

Annual Survey of Massachusetts Law

Volume 1981

Article 4

1-1-1981

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Recommended Citation

Rogers, James Steven (1981) "Chapter 1: Contracts and Commercial Law," *Annual Survey of Massachusetts Law*: Vol. 1981, Article 4.

CHAPTER 1

Contracts and Commercial Law

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§ 1.1. Contracts—Termination of At Will Employment Contract—Damages. In 1977 the Supreme Judicial Court held in *Fortune v. National Cash Register Co.*¹ that an at will employment contract contained an implied obligation of good faith and fair dealing such that the employer's bad faith termination of the employment contract was a breach for which the employee could recover damages. As one might have anticipated, the Massachusetts courts have been confronted with a variety of problems in delineating the scope of the *Fortune* principle. During the *Survey* year, both the Supreme Judicial Court and the Massachusetts Appeals Court rendered decisions which provide some guidance concerning the reach of the *Fortune* case.²

In *Gram v. Liberty Mutual Insurance Co.*³ an insurance salesman brought suit against his employer and his supervisors seeking damages from the employer for the termination of his employment, and from his supervisors for intentional interference with his employment contract. Gram was employed in 1970 as an insurance salesman by Liberty Mutual under an at will employment arrangement.⁴ His compensation consisted of percentage commissions on new sales and, at a lower rate, on renewals of policies previously sold.⁵ In 1976, renewal commissions accounted for approximately one-fourth of his earnings.⁶ Gram's work was generally satisfactory, although there had been several instances in which Gram had been reprimanded for altering company mailings and using unauthorized sales literature.⁷ In early January, 1977, Gram sent to prospective customers a mailing

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§ 1.1. ¹ 373 Mass. 96, 364 N.E.2d 1251 (1977). The Court left open the possibility that there may be situations in which the obligation of good faith and fair dealing might not be implied. *Id.* at 104, 364 N.E.2d at 1257.

² *Gram v. Liberty Mut. Ins. Co.*, 1981 Mass. Adv. Sh. 2287, 429 N.E.2d 21; *Maddaloni v. Western Mass. Bus Lines, Inc.*, 1981 Mass. App. Ct. Adv. Sh. 1357, 422 N.E.2d 1379, *review granted* 1981 Mass. Adv. Sh. 2083.

³ 1981 Mass. Adv. Sh. 2287, 429 N.E.2d 21.

⁴ *Id.* at 2288, 429 N.E.2d at 22.

⁵ *Id.* at 2288, 429 N.E.2d at 22-23.

⁶ *Id.* at 2288, 429 N.E.2d at 23.

⁷ *Id.* at 2289, 429 N.E.2d at 23.

which he had prepared.⁸ Gram's supervisors obtained the approval of higher authorities at Liberty to fire Gram on the grounds that this mailing was unauthorized and violated company policies.⁹ Gram brought suit and recovered verdicts in the amount of \$100,000 against Liberty, and \$40,000 and \$30,000 against his two supervisors.¹⁰ Defendants' appeals were transferred to the Supreme Judicial Court on the Court's own motion.¹¹

Viewing the evidence in the light most favorable to the plaintiff, the Court concluded that the jury could have found that the mailings did not violate any established company policy and that Gram was discharged without good cause.¹² Addressing Gram's action against his supervisors for tortious interference with his employment contract, the Court ruled that since the supervisors were acting within the scope of their duties to the employer, they could not be held liable for interference with Gram's employment contract unless they acted with actual malice.¹³ The Court ruled that the evidence at most could support an inference that the supervisors did not want Gram to work under them, that they did not conduct an adequate investigation of the alleged violation of company policy, and that there was no other valid cause for Gram's termination.¹⁴ Such evidence and inferences, however, could not support a finding of actual malice.¹⁵ Accordingly, the judgments against the supervisors were reversed.

Turning to Gram's action against his employer, the Court noted that under *Fortune*, Gram might recover for breach of his at will employment contract if the evidence would support a finding that the termination violated the employer's implied obligation of good faith and fair dealing.¹⁶ The Court ruled, however, that the absence of good cause for terminating an employee does not, in itself, amount to a violation of the obligation of good faith and fair dealing.¹⁷ The Court found no basis in the evidence for inferring that Gram was discharged for any illicit reason.¹⁸ In particular, although the effect of the termination was to deprive Gram of the expectation of receiving renewal commissions in the future on policies sold by him in the past, the Court found no basis for inferring that the discharge was motivated by a desire to avoid paying Gram the renewal commissions.¹⁹ Ac-

⁸ *Id.* at 2289-90, 429 N.E.2d at 23.

⁹ *Id.*

¹⁰ *Id.* at 2291, 429 N.E.2d at 24.

¹¹ *Id.*

¹² *Id.* at 2290, 429 N.E.2d at 24.

¹³ *Id.* at 2291, 429 N.E.2d at 24.

¹⁴ *Id.* at 2293, 429 N.E.2d at 25.

¹⁵ *Id.*

¹⁶ *Id.* at 2294, 429 N.E.2d at 25-26.

¹⁷ *Id.* at 2295-96, 429 N.E.2d at 26.

¹⁸ *Id.* at 2298-99, 429 N.E.2d at 27-28.

¹⁹ *Id.* at 2298, 429 N.E.2d at 27-28.

cordingly, Gram was not entitled to recover full contract damages for breach of his employment contract.

The Court noted, however, that Gram's loss of his expectation of receiving renewal commissions warranted special consideration.²⁰ The Court held that "the obligation of good faith and fair dealing imposed on an employer requires that the employer be liable for the loss of compensation that is so clearly related to an employee's past service, when the employee is discharged without good cause."²¹ Thus, the Court remanded the case for a determination of damages based upon the amount of renewal commissions which Gram reasonably could have expected to receive, reduced by some percentage to reflect the proportion of Gram's time which he would have had to spend in servicing the renewal policies in order to receive the renewal commissions.²²

Justices Nolan and Lynch dissented from the Court's ruling concerning Gram's right to recover damages based upon expected renewal commissions.²³ In the view of the dissenting Justices, the Court should not "impose a condition on parties to a contract which neither party had ever considered," at least in a case where the termination was not made in bad faith.²⁴ Furthermore, the dissenters charged that the measure of damages adopted by the majority would require the trier of fact to "engage in extravagant speculation" concerning the variety of factors which might have led policy holders to fail to renew their policies.²⁵

The possibility that a termination of an at will employment contract may lead to more extensive recovery by the employee than occurred in *Gram* is well illustrated by a case decided during the *Survey* year by the Appeals Court, *Maddaloni v. Western Mass. Bus Lines, Inc.*²⁶ The employee, Maddaloni, was hired by the bus company as its general manager under a written employment contract which was terminable at will.²⁷ Maddaloni's employment contract provided that if he were successful in obtaining for the company authority from the Interstate Commerce Commission for interstate charter operations, he would receive a commission based upon revenues from such operations.²⁸ Between the time Maddaloni was hired and the time of his discharge, the sole shareholder of the company sold his stock to

²⁰ *Id.* at 2300, 429 N.E.2d at 29.

²¹ *Id.*

²² *Id.* at 2301, 429 N.E.2d at 29.

²³ *Id.* at 2302-03, 429 N.E.2d at 30.

²⁴ *Id.* at 2303, 429 N.E.2d at 30.

²⁵ *Id.*

²⁶ 1981 Mass. App. Ct. Adv. Sh. 1357, 422 N.E.2d 1379, *review granted* 1981 Mass. Adv. Sh. 2083.

²⁷ *Id.* at 1357, 422 N.E.2d at 1380.

²⁸ *Id.* at 1359 & n.3, 422 N.E.2d at 1381 & n.3.

another.²⁹ The new owner approved Maddaloni's employment contract, and Maddaloni did in fact succeed in obtaining ICC approval for the new charter operations.³⁰ The new owner expressed considerable reluctance about paying Maddaloni his commissions, and, after the commissions had been paid for three months, Maddaloni was discharged.³¹ Maddaloni brought suit against his employer and recovered a judgment for a portion of the commissions he could have expected to receive.³² The employer appealed the judgment finding liability and the employee cross-appealed on the issue of damages.

The Appeals Court ruled that the jury properly could have found that Maddaloni was discharged in order to deprive him of the commissions to which he had become entitled and that such a finding would bring the case within the principles of the *Fortune* decision.³³ On the issue of damages, the court held that in cases in which an at will employee is discharged in bad faith, he is entitled to recover full damages computed on ordinary contract law principles.³⁴ Thus, Maddaloni would be entitled to judgment both for commissions and for lost wages.³⁵ The case was remanded for further proceedings to assess damages for loss of wages and fringe benefits as well as commissions.³⁶

The Supreme Judicial Court's decision in the *Gram* case represents a rather uneasy compromise on the difficult question of the extent to which employees should be protected against termination. In the 1977 decision of *Fortune v. National Cash Register Co.*³⁷ the Court held that an employer's termination of the employment contract of an at will employee was actionable in a situation in which the evidence would support a finding that the employer terminated a salesman for the purpose of depriving him of commissions on a sale made shortly before his termination.³⁸ The *Fortune* decision has been widely regarded as a major break from the traditional view that an at will employment contract can be terminated for good reason, bad reason, or no reason at all.³⁹ The *Gram* decision is both a limitation and an

²⁹ *Id.* at 1360, 422 N.E.2d at 1381.

³⁰ *Id.* at 1360, 422 N.E.2d at 1382.

³¹ *Id.* at 1361, 422 N.E.2d at 1382.

³² *Id.* at 1366-67, 422 N.E.2d at 1385.

³³ *Id.* at 1362-63, 422 N.E.2d at 1382-83.

³⁴ *Id.* at 1370, 422 N.E.2d at 1387.

³⁵ *Id.* at 1371, 422 N.E.2d at 1387.

³⁶ *Id.*

³⁷ 373 Mass. 96, 364 N.E.2d 1251 (1977).

³⁸ *Id.* at 104-05, 364 N.E.2d at 1257.

³⁹ See, e.g., Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457, 471-73; Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1821, 1838-39 (1980).

expansion of the principles of *Fortune*. *Gram* makes it clear that the Court does not regard *Fortune* as establishing the rule that at will employment contracts can be terminated only for good cause.⁴⁰ In order for an employee to recover full contract damages for breach of an at will employment contract, it will be necessary for the employee to demonstrate that he was terminated for some affirmatively bad reason, not simply that the employer lacked good cause for the discharge.⁴¹ On the other hand, the *Gram* Court's ruling that *Gram* could recover damages for the loss of expected renewal commissions merely upon a showing that the employer lacked good cause for the termination is a considerable expansion of the *Fortune* ruling.

It is interesting to note that the relief sought by the employee in *Fortune* was precisely the same as the relief awarded in *Gram*—that is, recovery of commissions related to sales made by the employee prior to his termination. In *Fortune* such relief was awarded only upon a showing that the termination was motivated by a desire to deprive the employee of such commissions.⁴² In *Gram*, however, the same relief was awarded even though the employee failed to demonstrate that the employer discharged him in order to deprive him of commissions. The difference between the cases seems to be that in *Gram*, but not in *Fortune*, the employee also sought damages for the loss of future earnings for future services.⁴³ The *Gram* decision may suggest that had the employee in *Fortune* sought such recovery it would have been awarded, as was done by the Appeals Court in *Maddaloni*.

The *Gram* decision indicates that the implied obligation of good faith and fair dealing imposes two separate requirements, breach of which result in different remedial consequences.⁴⁴ The good faith requirement prohibits only discharges based on some improper motive;⁴⁵ however, it appears that such a breach may lead to the award of full contract damages. The fair dealing requirement, on the other hand, may be violated even without a showing of improper motive, although such a breach may result in a less extensive award of damages.⁴⁶ Thus, in *Gram*, the obligation of fair dealing required the employer to compensate the employee for “the agreed worth of such an employee's past services” even though no violation of the obligation of good faith had been shown.⁴⁷

⁴⁰ 1981 Mass. Adv. Sh. at 2294-96, 429 N.E.2d at 26.

⁴¹ *Id.* at 2296-99, 429 N.E.2d at 26-28.

⁴² 373 Mass. at 104-05, 364 N.E.2d at 1257.

⁴³ Compare *Gram v. Liberty Mut. Ins. Co.*, 1981 Mass. Adv. Sh. 2287, 2289, 429 N.E.2d 21, 22, with *Fortune v. National Cash Register Co.*, 373 Mass. 96, 96, 364 N.E.2d 1251, 1251 (1977).

⁴⁴ See 1981 Mass. Adv. Sh. at 2298, 2301, 429 N.E.2d at 27, 29.

⁴⁵ *Id.* at 2296-2299 & 2296-97 n.6, 429 N.E.2d at 26-28 & 27 n.6.

⁴⁶ *Id.* at 2300-01, 429 N.E.2d at 29.

⁴⁷ *Id.* at 2301, 429 N.E.2d at 29.

