] granted jurisdiction to the states to impose state hunting and fishing laws on lands held in trust by the federal government for Indians. The Cheyenne-Arapaho reservation was created by two treaties[119] and clarified by an executive order in 1869.[120] Hunting and fishing rights were not discussed in the text of the

112. 609 F.2d 1365 (10th Cir. 1979).
113. *Id.* at 1367.
114. 25 U.S.C. § 354 (1976).
115. 609 F.2d at 1366.
116. 452 F.2d 741, 747 (9th Cir. 1971).
117. 618 F.2d 665 (10th Cir. 1980).
118. 18 U.S.C. §§ 1151-1165 (1976).
119. Treaty with the Cheyennes and Arapahoes, 14 Stat. 703 (1865); Treaty with the Cheyenne Indians, 15 Stat. 593 (1867).
120. 618 F.2d at 666.

treaties or in the executive order. Under the General Allotment Act,[121] the President was authorized to allot portions of Indian reservations to individual tribal members and to sell the excess to private parties. The Cheyenne-Arapahoe reservation was subsequently disestablished.[122]

Oklahoma apparently had been exercising jurisdiction over the trust lands within the disestablished reservation.[123] The Cheyenne-Arapaho tribe brought an injunctive action seeking to halt this practice. Since Indian hunting and fishing rights within "Indian Country"[124] are determined under exclusive tribal jurisdiction, the Tenth Circuit had to decide whether trust lands within a disestablished reservation are included in the definition of the term "Indian Country," thereby rendering them immune from state hunting and fishing regulations.

The Tenth Circuit court relied principally on the recent decision in *United States v. John*,[125] wherein the Supreme Court held that criminal jurisdiction over Indian trust lands was vested exclusively in the United States. The court of appeals also noted that a 1945 Solicitor's Opinion had stated that lands acquired in trust for the Cheyenne-Arapaho tribe were classified as reservation lands.[126] Based on the Supreme Court's opinion in *John*, and on the 1945 Solicitor's Opinion, the Tenth Circuit court found that the Cheyenne-Arapaho trust lands should be considered "Indian Country."[127] Oklahoma therefore had no authority to regulate Indian hunting and fishing activities on trust lands.

The court of appeals rejected Oklahoma's argument that the Assimilative Crimes Act gave the state jurisdiction over hunting and fishing activities, asserting that the Act did not incorporate state criminal statutes which are inconsistent with federal policies. Particular reliance was placed on the Act's section 1162(b),[128] which specifically guarantees Indian hunting and

121. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, *as amended by* Act of May 8, 1806, ch. 2348, 34 Stat. 182.

122. Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, which ratified an earlier agreement between the United States and the tribes, and which provided:

> The said Cheyenne and Arapaho tribes of Indians hereby cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest of every kind and character, in and to the lands [established by the executive order].

26 Stat. 1022. The Act also provided that the lands were to be held in trust by the United States. 26 Stat. 1024.

123. In Ellis v. Page, 351 F.2d 250, 252 (10th Cir. 1965), the court had held that the cumulative effects of the several acts disestablished the reservation. The lands within the disestablished reservation were classified into three categories: 1) individual allotments, 2) trust lands, and 3) non-Indian lands. In the 1980 case, the Tenth Circuit was concerned with the second category.

124. The term "Indian Country" is defined, in 18 U.S.C. § 1151 (1976), as comprising all Indian reservation land, including patented and easement lands, "all dependent Indian Communities," and all Indian allotments with restrictions against alienation still in effect.

125. 437 U.S. 634 (1978).

126. 59 Interior Dec. 1 (1945).

127. 618 F.2d at 667-68.

128. 18 U.S.C. § 1162(b) (1976) provides, in part:

> Nothing in this section . . . shall deprive any Indian or Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

fishing rights on trust lands. The appellate court agreed with the United States argument that it would be inconsistent for Congress to have prohibited state control of Indian hunting and fishing rights in section 1162(b), and then to have given this authority back, indirectly, through other, less explicit language in the Act.[129]

II. NATURAL GAS SALES CONTRACTS

A. *Interpretation of Favored Nations Clauses*

In *Superior Oil Co. v. Western Slope Gas Co.*,[130] the Tenth Circuit Court of Appeals was asked to settle a contract dispute between the buyer and seller of natural gas. The contract, delineating the conditions of the intrastate sale of natural gas, included a favored nations clause requiring the buyer to pay to the seller a purchase price equal to the highest price paid to any other seller within a specific geographic area. The natural gas sales contract also included a savings clause, whereby the buyer's obligation to pay the higher price was made subject to several factors, including the quality of the gas, the bases of measurement, delivery pressure, and "other conditions of sale." When challenged by seller's claim that buyer was paying a higher price to certain other sellers in contravention of the favored nations clause, buyer defended by noting that the higher prices were being paid as a result of a Federal Power Commission (FPC) "vintaging" order.[131] The buyer asserted that vintaging, as one of the "other conditions of sale" contemplated by the contracting parties as an exception to the favored nations clause, should not be a factor in determining the price paid to seller. The Tenth Circuit, overruling the district court, found that the phrase "other conditions of sale" did not include vintaging,[132] and hence the FPC's order did not protect buyer from paying higher prices to seller when buyer paid higher prices to local sellers subject to the FPC's jurisdiction.[133]

Superior Oil, a natural gas production company, had entered, in 1964, into a 20-year natural gas contract with Western Slope. The contract contained a favored nations clause, which stated that Western Slope would pay Superior a rate equal to the price that Western Slope paid other natural gas suppliers within a three-county area of Colorado, if that price was higher than that being paid Superior.[134] In 1972, Western Slope notified Superior

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See also 18 U.S.C. § 1165 (1976).

129. 618 F.2d at 669.

130. 604 F.2d 1281 (10th Cir. 1979).

131. "Vintaging" refers to the date when a successful well is drilled, with gas from older wells being priced lower than gas from recently drilled wells. 604 F.2d at 1284.

132. 604 F.2d at 1291.

133. Most of the regulatory responsibilities of the now defunct Federal Power Commission have been assumed by the Federal Energy Regulatory Commission. The federal regulatory agencies have authority over natural gas which is to be sold interstate.

134. Article 8.4 of the contract provides, in part:

> If, at any time during the term of this Agreement, Buyer pays to a producer of natural gas in Mesa, Garfield, and Rio Blanco County, Colorado, for the purpose of reselling such gas in its Colorado market area, a price per MCF higher than that being paid to Seller hereunder, due consideration being given to the quality of the gas, bases of measurement, delivery pressure, and *other conditions of sale*, Buyer shall, commencing upon the date of the first delivery of such natural gas at such higher price, and contin-

Oil that it was paying a higher rate to other suppliers in the vicinity under an FPC order and explained that it would begin paying Superior Oil at an equal rate, even though the FPC order applied only to natural gas contracts instituted on or after June 17, 1970.[135] In 1974, Western Slope informed Superior Oil that the favored nations clause was being triggered again, this time as a result of Western Slope's contract with a supplier of gas from wells drilled on or after January 1, 1973.[136] In 1975, however, Superior Oil discovered that Western Slope was paying a higher price to yet another supplier in the three-county area—fifty cents per mcf compared with forty-five cents per mcf paid to Superior Oil. Superior Oil notified Western Slope that the buyer was violating the favored nations clause. Western Slope replied that it had been advised that the vintaging concept established by the FPC was included in the phrase "other conditions of sale" in the favored nations clause of the 1964 agreement and that, under the vintaging scheme, Superior Oil was receiving a fair rate. Superior Oil reminded Western Slope that a triggering of the favored nations clause had occurred under previous FPC orders, which included vintaging schedules. Superior Oil noted that Western Slope's position was inconsistent with its past practice. When Western Slope refused to increase the price paid to Superior Oil, the seller filed a complaint against Western Slope, alleging buyer's failure to pay the full contract price.[137]

The Tenth Circuit attempted to discern what the intent of the contracting parties was at the time of the agreement's negotiation in 1964. In so doing, the court of appeals found that the intrastate utilization clause of the contract demonstrated that both Superior Oil and Western Slope intended that their contract should *not* come under FPC jurisdiction.[138] The court examined Western Slope's pre-1975 actions regarding the favored nations clause. By increasing the rate paid to Superior Oil without regard to the FPC's vintaging schedule in effect during the earlier period, the court felt that Western Slope indicated that it did not consider vintaging to be included in the term "other conditions of sale."[139]

Western Slope had relied primarily on the Seventh Circuit's holding in *Pure Oil v. FPC*[140] to support its position that all factors, including vintaging,

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uing so long as such higher price is paid for such gas, increase the price being paid to Seller hereunder to equal such higher prices.

604 F.2d at 1282 (emphasis supplied by the court).

135. 604 F.2d at 1283.

136. *Id.* at 1283-84.

137. *Id.* at 1284-85.

138. Article 7.1 of the contract provides, in part:

Buyer represents that it is engaged solely in intrastate transportation of natural gas within the State of Colorado and represents that gas purchased hereunder shall be sold and used only in connection therewith. In the event Buyer should, at any time, propose to sell or use gas purchased hereunder in such manner that . . . will subject Seller to the jurisdiction of the Federal Power Commission or any successor body . . . , Buyer shall notify Seller at least ninety (90) days before such resale or other disposition is commenced and Seller shall have the right hereunder, upon thirty (30) days' notice to Buyer to terminate this agreement.

Id. at 1283.

139. 604 F.2d at 1289.

140. 299 F.2d 370 (7th Cir. 1962).

were included in the clause. The Tenth Circuit acknowledged the *Pure Oil* decision and agreed that peaking capacity was included in the savings clause; peaking capacity, however, is a physical characteristic of natural gas while there is no physical difference between "old" and "new" gas.[141] The court of appeals also distinguished the *Pure Oil* decision on the basis that the contract in that case involved interstate gas and as such it was subject to Commission regulations. The court noted that the contract in the instant controversy concerned the intrastate sale of natural gas.[142]

The court of appeals concluded that since vintaging was not contemplated by the parties as one of the "other conditions of sale" restricting the favored nations clause, vintaging could not relieve Western Slope of its duty to pay the higher price to Superior Oil.[143] Judge Barrett, in a concurring opinion, stated that favored nations clauses should be declared void as against public policy.[144] The concurrence urged the district court to consider this issue on remand.

B. *Restrictions on Interstate Contract Termination Under Section 7(b) of the Natural Gas Act*

The higher prices available in intrastate markets for natural gas persuaded two oil and gas producers to attempt termination of interstate gas purchase agreements. In both of these cases, the Tenth Circuit court found that the attempted terminations were invalid because the wells, from which the oil and gas flowed, previously had been dedicated to interstate markets under Federal Power Commission (Commission) public convenience and necessity certificates. The wells had not been abandoned formally under the Commission's administrative procedures. These Tenth Circuit decisions reflect the trend in recent Supreme Court opinions. The Court has sought to restrict the ability of producers to discontinue unilaterally interstate distributor contracts. Absent Commission approval, gas from wells dedicated to interstate markets cannot be diverted to intrastate markets.[145] Lease expiration or non-use of the wells do not obviate the necessity for formal abandonment proceedings.

The issue of interstate abandonment through lease expiration arose in *Amarex, Inc. v. FERC*.[146] In 1970, Amarex had succeeded, by assignment, to a leasehold interest in an Oklahoma oil and gas field. The lease, by its terms, was to expire in 1972. After acquiring the leasehold, but prior to 1972, Amarex entered into a gas purchase contract with Arkansas Louisiana Gas Company (Arkla) whereby Arkla agreed to purchase the gas produced from

141. 604 F.2d at 1290-91.
142. *Id.*
143. *Id.* at 1291.
144. *Id.* at 1291-97 (Barrett, J., concurring).
145. United Gas Pipe Line Co. v. McCombs, 442 U.S. 529 (1979); California v. Southland Royalty Co., 436 U.S. 519 (1978); Sun Oil Co. v. FPC, 364 U.S. 170 (1960); Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137 (1960); Atlantic Refining Co. v. Public Serv. Comm'n, 360 U.S. 378 (1959). *See also* Phillips Petroleum Co. v. FPC, 556 F.2d 466 (10th Cir. 1977).
146. 603 F.2d 127 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 1067 (1980). The regulatory responsibilities of the Federal Power Commission have been assumed by the Federal Energy Regulatory Commission.

"all wells now or hereafter completed" on the lands covered by the Oklahoma lease.[147] The contract included the gas produced from the quarter section, which gas became the subject of the dispute. After entering the contract, Amarex filed a petition with the Commission seeking a "small producer" certificate of convenience and necessity, which was granted in 1971. The effectiveness of the certificate was for an unlimited duration.

Amarex began natural gas deliveries to Arkla in 1971, although the gas delivered was not from the Oklahoma leasehold. Upon expiration of the Oklahoma leasehold in 1972, Amarex entered into another lease agreement with the fee owner for a term of five years. A gas well had been drilled, and there was production from the leasehold, but Amarex refused to deliver the leasehold's gas to Arkla. After both parties filed petitions with the Commission, the federal agency directed Amarex to deliver the natural gas to Arkla.[148]

The issue presented to the court of appeals was whether Amarex's certificate of public convenience and necessity, together with its contract with Arkla, required it to deliver natural gas produced from the Oklahoma lease. Amarex asserted that because the lease had been renewed subsequent to both the distribution contract and the certificate's issuance, and since gas had not been actually produced until 1975, Amarex was relieved of any duty to deliver the gas to Arkla. The Tenth Circuit, in concluding that the gas produced on the leasehold was dedicated to the interstate market, relied heavily on the Supreme Court's decision in *California v. Southland Royalty Co.*[149] In *Southland*, the fee owner of certain Texas acreage had entered into a fifty year lease with lessee, Gulf Oil Corporation. Gulf subsequently contracted to sell gas interstate and obtained a certificate of public convenience and necessity from the Commission to facilitate its interstate sales. Prior to the expiration of Gulf's lease, Southland Royalty Company obtained fee title to the acreage. Upon the expiration of the original fifty year lease in 1975, the remaining oil and gas reserves automatically reverted to Southland. Southland contracted to sell the gas intrastate; the Commission prevented delivery because Southland had not petitioned for a ruling of "abandonment" pursuant to the procedure established in Section 7(b) of the Natural Gas Act.[150] Since the original certificate was of unlimited duration, Southland was ordered to continue delivery to the interstate distributor. The Court asserted that the fact that the original lessee no longer had an interest in the land did not alter the circumstance that the wells had been dedicated to interstate service.[151]

147. *Id.* at 128.
148. *Id.* at 129.
149. 436 U.S. 519 (1978).
150. 15 U.S.C. § 717f(b) (1976) provides:
> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

151. 436 U.S. at 525.

Although acknowledging that the question in *Southland* was not precisely the one presented in *Amarex*, the court of appeals stated that the Supreme Court's holding in *Southland* was dispositive of the instant case. Once a natural gas field has been dedicated to interstate commerce pursuant to issuance, by the Commission, of a certificate of convenience and necessity, all gas in the field is subject to the certificate and gas produced from these fields cannot be diverted to intrastate sale without compliance with the statutorily mandated abandonment procedures.[152] The Tenth Circuit ruled that because Amarex had dedicated the Oklahoma gas to interstate commerce pursuant to a certificate granted by the Commission, all gas produced on the leased lands should be delivered to Arkla absent a Commission determination of abandonment. The court noted that it was irrelevant that the original lease had expired before production on the leased lands began.[153]

Another aspect of the abandonment issue was decided on the same day in *Texas Oil & Gas Corp. v. Michigan Wisconsin Pipe Line Co.*[154] In this case, the dispute centered upon leases originally held by Shell Oil Company, Texas Oil's predecessor. The leases of Oklahoma oil and gas lands were the basis for a gas purchase agreement between Shell and Michigan Wisconsin, whereby Shell committed all natural gas produced from the leased lands to interstate sale. When a successful well was drilled in 1962, Shell began delivery of all of the natural gas produced to Michigan Wisconsin, pursuant to a certificate of convenience and necessity issued by the Commission.[155] Texas Oil meanwhile had begun production within the same unitized tract and had entered into an intrastate contract for the delivery of gas to an Oklahoma distributor. Shell abandoned and plugged its well in 1969 with the permission of the Oklahoma Corporation Commission.[156]

Obtaining Shell's interest in the lease at issue, Texas Oil instituted a declaratory judgment action in federal district court to quiet title against Michigan Wisconsin's contractual claim to the gas and for a determination that the gas produced from the lease was not dedicated to interstate commerce.[157] The district court, in quieting title to the gas in Texas Oil, ruled that the Commission had no primary jurisdiction to determine the abandonment issue and that the Oklahoma Corporation Commission's permission to abandon was sufficient to terminate the interstate dedication.[158]

152. *See, e.g.*, United Gas Pipe Line Co. v. McCombs, 442 U.S. 529 (1979). In *McCombs*, the Supreme Court reversed a Tenth Circuit decision which had held that a gas field, from which there had been no production for several years, and on which a new deeper well had been drilled so as to produce gas, had been abandoned in fact although no formal abandonment procedure had been instituted. McCombs v. FERC, 570 F.2d 1376 (1978); *see* Overview, *Lands and Natural Resources, Fifth Annual Tenth Circuit Survey*, 56 DEN. L.J. 517, 531 (1979). The Supreme Court declared that there could be no abandonment of a natural gas field dedicated to interstate commerce absent a finding of abandonment, by the Commission, following a § 7(b) hearing. 442 U.S. at 543.

153. 603 F.2d at 131. Judge Barrett, in concurrence, maintained that the *Southland* decision cannot be broadened to include dedications beyond those lands included in oil and gas leases from which production was in fact realized. *Id.* at 132.

154. 601 F.2d 1144 (10th Cir. 1979).

155. *Id.* at 1145.

156. *Id.*

157. *Id.*

158. *Id.*

The Tenth Circuit, reversing the district court's holding, found that the Commission had primary jurisdiction to determine the question of the abandonment of gas wells dedicated to interstate markets. The district court had relied erroneously on the Tenth Circuit's earlier decision in *Wessely Energy Corp. v. Arkansas Louisiana Gas Co.*[159] as dispositive of the primary jurisdiction issue. The court of appeals, however, distinguished the *Wessely* case from the *Texas Oil* and *Amarex* situations because in *Wessely*, although a predecessor lessee had entered a contract for the sale of natural gas interstate, no natural gas was ever produced during the time of the lease. When the second lessee entered into a gas purchase contract with an intrastate distributor, the *Wessely* court determined that the second lessee was not bound by the previous lessee's contract with the interstate distributor.[160] Conversely, in the instant case, gas had been produced and was distributed in interstate commerce for seven years before Shell's well was shut down.[161] Following the Supreme Court's *Southland* rationale, the Tenth Circuit held that once gas is produced from a lease pursuant to a certificate of convenience and necessity issued by the Commission, and once the gas begins to flow in interstate commerce, all of the gas produced from the lease is dedicated to interstate commerce and cannot be terminated absent Commission approval.[162]

III. PUBLIC LANDS

A. *Mineral Title Questions*

In *Amoco Production Co. v. United States*,[163] the Tenth Circuit Court of Appeals was asked to determine the timeliness of a quiet title action filed against the United States.[164] The court was called upon to interpret the constructive notice provision of a statute authorizing suit against the United States if filed within twelve years of the plaintiff's actual or constructive knowledge of an adverse title claim of the federal government.[165] The court of appeals determined that a quitclaim deed which did not appear in the grantor-grantee chain of title but which was recorded in the Bureau of Land Management (BLM) tract index did not constitute constructive notice to a subsequent grantee so as to commence the running of the statute of limitations.[166]

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159. 593 F.2d 917 (10th Cir. 1979).

160. *Id.* at 920. The *Wessely* court held that "with no drilling, no production, no facilities, there was no introduction of gas into the interstate market or any market. The Natural Gas Act was never applicable to the tract." *Id.*

161. 601 F.2d at 1146.

162. *See* 436 U.S. 519, 527-28 (1978).

163. 619 F.2d 1383 (10th Cir. 1980).

164. *See* 28 U.S.C. § 2409a (1976) provides, in part:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

165. 28 U.S.C. § 2409a(f) (1976) provides:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

166. 619 F.2d at 1392.

In 1942, the Federal Farm Mortgage Corporation (FFMC) conveyed a fee interest in the disputed Utah land to the Newton family. The conflict arose over the grantor's subsequent conveyance of one-half of the mineral interest in the Newton tract to the United States by quitclaim deed in 1957. Amoco, the lessee of the Newton family company which claimed fee title, sued the United States to quiet title to its mineral interests. The United States defended, claiming that the action was barred by the twelve year statute of limitations. When the district court ruled that the action was timely, the United States sought to introduce evidence challenging the validity of the Newton's 1942 deed. The district court excluded all of the United States' proffered evidence and granted summary judgment for Amoco.[167]

On appeal, the Tenth Circuit affirmed the district court's conclusion that it was unreasonable to assume that Amoco had constructive notice of a stray deed.[168] The court of appeals emphasized that whereas Utah law was ambiguous and inconclusive on the issue of constructive notice, the federal courts could not assume that Amoco "should have known" of the 1957 FFMC mineral conveyance to the United States.[169] The appellate court did overturn the district court's grant of summary judgment, however, asserting that the exclusion of all of the evidence tendered by the United States was error. The Tenth Circuit noted that the trial court had misinterpreted several rules of evidence.[170]

The Tenth Circuit Court of Appeals was afforded a further opportunity to delineate the parameters of constructive notice to grantees of interests in the public lands in *Winkler v. Andrus*.[171] The case involved a challenge to the rights of an assignee of a second priority drawee of a noncompetitive federal oil and gas lease by the first drawee who had contested successfully the Department of Interior's invalidation of his right to the oil and gas lease. Although the court of appeals remanded the case for further deliberations at the district court level, it outlined the various factors to be considered in determining whether a lessee is a bona fide purchaser and, as such, is protected from administrative errors made by Interior in granting the lease.

The case arose from Winkler's efforts to obtain an oil and gas lease to which the Tenth Circuit previously had declared he was entitled.[172] Win-

167. *Id.* at 1387.

168. *Id.* at 1389.

169. *Id.* at 1388.

170. The trial court had not allowed the BLM file copy of the recorded deed into evidence, basing its decision on FED. R. EVID. 1005 which provides that a certified, recorded copy of a deed appearing in the county recorder's office and received into evidence precludes acceptance of any other evidence. The Tenth Circuit, after quoting from the notes of the Advisory Committee relative to rule 1005, found that the rule applied to "the actual record maintained by the public office . . . , not the original deed from which the record is made." 619 F.2d at 1390. Since the contents of the original deed were at the crux of the controversy, FED. R. EVID. 1004(1), "which authorizes the admission of other evidence of the contents of a writing if all originals are lost or destroyed, rather than Rule 1005, is applicable to the 1942 deed." *Id.* The court also applied FED. R. EVID. 406, which allows introduction of the routine practice of an organization, in finding that the conformed copy of the deed from the BLM files was properly introduced and should have been received into evidence, assuming that the United States could obtain proper authentication from the BLM office under FED. R. EVID. 901 and 902.

171. 614 F.2d 707 (10th Cir. 1980).

172. *Id.* at 708-709.

kler had been the first drawee for a noncompetitive oil and gas lease on certain Wyoming acreage; the Department nevertheless rejected his entry card because of a name insufficiency.[173] Although the Tenth Circuit ultimately vindicated Winkler's right to the lease, the second drawee had been given the lease in the interim. The second drawee assigned her rights to the Davis Oil Company.[174]

After the initial rejection of Winkler's application by the Wyoming State Office of the BLM, he appealed, unsuccessfully, to the Interior Board of Land Appeals (IBLA).[175] Although Winkler sought relief in federal district court, he did not request a preliminary injunction or a temporary restraining order to stay the issuance of the lease. Winkler failed to file a lis pendens on the subject lease as required under section 1964 of Title 28.[176] Consequently, no actual or constructive notice was provided to the second drawee or to her assignee, Davis Oil Company, under Wyoming law.

Davis Oil, however, failed to search BLM records to assure itself that there was no claimed adverse interest, relying on issuance of the lease by the BLM as sufficient assurance that the award was not contested. By the time Davis Oil filed notice of the assignment in the BLM office, the office had received notice of Winkler's federal court action, and, as a result, the BLM delayed approval of the assignment. Two years later, in 1977, the BLM informed Davis Oil of the court action, but rather than wait until the Tenth Circuit had rendered an opinion, the BLM approved the assignment. At all times after this BLM approval of the assignment, Davis Oil had actual notice of Winkler's court action.[177]

The Tenth Circuit noted that the bona fide purchaser provision of the Mineral Leasing Act[178] and the holding in *Southwestern Petroleum Corp. v. Udall*[179] demonstrated that the time of bona fide purchaser determination is the date of the assignment, not the date of BLM approval of a transfer of

173. The BLM initially rejected Winkler's entry card because he had stamped "F.A. Winkler Agency" on one side, implying that the card was endorsed by a corporation. A corporation is required to provide supplemental information not supplied by Winkler. 43 C.F.R. § 3112.2-1(a) (1979). *See* Winkler v. Andrus, 594 F.2d 775 (10th Cir. 1979). *See also* Overview, *Administrative Law, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 131 (1980).

174. 614 F.2d at 709.

175. The issuance of the oil and gas lease was suspended during Winkler's administrative appeal, pursuant to 43 C.F.R. § 4.21(a) (1978), which provides, in pertinent part: "[A] decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal."

176. 28 U.S.C. § 1964 (1976) provides that an action in federal court against real property interests, including federal interests, must be recorded in the county office where the property is located to constitute constructive notice to potential purchasers, if state law so requires. This federal provision was triggered by state law. WYO. STAT. § 1-6-108 provides, in part:

> In an action in a state court or in a United States district court affecting the title or right of possession of real property . . . the plaintiff at the time of the filing of the complaint . . . , may file in the office of the county clerk in which the property is situate a notice of pendency of the action . . . . From the time of filing the notice a subsequent purchaser or encumbrancer of the property shall have constructive notice of the pendency of the action.

177. 614 F.2d at 709-10.

178. 30 U.S.C. § 184(h)(2) (1976).

179. 361 F.2d 650 (10th Cir. 1966). In *Southwestern*, the Tenth Circuit held that bona fide purchaser status under 30 U.S.C. § 184 was to be determined by common law standards; *i.e.*,

interest. Since Winkler had not filed a lis pendens on the contested lease, as he was required to do under both federal and state law, Davis Oil could not have been on constructive notice under the Wyoming standard.[180] The court noted, however, that the test of constructive notice under *Southwestern* is whether the circumstances are sufficient to put a man of ordinary prudence on inquiry, an inquiry which, if diligently followed, would lead to discovery of defects in title.[181] Davis failed to conduct a title examination of the Wyoming State Office BLM records before acquiring the lease assignment. Davis contended that it is standard industry practice to conduct a title examination only on lease assignments involving large cash payments. The court of appeals rejected this argument as not supported by case precedent.[182] Under the *Southwestern* holding, as applied in *O'Kane v. Walker*,[183] a BLM record search is mandatory for bona fide purchaser status, since any facts relevant to the situation would include notices of court action contained in BLM records.[184]

The Tenth Circuit emphasized that when Davis took its assignment, BLM records reflected that Winkler had made an unsuccessful administrative appeal. But Davis was also deemed to have constructive notice of the applicable statutes, particularly section 226-2 of Title 30, which states that an unsuccessful administrative appellant has ninety days after an adverse IBLA decision to seek judicial relief.[185] To be a bona fide purchaser Davis Oil should have waited for the expiration of the ninety-day period before taking its assignment.[186] The appellate court concluded by stating that the general rule is that a person taking a real property interest does so at his peril and that a lawsuit is considered pending until the time for appeal has passed.[187] The district court decision was remanded for further hearings to determine if Davis was a bona fide purchaser under the ordinary prudent man standard of *Southwestern*.[188]

This decision apparently voids a long-standing oil and gas industry practice of relying on BLM issuance of leases to qualify assignees as bona fide purchasers. Assignees of second drawees must now wait until the ninety-day appeal period has expired after an adverse decision of the IBLA to assure themselves that no federal court action has been taken by the first

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that he "acquired his interest in good faith, for valuable consideration, and without notice of the violation of the departmental regulations." *Id.* at 656.

180. 614 F.2d at 712.

181. *Id.*

182. *Id.* at 713.

183. 561 F.2d 207 (10th Cir. 1977). In *O'Kane*, the assignee of a second drawee was held to be a bona fide purchaser because he had employed an abstractor to conduct a title examination of BLM records. The examination had produced no evidence of any adverse claims or interests.

184. 614 F.2d at 713.

185. *Id.* 30 U.S.C. § 226-2 (1976) provides, in part: "No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter."

186. 614 F.2d at 714.

187. *Id. See* Wilkin v. Shell Oil Co., 197 F.2d 42 (10th Cir. 1951), *cert. denied*, 344 U.S. 854 (1952).

188. 614 F.2d at 714-15. The federal district court subsequently found that Davis Oil Company was not a bona fide purchaser and therefore the assignment of the lease issued to the second drawee was void. Winkler v. Andrus, No. 76-127k (D. Wyo. Aug. 5, 1980).

drawee. Alternatively, assignees could condition payment to drawees upon the absence of any federal court action within the ninety-day period.

A question not answered by the Tenth Circuit is whether an assignee of a first drawee who has been issued an oil and gas lease from the BLM can be a bona fide purchaser before the initial thirty-day protest period has expired. Past BLM practice has been to consider the first drawee's assignee a bona fide purchaser even if a protest by the second or third drawee ultimately is upheld; in such cases the first drawee's overriding royalty has been cancelled but the assignee has been allowed to retain the lease. Under the Tenth Circuit's decision in this case, it would appear that the first drawee's assignee would be required to wait until the thirty-day protest period has elapsed, since the assignee is on constructive notice of this regulation. A related question is whether the thirty-day period begins to run on the day of the drawing or on the date the second drawee is notified by the BLM that the first drawee's entry card is considered valid.

B. *Grazing Allotment Reduction Programs*

In *Valdez v. Applegate*,[189] the Tenth Circuit held that commencement of a court action challenging a grazing management program operates to stay implementation of the program until the case has been determined.[190] In making this determination, the court of appeals apparently ignored the clear implication of a provision in the November 27, 1979 Appropriations Act for the Department of the Interior.[191]

Pursuant to an Environmental Impact Statement prepared under an order issued by the District of Columbia District Court in *NRDC v. Morton*,[192] the BLM began implementation of the Rio Puerco Livestock Grazing Management Program. The program called for reductions in grazing permit areas, and some of the affected permittees instituted an action to enjoin the implementation of the program. The federal district court denied the motion for a preliminary injunction and the plaintiffs appealed to the Tenth Circuit, which issued a stay of program implementation until it rendered a decision.[193]

The United States claimed that the issue was moot because of a provision in the 1979 Appropriations Act stating that reductions of grazing allotments amounting to no more than ten percent were effective "when so

189. 616 F.2d 570 (10th Cir. 1980).

190. *Id.* at 573.

191. Pub. L. No. 96-126, 93 Stat. 954, 956 (1979) states in part:

> *Provided further*, That an appeal of any reductions in grazing allotments on public rangelands must be taken within 30 days after receipt of a final grazing allotment decision or 90 days after the effective date of this Act in the case of reductions ordered during 1979, whichever occurs later. Reductions of up to 10 per centum in grazing allotments shall become effective when so designated by the Secretary of the Interior. Upon appeal any proposed reduction in excess of 10 per centum shall be suspended pending final action on the appeal, which shall be completed within 2 years after the appeal is filed.

192. 388 F. Supp. 829, 838-41 (D.D.C. 1974), *aff'd*, 527 F.2d 1386, (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976).

193. 616 F.2d at 571.

designated by the Secretary."[194] Since the grazing reductions being challenged were apparently within the ten percent limit, the United States argued that the reductions were effective immediately.

In rejecting this argument, the court relied on a provision in the 1976 Federal Land Policy and Management Act which states that "judicial review of public land adjudication decisions be provided by law."[195] The court interpreted this to mean that implementation of a program affecting public lands while the program was being judicially contested was "not consonant with judicial review."[196]

The court further held that the plaintiffs had demonstrated sufficient likelihood of success on the merits and a sufficient showing of irreparable harm to warrant a preliminary injunction prohibiting program implementation until the case was determined on the merits. An apparently crucial concern of the court was the fact that some permittees would be forced out of their livestock operations and that the program's probability of success in reducing costs to the permittees was questionable.[197] However, by ignoring the express provisions of the Appropriations Act, which gave the Secretary discretionary power to implement grazing reductions of ten percent or less, the court may have left itself open to the criticism that it exceeded statutory limits.

C. *Railroad Rights-of-Way*

1. Mineral Interests in Railroad Rights-of-Way

The continuing controversy over mineral interests in railroad rights-of-way grants resurfaced in *Energy Transportation Systems, Inc. v. Union Pacific Railroad Co.*,[198] a consolidation of two decisions at the federal district court level.[199] The Tenth Circuit disposed of two questions that have been plaguing the courts for years—whether mineral reservations were granted to railroads under the Union Pacific Railroad Act of 1862 (Act);[200] and, if they were, what type of mineral grant was envisioned. The court found that section 2 of the Act,[201] which granted the actual right-of-way for railroad construction across the public domain, did *not* include the servient mineral

194. *Id.* *See* note 191 *supra.*
195. 616 F.2d at 572. *See also* 43 U.S.C. § 1701(a)(6) (1976).
196. 616 F.2d at 572.
197. *Id.*
198. 606 F.2d 934 (10th Cir. 1979).
199. Energy Transp. Systems, Inc. v. Union Pac. R.R. Co., 456 F. Supp. 154 (D. Kan. 1978); Energy Transp. Systems, Inc. v. Union Pac. R.R. Co., 435 F. Supp. 313 (D. Wyo. 1977).
200. 12 Stat. 489, *as amended by* Act of July 2, 1864, 13 Stat. 356.
201. Section 2 of the Act provides, in part:

> [T]he right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line: and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, ...

12 Stat. 491.

estate, while the grant, under section 3,[202] of alternate township sections adjoining the railroad *did* include the mineral estate.[203]

Energy Transportation Systems, Inc. was planning to construct an underground coal slurry pipeline from Wyoming to Arkansas. It had obtained rights-of-way from successors to a Wyoming homestead patent issued in 1913, with neither a reservation of the mineral estate in the United States nor any mention of conflicting mineral interests by Union Pacific. Union Pacific had a right-of-way granted pursuant to section 2 of the Act which cut across the land and under which Energy Transportation Systems' pipeline had to pass. Because Union Pacific would not allow the company to construct the pipeline under Union Pacific's right-of-way, the coal slurry pipe line company sought a declaratory judgment to determine what, if any, right Union Pacific had to the mineral estate. The trial court found that Union Pacific did not have title to the mineral estate beneath its right-of-way.[204]

Union Pacific relied principally on *Northern Pacific Railway Co. v. Townsend*[205] as support for its claim that Union Pacific had been granted a limited fee which included the mineral estate. The district court, however, distinguished the *Northern Pacific* decision because that case had involved a homestead patentee's claim to the surface estate of the adjoining railroad right-of-way and did not address the railroad's mineral estate rights.[206] The trial court then followed the holdings in *United States v. Union Pacific Railroad Co.*[207] and *Wyoming v. Udall*.[208] The latter stated that the exception of mineral lands as reserved to the United States under section 3 also applied to section 2 and that, therefore, the United States had a right to the oil and gas underneath the right-of-way. Finding these decisions dispositive of the issue in the case before it, the district court held that Union Pacific had only surface rights in the section 2 right-of-way grant.[209]

The Tenth Circuit reached a different conclusion for those lands granted as inducement for railroad construction under section 3 of the Act. These grants were for odd-numbered township sections located in Kansas. Union Pacific's successors conveyed these lands to the present title holder, who had given Energy Transportation Systems an underground easement for its pipeline. Union Pacific argued that the *Northern Pacific* decision had precluded the original railroad company from conveying its mineral estate in the right-of-way adjacent to the odd-numbered sections when it transferred its title to a third party. The court of appeals noted that the *Northern*

202. Section 3 of the Act provides, in part:
> [T]here be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad . . . , every alternate section of public land, designated by odd numbers . . . , and within the limits of ten miles on each side of said road, ...

203. 606 F.2d at 937-38.
204. 435 F. Supp. at 319.
205. 190 U.S. 267 (1903).
206. 606 F.2d at 936.
207. 353 U.S. 112 (1957). In this case, the Court held that the reservation of "mineral lands" in section 3 of the Act also applied to the section 2 right-of-way grants and that, therefore, Union Pacific had no right to drill oil and gas wells on right-of-way lands.
208. 379 F.2d 635, 640 (10th Cir.), *cert. denied*, 389 U.S. 985 (1967).
209. 606 F.2d at 937.

Pacific Court's ruling, that a railroad cannot alienate its right-of-way grant, pertained only to the surface estate. The Tenth Circuit declared that the servient mineral estate could be conveyed by the railroad.[210]

The appellate court's rationale is questionable because, if the railroad did not have an interest in the mineral estate sufficient to justify oil and gas exploration, as determined by the Supreme Court in *Union Pacific*,[211] it appears implausible to assert that the railroad had the right to convey the mineral interest to a third party. A logical extension of the *Union Pacific* decision would be a holding that the mineral estate remained in the United States and that any easement in the underground area should be obtained from the United States as holder of the mineral interest. In any event, this decision has resolved an important issue involving the right of a pipeline company to cross the subsurface of railroad rights-of-way and has helped open the way for development of coal slurry pipelines.

2. Railroad Rights-of-Way and State In-Lieu Selections

The Tenth Circuit addressed another aspect of railroad rights-of-way in *Wyoming v. Andrus*.[212] Wyoming filed a patent application for a school section with the Wyoming BLM office in 1970,[213] excluding that portion of the school section traversed by a railroad right-of-way. The BLM informed Wyoming that it would issue a patent for the entire school section, subject to the right-of-way easement. Wyoming then filed for a lieu land selection[214] to indemnify the state for the right-of-way area. The BLM refused to allow the selection, stating that Wyoming was not entitled to lieu lands as indemnification for the easement. Wyoming appealed the decision to the Interior Board of Land Appeals (IBLA), which upheld the BLM decision.[215] The District Court for the District of Wyoming affirmed the IBLA decision.[216]

The issue presented on appeal was whether the grant of a right-of-way to a railroad, prior to the enactment of the Wyoming Enabling Act, was a "prior disposition" that entitled Wyoming to lieu selections for that part of the school section sold or otherwise disposed of.[217] In finding that railroad rights-of-way create surface rights only, with certain profit à prendre rights to coal and iron ore, the court of appeals affirmed other recent decisions

210. *Id.* at 938.