The scope of the *Gram* fair dealing requirement is not clear. In addition to cases such as *Gram* and *Fortune*, involving an employee whose compensation consists in part of commissions for past sales, the *Gram* principle may be relevant to other forms of expected compensation for past services. *Gram* may well prove to be a most useful precedent for employees who lose nonvested pension rights as a result of a termination of their employment without good cause. The *Gram* court explicitly suggested the possibility of recovery of nonvested pension rights in such cases by noting that "Gram has made no specific showing of his loss of any other identifiable, future benefit, such as pension rights, reflective of past services to Liberty."⁴⁸

Indeed, the possibility of the expansion of the *Gram* principle suggests that the Court may well have considerable difficulty in maintaining the distinction, upon which *Gram* rests, between the loss of future income for past services and the loss of future income for future services. An employee who has worked for his employer for a long time may, by virtue of his years of service, have acquired formal or informal seniority rights which made him eligible for higher paying jobs and increased fringe benefits such as vacations and the like. If the employee is discharged without good cause, he may be forced to take a job with a new employer and begin anew his climb up the seniority ladder toward increased wages and benefits. The employee might well argue that the higher level of wages and benefits which he would have received in his former job represented compensation for past services which are recoverable under *Gram* even in the absence of a showing of a bad faith discharge. Yet, recovery for such a loss of wages and benefits is precisely the sort of relief which would be awarded under ordinary contract law principles for a full-scale breach of the employment contract, and *Gram* holds that such damages are not to be awarded merely upon a showing of the lack of good cause for the discharge.

Thus, *Gram* appears to represent a rather unstable balance between the employer's interest in freedom of action and the employee's interest in the wide variety of benefits which he obtains from his employment. In effect, the Court has ruled that the employer's interest in freedom of action must yield to the protection of those aspects of the employee's interest in continued employment which are specifically and directly related to his past services, but not to those of aspects of the employee's interest which are more nebulously related to his past service. Yet, the very point which critics of the traditional rules concerning the termination of at will employment contracts have been making for the past few decades is that an employee's decision to remain with his employer for a substantial period of time represents a very real investment in the benefits which he expects to obtain in the future and that this investment ought to be protected against unjustified dis-

⁴⁸ *Id.*

charges.⁴⁹ *Fortune* and *Gram* are steps in the direction of full recognition of the employee's interest in the continuation of his employment. Having taken those steps, it will not be easy for the Court to stop short of the adoption of the proposition that all aspects of the employee's investment in his job warrant protection against arbitrary discharges. Surely we have not seen the last word on this subject from the Massachusetts courts.⁵⁰

§ 1.2. Contracts — Joint Obligation or Joint and Several Obligation — Effect of Judgment for One Co-Obligor. In a decision rendered during the *Survey* year, *Eastern Electrical Co. v. Taylor Woodrow Blitman Construction Corp.*,¹ the Appeals Court all but sounded the death knell for the distinction between joint obligations and joint and several obligations. Ironically, however, the case was one in which the distinction was probably irrelevant.

The plaintiff, Eastern Electrical Company ("Eastern"), was the electrical subcontractor on a construction project.² The general contractor was an unincorporated joint venture named Taylor-South Company, created by a joint venture agreement between Taylor Woodrow Blitman Construction Corp. ("Taylor") and South Construction Co. ("South").³ The subcontract with Eastern was signed for Taylor-South Company by representatives of both Taylor and South.⁴

In 1974, Eastern brought an action against Taylor for amounts due under the subcontract.⁵ South was joined as a co-defendant in 1975; however, in 1976, Eastern's action was dismissed against South due to Eastern's failure to answer interrogatories asked by South.⁶ Three years later, Eastern's motion to vacate the dismissal against South was denied.⁷ Eastern then moved for summary judgment against Taylor. The trial judge granted Eastern's motion for summary judgment, rejecting Taylor's contention that since Taylor and South were jointly liable, the earlier judgment for South precluded the entry of judgment against Taylor.⁸ The Appeals Court affirmed.

⁴⁹ See Glendon & Lev, *supra* note 39, at 475-83; Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1420 (1967); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974); cf. Reich, *The New Property*, 73 YALE L. J. 733, 738 (1964).

⁵⁰ Indeed, the Supreme Judicial Court has agreed to hear an appeal from the Appeals Court's ruling in *Maddaloni*. 1981 Mass. Adv. Sh. 2083.

§ 1.2. ¹ 1981 Mass. App. Ct. Adv. Sh. 110, 414 N.E.2d 1023.

² *Id.* at 110-11, 414 N.E.2d at 1024.

³ *Id.*

⁴ *Id.* at 111, 414 N.E.2d at 1024.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 111-12, 414 N.E.2d at 1024.

Justice Cutter's opinion in *Eastern Electrical Co.* began by considering whether the Uniform Partnership Act,⁹ section 15(b) of which provides that partners are jointly liable for most contractual claims against the partnership,¹⁰ must be applied to joint ventures.¹¹ Noting that Massachusetts law on joint ventures is not fully developed, the court ruled that the Uniform Partnership Act should not be considered as definitive on questions involving joint ventures, but may be applied by analogy when appropriate.¹² In the present case, however, the court found, upon consideration of the joint venture agreement between Taylor and South, that their relationship was unlike the usual relationship between partners.¹³ In particular, South was to some extent under common control with the owner and occupied a dominant role over Taylor under the joint venture agreement.¹⁴ Thus, the court concluded that partnership law principles should not be applied so as to render Taylor and South's liability on the subcontract with Eastern joint rather than joint and several.¹⁵

The court then considered whether, as a matter of general contract law, there were grounds for finding that Taylor and South were jointly and severally liable.¹⁶ The court noted that there were several indicia in the subcontract between Taylor-South and Eastern which might suggest that Taylor and South had incurred joint and several liability: the contract was in the form of "an agreement of a singular contractor but signed by plural obligors;"¹⁷ the contract did not explicitly state that only joint liability was incurred;¹⁸ and the agreement stated that the joint venturers made the contract "for themselves, their . . . successors and assigns."¹⁹ Moreover, the court stated that support for the imposition of joint and several liability could be found in the fact that under the joint venture agreement between Taylor and South, Taylor was given primary responsibility for relations

⁹ G.L. c. 108A.

¹⁰ "All partners are liable: (a) Jointly and severally for everything chargeable to the partnership under sections thirteen [claims for loss or injury caused by partner's wrongful act or omission] and fourteen [claims for money or property of third parties misapplied by partners]. (b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract." G.L. c. 108A, § 15.

¹¹ 1981 Mass. App. Ct. Adv. Sh. at 114-19, 414 N.E.2d at 1025-28.

¹² *Id.* at 114-16, 414 N.E.2d at 1025-27.

¹³ *Id.* at 117-19, 414 N.E.2d at 1027-28.

¹⁴ *Id.* at 111-12 n.2, 117-19, 414 N.E.2d at 1025 n.2, 1027-28.

¹⁵ *Id.* at 119, 414 N.E.2d at 1028.

¹⁶ *Id.* at 120-23, 414 N.E.2d at 1028-30.

¹⁷ *Id.* at 120, 414 N.E.2d at 1029.

¹⁸ *Id.* The court's suggestion that the failure explicitly to provide for only joint liability is some indication of intent to incur joint and several liability suggests a welcome reversal of the traditional rule presuming that multiple promisors of the same performance incur joint liability. RESTATEMENT (SECOND) OF CONTRACTS § 289(2) (1981).

¹⁹ 1981 Mass. App. Ct. Adv. Sh. at 120, 414 N.E.2d at 1029.

with subcontractors, and, whether or not Eastern had knowledge of this provision of the joint venture agreement, Eastern “undoubtedly dealt primarily with Taylor, which was in charge of construction, and probably looked for payment primarily to Taylor which it sued first.”²⁰ Furthermore, the court observed that the distinction between joint liability and joint and several liability has been subjected to trenchant criticism.²¹ Justice Cutter noted that although the recently promulgated Restatement (Second) of Contracts does not go so far as to obliterate the distinction and make all joint obligations joint and several, it does recognize that the courts have often given effect to any manifestation of intention to incur joint and several liability that can be found.²²

The court, however, expressly stated that it was not basing its decision either on rejection of the distinction between joint obligations and joint and several obligations, or on a finding that the joint venturers had in fact incurred joint and several liability, since so doing “might involve more sweeping rejection of long standing (but probably outworn) authorities than is now necessary.”²³ Rather, Justice Cutter stated that these considerations at least suggested that “limits should be placed upon application of the old rule (assuming it should be applied at all) that at least a voluntary discharge or release of one joint obligor has the effect of releasing all joint obligors.”²⁴ The court noted that it is well established that a judgment for one joint obligor based on certain defenses personal to him, such as discharge in bankruptcy, does not preclude the entry of judgment against the other joint obligors.²⁵ The Appeals Court approved the trial judge’s ruling that the default judgment of dismissal entered for South upon Eastern’s failure to answer interrogatories should be considered a defense personal to South which should not bar Eastern’s recovery against Taylor.²⁶ The court recognized that this ruling may be an extension of the authorities concern-

²⁰ *Id.* at 122, 414 N.E.2d at 1030.

²¹ *Id.* at 120-21, 414 N.E.2d at 1029.

²² *Id.* at 121-22, 414 N.E.2d at 1029-30.

²³ *Id.* at 123, 414 N.E.2d at 1030.

²⁴ *Id.* Although the court referred to the rule that “a voluntary discharge or release” of one joint obligor releases all, *id.*, presumably the rule which might be applicable to the present case is not the rule concerning releases, see RESTATEMENT OF CONTRACTS §§ 121-24 (1932), RESTATEMENT (SECOND) OF CONTRACTS § 294 (1981), but the rules concerning the effect of judgment for one co-promisor on the liability of the other co-promisors, see RESTATEMENT OF CONTRACTS §§ 118-19 (1932), RESTATEMENT (SECOND) OF CONTRACTS §§ 291, 292 (1981). The opinion manifests some confusion on this point, as in the suggestion that the fact that the judgment of dismissal for South was not voluntary or intentional warrants the conclusion that the dismissal of South should have no effect on Eastern’s action against Taylor. See 1981 Mass. App. Ct. Adv. Sh. at 124, 414 N.E.2d at 1031.

²⁵ *Id.* at 113 & n.2, 123, 414 N.E.2d at 1025 & n.2, 1030.

²⁶ *Id.* at 123, 414 N.E.2d at 1030.

ing such personal defenses, but felt that this was appropriate in the present case to avoid unjust consequences of the procedural dismissal of Eastern's claim against South.²⁷ Accordingly, the entry of summary judgment against Taylor for the amount remaining due to Eastern under the subcontract with Taylor-South was affirmed.

The terms "joint" and "several" as applied to contractual obligations are quite ambiguous.²⁸ Such language is sometimes used in describing the distinction between situations in which a number of persons promise to render different performances and situations in which a number of persons promise to render the same performance.²⁹ While the terms "joint" and "several" may do little more than engender confusion, this distinction involves a genuine issue of contractual interpretation. For example, in *Goldstein v. Katz*³⁰ two partners promised their employee a \$1000 bonus if he undertook certain additional duties. The dispute was whether there was a single performance, payment of \$1000, which had been promised by the two partners, or whether the partners had promised separate performances, that is, each would pay the employee \$500. Such questions entail unavoidable problems of contractual interpretation which arise out of the complexities of human affairs and must be resolved by the ordinary process of seeking the intentions of the parties.³¹ In the *Eastern Electrical Co.* case, however, there was no dispute on this score. No one suggested that Taylor and South had each engaged separately to pay Eastern only a portion of the total amount due under the subcontract. Rather, it was clear from the arrangements between the parties that a single performance, payment of the agreed price for the subcontract work, had been promised by two parties, Taylor and South.

The issue discussed in *Eastern Electrical Co.* — distinguishing between joint obligations and joint and several obligations — is a problem which arises not out of the inevitable complexity of human affairs but out of the unnecessary complexity of legal categories. It should be borne in mind that both "joint obligation" and "joint and several obligation" are subcategories of the category of promises of a single performance by multiple promisors, and that the distinction between these two concepts has nothing to do with the basic nature of the undertakings of the parties.³² Whether an

²⁷ *Id.* at 124-25, 414 N.E.2d at 1031.

²⁸ RESTATEMENT (SECOND) OF CONTRACTS Introductory Note to Chapter 13, at 402 (1981); 4 CORBIN ON CONTRACTS § 925, at 702 (1951).

²⁹ See generally 4 CORBIN ON CONTRACTS §§ 925-26.

³⁰ 325 Mass. 428, 91 N.E.2d 237 (1950).

³¹ See *id.*; *Lovell v. Commonwealth Thread Co.*, 272 Mass. 138, 172 N.E. 77 (1930); RESTATEMENT (SECOND) OF CONTRACTS § 288 (1981); 4 CORBIN ON CONTRACTS § 926 (1951).

³² See RESTATEMENT (SECOND) OF CONTRACTS § 288, Comment b (1981); 4 CORBIN ON CONTRACTS § 925, at 701-02 (1951).

There is, of course, a third possible subcategory of multiple promises of one performance,

obligation is classified as joint or as joint and several, the promisee can, if he successfully avoids various procedural traps, obtain damages from any or all of the promisors for the full amount promised, although he is, of course, limited to a single satisfaction;³³ and if one of the promisors is forced to pay more than his pro rata, or otherwise agreed, share of the total liability, he can recover contribution from the others.³⁴

The distinction between joint and joint and several obligations involves only what Professor Corbin aptly terms certain “analytical and procedural excrescences.”³⁵ In the absence of statutory or judicial reform, the principal common law differences between joint and joint and several obligations were as follows: Obligors of a joint obligation must all be joined as defendants in an action on the obligation, while obligors of a joint and several obligation could be sued separately.³⁶ In an action on a joint obligation, the judgment must be for or against all of the obligors, while in an action on a joint and several obligation judgment might be entered for some and against others.³⁷ In an action on a joint obligation, but not a joint and several obligation, a judgment entered against one of the promisors would preclude the promisee from later proceeding against the other promisors, even though the first judgment was unsatisfied.³⁸ In the case of joint obligations, but not joint and several obligations, an action against the estate of a deceased joint promisor was barred while co-promisors survived.³⁹ Finally, in some, but not all, jurisdictions, the rule that a release of one promisor barred an action against the other co-promisors was applied only to joint obligations.⁴⁰

that is, several obligations. Parties might incur several liability by expressly so providing or by promising the same performance in separate documents. See 4 CORBIN ON CONTRACTS § 925, at 700-01 (1951). Disputes concerning several, but not joint and several, obligations do not seem to appear frequently in the decisions since as there is little, if any, difference of significance in the distinction between several obligations and joint and several obligations. See G.L. c. 231 § 4 and MASS. R. CIV. P. 20 (permitting joinder of several obligors).

³³ RESTATEMENT (SECOND) OF CONTRACTS § 289(1) (1981); 4 CORBIN ON CONTRACTS § 928 (1951).

³⁴ *Quintin v. Magnant*, 285 Mass. 450, 189 N.E. 209 (1934); 4 CORBIN ON CONTRACTS § 924, at 698-99 (1951); *id.* § 929, at 702-03.

³⁵ 4 CORBIN ON CONTRACTS § 925, at 701-02 (1951).

³⁶ RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Chapter 13, at 402 (1981); *id.* § 290, Comment a; 4 CORBIN ON CONTRACTS § 929, at 717-19 (1951); *id.* § 937, at 774.

³⁷ RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Chapter 13, at 402 (1981); *id.* § 291, Comment a.

³⁸ RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Chapter 13, at 402 (1981); *id.* § 292, Comment a; 4 CORBIN ON CONTRACTS § 929, at 720-21 (1951); *id.* § 937, at 774.

³⁹ RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Chapter 13, at 402-03 (1981); *id.* § 296, Comment a; 4 CORBIN ON CONTRACTS § 930 (1951).

⁴⁰ RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Chapter 13, at 403 (1981); *id.* § 294, Comments a and c (1981); 4 CORBIN ON CONTRACTS §§ 931-34 (1951); *id.* § 937, at 777-79.

In Massachusetts, as in other jurisdictions, many of the distinctions have been superseded by legislative or judicial reform,⁴¹ although Massachusetts has not, thus far, gone as far as the many jurisdictions which have adopted statutes converting all joint obligations into joint and several obligations.⁴² The Appeals Court's opinion in *Eastern Electrical Co.* suggests that the court may well abrogate the distinction by judicial decision if presented with a case in which no other method of avoiding the unjust consequences of the joint obligation rules is available.

Until the time that the joint obligation rules are finally laid to rest, it seems likely, as the *Eastern Electrical Co.* opinion indicates, that the court will be quite willing, under the guise of contractual interpretation, to avoid the effects of the joint obligation rules by construing agreements to create

Massachusetts is one of the states in which the rule that discharge of one co-obligor discharges all has been applied both to joint obligations and to joint and several obligations. *E.g.*, *Wiggin v. Tudor*, 40 Mass. (23 Pick.) 434, 444 (1839); *American Bank v. Doolittle*, 31 Mass. (14 Pick.) 123 (1833). In his discussion in *Eastern Electrical Co.* of the desirability of abolishing the distinction between joint obligations and joint and several obligations, Justice Cutter states that, "the distinction all too frequently may result in serious unfairness because of the rule that the voluntary discharge or release of one joint obligor discharges other joint obligors." 1981 Mass. App. Ct. Adv. Sh. at 121, 414 N.E.2d at 1029. In a jurisdiction such as Massachusetts, however, the problems concerning the rules on release of one co-obligor have nothing to do with the distinction between joint obligations and joint and several obligations. See RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Chapter 13, at 403 (1981); *id.* § 294, Comment c (1981).

⁴¹ Concerning the requirement of joinder of all joint obligors, Massachusetts long ago adopted the rule that non-joinder could be raised only by a plea in abatement wherein the defendant "gave the plaintiff a better writ" by naming the other joint obligors so that plaintiff might join them in a new suit. *Wilson v. Nevers*, 37 Mass. (20 Pick.) 20 (1838). Moreover, non-joinder of a joint obligor who cannot be served with process due to his absence from the state or other good cause does not prevent continuation of the suit against the remaining co-obligors. G.L. c. 227, § 14. To the extent that anything remains of the joinder rule, the flexible language of MASS. R. CIV. P. 19 should prevent it from doing any serious harm.

The rule requiring that judgment be either for or against all joint obligors is subject to the exception for certain defenses personal to one of the co-obligors, *MacKintosh v. Chambers*, 285 Mass. 594, 190 N.E. 38 (1934), and a somewhat limited statutory modification, G.L. c. 235, § 6. Any remaining fragment of the related rule requiring that a plaintiff whose complaint named as joint obligor defendants more parties than he actually proved to be joint obligors be non-suited, *see Tuttle v. Cooper*, 27 Mass. (10 Pick.) 281 (1830), should have been eliminated by modern rules on amendment of pleadings, MASS. R. CIV. P. 15.

The rule that a judgment entered in a suit against fewer than all of the joint obligors discharges the other joint obligors may still be the law in Massachusetts, *see Lonqvist v. Lammi*, 242 Mass. 574, 577, 136 N.E. 610, 612 (1922); *Cowley v. Patch*, 120 Mass. 137, 138 (1876); *Ward v. Johnson*, 13 Mass. 148 (1816), except to the extent modified by G.L. c. 227, § 14, permitting subsequent suits against joint obligors who could not be served with process in the first suit.

The rule of barring actions against the estate of a joint obligor has been abolished altogether by statute. G.L. c. 197, § 8.

⁴² See RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Chapter 13, at 403-06.

joint and several liability. Although the Appeals Court did not ultimately rest its decision on this ground, the court did, as has been noted above, suggest that there were various aspects of the relationship between Eastern and Taylor-South which might warrant a finding that joint and several liability was intended.⁴³ This seems to be a somewhat disingenuous approach. The new Restatement (Second) of Contracts, deferring to the existing state of decisional law, continues to adhere to the rule that when multiple obligors promise the same performance it is presumed that they incur only joint liability unless they manifest an intention to create several or joint and several liability.⁴⁴ The comment to this section, however, thoroughly undercuts the rationale both for the rule presuming joint liability and for the notion that the parties' intention provides the key to determining whether joint or joint and several liability was incurred. The comment notes that "[w]here a 'joint' duty differs from 'joint and several' duties, the joint duty is invariably less advantageous to the promisee, while the advantage to the promisor does not normally serve any legitimate interest."⁴⁵ Given that fact, and given the exceedingly quirky nature of the differences, it seems highly unlikely that parties actually will bargain for only joint liability, if, indeed, it is plausible to suppose that parties really think about the distinction at all.⁴⁶

The Appeals Court's discussion of the possibility of abrogating the distinction between joint and joint and several liability, or finding that Taylor and South had incurred joint and several liability assumes that if the rules governing joint and several obligations were applied it would follow that the dismissal of Eastern's complaint against South would not affect Eastern's claim against Taylor.⁴⁷ This assumption, however, appears to be unfounded. Indeed, in the situation involved in the *Eastern Electrical Co.* case, it may make no difference whether Taylor and South's liability is considered to be joint or joint and several.

As the court recognized in its ultimate disposition of the case, the rule that judgments in actions on joint obligations must be for or against all obligors alike is subject to a number of exceptions.⁴⁸ A judgment in favor of

⁴³ 1981 Mass. App. Ct. Adv. Sh. at 120, 122, 414 N.E.2d at 1029, 1030.

⁴⁴ RESTATEMENT (SECOND) OF CONTRACTS § 289(2) (1981).

⁴⁵ *Id.* Comment b.

⁴⁶ Moreover, indicia of "separateness" such as the facts pointed to by the Appeals Court in *Eastern Electrical Co.* that Eastern probably dealt with and looked for payment primarily to Taylor, 1981 Mass. App. Ct. Adv. Sh. at 122, 414 N.E.2d at 1030, seem to have little to do with the technical, procedural differences between joint obligations and joint and several obligations.

⁴⁷ *Id.* at 122-23, 414 N.E.2d at 1030 ("Either of these grounds of action [abolition of the distinction or finding joint and several liability] would achieve the equitable purpose of assuring that Eastern receive payment for work which it has fully performed.")

⁴⁸ See *id.* at 113 & n.2, 123, 414 N.E.2d at 1025 & n.2, 1030.

one joint obligor will not preclude judgment against other obligors in cases in which the obligor who prevailed did so on the basis of certain defenses personal to him, such as discharge in bankruptcy, statute of limitations, lack of personal jurisdiction, or contractual incapacity.⁴⁹ On the other hand, a judgment for one joint obligor on the basis of a ruling on the merits that the obligee is not entitled to recover would preclude judgment for the obligee against the other obligors.⁵⁰ Thus, if Taylor and South were jointly liable, the effect of the dismissal of Eastern's claim against South on its claim against Taylor would depend on the characterization of South's defense.

The Appeals Court seems to have assumed that if Taylor and South were jointly and severally liable, it would follow, without more, that South's dismissal could have no effect on Eastern's claim against Taylor.⁵¹ It is clearly not the case, however, that the fact that promisors are jointly and severally liable means that a judgment for one co-promisor can have no effect on the liability of the others.⁵² As the new Restatement (Second) of Contracts indicates, the rules concerning the effect of a judgment for one co-promisor on the liability of the others are the same no matter how the promisor's liability is categorized. Section 291 states that "[i]n an action against promisors of the same performance, whether their duties are joint, several, or joint and several, judgment can properly be entered for or against one even though no judgment or a different judgment is entered with respect to another, except that judgment for one and against another is improper where there has been a determination on the merits and the liability of one cannot exist without the liability of the other."⁵³ Similarly, section 292 states that "the effect of judgment for one or more promisors of the same performance is determined by the rules of *res judicata* relating to suretyship or vicarious liability."⁵⁴

Thus, all of the Appeals Court's discussion of the distinction between joint obligations and joint and several obligations seems to have been entirely beside the point. Under either characterization, the question is the extent to which principles of fairness, consistency, and *res judicata* dictate

⁴⁹ *Riley v. Burns*, 304 Mass. 15, 17, 22 N.E.2d 761, 762 (1939); *MacKintosh v. Chambers*, 285 Mass. 594, 598-99, 190 N.E. 38, 40 (1934); *Hathaway v. Crocker*, 48 Mass. (7 Met.) 262 (1843); *Tuttle v. Cooper*, 27 Mass. (10 Pick.) 281 (1830).

⁵⁰ *Riley v. Burns*, 304 Mass. 15, 22 N.E.2d 761 (1939); *MacKintosh v. Chambers*, 285 Mass. 594, 190 N.E. 38 (1934); *Mulrey v. Carberry*, 204 Mass. 378, 381, 90 N.E. 576, 577 (1910).

⁵¹ See 1981 Mass. App. Ct. Adv. Sh. at 122-23, 414 N.E.2d at 1030.

⁵² See, e.g., *Taylor v. Sartorius*, 130 Mo. App. 23, 108 S.W. 1089 (1908); *Spencer v. Dearth*, 43 Vt. 98 (1870); *Townsend v. Riddle*, 2 N.H. 448 (1822).

⁵³ RESTATEMENT (SECOND) OF CONTRACTS § 291 (1981).