211. The 1957 *Union Pacific* decision implied that the railroad never had a right to mineral lands as part of those alternate, odd-numbered sections granted by section 3 of the Act. 353 U.S. at 114.

212. 602 F.2d 1379 (10th Cir. 1979).

213. Wyoming filed the application pursuant to 43 U.S.C. § 871(a) (1970), which statute authorized the issuance of patents to states for certain township school sections. This statute was repealed by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (1976). Patent applications which already were pending are protected under a savings clause in 43 U.S.C. § 1701 (1976).

214. Under 43 U.S.C. §§ 851-852 (1976), states are permitted to select indemnity lands, of equal acreage, for those school sections to which the state was entitled but in which title did not vest because of homestead claims, mining entrys, Indian, military or other reservations by the United States, and those lands "otherwise disposed of by the United States . . . ." *See also* Act of July 10, 1890, ch. 664 (Wyoming's Enabling Act), 26 Stat. 222.

215. State of Wyoming, 27 I.B.L.A. 137, 83 Interior Dec. 364 (1976).

216. Wyoming v. Andrus, 436 F. Supp. 933 (D. Wyo. 1977).

217. 43 U.S.C. § 851 (1976). *See* note 214 *supra*.

concerning the type of interest conveyed by these grants.[218] The court noted that, under the Act of July 1, 1862,[219] Union Pacific Railroad Company was given surface use only, through the grants of rights-of-way, with the United States retaining a mineral reservation, except for coal and iron ore incident to the use of the right-of-way.[220] The appellate court also relied on the assumption that Congress was aware of the Union Pacific's right-of-way when it passed the General Indemnification Act of 1891,[221] which Act listed the types of prior dispositions subject to in lieu selections by the states. Since railroad rights-of-way were not listed specifically among those dispositions for which a state could select lieu lands, the appellate court reasoned that Congress did not intend to include the right-of-way grants as prior dispositions.[222]

The Tenth Circuit limited its earlier decision of *Wyoming v. Udall*,[223] wherein the court had held that although the 1862 Act did not give Union Pacific or Wyoming a mineral interest in railroad rights-of-way, the right-of-way grant constituted a "prior disposition."[224] The court reconciled this latest decision by contending that its previous statements were dicta. The court further noted that Wyoming's continuing claim to a reversionary interest in the right-of-way,[225] was inconsistent with its argument that the land had been previously disposed.[226] Since the fee interest in these rights-of-way remained in the United States, and since the legislative history and a contemporaneous opinion by the Secretary[227] indicated that these lands were not considered among those subject to in lieu selections, the court of appeals held that Wyoming had no right to claim lieu land for that portion of the school section crossed by the railroad right-of-way.[228]

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218. *E.g.*, Energy Transp. Systems, Inc. v. Union Pac. R.R. Co., 606 F.2d 934 (10th Cir. 1979). *See* text accompanying notes 198-211 *supra*.

219. 12 Stat. 489 (1862).

220. United States v. Union Pac. R.R. Co., 353 U.S. 113 (1957).

221. Act of Feb. 28, 1891, ch. 384, 26 Stat. 796 (codified at 43 U.S.C. § 851 (1976)).

222. 602 F.2d at 1384.

223. 379 F.2d 635 (10th Cir.), *cert. denied*, 389 U.S. 985 (1967).

224. *Id.*

225. 602 F.2d at 1384. The court noted that its decision, in *Wyoming v. Udall*, that "neither the railroad nor Wyoming was entitled to these minerals" indicated that there was no disposition of these lands by the United States in spite of its later use of the term "prior disposition." This claim was brought under the Railroad Right-of-Way Abandonment Act, 43 U.S.C. § 912 (1976).

226. 602 F.2d at 1384.

227. The court gave considerable weight to an opinion issued by the Secretary of the Interior at the time of Wyoming's Enabling Act in 1891, which stated, in reference to in lieu selections:

> No provision is made by law for indemnifying the state in cases where the school section is crossed by railroads, claiming the right of way either under the act of March 3, 1875, or by a special grant from Congress . . . ." 13 Pub. Lands Dec. 454-55 (1891).

228. 602 F.2d at 1385-87. The debate over in lieu selections continues. The Supreme Court recently overturned a Tenth Circuit decision which permitted states to select in lieu lands of comparable mineral value to those school sections lost because of prior dispositions. Utah v. Kleppe, 586 F.2d 756 (10th Cir. 1978). In Andrus v. Utah, 100 S. Ct. 1803 (1980), the Court held that it was within the discretionary power of the Secretary to determine those lands available for in lieu selections, even if their mineral value was much less than those lands lost. Utah was claiming rights to lands rich in oil shale. *See United States Supreme Court Review of Tenth Circuit Decisions* within this Seventh Annual Tenth Circuit Survey, *infra* at 534.

IV. ENVIRONMENTAL LAW

Two cases of importance in the environmental area were decided by the Tenth Circuit in the last year. In *Environmental Defense Fund v. Andrus*,[229] the court of appeals held that variations in an approved plan for the production of oil shale on federally leased land did not require a supplemental Environmental Impact Statement (EIS), because the modifications would not cause any different or more severe effects upon the surrounding area than those environmental effects dealt with in the original EIS. In *United States v. Texas Pipeline Co.*,[230] the court reaffirmed its definition of "navigable stream" under the Clean Water Act as established in *United States v. Earth Sciences, Inc.*[231]

A. *Modification of Development Plans*

The imminent federal oil shale leasing program by the Department of Interior has come under attack by environmental groups. The possibilities of severe and permanent alteration of land, air, and water quality incident to a large scale oil shale industry has prompted environmental groups to challenge all aspects of the proposed leasing scheme. When Interior first proposed an experimental prototype oil shale leasing program in 1969, the Secretary issued a seven step procedure to be followed, with an exhaustive, comprehensive EIS for all aspects of the proposed oil shale leasing program.[232] After approval of the final EIS, bonus bids were accepted. Two of the lessees conducted baseline studies for site-specific analyses and issued final environmental baseline reports in October, 1976. Detailed Development Plans (DDP's) also were prepared in 1976. In 1977, modifications were incorporated into the DDP's, principally for "in situ" retorting. The Secretary determined that no supplemental EIS was necessary for these DDP's. The Environmental Defense Fund filed suit to force the Secretary to prepare a supplemental EIS for the "in situ" modifications.[233]

Finding that a supplemental EIS for the modified "in situ" DDP's was not necessary, the court of appeals emphasized that the requirements of the National Environmental Protection Act (NEPA) are procedural and do not control internal departmental decision-making.[234] The court also reiterated

229. 619 F.2d 1368 (10th Cir. 1980).
230. 611 F.2d 345 (10th Cir. 1979).
231. 599 F.2d 368 (10th Cir. 1979).
232. The procedure included:
1) promulgation of an EIS;
2) approval of an overall prototype program based on the environmental description and analysis of the EIS;
3) solicitation of competitive bids and awarding of leases for the tracts reviewed in the EIS;
4) filing by the lessees of Detailed Development Plans (DDP's), supplements and modifications thereto, if needed;
5) review and approval of the DDP's by the area oil shale supervisor;
6) specific site authorizations, such as rights-of-way; and
7) development of deposits on leased tracts in compliance with the terms of the lease and the DDP.

619 F.2d at 1371.
233. *Id.* at 1370-74.
234. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,

its position that remote environmental effects of a proposed federal agency action do not need detailed discussion in an EIS. The Tenth Circuit adhered to the "rule of reason" standard established by the District of Columbia Court of Appeals in *NRDC v. Morton*.[235] Noting that the Environmental Defense Fund had not disputed the adequacy of the 1973 EIS but was arguing that supplemental, site-specific EIS's were required for the new, modified in-situ retorting, the Tenth Circuit stated that NEPA did not mandate a detailed analysis of every federal implementing action. NEPA requires only that the agency take a "hard look" at the alternatives.[236]

Relying on the standard of review for determining the adequacy of an EIS set forth in *Save Our Invaluable Land (Soil), Inc. v. Needham*,[237] the Tenth Circuit found that the 1973 EIS, which included programmatic, site-specific, and regional analyses of the proposed oil shale leasing program, had adequately discussed the environmental effects of the modified in-situ retorting.[238] Acknowledging that the modified in-situ plans had not been specifically addressed, the court nevertheless held that the in-situ retorting modification did not demonstrate any "unknown, undescribed, or unidentified" effects on the environment not previously noted in the original EIS.[239] Because the 1973 EIS contained a reasonable, good faith discussion of each of the five NEPA procedural requirements for all future actions under the oil shale leasing program, no separate, supplemental EIS was required.[240] Following the decision in *Kleppe v. Sierra Club*,[241] the Tenth Circuit restated that an EIS need not resolve all of the issues incident to a proposed governmental action. The EIS need only insure that all issues are identified fully, so that

435 U.S. 519 (1978); Jette v. Bergland, 579 F.2d 59 (10th Cir. 1978); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

235. 458 F.2d 827 (D.C. Cir. 1972) wherein the court stated that:

> We reiterate that the discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned.
>
> . . . .
>
> . . . Furthermore, the requirement in NEPA of discussion as to reasonable alternatives does not require "crystal ball" inquiry . . . . The statute must be construed in the light of reason . . . .

Id. at 836-37.

236. *See* Manygoats v. Kleppe, 558 F.2d 556, 560 (10th Cir. 1977).

237. 542 F.2d 539 (10th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). The standard of review established by the Tenth Circuit to determine EIS adequacy was 1) whether the EIS addressed the five requirements set forth in 42 U.S.C. § 4332(2)(C) (1976); and 2) whether the EIS was a good faith effort to comply with NEPA. *Id.* at 542-43.

238. 619 F.2d at 1382.

239. *Id.*

240. *Id.*

241. 427 U.S. 390 (1976). In *Kleppe*, the Court held that a regional EIS was not a prerequisite for Interior's issuance of coal leases or for other activities incident to coal leasing. The Secretary was in the process of completing an interim report on the potential impact of coal development in the Northern Great Plains when the Sierra Club sued to enjoin him from further leasing until the regional EIS was prepared. Noting that the Secretary had not proposed any legislation or plan for the development of coal on a regional basis, the Court held that the triggering provisions of 42 U.S.C. § 4332(2)(C) (1976) had not been met. *Id.* at 398-402. The Tenth Circuit found that implicit in the *Kleppe* decision was the approval by the Court of the Secretary's procedures and actions in the preparation of the interim report, procedures similar to the seven-step process employed in the instant case. 619 F.2d at 1377.

agency personnel can make informed and reasoned choices.[242]

B. *"Navigable Waters" in the Clean Water Act*

In *United States v. Texas Pipeline Co.*,[243] the Tenth Circuit reaffirmed the definition of "navigable waters" that it had established in *United States v. Earth Sciences, Inc.*[244] A pipeline owned by Texas Pipeline Company had been hit by a bulldozer, causing the release of the equivalent of 600 barrels of oil. Texas Pipeline immediately notified the Coast Guard and acted expeditiously in constructing a temporary dam to contain the oil, but the Coast Guard, after commending Texas Pipeline for its efforts, levied a $2,500 civil penalty against the company under provisions of the Clean Water Act.[245] Texas Pipeline argued that because the creek into which the oil had run was not a "navigable water" the provisions of the Act were not triggered. The creek, an unnamed tributary of Clear Boggy Creek, ultimately emptied into Red River; the tributary and creek had intermittent flows, generally only after heavy rainfalls.[246]

The Tenth Circuit held, as it had in *Earth Sciences*, that "navigable waters" under the Clean Water Act had a much broader definition than that which is accorded the conventional meaning of "navigable."[247] The stream involved in the *Earth Sciences* case was confined to one county where two dams collected the entire flow; yet the stream was determined to be navigable because of its impact on interstate commerce.[248] The water from the unnamed tributary in the instant case eventually flowed into a large interstate river; therefore, the stream was included in the definition of navigable waters contained in the Clean Water Act, regardless of whether there was any water flowing in it, or in Clear Boggy Creek, at the time of the oil spill-

242. 619 F.2d at 1378.

243. 611 F.2d 345 (10th Cir. 1979).

244. 599 F.2d 368 (10th Cir. 1979).

245. 33 U.S.C. § 1321(b) (1976), which provides, in part:

> (3) The discharge of oil or hazardous substances into or upon the *navigable waters* of the United States . . . is prohibited. . . .
>
> . . . .
>
> (6) Any owner or operator of any . . . , on shore facility, . . . from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. (emphasis added).

For a discussion of the fifth amendment implications of these provisions of the Clean Water Act, see the comments on Ward v. Coleman, 598 F.2d 1187 (10th Cir. 1979), *rev'd*, 100 S. Ct. 2636 (1980) in *United States Supreme Court Review of Tenth Circuit Decisions* within this Seventh Annual Tenth Circuit Survey, *infra* at 531.

246. 611 F.2d at 345.

247. *Id.* at 347. The definition of "navigable waters" in 33 U.S.C. § 1363(7) (1976) is "the waters of the United States, including the territorial seas."

248. 599 F.2d at 374-75. Although recognizing that, by stipulation of both parties, the stream was not "navigable in fact nor is it used to transport any goods or materials," the Tenth Circuit found that the stream supported trout and beaver and water from the stream was used for agricultural irrigation, from which products were "sold in interstate commerce." *Id.* at 375. This constituted a sufficient nexus to interstate commerce to bring the stream within the meaning of "navigable waters" as intended by Congress. *See* S. REP. NO. 1236, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3822.

age.[249]

V. WATER LAW

The Tenth Circuit decided two cases in the water law area during the past year. *Jicarilla Apache Tribe v. United States* has been discussed previously.[250] The other water case concerned a continuing controversy over the reservoir rights of Denver vis à vis the United States. In *United States v. Northern Colorado Water Conservancy District*[251] the Tenth Circuit upheld a district court decision which had concluded that Denver was precluded from raising legal protests against the release of water from the Dillon Reservoir to the Green Mountain Reservoir because of the city's participation in stipulations in previous court decrees.

Green Mountain Reservoir was constructed in 1943 on the Blue River on the eastern slope of the Colorado Rockies as part of the Colorado-Big Thompson Project. The purpose of the project was to bring western slope waters to the more developed eastern range. Approximately one-third of the reservoir water is returned to the western slope, while the remainder is used "primarily for power purposes" on the eastern slope. After the water is released, it is available without charge "to supply existing irrigation and domestic appropriations of water."[252] In 1955, a stipulation was agreed upon between the United States and several state appropriators, including Denver, as to the water rights for the Colorado-Big Thompson Project and other water uses on the Blue River. Section 4(a) of the stipulation, which was incorporated into the 1955 decree of the United States District Court for the District of Colorado, reads:

> The rights of the City and County of Denver and the City of Colorado Springs are limited solely to municipal purposes as herein described and *subject to the rights of the United States of America* to fill each year the Green Mountain Reservoir to a capacity of 154,645 acre feet for utilization by the United States of America [for power generation].[253]

After Denver completed construction of the Dillon Reservoir, upstream from the Green Mountain Reservoir, in 1963, the city began to impound water normally flowing into the federally-operated facility. Suit was filed by the United States to enjoin Denver from continuing this impoundment; another stipulation was entered by Denver following an April, 1964 decree. In this second stipulated agreement, Denver acknowledged that the United States had a right to fill the Green Mountain Reservoir to capacity each year and that "Denver and Colorado Springs may not exercise their decreed right to divert the waters of the Blue River except with approval by the Secretary of the Interior."[254]

249. 611 F.2d at 347.
250. See text accompanying notes 68-96 *supra*.
251. 608 F.2d 422 (10th Cir. 1979).
252. *Id.* at 425 (quoting S. DOC. NO. 80, 75th Cong., 1st Sess. (1937)).
253. *Id.* at 425-26.
254. *Id.* at 427.

In the summer of 1977, following a winter of below average snowfall, Denver refused to deliver 28,622 acre feet of water to the Green Mountain Reservoir. The Regional Director of the Bureau of Reclamation stated that this water was necessary to fill the Reservoir to its decreed capacity. A declaratory judgment action was subsequently filed against Denver.[255]

The central issue confronting the Tenth Circuit was the interpretation of a clause in the Senate document concerning the operation of the Green Mountain Reservoir as it related to the subsequent stipulations. Denver contended that since the primary purpose of the water stored in the Green Mountain Reservoir was for "power purposes," the city should be able to deliver to the United States an amount of electrical power equivalent to that which would be generated if the water it was impounding in Dillon Reservoir were released. Denver asserted that because it had the right to use the water for agricultural and domestic purposes, the United States electrical generating right was subservient to Denver's uses.[256]

The Tenth Circuit noted that Denver was neither a beneficiary of the Colorado-Big Thompson Project nor a party to the Colorado River Compact of 1922. Because of this, the city could not raise issues such as beneficial use. Denver's rights were deemed limited to the 1955 and 1964 court-approved stipulations, which expressly required Denver to release the water stored in Dillon Reservoir until the storage capacity of the Green Mountain Reservoir was filled. The court of appeals affirmed the lower court's finding that:

> [T]he 1955 decree determined that the United States' right to the water [from the Blue River] was superior to Denver's; under the 1964 decree it was provided that Denver had no right, title or interest in the Green Mountain Reservoir or in the water which the United States may or is entitled to store therein; [and that] under the 1964 decree, . . . Denver could not divert the Blue River water except with approval by the Secretary.[257]

Although no new legal ground was broken by this Tenth Circuit water decision, the settlement of the case should resolve finally the long-standing dispute as to which water rights are superior on the transmountain diversion affected by the Colorado-Big Thompson Project. It is now apparent that Denver's water rights in the Dillon Reservoir are subject to the superior rights of the United States to fill the Green Mountain Reservoir to its annual decreed capacity.

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255. *Id.* at 427-28.
256. *Id.* at 428.
257. *Id.* at 428-29.

ANDRUS V. SHELL OIL CO.: THE MARKETABILITY STANDARD AND THE OIL SHALE EXCEPTION

In *Andrus v. Shell Oil Co.*,[1] the United States Supreme Court affirmed a Tenth Circuit decision which had held that a future marketability standard applies to oil shale claims located prior to 1920.[2] In so holding, the Supreme Court created an exception to the present marketability standard established in *Coleman v. United States*.[3] This comment will discuss the factual and legal background of the case and examine the Supreme Court's reasoning; furthermore, the comment will analyze the soundness of the Court's rationale and offer some policy considerations relating to the effect of the decision on the oil shale leasing program.

I. FACTUAL AND LEGAL BACKGROUND

In 1872, Congress passed the General Mining Law,[4] opening up large areas of federal lands to private entrepreneurs in order to promote the exploration and development of American mining resources. The requirements for a private citizen to obtain a mineral patent are minimal. One requirement is that the claim be maintained through yearly assessment work until such time as a patent for the particular claim issues from the government. Assessment work is defined as work to improve the mining claim, which cannot be "less than $100 worth of labor . . . or improvements made during each year."[5] Furthermore, the patent may issue only upon a showing that

1. 100 S. Ct. 1932 (1980).

2. Shell Oil Co. v. Andrus, 591 F.2d 597 (10th Cir. 1979). For a history of the protracted litigation leading to this decision, as well as an analysis of the Tenth Circuit's reasoning, see Overview, *Lands and Natural Resources, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 293, 293-96 (1980).

3. 390 U.S. 599 (1968).

4. Act of May 10, 1872, ch. 85, 17 Stat. 91 (current version at 30 U.S.C. §§ 22, 26, 28, 29 (1976)).

5. 30 U.S.C. § 28 (1976). The $100 assessment work requirement, although not an issue in this case, has presented problems for oil shale locators. In 1920, immediately preceding passage of the Mineral Leasing Act, speculators rushed to locate oil shale claims on the public lands under the provisions of the Mining Law. *See* Hickel v. Oil Shale Corp., 400 U.S. 48, 54 (1970). Although the Mineral Leasing Act of 1920 removed oil shale from the category of minerals locatable under the Mining Law, the Act included a saving clause whereby valid pre-Act claims were preserved so long as they were maintained in accordance with the law. *Id.* at 51. Because the Act removed the possibility that oil shale locations be usurped by subsequent locations or by subsequent challengers to pre-Act oil shale claimants, and because the pre-Act law prohibited the federal government from challenging the validity of mining claims because of claimant's failure to do assessment work, oil shale speculators became less diligent in their asessment work. *See* Udall v. Oil Shale Corp., 406 F.2d 759 (10th Cir. 1969), *rev'd in* Hickel v. Oil Shale Corp., 400 U.S. 48 (1970).

The Interior Department challenged the validity of oil shale claims for failure of claimants to do the statutorily required assessment work. In United States v. Krushnic, 280 U.S. 306 (1930), and again in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639 (1935), the Supreme Court declared that the 1920 Mineral Leasing Act had not altered the pre-Act law insofar as it pertained to the authority of the government to challenge mining claims for insufficiency of the assessment work. Interior acquiesced to the Court's pronouncements, for a while.

In the 1960's, however, Interior again challenged certain mining claims involving oil shale

the claimant has expended a total of $500 on the development of the claim.[6]

In addition to the improvement requirements, a mining location, to be patentable, must contain "valuable mineral deposits."[7] Since the enactment of the General Mining Law, determination of what constitutes a valuable mineral deposit has been the subject of much litigation and several Department of Interior decisions. Interior's first interpretation of the term came in the watershed decision of *Castle v. Womble*,[8] in 1894. In this decision, the Secretary of the Interior explained that "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."[9] This "prudent man" test established in *Castle v. Womble*, though later modified by the Supreme Court's *Coleman* decision, remains the standard by which Interior officials determine the existence of a valuable mineral deposit on mining claims.

Andrus v. Shell Oil Co. involved two groups of oil shale claims,[10] known as the Mountain Boy and Shoup claims, located on public lands in 1917 and 1918. Subsequently, in 1920, Congress amended the General Mining Law by enacting the Mineral Leasing Act.[11] The Leasing Act provided that certain public domain mineral lands, including oil shale lands, would no longer be available for location under the Mining Law, but the 1920 Act provided that the minerals under these public lands could be obtained through a newly-established departmental leasing system. The Leasing Act contained a saving clause, however, which preserved "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be affected under such laws, including

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because of claimant's failure to do the required assessment work. The Tenth Circuit, per Judge Seth, was indignant with the Department and, citing *Krushnic* and *Virginia-Colorado*, upheld the validity of the oil shale claims. Udall v. Oil Shale Corp., 406 F.2d 759 (10th Cir. 1969).

In Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), the Supreme Court, limiting *Krushnic* and *Virginia-Colorado* to their facts, reversed the Tenth Circuit and declared the oil shale claims to be invalid, as requested by the Department. The Court reasoned that, as the saving clause of the 1920 Mineral Leasing Act required the maintenance of pre-Act claims, including assessment work in substantial compliance with 30 U.S.C. § 28, as a condition for the continuing validity of the claims, Congress must have implied that the Department would have some means of enforcing the statutory provision. Asserting that statements to the contrary in *Krushnic* and *Virginia-Colorado* were dicta, the Court concluded that the failure of locators to do assessment work on oil shale claims gives the government the right to declare forfeiture. 400 U.S. at 52-58.

6. 30 U.S.C. § 29.

7. *Id.* at § 22. The discovery of a valuable mineral deposit is the prerequisite to the establishment of a valid mining claim.

8. 19 Pub. Lands Dec. 455, 457 (1894). *Accord*, Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-36 (1963); Cameron v. United States, 252 U.S. 450, 459 (1920).

9. 19 Pub. Lands Dec. at 457.

10. The term "oil shale" is a misnomer, for the rock formations in which oil shale is found contain neither oil nor shale in its natural state. The rock is actually a marlstone which contains an organic matter called kerogen. When kerogen is heated to between 500 and 900 degrees Fahrenheit, it will yield a petroleum product which is approximately 66% liquid oil, plus a fuel gas and a coke-like solid. The oil obtained from the heating process is high in sulfur and nitrogen content and can be refined into products similar to crude oil. Note, *The Disputed Oil Shale Claims: Background and Current Conflict*, 51 MINN. L. REV. 1154, 1154 n.1 (1967).

11. Act of Feb. 25, 1920, ch. 85, 41 Stat. 437 (current version at 30 U.S.C. §§ 22, 48, 49, 171, 181-194, 201-209, 211-214, 221, 223-229, 229a, 241, 251, 261-263 (1976)).

discovery."[12] Oil shale claims were included in this saving clause, thereby entitling the Mountain Boy and Shoup claims to proceed to patent under the Mining Law.

At the time of its passage, the Mineral Leasing Act, with its saving clause, evoked few comments from congressmen; especially lacking were comments concerning the requirements for a valid discovery of oil shale. The purpose of the saving clause, according to Congressman Taylor of Colorado, was to prevent any federal department from denying a pre-1920 oil shale locator from the pursuit of a valid claim.[13] Three months after the enactment of the Mineral Leasing Act, Interior ruled that patentability of oil shale placer claims[14] was dependent upon a showing that the claims were valuable because of the oil shale deposits.[15]

In 1905, the Supreme Court had adopted the *Castle v. Womble* test in *Chrisman v. Miller*.[16] Thus, by 1920, there existed both an Interior ruling and a Supreme Court decision holding that a valuable mineral deposit was to be determined by the prudent man test. Yet, between 1920 and 1960, Interior periodically issued oil shale patents on the basis of another test, enunciated in 1927 by an assistant secretary of the Department, in *Freeman v. Summers*.[17] In *Freeman*, oil shale was declared to be a unique mineral, one which could be patented under the general mining laws based solely on its *future* marketability potential.[18]

The special future marketability test for oil shale remained in effect until 1964, when Interior re-examined the position taken in *Freeman* and determined that the *Freeman* future marketability standard was inconsistent with the mining statutes. This change in position prompted the Secretary of Interior to file complaints contesting the oil shale claims located in 1917 and

12. 30 U.S.C. § 193 (1976).

13. 59 CONG. REC. 2711-12 (1920). *See also* 59 CONG. REC. 2709 (1920); 58 CONG. REC. 4444, 4579-84 (1919).

14. "Placer claims" are those claims in which a deposit of valuable minerals is found loose, in sand or gravel, instead of in a vein. The term includes gulch claims, old channels, and drift diggings. The United States mining acts have categorized all minerals as either placer or lode claims. If a mineral deposit is "in place," or in a vein, it is a lode claim. E. DE SOTO & A. MORRISON, MORRISON'S MINING RIGHTS 252-53 (16th ed. 1936).

15. Instructions, 47 Pub. Lands Dec. 548, 551 (1920). The Department's policy statement is set forth:

> Oil shale having been thus recognized by the Department and by the Congress as a mineral deposit and a source of petroleum . . . lands valuable on account thereof must be held to have been subject to valid location and appropriation under the placer mining laws to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas.

16. 197 U.S. 313 (1905).

17. 52 Pub. Lands Dec. 201 (1927).

18. *Id.* at 206. The standard for determining the value of oil shale deposits, enunciated in *Freeman*, follows:

> While at the present time there has been no considerable production of oil from shales, due to the fact that abundant quantities of oil have been produced more cheaply from wells, there is no possible doubt of its value and of the fact that it constitutes an enormously valuable resource for future use by the American people.
>
> It is not necessary, in order to constitute a valid discovery under the general mining laws sufficient to support an application for [an oil shale] patent, that the mineral in its present situation can be immediately disposed of at a profit.

1918.[19] While Interior offered several reasons for its change of position on the validity of the pre-1920 oil shale locations, the most important rationale advanced was that no valuable mineral deposit existed within the claims when they were originally located.

The Secretary's protest was heard before an administrative law judge in 1967, but the decision was not rendered until 1970.[20] During this time, the Supreme Court, in *United States v. Coleman*,[21] modified the prudent man standard, as enunciated in *Castle v. Womble*, by introducing a *present* marketability requirement as a guide in determining the value of a mineral deposit. The "marketability test," an extension of the *Castle v. Womble* prudent man test, stated that, if the mineral could not be marketed at a profit *at the time of location*, the mineral deposit was not, in fact, valuable.[22] The administrative law judge examining the oil shale claims nevertheless held that he was bound by Interior's *Freeman* position and he adjudged that the validity of the pre-1920 oil shale claims was to be determined on the basis of the *Freeman* future marketability standard. It was clear from his opinion that, but for the *Freeman* decision, he would have found no valuable mineral deposits in the pre-1920 oil shale locations.[23]

Interior appealed the administrative decision to the Interior Board of Land Appeals (Board). The Board reversed the administrative law judge's decision on June 28, 1974,[24] reasoning that the original oil shale locators failed the test of value because there had been no present, reasonable prospect of successfully operating an oil shale mine, at a profit, at the time of location. It declined to consider the evidence presented by the claimants as to the speculative value of the oil shale. The Board overruled *Freeman* as being inconsistent with both the General Mining Law of 1872 and the 1920 amendments thereto.[25] Considering the reliance by the parties involved, the purposes of the statute, public policy, and the harm to both the government and the oil shale claimants, the Board held that the reversal of *Freeman* should be applied retroactively, invalidating both the Mountain Boy and Shoup claims.[26] The Secretary subsequently ordered that the claims be cancelled.

After cancellation, the oil shale claimants appealed to the United States District Court for the District of Colorado. Both the claimants and the government moved for summary judgment. The district court found for the claimants.[27] The court based its decision on findings that the pre-1920 locations were valuable mineral deposits, that Congress had approved the *Freeman* rule, and, alternatively, that Interior was estopped from denying the

19. 100 S. Ct. at 1935.

20. Decision of Dalby, J. (Apr. 17, 1970). The decision of Judge Dalby was not reported. A copy of the full decision may be found in Appendix F, Petition for Certiorari at 166a-67a, Andrus v. Shell Oil Co., 100 S. Ct. 1932 (1980).

21. 390 U.S. 599 (1968).

22. *Id.* at 602.

23. *See* note 20 *supra* at 166a-67a.

24. United States v. Winegar, 81 Interior Dec. 370 (1974).

25. *Id.* at 396-99.

26. *Id.* at 399.

27. Shell Oil Co. v. Kleppe, 426 F. Supp. 894 (D. Colo. 1977).

validity of the claims.[28]

The Tenth Circuit Court of Appeals, per Chief Judge Seth, affirmed the district court in *Shell Oil Co. v. Andrus*.[29] The court of appeals reasoned that the *Freeman* standard had become an annexation to the mining law of 1872 to such an extent that it could not be removed without affirmative congressional action. The Tenth Circuit asserted that the intensive congressional investigations into the test without any subsequent modification of the *Freeman* standard constituted a congressional ratification of the future marketability test for oil shale.[30] Chief Judge Seth noted that Congress was fully aware of the *Freeman* standard in 1930 when it conducted investigations into the possibility that the original oil shale locations were fraudulent. Since Congress, at the conclusion of these investigations, did not call for the imposition of the prudent man standard to satisfy oil shale discovery requirements, the Tenth Circuit found that Congress had affirmatively approved the future marketability standard of *Freeman*.[31] The Tenth Circuit emphasized Interior's "contemporaneous construction" of the oil shale marketability standard in both the *Freeman* decision and the 1920 Secretarial instructions regarding oil shale claims.[32] The court of appeals was convinced that these departmental interpretations, coupled with apparent congressional approval of these interpretations, were sufficient to demonstrate the creation of an oil shale exception to the *Castle v. Womble* prudent man standard.[33]

II. Congressional Ratification and Contemporaneous Construction

In a six to three decision, the Supreme Court affirmed the holding of the Tenth Circuit.[34] Chief Justice Burger, for the majority, dealt extensively with the legislative history of the 1920 Mineral Leasing Act and with the subsequent actions taken by Congress in considering the *Freeman* decision. The majority asserted that the 1920 Act was passed as an effort to put an end to the question of oil shale patentability. The Court concluded that the marketability requirement of the General Mining Law was met by the pre-1920 oil shale claims.[35] The Court relied, as had the Tenth Circuit, upon the contemporaneous construction of the *Freeman* decision, the 1920 Secretarial instructions and the subsequent patenting by Interior officials of many pre-1920 oil shale claims.[36]

The Supreme Court also adopted the reasoning of the Tenth Circuit concerning the 1930 congressional hearings on the issue of the patentability of the pre-1920 oil shale locations. Since the Senate committee conducting

28. *Id.*
29. 591 F.2d 597 (10th Cir. 1979). *See* note 2 *supra*.
30. *Id.* at 602.
31. *Id.* at 604.
32. *Id.* at 603-04. *See* notes 15, 18 *supra*.
33. *Id.* at 605.
34. Andrus v. Shell Oil Co., 100 S. Ct. 1932 (1980).
35. 100 S. Ct. at 1937-38.
36. *Id.* at 1936-37.

the investigations did not issue a report, and the House of Representatives, after its hearings, did not reject the future marketability standard of *Freeman*, the Court held that Congress had specifically affirmed the future marketability test for oil shale locations.[37]

Chief Justice Burger stated that for the Court to find oil shale "non-valuable" would be unlawful judicial invalidation of congressional intent to apply a future marketability standard for oil shale locations as demonstrated by the 1930 hearings and by the 1956 congressional modification of the 1920 Mineral Leasing Act.[38] The Court also noted the irony of Interior's attempts to have the oil shale claims adjudged non-valuable at a time when all alternative energy sources were becoming extremely valuable because of the United States energy crisis. Though not directly addressing the estoppel issue, the Court noted that Interior had consistently applied the *Freeman* rule for thirty-three years.[39]

In his dissent, Justice Stewart declared that he was unable to find anything in the legislative history of the Mineral Leasing Act which would permit creation of a less stringent test for oil shale locations.[40] He noted that although the congressional hearings of 1930 focused on the *Freeman* decision, the *Freeman* standard was never expressly approved. The Justice further asserted that, even if congressional approval for the *Freeman* decision were found, it would not be sufficient to overrule the plain meaning of the saving clause of the 1920 Act.[41] The dissent also pointed out that the 1956 congressional amendment to the Mineral Leasing Act had nothing to do with the question of valuable mineral deposits as that term related to oil shale claims. Justice Stewart found that the Mountain Boy and Shoup claims necessarily failed the valuable mineral deposit test.[42]

III. ANALYSIS OF THE COURT'S RATIONALE

Chief Justice Burger stated that the 1920 Mineral Leasing Act was enacted in order to put an end to the question of patentability of oil shale. He did not totally rely on the 1920 Act, however, as he also emphasized subsequent legislative actions and Interior decisions.[43] To have stated that the 1920 Act settled patentability questions would have been incorrect. One commentator has noted that the Mineral Leasing Act of 1920 was the result of a controversy between the Interior Department and private parties over the ownership of natural resources.[44] It also has been stated that "Congress

37. *Id.* at 1940 n.10 (citing H.R. REP. No. 2537, 71st Cong., 3d Sess. (1931)).
38. *Id.* at 1941.
39. *Id.*
40. *Id.* at 1942-43 (Stewart, J., dissenting).
41. *Id.* at 1943. The dissent recognized that neither the Board of Land Appeals nor the Tenth Circuit Court of Appeals held that there was no evidence that claimants had met the prudent man test of value. Justice Stewart noted, however, that the hearing examiner had specifically stated that the Mountain Boy and Shoup claims failed the 1920 test for value. Indeed, none of the numerous adjudicatory panels found that the *Castle* test, as supplemented by *Coleman*, had been met by the respondent.
42. *Id.* at 1944.
43. *Id.* at 1937-38.
44. *Foreword* to H. SAVAGE, THE ROCK THAT BURNS at v (1967).

was well aware that oil shale was an undeveloped natural resource; [and] that there was no precedent nor handbook to supply the answers to many complex problems."[45] With so many unresolved issues before Congress at that time, it is difficult to see how the Court could conclude that the 1920 Act resolved all oil shale patentability questions. The suit between Shell Oil and Interior demonstrates that for several decades questions concerning oil shale patentability have not been answered.

A. *The* Freeman *Decision*

The Court relied, as had the lower courts, on the future marketability test established in *Freeman*. The District Court for the District of Colorado found, for example, that the *Freeman* decision was not an undue extension of the test of the prudent man as established by *Castle v. Womble*, since the prudent man would consider the future marketability of the fruits of his labor in deciding whether to continue his project.[46] The decision in *Castle v. Womble*, however, contains language that negates such a conclusion. In *Castle v. Womble*, Secretary Smith stated that a claimant's hopes and beliefs would not be useful in determining the value of mineral deposits and that the requirement of value related only to the present available facts, "not to the probabilities of the future."[47]

It is significant that the only precedent cited in *Freeman* in support of the future marketability standard was *Narver v. Eastman*,[48] a case wherein the Board had held that a valid discovery does not require disposal of the mineral at a profit. The Board in *Narver* had compared a mineral locator to a farmer who has a bad year and yet sells his crops in order to recoup some of the loss. While the farmer receives no profits from his labor, it could not be argued that his crops were without value.[49] The *Freeman* decision's reliance on such an analogy, however, was unsound. If a prudent farmer had known *before* planting his crops that he would not realize a profit, then he would not have planted at all.[50] Based on the economic information available to the oil shale claimants throughout the history of the claims, no claimant could have considered oil shale development economically viable. Thus, the oil shale claimants are in the position of the hypothetical farmer who knows, prior to planting, that his crops will not produce a profit.