⁵⁴ RESTATEMENT (SECOND) OF CONTRACTS § 292(2) (1981).

that the dismissal of Eastern's action against South should affect Eastern's action against Taylor.⁵⁵

In considering the effect of a judgment for one co-obligor on the liability of the remaining co-obligors, it is important to consider both the rights of the obligee against the co-obligors and the rights of the co-obligors among themselves. As Professor Corbin has pointed out, the law of suretyship is necessarily involved in any situation in which two or more persons have promised the same performance.⁵⁶ Co-obligors, whether their liability is joint, several, or joint and several, can be considered as principal debtors to the extent of their pro rata portion of the total debt, or whatever other portion they have among themselves agreed to bear, and as sureties of the performance of their co-obligors for the remainder of the total debt.⁵⁷ Accordingly, if any of the co-obligors pay more than their fair portion of the debt, they can recover the excess from their co-obligors in a contribution action.⁵⁸ A judgment entered for one co-obligor in an action by the obligee must be considered in light of the suretyship relation among the co-obligors in order properly to resolve the question of the effect of such a judgment on the obligee's rights against the remaining co-obligors.

There are three main ways in which the questions of the effect of a judgment for one co-obligor on the rights of the obligee and the other co-obligor have generally been resolved. First, a judgment for one co-obligor in certain situations bars any recovery by the obligee from the remaining co-obligor, in which case the question of contribution does not arise. Second, in other situations, a judgment for one co-obligor does not preclude the obligee from recovering the full amount of his claim from the remaining co-obligor, but does prevent the co-obligor found liable from recovering contribution from the prevailing co-obligor. Third, in still other cases, a judgment for one co-obligor does not preclude the obligee from recovering the full amount of the claim from the remaining co-obligor, and does not prevent the co-obligor found liable from recovering contribution from the prevailing co-obligor.

As the *Eastern Electrical Co.* opinion reflects,⁵⁹ the courts tend to regard the issue of the effect of a judgment for one co-obligor on the liability of the remaining co-obligor as simply a matter of deciding whether the judgment for the co-obligor should be regarded as a ruling on the merits which pre-

⁵⁵ The same approach should be taken to the question of whether different judgments can be rendered for different co-obligors in one lawsuit and whether a judgment for one co-obligor in one lawsuit precludes a subsequent suit against other co-obligors. Compare RESTATEMENT (SECOND) OF CONTRACTS § 291 with *id.* § 292.

⁵⁶ 4 CORBIN ON CONTRACTS § 924 (1941).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See 1981 Mass. App. Ct. Adv. Sh. at 123-25, 414 N.E.2d at 1030-31.

cludes the obligee from recovering from the remaining obligors or as a defense personal to the prevailing co-obligor which does not affect the liability of the remaining co-obligors. Questions concerning the contribution rights of the co-obligors inter se often seem to be ignored in ruling on the rights of the obligee against the co-obligors. It is, however, helpful to consider such questions in light of the more complex scheme of possible resolutions outlined above.

Cases in which one co-obligor prevails on the merits, or, more precisely, on a defense which is necessarily common to all co-obligors, fall into the category in which the judgment for one co-obligor discharges the other co-obligors and hence moots any issues of contribution.⁶⁰ Issues concerning contribution do, however, have a great deal to do with the rule that a judgment on the merits for one co-obligor discharges the other co-obligors. In situations in which the co-obligors' liability is joint, the rule that a judgment on the merits for one co-obligor bars judgment against the others might be based without analysis on the old rule of joint obligations that judgment must go for or against all co-obligors alike. In the case of joint and several obligations, however, that avenue was not open to the courts, and more serious analysis was required. Thus, in a Missouri case, *Taylor v. Sartorius*,⁶¹ which arose after the enactment of a statute converting all joint obligations into joint and several obligations, it was held that an earlier judgment on the merits for one co-obligor would preclude recovery against the other obligors on res judicata grounds, notwithstanding that the parties in the two suits differed. The court noted that if the res judicata defense were not allowed, the prevailing obligor might lose the benefit of his victory if a subsequent suit goes against a co-obligor and the co-obligor brings a contribution action against the first co-obligor.

The clearest situation in which a defense personal to one co-obligor does not preclude the entry of judgment against other co-obligors, but does bar contribution, is that of discharge in bankruptcy. Clearly the discharge in bankruptcy of one co-obligor should not prevent the obligee from recovering from the other co-obligors.⁶² Indeed, it will often be the case that the very reason that the obligee obtained the promises of several obligors was to protect himself against the possibility of the insolvency of one of the obligors. It would, however, be inconsistent with the objectives of the bankruptcy system to deprive the obligor of the benefit of his discharge by

⁶⁰ For convenience, I refer to such cases as ones in which one co-obligor prevailed "on the merits" although the category may well cover grounds for ruling against the obligee which are not rulings on the merits, as for example, a successful statute of frauds defense, so long as the defense is one which would apply equally to all of the co-obligors.

⁶¹ 130 Mo. App. 23, 108 S.W. 1089 (1905); accord *Spencer v. Dearth*, 43 Vt. 98 (1870); *Townsend v. Riddle*, 2 N.H. 448 (1822).

⁶² E.g., *Hathaway v. Crocker*, 48 Mass. (7 Met.) 262 (1843).

forcing him to pay discharged debts through the roundabout method of a contribution action. Accordingly, at least where the bankruptcy statute provides that contingent claims of sureties can be proved in the bankruptcy proceedings, an obligor's discharge in bankruptcy will bar a contribution action against him by his co-obligor as well as a direct action against him by the obligee.⁶³

Most of the personal defenses which do not preclude the entry of judgment against co-obligors appear to have been placed in the third category, that is, judgment for one co-obligor in an action by the obligee bars neither an action by the obligee against the remaining co-obligors nor a contribution action against the obligor who was successful in the obligee's suit against him.⁶⁴ While it may seem anomalous to allow such a circuitous form of recovery against an obligor who prevailed in the original suit, there may be situations in which this is appropriate. For example, if one obligor prevails in an action by the obligee on the basis of a defense of lack of personal jurisdiction, it seems entirely proper to allow the obligee to recover from other co-obligors over whom he can obtain personal jurisdiction, and leave it to the co-obligors against whom judgment is entered to track down their co-obligor in a place where he can be served with process in a contribution action. Statute of limitation defenses have generally been treated in the same fashion,⁶⁵ although with less justification. The usual explanation of the rule that a co-obligor can be held liable in a contribution action even though the statute of limitations has run on a direct action against him by the obligee is that the contribution cause of action does not arise until the co-obligor has actually paid the common obligation.⁶⁶ Although this may undercut whatever policies are thought to be served by statutes of limitation, it may be that the rule reflects the fact that statutes of limitation do not embody particularly strong policies or that the problems prompting the enactment of statutes of limitation are less severe when the underlying contract dispute has been litigated, albeit between different parties, in at least one timely action.

The specific problem involved in *Eastern Electrical Co.* — dismissal of one co-obligor as a result of the obligee's failure to answer interrogatories — does not fit well within any of the three categories thus far considered.

⁶³ *Mace v. Wells*, 48 U.S. (7 How.) 272 (1849). Presumably, a defense of contractual incapacity, such as infancy, which does not preclude the obligee from proceeding against other co-obligors, *Woodward v. Newhall*, 18 Mass. (1 Pick.) 500 (1823), should be treated, for purposes of contribution, in the same way as a defense of discharge in bankruptcy, since otherwise the benefit of the defense would be lost.

⁶⁴ See, e.g., *Quintin v. Magnant*, 285 Mass. 450, 189 N.E. 209 (1934).

⁶⁵ See, e.g., *id.*

⁶⁶ See, e.g., *Seabury v. Sibley*, 183 Mass. 108, 66 N.E. 590 (1903); *Wood v. Leland*, 42 Mass. (1 Met.) 387 (1840).

Although the point is debatable, it may be that, as the Appeals Court ruled, such a default by Eastern should not be regarded as sufficiently serious to preclude any recovery by it against co-obligors, as would be done if the ruling had been an actual determination on the merits against Eastern. However, neither of the rules usually applied to defenses personal to one co-obligor seems fair in this situation. Surely the judgment dismissing Eastern's action against South should not bar a contribution action by Taylor against South in the event that Taylor is forced to pay the entire debt to Eastern, for it would be extremely unfair to Taylor to force it to bear the entire burden of the common debt solely because of Eastern's default. On the other hand, if Eastern is allowed to recover in full from Taylor and Taylor's contribution action against South is not barred, then Eastern has actually suffered no loss, and South has obtained no benefit, as the result of the dismissal of Eastern's action against South. Dismissal of plaintiff's action for failure to comply with discovery orders is usually thought of as the most severe sanction. It would certainly be hard to justify a total emasculation of this sanction in cases against joint obligors.

In *Eastern Electrical Co.* the Appeals Court did not rule directly on the question of Taylor's rights against South after Taylor pays the judgment to Eastern.⁶⁷ The trial court had ruled that the judgment against Taylor could be satisfied out of the assets of the joint venture and, to the extent that Taylor's own assets were used, Taylor could treat this as a contribution to the joint venture in any future accounting between the two.⁶⁸ The Appeals Court stated that it could not, on the record before it, rule on the question of the rights of Taylor and South since that question might be affected by various matters concerning the joint venture agreement and the transactions between the parties concerning the construction project.⁶⁹ It does seem fairly clear, however, that the Appeals Court did not contemplate that Taylor would, by virtue of the dismissal of South, be precluded from recovering

⁶⁷ See 1981 Mass. App. Ct. Adv. Sh. at 125, 414 N.E.2d at 1031.

⁶⁸ *Id.* at 114, 414 N.E.2d at 1025.

⁶⁹ *Id.* at 125, 414 N.E.2d at 1031.

The Appeals Court phrased the question as whether Taylor "can charge the amount so paid as a construction cost, for which Taylor is entitled to credit in the settlement of the accounts of the joint venture and between the participants in the joint venture and the owner," and stated that this would depend, among other things, on the amounts paid or due to the joint venture from the owner, whether the upset price has been reached, the amount of compensation received or losses borne by the joint venturers, and the extent to which South and the owner were under common control. *Id.* This discussion should not be taken to mean that Taylor must find some source in the contract between it and South upon which to base its right to recover from South, since the right of contribution arises from equitable principles not from contract, *Quintin v. Magnant*, 285 Mass. 450, 451 (1934). The contractual relations between Taylor and South may, of course, be relevant to modify the usual presumption that co-obligors are entitled to contribution to achieve a pro rata distribution of the total amount paid. *See id.*

anything from South. Rather, the Appeals Court's reluctance to rule on the matter of the rights between Taylor and South seems to have stemmed from the absence of sufficient facts upon which to determine the portion of the liability which each was to bear.

Thus, it does seem quite likely that the ultimate effect of the Appeals Court's ruling will be that the default dismissal of Eastern's claim against South will have had no effect. On the particular facts of the case, that may not have been all that inappropriate. In a footnote, the Appeals Court stated that although the matter was not before it, it had considerable doubt whether it was proper to have entered the judgment dismissing Eastern's claim against South rather than employing some lesser sanction.⁷⁰ It would be unfortunate, however, if the *Eastern Electrical Co.* case were applied in cases in which the severe sanction of dismissal of a plaintiff's action for failure to comply with discovery rules or other procedural rules or court orders does seem warranted. Accordingly, it may be appropriate for the courts in such situations to consider another possible resolution of the rights of the obligee against the obligors and the obligors among themselves in order to give some effect to such a dismissal.

As has been noted, co-obligors can be viewed as principal debtors for their pro rata portion of the entire debt and sureties of their co-debtors for the remainder. Under the law of suretyship, an obligee's release of the principal debtor often has the effect of discharging the surety.⁷¹ To be sure, this has proved to be a troublesome rule in the context of releases of sureties, whether in the context of co-debtors or elsewhere.⁷² However, the suretyship principle can be applied to achieve a more appropriate solution of problems of the sort presented in *Eastern Electrical Co.* The dismissal of Eastern's action against South as a sanction for Eastern's failure to answer interrogatories could be viewed, insofar as Taylor's rights are involved, as discharging South altogether, and, therefore, as discharging Taylor to the extent that Taylor is surety for South. If Taylor and South as co-obligors would have been liable pro rata among themselves, then the dismissal of South should leave Taylor liable for only one-half of the total debt. If the two had agreed among themselves to share the liability in some different proportion, Taylor could have been given the opportunity to make such a showing, and Taylor would be liable to Eastern only for its agreed proportion.

It seems fairly evident from the opinion of the Appeals Court in *Eastern Electrical Co.* that in the future the court will not allow the technical distinction between joint obligations and joint and several obligations to dictate

⁷⁰ 1981 Mass. App. Ct. Adv. Sh. at 123 n.12, 414 N.E.2d at 1030 n.12.

⁷¹ RESTATEMENT OF SECURITY § 122 (1941).

⁷² See generally 4 CORBIN ON CONTRACTS §§ 931-34 (1951).

the outcome of cases. It is perhaps a testament to the continuing ability of that distinction to engender confusion that the court does not, however, appear to have noticed that that distinction was irrelevant in the instant case or to have considered adequately the problems actually presented. It is to be hoped that *Eastern Electrical Co.* foreshadows the demise of the distinction between joint obligations and joint and several obligations in those situations where it actually may make a difference. Furthermore, the case is an apt illustration of the fact that even after the deadwood of the common law is cleared away, difficult problems remain in resolving questions concerning the obligations of multiple promisors of the same performance.

§ 1.3. Fraudulent Conveyances — Liability of Transferee. In *Northborough National Bank v. Risley*,¹ the Supreme Judicial Court held that a recipient of a fraudulent conveyance who returns to the debtor the proceeds of the property conveyed is not liable to the debtor's creditors. The debtor, Allen, conveyed certain real estate to his wife for nominal consideration at about the time that one of his creditors filed suit to collect a debt due from Allen.² The wife then conveyed the property to her brother-in-law, Risley, without consideration.³ Seven months later, the Allens arranged for the sale of the property to unrelated parties who in good faith paid Risley a fair consideration for the property.⁴ Risley immediately turned over the proceeds of the sale to the Allens.⁵

One of Allen's creditors then brought suit against Risley seeking recovery of the amount received by Risley from the sale of the property on the theory that the conveyance to Risley was a fraudulent conveyance.⁶ The trial court awarded a judgment to the plaintiff, ruling that the debtor transferred the property with intent to defraud creditors and that Risley knowingly participated in the fraud.⁷ While the sale of the property to a bona fide purchaser cut off plaintiff's rights to the property itself, the trial court held that Risley was accountable for the proceeds of the sale and was not absolved by turning over the sale proceeds to the debtor.⁸ Risley appealed, and the Supreme Judicial Court reversed. Chief Justice Hennessey dissented.

Justice Braucher's opinion for the majority noted that on the facts as found by the trial court the conveyance to Risley was fraudulent under section 7 of the Uniform Fraudulent Conveyances Act ("UFCA") as a "conveyance made . . . with actual intent . . . to hinder, delay, or defraud . . .

§ 1.3. ¹ 1981 Mass. Adv. Sh. 1910, 424 N.E.2d 522.

² *Id.* at 1911, 424 N.E.2d at 522.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 1911, 424 N.E.2d at 522-23.

⁶ *Id.* at 1911, 424 N.E.2d at 523.

⁷ *Id.* at 1911-12, 424 N.E.2d at 523.

⁸ *Id.*

creditors.”⁹ Thus, had the property not been sold by Risley, Allen’s creditors could have recovered it from Risley under section 9 of the UFCA.¹⁰ Moreover, the Court noted that prior Massachusetts cases established that upon the sale of the property Risley might be held personally liable to the extent of the proceeds remaining in his hands.¹¹

The Court then considered the effect of Risley’s return of the sale proceeds to the debtors. The majority opinion referred to a number of Massachusetts cases in which transferees who actively participated in the fraudulent scheme were not permitted to reduce their liability to the transferor’s creditors by showing that some of the property received by them had been used to pay other creditors of the transferor.¹² However, in *Modin v. Hanron*,¹³ those cases had been held inapplicable in a situation much like that involved in the *Risley* case on the grounds that transferee was less guilty of active participation in the scheme and had voluntarily reconveyed the property to the original grantor. The plaintiff in *Risley* sought to distinguish *Modin* on the basis that in *Modin* the property transferred had been returned to the debtor while in *Risley* the property was sold and the proceeds returned.¹⁴ Justice Braucher rejected plaintiff’s argument stating that the change in the form of the asset was not dispositive.¹⁵ Inasmuch as the defendant Risley was simply used as an instrument in the debtor’s scheme, had minimal knowledge of the facts, and neither sought nor received any benefit from the transaction, the Court ruled that Risley was absolved from liability under the principle of the *Modin* case.¹⁶

Chief Justice Hennessey dissented, stating that “[w]hatever the merits of the rule established in [*Modin*], the application or extension of the rule to sanction the defendant’s conduct in the present case is unwarranted.”¹⁷ The Chief Justice suggested that *Modin* holds that the transferee’s liability turns on the extent of his participation in the transferor’s fraudulent scheme.¹⁸ Chief Justice Hennessey argued that *Risley* was distinguishable from *Modin* on the grounds that the defendant in *Modin* acted only as a custodian for the transferor’s funds and returned the property to the transferor in the

⁹ *Id.* at 1912, 424 N.E.2d at 523 (citing G.L. c. 109A, § 7).

¹⁰ *Id.* (citing G.L. c. 109A, § 9).

¹¹ *Id.*

¹² *Id.* (citing *R.E. McDonald Co. v. Finkovitch*, 270 Mass. 362, 366-67, 170 N.E. 112, 114 (1930); *Massachusetts Trust Co. v. Simon Mfg. Co.*, 237 Mass. 92, 96, 129 N.E. 432, 433 (1921); *Manufacturers Nat’l Bank v. Simon Mfg. Co.*, 233 Mass. 85, 89, 123 N.E. 340, 343 (1919)).

¹³ 346 Mass. 629 (1964).

¹⁴ 1981 Mass. Adv. Sh. at 1913, 424 N.E.2d at 523.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1913, 424 N.E.2d at 524.

¹⁸ *Id.*

same form.¹⁹ By contrast, Risley accepted a transfer of real estate — a form of property which creditors may readily attach or inhibit transfer of — and aided the debtor in transforming the property into cash, knowing that the debtor's creditor was attempting to attach the property involved.²⁰ The Chief Justice regarded this conduct as sufficiently active participation by the defendant to render him liable under *Modin*.²¹

Both the majority and dissenting opinions in *Risley* seem to have regarded the issue as whether Risley's conduct fell within the protections of the rule established in *Modin*. Both opinions seems to regard *Modin* as an exception to an otherwise applicable rule that the return of the property to the debtor or to other creditors of the debtor will often not absolve the transferee of liability, as illustrated by cases such as *Manufacturers National Bank v. Simon Manufacturing Co.*,²² *Massachusetts Trust Co. v. Simon Manufacturing Co.*,²³ and *R.E. McDonald Co. v. Finkovitch*,²⁴ which held that a recipient of a fraudulent conveyance was liable for the value of the property received notwithstanding his payment of other creditors of the debtor from the proceeds of the property received. These cases, however, are best seen as establishing not a general rule from which *Modin* was an exception, but as themselves representing limited exceptions to the rule that the transferee's return of the property or its proceeds to the debtor or his creditors absolves the transferee from liability to the debtor's creditors.

The core of fraudulent conveyance law is the proposition that a debtor should not be permitted to impede his creditors' efforts to collect their claims by transactions which result in the depletion of the debtor's estate.²⁵ Accordingly, as both the majority and dissenting opinions in *Risley* recognize,²⁶ a transferee who returns the property to the debtor will generally not be held liable to the debtor's creditors, since he no longer holds property of the debtor and since the debtor's estate has not been depleted.²⁷ In order to consider the extent to which cases such as *Manufacturers National Bank* warrant exceptions to that rule, it is necessary to consider the issues raised by a transferee's payment of the transferor's creditors. It was long ago established in Massachusetts law that the transferee's use of the property to repay creditors of the debtor has the same effect as a return of the

¹⁹ *Id.* at 1913-14, 424 N.E.2d at 523.

²⁰ *Id.* at 1914, 424 N.E.2d at 523.

²¹ *Id.* at 1915, 424 N.E.2d at 524.

²² 233 Mass. 85 (1919).

²³ 237 Mass. 92 (1921).

²⁴ 270 Mass. 366 (1930).

²⁵ *E.g.*, 1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 275 (1940).

²⁶ 1981 Mass. Adv. Sh. at 1913, 1914-15, 424 N.E.2d at 523, 524.

²⁷ 1 G. GLENN, *supra* note 25, at § 57.

property to the debtor. In an 1815 case, *Thomas v. Goodwin*,²⁸ a merchant in failing circumstances conveyed all of his assets to one of his creditors in exchange for a promissory note of the transferee payable to the order of the debtor. The debtor subsequently directed the transferee to pay the note to various of the debtor's creditors. The Court held that such payments by the transferee absolved him of any liability to unpaid creditors of the debtor:

Although previously to [the time that the fraudulent conveyance action was initiated] the person summoned as trustee may have received the property of the debtor under circumstances which would render him liable, yet, if he has since discharged himself of all trust by delivering back to the debtor the property received, in such manner that it may be attached by his creditors, or if he has paid the proceeds to bona fide creditors of the principal in satisfaction of their just demands, so that at the time of service of the writ he truly has nothing in his hands, he cannot be subjected to a judgment.²⁹

Prior to the 1919 case of *Manufacturers National Bank v. Simon Manufacturing Co.*,³⁰ the rule of *Thomas v. Goodwin* seems never to have been questioned.³¹ Indeed, the validity of the common law assignment for the benefit of creditors as a liquidating device depends on the proposition that it is not a fraudulent conveyance for an insolvent debtor to convey his property to an assignee who agrees to use the property to pay the claims of the transferor's creditors.³² Even in situations not amounting to a general assignment for the benefit of creditors, a conveyance, otherwise fraudulent, followed by the transferee's payment of certain of the transferor's debts is at most an indirect form of a preference, and it is well settled that a preference is not a fraudulent conveyance.³³

In *Manufacturers National Bank v. Simon Manufacturing Co.*,³⁴ however, the Court carved out an exception to the rule of *Thomas v. Goodwin*. In that case the principal of a corporation in financial difficulties organized a new corporation and caused the old corporation to convey all

²⁸ 12 Mass. 140 (1815).

²⁹ *Id.* at 141-42.

³⁰ 233 Mass. 85, 123 N.E. 340 (1919).

³¹ See *Adams v. Young*, 200 Mass. 588, 591, 86 N.E. 942, 943 (1909); *Pierce v. LeMonier*, 172 Mass. 508, 512, 53 N.E. 125, 128 (1899); *Cavill v. Emery*, 148 Mass. 32, 34, 18 N.E. 574, 575 (1888); *Harvey v. Varney*, 98 Mass. 118, 120 (1867); *Crowninshield v. Kittridge*, 48 Mass. (7 Met.) 520 (1844); *Oriental Bank v. Haskins*, 44 Mass. (3 Met.) 332, 340 (1841).

³² G. GLENN, *supra* note 25, at §§ 208-09; G. GLENN, *THE LAW GOVERNING LIQUIDATION* §§ 106-07 (1935). It should be noted, however, that Massachusetts follows the peculiar rule that an assignment for the benefit of creditors is not valid unless assented to by a majority of the creditors. *Sinclair v. Napoli Cafeteria*, 244 Mass. 221, 138 N.E. 327 (1923).

³³ *E.g.*, *Banca Italiani di Sconto v. Bailey*, 260 Mass. 151, 157 N.E. 40 (1929).

³⁴ 233 Mass. 85, 123 N.E. 340 (1919).

of its assets to the new corporation without consideration.³⁵ The new corporation carried on the business in the same manner and at the same location.³⁶ In order to remain in business, the new corporation paid off various debts of the old corporation to trade creditors.³⁷ A bank which had lent money to the old corporation brought suit seeking to establish that the new corporation was liable for the debts of its predecessor at least to the extent of the value of the property conveyed to it by the old corporation.³⁸ On these facts the Court ruled that the transfer of the assets of the old corporation to the new corporation was a fraudulent conveyance and that the new corporation could not be absolved of liability by virtue of its payments to trade creditors of the predecessor corporation.³⁹ Curiously, the Court did not discuss or even cite *Thomas v. Goodwin*, and the cases which the Court did cite in support of the proposition that the transferee should not be given credit for payments to the transferor's creditors fall far short of establishing that proposition.⁴⁰ Nonetheless, on its particular facts, the case seems correctly decided. As the Court noted, the payments to the predecessor corporation's trade creditors were an integral part of the scheme to continue the business in a form which would insulate it from liability to the bank creditors.⁴¹ Presumably, the payments to trade creditors were made in order to preserve the business' credit with its suppliers, so that it seems likely that the business was incurring additional trade debts as the old ones were paid off. Thus, unlike the situation in *Thomas v. Goodwin*,⁴² the payments probably did not reduce the aggregate liabilities of the enterprise. Faced with such a transparent effort to defeat creditors by the manipulation of corporate forms it is hardly surprising that the Court adopted fraudulent con-

³⁵ *Id.* at 88, 123 N.E. at 343.

³⁶ *Id.*

³⁷ *Id.* at 89-90, 123 N.E. at 343.

³⁸ *Id.* at 87, 123 N.E. at 342.

³⁹ *Id.* at 89-90, 123 N.E. at 343.