The Court also relied on subsequent congressional approval of the *Freeman* test.[51] It is doubtful, however, that the hearings on which the majority relied constituted a ratification of the *Freeman* decision. Congress clearly was aware of the *Freeman* decision, since it had been the focus of several congressional hearings. But it is debatable whether awareness equals approval. The district court felt that the failure of Congress to change the discovery requirements under *Freeman* demonstrated congressional adoption of the *Free-*

45. *Id.*
46. Shell Oil Co. v. Kleppe, 426 F. Supp. 894, 896 (D. Colo. 1977).
47. 19 Pub. Lands Dec. at 457.
48. 34 Pub. Lands Dec. 123 (1905).
49. *Id.* at 125.
50. United States v. Winegar, 16 I.B.L.A. 112, 170 (1974).
51. 100 S. Ct. at 1939-40.

man standard.[52] The Tenth Circuit adopted the district court's conclusion, finding that congressional inaction, in the face of the many alternatives which it could have taken to overrule *Freeman*, manifested a congressional intent to follow the *Freeman* test.[53]

It is significant that neither of the lower federal courts cited case law or statutory provisions for the proposition that non-action equals ratification. Such a conclusion is clearly at odds with the Court's position in the cases of *TVA v. Hill*[54] and *SEC v. Sloan*,[55] wherein the Court held that congressional intent to repeal a recognized standard must be clear and express. In fact, the only action taken by Congress after the *Freeman* investigations was the dispatch of a letter, from the chairman of one of the investigatory committees to the Secretary, instructing him to "proceed to final disposition of pending applications . . . in conformity with the law."[56] To endorse the concept that statutory law may be amended by the inaction of the legislative body establishes a potentially dangerous precedent, especially when the inaction is, in turn, based on an arguably erroneous administrative interpretation of the statutes.

B. *Determination of "Valuable Mineral Deposits"*

The Supreme Court stated that the question presented in *Andrus v. Shell Oil Co.* was whether "oil shale deposits located prior to the 1920 Act are 'valuable mineral deposits' patentable under the savings clause of the Act."[57] By deciding, on the basis of *Freeman*, that these oil shale deposits had future value and were therefore valuable mineral deposits, the Court precluded Interior from applying the present marketability standard established in *Castle v. Womble.* Yet, the *Castle v. Womble* test was the only interpretation of the term "valuable mineral deposit" available when the original Shoup and Mountain Boy claims were located in 1917 and 1918 and when the Mineral Leasing Act was passed in 1920. Thus, with respect to the original location of these claims, the only test which could be applied was that of *Castle v. Womble*. The purported change in this standard effected by *Freeman* occurred *seven years after* the enactment of the Mineral Leasing Act. The Supreme Court held, however, that these pre-1920 claims need only meet the 1927 standard established in *Freeman*. The Supreme Court's retroactive use of the *Freeman* test to change a standard in effect at the time of the Leasing Act's passage is questionable.

Davis v. Wiebold, a Supreme Court case decided prior to the location of the Mountain Boy and Shoup claims and prior to the *Freeman* decision, had held that the burden was on the mineral claimant to show that his claim was, as a present fact, mineral in character and capable of actual production.[58] *Wiebold* also conditioned patentability on the existence of a mineral

52. 426 F. Supp. at 901.
53. 591 F.2d at 601.
54. 437 U.S. 153, 189 (1978). *See also* Cleveland v. United States, 329 U.S. 14 (1946).
55. 436 U.S. 103, 119-21 (1978).
56. Petitioner's Brief for Certiorari at 18, Andrus v. Shell Oil Co., 100 S. Ct. 1932 (1980).
57. 100 S. Ct. at 1934.
58. Davis v. Wiebold, 139 U.S. 507, 523 (1891).

deposit that could be extracted at a profit through present expenditures and effort rather than through some future, speculative value.[59] The *Wiebold* decision supports the *Castle v. Womble* and *Coleman* tests rather than the test enunciated in *Freeman*.

For the Court to ignore the prudent man standard for value established by administrative ruling and Supreme Court precedent in effect when the Leasing Act was passed, and for the Court to disregard the fact that no legislative amendment to the prudent man standard was added at that time, contradicts both applicable law and the intent of the legislative body. The inherent weakness in determining legislative intent by examining subsequent administrative decisions and subsequent congressional hearings, rather than by looking to the fact that there was a pre-existing standard not changed by the statute, is evident. Though Chief Justice Burger recognized, in a footnote, that the Court had approved an extension of the *Castle v. Womble* test in the *Coleman* decision by requiring the mineral to be "extracted, removed, and marketed at a profit," the Chief Justice stated that this new standard did not apply to the oil shale claims.[60] Even if a prudent man would have chosen to expend money and labor in developing oil shale claims, there is no evidence that the actual production of oil shale was then, or at any time since, marketable. It is clear that, had the Court followed its decision in *Coleman*, the result would have been an invalidation of the oil shale claims because of failure to meet the present marketability test.

Evidence of the lack of marketability of oil shale to date is abundant. As noted by the Board, a half-century has failed to show a single commercial operation on any of the patented or unpatented oil shale claims. Forty years of intermittent efforts have failed to produce even the beginnings of an industry which could process oil shale economically. Based on the definitions of value as adopted by the Supreme Court both in the early part of this century in *Castle v. Womble*, and as late as 1968 in *Coleman*, the Court's decision to adopt *Freeman* as the absolute test for oil shale marketability indicates that the present Court was predisposed to find the oil shale claims valuable.

C. *The Estoppel Argument*

Although the Court did not specifically address the estoppel issue, the Court's use of the contemporaneous construction argument seems to be very much like estoppel. By looking at the history and administrative developments subsequent to the passage of the Leasing Act, and by holding that Interior should not be permitted to invalidate pre-1920 claims because of the reliance of the claimants on subsequent Interior interpretations and actions, the Court seemed to be making an equitable estoppel argument. This case was not the first in which the Court applied principles of equitable estoppel against the government with regard to oil shale. Interior has been estopped on several previous occasions from denying the validity of oil shale patents on the basis of the assessment requirements of the mining laws.[61]

59. *Id.* at 525.
60. 100 S. Ct. at 1935 n.4 (citing United States v. Coleman, 390 U.S. at 602).
61. *See* note 5 *supra*.

In recent years the emphasis on equitable estoppel has been to achieve fairness between the parties, and the traditional restrictions on the assertion of the doctrine against the government have had only limited effect.[62] Even current decisions, however, are quick to subordinate the interest of the individual, who has a valid estoppel argument, to the interests of the public, as represented by the government, when the facts indicate that estoppel would cause much greater harm to the public than to the individual. One of the earliest cases holding that estoppel would not apply against the government was *United States v. Lazy FC Ranch*.[63] The Ninth Circuit, in this case, held that, although estoppel would normally apply in the situation, it would be allowed only where the public interest would not be unduly harmed and where public policy would not be significantly frustrated.[64] The public interests sacrificed by the Supreme Court's decision in *Andrus v. Shell Oil Co.* include the large mineral windfall to the respondent, which will now not have to bid for lease agreements. This represents a substantial loss of funds which would otherwise go into the public fisc. It appears that this consideration would have been sufficient to justify the Court's denial of the oil shale patent applications.

IV. POLICY CONSIDERATIONS

The general policy behind the mining laws was enunciated in *Cataract Gold Mining Co.*,[65] in which the Board referred to the early history of the United States efforts to develop a consistent policy to promote and encourage the discovery and development of minerals. The Supreme Court alluded to this position in commenting on the need for a sharp increase in alternative energy sources and by noting the ironic position of Interior in challenging the validity of claims which could promote production of an alternate energy source.[66]

What is unclear, however, is how a different outcome would jeopardize the production of these oil shale reserves. The district court declared that it wanted to avoid tying up oil shale claims in years of litigation.[67] But a decision invalidating the claims would have terminated the litigation as quickly as a ruling in favor of patentability. Also, in its decision giving Shell Oil a potential monopoly on these particular claims, the Court removed the possibility of competitive bidding for leases, thereby reducing the competitive incentive for producers to explore and develop the oil shale resources in the most efficient manner. The Court has, in effect, restricted the market forces of supply and demand by creating a partial monopoly for Shell Oil Company.

While the invalidation of the oil shale claims would have resulted in a financial loss to respondents, this loss could be justified in light of the grave

62. *See* Comment, *Emergence of an Equitable Doctrine of Estoppel Against the Government—The Oil Shale Cases*, 46 U. COLO. L. REV. 433, 446 (1975).
63. 481 F.2d 985 (9th Cir. 1973).
64. *Id.* at 989.
65. 43 Pub. Lands Dec. 248 (1914).
66. Andrus v. Shell Oil Co., 100 S. Ct. at 1941.
67. Shell Oil Co. v. Kleppe, 426 F. Supp. at 907.

harm incident to a perpetuation of the *Freeman* interpretation of the General Mining Law. A continuation of the erroneous *Freeman* administrative ruling serves neither the mining laws nor the public. The practical effect of the *Andrus v. Shell Oil Co.* decision has been to open the way for the patenting of more than five million acres of federal land for $2.50 an acre. Clearly, the resulting monetary loss to the government, which would have been able to lease the oil shale lands on a competitive basis, is tremendous.

By allowing public lands to go to respondents outside of the leasing system, the objectives of the oil shale leasing regulations and the policies behind them have been circumvented. The leasing regulations are designed to

> foster improved technology for mining and recovery of shale oil and other mineral components of oil shale, to encourage competition in the development and use of oil shale and related mineral resources and [to] develop a basis for future competitive leasing of federal oil shale lands, to encourage participation by companies which are not favorably situated with respect to access to reserves of the minerals which are present in oil shale, to prevent speculation and windfall profits, and to provide reasonable revenues to the Federal and state governments—all under mining operation and production practices that are consistent with good conservation management of the overall resources in the oil shale regions.[68]

These policy considerations cannot be treated lightly. They go to the very heart of our mineral leasing system and should have been considered by the Court. The Court has taken on a mask of equity and justice, yet it has avoided very important environmental and developmental considerations.

The decision in *Andrus v. Shell Oil Co.* is an example of the Court's ability to rationalize a result which it deems favorable, regardless of applicable legal precedent and congressional intent. The result has been a potentially massive windfall for a few oil companies and a substantial loss to the people of the United States.

William G. Myers, III

68. Anderson, *Acquiring Rights to Minerals Associated With or Contained In Oil Shale*, 13 ROCKY MTN. MIN. L. INST. 233, 243 (1967).

PATENTS

SYNERGISM AND NONOBVIOUSNESS: THE TENTH CIRCUIT ENTERS THE FRAY

INTRODUCTION

The federal courts of appeals are in conflict on the standard to be used to determine the patentability of "combination" patents under the statutory nonobviousness requirement for patent validity. As distinguished from an entirely new innovation, a "combination" is the product of using or uniting commonly known devices together to function as one complete apparatus. When the overall effect of the combination produces an unpredictable change from the individual components' functions, the result is termed "synergistic." Synergism then is the combining of known elements to produce a unique result.[1]

In essence, the question dividing the appellate courts is whether synergism is a necessary result that must be achieved by combination patents under the guidelines for determining nonobviousness established by the Supreme Court in *Graham v. John Deere Co.*[2] In *Graham*, the Supreme Court interpreted the statutory nonobviousness requirement and announced that this prerequisite to patentability was to be evaluated under objective standards. The *Graham* nonobviousness standards provide that in determining patent validity, the patent must be examined in light of the prior art as it existed at the time the innovation was developed. Additionally, three factual inquiries must be undertaken by the reviewing court: 1) the nonobviousness considerations in view of the prior art; 2) the differences between the prior art and the claims at issue; and 3) the level of ordinary skill in the pertinent art.[3]

The present controversy among the circuits centers around the applicability of the synergism doctrine to combination patents. The synergism approach is a digression to an earlier, subjective standard of "invention" previously imposed by the courts before the advent of the statutory nonobviousness criteria. This split between the circuits developed from language contained in the Supreme Court's decisions in *Anderson's-Black Rock Inc. v. Pavement Salvage Co.*,[4] and *Sakraida v. Ag Pro Inc.*[5]

In holding that the patents at issue were invalid for failing to meet the statutory nonobviousness requirement, the Supreme Court, in these cases, obliquely referred to the word "synergism" to describe the result achieved by

1. According to THE AMERICAN HERITAGE DICTIONARY at 1305 (1969), synergism is "[t]he action of two or more substances . . . to achieve an effect of which each is individually incapable."

2. 383 U.S. 1 (1966).

3. *Id.* at 17.

4. 396 U.S. 57 (1969).

5. 425 U.S. 273 (1976).

a combination patent. Without the benefit of further elaboration by the Supreme Court, either specifically endorsing a synergism standard or prescribing tests for its application, many of the lower federal courts adopted the term and employed it as a measure for combination patents. As most, if not all, patents contain combinations of old or known elements, the use of the criterion has vast implications for restricting the scope of patentable innovations.

The confusion that now exists among the circuits is exemplified by the 1979 Tenth Circuit decisions. In the August 1979 decision of *Plastic Container Corp. v. Continental Plastics of Oklahoma, Inc.*,[6] the Tenth Circuit, in an opinion written by Judge Robert Miller,[7] held that synergism was not a requirement for the nonobviousness test. In remanding the case to the district court for consideration of the nonobviousness issue, the court stressed that only the guidelines espoused in *Graham* are determinative of the question of nonobviousness. A premise of the *Plastic* opinion was that "Congress expressly mandated nonobviousness, not synergism, as the sole test for the patentability of novel and useful inventions. . . . [A]s section 103 [of the 1952 Patent Act] applies to all patent claims, there is no justification why patentability of a combination patent should be measured by a different standard than any other type of invention."[8] Conversely, the May 1979 opinion in *True Temper Corp. v. CF&I Steel Corp.*,[9] written by Judge Holloway, stated without explanatory comment that synergism was required. "A combination of known elements may be patentable, but the result in such a case must be truly synergistic. Combination patents are subjected to a scrutiny 'proportioned to the difficulty and improbability of finding invention in an assembly of old elements.' "[10] In the March 1979 decision of *Deere & Co. v. Hesston Corp.*,[11] the court, in an opinion written by Judge Doyle, held that for the combination of old elements to be patentable, a synergistic effect must be achieved.

This note argues that the Tenth Circuit in *Plastic* correctly rejected the requirement of synergism in combination patents. In evaluating the impact of the Supreme Court decisions of *Black Rock* and *Sakraida* on the synergism question in the appellate circuits, a review of recent decisions of each circuit will be undertaken.

I. THE DEVELOPMENT OF THE NONOBVIOUSNESS STANDARD

The Constitution provides that "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ."[12] Patent law, founded on this constitutional clause, rewards inventors by conferring a limited monopoly for their innova-

6. 607 F.2d 885 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 672 (1980).

7. Judge Robert Miller, of the United States Court of Customs and Patent Appeals, sat by designation pursuant to 28 U.S.C. § 293(a) (1976).

8. 607 F.2d at 905 n.48.

9. 601 F.2d 495 (10th Cir. 1979).

10. *Id.* at 506.

11. 593 F.2d 956 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 75 (1980).

12. U.S. CONST. art. I, § 8, cl. 8.

tions that achieve actual invention status.[13] The accepted argument for providing patent protection is to encourage the discovery of new technology.[14] This incentive to the inventor, the exclusive utilization of the patent, is weighed against the public's interest in access to new technology. In balancing these conflicting interests, the interest which furthers the notion of a federal constitutional mandate for a competitive economy, in theory, should prevail.[15] In view of the Constitution's grant of authority to Congress to award a proprietary monopoly, the patent monopoly should prevail. The long range interests of providing incentives to the inventor are greater, therefore, than the public's short range interest in access.

In accordance with the constitutional grant of authority and with these policy considerations in mind, Congress established the statutory prerequisites for patentability. These requirements include three primary tests of invention: utility,[16] novelty,[17] and nonobviousness.[18] Historically, utility was the only measure of a patent's validity. The Patent Act of 1790 granted

13. The patent owner has the exclusive right to manufacture, distribute, license, or sell the patent for a term of 17 years. After this term, the patented innovation is dedicated to the public. 35 U.S.C. § 154 (1976).

14. In exchange for this proprietary monopoly, a patent claim must describe the patent in such a manner that knowledge of the patent can be shared with the world.

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

35 U.S.C. § 112 (1976).

15. The operation of federal patent . . . laws is assumed to advance the federal competitive mandate. Each law grants a proprietary monopoly over subject matter that, but for the grant, would lie in the public domain. The Constitution's authorization to Congress to grant patent and copyright protection represents a judgment that, although short range competitive interests would benefit from immediate and free public access to technological and artistic innovation, to permit such access would destroy incentive to innovate; new products and works would not be introduced into the market and consequently the long range competitive situation would decline.

Goldstein, *The Competitive Mandate: From* Sears *to* Lear, 59 CALIF. L. REV. 873, 878 (1971).

16. 35 U.S.C. § 101 (1976) reads: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

17. 35 U.S.C. § 102 (1976) reads:

> A person shall be entitled to a patent unless—
>
> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States . . . .

18. Nonobviousness, long a condition for obtaining a patent in American law, means that an invention must not have been obvious to one with ordinary skill in the art to which the subject matter of the invention pertains at the time of the invention and in the light of the teachings of the prior art. Nonobviousness is distinct from novelty in the sense that an invention may be obvious even though it is not identically disclosed anywhere in the prior art.

> The general purpose behind the requirement of nonobviousness is the same as that behind the requirement of novelty. It serves to limit patent monopolies to those innovations that in fact serve to advance the state of the useful arts. New problems arise and call for new solutions. A patent monopoly may issue only for those literally new solutions that are beyond the grasp of the ordinary artisan who had a full understanding of the pertinent prior art.

2 D. CHISOLM, PATENTS § 5.01 (1978).

patents for innovations that were useful and important.[19] That test inquired as to whether the invention actually worked or did a better job than earlier devices.[20] Three years later, the standard of novelty was added.[21] This criterion was a measure of the innovation's "newness." Novelty determined if the innovation existed in written form or if it was in actual public use prior to the time the patent was sought.[22] Thus, the early test of patentability was whether the innovation was "new and useful."[23]

Before the institution of the nonobviousness requirement, the judiciary espoused a third standard: that the innovation had to be an "invention." The Supreme Court case originating the patentability standard of "invention" was *Hotchkiss v. Greenwood*.[24] In rejecting the validity of the patent, the Court found that although the replacement of wooden door handles with ceramic knobs was new, the elements of the improved doorknob were old and well known and devoid of the ingenuity of invention. Distinguishing between those innovations that were patentable and those that were not, the Court stressed that

> unless more ingenuity and skill . . . than . . . [that] possessed by an ordinary mechanic acquainted with the business [was required] . . . there . . . [would be] an absence of that degree of skill and ingenuity which constitute essential elements of every invention. In other words, the improvement is the work of the skillful mechanic, not that of the inventor.[25]

Construing this standard, however, proved the word "invention" to be a term of legal art. As the Supreme Court subsequently noted, "the truth is [that] the word [invention] cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not."[26]

The courts, nevertheless, continued to use the "invention" standard, and the judicial construction of "invention" evolved into an increasingly severe test. The culmination of this strict scrutiny is illustrated in *Cuno Engi-*

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19. Patent Act of April 10, 1790, ch. 7, 1 Stat. 109, 110 (1790).

20. In the famous "useless steroid" case, Brenner v. Manson, 383 U.S. 519 (1966), the Supreme Court rejected the patent of a chemical steroid because the specification of the patent claims did not indicate any use for the steroid. Until such time as there was an actual use for the steroid, no patent would be granted. The claimed innovation had failed the test of usefulness.

21. 1 Stat. 318 (1793).

22. *See* Note, *Novelty and Reduction to Practice: Patent Confusion*, 75 YALE L.J. 1194 (1966).

23. *See* Rich, *Principles of Patentability*, 28 GEO. WASH. L. REV. 393 (1960).

24. 52 U.S. (11 How.) 248 (1850).

25. *Id.* at 266. The rationale for this judicially sanctioned third test is that an implicit limitation on the constitutional grant of authority to confer patent status requires that it be given only to those innovations that contribute to the public knowledge. Thus, when the contribution to public knowledge is insubstantial, such that anyone familiar with the technology could have accomplished the same result, no monopoly should be granted.

26. McClain v. Ortmayer, 141 U.S. 427 (1891). The Supreme Court further stated:

> Courts, adopting fixed principles as a guide, have by a process of exclusion determined that certain variations in old devices do or do not involve invention; but whether the variation relied upon in a particular case is anything more than ordinary mechanical skill is a question which cannot be answered by applying the test of any general definition.

Id. at 427.

neering Corp. v. Automatic Devices Corp.,[27] wherein the Supreme Court further restricted the scope of patents by proposing the "flash of creative genius" test.[28] In this case, the patent advanced the state of the art of automobile cigarette lighters with the addition of cordless, thermostatically-controlled heat.[29] Although the Court conceded that the patent combination was "new and useful,"[30] it instructed that "the new device, however useful it may be, must reveal the flash of creative genius, not merely the skill of the calling."[31]

Echoing this strict standard for patentability, the Supreme Court in *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*[32] reversed the decisions of both the district court[33] and the court of appeals[34] and held the patent under consideration to be invalid. The patent involved a grocery cashier's counter that contained a rack for manually moving the groceries over the counter from the customer to the cashier.[35] At the initial adjudication of the patent claim, the district court found that although each element of the patent was known in the prior art, the blend was "a decidedly novel feature and constitute[d] a new and useful combination."[36] The Supreme Court reversed. In determining that the patent was invalid, the Supreme Court held that "[t]he conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable."[37] Further, the Court cautioned the lower tribunals that "courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements."[38]

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27. 314 U.S. 84 (1941).

28. *Id.* at 91. According to one commentator, the judicial evolution towards the strict tests of patentability came not from

> any authoritative break from established guidelines that produced these shifts, but only the slightest nuance in wording. For example, although the trend toward findings of invalidity which followed on the heels of *Cuno* has been attributed to the Court's adoption there of a test that, to be patentable, subject matter must stem from a "flash of creative genius," *Cuno*, in fact, reflects no intention to replace, or even to augment, the objective *Hotchkiss* standard with a subjective measure. *Cuno*'s purportedly new test of invention actually dates back to *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U.S. 59 (1885); and, as in *Hollister*, the term was used in an offhand way to describe the opposite of what *Hotchkiss* called ordinary skill. Had Justice Douglas instead coined a term such as "extraordinary skill," the lower courts would probably have imputed to it, too, a high, subjective requirement.

Cooch, *The Standards of Invention in the Courts*, in DYNAMICS OF THE PATENT SYSTEM 34, 56 (W. Ball ed. 1960).

29. 314 U.S. at 87.

30. *Id.* at 90.

31. *Id.* at 91.

32. 340 U.S. 147 (1950).

33. Bradley v. Great Atl. & Pac. Tea Co., 78 F. Supp. 388 (E.D. Mich. 1948).

34. Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp., 179 F.2d 636 (6th Cir. 1950).

35. 340 U.S. at 149.

36. *Id.* (quoting from the district court's opinion).

37. *Id.* at 152.

38. *Id.* The rationale for this scrutiny was that

> the function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men.

In essence then, the lack of precision of the invention standard and the increasingly strict tests resulted in an inconsistent body of law producing subjective reviews of patent applications by the courts.[39]

In the Patent Act of 1952,[40] Congress, cognizant of the widening disparity in judicial decisions on patents, added a third requirement of nonobviousness.[41] An invention is obvious and a patent may not be obtained

> if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art. Patentability shall not be negatived by the manner in which the invention was made.[42]

The standard of nonobviousness embodied in section 103 was intended to advance certainty and uniformity in adjudicating patent claims.[43] The standard has not yet achieved that goal. An initial source of disagreement developed among the circuits concerning whether section 103 altered the previous judicial standard of "invention."[44] Several circuits interpreted the section to mean that the criterion was intended only to codify the judicial standards in use at the time of its enactment.[45] These judicial standards were extremely strict and posed a difficult hurdle for the patent seeker to clear. Another interpretation was that the nonobviousness standard reinstated the more liberal test of *Hotchkiss*—that the level of patentability was merely something more than that which would easily have been discerned by a mechanic skilled in that field.[46]

To resolve this division among the circuits, the Supreme Court inter-

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Id. at 152-53.

39. This lack of consistency prompted one commentator to note:

> In the final analysis, all it amounted to was that if the court thought the invention, though new and useful, was not patentable, then it did not involve "invention" and vice versa. The requirement of "invention" was the plaything of the judges who as they became initiated into its mysteries, delighted to devise and expound their own ideas of what it meant; some very lovely prose resulting.

Rich, *supra* note 23, at 404.

40. 35 U.S.C. §§ 1-293 (1976).

41. *Id.* § 103.

42. *Id.*

43. The Revision Notes provide:

> There is no provision corresponding to the first sentence explicitly stated in the present statutes, but the refusal of patents by the Patent Office, and the holding of patents invalid by the courts, on the ground of lack of invention or lack of patentable novelty has been followed since at least as early as 1850. This paragraph is added with the view that an explicit statement in the statute may have some stabilizing effect, and also to serve as a basis for the addition at a later time of some criteria which may be worked out.
>
> The second sentence states that patentability as to this requirement is not to be negatived by the manner in which the invention was made, that is, it is immaterial whether it resulted from long toil and experimentation or from a flash of genius.

35 U.S.C. § 103 (1976) (Historical and Revision Notes).

44. *See* D. CHISOLM, *supra* note 18, § 5.02(4); Note, *The Standards of Patentability—Judicial Interpretation of Section 103 of the Patent Act*, 63 COLUM. L. REV. 306 (1963); Note, *The Impact of the Supreme Court Section 103 Cases on the Standard of Patentability in the Lower Federal Courts*, 35 GEO. WASH. L. REV. 818 (1967).

45. Hawley Prod. Co. v. U.S. Trunk Co., 259 F.2d 69 (1st Cir. 1958); Kwikset Locks, Inc. v. Hillgren, 210 F.2d 483 (9th Cir. 1954).

46. Judge Learned Hand opined that Congress intended section 103 to signal a return to the *Hotchkiss v. Greenwood* test of "obviousness to a skilled mechanic" and to repudiate the stricter

preted the nonobviousness standard of section 103 in the leading case of *Graham v. John Deere Co.*[47] Endorsing the preferred terminology of nonobviousness over the "invention" standard, the Court opined that nonobviousness was intended to embrace the judicial decisions which had followed the *Hotchkiss* test, which test required an innovation to exhibit a high level of skill and ingenuity as a prerequisite to the issuance of patent.[48] Advocating the *Hotchkiss* criterion the Court expressly abolished the "flash of creative genius" test used in *Cuno*.[49] The Supreme Court continued its analysis of section 103 by asserting that, although nonobviousness is a question of law, resolution of this requirement rests upon factual inquiries.[50] The Court posited that each of the three factual inquiries must be met under section 103. The scope and content of the prior art are to be determined, the differences between the prior art and the claims at issue are to be ascertained, and the level of ordinary skill in the pertinent art is to be resolved.[51] The Court concluded that "strict observance of the requirements laid down here will result in that uniformity and definiteness which Congress called for in the 1952 Act."[52]

The three-pronged test that the Court proposed did set out a systematic method of analysis for assessing an invention's patentability according to the nonobviousness standard. The Court stated, however, that section 103 "was not intended by Congress to change the general [high] level of patentable invention."[53] As indicated by the increasing degree of strictness in the judi-

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judicial standards that had developed. Lyon v. Bausch & Lomb Optical Co., 224 F.2d 530, 536 (2d Cir. 1955).

In Reiner v. I. Leon Co., 285 F.2d 501 (2d Cir. 1960), Judge Hand again stated that in considering the congressional intent of section 103

> there can be no doubt that the Act of 1952 meant to change the slow but steady drift of judicial decision that had been hostile to patents . . . . We cannot escape that conclusion . . . that Congress deliberately meant to restore the old definition, and to raise it from a judicial gloss to a statutory command.

Id. at 503.

47. 383 U.S. 1 (1966).

48. *Id.* at 17.

> *Hotchkiss* established that invention was a prerequisite to patentability, and further, espoused a test for determining whether invention existed. Therefore, *Hotchkiss* established two distinct things: an invention requirement and an invention test. Under section 103 there is no longer an invention requirement for patentability; rather, section 103 only establishes a nonobviousness test for patentability based on the *Hotchkiss* invention test. The only necessary finding under section 103 is that the patented object would not have been obvious to a man of ordinary skill in the art at the time it was discovered; a finding of invention, however, is not required.

Note, *Nonobviousness in Patent Law: A Question of Law or Fact?*, 18 WM. & MARY L. REV. 612, 621 (1977) [hereinafter cited as *Nonobviousness*].

49. 383 U.S. at 15. The Court asserted, in a footnote, that the phrase "flash of creative genius" has been misunderstood. "Although some writers and lower courts found in the language connotations as to the frame of mind of the inventors, none were so intended. The opinion approved *Hotchkiss* specifically, and the reference to 'flash of creative genius' was but a rhetorical embellishment of language going back to 1833." *Id.* at 15-16 n.7.

50. *Id.* at 17.

51. *Id.* See *Nonobviousness*, *supra* note 48.

52. 383 U.S. at 18.

53. *Id.* at 17. The Court also noted the relevance of "secondary considerations" in resolving the issue of obviousness. "Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or

cial evolution of patentability determinations, even among those courts asserting adherence to the *Hotchkiss* principles, the *Graham* Court did not elucidate the exact standard to be used. Rather than clarifying whether section 103 was intended to codify or overrule the severe judicial decisions prior to the 1952 Act, the Court's decision contributed to the confusion of the patentability standard. Furthermore, since *Graham* did not differentiate between new innovations and combinations or improvements of earlier innovations, many courts adhered to judicial pronouncements made prior to the advent of section 103. These decisions distinguished combination patents from new technology and have held combination patents to a higher level of patentability.[54]

II. A DIFFERENT STANDARD FOR COMBINATION PATENTS: THE SYNERGISM QUESTION

In *Anderson's-Black Rock Inc. v. Pavement Salvage Co.*,[55] the Supreme Court reviewed section 103 as it applied to a combination patent in which each of the component elements was known in the prior art. The patent consisted of a technique for using a radiant energy generator with an asphalt paving machine to seal joints between asphalt strips.[56] In this case, the Court adhered to the guidelines it had developed in *Graham*.[57] Using this analysis, the Court held the patent invalid because "the combination was reasonably obvious to one with ordinary skill in the art."[58] Although in the course of its discussion the Court noted that a combination "may result" in a synergistic effect, it went on to hold that the device in question "was not an invention by the obvious-nonobvious standard."[59]

In *Sakraida v. Ag Pro, Inc.*,[60] the Supreme Court, reversing the Fifth Circuit,[61] affirmed the finding of the district court that the patent was invalid for obviousness. The patent in question was for a new water flush system to remove animal wastes from dairy barn floors.[62] In this decision the Supreme Court reasoned that the patent lacked the quality of "invention" as defined by *Hotchkiss*, because the patent was obvious to one skilled in the art.[63] In

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nonobviousness, these inquiries may have relevance." *Id.* at 17-18 (citing Note, *Subtests of "Nonobviousness": A Nontechnical Approach to Patent Validity*, 112 U. PA. L. REV. 1169 (1964)).

54. See text accompanying notes 95-172 *infra*.

55. 396 U.S. 57 (1969).

56. *Id.* at 59.

57. *Id.* at 61-62.

58. *Id.* at 60.

59. *Id.* at 61.

> We conclude that while the combination of old elements performed a useful function, it added nothing to the nature or quality of the radiant-heat burner already patented. We conclude further that to those skilled in the art the use of the old elements in combination was not an invention by the obvious-nonobvious standard. Use of the radiant-heat burner in this important field marked a successful venture. But as noted, more than that is needed for invention.

Id. at 62-63. *See* Note, *After* Black Rock*: New Tests of Patentability—The Old Tests of Invention*, 39 GEO. WASH. L. REV. 123 (1970).

60. 425 U.S. 273 (1976).

61. 512 F.2d 141 (5th Cir. 1975), *rev'd*, 425 U.S. 273 (1976).

62. 425 U.S. at 274.

63. *Id.* at 279.

an incongruous juxtaposition, the Court first noted that the standard of obviousness had been interpreted in *Graham*, but it then proceeded to cite with approval the *Great Atlantic & Pacific Tea Co.* case for the proposition that combination patents are to be carefully scrutinized.[64] The standard apparently used to defeat the patent's validity was based on the *Graham* guidelines. The Court concluded that the scope of the prior art included all elements of the patent and that the combination of these elements was "the work of the skillful mechanic, not that of the inventor."[65] The Court again digressed from the *Graham* test, stating that because the patent did not result in a new or different function, it failed the test for patentability of combination patents.[66]

The controversy among the circuits has centered around the requirement that a synergistic result be achieved for combination patents to comply with the nonobviousness prerequisite to patentability under section 103. The basis for this division is that the synergism requirement would mandate that combination patents follow a different standard than the criteria established in *Graham*. Adherence to the synergism requirement by a reviewing tribunal would subject the combination patent to a stricter scrutiny than new inventions. The point of disagreement among the circuits is that this distinction between combination patents and new inventions was not specifically addressed in *Graham*. The essential argument of the courts of appeals rejecting the synergism requirement is that *Graham* was the Supreme Court's definitive interpretation of the statutory nonobviousness section and as such addressed the patentability of all innovations. The circuits that have followed the requirement of a synergistic effect have gleaned their rationale from the holdings of *Black Rock* and *Sakraida*.

The question thus remaining in view of the language and holdings of *Black Rock* and *Sakraida* is whether the Supreme Court advocated that a combination patent must be synergistic to be nonobvious under section 103.[67] The answer is found in the language of both cases. In *Black Rock*, the Court stated that "a combination of elements may result in an effect greater than the sum of the several effects taken separately. No such synergistic result is argued here."[68] Initially, in the *Black Rock* opinion, the Court indicated that the combination was "a matter of great convenience"[69] but that it

64. *Id.* at 281.

65. *Id.* at 282 (quoting Hotchkiss v. Greenwood, 52 U.S. (11 How.) at 261).

66. *Id.* The Court noted that the "patent simply arranges old elements with each performing the same function it had been known to perform, although with perhaps producing a more striking result than in previous combinations. Such combinations are not patentable under standards appropriate for a combination patent." *Id.* Perhaps the question is, if this patent was obvious why was it not available sooner, in view of the long felt need and the commercial success of the innovation?

67. *See* Note, Sakraida v. Ag Pro, Inc.: *Combination Patents Now Require Synergistic Effects*, 15 HOUS. L. REV. 157 (1977) (criticizing the synergistic effect test); Note, *Patentability of Mechanical Combinations: A Definition of Synergism*, 57 TEX. L. REV. 1043 (1979) (reconciling synergism with the *Graham* standards); Note, *Endorsing the Application of Non-Technical Factual Considerations for Obviousness Determinations in Combination Patent Cases*, 10 TOL. L. REV. 1011 (1979) (favoring a clear choice by Congress of either adopting or abandoning the synergism test).

68. 396 U.S. at 61.

69. *Id.* at 60.

did not contain a "new or different function."[70] Most importantly for determining the synergistic effect question, the Court cited the *Graham* analysis of the statutory interpretation of section 103 as binding on the issue of nonobviousness.[71] There is little doubt that if the Court had been proposing an additional patent test it would have analyzed and differentiated between the synergism test and the *Graham* standards.[72] In fact, it appears that the Court was not cognizant of the inconsistency of the language it used in *Black Rock* or of the potential for digression to a pre-*Graham* standard.

Similarly, in *Sakraida*, the Court did not hold that synergism is required for patentability.[73] The focus of the Court's attention on synergism was directed to the Fifth Circuit Court of Appeals' opinion. The Fifth Circuit had held that the patent at issue did "achieve a synergistic result. . . ."[74] Dismissing this contention, the Supreme Court concluded that "[w]e cannot agree that the combination of these old elements . . . can properly be characterized as synergistic, that is, 'result[ing] in an effect greater than the sum of the several effects taken separately.' "[75] Again, however, the Court used the phrase "new and different function" with a clear implication that combination patents are subject to a different test from that prescribed in the *Great Atlantic & Pacific Tea Co.* case. This suggestion of a "new and different function test" is the crux of the division among the circuits.

As previously noted, the *Great Atlantic & Pacific Tea Co.* case was the culmination of an increasingly strict judicial standard of patentability.[76] Decided two years before the incorporation of section 103 into the 1952 Patent Act, the *Great Atlantic & Pacific Tea Co.* decision held that a combination patent must "in some way [exceed] the sum of its parts"[77] or, in other words, the combination must produce or achieve a synergistic result. If the courts of appeals and the Supreme Court scrutinized combination patents according to the holding in the *Great Atlantic & Pacific Tea Co.* case, then to be still an acceptable guideline, this decision should turn on objective tests similar to those prescribed in *Graham*. Although the Court in *Graham* did not address the *Great Atlantic & Pacific Tea Co.* issue of combination patents, there was not, either in *Graham* or in section 103, language indicating that combination patents are subject to a different or more stringent review than other patentable innovations.

Further, although the *Great Atlantic & Pacific Tea Co.* Court noted the improbability of ascertaining invention in a combination of known ele-

70. *Id.* (quoting Lincoln Eng'r Corp. v. Stewart-Warner Corp., 303 U.S. 545, 549 (1938)).

71. *Id.* at 61-62. *See* D. CHISOLM, *supra* note 18, § 5.02(5); Edwards, *That Clumsy Word Nonobvious!*, 60 J. PAT. OFF. SOC'Y 3 (1978); Rich, *Escaping the Tyranny of Words—Is Evolution in Legal Thinking Impossible?*, 60 J. PAT. OFF. SOC'Y 271, 295 (1978); Schneider, *Non-Obviousness, The Supreme Court, and the Prospects for Stability*, 60 J. PAT. OFF. SOC'Y 304 (1978).

72. The Patent Office is in agreement with this conclusion. See 949 OFFICIAL GAZETTE OF THE U.S. PAT. OFF. No. 1, TM3 (1976).

73. For diametrically opposed views on this argument *compare* Mintz, *The Standard of Patentability in the United States—Another Point of View*, 1977 DET. C. L. REV. 755 *with* Sears, *Combination Patents and 35 U.S.C. § 103*, 1977 DET. C. L. REV. 83.

74. 474 F.2d at 173.

75. 425 U.S. at 282 (quoting *Black Rock*, 396 U.S. at 61).