⁴⁰ The principal cases cited by the court were *Wall v. Provident Institution for Savings*, 85 Mass. (3 Allen) 96 (1861) (grantor cannot recover property fraudulently conveyed); *Fiske v. Fiske*, 173 Mass. 413, 53 N.E. 916 (1899) (same); *Lawtor v. Estes*, 167 Mass. 181, 45 N.E. 90 (1896) (creditor who participated in fraudulent scheme estopped from attacking it as fraudulent conveyance); *Lynde v. McGregor*, 95 Mass. (13 Allen) 172 (1866) (mortgage on property having value far in excess of amount of debt is fraudulent and is not rendered valid by subsequent advances); *Bolster v. Graves*, 189 Mass. 301, 75 N.E. 714 (1905) (mortgage voidable as preference under insolvency statute is not rendered valid by subsequent advances); *Lamb v. McIntire*, 183 Mass. 367, 67 N.E. 320 (1903) (mortgage on property having value far in excess of amount of debt is fraudulent and is not enforceable even to extent of actual debt); *Rubenstein v. Lottow*, 220 Mass. 156, 107 N.E. 718 (1915) (purchase of accounts voidable as fraudulent conveyance where made to provide funds to keep debtor out of bankruptcy for sufficient period of time to avoid attack on prior preferential payment).

⁴¹ 233 Mass. at 90, 123 N.E. at 343.

⁴² 12 Mass. 140 (1815).

veyance theory in order to hold the successor corporation liable for the debts of its predecessor.⁴³

The other principal case cited in *Risley* in which a transferee of a fraudulent conveyance was not given credit for payments to the transferor's creditors was *R.E. McDonald Co. v. Finkovitch*.⁴⁴ In that case, after the debtor had notified his creditors of his financial difficulties, one of his creditors, representing himself and two other creditors, proposed to the debtor that his business be liquidated by transferring all of his assets to the creditor who would use the property to pay the debtor's debts to himself and his confederates and to pay 30% of the claims of other creditors upon their agreement to give the debtor a six month extension.⁴⁵ The creditor also promised to extend further credit to the debtor to enable him to remain in business to earn enough to pay the balance of his debts.⁴⁶ The creditor managed to obtain the consent of the other creditors to an extension without paying them the 30% dividend, and simply applied the property received from the debtor to the claims of himself and his confederates.⁴⁷ The creditor who proposed the scheme was held to be liable to the other creditors for the value of the property received by the debtor without deduction for the amounts applied to his claim or those of his confederates.⁴⁸ The case seems to establish only that there are limits to the proposition that a preference is not a fraudulent conveyance. The determinative factor seems to have been that the defendant creditors not only received a preferential payment, but also, through less than honest means, persuaded other creditors to hold off for a period of six months, to the possible prejudice of their rights under federal bankruptcy law.⁴⁹

The situation presented in the *Risley* case, or the *Modin* case, seems to share none of the specific characteristics which warranted the results in the *Manufacturers National Bank* or *R.E. McDonald Co.* cases. Thus, to the extent that the plaintiff's argument in *Risley* rests on such cases, it was properly rejected.

It is possible, however, that the plaintiff in *Risley* might have based its case on a somewhat different theory. If we collapse the transactions by

⁴³ In *Massachusetts Trust Co. v. Simon Mfg. Co.*, 237 Mass. 92, 129 N.E. 432 (1921), a case involving the same debtor involved in the *Manufacturers Nat'l Bank* case, the principle of the earlier case was extended, without much discussion, to the somewhat different situation of an individual closely affiliated with the company who had, for a time, held the funds of the corporation in his personal bank account, apparently to prevent creditors from reaching them. The individual was held liable to the company's creditors on a fraudulent conveyance theory and was not given credit for amounts paid to creditors of the company.

⁴⁴ 270 Mass. 362, 170 N.E. 112 (1930).

⁴⁵ *Id.* at 364, 170 N.E. at 113.

⁴⁶ *Id.* at 364-65, 170 N.E. at 113.

⁴⁷ *Id.* at 365, 170 N.E. at 113.

⁴⁸ *Id.* at 367, 170 N.E. at 114.

⁴⁹ *See id.* at 366, 170 N.E. at 113-14.

which Risley obtained the property for no consideration and then sold it to a bona fide purchaser turning over the proceeds to the debtor, the case becomes analogous to one in which a debtor, intending to hinder his creditors, sells property to another for a fair consideration where the transferee is fully aware of the debtor's fraudulent purpose. Section 7 of the UFCA states that actual intent to hinder, delay, or defraud creditors renders a conveyance fraudulent.⁵⁰ By its terms, the adequacy of the consideration received is not relevant under section 7. While section 9 of the UFCA protects bona fide purchasers for fair consideration from any liability and protects purchasers who give less than fair consideration, without actual fraudulent intent, to the extent of the consideration given,⁵¹ it appears that a conveyance to a purchaser with actual fraudulent intent can be set aside even if he gave fair consideration.

Indeed, in Massachusetts, as in other jurisdictions, one can find dozens of cases in which the proposition is asserted that a conveyance made by the debtor with actual intent to hinder, delay, or defraud creditors can be recovered from a transferee who participated in the fraud even if fair consideration was given. It is quite interesting, however, that there appear to be few cases in which this general proposition has actually been applied in cases in which it was clearly shown that the transferee did give fair consideration. Most of the statements that fair consideration is irrelevant in cases of actual fraud seem to be pure dicta in cases in which the issue was not presented.⁵² In many other cases in which such statements appear, the proposition actually seems to function only as a convenient way for an appellate court to dispose of a transferee's contention, disbelieved by the finder of fact, that he did give fair consideration.⁵³

In *Risley*, or in any other case in which a transferee gives fair consideration, though with knowledge of the transferor's fraudulent purpose, the "fraud" must be of a very different sort than in the usual fraudulent conveyance situation. The core concern of fraudulent conveyance law is the

⁵⁰ G.L. c. 109A, § 7.

⁵¹ G.L. c. 109A, § 9.

⁵² *E.g.*, *Merchants Discount Co. v. Esther Abelson, Inc.*, 297 Mass. 517, 520, 9 N.E.2d 528, 530 (1937); *Cohen v. Levy*, 221 Mass. 336, 339, 108 N.E. 1074, 1075 (1915); *Gately v. Kappler*, 209 Mass. 426, 431, 95 N.E. 859, 861 (1911); *Pierce v. O'Brien*, 189 Mass. 58, 60, 75 N.E. 61, 62 (1905).

⁵³ A case relied on by Judge Hennessey in his dissent, *Hickman v. Thielman*, 147 Cal. App.2d 11, 304 P.2d 122 (1956), is a classic example. Concerning the transferee's contention that she had returned the property to the debtor, the court stated, "The [trial] court was not required to believe her testimony and we must assume that the court did not believe it. But there is evidence to support the findings that [the transferee] conspired with the others to defraud plaintiff and if, as the court found, she received the money with that intention and purpose, returning the money to [the debtor] would not have relieved her of responsibility." *Id.* at 15, 304 P.2d at 125.

prevention of transfers of the debtor's property which diminish his estate otherwise available to creditors. In *Risley*, or any other case where the transferee has given full consideration, no such diminution has occurred. Rather, the fraud, if any, in such cases can only be that the debtor has converted assets from a form easily reached by creditors, such as real estate, into a form, such as cash, which may more easily be secreted by the debtor. The author has been unable to find any case in Massachusetts in which such a transformation, without more, has been held to be a fraudulent conveyance.⁵⁴ It may well be that some sanction to deter such conduct is desirable; however, the sanction of a forfeiture of the property for which fair consideration has been given may often seem overly severe.

On the particular facts of the *Risley* case, the participation of *Risley* in the debtor's scheme seems to have been limited to holding title to the real estate until the time that the debtor located a buyer for the property. In this situation, there seems to be adequate protection for the debtor's creditors, and adequate sanctions against the debtor's conduct, that awarding a judgment against *Risley* would be unnecessarily harsh. Since *Risley* did not give any consideration at the time of the original conveyance to him, that conveyance could have been set aside by *Allen's* creditors prior to the time that the property was sold to a bona fide purchaser and the proceeds turned over to *Allen* by *Risley*.⁵⁵ To some extent, then, the loss of the property to *Allen's* creditors was a result of their lack of diligence in pursuing it during the seven month period it was held by *Risley*. Moreover, the Court's ruling that *Risley's* return of the proceeds of the property to the debtor discharged him from liability would not seem to be a holding that the debtor did not make a fraudulent conveyance, but rather a ruling that the transferee was absolved from liability for this fraudulent conveyance by his subsequent conduct. Accordingly, there may remain other sanctions to deter conduct of the sort involved in this case. Thus, the debtor, having made a fraudulent conveyance, might be barred from obtaining a discharge in bankruptcy under section 727 of the federal bankruptcy code.⁵⁶ Moreover, an attorney who participates in such a transaction may well be subject to disciplinary ac-

⁵⁴ There do, however, appear to be a few such cases in other jurisdictions. In *Green v. Tatum*, 19 N.J. Eq. 105 (1865) a judgment was entered against the debtor in an action for breach of a promise to marry. The day the judgment was entered, the debtor left New Jersey and travelled to his brother's home in Delaware and sold to his brother all of his property, consisting mainly of seven mortgages on property in New Jersey, for a fair consideration. The debtor never openly returned to New Jersey. The court ruled that the debtor's brother must have known that the conveyance was designed to place the debtor's property beyond the reach of his judgment creditor in New Jersey and held that the conveyance would be set aside notwithstanding the adequacy of the consideration paid by the brother.

⁵⁵ 1981 Mass. Adv. Sh. at 1912, 424 N.E.2d at 523.

⁵⁶ 11 U.S.C. § 727(a)(2) (Supp. IV 1980).

tion⁵⁷ — a matter which, from the volume of reported cases involving fraudulent conveyances in which an attorney participated in effecting the transaction, does not seem to be sufficiently considered by the bar.

§ 1.4. **Bank Deposits and Collections — Wrongful Dishonor of Checks.** In *Raymer v. Bay State National Bank*¹ the Supreme Judicial Court was confronted with the recurring problem of determining whether a bank had proceeded too far along the process of determining to pay a check for it to be permitted to dishonor it. Raymer Products Corp. (“the company”) was a customer of the defendant bank, maintaining a commercial checking account and being indebted to the bank on a number of loans secured by a real estate mortgage and security interests covering machinery, accounts receivable, and inventory.² During 1975 and 1976 the company encountered financial difficulties, although it missed no payments on its loans from the bank.³ On July 15, 1976, a loan officer of the bank told the company that a separate account would be established the following week for the deposit of collections of accounts receivable, but stated that until that time the company should continue to make deposits and pay bills as it had done in the past.⁴ Thirteen checks drawn by the company were presented to the bank for payment on Friday, July 16, and an additional thirteen checks were presented on Monday, July 19.⁵ There were sufficient funds in the company’s account to cover the checks and they were posted in accordance with the bank’s usual procedures by 6 a.m. of the banking day following the day of receipt.⁶ On Tuesday, July 20, representatives of the company and the bank met at the bank at 3 p.m. to discuss the company’s financial affairs.⁷ While the meeting was going on, and unknown to the company’s representatives, a bank officer was at the company’s plant taking possession of all of its property as collateral for the loans.⁸ Later that day, the twenty-six checks, totaling \$36,463.73, were returned for “uncollected funds” and the bank recredited the company’s account with the amount of the checks and then set off the entire balance in the checking account against loans due to the bank.⁹ Within a month, the company filed a petition under chapter XI

⁵⁷ D.R. 7-102(A)(7), S.J.C. Rule 3:22, 359 Mass. 787, 819-20 (1971) (“In his representation of a client, a lawyer shall not . . . counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.”).

§ 1.4. ¹ 1981 Mass. Adv. Sh. 1870, 424 N.E.2d 515.

² *Id.* at 1872, 424 N.E.2d at 517.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 1872-73, 424 N.E.2d at 517.

⁷ *Id.* at 1873, 424 N.E.2d at 517.

⁸ *Id.* at 1873, 424 N.E.2d at 517-18.

⁹ *Id.* at 1872-73, 424 N.E.2d at 517-18.

of the Bankruptcy Act, and an arrangement was confirmed in 1977.¹⁰ During the course of the arrangement proceedings, the company assigned to Raymer, its president and principal shareholder, any claims it had against the bank arising out of the dishonor of the checks.¹¹

Raymer filed suit against the bank alleging that the dishonor of the checks was wrongful under section 4-402 of the Uniform Commercial Code (“U.C.C.”) and was an unfair and deceptive act or practice under G.L. c. 93A, § 11.¹² The trial judge ruled for the plaintiff on both counts and awarded plaintiff judgment for the face amount of the checks, plus attorneys’ fees and costs.¹³ The bank appealed the finding of liability and the plaintiff cross-appealed, contending that additional consequential damages should have been awarded.¹⁴

The Supreme Judicial Court, in a unanimous opinion written by Justice Braucher, affirmed the decision of the trial court that the bank had wrongfully dishonored the checks but reversed the ruling that the plaintiff was entitled to recover substantial damages. The Court first rejected the bank’s arguments that Raymer could not maintain suit on the company’s claims assigned to him, affirming the trial court’s rulings that the wrongful dishonor claims were assignable, that the action was not barred by the company’s failure to schedule the claims as assets in the bankruptcy proceedings, and that the claims were not required to be raised as compulsory counterclaims in an adversary proceeding which the bank had filed against the company in the bankruptcy proceedings.¹⁵ The Court then turned to the merits of the wrongful dishonor claims.