76. See text accompanying notes 32-39 *supra*.

77. 340 U.S. 147, 152 (1950).

ments,[78] it did not apply the objective standards of *Graham*. The Court did not consider the scope and content of the prior art, the differences between the prior art and the patent, and the level of skill in that art.[79] Contrary to the Court's contention, several cases and commentators have noted that "[f]ar from being an improbable place to find patentability, the new and unobvious 'combination' is the usual place for finding it."[80]

A case on the question of patentability of a combination of known elements is *United States v. Adams*,[81] decided with the *Graham* decision. In *Adams*, the Supreme Court determined that the patent, a combination of old elements which produced a better battery, was not obvious under the prior art.[82] The Court, considering the nonobviousness criteria stated that

> to combine [the elements] as did *Adams* required that a person reasonably skilled in the prior art must ignore [certain teachings of the art]. . . . This is not to say that one who merely finds new uses for old inventions by shutting his eyes to their prior disadvantages thereby discovers a patentable innovation. We do say, however, that known disadvantages in old devices which would naturally discourage the search for new inventions may be taken into account in determining obviousness.[83]

No mention was made in *Adams* that the components of the battery must have produced a synergistic effect. Additionally, the Court concluded that "[i]t begs the question . . . to state merely that [the patent's elements] were individually known battery components. If such a combination is novel, the issue is whether bringing them together as taught by [the inventor] was obvious in the light of the prior art."[84] The judicial precedent after the enactment of section 103 in 1952 does not support the courts that continue to follow the Court's *Great Atlantic & Pacific Tea Co.* holding. If the Court meant to pronounce in *Sakraida* a higher standard for patentability—that of synergism for combination patents—the Court should have specifically enunciated such a standard.

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78. *Id.* at 152.

79. 383 U.S. at 17.

80. Rich, *supra* note 70, at 296.

If the holding of the *Great Atlantic & Pacific Tea Co.* case is carried to its furthest extreme, then only those innovations that represent decidedly new technology would be considered worthy of patent protection. This position is clearly contrary to the statutory policy of conferring patents. *See, e.g.*, Shaw v. E.B. & A.C. Whiting Co., 417 F.2d 1097 (2d Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970); Reiner v. I. Leon Co., 285 F.2d 501 (2d Cir. 1960), *cert. denied*, 366 U.S. 929 (1961). "It is idle to say that combinations of old elements cannot be inventions; substantially every invention is from such a 'combination': that is to say, it consists of former elements in a new assemblage." 285 F.2d at 503.

81. 383 U.S. 39 (1966).

82. Justice White dissented, but he did not file an opinion, 383 U.S. at 52. In his patent, Adams claimed creation of a nonrechargeable wet electric battery.

83. *Id.* at 51-52.

84. *Id.* at 50. The elements of Adams' patented battery were electrodes composed of magnesium and cuprous chloride. When these electrodes were combined, the resulting battery was only the sum of its parts. The battery did not, under any definition of synergism, produce a synergistic effect. There was no discussion in the *Adams* decision that something other than a better battery, in terms of voltage, capacity, and ability to be water-activated, was patented. Thus, the focus of the *Adams* court was placed on the unobviousness of creating (or combining the components of) the combination, not on the examination of the quality of the results achieved.

It could be argued that the Supreme Court did intend to hold combination patents to a different and stricter standard. In the same year that *Sakraida* was decided, the author of the *Sakraida* decision, Justice Brennan, joined Justice White in dissenting from the denial of certiorari in a case involving a district court's ruling of nonobviousness in a combination patent.[85] Citing the *Great Atlantic & Pacific Tea Co.* decision, the dissenting Justices asserted that

> [w]here the patent claim is for a combination of existing elements, "[c]ourts should scrutinize [such] claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements." When a device consists of a mere aggregation of segments of the prior art, there is an increased danger that a patent will withdraw into its monopoly what is already known and add nothing to the sum of useful knowledge. Thus, to be patentable, a combination of elements must produce something more than the sum of the pre-existing elements; *there must be a synergistic result that is itself nonobvious*.[86]

Since the district court had not made any findings that the combination produced a synergistic result,[87] and because each component of the combination had previously been used to perform the same function it performed in the patented device, the dissenting Justices contended that the district court had "departed from the clear teachings of the Court's prior cases."[88] The dissenters' conclusion certainly was at odds with the Second Circuit's approval of the district court's analysis.[89] The Second Circuit asserted that the district court's "lucid and complete opinion . . . properly determined all of the issues" and that the "record amply supports the finding that the . . . patent constituted a major breakthrough in the art . . . and was not anticipated by prior patents."[90]

Apparently, the other members of the Supreme Court did not agree with the dissenting Justices' position on the patentability of combinations, for only Justices White and Brennan dissented from the denial of certiorari.[91] This lack of concurrence with the dissenting Justices' position was exemplified in *Dann v. Johnston*.[92] In *Dann*, decided three weeks before *Sakraida*, the briefs of the petitioner[93] and one of the *amici*[94] argued that synergism was an essential prerequisite for patentability. Since the patent at issue was not synergistic, they argued that it was therefore invalid. Justice Marshall, writing the Court's opinion, evaluated the patent claims using only the *Graham* analysis, and completely ignored the synergism issue.

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85. Roanwell Corp. v. Plantronics, Inc., 429 U.S. 1004 (1976).
86. *Id.* at 1006 (emphasis added) (citations omitted).
87. Plantronics, Inc. v. Roanwell Corp., 403 F. Supp. 138 (S.D.N.Y. 1975).
88. 429 U.S. at 1008.
89. 535 F.2d 1397 (2d Cir. 1976) (per curiam).
90. *Id.* at 1398.
91. The dissenting Justices indicated that the crowded court docket was the reason the case was not granted certiorari. 439 U.S. at 1009.
92. 425 U.S. 219 (1976).
93. *See* Brief for Petitioner at 29, Dann v. Johnston, 425 U.S. 219 (1976).
94. *See* Brief for Amicus Curiae, Computer and Bus. Equip. Mfrs. Assoc., at 9, Dann v. Johnston, 425 U.S. 219 (1976).

The undesirable confusion engendered by the Supreme Court's decisions on the question of synergism is amplified by the conflicting standards of the federal courts of appeals. A review of the appellate decisions of each circuit[95] is necessary to allow the practitioner to appreciate the judicial schism which has developed.[96]

III. JUDICIAL CONTRADICTION: DIVISION AMONG THE FEDERAL COURTS OF APPEALS

A. *Advocates of the* Graham *Standards—Rejecting the Synergism Test*

1. The Sixth Circuit

The latest patent decision of the Sixth Circuit, *Smith v. Acme*,[97] reviewed the synergism question. Acknowledging that the purpose of the synergism test is to grant patent protection to a combination which contributes new knowledge to a particular technology, the appellate court concluded, however, that synergism is not a separate test for determining patentability.[98] In a curious analysis of the *Black Rock* and *Sakraida* decisions, the court opined that "the Supreme Court has recognized synergism to a limited extent as a term symbolizing the more stringent standard for combination patent claims."[99] Explaining this statement, the appellate court held that a combination patent must contribute to mankind's store of knowledge. Further, the court asserted that if the synergism test were applied to reduce the emphasis on the *Graham* standards, synergism would be rejected as an inappropriate measure of patentability.[100] The apparent inconsistency in the Sixth Circuit's statement that combination patents are subject to a "more stringent standard" while professing to adhere to the *Graham* standards is difficult to reconcile. The court simply may have meant that combination patents require stricter judicial inquiry to distinguish prior art from new innovations. Moreover, to speak in terms of a symbolic reminder of the standard of nonobviousness for combination patents is of questionable judicial value in adjudicating patent claims. Despite this confusing language, the Sixth Cir-

95. The Fourth Circuit is noticeably absent from the circuit reviews. At the appellate level, the Fourth Circuit has not addressed the synergism question since the Supreme Court's *Sakraida* decision. This review is limited to appellate decisions or significant district court cases handed down after *Sakraida*. Although the Fourth Circuit's position on synergism is inconclusive, several Fourth Circuit district court cases adhere to the synergism requirement for patentability of combination patents. *See* Duplan Corp. v. Deering Milliken, Inc., 444 F. Supp. 648, 750-51 (D.S.C. 1977); Joy Mfg. Co. v. Ingersoll-Rand Co., 441 F. Supp. 1331 (S.D.W.Va. 1977); Ward Mach. Co. v. Staley Mach. Corp., 409 F. Supp. 273 (D. Md. 1976).

96. Because of the availability of forum shopping, the division among the appellate courts is of particular importance to patent attorneys. Depending upon the patent litigation being contemplated, the attorney should assess the previous holdings of each circuit and file suit in the circuit where the holdings are most favorable to the client's position.

97. 614 F.2d 1086 (6th Cir. 1980). The earlier decisions by the Sixth Circuit had passively followed the language in *Sakraida*. American Seating Co. v. National Seating Co., 598 F.2d 611, 620-21 (6th Cir. 1978); Reynolds Metals Co. v. Acorn Bldg. Components, Inc., 548 F.2d 155, 161 (6th Cir. 1977). *See generally* Nickola v. Peterson, 580 F.2d 898 (6th Cir. 1978).

98. 614 F.2d at 1094.

99. *Id.* at 1095.

100. *Id.*

cuit does consider *Graham* as the accepted standard of patentability, applicable to both new innovations and combinations.

2. The Seventh Circuit

In the leading case of *Republic Industries, Inc. v. Schlage Lock Co.*,[101] the Seventh Circuit held that section 103 and the *Graham* standards comprise the only criteria for determining nonobviousness. The court reached this conclusion after carefully scrutinizing the synergism requirement and rejecting any vestiges of the use of synergism in evaluating patent claims.[102]

In *Republic*, the Seventh Circuit was asked to determine whether a fire door, which combined elements of prior art, was patentable.[103] Even though the innovation was the first to unite the known elements, the court, using the *Graham* guidelines, found that the combination patent was invalid. Its rationale was that at the time the combination was made, it would have been obvious to a person having ordinary skill in the art.[104]

Republic was the first case from the courts of appeals that perceptively analyzed the requirement of synergism. As such, it is a landmark decision.[105] In considering the synergism question, the Seventh Circuit focused on two essential inquiries: 1) whether the Supreme Court in *Black Rock* and *Sakraida* advocated a synergism test for combination patents,[106] and 2) if so, whether the synergism test comported with the statutory standards prescribed in section 103 as interpreted in *Graham*.[107] Addressing the first inquiry, the appellate court reasoned that because the patent validity issues presented in both *Black Rock* and *Sakraida* were analyzed under the *Graham*

101. 592 F.2d 963 (7th Cir. 1979).

102. A decision by the Seventh Circuit two years before *Republic* had reversed a lower court ruling of patent validity on the ground that the patent did not produce a synergistic effect. The appellate decision held that "[u]nless the combination is 'synergistic, that is, result[ing] in an effect greater than the sum of the several effects taken separately,' it cannot be patented." St. Regis Paper Co. v. Bemis Co., 403 F. Supp. 776 (S.D. Ill. 1975), *rev'd*, 549 F.2d 833, 838 (7th Cir. 1977) (citations omitted). The same district judge, Judge Morgan, who had been reversed in *St. Regis*, can be credited with a thoughtful analysis of the synergism requirement and of the Supreme Court's decisions in *Black Rock* and *Sakraida*, which persuaded the appellate court to review its holding in *St. Regis*. The district court found that the synergism effect test precluded the measurement of the results achieved by the combination and instead, required that the sum total of the effect be greater than the sum of the effects of each element taken separately. Additionally, the district court noted:

> As is the case with the *Black Rock* reference, it is far from clear that *Sakraida* approved the principle that "synergistic effect" is the guiding criteria of nonobviousness. The Court did not so state. It simply refuted the existence of synergistic effect in the particular combination with which it was there concerned.

Republic Indus., Inc. v. Schlage Lock Co., 433 F. Supp. 666, 671 (S.D. Ill. 1977), *aff'd*, 592 F.2d 963 (7th Cir. 1979).

103. The patent at issue was a fire door which combined two known elements: 1) a multiple-point hold-open, *i.e.*, the door could be held open at any point between closed and fully open positions; and 2) a momentary manual release, *i.e.*, the door could self close if slightly pushed or pulled. 592 F.2d at 966-67.

104. *Id.* at 975-76.

105. The Sixth and Tenth Circuits have followed the Seventh Circuit's reasoning in *Republic* and rebuked earlier holdings which had embraced the synergism test. The Second, Third, and Ninth Circuits have empathized with the *Republic* decision, but have decided cautiously to await further holdings from the Supreme Court before rejecting the synergism test.

106. 592 F.2d at 967.

107. *Id.* at 969.

tripartite standards, neither decision departed from the established patentability standards, and, consequently, could not be cited as support for the synergism test.[108] As to the second inquiry, the Seventh Circuit determined that the synergism test would require a reviewing court to inspect the combination's operation after the elements were brought together, not at the time the invention was made.[109] The Seventh Circuit asserted that evaluating the performance of the combination without considering the obviousness of the combination is not in accordance with the *Graham* directive to follow section 103.[110] Thus, the cogent conclusion of the Seventh Circuit was that synergism is not an acceptable test of patentability. The Seventh Circuit added, as a final note, that until the Supreme Court or Congress specifically mandates otherwise, it would continue to apply section 103 and *Graham*.[111]

3. The Tenth Circuit

As noted previously,[112] the initial determinations of the Tenth Circuit on the synergism questions in *Deere & Co. v. Hesston Corp.*[113] and *True Temper Corp. v. CF&I Steel Corp.*[114] stated without explanatory comment that synergism is a precondition to patentability. Contending that these statements in the *Hesston* and *True Temper* cases were broad dicta, the latest Tenth Circuit decision, *Plastic Container Corp. v. Continental Plastics of Oklahoma, Inc.*[115] repu-

108. *Id.* at 968-69.

109. *Id.* at 971.

110. *Id.* at 971-72.

111. *Id.* at 971. For a recent article on this case see Note, *Patent Law—Requirements for Patentability—To Determine Whether a Device that Combines Well-Known Elements, None of Which Performs Any New or Different Function in the Combination, Is Obvious to a Man of Ordinary Skill, A Court Should Apply the* Graham *Test and not a Synergy Test*—Republic Indus., Inc. v. Schlage Lock Co., 592 F.2d 963 (7th Cir. 1979), 48 GEO. WASH. L. REV. 110 (1979).

112. *See* notes 6-11 *supra* and accompanying text.

113. 593 F.2d 956 (10th Cir. 1979).

114. 601 F.2d 495 (10th Cir. 1979). *True Temper* was discussed in *Patents, Trademarks, Copyrights, and Unfair Competition, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 305, 310 (1980). The survey noted that the court in *True Temper* held that "for a combination of known elements to be patentable, the result must be synergistic. Since the plaintiff's process took essentially the same steps in producing rail anchors as did prior art, mere automation of the process was held to be obvious, *i.e.*, conceivable to a worker of ordinary skill in that industry." *Id.* at 311-12. Although the *True Temper* findings of obviousness of the patent at issue rested essentially on *Graham* standards, synergism does not imply that the patented process is conceivable to a person skilled in the art.

115. 607 F.2d 885 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 672 (1980). The other issues addressed by the court in *Plastic* were collateral estoppel, *see* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); intervening rights after patent reissue, *see generally* Dunner & Lipsey, *The New Reissue Practice*, 61 J. PAT. OFF. SOC'Y 68 (1979); Federico, *Intervening Rights in Patent Reissues*, 30 GEO. WASH. L. REV. 603 (1962); Note, *Equitable Defenses to a Broadened Reissue Patent*, 1964 WASH. U.L.Q. 229; fraud on the Patent Office, *see* Cullen & Vickers, *Fraud in the Procurement of a Patent*, 29 GEO. WASH. L. REV. 110 (1961); and attorneys fees, *see generally* Stroup, *Patentee's Monetary Recovery From an Infringer*, 59 J. PAT. OFF. SOC'Y 362 (1977); Note, *Damages and Account of Profits in Trademark, Trade Secrets, Copyright and Patent Law*, 3 AUCKLAND U.L. REV. 188 (1977).

The only other patent case decided by the Tenth Circuit in this survey period was Milgo Electronic Corp. v. United Business Communications, Inc., 623 F.2d 645 (10th Cir. 1980). This per curiam decision before Judges Barrett, Doyle, and Logan involved a direct infringement suit concerning a patent which represented a significant new technology and the state of the art in that field. In a well-reasoned opinion, in which the court addressed the issues of patent validity, agency relationship, damages, and attorneys fees, the patent was held to be patentable and

diated the synergism test. In remanding the question of the nonobviousness of the patent at issue to the district court level, the Tenth Circuit court mandated that the analysis of nonobviousness be in accordance with the *Graham* standards. Specifically, the appellate court held that the *Graham* guidelines "do not require that, for a combination of known elements to be nonobvious, the result achieved by the combination must be synergistic."[116] In the *Plastic* decision, written by Judge Miller,[117] the court relied upon the Seventh Circuit's reasoning in *Republic* for support of the Tenth Circuit's rejection of the synergism test. Citing the crux of the Seventh Circuit's repudiation of the synergism requirement, the Tenth Circuit noted that synergism had not been mentioned either in section 103 or in *Graham*. The appellate court further noted the defects in the synergism test, which initially assumes that the combination of the known elements was obvious. The court found that the test looks to the performance of the combination after the invention is complete, not at the time the elements are combined. Because these defects are inherent in the application of the synergism test, and because the test does not comport with the statutory prerequisites of patentability, the Tenth Circuit court rejected the synergism requirement.[118]

B. *Adherents to the Synergism Test*

1. The First Circuit

The First Circuit, without specifically analyzing *Black Rock* or *Sakraida*, has adopted the language of these cases, which cite to the strict *Great Atlantic & Pacific Tea Co.* test of validity for combination patents. Deciding in favor of the validity of combination patents in its two most recent patent decisions, the First Circuit reached both results after finding that each combination achieved a synergistic effect. The rulings on the nonobviousness question hinged on the synergistic result; therefore, it is unclear whether this circuit recognized the synergism test as a separate test for nonobviousness or whether it used the test to supplement the *Graham* standards.

In *ITT v. Raychem Corp.*,[119] the First Circuit affirmed a lower court ruling which had held that the patent was valid and had been infringed. The patent involved a wire insulation composed of polyolefin and polyvinylidene

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infringed. Because the infringement was willful and flagrant, the court awarded treble damages in excess of two million dollars. The section of the case devoted to damages is especially instructive on the evaluation of damages in an infringement suit. On direct patent infringement, *see generally* Harmon, *Direct Infringement of Patents*, 58 J. PAT. OFF. SOC'Y 739 (1976); Rowland, *The Interplay of the Doctrines of Equivalents and File Wrapper Estoppel*, 29 GEO. WASH. L. REV. 917 (1961); Whale, *The ABCD's of Patent Infringement*, 62 J. PAT. OFF. SOC'Y 136 (1980).

116. 607 F.2d at 904.

117. Judge Miller sat by designation from the Court of Customs and Patent Appeals. For a discussion of the viewpoint of the patent judges, see notes 162-67 *infra* and accompanying text.

118. 607 F.2d at 905 n.48.

119. 538 F.2d 453 (1st Cir.), *cert. denied*, 429 U.S. 886 (1976). One commentator has argued that *Raychem* "skinned the synergism cat: in applying the synergism requirement as an interaction between the components of the patent, not as a unique and unexpected result. This type of application then was similar to the Supreme Court's analysis of nonobviousness in *Adams*." Geriak, *Synergism—The Artificial Barrier to Patentability*, in NONOBVIOUSNESS—THE ULTIMATE CONDITION OF PATENTABILITY 7:301 to :309 (Witherspoon ed. 1978). The First Circuit, nevertheless, has continued to analyze patent claims using the synergism requirement.

fluoride.[120] Although the constituents of the wire were well known, the district court found that uniting these materials in the wire produced some unexpected and surprising results.[121] ITT, the plaintiff-appellant, asserted that the patent was obvious because the new insulation was merely a combination of known materials assembled in a known pattern and exhibiting predictable characteristics.[122] On review, citing both the *Graham* analysis and the *Sakraida* language requiring a new and different result in combination patents, the First Circuit held that the patent was valid. The appellate court stated that the standard espoused for combination patents is "whether the new combination 'result(s) in an effect greater than the sum of several effects taken separately.' "[123] Based upon the trial court's factual findings—that the temperature rating of the combined insulation was "unpredictably high," as compared with the individual components, and that the insulation was unexpectedly flame resistant[124]—the court affirmed the finding that the requirement of a synergistic effect was met.[125]

The First Circuit applied the strict patentability test in *Rosen v. Lawson-Hemphill*,[126] where it affirmed that the patent satisfied the nonobviousness standard. The appellate court stated that although the combination of the elements was old, "the combination is patentable if it is based upon an inventive improvement in one of the elements that permits the combination device to produce a beneficial result never previously obtained."[127] The court concluded, in other words, that the combination patent must produce a synergistic result.

2. The Third Circuit

Although the Third Circuit's initial position was that *Sakraida* emphasized the *Graham* test of nonobviousness,[128] the appellate court subsequently decided, in *Sims v. Mack Truck Corp.*[129] that combination patents should be held to a higher standard of patentability. In *Sims*, the plaintiff alleged that the patent, which was a change in the discharge location of a concrete mixer truck from the rear of the vehicle to the front,[130] had been infringed. The district court found that the patent was valid and that it had been in-

120. 538 F.2d at 454.
121. *Id.* at 456.
122. *Id.* at 457.
123. *Id.* (citing *Black Rock*, 396 U.S. at 61, quoted in *Sakraida*, 425 U.S. at 270).
124. *Id.*
125. *Id.*
126. 549 F.2d 205 (1st Cir. 1976).
127. *Id.* at 209.
128. *See* Systematic Tool & Mach. Co. v. Walter Kidde & Co., 555 F.2d 342 (3d Cir.), *cert. denied*, 434 U.S. 857 (1977). The Third Circuit noted the recent decision of *Sakraida* by the Supreme Court, but in analyzing the obviousness of the patent, the circuit court cited that part of *Sakraida* which endorsed the *Hotchkiss* test of the degree of skill and ingenuity exhibited by the patented innovation. *Id.* at 347-48. *See generally* American Sterilizer Co. v. Sybron Corp., 614 F.2d 890 (3d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3039 (U.S. June 6, 1980) (No. 79-1916) (hinging exclusively on the determination of nonobviousness under the *Graham* standards); Aluminum Co. of Am. v. Amerola Prod. Corp., 552 F.2d 1020, 1027 (3d Cir. 1977).
129. 608 F.2d 87 (3d Cir. 1979), *cert. denied*, 100 S. Ct. 1319 (1980).
130. 608 F.2d at 88.

fringed.[131] The Third Circuit reversed.[132]

After sketching the history of the nonobviousness standard,[133] the court held that both *Black Rock* and *Sakraida* stood for the proposition that the Supreme Court required a higher standard of patentability for combination patents.[134] The Third Circuit asserted that "in determining obviousness in a combination patent [the courts] must undertake the tripartite *Graham* inquiry without losing sight of the necessity to determine whether the device performs its function in an innovative fashion."[135] The appellate court concluded that although the third *Graham* inquiry of obviousness, which requires an analysis and a comparison of the level of ordinary skill in the pertinent art with the patented innovation, was the usual measure of patent validity, a combination patent must, in its total function, produce a more striking improvement upon the prior art.

In holding that the patent at issue failed to meet the *Graham* standard for nonobviousness, the court declined to rule on the question of whether synergism is a prerequisite to a finding of patent validity.[136] Aware of the division of the circuits on the synergism issue,[137] the Third Circuit nevertheless posited that the Supreme Court's precedents on combination patents required these patents to meet a stringent test of patentability.[138]

3. The Fifth Circuit

The Fifth Circuit is the federal court of appeals from which came the *Sakraida* case.[139] In its opinion in *Sakraida*, the Fifth Circuit's rationale for upholding the validity of the patent was that the elements of the combination patent were so joined as to produce a synergistic effect.[140] Accordingly, it is not surprising that the Fifth Circuit has endorsed the synergism test.

In *John Zink Co. v. National Airoil Burner Corp.*,[141] the Fifth Circuit found that the language of *Great Atlantic & Pacific Tea Co.*, *Black Rock*, and *Sakraida* required a combination patent to achieve a synergistic result as a prerequisite to patentability.[142] The analysis of the patent claims, however, turned on the *Graham* standards.

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131. *Id.* at 89.

132. *Id.* at 88.

133. *Id.* at 89-92.

134. *Id.* at 90. The Third Circuit in *Simms* found support for requiring combination patents to meet a higher level of patentability in a policy argument. The court reasoned that to grant combinations a monopoly would restrict the public's access and use of technology which is already known and available.

135. *Id.* at 91.

136. *Id.* at 93.

137. *Id.* Although the court had earlier noted the dissenting Justices' viewpoint in Roanwell Corp. v. Plantronics, Inc., 429 U.S. 1004 (1976), the circuit court did not endorse either the acceptance or the rejection of the synergism test. 608 F.2d at 90-91.

138. 608 F.2d at 93.

139. 474 F.2d 167 (5th Cir. 1973).

140. *Id.* at 173.

141. 613 F.2d 547 (5th Cir. 1980). The patent in this case was for flare burners designed for efficient smokeless burning of waste gases in gas refinery smoke stacks. The patent was considered by the expert testimony in the case as a breakthrough in the art. The patent was extremely successful, with sales of approximately twenty million dollars. *Id.* at 555.

142. *Id.*

In *Huron Machine Products v. A. & E. Warbern, Inc.*,[143] the court of appeals affirmed the district court's decision that the patent for a special grip plastic clothes hanger was valid and had been infringed. In considering the defendant's assertion that the patent was invalid for failing the nonobviousness test, the Fifth Circuit noted with approval the requirement that a combination patent must achieve a synergistic result.[144] Dismissing the defendant's contention of obviousness, however, the court found that the patented hanger was substantially different from the prior art.[145] The court concluded that the patent represented "the exercise of inventive skill"[146] and thus satisfied the requirements for patentability.

Although the court did not analyze the synergism test in either case, nor did it base its decisions on a finding that a synergism had resulted, its adherence to this test will be of probative value in subsequent patent validity cases in the Fifth Circuit.[147]

4. The Eighth Circuit

The Eighth Circuit has declared that synergism is a required test for determining the patentability of combinations. In actual practice, however, the court has not used this requirement to evaluate the validity of any patent.[148]

The Eighth Circuit, in *Reinke Manufacturing Co. v. Sidney Manufacturing Corp.*,[149] applied the *Graham* standards to determine that the patent at issue was obvious and therefore invalid.[150] The court concluded that although the improvements of the patent were desirable features, any "hypothetical" person skilled in the field could have accomplished the same patented improvements by studying the prior art.[151] The court underscored its adherence to the principles of the synergism test by declaring that in examining the patent claims, "we will not only consider whether it was *obvious* that by putting together the various elements used the result would be the effect achieved in the [patent]; we will also consider whether the effect is a new effect, or simply each of the items performing its expected function."[152]

143. 615 F.2d 222 (5th Cir. 1980).

144. *Id.* at 224. The court expounded that as a precondition to patent validity for a combination patent, "there must be an unexpected, unusual or synergistic result." *Id.*

145. *Id.* at 225. The patent owners had successfully maintained five previous infringement suits.

146. *Id.*

147. Robbins Co. v. Dresser Indus., Inc., 554 F.2d 1289, 1295 (5th Cir. 1977); Whitaker v. Barwick Indus., 551 F.2d 622 (5th Cir. 1977).

148. *See* Reinke Mfg. Co., Inc. v. Sidney Mfg. Corp., 594 F.2d 644 (8th Cir. 1979); Clark Equip. Co. v. Keller, 570 F.2d 778, 788 (8th Cir.), *cert. denied*, 439 U.S. 825 (1978). The *Clark* court stated that "in the patent law context, 'synergism' has no talismanic power; synergism is merely one indication of nonobviousness." *Id.* at 789.

149. 594 F.2d 644 (8th Cir. 1979).

150. *Id.* at 645.

151. *Id.* at 652.

152. *Id.* at 648 (emphasis in original).

5. The District of Columbia Circuit

In *Robintech, Inc. v. Chemidus Wavin Ltd.*,[153] the District of Columbia Circuit Court of Appeals affirmed a lower court's finding that a patent was invalid for obviousness.[154] The synergism discussion was limited to a reply to the patent owner who argued that the district judge erred in relying on the absence of synergism to determine patentability.[155] The appellate court rejected his assertion, countering that the Supreme Court's decision in *Sakraida* adopted this test for combination patents.[156] The court's decision on patent invalidity, however, rested on the *Graham* standards. The court of appeals stated that the determination of the invention's unpatentability was conclusive without the use of the synergism test.[157]

C. *Questioning The Applicability Of Synergism: Uncertain Conclusions*

1. The Second Circuit

Without specifically rejecting the synergism test, the Second Circuit, in strong language, repudiated any notion that the Supreme Court in *Sakraida* had departed from the *Graham* interpretation of section 103. The court of appeals declared that

> we do not agree with what amounts to an oblique suggestion that the dicta in the Supreme Court's opinion overruled the statutory test of nonobviousness established by [section 103] along with the analytical guidelines for that test established by the Court in *Graham v. John Deere Co.* . . . which the opinion in *Sakraida* cites with approval.[158]

The Second Circuit, in *Champion Spark Plug Co. v. Gyromat Corp.*,[159] reversed a lower court ruling and held that a patent was invalid for obviousness. The defendants argued on appeal that the patent was invalid because it only combined old elements and that predictable combinations were not patentable.[160] The appellate court, however, in reiterating the established test of nonobviousness, stated that an invention is patentable if the differences between the subject matter sought to be patented and the prior art is such that the new device would not have been obvious to a person skilled in the pertinent art.[161]

153. [1980] 205 U.S.P.Q. (BNA) 873.

154. The patent at issue consisted of a device for forming internal grooves in plastic piping. *Id.* at 875.

155. *Id.* at 873.

156. *Id.* at 874.

157. *Id.*

158. Champion Spark Plug Co. v. Gyromat Corp., 603 F.2d 361, 372 (2d Cir. 1979). The Second Circuit, prior to *Champion*, had not stated whether the circuit approved or disapproved of synergism. *See* Eutectic Corp. v. Metco, Inc., 579 F.2d 1 (2d Cir.), *cert. denied*, 439 U.S. 867 (1978); Digitronics v. New York Racing Assoc., Inc., 553 F.2d 740 (2d Cir.), *cert. denied*, 434 U.S. 860 (1977); and U.S. Philips Corp. v. National Micronetics, Inc., 550 F.2d 716 (2d Cir.), *cert. denied*, 434 U.S. 859 (1977).

159. 603 F.2d 361 (2d Cir. 1979).

160. *Id.* at 372.

161. *Id.*

The unanimous decision was written by Judge Robert Miller,[162] who was sitting by designation from the Court of Customs and Patent Appeals. Thus, part of the basis for the strong rejection of the synergism test lies in the patent judges' predilection to gauge patent validity upon statutory merits and the subsequent guidelines established by *Graham* rather than on the Supreme Court's other embellishments of the patent law.[163]

Despite this commitment to the *Graham* standards, it is not clear whether this circuit will pursue this preliminary judicial opining on the synergism question and specifically repudiate the synergism requirement. Hints about the Second Circuit's future position on this issue perhaps can be gleaned from decisions at the trial level. A recent district court case, *Brennan v. Mr. Hanger, Inc.*,[164] noted the controversy surrounding the synergism question and expressed approval of those circuits expressly rejecting the synergism requirement.[165] Since the district court did not view *Champion* as authority on this point,[166] the opinion made only a half-hearted acknowledgment of the synergism test. Holding that the patent at issue had met the synergism requirement, the court concluded that "[t]he several elements of the claimed combination cooperate to produce a highly desirable new result not theretofore obvious: a hanger bar which is not only cheaper to make but easier to use. This seems as close to 'synergism' as anyone will ever get with a mechanical device."[167]

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162. Judge Miller also was the author of the Tenth Circuit case, Plastic Container Corp. v. Continental Plastics of Okla., Inc., 607 F.2d 885 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 672 (1980). In *Plastic*, Judge Miller cited his earlier decision in *Champion* in rejecting the synergism test. The opinion in *Champion* does not specifically repudiate synergism as a test for a patent's validity, but synergism is not included as part of the preconditions to patentability.

163. The Court of Customs and Patent Appeals (C.C.P.A.) has, with a note of disdain perhaps, been extremely critical of the Supreme Court's patent opinions. In 1944, the C.C.P.A. decision, *In re* Shortell, 142 F.2d 292 (C.C.P.A. 1944), rebuffed the flash of genius test:

> While recognizing, of course, that it is the duty of this court to follow the law as declared by the Supreme Court . . . . it is not within the province of the courts to establish new standards by which invention is to be determined. It seems clear to us that the creation of new standards for the determination of what constitutes invention would be judicial legislation and not judicial interpretation.

Id. at 296. More recently, the C.C.P.A. stated that "the term 'synergism' is applied without qualification. Synergism, in and of itself, is not conclusive of unobviousness in that synergism might be expected." Application of Kollman, 595 F.2d 48, 55 n.6 (C.C.P.A. 1979).

Judge Rich, author of two articles cited previously, *see* notes 23 & 71 *supra*, also disagreed with the Supreme Court analysis of patent law in Application of Bergy, 596 F.2d 952 (C.C.P.A. 1979). Judge Rich opined that the Supreme Court had misread both the statute and case law in construing the tests of usefulness, novelty, and nonobviousness.

There are those commentators who criticize the position of the C.C.P.A. and the patent bar. Their main objection is that the C.C.P.A. and the patent bar have adopted a "liberal" attitude concerning patentability of small advances over the current technology. These objectors believe inventions that rightfully should be in the public domain have been given patent protection. Thus, granting monopolies to these inventions reduces the public's access to the innovation. For a discussion on this position, see Sears, *Combination Patents and 35 U.S.C. § 103*, 1977 DET. C. L. REV. 83; Note, *Endorsing the Application of Non-Technical Factual Considerations for Obviousness Determinations in Combination Patent Cases—Nickola v. Peterson*, 10 TOL. L. REV. 1011 (1979).

164. 479 F. Supp. 1215 (S.D.N.Y. 1979).

165. *Id.* at 1224-25.

166. *Id.* at 1225.

167. *Id.* Judge Conner offered an alternative to interpreting the synergism definition. He stated that synergism is "the result produced by the overall combination. Whenever a new and

2. The Ninth Circuit

Retreating from earlier opinions that had urged the requirement of synergism, the Ninth Circuit, in *Palmer v. Orthokinetics, Inc.*,[168] questioned the applicability of synergism to the determination of nonobviousness. The prior decisions of this circuit had held, without comment, that a synergistic result must be achieved by combination patents.[169] The reason for this reversion was the appellate court's recognition that synergism fails to resolve the question posed by section 103, namely, whether the combination of the elements in the innovation was obvious in light of the level of skill in the art at the time the combining was done.[170] Noting that the Ninth Circuit's decisions have often held "that a synergism test will assist a court in determining whether a combination patent is nonobvious," the court asserted that the final conclusions at the fact finding level "must be guided by the requirements of section 103 and *Graham v. John Deere Co.*"[171] The Ninth Circuit recognized the Seventh Circuit's reasoning in *Republic*, but reserved judgment on rejecting the synergism test.[172] This qualification, therefore, does not indicate whether the Ninth Circuit approves or disapproves of synergism.

CONCLUSION

Perhaps the most that can be concluded from the recent divergence of opinions is that, from *Graham* to the subsequent decisions in *Black Rock* and *Sakraida*, the Supreme Court muddied the already turbid waters of judicial evaluation of patentability under the nonobviousness standard. The nonobviousness standard developed from the dissatisfaction with the subjective judicial "invention" standard. The standards of patentability contained in section 103 were enacted to promote consistent and definite analysis of patent claims. Requiring synergism as a condition of patentability would be a digression from the *Graham* guidelines and would reintroduce subjective concepts into the adjudication of patent claims.

Additionally, the synergism test is fatally defective in view of the statutory requirements and the interpretation of these requirements in *Graham*. The first flaw of the synergism test is that neither section 103 nor *Graham* expressly mention synergism. This defect was noted by the Seventh Circuit:

> In enacting section 103, Congress expressly mandated nonobviousness, not synergism, as the sole test for the patentability of novel and useful inventions: indeed, synergism is not even mentioned in

desirable result is achieved, or an old result is achieved more efficiently, synergism is present." Conner, *Winning Patent Infringement Suits—The Art of Swimming Against the Tide*, in NONOBVIOUSNESS—THE ULTIMATE CONDITION OF PATENTABILITY 4:401,:405 (Witherspoon ed. 1978).

168. 611 F.2d 316 (9th Cir. 1980).

169. *See* Kaeiautokomfort v. Eurasian Auto. Prod., 553 F.2d 603 (9th Cir. 1977); Deere & Co. v. Sperry Rand Corp., 513 F.2d 1131 (9th Cir.), *cert. denied*, 423 U.S. 914 (1975); Hewlett-Packard Co. v. Tel-Design, Inc., 460 F.2d 625 (9th Cir. 1972); Regimbal v. Scymansky, 444 F.2d 333 (9th Cir. 1971); Reeves Instrument Corp., v. Beckman Instruments, Inc., 444 F.2d 263 (9th Cir.), *cert. denied*, 404 U.S. 951 (1971).

170. 611 F.2d at 324.

171. *Id.*

172. *Id.* at n.17.

> the Patent Act of 1952. Moreover, as section 103 applies to all patent claims, there is no justification [for] why patentability of a combination patent should be measured by a different standard than any other type of invention.[173]

A further flaw in the synergism test is that the patent claims are not evaluated "*at the time the invention was made* to a person having ordinary skill in the art . . . ."[174] The synergism test would analyze nonobviousness *after* the combination was made, contrary to the section 103 language requiring a determination of patent validity "*at the time the invention was made*."[175] The synergism test ignores the possibility that nonobviousness could be found in the very choice of the elements. The synergism test fails because it focuses on the result of the combination rather than on the obviousness or nonobviousness of the combination. A rejection of the synergism test does not imply that there is no place for a synergistic result in the scheme of determining patent validity. Instead of relying on a synergistic effect as determinative of patentability, the new result should be considered, as with all other patent claims, under the nonobviousness standard.

Finally, to resolve the confusion that now exists as a result of the Supreme Court's holdings and the division in the appellate courts, the Court should address the question of synergism. If the Court does conclude that a synergistic result is necessary for combinations to be patentable, then it should specifically so hold. To promote this additional criterion, the Court should advance the tests to be used by a reviewing court in evaluating patentability, and it should distinguish the *Graham* standards from the synergism test. Endorsing the synergistic effect test would substantially increase the difficulty of obtaining a patent and severely restrict the number of innovations granted patent protection.

The Supreme Court, however, has not yet specifically held that synergism is required, nor should it so hold. Using the *Graham* three-pronged test, without requiring an additional standard for combination patents, courts can still discern whether an innovation merits patent status. The ultimate fate of the synergism question rests with Congress. Until Congress enacts legislation prescribing different criteria for combination patents, the federal courts, in the interest of uniformity, definiteness, and consistency, should continue to apply the standard of section 103 as it has been interpreted by *Graham*.

Hollie L. Baker

173. Republic Indus., Inc. v. Schlage Lock Co., 592 F.2d 963, 971 (7th Cir. 1979).
174. 35 U.S.C. § 103 (1976) (emphasis added).
175. *Id.* (emphasis added).

SECURITIES

OVERVIEW

During the past term,[1] the Tenth Circuit reviewed only three decisions[2] dealing with the Securities Act of 1933 (1933 Act)[3] and the Securities Exchange Act of 1934 (1934 Act).[4] The court considered section 12(2),[5] section 13,[6] and section 17(a)[7] of the 1933 Act; section 10(b)[8] of the 1934 Act and rule 10b-5[9] were also discussed. These Tenth Circuit decisions followed well-established precedents. An examination of these decisions will, nevertheless, serve to further clarify the position of the Tenth Circuit on these securities issues.

I. SCIENTER AND THE STATUTE OF LIMITATIONS

In *Wertheim & Co. v. Codding Embryological Sciences, Inc.*,[10] the Tenth Circuit reviewed a securities offering of a corporation organized to engage in a special beef stock promotion. The plaintiff charged violations of section 12(2) and 17(a) of the 1933 Act and noncompliance with section 10(b) of the 1934 Act and rule 10b-5.[11] The trial court found that the defendants had indeed made material misstatements[12] and a material omission;[13] nevertheless, the trial court found for the defendant. In a decision delivered by Judge McWilliams, the Tenth Circuit affirmed.

A. *The Section 10(b) Claim*

The trial court concluded that the misrepresentations and the omission were the result of mere negligence and that the defendant acted in good faith. Under *Hochfelder*, the absence of scienter is fatal to a private damages action predicated on section 10(b).[14] Judge McWilliams, noting that one's

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1. This survey covers opinions filed from June 1, 1979 to May 31, 1980.
2. Wertheim & Co. v. Codding Embryological Sciences, Inc., 620 F.2d 764 (10th Cir. 1980); Cronin v. Midwestern Okla. Dev. Auth., 619 F.2d 856 (10th Cir. 1980); and United States v. Jensen, 608 F.2d 1349 (10th Cir. 1979).
3. 15 U.S.C. §§ 77a-77aa (1976).
4. *Id.* §§ 78a-78kk.
5. *Id.* § 77*l*(2).
6. *Id.* § 77m.
7. *Id.* § 77q(a).
8. *Id.* § 78j(b).
9. 17 C.F.R. § 240.10b-5 (1980).
10. 620 F.2d 764 (10th Cir. 1980).
11. *Id.*
12. The defendants had misrepresented the magnitude of the cost overruns in connection with the construction of a building. *Id.* at 766.
13. The defendants also failed to disclose that they had previously engaged in a similar venture with another company. That enterprise had ended as a financial failure. Moreover, the defendants were involved in a protracted lawsuit in connection with the prior venture. C.H. Codding & Sons v. Armour & Co., 404 F.2d 1 (10th Cir. 1968). The plaintiffs were not informed of this litigation. 620 F.2d at 766.
14. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). Even assuming that the statements were made with the requisite scienter, the trial court held, in the alternative, that the plaintiffs

"state of mind almost invariably presents an issue of fact," ruled that the trial court's negligence finding was not clearly erroneous and hence would not be disturbed on appeal.[15]

The plaintiff urged that reckless misconduct should be deemed the equivalent of scienter.[16] Judge McWilliams recognized that other circuits have decided that the reach of scienter includes recklessness,[17] but the judge concluded that the trial court's determination that the defendant's conduct was merely negligent precluded such an inquiry in the instant case.[18]

B. *The Section 12(2) and 17(a) Claims*

Acknowledging that a section 12(2) claim survives the lack of scienter, the Tenth Circuit turned to section 13 of the 1933 Act, which imposes a one-year statute of limitations commencing "after the discovery of the untrue statement or omission." The defendant first discovered the misrepresentations in December 1973; the action was not filed until January 1975—one month too late. Because there was insufficient evidence to toll section 13, Judge McWilliams dismissed the section 12(2) claim.[19]

On appeal, the plaintiffs did not pursue the section 17(a) claim. At the trial level, counsel indicated that this claim was included under the umbrella of rule 10b-5.[20] This presents a vivid illustration of how *Aaron v. SEC*[21] may well move the battleground for securities fraud from section 10(b) to section 17(a). That rule 10b-5 has overshadowed section 17(a) in the past is without question. The implications of *Aaron* on private damage actions based on section 17(a), however, may well breathe new life into this anti-fraud provision.

Hochfelder and *Aaron* both stand for the proposition that the scienter requirement under the anti-fraud sections does not turn upon the identity of the plaintiff or upon the nature of the relief sought; rather, what is determinative is the language and legislative history of the statutory provision. It seems, therefore, that this logic allows a private plaintiff seeking money damages to prevail under section 17(a)(2) and (3) without a showing of scienter. The catch, of course, is that the Supreme Court has not yet decided whether it will imply a private action under section 17(a) of the 1933 Act.[22] Until the Court resolves this question, private plaintiffs undoubtedly will pursue section 17(a) claims with much more vigor than they have in the past.

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could not show that they had in fact relied on the representations or that they had acted with due diligence in the transaction. 620 F.2d at 766.

15. *Id.*

16. The *Hochfelder* Court refrained from deciding whether reckless behavior was a form of scienter. 425 U.S. at 193 & 194 n.12.

17. Rolf v. Blyth, Eastman, Dillion & Co., 570 F.2d 38 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978); Sunstrand v. Sun Chem. Corp., 553 F.2d 1033 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977).

18. 620 F.2d at 766-67.

19. *Id.* at 767.

20. *Id.*

21. 100 S. Ct. 1945 (1980).

22. *Id.* at 1951. For a detailed discussion of the *Aaron* decision and its possible ramifications, see Aaron v. SEC: *The Scienter Requirement in SEC Injunctive Actions*, which immediately follows this overview, *infra* at 493.

II. BOND COUNSEL AND TRUSTEE'S LIABILITY

Cronin v. Midwestern Oklahoma Development Authority,[23] involved a securities fraud action by purchasers of two issues of industrial development revenue bonds. The bonds went into default, and numerous defendants were named in the litigation.[24] The purchasers' complaint alleged, in part, that the bond counsel and trustee had violated or aided and abetted violations of rule 10b-5 by failing to disclose certain allegedly material facts. The district court granted summary judgment to the bond counsel and to the trustee, and the plaintiffs appealed. Judge Doyle, speaking for the Tenth Circuit panel, directed the trial court to vacate all of the summary judgment orders. In essence, Judge Doyle overruled the trial court's decision because the "orders are replete with conclusory statements" and the facts surrounding the bonds' issuance needed further development.[25] The Tenth Circuit did look, however, to one legal conclusion of the lower court. The trial court assumed that since the express fraud was committed by a broker-dealer's sales representative, the purchasers were required to prove that the bond counsel and the indenture trustee were privy to the misrepresentation. Judge Doyle disagreed. He noted that the defendants would be liable if "shown to have had participat[ed] in the issuance of the bonds and thus [to have] owed a duty to all of the buyers to reveal the facts . . . and [liability would also result] if the defendant-lawyers and banks knowingly aided the underwriter in the issuance of value-depleted bonds."[26]

III. BROKER'S FRAUD UNDER SECTION 17(A)

The Tenth Circuit confronted a criminal prosecution based on alleged violations of section 17(a) of the 1933 Act in *United States v. Jensen*.[27] The defendant was the principal operator of a stock brokerage firm called Associated Underwriters (Associated). Associated operated by having an investor enter into a "conversion investment contract." Under this agreement, Associated would select certain securities, using the investor's funds for the purchase price. Next, both a "call" option and a "put" option[28] would be acquired on these securities. As additional protection, the put options were to be guaranteed by a financially secure institution. Thus, the investors were promised a fixed return on their investment, not subject to the vagaries of the stock market.

Associated fell into financial difficulties. One of Associated's customers defrauded the brokerage house out of $300,000. Many of these stocks were sold to the investor's accounts at prices far in excess of their fair market

23. 619 F.2d 856 (10th Cir. 1980).

24. The defendants included: the bond issuer and its officials, the private corporation which received the bond proceeds, the underwriters, the bond counsel, the indenture trustees, and the broker-dealers involved in selling the bonds to the plaintiff.

25. 619 F.2d at 862.

26. *Id.*

27. 608 F.2d 1349 (10th Cir. 1979).

28. The purchaser of a call option has the right to buy stock at a given price. In contrast, the put option gives one the right to sell a given number of shares of stock, at a specific price, within a specified time frame.

value. Moreover, the defendant began to function as the writer of both the put and call options, as well as becoming the guarantor of the put option, thus, guaranteeing its own legal obligations. Associated subsequently went bankrupt and left its customers with virtually worthless stock.[29]

On appeal, the defendant, Jensen, argued that there was no *sale* of the common stock. Instead, he argued that the investors merely purchased an investment contract.[30] Judge Logan, speaking for the court, focused on the legal obligations between the defendant and the investors. Specifically, the court considered whether Jensen was acting in the capacity of a broker or of a debtor. The court examined Jensen's representation that the investor's money would be used to purchase stocks, "which were then placed in the individual accounts, with each investor being notified." Concluding that this was essentially a brokerage account, the court held that purchases of stock by brokers are the equivalent of sales to the customers.[31]

The defendant urged that there was no fraud committed within the meaning of subsections (2) and (3) of section 17(a). Judge Logan rejected this argument, finding misrepresentations,[32] omissions,[33] and a fraudulent course of business.[34]

Finally, Jensen contended that the fraudulent practices did not have the necessary nexus to the sale of securities. The Tenth Circuit also rejected this argument, reasoning that "fraud does not have to relate directly to the value or nature of stock to be a section 17(a) violation."[35] After viewing the transaction as a whole, Judge Logan concluded that if stock was sold, then section 17(a) applies, and if a section 17(a)(2) or (3) fraud was committed at some point in the transaction, then there was the requisite fraud in the sale of the securities.[36]

Steve M. Skoumal

29. 608 F.2d at 1353.
30. *Id.*
31. *Id.*
32. The court noted that, contrary to Jensen's original statements, Associated acted as the guarantor, with Jensen writing the put and call options on worthless stock. *Id.* at 1354.
33. The defendant failed to notify the investors of the changed nature of the investment agreement. *Id.*
34. Jensen used stock that he knew was essentially worthless, selling it to the investors at highly inflated prices. Furthermore, he devised a "sham put and call option transaction" and then guaranteed the put options himself. *Id.*
35. *Id.*
36. *Id.* at 1354-55.

AARON V. SEC: THE SCIENTER REQUIREMENT IN SEC INJUNCTIVE ACTIONS

The recent decision of the Supreme Court in *Aaron v. SEC*[1] is one whose immediate impact will be felt in all federal courts.[2] The Court in *Aaron* significantly altered the enforcement scheme of the anti-fraud provisions of the Securities Act of 1933 (1933 Act)[3] and the Securities Exchange Act of 1934 (1934 Act).[4] The question in *Aaron* was whether the Securities and Exchange Commission (SEC or Commission) is required to establish scienter[5] as an element of a civil enforcement action[6] to enjoin violations of sec-

1. 100 S. Ct. 1945 (1980).

2. A look at scienter in the Tenth Circuit follows at notes 15-45 *infra* and accompanying text.

3. 15 U.S.C. §§ 77a-77aa (1976).

4. 15 U.S.C. §§ 78a-78kk (1976).

5. The *Aaron* Court defined scienter as "an intent on the part of the defendant to deceive, manipulate, or defraud." 100 S. Ct. at 1950. This is in accordance with Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), which defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud." *Id.* at 193 n.12. As in *Hochfelder*, the Supreme Court in *Aaron* reserved judgment whether scienter may be defined to include "reckless behavior." 100 S. Ct. at 1950 n.5.

The Tenth Circuit in the pre-*Hochfelder* decision of Clegg v. Conk, 507 F.2d 1351 (10th Cir. 1974), *cert. denied*, 422 U.S. 1007 (1975), imposed a "scienter or conscious fault" requirement on a private party seeking money damages under 17 C.F.R. § 240.10b-5 (1980) (rule 10b-5). 507 F.2d at 1361-62. The Tenth Circuit has also ruled that a private plaintiff need only prove that the defendant was negligent. Financial Indus. Fund, Inc. v. McDonnell Douglas Corp., 474 F.2d 514, 521 (10th Cir.), *cert. denied*, 414 U.S. 874 (1973). In 1976, the Supreme Court in *Hochfelder* concluded that a private cause of action for money damages will not lie under either § 10(b) of the 1934 Act or under rule 10b-5 in the absence of an allegation of scienter. 425 U.S. at 193.

Whether reckless conduct constitutes scienter in the Tenth Circuit has not been directly addressed by the court of appeals. *See, e.g.*, Holdsworth v. Strong, 545 F.2d 687 (10th Cir. 1976), *cert. denied*, 430 U.S. 955 (1977). However, in Utah State Univ. of Agriculture & Applied Science v. Bear, Stearns & Co., 549 F.2d 164, 169 (10th Cir.), *cert. denied*, 434 U.S. 890 (1977), the Tenth Circuit concluded that willful or intentional misconduct, or its equivalent, is an essential element under § 10(b) of the 1934 Act. Even in the face of *Bear, Stearns & Co.*, the Tenth Circuit nevertheless seems to have adopted a noncommittal position as to the scope of scienter. In the recent decision of Wertheim & Co. v. Codding Embryological Sciences, 620 F.2d 764 (10th Cir. 1980), the court noted:

> We recognize that recklessness has been held to be tantamount to *scienter* in some circumstances . . . . However, recklessness has been defined, in such context, as a frame of mind which comes closer to being a lesser form of intent than merely a greater degree of ordinary negligence . . . . The trial court's determination that the [defendants] were only negligent negates the argument that they were guilty of reckless conduct, if indeed there was no actual intent to deceive.

Id. at 766-67 (citations omitted).

6. The Commission is expressly empowered under § 20(b) of the 1933 Act, 15 U.S.C. § 77t(b) (1976), to seek injunctive relief:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter [*e.g.*, section 17(a)], or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

Similarly, § 21(d) of the 1934 Act, 15 U.S.C. § 78u(d) (1976), expressly authorizes the Commission to seek injunctive relief:

tion 17(a) of the 1933 Act,[7] section 10(b) of the 1934 Act,[8] and rule 10b-5,[9] promulgated under section 10(b).

The *Aaron* Court decided that section 10(b) of the 1934 Act[10] and section 17(a)(1) of the 1933 Act[11] are violated only when the defendant has acted with a willful intent to defraud. On the other hand, the *Aaron* Court held that sections 17(a)(2) and 17(a)(3) of the 1933 Act require no proof of scienter;[12] a finding of negligence is sufficient. The Court also concluded that because the SEC must prove some likelihood of a future violation before an injunction can issue,[13] "an important factor in this regard is the degree of intentional wrongdoing evident in a defendant's past misconduct."[14] This note will examine the state of the law before *Aaron*, the analysis employed by the *Aaron* Court, and the implications of this decision for the federal courts.

I. THE STATE OF MIND REQUIREMENT IN SEC INJUNCTIVE PROCEEDINGS: THE TENTH CIRCUIT

The question of whether the Commission[15] must show that the defendant in an injunctive proceeding acted with scienter has been fertile ground for commentary.[16] When examining the history of scienter as a necessary

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Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter [*e.g.*, § 10(b)], the rules or regulations thereunder [*e.g.*, rule 10b-5(1)] . . . it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

7. 15 U.S.C. § 77q(a) (1976). For the text of § 17(a), see note 31 *infra*.

8. 15 U.S.C. § 78j(b) (1976). For the text of § 10(b), see note 20 *infra*.

9. 17 C.F.R. § 240.10b-5 (1980). For the text of rule 10b-5, see note 20 *infra*.

10. 100 S. Ct. at 1954-55.

11. *Id.* at 1956.

12. *Id.*

13. *Id.* at 1959.

14. 100 S. Ct. at 1958. Chief Justice Burger went even further in his concurrence. The Chief Justice noted that it will "almost always be necessary" for the Commission to establish the defendant's intent to deceive before a court will issue an injunction. *Id.* at 1959.

15. This survey will limit itself to a consideration of the Commission, rather than private parties, as plaintiff. While the outcome of a private injunctive action is identical to that of an SEC injunctive proceeding, the elements of the action differ significantly. *See generally* Note, *Scienter and Injunctive Relief Under Rule 10b-5*, 11 GA. L. REV. 879, 880 n.9 (1977) [hereinafter cited as GA. L. REV.]. The Commission, because its injunctive power is a creature of statute, must seek its injunction under either § 20(b) of the 1933 Act or § 21(d) of the 1934 Act. (For the text of these sections, see note 6 *supra*). In contrast, the private plaintiff seeking an injunction must show both irreparable harm and the inadequacy of a remedy at law. The private injunctive action is judicially inferred; therefore, traditional equity principles apply. Ronbeau v. Mosinee Paper Corp., 422 U.S. 49, 57 (1975) (private injunction sought under § 13(d) of the 1934 Act); W. DE FUNIAK, HANDBOOK OF MODERN EQUITY 33-37 (1950). For an argument that the SEC and private injunctive actions should, as a matter of policy, contain the same requirements, see Note, Rondeau v. Mosinee Paper Corporation *and Implied Private Rights of Action*, 28 HASTINGS L.J. 93, 114 (1976).

16. *E.g.*, Berner & Franklin, *Scienter and Securities and Exchange Commission Rule 10b-5 Injunctive Actions: A Reappraisal in Light of* Hochfelder, 51 N.Y.U.L. Rev. 769 (1976); Harkleroad, *Requirements for Injunctive Actions under The Federal Securities Laws*, 2 J. CORP. L. 481 (1977); Lowenfels, *Scienter or Negligence Required for SEC Injunctions under Section 10(b) and Rule 10b-5: A Fascinating Paradox*, 33 BUS. LAW. 789 (1978); Mathews, *Liabilities of Lawyers Under the Federal Securities Laws*, 30 BUS. LAW. 105 (Sp. Issue, Mar. 1975); Note, *The Scienter Requirement in SEC Injunctive Enforcement of Section 10(b) After* Ernst & Ernst v. Hochfelder, 77 COLUM. L. REV. 419 (1977) [hereinafter cited as *The Scienter Requirement*]; Note, *Injunctive Relief in SEC Civil Actions: The Scope of Judicial*

element in an action for injunctive relief, it is important to note whether the case was decided before or after *Ernst & Ernst v. Hochfelder*.[17] In 1976, the Supreme Court concluded in *Hochfelder* that a private action for money damages will not lie under either section 10(b) of the 1934 Act or rule 10b-5 in the absence of an allegation of scienter.[18] The *Hochfelder* Court expressly declined, however, to decide whether proof of scienter is required in SEC injunctive proceedings for violations of section 10(b).[19]

A. *Pre-1976 Violations of Section 10(b) of the 1934 Act*[20]

Prior to *Hochfelder*, most courts that considered whether proof of any particular mental state was necessary in SEC injunctive actions for section 10(b) violations adopted a negligence standard.[21] Disagreement existed among the circuits, however, as to whether scienter or mere negligence was the appropriate standard in private damages actions.[22]

Discretion, 10 COLUM. J.L. & SOC. PROB. 328 (1974) [hereinafter cited as Note, *Judicial Discretion*]; GA. L. REV., *supra* note 15; Comment, *Scienter And SEC Injunctive Suits*: SEC v. Bausch & Lomb, Inc. *and* SEC v. World Radio Mission, Inc., 90 HARV. L. REV. 1018 (1977) [hereinafter cited as Comment, *SEC Injunctive Suits*]; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 255 (1976); Note, *SEC Enforcement Actions to Enjoin Violations of Section 10(b) and Rule 10b-5; The Scienter Question*, 5 HOFSTRA L. REV. 831 (1977); and Note, *New Light on an Old Debate: Negligence v. Scienter in an SEC Fraud Injunctive Suit*, 51 ST. JOHN'S L. REV. 759 (1977) [hereinafter cited as *New Light on an Old Debate*].

17. 425 U.S. 185 (1976).

18. *Id.* at 193.

19. "Since this case concerns an action for damages we . . . need not consider the question whether scienter is a necessary element in an action for injunctive relief under § 10(b) and Rule 10b-5. *Cf.* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963)." *Id.* at 194 n.12.

20. This discussion is limited to SEC injunctive actions alleging violations of § 10(b) of the 1934 Act or rule 10b-5. Section 10(b) of the 1934 Act makes it "unlawful for any person . . . to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest." 15 U.S.C. § 78j(b) (1976).

Under this section, the SEC promulgated rule 10b-5, which provides:

> It shall be unlawful for any person . . .
>
> (1) To employ any device, scheme, or artifice to defraud,
>
> (2) To make any untrue statements of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
>
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the sale or purchase of any security.

17 C.F.R. § 240.10b-5 (1980).

For an examination of SEC proceedings based on § 17(a) of the 1933 Act, see notes 148-229 *infra* and accompanying text.

21. *See, e.g.*, SEC v. Management Dynamics, Inc., 515 F.2d 801, 809 (2d Cir. 1975); SEC v. Dolnick, 501 F.2d 1279, 1284 (7th Cir. 1974); SEC v. Spectrum, Ltd., 489 F.2d 535, 541 (2d Cir. 1973); and SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1096 (2d Cir. 1972). *See also* 1 A. BROMBERG, SECURITIES LAW § 2.6(1) (1975); Berner & Franklin, *supra* note 16, at 781-92; Note, *Scienter and Rule 10b-5*, 69 COLUM. L. REV. 1057 (1969).

The Sixth Circuit had a higher standard than that embraced by the Second, Seventh, and Tenth Circuits. SEC v. Coffey, 493 F.2d 1304 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975). *Coffey* stemmed from an SEC enforcement action based, in part, on § 10(b) of the 1934 Act and rule 10b-5. The court in *Coffey* decided that the Commission must prove that the defendants acted with a "wilful or reckless disregard for the truth." *Id.* at 1314.

22. *Compare* Woodward v. Metro Bank, 522 F.2d 84, 93 (5th Cir. 1975) (scienter required) *with* Myzel v. Fields, 386 F.2d 718, 735 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968) (mere negligence required). *Hochfelder* settled this disagreement.

The Tenth Circuit followed a dual approach that was initially developed in the Second Circuit.[23] In *Clegg v. Conk*,[24] the TenthCircuit ruled that "scienter or conscious fault" is required in a private action for money damages based on rule 10b-5.[25] In contrast, when the SEC sought to enjoin a fraudulent practice based, in part, on section 10(b) of the 1934 Act, the Tenth Circuit, in *SEC v. Pearson*,[26] concluded that "[p]roof of scienter or intent to defraud is not required to show violations justifying preliminary injunctive relief."[27] Similarly, the court in *SEC v. Geyser Minerals Corp.*[28] held that "[m]otive and intent, however, are not material in determining, in a[n] [SEC] civil injunctive suit, whether the defendants have violated the antifraud provisions of the 1933 Act and the 1934 Act [section 10(b)]. . . . The state of mind of the violators is not germane."[29] In sum, a pre-*Hochfelder* private plaintiff seeking money damages would have needed to prove scienter in the Tenth Circuit; however, if the Commission sought a statutory injunction it would not have been required to probe the state of the defendant's mind.

B. *Pre-1976 Violations of Section 17(a) of the 1933 Act*

Section 17(a), unlike section 10(b) and rule 10b-5,[30] applies only to *sellers* of securities.[31] The Seventh Circuit was confronted with a Commission injunctive proceeding based solely upon alleged violations of section 17(a) in *SEC v. G.N. Van Horn*.[32] The court reasoned that given the "plain language"[33] and the peculiar legislative history of section 17(a),[34] "under 17(a)(2) and (3) proof of scienter or fraudulent intent is not essential in a suit for injunctive relief."[35]

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23. *See generally New Light on an Old Debate*, *supra* note 16, at 765-68.

24. 507 F.2d 1351 (10th Cir. 1974), *cert. denied*, 422 U.S. 1007 (1975). *See also* note 5 *supra*.

25. 507 F.2d at 1361-62. *See generally* Krendl & Krendl, *Securities, Second Annual Tenth Circuit Survey*, 53 DEN. L.J. 261 (1976).

26. 426 F.2d 1339 (10th Cir. 1970).

27. *Id.* at 1343. There is some confusion, however, as to whether *Pearson's* holding was rooted in section 10(b) of the 1934 Act or in section 17(a) of the 1933 Act. *See* notes 40-43 *infra* and accompanying text.

28. 452 F.2d 876 (10th Cir. 1971).

29. *Id.* at 880-81.

30. For the text of § 10(b) and rule 10b-5, see note 20 *supra*.

31. Section 17(a) of the 1933 Act provides:

> It shall be unlawful for any person in the offer or sale of any security by the use of any means . . .
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q (1976).

32. 371 F.2d 181 (7th Cir. 1966). In this case, the SEC also alleged violations of § 5 of the 1933 Act; however, § 5 is not relevant for the purposes of this survey. It is significant, however, that the Commission did not couple its § 17(a) claim with a § 10(b) allegation.

33. The text of § 17(a) of the 1933 Act is set forth in note 31 *supra*.

34. 371 F.2d at 185. For an extended discussion of the legislative history of § 17(a) of the 1933 Act, see notes 173-80 *infra* and accompanying text.

35. 371 F.2d at 186.

The Sixth Circuit stood alone in imposing a scienter standard in an SEC enforcement action as declared in *SEC v. Coffey*.[36] In *Coffey*, unlike the charges made in *Van Horn*, the Commission alleged violations of section 17(a) of the 1933 Act *and* section 10(b) of the 1934 Act and rule 10b-5 thereunder. Although a violation of section 17(a) was asserted by the Commission, the *Coffey* court focused on the language of section 10(b),[37] concluding that the legislature's use of the words "manipulative" and "deceptive" ruled out any liability for mere negligence[38]—regardless of the identity of the plaintiff.[39]

The Tenth Circuit addressed the culpability standard of section 17(a) of the 1933 Act in *SEC v. Pearson*,[40] a case in which the SEC sought to enjoin alleged securities violations based upon section 17(a)[41] and section 10(b) charges. Judge Holloway, speaking for the court, did not indicate whether section 17(a) or section 10(b) formed the analytical base for his conclusion that the SEC was not required to prove that the defendant acted with scienter.[42] *Pearson* did, however, cite the Seventh Circuit's decision in *Van Horn* as support for its conclusion.[43] Since the SEC had not asserted a section 10(b) violation in *Van Horn*, one can infer that *Pearson*'s holding is grounded solely on section 17(a).

As in *Pearson*, the Tenth Circuit case of *Geyser Minerals* involved securities violations based upon both section 17(a) and section 10(b).[44] Citing *Van Horn*, Judge Hamley in *Geyser Minerals* ruled that the SEC need not prove scienter in establishing securities violations under "the anti-fraud provisions of the 1933 Act [section 17(a)] *and* the 1934 Act [section 10(b)]."[45] *Van Horn* does support the Tenth Circuit's finding of a section 17(a) violation. Moreover, by linking the 1934 Act to the 1933 Act, Judge Hamley suggested that section 10(b) provides independent justification for a court's grant of an SEC

36. 493 F.2d 1304 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975). See the discussion of *Coffey*, in the context of a § 10(b) violation, in note 21 *supra*.

37. The text of § 10(b) is found in note 20 *supra*.

38. 493 F.2d at 1314.

39. The Sixth Circuit, in *Coffey*, relied on the private damages action of Lanza v. Drexel & Co., 479 F.2d 1277 (2d Cir. 1973). The court reasoned that the statutory language that controlled in *Lanza* has equal force in an SEC injunctive proceeding. 493 F.2d at 1314.

Other circuits, by way of dicta, have dealt with the degree of culpability required under § 17(a) in an SEC injunctive proceeding. Each of the following cases contains dicta to the effect that § 17(a) does not impose the strict state-of-mind requirements of a common law fraud action for money damages: Norris & Hirshberg, Inc. v. SEC, 177 F.2d 228, 233 (D.C. Cir. 1949) (Every element of common law fraud need not be proven to revoke a broker-dealer's registration.); Charles Hughes & Co. v. SEC, 139 F.2d 434, 437 (2d Cir. 1943) ("We need not stop to decide, however, how far common-law fraud was shown. For the business of selling investment securities has been considered one peculiarly in need of regulation for the protection of the investor."); Archer v. SEC, 133 F.2d 795, 799 (8th Cir. 1943) ("But the Commission is not bound by the strict common law rules as to the reception and consideration of such evidence.").

40. 426 F.2d 1339 (10th Cir. 1970).

41. *Id.* at 1340 n.1.

42. *Id.* at 1343.

43. *Id.* Judge Holloway also cited SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963). *Capital Gains* involved an SEC action based on § 206(2) of the Investment Advisers Act. *Id.* at 181. An examination of *Capital Gains* is found at notes 124-47 *infra* and accompanying text.

44. 452 F.2d 876, 877 n.1 (10th Cir. 1971).

45. *Id.* at 880-81 (emphasis added).

request for a statutory injunction, even in the absence of any evidence of the defendant's intent to deceive.

II. *HOCHFELDER*: PRIVATE ACTIONS UNDER SECTION 10(B)

In *Ernst & Ernst v. Hochfelder*, a private plaintiff sought money damages from an accounting firm, charging that the defendant had conducted improper audits and, consequently, aided and abetted its client's violations of section 10(b) and rule 10b-5.[46] The plaintiff failed to allege that the defendant acted with scienter, and Justice Powell, speaking for the Court, found this omission fatal to the action.[47] Justice Powell rested the decision on three pillars: 1) the wording of section 10(b); 2) the legislative history surrounding the 1934 Act; and 3) the relationship of section 10(b) to the express civil remedies in the 1933 and 1934 Acts.

A. *The Text of Section 10(b)*

Looking to the language of section 10(b) as the starting point in statutory interpretation,[48] Justice Powell viewed the phrase "manipulative or deceptive device or contrivance" as clearly substantiating Congress' intent to impose liability only for "intentional misconduct."[49] The Court reasoned that whether the words were given their "commonly accepted meaning"[50] or read as "term[s] of art,"[51] the outcome was the same: Section 10(b) contemplates "conduct quite different from negligence."[52]

The Court found the statutory language so compelling that any court need look no further: "[M]indful that the language of a statute controls when sufficiently clear in its context, further inquiry may be unnecessary."[53] Nevertheless, the Court went on to examine whether a negligence standard for section 10(b) could be inferred from the legislative history of the 1934 Act.[54]

B. *The History of the 1934 Act*

While conceding that the legislative history surrounding the 1934 Act

46. 425 U.S. at 190. The plaintiff did not claim that the defendant aided and abetted any securities violations under § 17(a) of the 1933 Act. Moreover, *Hochfelder* expressly refrained from deciding whether civil liability for aiding and abetting a securities fraud exists under § 10(b) and rule 10b-5. *Id.* at 192 n.7. *See generally* GA. L. REV., *supra* note 15, at 883 n.18.

47. 405 U.S. at 193.

48. *Id.* at 197. The text of § 10(b) and rule 10b-5 appear at note 20 *supra*.

Justice Powell chose to follow his concurring opinion in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). ("The starting point in every case involving construction of a statute is the language itself." *Id.* at 756.). This represented a departure from the approach adopted in SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963). *Capital Gains* noted that securities statutes should be construed "flexibly to effectuate [their] remedial purposes." *Id.* at 186.

49. 425 U.S. at 197-98.

50. *Id.* at 199.

51. *Id.* Justice Powell noted that "manipulative" connoted "intentional or willful" deception of investors in the securities markets. *Id.*

52. *Id.*

53. *Id.* at 201.

54. *Id.*

was inconclusive as to the proper culpability standard,[55] the *Hochfelder* Court was satisfied that there was no congressional history to support the plaintiff's contention that section 10(b) was intended to impose liability for mere negligence.[56] The Court placed great weight on the comments of Mr. Corcoran, a spokesman for the drafters of the 1934 Act, who stated that section 10(b) was " 'a catch-all clause to prevent manipulative devices.' "[57] It appears, therefore, that it was not a case of the legislative history providing convincing support for the Court's literal reading of section 10(b), but rather it was the failure of the plaintiff to adduce legislative history supporting a contrary interpretation that proved decisive.[58]

C. *The Scheme of the Securities Laws*

The *Hochfelder* Court ruled that the 1933 and 1934 Acts are to be viewed as "interrelated components."[59] The Court then proceeded to point to the particularized culpability standards of the 1933 and 1934 Acts' civil liability provisions as evidence that mere negligent conduct would not support a section 10(b) private action. Justice Powell noted that when Congress wanted to create civil liability based on negligent conduct, it did so expressly.[60] As an example, the Court cited section 11(b)(3)(B) of the 1933 Act,[61] concerning the liability of experts for their misrepresentations in registration statements, and the associated availability of a due diligence defense.[62] The *Hochfelder* decision failed to explain, however, why the express creation of the scienter standard in section 9 of the 1934 Act would not, by the same reasoning, suggest a negligence culpability standard for section 10(b).[63]

In addition, the Court in *Hochfelder* drew a distinction between the judicially implied private damages action under section 10(b)[64] and the ex-

55. The Court noted that "the extensive legislative history of the 1934 Act is bereft of any explicit explanation of Congress's intent . . . ." *Id.* at 201.

56. *Id.*

57. *Id.* at 202.

58. Justice Powell concluded by saying: "There is no indication that Congress intended anyone to be made liable for such practices unless he acted other than in good faith. The catch-all provision of § 10(b) should be interpreted no more broadly." *Id.* at 206.

59. *Id.*

60. *Id.* at 208.

61. 15 U.S.C. § 77k (1976).

62. "The express recognition of a cause of action premised on negligent behavior in § 11 [of the 1933 Act, 15 U.S.C. § 77k] stands in sharp contrast to the language of § 10(b) . . . ." 425 U.S. at 208.

An expert's due diligence defense is a shorthand expression of the defense reflected in the language of § 11 itself. The expert may avoid civil liability by showing that "after a reasonable investigation" he had "reasonable ground[s] to believe" his statements were not materially misleading. *See, e.g.*, Escott v. Barchris Constr. Corp., 283 F. Supp. 643, 697-703 (S.D.N.Y. 1968).

63. *See generally The Scienter Requirement*, *supra* note 16, at 422-28.

64. The existence of a private action for money damages based on § 10(b) or rule 10b-5 violations is now well settled. *E.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975); Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

Because it was the SEC, and not a private party, who sought the injunction in *Aaron*, the Supreme Court did not have "occasion to address the question whether a private cause of action exists under § 17(a) [of the 1933 Act]." 100 S. Ct. at 1951. *Cf.* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733-34 n.6 (1975) (reserved for another a day a decision on an implied right to a private action under § 17(a) of the 1933 Act). Judge Doyle, in Trussel v.

pressly created civil liability provisions based upon a negligence standard.[65] The express remedies, sections 11,[66] 12(2),[67] and 15[68] of the 1933 Act, contain certain "procedural limitations;" namely, the posting of a bond for costs (including attorney's fees),[69] an authorization for the court to assess costs,[70] and a relatively short statute of limitations.[71] In contrast, a judicially created private damages action has no comparable limitations. If section 10(b) were extended to unintentional conduct, the Supreme Court argued, plaintiffs would bring their securities actions under section 10(b), instead of under sections 11, 12(2), and 15. This, of course, would nullify the procedural limitations Congress intended to place on the express actions.[72]

Lastly, *Hochfelder* addressed the ambit of rule 10b-5.[73] Justice Powell acknowledged that rule 10b-5 may be read to prohibit unintentional conduct.[74] Noting, however, the administrative history of the rule[75] and the authority of the SEC to promulgate rules under section 10(b),[76] the Court concluded that rule 10b-5 provided no basis for extending the reach of section 10(b) beyond intentional misconduct.[77]

United Underwriters, Ltd., 228 F. Supp. 757 (D. Colo. 1964), concluded that there are no implied civil remedies under § 17(a).

65. 425 U.S. at 208-11.

66. 15 U.S.C. § 77k (1976).

67. 15 U.S.C. § 771(2) (1976). Section 12(2) imposes liability, based on a negligence standard, on a seller of securities who makes misrepresentations in connection with the sale.

68. 15 U.S.C. § 77o (1976). Under § 15, a "controlling person" is liable, under a negligence standard, for the violations of § 11 and § 12 committed by a controlled person.

69. Section 11(e), 15 U.S.C. § 77k(e) (1976), empowers a court to require a plaintiff suing under § 11, § 12(2), or § 15 of the 1933 Act to post a bond for the costs. This bond could prove to be an insurmountable hurdle, especially when attorney's fees are included. *See* Dabney v. Alleghany Corp., 164 F. Supp. 28 (S.D.N.Y. 1958).

70. In specified circumstances, § 11(e), 15 U.S.C. § 77k(e) (1976), also authorizes a court to assess costs at the conclusion of the litigation.

71. Section 13, 15 U.S.C. § 77m (1976), specifies that an action brought under § 11, § 12(2), or § 15 can be filed no later than one year from the time the violation was, or should have been, discovered. Regardless of the date of discovery, under no circumstances can the period exceed three years from the time of the offer or sale.

The statute of limitations for § 10(b) actions is governed by state law. *See generally* Raskin & Enyart, *Which Statute Of Limitations In A 10b-5 Action?*, 51 DEN. L.J. 301 (1974). The Tenth Circuit's position is that the state's fraud limitation period applies to 10b-5 claims. *Id.* at 313.

72. 425 U.S. at 210.

73. *Id.* at 212-14. The text of rule 10b-5 is found in note 20 *supra*.