Since the company’s indebtedness to the bank gave the bank the right to set off the balance in the company’s deposit account, the critical question was whether the bank had exercised its right of set-off in a timely fashion. Justice Braucher’s opinion noted that this question is determined by section 4-303(1) of the Uniform Commercial Code which provides that any of the so-called “four legals,” including a set-off, “comes too late to . . . terminate, suspend, or modify [the bank’s] right or duty [to pay a check]” if the bank has taken any of several specified actions with respect to the check.¹⁶ The two provisions of section 4-303(1) relevant to the *Raymer* case

¹⁰ *Id.* at 1873, 424 N.E.2d at 518.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1874-75, 424 N.E.2d at 518-19.

¹⁶ Section 4-303(1), G.L. c. 106, § 4-303(1) provides that:

Any knowledge, notice or stop-order received by, legal process served upon or set-off exercised by a payor bank, whether or not effective under other rules of law to terminate, suspend or modify the bank’s right or duty to pay an item or to charge its custom-

were subsection 4-303(1)(d), which provides that a set-off comes too late if the bank has completed the process of posting the check to the drawer's account "or otherwise has evidenced by examination of such indicated account and by action its decision to pay the [check]," and subsection 4-303(1)(e) which, when read in conjunction with related sections,¹⁷ provides that a set-off comes too late if exercised after the bank's midnight deadline with respect to the item.

As to the thirteen checks presented on Friday, July 16, the bank's midnight deadline was midnight of Monday, July 19.¹⁸ Accordingly, the set-off exercised on July 20 came too late with respect to these checks, and their dishonor was wrongful.¹⁹ Since the set-off occurred prior to the bank's midnight deadline with respect to the other thirteen checks, which were presented on July 19, the determinative provision concerning these checks was subsection (d) of section 4-303(1).²⁰ On the basis of the testimony of an officer of the bank, the trial court had found that the bank's usual procedure involved completion of posting by 6 a.m. on the day following receipt of items, and that, with respect to the July 19 checks, the bank had "completed the process of posting" and had "evidenced by examination of such indicated account and by action its decision to pay" the checks.²¹ The

er's account for the item, comes too late to so terminate, suspend or modify such right or duty if the knowledge, notice, stop-order or legal process is received or served and a reasonable time for the bank to act thereon expires or the set-off is exercised after the bank has done any of the following:

- (a) accepted or certified the item;
- (b) paid the item in cash;
- (c) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearinghouse rule or agreement;
- (d) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item; or
- (e) become accountable for the amount of the item under subsection (1) (d) of Section 4-213 and Section 4-302 dealing with the payor bank's responsibility for late return of items.

¹⁷ Under § 4-213(1)(d) a payor bank becomes accountable for an item when it has "made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearinghouse rule or agreement." In the absence of a contrary clearinghouse rule or agreement, § 4-301 specifies that provisional settlements must be revoked before the bank's "midnight deadline." Midnight deadline is defined by § 4-104 as "midnight on its next banking day following the banking day on which it receives the relevant item"; however, § 4-107 permits a bank to establish an afternoon cutoff hour of 2 p.m. or later after which time items will be deemed to have been received at the opening of the following banking day.

¹⁸ 1981 Mass. Adv. Sh. at 1875, 424 N.E.2d at 519.

¹⁹ *Id.* at 1875-76, 424 N.E.2d at 519.

²⁰ *Id.* at 1876, 424 N.E.2d at 519.

²¹ *Id.*

Supreme Judicial Court ruled that the trial judge's findings were not clearly erroneous and, therefore, affirmed the ruling that the set-off came too late as to all of the checks and that their dishonor was wrongful.²²

Turning to the question of damages, the Court upheld the trial court's finding of fact that the plaintiff had not shown that the dishonor of the checks was the proximate cause of any consequential damages, such as the deterioration of the company's financial condition.²³ The trial court's award of judgment for the plaintiff for the face amount of the checks was, however, reversed by the Court.²⁴ Although the Court left open the possibility that such recovery might be appropriate under section 4-402 in certain situations, Justice Braucher noted that there was no dispute as to the bank's right of set-off other than on the ground that it was untimely and that the only result of the wrongful dishonor was that the company's bank account was used to pay its debts to the bank rather than its debts to the payees of the checks.²⁵ Thus, damages measured by the face amount of the check would not reflect any actual loss suffered by the company.²⁶ Accordingly, the Court ruled that the plaintiff could recover only nominal damages for the wrongful dishonors.²⁷

Finally, the Court considered the issues presented under chapter 93A of the General Laws. The Court held that chapter 93A can be applied to banks, resolving an issue which had been left open in a number of prior cases,²⁸ and affirmed the trial judge's ruling that the dishonor of the checks was, in the circumstances of the present case, an unfair act or practice in violation of section 2 of chapter 93A.²⁹ Apparently, the critical factors leading to this conclusion were that the bank, having been fully apprised of the company's financial difficulties, assured the company that checks could continue to be drawn on the account, and then, shortly thereafter, made the wrongful dishonor by virtue of the untimely set-off at a time when the bank had adequate collateral for its loans.³⁰ Justice Braucher ruled, however, that since it had not been shown that the company had sustained any damage as a result of the wrongful dishonor, nor that the bank's violation of section 2 of chapter 93A was "willful or knowing," it was not improper for the trial court to deny an award of multiple damages.³¹ The Court did,

²² *Id.*

²³ *Id.* at 1878, 424 N.E.2d at 520.

²⁴ *Id.* at 1877-78, 424 N.E.2d at 520.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1879, 424 N.E.2d at 521.

²⁹ *Id.* at 1878-79, 424 N.E.2d at 521.

³⁰ *See id.*

³¹ *Id.* at 1879, 424 N.E.2d at 521.

however, affirm the trial judge's ruling that since the plaintiff did prove a violation of section 2 of chapter 93A it was appropriate to award plaintiff attorneys' fees pursuant to section 11 of chapter 93A. Accordingly, the Court reversed the judgment and remanded the case to the Superior Court for the entry of judgment for plaintiff for \$1.00 as nominal damages plus attorneys' fees and costs.

Aside from providing yet another illustration of the broad sweep of chapter 93A and the capacity of that statute to effect a de facto reversal of the traditional American rule concerning attorneys' fees, the principal significance of the *Raymer* case is its impact on the resolution of the difficult family of problems concerning the specification of the point of no return in the process of the payment of checks by payor banks. The factual pattern involved in *Raymer* is a common one: a bank has taken all or nearly all of the steps which it customarily takes in the processing of the millions of checks about which nothing goes wrong and then discovers that something has gone wrong and seeks to avoid paying a check. One of the most well known legal problems to which such occurrences give rise is the controversy over the propriety of the decision of the Wisconsin Supreme Court in *West Side Bank v. Marine National Exchange Bank*.³² In the *West Side Bank* case, a check was presented to the payor bank on Friday morning and on that day's computer run was sorted, charged to the drawer's account and stamped paid.³³ On Monday, the bookkeeper checked the computer print-outs, found sufficient funds to cover the check, photographed and cancelled the check, and filed it in the drawer's file.³⁴ Later on Monday, the drawer ordered payment stopped. In compliance with its customer's request, the payor bank reversed the entries made to the customer's account and returned the check to the presenting bank on Tuesday.³⁵ The presenting bank sued the payor bank arguing that final payment had occurred prior to the time the bank received the stop order and therefore the payor bank had become accountable for the amount of the checks under section 4-213(1) which provides that a payor bank becomes accountable for an item as soon as it has taken any of certain specified actions with respect to the item, including completion of the process of posting or failure to return the item within the prescribed time limits.³⁶ Although the return of the checks on

³² 37 Wis.2d 661, 155 N.W.2d 587 (1968).

³³ *Id.* at 664, 155 N.W.2d at 589.

³⁴ *Id.*

³⁵ *Id.* at 665, 155 N.W.2d at 589.

³⁶ U.C.C. § 4-213(1) provides as follows:

(1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:

(a) paid the item in cash; or

(b) settled for the item without reserving a right to revoke the settlement and

Tuesday would have been later than the usual statutory midnight deadline, a clearinghouse rule extended that time limit so that the return was not untimely unless the bank had completed the process of posting prior to the time the stop order was received.³⁷ The Wisconsin court held that the bank had not made final payment, since it had not completed the process of posting.³⁸ Section 4-109 provides that

The “process of posting” means the usual procedure followed by a payor bank in determining to pay an item and in recording the payment including one or more of the following or other steps as determined by the bank:

- (a) verification of any signature;
- (b) ascertaining that sufficient funds are available;
- (c) affixing a “paid” or other stamp;
- (d) entering a charge or entry to a customer’s account;
- (e) correcting or reversing an entry or erroneous action with respect to the item.

The *West Side Bank* court held that subsection (e) of section 4-109 permits a payor bank to reverse any action taken with respect to a check so long as the time limits established by section 4-213(1)(d) have not yet expired.³⁹ The *West Side Bank* decision has found little favor with the commentators, who point out that section 4-213 seems to assume that the process of posting might be completed prior to the expiration of the bank’s midnight deadline, while under the Wisconsin court’s interpretation the process of posting would never be completed until the expiration of the section 4-213(1)(d) time limits and therefore section 4-213(1)(c) would be superfluous.⁴⁰

In the *Raymer* case Justice Braucher stated the “[w]e need not and do not decide whether we would follow the much discussed decision in *West Side Bank*.”⁴¹ Although the factual situations involved in *Raymer* and *West Side Bank* were quite similar, Justice Braucher was quite correct in pointing out that rather different legal issues were posed in the two cases. The critical difference is that the *West Side Bank* case was an action by the presenting bank as holder of the check seeking to recover the amount of the check from the

- without having such right under statute, clearinghouse rule or agreement; or
- (c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or
 - (d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearinghouse rule or agreement.

Upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item.

³⁷ 37 Wis.2d at 672, 155 N.W.2d at 593.

³⁸ *Id.* at 668-72, 155 N.W.2d at 591-93.

³⁹ *Id.*

⁴⁰ See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 16-4, 17-7 (2d ed. 1980); Malcolm, *Reflections on West Side Bank: A Draftman’s View*, 18 CATH. U.L. REV. 23 (1968).

⁴¹ 1981 Mass. Adv. Sh. at 1877, 424 N.E.2d at 520.

payor bank on the theory that the bank had made final payment, while the *Raymer* case was an action by the drawer alleging that the bank's failure to pay the checks in question was wrongful, entitling the drawer to damages for wrongful dishonor.

As both the trial court and the Supreme Judicial Court recognized in *Raymer*, section 4-303(1) is the provision of the U.C.C. which governs the question of whether a payor bank's contractual obligation to honor properly payable checks drawn by its customer has been affected by the interposition of a conflicting claim to the customer's account. Although section 4-303(1) may not provide a complete priority rule for resolving conflicting claims to a customer's account, section 4-303(1) does specify that if certain actions have been taken with respect to the payment of a check before the interposition of the conflicting claim to the account, then the existence of the conflicting claim does not alter the bank's right or duty to pay the check. Accordingly, section 4-303 was sufficient to resolve the problem presented in *Raymer*. Since the Court concluded that the bank's exercise of its right of set-off came too late under the standards of section 4-303(1), the obligation of the bank to its customer to honor checks properly payable was not affected by the set-off, and the bank therefore subjected itself to possible wrongful dishonor liability to the drawer under section 4-402 when it chose to dishonor the checks for which no funds remained after the untimely set-off.

The issue involved in the *West Side Bank* case would have been presented in the *Raymer* case had the payees of the checks in question brought suit against the payor bank seeking to recover the amount of the checks. The conclusion that the set-off came too late under the section 4-303(1) standards would not, however, have resolved such a dispute. Section 4-303(1) would, in such a case, only tell us that the bank's right or duty to honor the check had not been affected by the attempted set-off. A payor bank, however, has no duty to the holder of a check to honor it unless the bank has accepted it or has become accountable under the provisions of section 4-213 or 4-302. Thus, in an action by a holder of a check against the payor bank, resort must be had to section 4-213(1), for section 4-303(1) stops short of resolving the issue.⁴²

⁴² Professors White and Summers, however, argue that § 4-303 should be regarded as a complete priority provision for resolving conflicts between the holder of a check and a competing claim to the accounts and that if the competing claim comes too late under the § 4-303 standards, then the holder is entitled to payment, without reference to § 4-213. See WHITE & SUMMERS, *supra* note 40, at § 17-7. White and Summers provide no explanation of where in the language of § 4-303 they find anything concerning the liability of the payor bank to the holder. The contrary view, adopted herein, is that developed in Leary & Tarlow, *Reflections on Articles 3 and 4 for a Review Committee*, 48 TEMPLE L.Q. 919, 926-33 (1975).