74. "Viewed in isolation the language of [rule 10b-5(2)], and arguably that of [rule 10b-5(3)], could be read as proscribing . . . any course of conduct . . . whether the wrongdoing was intentional or not." 425 U.S. at 212.

75. *Id.* at 212-13 n.32. First, *Hochfelder* urged that rule 10b-5 was promulgated in "response to a situation clearly involving intentional misconduct." *Id.* at 212 n.32. Second, the Court stressed the use of the word "fraud" in the Commission's announcement of the rule. *Id.* at 213 n.32 (quoting SEC Rel. No. 34-3230 (May 21, 1942) and 8 SEC ANN. REP. 10 (1942)).

For a critical examination of the administrative history of rule 10b-5, see Cox, *Ernst & Ernst v. Hochfelder: A Critique and an Evaluation of Its Impact upon the Scheme of the Federal Securities Laws*, 28 HASTINGS L.J. 569, 582 (1977). One commentator has concluded that "*Hochfelder's* establishment of a scienter requirement must be read to stand solely upon the interpretation of the statutory provision itself." *The Scienter Requirement*, *supra* note 16, at 424 n.39.

76. 425 U.S. at 213-14. The scope of rule 10b-5 cannot exceed the power delegated to the SEC through § 10(b). *Id.* "The rule-making power granted to an administrative agency charged with the administration of a federal statute is not the power to make law." *Id.* at 213.

Since the Court in *Hochfelder* found "the language and history of § 10(b) dispositive," it refused to examine policy considerations. *Id.* at 214 n.33.

77. *Id.* at 214.

III. *AARON V. SEC*: SCIENTER REQUIREMENT IN SEC INJUNCTIVE ACTIONS

A. *Factual Background of* Aaron

E.L. Aaron & Co. (Aaron & Co.) was a registered brokerage firm.[78] Peter Aaron had supervisory responsibility over Aaron & Co.'s registered representatives, including Norman Schreiber and Donald Jacobson. In connection with the solicitation of orders for the purchase of Lawn-A-Mat Corporation's (LAM) securities, Schreiber and Jacobson made the following representations: that LAM was in the process of developing a new type of small car, that LAM's stock was about to enjoy a substantial price increase, and that LAM was financially prospering. LAM, however, was not manufacturing, nor did it plan to manufacture, any cars. Furthermore, the company was losing money during the relevant period.[79] Peter Aaron both knew[80] and had reason to know[81] of Schreiber and Jacobson's misleading statements. Nevertheless, Peter Aaron failed to take affirmative steps to correct or stop the misstatements.[82]

The SEC filed a complaint in the District Court for the Southern District of New York seeking injunctive relief. The Commission charged that the defendant had violated and aided and abetted violations of section 17(a), section 10(b), and rule 10b-5. The trial court agreed and enjoined Peter Aaron from future violations of these antifraud provisions.[83] While noting that "negligence alone may suffice as a standard for liability in Commission enforcement proceedings," the district court found the defendant's intentional failure to terminate the misleading statements sufficient to establish scienter.[84]

The Court of Appeals for the Second Circuit affirmed the lower court's decision;[85] however, the Second Circuit ruled that negligence alone was sufficient to support injunctive actions under section 10(b) or section 17(a).[86] The Supreme Court reversed the judgment of the appellate court, finding that although scienter is not required in SEC injunctive proceedings based on section 17(a)(2)-(3), scienter is a prerequisite to a judicial grant of an SEC request for an injunction based upon either section 10(b) or section 17(a)(1).[87]

78. For a general discussion of the functions of a broker-dealer, see JAFFE, BROKER-DEALERS AND SECURITIES MARKETS (1977).

79. SEC v. E.L. Aaron & Co. [1977-78 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,043, at 91,682-83 (S.D.N.Y. May 5, 1977).

80. Peter Aaron was personally contacted by two representatives of LAM and told of the misrepresentations. *Id.* at 91,683.

81. The defendant also maintained due diligence files on LAM. These files contained no information regarding the manufacture of a car, but did indicate a deteriorating financial condition. *Id.*

82. *Id.*

83. *Id.* at 91,687.

84. *Id.* at 91,685.

85. SEC v. Aaron, 605 F.2d 612 (2d Cir. 1979).

86. *Id.* at 624.

87. Aaron v. SEC, 100 S. Ct. 1945, 1958 (1980).

B. Hochfelder *to* Aaron: *The Federal Courts Grapple with Scienter*

At the outset, it is important to note the distinction between the SEC's enforcement authority as compared with the private damages action at issue in *Hochfelder*. Unlike the judicially implied private remedy for violations of section 10(b), the Commission is expressly authorized to enjoin section 10(b) transgressions in section 21(d) of the 1934 Act. Similarly, for violations of section 17(a) of the 1933 Act, the SEC is expressly empowered under section 20(b) of the 1933 Act[88] to enjoin such acts. Both section 21(d) of the 1934 Act and 20(b) of the 1933 Act condition a court's power to issue an injunction upon "a proper showing" by the SEC that the defendant "is engaged or about to engage in any acts or practices which constitute or will constitute a violation" of the respective anti-fraud provisions. The text of these sections is devoid of any culpability standard.

Shortly after *Hochfelder* was decided, the Office of the General Counsel of the SEC issued a staff memorandum[89] that predicted that "[t]he *Hochfelder* decision clearly will have an impact upon pending and future Commission injunctive actions."[90] The first decision to assess such impact in the context of a section 10(b) violation was the Southern District of New York's opinion in *SEC v. Bausch & Lomb, Inc.*[91] Prior to *Bausch & Lomb*, the Second Circuit had consistently granted injunctions against defendants based merely on their unintentional misdeeds.[92] After reviewing *Hochfelder's* conclusion that the language and history of section 10(b) proscribed only intentional misconduct, the district court in *Bausch & Lomb* reasoned that the same must be true for all plaintiffs pursuing remedies under section 10(b)—regardless of the identity of the plaintiff or the nature of the remedy sought.[93] Since *Hochfelder* refused to consider policy considerations supporting a relaxed culpability standard,[94] the district court felt constrained to do likewise.[95]

The continued vitality of the Second Circuit's pre-*Bausch & Lomb* view

88. For the text of § 20(b) of the 1933 Act and § 21(d) of the 1934 Act, see note 6 *supra*.

89. Memorandum from The Office of the General Counsel of the Securities and Exchange Commission to Commission Staff Attorneys Regarding *Ernst & Ernst v. Hochfelder* (Apr. 26, 1976), *reprinted in* SEC. REG. & L. REP. (BNA) F-1 (May 26, 1976), [hereinafter cited as SEC Staff Memo].

90. *Id.* at F-1 (footnote omitted).

91. 420 F. Supp. 1226 (S.D.N.Y. 1976), *aff'd on other grounds*, 565 F.2d 8 (2d Cir. 1977). The Supreme Court's decision in *Hochfelder* was rendered during the course of the trial in *Bausch & Lomb*. On appeal to the Second Circuit, the Court of Appeals specifically refrained from deciding "whether scienter is a necessary predicate for injunctive relief." *Id.* at 14.

92. *See* note 21 *supra* and accompanying text.

93. The *Bausch & Lomb* court stated:

> Argument drawing upon the words of § 10(b) and the history, legislative and administrative, of both § 10(b) and Rule 10b-5 applies equally to private suits and actions brought by the Commission.
>
> . . . .
>
> A careful analysis of *Hochfelder* has convinced this Court that the distinction is no longer to be drawn and that the identical standard under § 10(b) and Rule 10b-5 must be applied whether the plaintiff is the SEC or a private litigant.

420 F. Supp. at 1241, 1243 n.4.

94. 425 U.S. at 214 n.33.

95. 420 F. Supp. at 1241. The district court noted that "[o]nly policy considerations . . . could support" a relaxation of the scienter requirement. *Id.*

of the culpability standard in injunctive proceedings was suggested in *Arthur Lipper Corp. v. SEC*.[96] The court reviewed an SEC order revoking a broker-dealer's registration because of violations of section 10(b).[97] Judge Friendly likened a private damages action to an SEC administrative disciplinary proceeding: both remedies visit "serious consequences on past conduct," and proof of scienter is, therefore, warranted in both actions. This is in contrast, the court urged, to SEC injunctive suits whose design "is solely to prevent threatened future harm."[98] In view of this distinction as to the nature of the remedies, *Arthur Lipper* intimated that *Hochfelder*'s scienter rule did not apply to Commission injunctive proceedings.[99]

The Second Circuit further questioned *Bausch & Lomb's* holding in *SEC v. Universal Major Industries Corp.*[100] The Commission in this case sought an injunction against an attorney who allegedly aided and abetted his client in selling unregistered securities in violation of section 5 of the 1933 Act.[101] The defendant argued that, pursuant to *Hochfelder*, intent to deceive must be proved. The court in *Universal Major* granted the injunction, noting, by way of dictum, that "*Hochfelder*, which was a private suit for damages, does not undermine our prior holdings" that scienter is not required in SEC injunctive proceedings.[102]

Notwithstanding the Second Circuit's aversion to the *Bausch & Lomb* rationale, the Fifth Circuit required scienter in an SEC injunctive suit in *SEC v. Blatt*.[103] The Fifth Circuit essentially echoed the analysis of *Bausch & Lomb*[104]—with one significant wrinkle. The *Hochfelder* Court had read the language and history of section 10(b) to require scienter; however, *Hochfelder* involved a remedy not rooted in the language of the statute—it was concerned with a judicially created private cause of action.[105] The *Blatt* court reasoned that since Congress had *expressly* empowered the SEC to seek injunctive relief for section 10(b) violations through section 21(d) of the 1934

96. 547 F.2d 171 (2d Cir. 1976), *cert. denied*, 434 U.S. 1009 (1977).

97. *Id.* at 173. The statutory culpability standard in SEC administrative enforcement actions is "willfully." Section 15(b)(4) of the 1934 Act, 15 U.S.C. § 78o(b)(5) (1976). The Tenth Circuit in Mawod v. SEC, 591 F.2d 588, 596 (10th Cir. 1979), considered the reach of *Hochfelder* in the context of SEC sanctions against broker-dealers. *See generally Securities, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 319, 323-28 (1980).

When considering broker-dealer suspensions and revocations, courts have traditionally viewed this remedy as more prophylactic than punitive. Accordingly, the courts have relaxed the § 15(b)(4) willfulness requirement. *See generally The Scienter Requirement*, *supra* note 16, at 433 n.79.

98. 547 F.2d at 180 n.6.

99. *Id.*

100. 546 F.2d 1044 (2d Cir. 1976), *cert. denied*, 434 U.S. 834 (1977).

101. 15 U.S.C. § 77e (1976). It is noteworthy that the Commission did not allege a § 10(b) violation, especially since the defendant's conduct appeared to be actionable under rule 10b-5. *See, e.g.*, SEC v. Spectrum, Ltd., 489 F.2d 535 (2d Cir. 1973); *see generally* GA. L. REV., *supra* note 15, at 886 n.35.

102. 546 F.2d at 1047. The Second Circuit did not rest its holding on the "negligence-scienter argument." Rather, *Universal Major* found that the defendant acted with scienter (*i.e.*, with knowledge or reckless disregard for the truth), obviating the good faith defense.

103. 583 F.2d 1325 (5th Cir. 1978).

104. *Id.* at 1332-34.

105. *See* note 64 *supra*.

Act,[106] arguably "the scienter requirement implicit in the statute [section 10(b)] must have been intended for SEC proceedings."[107] Therefore, the *Blatt* court drew "a stronger inference that Congress intended to require scienter in SEC actions than in private damages suits."[108]

C. *The Supreme Court Decides That Scienter Is a Necessary Element of a Section 10(b) Violation*

1. The Court Relies on the *Hochfelder* Rationale

Delivering the opinion of the Court in *Aaron*, Justice Stewart ruled that the *Hochfelder* rationale "ineluctably leads to the conclusion that scienter is an element of a violation of section 10(b) and rule 10b-5, *regardless of the identity of the plaintiff or the nature of the relief sought.*"[109] Justice Stewart reasoned that *Hochfelder's* reading of section 10(b)'s language and legislative history controlled, regardless of whether the plaintiff was a private party suing for damages or the Commission seeking injunctive relief.[110] This view is consistent with the district court's decision in *Bausch & Lomb* and with the Fifth Circuit's opinion in *Blatt*. *Aaron* also embraced the novel reasoning expressed by the Fifth Circuit in *Blatt*.[111] Since *Hochfelder* involved a judicially implied action not within Congress' contemplation, it would be "quite anomalous" if *Hochfelder's* interpretation of section 10(b) would not similarly govern the express remedy Congress created for the SEC.[112]

Justice Blackmun, dissenting in *Hochfelder*, had argued that the culpability standard "should not depend upon the plaintiff's identity."[113] The dissent could "see no real distinction" between private damages actions and SEC enforcement proceedings, both predicated on section 10(b).[114] The *Aaron* decision at least settles Justice Blackmun's concern for judicial inconsistency.

In its treatment of *Aaron*, the Second Circuit had looked to section 21(d)

106. The text of § 21(d) of the 1934 Act is contained in note 6 *supra*.

107. 583 F.2d at 1333 n.21.

108. *Id.*

109. 100 S. Ct. at 1952 (emphasis added).

110. *Id. Aaron* noted that the third leg of *Hochfelder's* analysis—the structure of civil liability provisions in the 1933 and 1934 Acts—would not be relevant in a statutory injunctive action. *Id.* at 1952-53 n.9. *Hochfelder* did not rest its decision solely on this third factor. Rather, Justice Powell urged that the text of § 10(b), standing alone, was sufficient to support a scienter standard. 425 U.S. at 201.

111. *See* notes 103-08 *supra* and accompanying text.

112. 100 S. Ct. at 1952-53.

113. 425 U.S. at 217 (1976) (Blackmun, J., dissenting). The Commission also advanced the position that the plaintiff's identity was irrelevant to imposing a scienter standard. Brief for SEC as Amicus Curiae at 8, 16-17, Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

114. 425 U.S. at 217-18. Justice Blackmun also dissented in *Aaron*. His assertions in *Hochfelder* seem somewhat incongruous with his position in *Aaron* that the SEC—and not a private party—should be granted an injunction under § 10(b) when the defendant is merely negligent. In fairness to Justice Blackmun, however, it appears that he is consistently advocating the view that *Hochfelder* reached the wrong conclusion, and both private damages actions and SEC injunctive proceedings should be successful if the plaintiff can show mere unintentional conduct.

of the 1934 Act[115] to determine if scienter was required in SEC actions.[116] The Second Circuit noted that during enactment of the Securities Acts Amendments of 1975, Congress expressed an intent to exempt the Commission from the scienter requirement.[117] The Senate Report provided: "In particular, issues related to matters of damages, such as scienter, causation and the extent of damages are elements *not* required to be demonstrated in a Commission injunctive action."[118] The Second Circuit concluded that the legislative intent of section 21(d) indicated that scienter was not contemplated for SEC injunctive suits.[119]

Justice Stewart rejected, without discussion, the notion that the legislative history of section 21(d) suggests a relaxation of the scienter requirement in SEC actions.[120] Moreover, a closer examination of the language of section 21(d) belies the Second Circuit's position. Section 21(d) provides that the SEC is authorized to seek injunctive relief only when it appears that the defendant "is engaged or is about to engage in acts or practices *constituting a violation* of [section 10(b)]" and that "upon a proper showing" a district court shall grant the injunction.[121] As Justice Stewart explained, at minimum "a proper showing" must include proof that the defendant is presently engaged in, or is about to engage in, a substantive violation of section 10(b).[122] Since the Court in *Hochfelder* read the language and history of section 10(b) as requiring a showing of scienter before a court can conclude that section 10(b) has been violated, an injunction likewise is not authorized under section 21(d) until scienter has been proven.[123]

2. The *Aaron* Court Distinguishes a Prior Decision

The Commission urged the Court in *Aaron* to look to *SEC v. Capital Gains Research Bureau, Inc.*,[124] for precedential guidance.[125] Justice Stewart refused

115. Section 21(d) is the explicit statutory provision in the 1934 Act which empowers the Commission to seek an injunction. The text of § 21(d) is found at note 6 *supra*.

116. SEC v. Aaron, 605 F.2d 612, 621-22 (2d Cir. 1979).

117. *Id.* at 622.

118. S. REP. NO. 75, 94th Cong., 1st Sess. 76 (1975), *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 179, 254 (citations omitted) (emphasis in original).

119. 605 F.2d at 622.

120. The Supreme Court did not address the Senate Report referred to in the court of appeals decision. Justice Stewart simply declared that "there is nothing in the legislative history of [§ 21(d)] to suggest a contrary intent." 100 S. Ct. at 1958.

121. 15 U.S.C. § 78u(d) (1976) (emphasis added).

122. 100 S. Ct. at 1957-58. The *Aaron* Court said:

> The elements of "a proper showing" thus include, at a minimum, proof that a person is engaged in or is about to engage in a substantive violation of either one of the Acts [1933 or 1934 Acts] . . . . Accordingly, when scienter is an element of the substantive violation sought to be enjoined, it must be proven before an injunction may issue.

Id.

123. In response, the Second Circuit and the Commission would probably argue that, under § 21(d), it is not necessary to first prove a *past* violation of § 10(b) to obtain an injunction to prevent conduct that will violate the act. *See generally* GA. L. REV., *supra* note 15, at 890-91; Comment, *SEC Injunctive Suits*, *supra* note 16, at 1023. As a practical matter, however, courts generally are reluctant to enjoin future violations without a showing that the defendant has already acted with scienter. This is apparent even in those circuits that concluded § 10(b) would be violated if the defendant engaged in mere negligent behavior. *See* Lowenfels, *supra* note 16, at 790; *New Light on an Old Debate*, *supra* note 16, at 784.

124. 375 U.S. 180 (1963).

this advice, concluding "that the controlling precedent here is not *Capital Gains* but rather *Hochfelder*."[126]

In *Capital Gains*, the Court decided whether section 206(2) of the Investment Advisers Act of 1940[127] (IAA) required the Commission to prove scienter when it sought injunctive relief.[128] The Court ruled that a showing of intent to defraud was not required.[129] The decision rested upon the legislative intent apparent in enacting the IAA, the elements of common law fraud, and the appropriate scienter requirement when a fiduciary duty is present.[130]

Justice Goldberg, speaking for the *Capital Gains* Court, focused chiefly on the IAA's purpose: to expose or eliminate all of an investment advisor's conflicts of interest in connection with his fiduciary position.[131] The Supreme Court held, accordingly, that "[i]t would defeat the manifest purpose" of the IAA if the SEC was required to prove the advisor's state of mind.[132] Second, *Capital Gains* drew a distinction between actions at law and actions in equity.[133] Courts traditionally have relaxed the culpability requirement in light of the nature of the action (at law or in equity), the character of the transaction,[134] and the special relationships of the parties.[135] Additionally, the Court observed that the elements of a fraud action should be tempered when a fiduciary relationship is part of the factual setting.[136]

The *Aaron* Court distinguished *Capital Gains* on three grounds: the legislative history, the statutory language, and the special fiduciary relationship.[137] The majority in *Capital Gains* had looked to the congressional intent surrounding the IAA to support its conclusion that scienter is not required in actions under section 206(2). In contrast, the Court in *Hochfelder* inferred, from the legislative history of section 10(b), a congressional reluctance to expand the ambit of liability to include unintentional behavior.[138] Justice Stewart in *Aaron* indicated that the phrase "any . . . course of business which operates as a fraud or deceit," in section 206(2) is concerned with the

125. Aaron v. SEC, 100 S. Ct. 1945, 1953 (1980).

126. *Id.* at 1954.

127. 15 U.S.C. § 80b-6 (1976). For the text of § 206(2), *see* note 201 *infra*.

128. 375 U.S. at 181-82.

129. *Id.*

130. *See generally* Berner & Franklin, *supra* note 16, at 781-85; *The Scienter Requirement*, *supra* note 16, at 435-37; Comment, *SEC Injunctive Suits*, *supra* note 16, at 1021-23.

131. 375 U.S. at 191-92.

132. *Id.* at 192.

133. *Id.* at 192-95.

134. *Id.* at 194. The Court noted:

> There has also been a growing recognition by common-law courts that the doctrines of fraud and deceit which developed around transactions involving land and other tangible items of wealth are ill-suited to the sale of such intangibles as advice and securities, and that, accordingly, the doctrines must be adapted to the merchandise in issue.

Id. (footnote omitted).

135. Justice Goldberg stressed that in a fiduciary relationship, it was not necessary at common law to establish all the elements of an arm's-length transaction. *Id.*

136. *Id.*

137. 100 S. Ct. at 1954-55.

138. *Id.* at 1954. *See generally* Note, *The Investment Advisers Act and the Supreme Court's Interpretation of its Antifraud Provisions*, 37 S. CAL. L. REV. 359, 366 (1964).

effect of the transaction—not the state of mind of the actor.[139] Section 10(b), however, contains the terms "manipulative" and "contrivance" that in *Hochfelder* were held to clearly refer to a state-of-mind requirement. The Court noted that section 206(2) governs a special fiduciary relationship, that of an investment advisor to his client. Section 10(b), in contrast, applies equally to fiduciary relationships and arm's-length transactions.[140] An additional factor served to circumscribe *Capital Gains's* precedential value to the Court in *Aaron*: Justice Goldberg had specifically found that the defendant's conduct was purposeful; the case did not involve unintentional misconduct.[141] In addition, Justice Goldberg cited authority for the proposition that at common law, fraud had a broader sweep in equity than at law.[142] Indeed, equitable relief traditionally was granted without a showing of the defendant's state of mind.[143] The relief granted was usually rescission, reformation of contract, or imposition of an equitable lien.[144] An injunction was viewed as a more drastic remedy.[145] The Court in *Capital Gains*, however, reasoned that an injunction was a "mild prophylactic" and thus the elements of common law fraud ought to be moderated.[146] Lower federal courts subsequently have recognized that an injunction can be a punitive sanction.[147]

D. *Post*-Hochfelder *Cases Predicated on Section 17(a) Violations*

The SEC Staff Memo that followed in the wake of *Hochfelder* correctly anticipated an avenue of escape from the scienter burden involved in SEC attempts to enjoin conduct violative of section 10(b). The memorandum urged the staff to include allegations of violations of section 17(a) of the 1933 Act in their complaints. It was asserted that even if the court should read *Hochfelder* "in a manner hostile to the Commission," the court still would have "an alternative basis upon which to find a violation and to issue an injunction."[148]

Less than two months after *Bausch & Lomb* was decided, the First Circuit, in *SEC v. World Radio Mission, Inc.*,[149] was faced, not surprisingly, with a

139. 100 S. Ct. at 1954. Section 206(2) of the IAA is essentially identical to rule 10b-5(c) and Section 17(a)(3) of the 1933 Act. *Aaron* interpreted the similar wording of these sections in a consistent fashion, since the high Court read section 17(a)(3) not to include a scienter requirement. *See* notes 224-29 *infra* and accompanying text.

140. 100 S. Ct. at 1954.

141. 375 U.S. at 192 n.39. The conduct of Peter Aaron, similarly, involved an intent to defraud.

142. *Id.* at 193.

143. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 687-88 (4th ed. 1971).

144. *Id.* at 687.

145. *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292-96 (1976).

146. 375 U.S. at 193. Chief Justice Burger, in his *Aaron* concurrence, urged that "[a]n injunction is a drastic remedy, not a mild prophylactic." 100 S. Ct. at 1959.

147. *E.g.*, SEC v. Caterinicchia, 613 F.2d 102, 105 (5th Cir. 1980) (characterizing statutory injunctive relief as an extraordinary measure); SEC v. Cenco Inc., 436 F. Supp. 193, 198 (N.D. Ill. 1977) ("We agree that no injunction should be lightly issued, for the ramifications are very serious.") *See* notes 281-300 *infra* and accompanying text.

148. SEC Staff Memo, *supra* note 89, at F-3.

149. 544 F.2d 535 (1st Cir. 1976).

Commission enforcement action founded both on section 17(a) and section 10(b).[150] The First Circuit, limiting *Hochfelder*'s good faith defense to private actions for past anti-fraud violations,[151] concluded that a defendant's state of mind is irrelevant to an injunction determination.[152] The function of an injunction, the court explained, was to "protect the public against conduct, not to punish a state of mind."[153] *World Radio Mission* did not concern itself with the sweep of *Hochfelder*; rather, the First Circuit rested its decision solely on section 17(a) and ignored the section 10(b) claim.[154] The defendant argued that since section 17(a) contains language virtually identical to rule 10b-5(2),[155] and since *Hochfelder* read section 10(b) as requiring scienter, section 17(a) should be similarly interpreted.[156] The First Circuit recognized the fallacy in this argument.[157] The Supreme Court in *Hochfelder* acknowledged that the language of rule 10b-5, of its own force, may be read to include negligent behavior.[158] Justice Powell, however, held that such a reading of the rule would exceed the statutory rulemaking authority of the Commission, since the Court interpreted section 10(b) to require a showing of scienter.[159] If anything, *Hochfelder's* narrow interpretation of rule 10b-5 reinforces *World Radio Mission's* view of section 17(a).[160] Although both Section 17(a) and section 10(b) are commonly referred to as the antifraud provisions of the securities laws, section 17(a) has its own language and legislative history,[161] which should be accorded independent vitality and not swallowed by the *Hochfelder* view of section 10(b).[162]

In a well-reasoned opinion, the Second Circuit, in *SEC v. Coven*,[163] upheld an SEC injunction based on section 17(a) violations in the absence of an intent to defraud. Following the First Circuit's lead in *World Radio Mission*, Judge Mansfield, for the *Coven* court, focused solely on section 17(a) and explicitly refrained from deciding whether scienter was required in SEC actions under section 10(b).[164] Judge Mansfield's examination of section 17(a) virtually paralleled the *Hochfelder* treatment of section 10(b). Specifically,

150. *Id.* at 537.
151. *Id.* at 540.
152. *Id.*
153. *Id.* at 541.
154. *World Radio Mission* noted: "Thus, strictly speaking, since this action is founded on both section 17(a) and Rule 10b-5, we need not decide what result would obtain in an SEC injunction action based solely on section 10(b) and Rule 10b-5 . . . ." *Id.* at 541 n.10.
155. For the language of rule 10b-5 and section 17(a) of the 1933 Act, see, respectively, notes 20 and 31 *supra*. Indeed, the language of rule 10b-5 was borrowed by the SEC from § 17(a). The Commission sought to make § 17(a)'s proscriptions applicable to buyers as well as sellers. 3 L. LOSS, SECURITIES REGULATION 1426-27 (2d ed. 1961).
156. 544 F.2d at 541 n.10.
157. *Id.*
158. *See* notes 73-77 *supra* and accompanying text.
159. 425 U.S. at 212-14.
160. *E.g.*, SEC v. Coven, 581 F.2d 1020, 1027 (2d Cir. 1978), *cert. denied*, 440 U.S. 950 (1979). *See generally* Comment, *SEC Injunctive Suits*, *supra* note 16, at 1021 n.24; Note, *Scienter and SEC Injunctive Actions Under Securities Act 17(a)*, 63 IOWA L. REV. 1248, 1255-56 (1978) [hereinafter cited as Note, *Securities Act 17(a)*].
161. *See* notes 174-80 *infra* and accompanying text.
162. For an argument that scienter should be required for actions predicated on § 17(a), see Berner & Franklin, *supra* note 16, at 796 n.221.
163. 581 F.2d 1020 (2d Cir. 1978), *cert. denied*, 440 U.S. 950 (1979).
164. *Id.* at 1026 n.10.

Coven reviewed the language of section 17(a), the legislative history, and the structure of the remedies of the securities acts.

The *Coven* court viewed section 17(a)(2)'s language as giving no indication of a good faith defense that would imply a culpability standard requiring scienter.[165] In addition, the Second Circuit read the clause "operate as a fraud or deceit" of subsection (3) as focusing attention on the *effect* of the misrepresentation on the investing public, not on the actor's state of mind.[166] Some courts[167] and commentators[168] have maintained that the use of the terms "fraud" and "deceit" in subsection (3) inherently entails an intent requirement. The *Coven* court disagreed.[169] Judge Mansfield viewed the legislative thrust of section 17(a) as expanding common law fraud to allow actions in the absence of scienter.[170] Indeed, frustration with the ineffectiveness of a tort action in fraud was one of the considerations in drafting the 1933 Act.[171] Moreover, Justice Powell in *Hochfelder* noted that "[v]iewed in isolation the language of [rule 10b-5(2)] and arguably that of [rule 10b-5(3)], could be read as proscribing . . . any course of conduct . . . whether the wrongdoing was intentional or not."[172]

After canvassing congressional history regarding the appropriate culpability standard for section 17(a), the Second Circuit concluded that its "reading of the language of section 17(a) is in accord with its [section 17(a)'s] legislative history."[173] Without recounting the details of the legislative his-

165. *Id.* at 1026.

Most commentators agree that § 17(a)(2) has no scienter requirement. *E.g.*, 6 L. LOSS, SECURITIES REGULATION 3552-53 (2d ed. Supp. 1969). *Contra*, Meisenholder, *infra* note 168, at 41. Section 17(a)(2) contains no reference to fraud, deceit, or manipulation. It prohibits the procurement of property through a material misrepresentation. Of course, one can negligently or intentionally mislead another. This statutory subsection looks to the end result and appears indifferent to the actor's state of mind.

166. *Id.* at 1026 n.11.

167. *E.g.*, Sanders v. John Nuveen & Co., Inc., 554 F.2d 790 (7th Cir. 1977); Trussell v. United Underwriters, Ltd., 228 F. Supp. 757, 770 (D. Colo. 1964). *Sanders* argued that "even if such a private cause of action does exist under § 17(a), it would require proof of scienter. Proof of scienter is unquestionably required as to subsections (1) and (3) which specifically refer to fraud. Subsection (2), on the other hand, does not expressly refer to fraud." 554 F.2d at 795.

168. *E.g.*, 3 A. BROMBERG, SECURITIES LAW: FRAUD, SEC RULE 10b-5 § 8.4(330), at 204.23 (1977); 3 L. LOSS, SECURITIES REGULATION 1440-41 (2d ed. 1961). *See generally* Meisenholder, *Scienter and Reliance as Elements in Buyer's Suit Against Sellers Under Rule 10b-5*, 4 CORP. PRAC. COMMENTATOR 1963, at 27, 44-47.

169. 581 F.2d at 1026 n.11.

170. *Id.*

171. *See, e.g.*, S. REP. NO. 47, 73d Cong., 1st Sess. 2 (1933); H.R. REP. NO. 85, 73d Cong., 1st Sess. 1-3 (1933); 77 CONG. REC. 2983 (1933) (remarks of the sponsor of the Senate bill).

Other commentators have argued for interpreting subsection (3) to include within its proscription negligent conduct, but for different reasons. One author, for example, emphasized subsection (3)'s focus upon the effect of the defendant's conduct rather than his mental culpability. *The Scienter Requirement*, *supra* note 16, at 431 n.72. Still another commentator engaged in a different analysis. *See generally* Note, *Securities Act 17(a)*, *supra* note 160, at 1253-54. The author begins with the premise that "a statute should be construed in a manner that would give effect to all its provisions." *Id.* at 1253. Accordingly, the additional language of subsection (3) must make it somewhat unique from subsection (1). Given that subsection (1) proscribes only intentional conduct, the commentators conclude that subsection (3)'s ambit should include actions "done without the intent or knowledge of the defendant." *Id.* at 1254.

172. 425 U.S. at 212. Of course, the text of rule 10b-5(3) is virtually identical to subsection (3) of section 17(a).

173. 581 F.2d at 1027.

tory,[174] the essence of it is as follows: The House and Senate passed different versions of the 1933 Act. The House bill, H.R. 5480,[175] did not include a willfulness requirement, but the Senate bill, S. 875,[176] included the phrases "willfully to employ" and "with intent to defraud."[177] After the House refused to agree to the Senate's bill, a Conference Committee was appointed.[178] Section 17(a) of the Committee's bill was patterned after H.R. 5480,[179] thus deleting the Senate's state-of-mind language. The Second Circuit in *Coven* reasoned that since the Conference Committee "opted for liability without willfulness, intent to defraud, or the like," the conferees could not have intended to impose a showing of scienter under section 17(a).[180]

Finally, in *Coven*, the Second Circuit recognized a concern shared by the Supreme Court in *Hochfelder*: A reading of section 10(b) that would permit private suits based upon unintentional conduct would undermine those sections of the 1933 Act explicitly based on a negligence standard. This is because unlike section 10(b), sections 11, 12(2) and 15 of the 1933 Act contain procedural limitations that impinge upon a plaintiff's ability to bring suit.[181] Even assuming the existence of a judicially implied private right of action under section 17(a),[182] the Second Circuit noted that *Hochfelder*'s procedural limitation concern could not properly act to limit the ambit of section 17(a) when the SEC is the plaintiff.[183] In the face of section 20(b) of the 1933 Act, which explicitly authorizes the injunctive action for violation of, *inter alia*, section 17(a), Congress clearly recognized the potential liability to defendants involved in Commission enforcement suits.

Shortly after *Coven*, the Fourth Circuit, in *SEC v. American Realty Trust*,[184] decided that "in an action for an injunction against future violations brought by the Commission, proof of scienter is unnecessary."[185] Fol-

174. For a thorough examination of the legislative history surrounding section 17(a), see Note, *Securities Act 17(a)*, *supra* note 160, at 1257-59. For the history of the 1933 Act in general, see *The Scienter Requirement*, *supra* note 16, at 429-35, and Landis, *The Legislative History Of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 45 (1959).

175. H.R. REP. NO. 85, 73d Cong., 1st Sess. (1933). During the House hearings, H.R. 5480 was substituted for H.R. 4314.

176. S. REP. NO. 47, 73d Cong., 1st Sess. (1933), *reprinted in Hearings on S. 875 Before the Senate Committee on Banking and Currency*, 73d Cong., 1st Sess. 1-8 (1933).

177. The Senate bill, after amendment, included the following provision:

> Sec. 13. It shall be unlawful for any person, firm, corporation, or other entity, directly or indirectly, in any interstate sale . . . or distribution of any securities *willfully* to employ any device, scheme, or artifice . . . *with the intent to defraud* or to obtain money or property by means of any false pretense . . . or to engage in any transaction . . . relating to the interstate purchase or sale of any securities which operates or would operate as a fraud upon the purchaser . . . . S. 875, 73d Cong., 1st Sess. (1933) (emphasis added).

178. 77 CONG. REC. 3000, 3085 (1933).

179. H.R. CON. REP. NO. 152, 73d Cong., 1st Sess. 12, 27 (1933).

180. 581 F.2d at 1027.

181. *See* notes 65-72 *supra* and accompanying text.

182. *See* note 64 *supra*.

183. 581 F.2d at 1027.

The Ninth Circuit, in SEC v. Blazon Corp., 609 F.2d 960 (9th Cir. 1979), relied almost totally on *Coven's* rationale and held that "[a] showing of fraudulent intent is not required in an action for an injunction brought by the Commission under § 17(a)." *Id.* at 965.

184. 586 F.2d 1001 (4th Cir. 1978).

185. *Id.* at 1002.

lowing the blueprint established by the First and Second Circuits, *American Realty* confined its attention to section 17(a),[186] examining the language of subsection (2) of section 17(a)[187] and its legislative history.[188] In addition, *American Realty* distinguished the decision of the Seventh Circuit in *Sanders v. John Nuveen & Co., Inc.*,[189] which was based upon a private action for damages. The Fourth Circuit commented that pursuant to "the whole legislative scheme," a court should not imply a private right of action under section 17(a) without simultaneously "including a requirement of fraud or willfulness."[190] In dictum,[191] the *American Realty* opinion clearly indicated that it probably would not create such a private action, and, therefore, the language of section 17(a)(2) could be accorded its commonly accepted meaning. The *American Realty* court went on to conclude that those considerations were immaterial when the Commission pursued its statutorily created injunction.[192]

The circuit opinion most relevant to the *Aaron* decision is that of *Steadman v. SEC*.[193] The Court in *Aaron*[194] ultimately embraced the Fifth Circuit's reasoning in *Steadman*. With this decision, the Fifth Circuit came full circle. The Fifth Circuit had previously held in *Blatt* that the Commission must prove scienter in an injunctive action under section 10(b).[195] In *Steadman*, the court clarified its position on scienter when the Commission, in an administrative proceeding under section 15(b) of the 1934 Act,[196] sought to discipline an investment advisor based on alleged violations of section 17(a) of the 1933 Act. For the most part, the court followed existing post-*Hochfelder* precedent,[197] with special emphasis on *Coven*;[198] *Steadmen* offered some unique contributions, however.

The petitioner in *Steadman* contended that *Coven* was distinguishable—an injunctive action as opposed to an administrative disciplinary proceeding. Judge Tjoflat, for the court, refused to interpret the language of 17(a) one

186. "And because of the Supreme Court's holding in [*Hochfelder*], that scienter must be proven in a private action under § 10(b) and Rule 10b-5, we will confine our attention to § 17 of the Securities Act of 1933." *Id.* (footnote omitted).

187. Contrary to *Coven*, the Fourth Circuit suggested it would have read § 17(a)(3), which includes the language "operates or would operate as a fraud," as connoting a scienter requirement. *Id.* at 1006.

188. *American Realty* found itself "in complete agreement" with *Coven's* reading of § 17(a)'s legislative history. *Id.*

189. 554 F.2d 790 (7th Cir. 1977). *Sanders* interpreted subsection (2) of § 17(a) as mandating an intent requirement: "Even if we assume that an implied cause of action does exist under § 17(a), for the same reasons expressed by the Court in *Hochfelder* we do not believe that such cause of action can be premised upon negligent wrongdoing." *Id.* at 796.

190. 586 F.2d at 1006-07.

191. The Fourth Circuit was faced with an SEC enforcement action, not a private damages action. *Id.* at 1007.

192. *Id.* at 1006-07.

193. 603 F.2d 1126 (5th Cir. 1979).

194. For a discussion of *Aaron*, *see* text accompanying notes 207-29 *infra*.

195. *See* notes 103-08 *supra* and accompanying text.

196. A review of SEC administrative disciplinary proceedings is contained in note 97 *supra*.

197. Pursuant to *World Radio Mission*, the Fifth Circuit was careful to concentrate on § 17(a), and not § 10(b). Furthermore, *Steadman* discussed, as did *Coven* and *American Realty*, the language and legislative history of § 17(a).

198. *Steadman* specifically adopted *Coven's* interpretation of the legislative history of § 17(a)(3). 603 F.2d at 1132-33.

way when the remedy was an injunction and yet another way when a stronger sanction was sought.[199] In sum, the court ruled that the reach of section 17(a) turned not on the character of the relief sought but rather it turned on the language of the statute.[200]

Steadman, like *Coven*, construed subsection (3) of section 17(a) as imposing liability for mere negligence. To support this reading of subsection (3), Judge Tjoflat cited the Supreme Court's construction of identical language in section 206(2) of the IAA[201] in *Capital Gains*.[202] In *Capital Gains*, the Supreme Court rejected the position that the terms "fraud" and "deceit" required proof of scienter.[203] The Supreme Court reasoned that "Congress intended the [IAA] to be construed like other securities legislation . . . not technically and restrictively, but flexibly to effectuate its remedial purposes."[204]

Perhaps the most significant discussion in *Steadman* was its interpretation of the clause "to employ any device, scheme, or artifice to defraud" contained in section 17(a)(1).[205] The court concluded that the phrases "device to defraud", "scheme to defraud", and "artifice to defraud", when viewed separately, gave rise to a strong implication that this subsection required intentional misconduct.[206]

E. *The Supreme Court Decided Against A Uniform Section 17(a) Culpability Requirement*

The *Aaron* Court prefaced its analysis of the language and legislative history of section 17(a) of the 1933 Act with a discussion of some guidelines for courts construing federal securities statutes.[207] Justice Stewart faced two lines of precedent. *Capital Gains* stressed that securities legislation should be interpreted "not technically and restrictively, but flexibly to effectuate its remedial purposes."[208] *SEC v. Sloan*,[209] however, emphasized that waving the "remedial purposes" banner will not justify reading securities laws "more broadly than [their] language and the statutory scheme reasonably per-

199. 603 F.2d at 1133.

200. A similar line of reasoning was followed in *Blatt* regarding a good faith defense to a § 10(b) violation. The court held that § 10(b) afforded the defendant a good faith defense whether the relief sought was money damages or an injunction. *See* notes 103-08 *supra* and accompanying text.

201. 15 U.S.C. § 80b-6(2) (1976). This section provides that:

> It shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> . . . .
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

202. 375 U.S. 180 (1963).

203. *Id.* at 195.

204. *Id. See also* Note, *Securities Act 17(a)*, *supra* note 160, at 1257.

205. 603 F.2d at 1133.

206. *Steadman* also noted that *Hochfelder* found the terms "device" and "employ" of § 10(b) as suggestive of intentional misconduct. *Id.*

207. 100 S. Ct. at 1955.

208. 375 U.S. at 195.

209. 436 U.S. 103 (1978).

mit."[210] *Aaron* concluded that if the statutory text of the securities laws "is sufficiently clear in its context and not at odds with the legislative history," a court should look no further.[211] Specifically, Justice Stewart admonished courts not to examine policy considerations when reading such statutes.[212]

1. Subsection (1) of Section 17(a)

The Court in *Aaron* essentially adopted the position of *Steadman*. The Supreme Court found that the language of subsection (1) of section 17(a) "strongly suggests" some scienter requirement.[213] Justice Stewart read the terms "device", "scheme", and "artifice" as connoting intentional misconduct.

Justice Stewart reviewed the legislative history surrounding section 17(a). As discussed in *Coven*, the Senate version of section 17(a) read "willfully to employ any device, scheme, or artifice."[214] The House bill, however, omitted the term "willfully."[215] Since the Conference Committee patterned its bill after the House bill,[216] the SEC urged that, by deleting this state-of-mind requirement, Congress intended to reject a scienter standard.[217] The Court's decision, however, drew the inference (since the Conference Report was silent as to the scienter question) that Congress believed that adding the term "willfully" would be "simply redundant."[218] Therefore, the Court in *Aaron* could find no "conflict between the reasonably plain meaning and legislative history."[219]

Justice Blackmun, in his dissent in *Aaron*,[220] disputed the Court's reading of section 17(a)(1). Looking to *Capital Gains* as the proper approach to reading securities statutes, Justice Blackmun viewed the phrase "device, scheme, or artifice to defraud" of subsection (1) as covering "a range of be-

210. *Id.* at 116.

211. 100 S. Ct. at 1955. A court still is vested with considerable discretion. For example, when are the securities provisions "sufficiently clear" or "not at odds with" Congress' intent?

212. The Court cited *Hochfelder*. A court can still consider policy factors if the language is not sufficiently clear or at odds with the statute's history. Moreover, this bar from examining policy applies only when a court is construing a specific provision. The admonition does not apply to a court considering whether to issue an injunction. *See* notes 255-59 *infra* and accompanying text.

213. 100 S. Ct. at 1955.

214. S. 875, 73d Cong., 1st Sess. (1933).

215. H.R. 5480, 73d Cong., 1st Sess. (1933). The House also rejected a proposal to modify the clause "to employ any device, scheme, or artifice," and to add "with intent to defraud." *Federal Securities Act: Hearings on H.R. 4314 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 1st Sess. 146 (1933).

216. H.R. CON. REP. NO. 152, 73d Cong., 1st Sess., 12, 27 (1933).

217. 100 S. Ct. at 1957.

218. *Id.* Justice Blackmun disputed this inference. The Justice contended that the Conference Report noted that several "clarifying changes" of the Senate bill were intended "to remove uncertainties" regarding SEC powers. H.R. CON. REP. NO. 152, 73d Cong., 1st Sess. 24 (1933). Justice Blackmun concluded that "retention of the Senate's explicit state-of-mind language undoubtedly would have added clarity to Congressional intent." 100 S. Ct. at 1961 n.1.

219. 100 S. Ct. at 1957. Justice Stewart did acknowledge, however, that the history of § 17(a) was "ambiguous." *Id.*

220. Justice Blackmun, with whom Brennan and Marshall joined, concurred in part and dissented in part. Chief Justice Burger wrote a separate concurrence.

havior including but not limited to intentional misconduct."[221] The dissent then proceeded to interpret "device to defraud" as reaching negligent acts as well.[222] Justice Blackmun, who also dissented in *Hochfelder*, apparently did not feel compelled to follow *Hochfelder*'s reading of "device": "[a term] that make[s] unmistakable a congressional intent to proscribe a type of conduct quite different from negligence."[223]

2. Subsections (2) and (3) of Section 17(a)

Aaron's view of subsections (2) and (3) paralleled the decisions of *Coven*, *American Realty*, and *Steadman*. Justice Stewart easily concluded that section 17(a)(2) "is devoid of any suggestion whatsoever of a scienter requirement."[224] *Aaron* cited *Hochfelder*'s interpretation of the similar language of rule 10b-5(2) as supporting its reading of section 17(a)(2).[225]

Similarly, Justice Stewart held that subsection (3) did not require the SEC to establish scienter.[226] After noting that section 17(a)(3) focuses on the effect of one's conduct—not on the actor's state of mind—the Supreme Court looked for further support to the argument advanced in *Steadman*.[227] That is, since the Supreme Court in *Capital Gains* concluded that section 206(2) of the IAA,[228] which contains essentially the same language as section 17(a)(3), did not require a showing of intentional misdeeds, no different result could occur under section 17(a)(3). Finally, Justice Stewart examined the legislative history of both section 17(a)(2) and 17(a)(3), and concluded that the history was "entirely consistent with the plain meaning of section 17(a)."[229]

IV. IMPLICATIONS OF *AARON*

A. *Only Seller's Negligent Misrepresentations Are Actionable*

Since the language of section 17(a) of the 1933 Act applies only to those who sell securities,[230] rule 10b-5 was promulgated to cover both purchasers and sellers.[231] In the wake of *Aaron*, however, courts will only be allowed to

221. 100 S. Ct. at 1961. Justice Blackmun noted that the terms are couched in the disjunctive and thus "each should be given its separate meaning." *Id.*

222. *Id.* Justice Blackmun relied principally on three grounds to support his reading of the term "device": (1) the legislative history used "device" as a synonym for "practice," a word that does not communicate a scienter requirement; (2) Congress has interpreted "device" in the context of § 15(c)(1) of the 1934 Act, 15 U.S.C. § 78o(c)(1) (1976), as including unintentional behavior; and (3) other statutes have given "device" a broad sweep. *Id.*

223. 425 U.S. at 199.

224. *Id.* at 1955. In fact, it appears generally agreed that "[t]here is nothing on the face of Clause (2) itself which smacks of *scienter* or intent to defraud." III L. LOSS, SECURITIES REGULATION 1442 (2d ed. 1961). *But see* Berner & Franklin, *supra* note 16, at 796-97 n.221.

225. *See* notes 155-60 *supra* and accompanying text.

226. 100 S. Ct. at 1955-56.

227. *See* notes 201-04 *supra* and accompanying text.

228. 375 U.S. at 200.

229. 100 S. Ct. at 1957.

230. Section 17(a) uses the phrase "[i]t shall be unlawful for any person in the offer or sale of any securities . . . ."

231. Ward La France Truck Corp., 13 S.E.C. 373, 381 (1943). Rule 10b-5 applies "in connection with the purchase or sale of any security."

enjoin a seller's unintentional misconduct. Justice Blackmun, in his *Aaron* dissent, denounced "this halfway-house approach" that "drives a wedge between" buyers and sellers.[232] Justice Blackmun stressed that this is the result of "the Court's technical linguistic analysis."[233] In the Court's defense, Chief Justice Burger, in his concurrence, stated that *Aaron* was compelled by *Hochfelder* and by the language of the anti-fraud provisions.[234] The Chief Justice noted that "if . . . the result [of the *Aaron* decision] is 'bad' public policy, that is the concern of Congress where changes can be made."[235]

As Justice Stewart noted, as recently as 1979 the Supreme Court had examined the differences among the three subparagraphs of section 17(a).[236] Justice Brennan, writing for the Court in *United States v. Naftalin*,[237] reasoned that "by the use of the infinitive 'to' to introduce each of the three subsections [of section 17(a)], and the use of the conjunction 'or' at the end of the first two, each subsection proscribes a distinct category of misconduct."[238]

One commentator has urged that the reach of section 17(a) need not be limited to sellers.[239] The same author emphasized that "the broader policies of the 1933 and 1934 Acts [to place buyers *and* sellers on equal footing] support treating them identically."[240]

B. *When Will an Injunction be Granted?*

The occurrence of past securities transgressions does not automatically give rise to injunctive relief.[241] Rather, the touchstone in a district court's calculus is whether there is a reasonable likelihood that a future violation will be committed.[242] Unlike a damages action, the purpose of an injunction is to prohibit continuing and future violations of the anti-fraud provisions.[243] An appeal to the equitable jurisdiction of the federal courts[244] permits a federal district court to weigh various factors,[245] such as the nature of the prior securities violations,[246] a past pattern of violations,[247] and the defendant's demeanor and cooperation,[248] when considering an injunctive

232. 100 S. Ct. at 1965.
233. *Id.*
234. *Id.* at 1958-59.
235. *Id.* at 1959.
236. *Id.* at 1956.
237. 441 U.S. 768 (1979).
238. *Id.* at 774 (footnote omitted).
239. *See generally The Scienter Requirement*, *supra* note 16, at 433-34.
240. *Id.* at 434 n.84 (footnote omitted).
241. *See* SEC v. Arthur Young & Co., 590 F.2d 785, 787 (9th Cir. 1979).
242. *E.g.*, SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972); SEC v. Culpepper, 270 F.2d 241, 249 (2d Cir. 1959). Jaeger & Yadley, *Equitable Uncertainties in SEC Injunctive Actions*, 24 EMORY L.J. 639, 640 n.5 (1975).
243. SEC v. Management Dynamics, Inc., 515 F.2d 801, 807 (2d Cir. 1975).
244. "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of Courts of equity." Meredith v. City of Winter Haven, 320 U.S. 228, 235 (1943).
245. *See generally* Harkleroad, *supra* note 16, at 491-96; Note, *Judicial Discretion*, *supra* note 16, at 343-53.
246. *See* SEC v. Coffey, 493 F.2d 1304, 1314 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975).
247. *See* SEC v. Shapiro, 494 F.2d 1301, 1308 (2d Cir. 1974).
248. *See* SEC v. Pearson, 426 F.2d 1339, 1343 (10th Cir. 1970).

remedy.

The single most important measure used in the balancing scheme is the defendant's mental culpability.[249] While a showing of good faith may not conclusively bar injunctive relief,[250] proof of misrepresentations made in bad faith may present a formidable hurdle for the defendant.[251] Indeed, Chief Justice Burger observed in *Aaron* that "it will almost always be necessary for the Commission to demonstrate that the defendant's past sins have been the result of more than negligence."[252] Although the Chief Justice did not cite any authority, lower courts[253] and commentators[254] support his observation.

C. *The Role of Policy Considerations*

Both *Hochfelder*[255] and *Aaron*[256] found the statutory language and the legislative history of the securities acts sufficiently clear to preclude analysis of the policy arguments advanced. This is not to say, however, that policy considerations will not play a role under the securities statutes. Justice Rehnquist was eager to weigh policy considerations[257] when he determined the scope of standing under rule 10b-5 in *Blue Chip Stamps v. Manor Drug Stores*.[258] In addition, a district court, in the exercise of its equitable discretion, will still balance the public and private interests involved before issuing an injunction. Specifically, even after a trial court follows *Aaron's* holding on the scienter requirement and ultimately finds securities violations—at all times closing its eye to policy—the same court still must weigh the compet-

249. *See* Note, *Judicial Discretion*, *supra* note 16, at 343-46; Comment, *SEC Injunctive Suits*, *supra* note 16, at 1025-26. The Court in *Aaron* noted that "[a]n important factor . . . is the degree of intentional wrongdoing evident in a defendant's past conduct." 100 S. Ct. at 1958.

250. *See* Harkleroad, *supra* note 16, at 494. It must be remembered that this discussion of good faith is beyond the question of what constitutes a violation of § 17(a) or § 10(b).

251. *See, e.g.*, SEC v. Broadwall Sec., Inc., 240 F. Supp. 962 (S.D.N.Y. 1965).

252. 100 S. Ct. at 1959.

253. *See, e.g.*, SEC v. Blatt, 583 F.2d 1325, 1334-35 (5th Cir. 1978); SEC v. Wills, [1979 Decisions] FED. SEC. L. REP. (CCH) ¶ 96,712 at 94,771-72 (D.D.C. Dec. 14, 1978).

254. Two commentators have examined post-*Hochfelder* decisions and both conclude that not one court has issued an injunction without a showing of scienter: Lowenfels, *supra* note 16, at 790; *New Light on an Old Debate*, *supra* note 16, at 767 n.50.

As one commentator notes:

> [A] survey of the cases would indicate that for the most part injunctive relief has not been granted without an indication by the Court that the past conduct was willful. Therefore, no matter what the articulated standard, Courts seem generally to search for willful conduct upon which to base an injunction.

Brodsky, *Willfulness in SEC Enforcement Proceedings*, N.Y.L.J., Dec. 15, 1976, at 1, col. 1, at 2, col. 3 (footnote omitted).

Finally, in Katz & Nerheim, *Injunctive Proceedings and Ancillary Remedies Under Federal Securities Statutes*, in THE 10B SERIES OF RULES 183 (K. Bialkin ed. 1975) the authors quote Professor Loss: "[Y]ou bring out all the dirt you possibly can, about bad faith and the like, but that is not essential to the Court; it just helps you get the injunction." *Id.* at 195-96.

255. 425 U.S. 185, 214 n.33.

256. 100 S. Ct. at 1957 n.19.

257. Justice Rehnquist attacked the "vexatious" litigation in *Blue Chip Stamps* and expressed the need to delimit private 10b-5 suits, describing the action as a "judicial oak which has grown from little more than a legislative acorn." Blue Chip Stamps v. Manor Drug Stores 421 U.S. 723, 737 (1975). *See generally* Note, *Judicial Retrenchment Under Rule 10b-5: An End to The Rule as Law?* 1976 DUKE L.J. 789, 798.

258. 421 U.S. 723 (1975).

ing policy goals in fashioning the appropriate remedy.[259] Accordingly, the competing interests, both public and private, will be examined here.

The underlying purpose of the 1933 Act is to protect investors by requiring full and accurate disclosure of all material information in connection with a public offering of securities.[260] The purpose of the 1934 Act is to protect investors from stock manipulations and to impose reporting requirements on certain companies.[261] Viewed in conjunction, these securities statutes are designed to foster market integrity and guard against the financial bilking of investors.[262]

The Commission is viewed as the "statutory guardian" of the investing public.[263] To the extent that the SEC must prove the defendant's intent to defraud, the evidentiary burden may obstruct Commission enforcement efforts.[264] The SEC was created with the intention that it possess flexible remedies deemed necessary for effective enforcement of the securities laws.[265] Moreover, the relief that the SEC seeks, a statutory injunction, has an objective quite different from a private damages action. An injunction is aimed not at punishing past wrongdoing[266] but at protecting the public against recurring and future securities violations.[267] The injunction is "prophylactic" in nature.[268]

An injunction, it is argued, also has a general deterrent function. The Supreme Court, in an unrelated context, stated that "[t]he historic injunctive process was designed to deter, not to punish."[269] Nevertheless, the deterrence value of an injunction based on negligent violations of the antifraud provisions seems questionable. Indeed, it may be that negligent misrepresentations defy control by the injunctive method.[270] It seems implausible that an injunction could successfully enjoin negligent misstatements that, by definition, are inadvertent and unintentional.[271]

Perhaps the most oft-repeated policy in support of the issuance of an injunction based on negligent conduct is that "it would be preferable to place liability for negligent misstatements on the shoulders of those responsible for their dissemination rather than to require innocent investors to suffer

259. *See* SEC v. World Radio Mission, Inc., 544 F.2d 535, 541 (1st Cir. 1976). *See generally* GA. L. REV., *supra* note 15, at 896-98. Once a past violation has been proved, "no *per se* rule requires that an injunction issue." SEC v. Arthur Young & Co., 590 F.2d 785 (9th Cir. 1979).

260. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976).

261. *Id.*

262. *See, e.g.*, SEC v. World Radio Mission, Inc., 544 F.2d 535, 540-41 (1st Cir. 1976); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1095-97 (2d Cir. 1972).

263. *See* SEC v. Management Dynamics, Inc., 515 F.2d 801, 808-09 (2d Cir. 1975); *See also* H.R. REP. NO. 1383, 73d Cong., 2d Sess. 5 (1934).

264. *See* SEC v. Shiell, [1977-78 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,190, at 92,386 (N.D. Fla. Sept. 27, 1977).

265. *See* S. REP. NO. 792, 73d Cong., 2d Sess. 5 (1934); H.R. REP. NO. 1383, 73d Cong., 2d Sess. 7 (1934).

266. The purpose of damages is to punish the wrongdoer and to make the defrauded investor whole. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 2, 9 (4th ed. 1971).

267. *E.g.*, Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972).

268. SEC v. J. & B. Indus., Inc., 388 F. Supp. 1082, 1084 (D. Mass. 1974).

269. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

270. *See generally New Light on an Old Debate*, *supra* note 16, at 781-82.

271. *See* SEC v. Universal Major Indus., 546 F.2d 1044, 1047 (2d Cir. 1976).

in silence."[272] As a corollary to this philosophy, it is urged that the effect of a misrepresentation is the same regardless of whether the misinformation resulted from a negligent mistake or a fraudulent design.[273]

What this argument fails to recognize, however, is the countervailing considerations of policy. First, the Supreme Court in *Hochfelder* noted that "[t]he logic of this effect-oriented approach would impose liability for wholly faultless conduct where such conduct results in harm to investors."[274] Indeed, since an investor's loss is identical whether the defendant's misrepresentation was *purely innocent* or negligent, should a court also impose an injunction for *innocent* misstatements to better protect investors? However one answers this question, it illustrates a second countervailing policy interest: There are social costs associated with strengthening the protections granted the investing public.[275] In short, there are tradeoffs.

Undoubtedly, the more the culpability standard is relaxed, the more protection investors receive. But exactly how much additional protection? Investors, as a group, can be divided roughly into four classes: those subject to purely faultless misrepresentations, those subject to intentional misrepresentations, those subject to negligent misrepresentations, and those not subject to any misrepresentations. Of course, the incremental benefits of an injunction based on negligent securities violations accrue exclusively to that class of investors victimized by *negligent* misrepresentation.[276] The benefits flowing to that particular class of investors should be balanced against the aggregate costs of enjoining negligent misconduct. The Roosevelt Administration intended the 1933 Act to achieve its goals with the least possible disruption of genuine business interests.[277] Courts may properly consider the burden imposed upon a defendant when an injunction issues on the basis of negligent conduct.[278] The social cost all investors must bear, at least indirectly,[279] stemming from an unintentional culpability standard is the additional expense to securities dealers for insurance to cover their expanded liability exposure.[280]

A more important countervailing policy is that a sanction should be

272. Aaron v. SEC, 100 S. Ct. 1945, 1965 n.5 (1980) (Blackmun, J., dissenting).

273. *Id. See also* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 860 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); 3 A. BROMBERG, SECURITIES LAW: FRAUD, SEC RULE 10b-5 § 8.4(508) at 204.11 to -.112 (1977).

274. 425 U.S. at 198.

275. *See generally* Note, *Securities Regulation*, 5 J. CORP. L. 377, 391-94 (1980) [hereinafter cited as Note, *Securities Regulation*].

276. Those investors bilked by innocent, *i.e.*, non-negligent, misstatements probably would have no recourse under § 17(a) or § 10(b). Those investors harmed by intentional misrepresentations would receive no additional protection because they would be covered under either a negligence or a scienter culpability standard. Finally, that class of investors not encountering any securities swindle needs no protection.

277. Message From the President—Regulation of Securities Issues, 77 CONG. REC. 937 (1933). *See generally* Note, *Securities Act 17(a)*, *supra* note 160, at 1262-63 n.150.

278. *See* A. BROMBERG, SECURITIES LAW: FRAUD, SEC RULE 10b-5 § 8.4(508), at 204.113-.114 (1977).

279. An implicit assumption is that, in the long run, securities dealers will be able to shift to their clients, in full or part, any increased operating expenses incurred throughout the industry.

280. *See* Note, *Securities Regulation*, *supra* note 275, at 392.

commensurate with the defendant's culpability.[281] Accordingly, at common law the ambit of an actor's tort liability was contingent upon whether the defendant made intentional or negligent misrepresentations.[282] In light of this policy, a court's inquiry should focus, not solely on the investor's injury, but on whether the sanction bears some reasonable relationship to the actor's mental culpability.[283] The upshot is that a trial court should carefully examine the consequences of an injunction vis-à-vis the defendant's unintentional misstatement.

Some courts, especially in the early decisions,[284] glossed over the serious burdens imposed by injunctions.[285] Recently, however, courts[286] and commentators[287] have re-examined the impact of SEC injunctions. Unquestionably, under some circumstances, injunctive relief cannot be accurately characterized as a "mild" sanction.

The immediate result of an injunction is that the defendant is under a court order to comply with the anti-fraud provisions. Failure to comply may result in civil or criminal contempt proceedings.[288] The sanctions against the individual include: disqualification of an attorney or accountant from professional practice before the SEC under a rule 2(e) proceeding;[289] suspension or revocation of a broker-dealer's registration;[290] and disqualifications under the 1933 Act and the IAA.[291] The rule 2(e) proceeding can be particularly distressing. The Commission may, under paragraph (3) of rule 2(e), "temporarily suspend" any attorney or accountant who has been "permanently enjoined" from violating federal securities laws.[292] This suspension is *without* notice or hearing.[293] Furthermore, although the suspension is labeled "temporary," to lift it, the professional must: 1) file a petition within

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281. *See, e.g.*, Ultramares v. Touche, Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931). *See generally* GA. L. REV., *supra* note 15, at 894-99.

282. GA. L. REV., *supra* note 15, at 895.

283. *See* 5 A. JACOBS, THE IMPACT OF RULE 10b-5 § 63, at 3-161 to -162 (rev. ed. 1976).

284. *Capital Gains* characterized an injunction as a "mild prophylactic." 375 U.S. 180, 193 (1963).

285. *E.g.*, Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 n.6 (2d Cir. 1976).

286. *See, e.g.*, SEC v. Caterinicchia, 613 F.2d 102, 105 (5th Cir. 1980) (district court had characterized an injunction as an "extraordinary measure"); SEC v. Petrofunds, Inc., 414 F. Supp. 1191, 1198 (S.D.N.Y. 1976) (noted "harmful impact of a receiver and an injunction on the legitimate activities of the defendant").

One district court noted:

> Despite SEC arguments to the contrary, what it seeks is more than a mere prophylactic related to the specific facts of the case. The broad, all-encompassing injunction sought here against any conceivable future violations carries the strong inference that the court believes the defendants *would* violate the law but for the court's intercession . . . .

SEC v. Bausch & Lomb, Inc., 420 F. Supp. 1226, 1245 (S.D.N.Y. 1976), *aff'd on other grounds*, 565 F.2d 8 (2d Cir. 1977).

287. *See* Mathews, *Liabilities of Lawyers Under the Federal Securities Laws*, 30 BUS. LAW. 105 (Sp. Issue, Mar. 1975); Note, *Judicial Discretion*, *supra* note 16, 340-43; *New Light on an Old Debate*, *supra* note 16, at 780-81.

288. *E.g.*, Frank v. United States, 395 U.S. 147 (1969).

289. 17 C.F.R. § 201.2(e)(3)(i) (1979). *See generally* Marsh, *Rule 2(e) Proceedings*, 35 BUS. LAW. 987, 993-94 (1980).

290. Sections 15(b)(5) and (7) of the 1934 Act, 15 U.S.C. § 78o(b)(5), (7) (1976).

291. *See generally* Berner & Franklin, *supra* note 16, at 785-86.

292. 17 C.F.R. § 201.2e(3) (1979).

293. Marsh, *supra* note 289, at 999-1001.

thirty days after being served with the order; and 2) bear the burden of convincing the Commission that he or she should not be censured.[294] Even worse, the consequences of being suspended from practicing before the SEC are not de minimis. Apparently, the Commission considers any services rendered in connection with the federal securities laws to be included within the suspended activities.[295] In effect, a rule 2(e) suspension could be the end of a security attorney's livelihood.

The comparable penalties against the corporation include the loss of business, the injury to reputation,[296] and the possible disclosure of the injunction in mandatory Commission and shareholder reports.[297] In addition, the Commission has certain ancillary remedies at its disposal, such as disgorgement of profits, rescission, and appointment of a receiver.[298] Aside from the above punitive aspects of an SEC enforcement action, the legal fees of defending against the injunction are usually very high.[299] In the face of all this, some commentators have argued that especially if the defendant is a securities lawyer, the imposition of an injunction is a more stinging sanction than a private damages action, which might be covered, at least in part, by insurance.[300]

CONCLUSION

The *Aaron* decision seems compelled by the Court's holding in *Ernst & Ernst v. Hochfelder* and the statutory language of the anti-fraud provisions of the securities laws. Indeed, the *Hochfelder* Court's reading of the language of section 10(b) of the 1934 Act must have universal application—regardless of the identity of the plaintiff or the nature of the relief sought. Viewing the text of sections 17(a)(2) and (3) of the 1933 Act, the *Aaron* Court could not find language indicating that scienter is necessary to constitute a violation of these provisions. Nevertheless, the Supreme Court recognized that a past securities violation does not automatically give rise to injunctive relief. Rather, a district court, in exercising its equitable discretion, must focus on the likelihood of future violations. A key, if not decisive, factor in the district

294. 17 C.F.R. § 201.2(e)(3) (1979). *See generally* Marsh, *supra* note 289, at 1012-13. Professor Marsh succinctly notes:

> The Commission has constantly argued before the Courts that no one should object to being subjected to the "mild prophylactic" of being enjoined against violating the law; and that, if he has no present intention of doing so in the future, he should not resist being required to conform to the law by order of the Court. However, in the next breath the Commission, under this Rule, has asserted the right to deprive a professional subject to such an injunction of his right to practice solely as a result of the injunction having been entered, unless he can carry the "burden of proof" of convincing them that he is not deserving of this punishment.

Id. at 1013.

295. Marsh, *supra* note 289, at 993-95.

296. Bauman, *The Future of Rule 10b-5: A Comment on Jacobs, The Impact of Rule 10b-5*, 4 SEC. REG. L.J. 332, 345 (1976).

297. *See* Note, *Judicial Discretion*, *supra* note 16, at 342.

298. *See generally* Jacobs, *Judicial and Administrative Remedies Available to the SEC For Breaches of Rule 10b-5*, 53 ST. JOHN'S L. REV. 397 (1979).

299. *See* Griggin, *The Beleagured Accountants: A Defendant's Viewpoint*, 62 A.B.A.J. 759, 761 (1976).

300. *See* Berner & Franklin, *supra* note 16, at 785-86; Mathews, *supra* note 287, at 107.

court's balancing of the public and private interests involved will be the defendant's mental culpability. Therefore, the battleground in securities litigation seems to have shifted away from whether scienter constitutes a securities violation to whether a finding of scienter is crucial before a trial court may grant an injunction.

Steve M. Skoumal

TAXATION

OVERVIEW

The Tenth Circuit Court of Appeals considered a limited number of federal taxation cases during the period covered by this survey. This overview will provide a brief summary of some of the published cases.[1]

I. CONSTRUCTIVE DIVIDENDS

In *Dolese v. United States*,[2] the issue before the Tenth Circuit Court of Appeals was whether the costs of litigation, paid by a corporate taxpayer in a divorce proceeding, were deductible. The case arose out of suits brought by Roger Dolese, the Dolese Company (TDC), and Dolese Concrete Company (DCC) to obtain income tax refunds in the amount of $1.5 million.[3] These suits, in turn, flowed from the divorce proceeding of Roger and Ardith Dolese. The divorce action began in 1957 and culminated nine years later. The divorce litigation costs, including $1.3 million in fees and expenses, were paid by Roger Dolese and the companies.

The divorce petition had named TDC, a company wholly owned by Roger Dolese, and DCC, a company which in turn was wholly owned by TDC, as party defendants. Also named as a defendant was the Dolese Brothers Company, which had been wholly owned by Roger Dolese and TDC, but was liquidated in 1970 and thereafter operated as a partnership between Dolese and TDC. In the divorce petition, Dolese was accused "of threatening to deplete and dissipate the assets of the companies in order to deprive Ardith of her rights as wife."[4] Ardith Dolese sought an order to prevent Dolese and the companies from engaging in any unusual business

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1. Also published were:

United States v. Wase, 608 F.2d 400 (10th Cir. 1979), in which the Tenth Circuit held that Congress, not the court of appeals, has the power to declare what is legal tender. The court held that taxpayers may not value earnings in terms of gold dollars as a means of determining the need to file an income tax return.

Portland Cement Co. v. Commissioner, 614 F.2d 724 (10th Cir. 1980), in which the Tenth Circuit held that a miner manufacturer's first marketable product was bulk cement. The court ruled that the expenses associated with bagging the cement could not be considered mining costs and, therefore, could not be used to reduce the depletion deduction. The United States Supreme Court has recently granted certiorari to determine: 1) if the costs of bags, bagging, storage, distribution, and sales should be included as nonmining costs, and 2) if bulk cement or if both bulk and bagged cement constitute the first marketable product for purposes of computing gross income from mining where the "proportionate profits method" is used. 49 U.S.L.W. 3212 (U.S. Oct. 6, 1980) (No. 79-1907).

Stahmann Farms, Inc. v. United States, 624 F.2d 958 (10th Cir. 1980), in which the Tenth Circuit held that airplanes, which used only the taxpayer's private landing strip and flew only over the taxpayer's property, were subject to the "use" tax of I.R.C. § 4491, since the planes were operated within the statutorily defined navigable airspace.

2. 605 F.2d 1146 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980).

3. The case had been before the Tenth Circuit in 1976. It was remanded to the trial court, where summary judgment was entered for the United States. *See* Dolese v. United States, 541 F.2d 853, 854 (10th Cir. 1976).

4. 605 F.2d at 1149.

activities. Early in the divorce litigation, the court ordered the companies not to pay investigative expenses.[5] In 1967, Ardith Dolese filed a motion alleging that her husband was incompetent and requesting that she be appointed to take his place in the management of the companies. In late 1968, this motion was denied.[6]

Ultimately, the state trial court issued orders requiring Dolese and the three companies each to pay one-fourth of the legal fees and expenses stemming from the divorce action. The state court reasoned that the legal proceeding was not just a divorce action, but was also a struggle for control of the companies. TDC and DCC sought to deduct their respective shares of the litigation expenses and fees as ordinary and necessary business expenses.[7] The United States, however, contended that these payments were actually constructive dividends paid to Dolese and, as such, were not deductible expenses.[8]

The Tenth Circuit court used the "origin of the claim" test to determine whether the costs of litigation were indeed ordinary and necessary business expenses.[9] The court of appeals divided the previous litigation into two categories, finding both a divorce action and an action against the companies. The court concluded that most of the expenses had their origin in the divorce action and, therefore, the litigation costs were not deductible.[10]

The Tenth Circuit went on to rule that the costs of obtaining clarification of the court order and the costs of resisting the motion to oust Dolese were deductible.[11] These expenses were found to have originated in the business activities of the companies. The court remanded the case to the trial court for a determination of the deductible amounts. The nondeductible expenses of litigation, representing "some direct benefit" to Dolese, were held to be constructive dividends.[12]

The court of appeals also considered whether a series of payments, totalling over $150,000, made by the companies to discharge Dolese's personal debts, were loans or constructive dividends. The Tenth Circuit court noted that although some loan attributes were present,[13] the debt was too large to be liquidated without the sale of one of the companies. Consequently, the payments were deemed to be constructive dividends.[14]

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5. *Id.* By mid-1967, Dolese had spent at least $350,000 investigating Ardith's infidelities and her children's paternity.

6. *Id.*

7. I.R.C. § 162(a).

8. 605 F.2d at 1149.

9. "[T]he origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test of whether the expense was 'business' or 'personal' and hence whether it is deductible or not . . . ." United States v. Gilmore, 372 U.S. 39, 49 (1963). *See also* Woodward v. Commissioner, 397 U.S. 572 (1970).

10. 605 F.2d at 1151-52.

11. *Id.*

12. *Id.* at 1152.

13. *Id.* at 1153. Appellants argued that the advances were loans because "notes were given . . . , interest was paid, some payments were made on the principal, and the shareholder [Dolese] had a balance sheet strong enough to obtain a bank loan sufficient to pay off the entire loan." *Id.*

14. *Id.* at 1154.

II. INDUSTRIAL DEVELOPMENT BONDS

The Tenth Circuit, in *Kirkpatrick v. United States*,[15] considered whether the interest derived from bonds issued by the Oklahoma Industries Authority, an agency of the State of Oklahoma, was subject to tax as gross income. Plaintiff Kirkpatrick purchased $175,000 worth of bonds issued by the Oklahoma Industries Authority, but did not include the interest from these bonds as gross income on her 1973 and 1974 income tax returns. The Commissioner of Internal Revenue (IRS) assessed deficiencies, which the taxpayer paid. When her suit for refund was dismissed by the district court, the taxpayer appealed to the Tenth Circuit.

The money raised by the bond issue was used to construct an office building which was subsequently leased to Mercy Hospital, a tax-exempt organization.[16] The hospital sublet building space to nonexempt persons. During 1973 and 1974, approximately six percent of the building was occupied by nonexempt subtenants. By the end of 1977, twenty-nine percent of the building's total leasable space had been leased to nonexempt subtenants.

The interest on an industrial development bond must be included as gross income for income tax purposes.[17] There are two tests used to determine if an obligation is an industrial development bond. To qualify for this status, both tests must be met. If the major portion of the proceeds of an obligation "are to be used directly or indirectly in any trade or business carried on by any person who is not an exempt person"[18] and if a major portion of the payment of principal and interest of an obligation is secured or derived from a property in a trade or business,[19] the obligation is an industrial development bond.

Since the obligations unquestionably met the second test,[20] the court of appeals looked to see if the requirements of the first test were present. Kirkpatrick contended that since Mercy Hospital was a tax-exempt entity, the criterion of the first test was not met. The Tenth Circuit noted that the intent of the law was to make sure that a tax-exempt entity, such as Mercy Hospital, would not become a conduit by which nonexempt persons would benefit from bond proceeds.[21] Therefore, the status of the subtenants was a determinative factor.

As the subtenants were nonexempt persons, the court looked to see if a "major portion" of the proceeds were used by these nonexempt persons in their trade or business. To make this determination, the court relied upon Treasury Regulation section 1.103-7(b)(3)(iii), which states that "the use of more than 25 percent of the proceeds of an issue of obligations in the trade or business of nonexempt persons will constitute the use of a major portion of such proceeds in such manner."[22]

15. 605 F.2d 1160 (10th Cir. 1979).
16. I.R.C. § 501(c)(3) provides that hospitals may be exempt from taxation.
17. *Id.* § 103(b)(1).
18. *Id.* § 103(b)(2)(A).
19. *Id.* § 103(b)(2)(B).
20. 605 F.2d at 1162.
21. *Id.*
22. Treas. Reg. § 1.103-7(b)(3)(iii) (1972).

The taxpayer argued that since only six percent of the building was leased to nonexempt persons in 1973 and 1974, the test was not met for those years. The court concluded that as nonexempt subtenants occupied twenty-nine percent of the total leasable space in 1977, there was an indication that the original intent was to use the building for nonexempt persons.[23] Therefore, the bonds were declared to be industrial development bonds and the interest income thereon was deemed taxable.