The significance of the analytical distinction between the provinces of sections 4-303(1) and 4-213(2) lies in the fact that in one respect the two provisions differ in the specification of the steps which if completed by the payor bank render the conflicting claim untimely, in the case of section 4-303(1), or render the payor bank accountable for the item, in the case of section 4-213(1). Section 4-303(1)(d) states that the conflicting claim to the account comes too late if the payor bank has

completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith *or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item.*

Section 4-213(1)(c), on the other hand, states that a payor bank becomes accountable for an item if it has

completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith.

It appears, then, that entirely aside from the thorny problems involved in determining when the “process of posting” has been completed, it is quite possible for the section 4-303(1)(d) time limit to expire prior to completion of the process of posting.

The comments to section 4-303(1)(d) indicate that the “or otherwise has evidenced . . . its decision to pay” language was intended to cover banking practices such as sight posting in which a bank official makes a specific decision to pay an item, although the actual mechanical process of posting — in the sense of recording the payment — is delayed.⁴³ For example, in *Yandell v. White City Amusement Park, Inc.*,⁴⁴ trustee process was served on a bank by a creditor of its customer during the period that certain checks were being processed, and a dispute ensued over whether the bank had proceeded far enough with the process of paying those checks to defeat the levy to the extent of the amount of the checks. Due to the troubled financial condition of the depositor, its accounts were carefully scrutinized by the bank, and the checks in question were shunted out of the usual posting process for individualized attention by more senior bank officials.⁴⁵ Prior to service of the trustee process writ, a responsible bank officer had examined the checks in question, ascertained the state of the account, and decided to pay the checks, evidencing that decision by placing a hold on the account for the amount of the checks and stamping them with a special stamp.⁴⁶ The actual machine posting of the checks was not completed until after the trustee process writ was served.⁴⁷ On these facts the district court, applying U.C.C.

⁴³ See U.C.C. § 4-303, comment 3.

⁴⁴ 242 F. Supp. 582 (D. Mass. 1965).

⁴⁵ *Id.* at 583-84.

⁴⁶ *Id.*

⁴⁷ *Id.* at 584.

section 4-303(1) as the law of Massachusetts, held that the trustee process came too late under the “decision to pay” provision of 4-303(1) to terminate the bank’s right to pay the checks.⁴⁴

In explaining why it was not necessary to resolve the *West Side Bank* issue in the *Raymer* case, Justice Braucher noted that in *West Side Bank* the Wisconsin court did not discuss section 4-303(1) while in *Raymer* “[i]n deciding the present case under § 4-303 the [trial] judge followed the analysis indicated in the official comment with respect to the ‘decision to pay.’”⁴⁵ It appears that the *Raymer* case is to be viewed as resting solely on the second clause of section 4-303(1)(d) and the trial judge’s finding, which the Supreme Judicial Court upheld under the clearly erroneous standard, that the bank had “evidenced . . . its decision to pay.”⁵⁰ Since section 4-303(1)(d) provides that a set-off comes too late if the payor bank has either completed the process of posting or has “evidenced . . . its decision to pay the item,” the *Raymer* court’s conclusion that the bank had evidenced its decision to pay made it unnecessary to consider whether the bank had also “completed the process of posting.” Thus, it was unnecessary to consider the *West Side Bank* case issue of whether section 4-109(e) permits a payor bank to contend that the process of posting cannot be completed until expiration of the time limits for the return of the item.

Whether the *Raymer* Court’s refusal to pass upon the *West Side Bank* issue was proper depends upon whether the Court was correct in ruling that the *Raymer* case could be disposed of on the basis of the “evidenced . . . its decision to pay” provision of section 4-303(1)(d). The opinion in *Raymer* does not specify what procedures the bank employed in processing the checks. The opinion states only that the trial judge’s finding that the bank had made the decision to pay rested on the finding “that the bank’s ‘usual procedure’ involved completion of posting before 6 a.m. on the day following receipt of the item.”⁵¹ The commentary to section 4-303 suggests that the “decision to pay” language was included in contemplation either of older banking practices in which the mechanical steps of recording payment regularly followed the decisional steps or of situations such as that involved in *Yandell* where a specific judgmental step is made outside of the usual routine process of payment.⁵² It seems likely that in *Raymer* the bank was following modern practices of completing the mechanical steps of recording the payment first and then proceeding through several routine steps for determining whether the check should not be paid and the previously made computer entries reversed. Moreover, from the absence in the opinion of

⁴⁴ *Id.* at 585.

⁴⁵ 1981 Mass. Adv. Sh. at 1877, 424 N.E.2d at 520.

⁵⁰ *Id.* at 1876, 424 N.E.2d at 519.

⁵¹ *Id.*

⁵² See U.C.C. § 4-303, comment 3.

any indication that specific judgmental steps were taken, it seems likely that no specific, out-of-the-ordinary judgmental step was involved in the processing of the checks involved in *Raymer*. If the facts were as here surmised, then one might have argued that it makes little sense in such a situation to distinguish between “completion of the process of posting” — however one may finally resolve the problems involved in interpreting that phrase — and “evidencing . . . [the] decision to pay the item,” since the evidence of the bank’s decision to pay would simply be the bank’s completion of the routine steps involved in posting without deciding not to pay the check. If that argument were accepted, then the 4-303(1)(d) standard and the 4-213(1)(c) standard would coincide, except in cases such as *Yandell* involving a specific judgmental step, and it would have been far more difficult for the Court in *Raymer* to have avoided the *West Side Bank* case issue.

Further consideration of the function of section 4-303(1) suggests, however, that whether or not one should in the context of a dispute between a payor bank and a holder of the check, as was involved in *West Side Bank*, take into account the distinction between completing the routine process of check payment without deciding not to pay and completing a specific nonroutine, judgmental process of deciding to pay, there is good reason to collapse that distinction in the context of pure section 4-303(1) disputes of the sort involved in *Raymer*. Although the situations covered by section 4-303(1) involve conflicts between holders of checks and other claimants to the account, section 4-303(1) does not specify a complete set of priority rules for resolving disputes where it is alleged that the bank chose the wrong party. Rather, section 4-303(1) at most tells the bank that if certain steps have been completed in the processing of the check then the bank can opt for paying the check, ignoring the competing claim, without fear of liability to the competing claimant. Section 4-303(1) is, then, more in the nature of a safe harbor rule for payor banks which elect to pay checks in disputed situations than a comprehensive priority rule. Viewing section 4-303(1) in this light, it appears that a principal objective of this provision is to provide payor banks which wish to proceed with the payment of checks notwithstanding competing claims to the account with assurance that they may safely do so. In light of the strong policies encouraging payment of checks, there is much to be said for interpreting 4-303(1) in a fashion that will result in protecting the bank’s decision to pay at the earliest possible time. Of course, in cases such as *Raymer* where the competing claim is the bank’s own set-off claim rather than a claim of a third party, the payor bank is unlikely to wish to proceed with the payment of the check. Thus, interpreting section 4-303(1) as cutting off the competing claim at an early stage may increase the payor bank’s potential wrongful dishonor liability in cases involving set-offs. Section 4-303(1), however, clearly provides that set-offs are to be treated in the same fashion as other claims to the depositor’s account. Thus, even though the 4-303(1) rule will appear to payor banks less

like a safe harbor than a rocky ledge in cases involving set-offs, that is no reason to alter the interpretation of section 4-303(1) favoring payment of checks.

Thus, there is much to be said for reading section 4-303(1)(d) as providing that the competing "legal" comes too late as soon as the bank has either made a specific, non-routine decision to pay and evidenced that decision by some notation in its records, or completed the routine process of check processing without coming to a decision not to pay. The *Raymer* case can well be read as supporting such a reading. On the other hand, in the context of disputes of the sort involved in *West Side Bank* between the holder of the check and the payor bank, the equities may well be different. As Professor Leary points out, such disputes are often appropriately categorized as situations in which the holder seeks a windfall at the expense of the bank's stockholders.⁵³ Therefore, the *Raymer* Court's resolution of the section 4-303(1) issue in favor of cutting off the "legal" at the earliest possible date should not pre-judge the Court's resolution of the *West Side Bank* issue if and when that question reaches the Court.

The *Raymer* Court's resolution of the issues involving damages seems entirely proper on the facts presented. Although a number of controversial issues concerning the measure of damages in wrongful dishonor cases may have been involved in the case, the Court's discussion of the damage issues was rather brief, such that it is unlikely that the Court will regard the case as a dispositive precedent should the issues arise again and be considered more fully.

The Court's reversal of the trial judge's award of damages in the face amount of the checks was clearly appropriate. The wrongful dishonor cause of action, whether classified as sounding in tort or contract, is in the nature of a defamation action for the injuries which may flow from what will appear to the holders of the checks in question, and to others who hear about it, as an assertion that the drawer is issuing bad checks. Damage to business reputation and credit standing are the central concerns. As the action has nothing to do with liabilities on the instruments in question, awarding the drawer the face amount of the checks as damages is wholly unsupported. On this point, some explanation may be warranted of the *Raymer* Court's suggestion that "in some circumstances such an award may be appropriate under UCC § 4-402."⁵⁴ The cases cited by the Court in support of this proposition were ones in which checks were dishonored as a result of a substantively wrongful set-off — as, for example, cases in which a bank sets off against customer's account a debt of another party or an alleged debt which was not due.⁵⁵ In such cases the depositor is entitled to the entire account

⁵³ See Leary & Tarlow, *supra* note 42.

⁵⁴ 1981 Mass. Adv. Sh. at 1877, 424 N.E.2d at 520.

⁵⁵ *American Fletcher Nat'l Bank v. Flick*, 146 Ind. App. 122, 252 N.E.2d 839 (1969);

balance, undiminished by the set-off, and accordingly can recover the amount of the set-off — not the amount of the dishonored checks — from the bank. This, in fact, was the measure of recovery in the cases cited by the Court.⁵⁶ Such recovery is more accurately considered as simply an action by the depositor to recover the Bank's debt to him represented by the account, undiminished by the set-off, rather than a wrongful dishonor action.

The plaintiff in *Raymer* did, however, also seek more appropriate damages, alleging that the wrongful dishonor had caused damage to the business of the company.⁵⁷ The trial judge, however, ruled against the plaintiff on the factual question of whether any harm to the business had been traced sufficiently to the wrongful dishonor, and the Supreme Judicial Court affirmed this finding as not clearly erroneous.⁵⁸ The Court further ruled that in the absence of such proof, the plaintiff was entitled only to nominal damages. This ruling does involve several issues of interpretation of section 4-402 which provides that

A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake, liability is limited to actual damages proved. If so proximately caused and proved damages may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

Justice Braucher noted that the comment to this provision indicates that this section was intended to reject the pre-Code rule that a business whose checks were wrongfully dishonored could recover substantial damages even without specific proof of any injury.⁵⁹ Commentators generally have suggested that the wording of the second sentence warrants the conclusion that this so-called "trader rule" is preserved in cases where the dishonor occurred other than through mistake, and therefore that substantial damages may be awarded even without proof of actual injury in cases of intentional dishonor.⁶⁰

In the *Raymer* case Justice Braucher states that "[t]he present case is not one of mistake, and we think it proper . . . to order the entry of judgment for nominal damages."⁶¹ Since the plaintiff in *Raymer* was suing on an as-

Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966). A third case cited by the Court in *Raymer*, *Joler v. Depositors Trust Co.*, 309 A.2d 871 (Me. 1973), did not actually present the issue.

⁵⁶ *American Fletcher Nat'l Bank v. Flick*, 146 Ind. App. 122, 124-28, 130-31, 252 N.E.2d 839, 840-43, 844 (1969); *Loucks v. Albuquerque Nat'l Bank*, 76 N.M. 735, 739-40, 745, 418 P.2d 191, 194, 198 (1966).

⁵⁷ 1981 Mass. Adv. Sh. at 1878, 424 N.E.2d at 520.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *E.g.*, J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 17-4 (2d ed. 1980).

⁶¹ 1981 Mass. Adv. Sh. at 1878, 424 N.E.2d at 520.

signed claim of a business, it would seem that under the interpretation of section 4-402 urged by the commentators, the determination that the dishonor was not a result of mistake could authorize the award of substantial, rather than merely nominal, damages. Whether the Court meant to exclude the possibility of awarding substantial damages is unclear from the opinion, so it appears that on this issue, as on the difficult problems involving the interpretation of section 4-109 and 4-213, we shall have to await further decisions by the Court. It is much to be regretted that the Court shall no longer have Justice Braucher's assistance on such matters. The *Raymer* case, handed down less than three weeks before Justice Braucher's death on August 26, 1982, was his last opinion on matters of commercial law. His presence will be greatly missed.