III. IRS CIVIL SUMMONS

In *United States v. MacKay*,[24] the question before the Tenth Circuit was whether the IRS had abused its civil summons power.[25] In April of 1978, a criminal investigation of a Mr. and Mrs. Rodgers was initiated by the Criminal Investigation Division of the IRS, on the basis of information received from a county sheriff's office and from the Federal Bureau of Investigation. The Criminal Investigation Division, asserting that there was a possibility of unreported income, notified the Audit Division that the investigation should be conducted jointly.[26]

Denied access to the taxpayers' books and records, an IRS agent issued a summons to the First National Bank of Gillette, Wyoming, requesting the production of the Rodgers' bank records for 1975, 1976, and 1977. The IRS agent notified the taxpayers of the summons. As instructed by Mr. and Mrs. Rodgers, respondent Marshall MacKay, assistant vice president of the bank, refused to comply with the summons.[27] The IRS sought enforcement of the summons in district court. When the district court ordered compliance with the summons, respondent MacKay and Mr. and Mrs. Rodgers, as intervenors, appealed to the Tenth Circuit Court of Appeals.[28]

The respondent contended that the summons was invalid since the IRS had used its summons powers to pursue an investigation that was strictly criminal.[29] The Tenth Circuit held that the summons was enforceable as it was issued in good faith[30] prior to any recommendation to the Department of Justice that a criminal prosecution be undertaken, and because the civil tax determination had not been abandoned.[31]

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23. 605 F.2d at 1163. Taxability of the interest income is not to be determined yearly by the fluctuation in the amount of space rented to nonexempt persons.

24. 608 F.2d 830 (10th Cir. 1979).

25. I.R.C. § 7602.

26. 608 F.2d at 832.

27. *Id.* at 831.

28. *Id.*

29. The respondent also contended that the Right to Financial Privacy Act of 1978 barred the disclosure of the taxpayers' bank records. The court found this argument to be inapplicable in view of the legislative history and the express and implied provisions of the Act. *Id.* at 834.

30. In United States v. Powell, 379 U.S. 48 (1964), the Supreme Court held that the Commissioner need not show probable cause after the ordinary limitations period expired. Instead, a good faith standard was imposed. Good faith could be shown by establishing that the investigation was for a legitimate purpose, that the inquiry was relevant to the purpose, that the Commissioner did not already possess the information, and that the proper administrative steps required by the Code had been taken. The burden of showing abuse was placed on the taxpayer.

31. 608 F.2d at 833 (citing United States v. LaSalle National Bank, 437 U.S. 298 (1978)).

IV. CONSTRUCTIVE RECEIPT

The constructive receipt of interest, which is taxable as income, was examined by the Tenth Circuit in *Estate of Shelton v. Commissioner*.[32] In 1970, the IRS refunded over $150,000[33] of improperly assessed taxes and interest to the Osage Indian Agency, on behalf of the Elkins estate.[34] Because Shelton, the sole residuary beneficiary of the Elkins estate, had died in 1967, the Indian Agency advised the co-executors of the Shelton estate that they had to obtain an additional co-executors' bond before the funds could be paid to them. The co-executors did not obtain the bond until 1974.

The Commissioner determined that the Shelton estate's gross income for 1970 should have included that part of the tax refund allocated to interest.[35] The Tax Court upheld the Commissioner's decision, but reduced the amount of the deficiency by twenty percent, the amount withheld by the Indian Agency to pay the legal fees arising from the litigation to obtain the original refund.[36]

In upholding the Tax Court, the court of appeals found that the agency had tendered payment to the Shelton estate in 1970,[37] and the requirement that the co-executors obtain an additional bond did not place "substantial limitations or restrictions" on the right to receive the income.[38] Therefore, the interest on the tax refund was constructively received by the estate, and taxable as income, in 1970.

V. TIME FOR ASSESSMENT—THREE YEAR LIMIT

Dowell v. Commissioner[39] involved taxpayers who had filed fraudulent tax returns for the years 1963 through 1966 and who, in 1968, filed nonfraudulent amended returns for those years. The government had used the amended returns in the investigation and prosecution of a fraud case against the taxpayers.[40] The IRS used the amended returns to make a determination of additional taxes, and to assess penalties and interest due. In late 1974, the IRS advised the taxpayers of deficiencies. The taxpayers petitioned the United States Tax Court, seeking a refund and a bar against any additional assessment of deficiencies.[41] The Tax Court upheld the Commissioner, and the taxpayers appealed to the Tenth Circuit Court of Appeals.

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32. 612 F.2d 1276 (10th Cir. 1980).

33. Over $92,000 was allocated to interest. *Id.* at 1278.

34. Mary Jacqueline Elkins was a noncompetent Osage Indian who died in 1932. *Id.*

35. *Id.*

36. Estate of Jacqueline E. Shelton, 68 T.C. 15 (1977).

37. The taxpayer had argued that the income should be taxed to the Elkins' estate. The court noted that I.R.C. § 661(a)(2) provides that an estate can properly deduct any amount paid or credited to a beneficiary and I.R.C. § 661(a)(2) provides that such amounts are taxable to the beneficiary. Therefore, even if included in the Elkins' estate, the interest income was taxable when constructively received by the Shelton estate. 612 F.2d at 1278-79.

38. 612 F.2d at 1279.

39. 614 F.2d 1263 (10th Cir. 1980).

40. *See* United States v. Dowell, 446 F.2d 145 (10th Cir. 1971) (affirming the convictions of defendants Alfonzo and Vivian Dowell for attempting to evade or defeat federal income taxes).

41. The Tax Court found that the nature of original returns determined the applicable statute of limitations. Since the original returns were fraudulent, the Commissioner could assess the tax at any time, according to I.R.C. § 6501(c)(1). The Tax Court found the three year

The taxpayers argued that the filing of the amended returns had started the statute of limitations[42] to run and that, under this accounting, the government had failed to make an assessment within the allotted three year period. The IRS responded with the argument that, because the original returns were fraudulent, the assessment against taxpayers could be made at any time.[43] The Tenth Circuit reasoned that as the amended filings satisfied the definition of a return,[44] the statute of limitations began to run in 1968.[45] Accordingly, the judgment of the Tax Court was reversed, and the case was remanded.[46]

The government also had contended that because the 1963 and 1964 amended returns were unsigned, the statute of limitations period never began to run.[47] The court concluded that the use of the amended returns in the fraud action constituted acceptance by the government, and commenced the running of the statute.[48]

VI. TWO YEAR LIMIT ON REFUNDS

Snyder v. United States[49] presented the question of whether a taxpayer is entitled to obtain a refund of gift taxes which were erroneously paid more than two years prior to filing of the refund claim. In May of 1973, the IRS made a jeopardy assessment[50] against the taxpayer. When no payments were forthcoming, the IRS began collecting the income from the taxpayer's rental properties. The assessment was not paid in full until March 1976. Three months later, the taxpayer filed a claim for refund of the full amount assessed and collected.[51] The IRS eventually conceded that the assessment was entirely unfounded, but the Commissioner refused to refund that portion of the assessment not paid within two years of the first claim for re-

general statute of limitations provided in I.R.C. § 6501(a) to be inapplicable. Dowell v. Commissioner, 68 T.C. 646 (1977).

42. "Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . . ." I.R.C. § 6501(a).

43. "In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, . . . at any time." I.R.C. § 6501(c)(1).

44. "Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such . . . , and evinces an honest and genuine endeavor to satisfy the law. This is so though at the time of filing the omissions or inaccuracies are such as to make amendment necessary." 614 F.2d at 1265 (quoting Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 180 (1934)).

45. I.R.C. § 6501(a). The court noted that the "at any time" provision of I.R.C. § 6501(c)(1) is necessary to give the government ample time to uncover information which the taxpayer fails to provide. But once the taxpayer provides the government with the necessary information, the three year statute takes over.

46. 614 F.2d at 1267.

47. *Id.* at 1266. *See* Kalb v. United States, 505 F.2d 506 (2d Cir. 1974); Doll v. Commissioner, 358 F.2d 713 (3d Cir. 1966).

48. 614 F.2d at 1267.

49. 616 F.2d 1187 (10th Cir. 1980).

50. If the Secretary believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary for the payment thereof.

I.R.C. § 6861(a).

51. 616 F.2d at 1187.

fund.[52] The taxpayer initiated a suit in district court contesting the IRS disallowance. The taxpayer was granted a summary judgment.[53] The IRS appealed to the Tenth Circuit Court of Appeals.

In reversing the decision of the district court,[54] the Tenth Circuit court relied on Internal Revenue Code section 6511(b)(2)(B) which states that "the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim." The court noted that this provision had been consistently interpreted to mean that the taxpayer's recovery was limited to the amounts paid within two years of bringing suit.[55] The court reasoned that any other construction would allow a taxpayer to extend the time for filing a claim by making small periodic payments.[56] The taxpayer asserted that a strict reading of the Code results in a hardship on a taxpayer who is unable to pay an assessment within two years. The court answered that an alternative remedy was available. A taxpayer may petition the United States Tax Court for a redetermination of the assessment prior to making any payment.[57]

VII. PENALTY UNDER SECTION 6672 OR 3505

In *Fidelity Bank v. United States*,[58] the Tenth Circuit Court of Appeals reversed the trial court for improperly instructing the jury that the government bore the risk of nonpersuasion in the action below. The case arose when a bank sought a refund of penalties assessed in accordance with section 6672 of the Internal Revenue Code.[59] In 1971, CDI Homes, Inc. (CDI) had obtained a one million dollar revolving credit line from Fidelity Bank, N.A. (Fidelity). By 1973, CDI had overdrawn its credit line and had ceased operations. Fidelity had agreed to permit CDI to overdraw its account, but Fidelity reserved the right to examine and approve each overdraft.

Checks clearly marked with the word "payroll" were among those approved by Fidelity in 1973. These payroll checks included gross wages, less income taxes and FICA taxes which had been withheld. CDI had no other source of funds and relied on Fidelity to honor checks for the amount of the

52. The IRS relied on I.R.C. § 6511(a), which states that a
claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

53. The district court held that the two year period of limitation of I.R.C. § 6511(a) did not begin to run until all of the assessment had been collected. 616 F.2d at 1188.

54. *Id.* at 1189-90.

55. *Id.* at 1188.

56. *Id.*

57. *Id. See also* I.R.C. § 6213.

58. 616 F.2d 1181 (10th Cir. 1980).

59. Section 6672(a) provides: Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.
I.R.C. § 6672(a).

withholdings.[60] On June 26, 1973, Fidelity dishonored CDI checks which had been presented through normal banking channels on June 25. The dishonored checks included one for the withholdings of the second quarter of 1973. In late June, the bank commenced the liquidation of the company. Fidelity used the proceeds of subsequent sales to pay wages and to reduce CDI's overdrawn account. Taxes were withheld from the wages, but the taxes were not paid to the IRS.[61]

The Commissioner assessed a one hundred percent penalty against Fidelity.[62] Although Fidelity paid a portion of the assessment,[63] the bank subsequently brought suit for refund. The Commissioner counterclaimed, demanding payment of the unpaid balance of the penalty and payment of the taxes due and owing. The IRS counterclaim was based upon section 3505(b) of the Code.[64] The trial court found for Fidelity, and the government appealed.

The Tenth Circuit Court of Appeals decided that each overdraft constituted a separate loan to CDI. The court asserted that since the checks were clearly marked "payroll," Fidelity must have known that it was providing funds for wages.[65] The court reasoned that Fidelity also must have known that CDI could not make a timely payment or deposit to cover the taxes. Furthermore, after CDI's closure, Fidelity controlled CDI's income.[66] The appellate court concluded that Fidelity was clearly liable for the unpaid tax under section 3505(b). The Tenth Circuit remanded the case for a determination of the exact amount of penalty to be imposed.[67] As to the government's original claim under section 6672, the Tenth Circuit court found that the jury properly could have concluded that Fidelity was not a responsible person.[68] Nevertheless, because the jury had been improperly told that the government bore the risk of nonpersuasion, the case was remanded on the section 6672 issue as well.[69]

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60. 616 F.2d at 1183.
61. *Id.* at 1184.
62. *Id.* at 1182.
63. Normally, the taxpayer must pay the full tax or penalty before bringing suit in district court. To challenge a penalty under I.R.C. § 6672, however, the taxpayer need pay only one employee's taxes.
64. Section 3505(b) provides: If a lender, surety, or other person supplies funds to or for the account of an employer for the specific purposes of paying wages of the employees of such employer, with actual notice or knowledge (within the meaning of section 6323(i)(1)) that such employer does not intend to or will not be able to make timely payment or deposit of the amounts of tax required by this subtitle to be deducted and withheld by such employer from such wages, such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) which are not paid over to the United States by such employer with respect to such wages. However, the liability of such lender, surety, or other person shall be limited to an amount equal to 25 percent of the amount so supplied to or for the account of such employer for such purpose.
I.R.C. § 3505(b).
65. 616 F.2d at 1184.
66. *Id.*
67. *Id.* at 1185.
68. *Id.* at 1186.
69. *Id.*

UNITED STATES SUPREME COURT REVIEW OF TENTH CIRCUIT DECISIONS

I. SUPREME COURT REVERSALS

A. United States v. Ward

In *United States v. Ward*,[1] the Supreme Court reversed the Tenth Circuit Court of Appeals' decision in *Ward v. Coleman*.[2] The Court held that fines, imposed by the United States against owners and operators of onshore facilities from which oil is discharged, in violation of the Federal Water Pollution Control Act (FWPCA),[3] constituted a civil rather than a criminal penalty. The Court thus concluded that a provision in the Act requiring dischargers to report their own violations[4] did not infringe upon a discharger's constitutional right to be protected from compulsory self-incrimination.

By the terms in effect at the time this case arose,[5] section 311(b)(3) prohibited the discharge of oil or hazardous substances in "harmful" quantities into navigable waters or onto adjoining shorelines.[6] Persons in charge of a vessel or responsible for an on-shore or off-shore facility were required to report any such hazardous discharge to the appropriate federal agency.[7] Failure to report the discharge would subject violators to possible fine or imprisonment.[8] A "civil penalty" was imposed against the owner or operator of a facility found to be in violation of the Act.[9] In 1977, a maximum penalty of $5,000 per violation could be assessed.[10]

In March 1975, oil escaped from a retention pit at a drilling facility located in Oklahoma and owned by L.O. Ward Oil and Gas Operations. The oil washed into Boggie Creek, a tributary of the Arkansas River System. Ward cleaned up the oil spill and notified the Environmental Protection Agency that the discharge had occurred. A more complete report was forwarded to the Coast Guard,[11] which assessed a $500 penalty against Ward.[12]

Ward appealed the Coast Guard's ruling, contending that the reporting requirements of the Act violated the fifth amendment privilege against self-incrimination. After the administrative appeal was denied, Ward filed suit

1. 100 S. Ct. 2636 (1980).
2. 598 F.2d 1187 (10th Cir. 1979).
3. 33 U.S.C. §§ 1251-1376 (1976) *as amended by* The Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, and The Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 96 Stat. 1566.
4. *Id.* § 1321(b)(5).
5. The Clean Water Act of 1977 and the Federal Water Pollution Control Act Amendments of 1978 amended § 311 of the FWPCA. The amendments, however, have no bearing on the case.
6. 33 U.S.C. § 1321(b)(3).
7. *Id.* § 1321(b)(5).
8. *Id.*
9. *Id.* § 1321(b)(6).
10. *Id.*
11. The Coast Guard was responsible for assessing civil penalties under § 311(b)(6).
12. 100 S. Ct. at 2640.

in the United States District Court for the Western District of Oklahoma seeking to enjoin enforcement of the penalty. Ward's action, and a separate action filed by the United States to collect the unpaid penalty, were consolidated for trial.[13]

The district court, on motion for summary judgment, rejected Ward's constitutional claim.[14] The case was thereafter tried to a jury on the sole issue of the occurrence and harmfulness of the discharge. The jury found that Ward's facility did indeed spill oil in harmful quantities into navigable waters. The district court assessed a penalty in the reduced amount of $250.[15]

The Tenth Circuit Court of Appeals found the penalty provision, section 311(b)(6), to be criminal in nature. The appellate tribunal invalidated the self-reporting requirement as violative of Ward's fifth amendment rights.[16]

In examining the statute, the court of appeals focused on the legislative aim in imposing the sanction. The court asserted that a determination of whether Congress sought primarily to punish violators or to regulate and clean up oil spills was significant. Legislative intent was analyzed by reference to the plain language of the statute, and by an examination of the enforcement mechanism established by the Coast Guard pursuant to the statute. A punitive intent was indicated by the fact that the penalty was assessed automatically; that the amount of the penalty was determined by a consideration of the size of the business, the effect of the penalty on the owner or operator's ability to continue in business, and the gravity of the violation[17] further evidenced a punitive intent. The court of appeals believed that these statutory factors bore no relation to the government's purported goal of maintaining an adequate clean-up fund. A violator's removal efforts and expenses could not be considered in fixing the amount of the penalty. Furthermore, under Coast Guard order, intentional discharges, and those discharges resulting from gross negligence, were to result in the most severe penalties.[18] The Tenth Circuit Court of Appeals concluded that this statutory and administrative enforcement scheme lacked any semblance of regulatory or remedial intent.[19]

The court of appeals confirmed this conclusion by examining the statute in light of an often used, but erratically applied test, set forth by the Supreme Court in *Kennedy v. Mendoza-Martinez*.[20] The test requires the application of seven "indicators of congressional intent" to a statute as a means of determining whether the statute is criminal (punitive) or civil (regulatory) in nature.[21] The court declared that application of the *Mendoza-Martinez* in-

13. *Id.*
14. Ward v. Coleman, 423 F. Supp. 1352 (W.D. Okla. 1976).
15. 100 S. Ct. at 2640.
16. 598 F.2d at 1194. *See* Overview, *Lands and Natural Resources, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 293, 297-99 (1980).
17. 33 U.S.C. § 1321(b)(6).
18. United States Coast Guard Commandant Instruction 5922.11A (Feb. 23, 1973).
19. 598 F.2d at 1190-92.
20. 372 U.S. 144 (1963).
21. A sanction may be deemed punitive if it: (1) involves an affirmative disability or re-

dicators to section 311(b)(6) of the FWPCA revealed a punitive intent. The section 311(b)(6) factors used to determine the amount of the penalty indicated the presence of a scienter requirement. The court emphasized that a party could act in good faith and undertake clean-up measures, yet that party would still be penalized for even an unavoidable discharge. The appellate court felt that these facts indicated that the statute promoted the traditional aims of punishment; namely, retribution and deterrence. The court also noted that the behavior to which the statute applied was already a crime under section 13 of the Rivers and Harbors Act of 1899.[22]

Whereas the legislative aim in adopting the section 311(b)(6) sanction was to punish, rather than to regulate, a water polluter, the Tenth Circuit Court of Appeals held that the sanction actually imposed a criminal penalty for the discharge of oil and hazardous substances into navigable waters. The court therefore declared that information obtained through the statutorily required notification procedure could not be used by the government to determine liability for violations of section 311(b)(3). The court of appeals added that self-reported information could not be used in the calculation of the amount of a violator's penalty under section 311(b)(6). The Tenth Circuit court declared that evidence to establish the existence of an illegal discharge had to be derived from an independent source.[23]

The Supreme Court, in an opinion written by Justice Rehnquist, overruled the court of appeals' decision without fully addressing many of the issues raised by the lower court. The Court's inquiry as to whether the statutory penalty was criminal in nature proceeded in two stages. Justice Rehnquist looked for either an express or an implied congressional preference for a civil or criminal penalty. The labelling of the sanction as a "civil penalty," in juxtaposition with the criminal penalties set forth in the immediately preceding subparagraph,[24] was considered by the Court as a sufficient indication of a congressional intent to impose a civil sanction.[25]

The Court's second level of analysis focused on whether the statutory scheme was so punitive in nature, either in purpose or effect, as to negate the legislature's express intention. In searching for a punitive effect, the Court failed to assess the section 311(b)(6) factors considered by the government in determining the amount of the penalty.[26] Justice Rehnquist also failed to set forth his assessment of the *Mendoza-Martinez* criteria.[27] The criteria were

straint, (2) has historically been regarded as punishment, (3) comes into play only on a finding of scienter, (4) promotes the traditional aims of punishment, namely retribution and deterrence, (5) applies to behavior which is already a crime, (6) may rationally be connected to an alternative purpose, or (7) is excessive in relation to its alternative assigned purpose. 372 U.S. at 168-69.

22. 33 U.S.C. § 407 (1976).

23. 598 F.2d at 1194.

24. 33 U.S.C. § 1321(b)(5). *See* text accompanying note 8 *supra*.

25. 100 S. Ct. at 2641.

26. *See* text accompanying note 17 *supra*. Justice Stevens, the lone dissenter, agreed with the Tenth Circuit's opinion that the failure to calculate penalties on the basis of the government's actual clean-up costs indicated a lack of remedial intent. Justice Stevens noted that, in light of the *Mendoza-Martinez* criteria, the section 311(b)(6) factors indicated a legislative intent to create a criminal sanction. 100 S. Ct. at 2646-47.

27. The majority acknowledged that the behavior to which the sanction applied is already

believed to be "neither exhaustive nor conclusive on the issue," and therefore were "in no way sufficient to render unconstitutional the congressional classification of the penalty established in section 311(b)(6) as civil."[28] Based on this limited examination, the Court found no punitive effect which might render the sanction criminal.

Respondent Ward's alternative claim, that the sanction was "quasi-criminal," and therefore sufficient to invoke the protection of the fifth amendment, was also rejected. Ward attempted to draw support for this claim from *Boyd v. United States*.[29] In the *Boyd* case, the Court had held that forfeiture proceedings, held as a result of a violation of a revenue statute, were sufficiently criminal in nature for the purpose of the fifth amendment. The majority found *Boyd*, and other similar cases, readily distinguishable on the basis that the penalty involved in those cases was not related to damage sustained by society or to the cost of enforcing the law. The FWPCA penalty involved in the *Ward* case was considered more analogous to traditional civil damages.[30] Weight was again given to the existence of separate statutory criminal remedies to punish similar activities.[31]

As the penalty imposed on discharges of oil and hazardous substances was neither criminal nor "quasi-criminal" in nature, Ward's fifth amendment privilege against compulsory self-incrimination did not relieve him of the duty to comply with the statutory notification procedure. A violator's own report of an illegal discharge, which is required by law, can be used as a means of determining liability for the violation, and the facts contained in the report may be used to determine the amount of the violator's penalty.

Dan Scheid

B. Andrus v. Utah

In *Andrus v. Utah*,[32] the Supreme Court reversed the Tenth Circuit Court of Appeals' decision in *Utah v. Kleppe*[33] wherein the Tenth Circuit court had held that section 7 of the Taylor Grazing Act, as amended,[34] did not empower the Secretary of the Interior (Secretary) to classify land as eligible for indemnity selection pursuant to the school indemnification selection statutes. The court of appeals had ruled that the selection of school indem-

a crime (the fifth indicator), but considered the point to be of little significance. Justice Blackmun, in a concurring opinion, joined by Justice Marshall, applied the *Mendoza-Martinez* factors and found that they indicated a remedial intent. 100 S. Ct. at 2644-45.

28. 100 S. Ct. at 2642.

29. 116 U.S. 616 (1886).

30. No explanation was offered as to why the money penalty involved in the *Ward* case is "much more analogous" to a civil penalty than to a criminal fine.

31. 100 S. Ct. at 2643-44.

32. 100 S. Ct. 1803 (1980).

33. 586 F.2d 756 (10th Cir. 1978). For a discussion of the Tenth Circuit's opinion, see Overview, *Lands and Natural Resources, Fifth Annual Tenth Circuit Survey*, 56 DEN. L.J. 517-23 (1979).

34. 43 U.S.C. § 315f (1976).

nity lands was to be based on equal *acreage*—not equal *value*—with the lost base lands.

Between 1965 and 1971, the State of Utah exercised its right, granted under the Utah Enabling Act of 1894[35] and the federal school indemnification statutes,[36] to select indemnity lands in lieu of original school land grants which Utah never received due to federal preemption or private entry prior to survey. Utah selected 194 parcels of land, embracing approximately 157,255.9 acres, all of which were located within federal grazing districts created under the Taylor Grazing Act. The selections included extremely valuable oil shale lands while the original land grants were of significantly lesser mineral value. Utah filed its selection lists with the Secretary for approval, but the Secretary responded that he would not approve any indemnity applications that involved "grossly disparate values."[37] The Secretary added that although the land values of the lost base lands and the indemnity lands had not been precisely determined, it appeared that they involved grossly disparate values as judged by departmental guidelines.[38] The State of Utah filed suit in the federal district court seeking injunctive relief. The state sought a court order directing the Secretary to approve or disapprove Utah's indemnity selections by December 15, 1976. The district court granted Utah's motion for summary judgment, and the Tenth Circuit Court of Appeals affirmed.[39]

The controversy in this statutory construction case turned upon whether the 1936 amendment[40] to section 7 of the Taylor Grazing Act or sections 851 and 852 of the federal statutes governing state land grants[41] controlled the disposition of school indemnity lands. As amended, section 7 authorizes the Secretary to compare the selected lands with the original school land grants on an equal *value* basis and to refuse the exchange if the selected lands are grossly higher in value than the original grants. Section 851, on the other hand, specifically states that whenever a state does not receive its allotted school land grant due to federal preemption or private entry, then the state is entitled to "other lands of equal *acreage*" selected in accordance with the provisions of section 852.[42] Section 852 provides, in part, that lands "mineral in character" cannot be selected as in lieu lands unless the lost base lands were also "mineral in character."[43]

The Tenth Circuit court reasoned that section 7 of the Taylor Grazing Act, as amended, was not applicable to school indemnity lands as neither the Act, nor its legislative history, evidenced an intent that section 7 was to ap-

35. Ch. 138, 28 Stat. 107.
36. 43 U.S.C. §§ 851-852 (1976).
37. 100 S. Ct. at 1805.
38. Department of Interior guidelines provided that the grossly disparate value policy would only be applied in cases where the estimated value of the selected lands exceeded that of the base lands by the greater of $100 per acre or 25%. *Id.* at 1805 n.3.
39. 586 F.2d 756 (10th Cir. 1978).
40. Act of June 26, 1936, ch. 842, § 7, 49 Stat. 1976 (codified at 43 U.S.C. § 315f (1976)).
41. 43 U.S.C. §§ 851-852 (1976).
42. *Id.* § 851 (emphasis added).
43. *Id.* § 852(a)(1).

ply to selected school lands.[44] Rather, after examining the legislative history and the express language of sections 851 and 852, the court of appeals found that school indemnity lands were governed by sections 851 and 852.[45] Consequently, the court of appeals concluded that once it was determined that both the original grants and the indemnity lands were mineral in character, the indemnity lands were to be selected on an equal acreage basis and not on the equal value basis mandated by section 7.[46] The court of appeals viewed the Secretary's function as ministerial, requiring that he approve indemnity applications upon a showing of compliance with sections 851 and 852.[47]

Reversing the Tenth Circuit Court of Appeals, the Supreme Court held that section 7 of the Taylor Grazing Act, as amended, confers broad discretion on the Secretary to classify lands within a federal grazing district as eligible for school indemnity selection and that the grossly disparate value policy was a lawful exercise of the Secretary's discretion when applied to school indemnity lands.[48] Thus, under the Court's view, the correct standard for school indemnity lands is the equal *value* principle—not the equal *acreage* principle.

Justice Stevens, writing for the majority, capsulized the majority opinion by stating that the district court and the Tenth Circuit Court of Appeals had misinterpreted the congressional policy underlying the provision for indemnity selection and had misconstrued section 7 of the Taylor Grazing Act.[49] Justice Stevens emphasized that the history of the general statutes relating to school indemnity grants repeatedly demonstrated that the purpose of these statutes was to provide the states with lands roughly equivalent to the lost original lands.[50] No evidence suggested that Congress intended the states to select lands of substantially greater value than the original grants.[51] Rather, the entire history of these statutes evidenced a congressional intent only to make the western states whole for the forfeited original grants.[52]

The Court further reasoned that the Taylor Grazing Act, as amended, and Executive Order 6910[53] had the effect of withdrawing all unappropriated federal lands in the western states from entry or selection pending subsequent congressional or presidential action except, at the Secretary's discretion, for the purposes specified in section 7.[54] Consequently, indemnity lands were only available as permitted by the Secretary in the exercise of his discretion under section 7. Therefore, Justice Stevens concluded that

44. 586 F.2d at 767.
45. *Id.*
46. *Id.*
47. *Id.* at 760-61.
48. 100 S. Ct. at 1813.
49. *Id.* at 1806.
50. *Id.* at 1807.
51. *Id.* at 1808.
52. *Id.*
53. Executive Order 6910, issued by President Roosevelt in 1934, withdrew all unappropriated and unreserved public lands in twelve western states from all forms of entry and selection pending further determination of the best use of the land. 54 Interior Dec. 539 (1934).
54. 100 S. Ct. at 1813.

the grossly disparate value policy employed by the Secretary was wholly consistent with the congressional intent underlying indemnity selections of giving the states a rough equivalent of the lost school grants.[55]

Justice Powell, joined by Chief Justice Burger, Justice Blackmun, and Justice Rehnquist, raised a vigorous dissent. Justice Powell perceived the majority opinion as resting on three fundamental misconceptions: 1) that the states had no right to equal acreage since the indemnity lands were given as compensation to the states; 2) that the creation of grazing districts under the Taylor Grazing Act had the same effect as a withdrawal of lands under the Pickett Act;[56] and 3) that the Secretary had authority under the Taylor Grazing Act to reject indemnity selections by applying standards which were inconsistent with the standards enunciated in the indemnity selection statutes.[57]

Justice Powell noted that the majority's first misconception could not stand in light of the long line of statutes dating from the early 1800's which demonstrated that Congress specifically adopted an equal acreage standard to compensate the states for the lost base lands.[58] Justice Powell viewed the majority's second misconception as displaying a serious misunderstanding of the history of federal land management and the language of the Taylor Grazing Act.[59] Moreover, Justice Powell stated that withdrawals under the Pickett Act of 1910[60] had the effect of halting entry on and selection of public lands pending further determination of the best use of the land.[61] Since Taylor Grazing Act lands were exempted from Executive Order 6910[62] by Executive Order 7274,[63] such lands were limited solely by the Taylor Grazing Act which allowed entry or selection upon classification of the land by the Secretary.[64] The majority's third misconception also could not stand, reasoned Justice Powell, as section 1[65] of the Taylor Grazing Act exempts school grant indemnity rights from the Act.[66] Furthermore, even if indemnity rights are not exempted from the Act, section 7 does not authorize the Secretary to apply the equal value standard when the school indemnification statutes specify that the proper standard is the equal acreage standard.[67]

In concluding his dissent, Justice Powell implied that the application of the equal value standard rather than the equal acreage standard results in a

55. *Id.* at 1813-14.

56. Pickett Act of 1910, ch. 421, 36 Stat. 847. The Pickett Act was repealed by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, tit. VII, § 704(a), 90 Stat. 2792.

57. 100 S. Ct. at 1814 (Powell, J., dissenting).

58. *Id.* at 1815.

59. *Id.* at 1814.

60. *See* note 56 *supra*.

61. 100 S. Ct. at 1820.

62. *See* note 53 *supra*. Executive Order 6910 was a Pickett Act withdrawal. 100 S. Ct. at 1819-20.

63. Executive Order 7274, which was issued two years after Executive Order 6910, excluded all grazing district lands from the operation of Executive Order 6910. 100 S. Ct. at 1820.

64. 100 S. Ct. at 1820 & n.21.

65. Section 1, codified at 43 U.S.C. § 315 (1976), specifies that the Act shall not affect "any land . . . which . . . [otherwise] would be a part of any grant to any State . . . ."

66. 100 S. Ct. at 1821.

67. *Id.* at 1822.

breach of the covenant that the United States made with Utah upon Utah's admission to the Union.[68] Consequently, Justice Powell stated that he would have upheld the Tenth Circuit Court of Appeals' affirmance of the district court's decision as he believed that the district court had reached a "just conclusion."[69]

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II. SUPREME COURT AFFIRMANCES*

Andrus v. Glover Construction Co.

In *Andrus v. Glover Construction Co.*,[70] the Supreme Court affirmed a 1979 Tenth Circuit decision wherein the court of appeals had held that a federal highway construction contract could not be awarded to an Indian construction company without the government first publicly advertising for bids.[71]

In March 1976, the Commissioner of the Bureau of Indian Affairs (BIA) issued a memorandum interpreting the Buy-Indian Act,[72] said memorandum providing that bidding on contracts with the BIA was restricted to Indian owned companies; non-Indian owned companies were allowed to bid only if Indian owned companies were not available. In an attempt to comply with the Commissioner's directive, the BIA invited three Indian owned construction companies to bid on a contract for the reconstruction of a five-mile segment of road in an area within the jurisdiction of the BIA. The contract was awarded to Indian Nations Construction Company, an Indian owned enterprise, in May, 1977. No public advertising occurred in relation to the bidding. Glover Construction Company, a non-Indian contracting operation, brought suit, alleging that the Federal Property and Administrative Services Act of 1949 (FPASA) requires public advertising for such bids.[73] The district court found that the contract was invalid, and that the government should be enjoined from entering into any future road contracts without complying first with the public advertising requirements of the FPASA.[74]

In affirming the district court's holding, the Tenth Circuit Court of Appeals rejected the government's claim that the Buy-Indian Act was an excep-

68. *Id.* at 1823.
69. *Id.*
70. 100 S. Ct. 1905 (1980).
71. Glover Construction Co. v. Andrus, 591 F.2d 554 (10th Cir. 1979).
72. 25 U.S.C. § 47 (1976). The Act, in relevant part, provides that "[s]o far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market." *Id.*
73. 41 U.S.C. §§ 252-253 (1976).
74. Glover Construction Co. v. Andrus, 541 F. Supp. 1102 (E.D. Okla. 1978).

* Two other decisions of the Tenth Circuit Court of Appeals were affirmed by the United States Supreme Court during the 1980 term. These decisions, Trammel v. United States, 445 U.S. 40 (1980), and Andrus v. Shell Oil Co., 100 S. Ct. 1932 (1980), are discussed in case comments within this Seventh Annual Tenth Circuit Survey.

tion "otherwise authorized by law" under the FPASA,[75] thus rendering public advertising unnecessary. In reaching its decision, the Tenth Circuit Court relied upon rules of statutory construction and upon legislative history indicating a congressional intent to exclude highway construction projects from the operation of the Buy-Indian Act.[76]

The Supreme Court affirmed the Tenth Circuit Court of Appeals.[77] Using the same rules of statutory construction as were employed by the court of appeals, the High Court concluded that the Buy-Indian Act was an exception "otherwise authorized by law," but found it questionable whether a road constructed or repaired by an Indian owned company was "a product of Indian industry" as contemplated by the Act.[78] The Court continued, stating that even if the road were a product of Indian industry, a second provision of the FPASA relating to road construction contracts[79] evinced a congressional intent to bar the negotiation of such contracts under the authority of laws like the Buy-Indian Act. Thus, the Court held that the FPASA required public advertising before such a road construction contract was entered.[80]

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75. The FPASA provides a broad exception to the advertising requirement:
All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if otherwise authorized by law . . . .

41 U.S.C. § 252(c)(15) (1976).

76. 591 F.2d at 560-61.

77. 100 S. Ct. at 1911.

78. *Id.* at 1910.

79. 41 U.S.C. § 252(e) (1976).

80. 100 S. Ct. at 1911.

III. DENIALS OF CERTIORARI

A. Cases from Fifth Annual Survey*	Tenth Circuit Citation	Certiorari Denied
United States v. Clayborne	584 F.2d 346 (1978)	444 U.S. 847 (1979) (*sub nom.* Bruneau v. United States)
United States v. Heath	580 F.2d 1011 (1978)	439 U.S. 1075 (1979) (*sub nom.* Babb v. United States)
United States v. Mireles	583 F.2d 1115 (1978)	439 U.S. 936

B. Cases from Sixth Annual Survey	Tenth Circuit Citation	Certiorari Denied
Century Laminating, Ltd. v. Montgomery	595 F.2d 563 (1979)	444 U.S. 987 (1979) (*cert. dismissed*)
Coleman v. Darden	595 F.2d 533 (1979)	444 U.S. 927 (1979)
Deere & Co. v. Hesston Corp.	593 F.2d 969 (1979)	444 U.S. 838 (1979)
Lindsey v. Dayton-Hudson Corp.	592 F.2d 1118 (1979)	444 U.S. 856 (1979)
Marshall v. Sun Oil Co.	592 F.2d 563 (1979)	444 U.S. 826 (1979)
Mac Adjustment, Inc. v. General Adjustment Bureau, Inc.	597 F.2d 1318 (1979)	444 U.S. 929 (1979)
St. Regis Paper Co. v. Marshall	591 F.2d 612 (1979)	444 U.S. 828 (1979)
United States v. Askew	584 F.2d 960 (1978)	439 U.S. 1132 (1979)
United States v. Barron	594 F.2d 1345 (1979)	441 U.S. 951 (1979)
United States v. Bowers	593 F.2d 376 (1979)	444 U.S. 852 (1979)
United States v. Brown	600 F.2d 248 (1979)	441 U.S. 917 (1979)
United States v. Davidson	597 F.2d 230 (1979)	444 U.S. 861 (1979)
United States v. Erb	596 F.2d 412 (1979)	444 U.S. 848 (1979)
United States v. Kilburn	596 F.2d 928 (1979)	440 U.S. 966 (1979)
United States v. Leavitt	599 F.2d 355 (1979)	444 U.S. 833 (1979)
United States v. New Mexico	590 F.2d 323 (1978)	444 U.S. 832 (1979)
United States v. Priest	594 F.2d 1383 (1979)	444 U.S. 847 (1979)
United States v. Roberts	583 F.2d 1173 (1978)	439 U.S. 1080 (1979)
United States v. Smaldone	583 F.2d 1129 (1978)	439 U.S. 1073 (1979) (*sub nom.* La Rocco v. United States) and 439 U.S. 1119 (1979) (*sub nom.* Foderaro v. United States)
United States v. Smyer	596 F.2d 939 (1979)	444 U.S. 843 (1979)
United States v. Watson	594 F.2d 1330 (1979)	444 U.S. 840 (1979) (*sub nom.* Brown v. United States)
United Telecommunications, Inc. v. Commissioner	589 F.2d 1383 (1978)	442 U.S. 917 (1979)

* Additional cases from the Fifth Annual Tenth Circuit Survey, for which certiorari has been denied, appear at 57 DEN. L.J. 344 (1979).