NORTHERN KENTUCKY LAW REVIEW

Twentieth Anniversary Issue

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DEDICATION FOR THE TWENTIETH ANNIVERSARY
OF LAW REVIEW

by David A. Elder*

The Salmon P. Chase College of Law, Northern Kentucky University, is celebrating its centennial year in 1993. Its predecessor entity opened its doors as a part-time evening law school in 1893, making the College of Law the second oldest of its kind. In 1972 the College of Law affiliated with the then Northern Kentucky State College and initiated a day division. Upon becoming a full-fledged dual division school, the College of Law also began publishing the *Northern Kentucky Law Review*.

During the two decades of its publication, several hundred of the College of Law’s “best and brightest” have contributed their considerable talents and innumerable hours in developing the *Law Review*’s respected reputation as a forum for critical analysis of legal developments of state, national and international significance by respected scholars and practitioners. The *Law Review* has annually published the Harold J. Siebenthaler Lecture given by a prominent academic or jurist, numerous issues and symposia on topics of national significance, including most recently the environmental law issue developed in conjunction with the Ohio Valley Environmental and Natural Resources Institute, Inc., housed at the College of Law. This year, the *Law Review* has recently initiated an annual review of Kentucky legal developments, making it the only law school in the Commonwealth of Kentucky providing this service to its readership and to members of the Kentucky Bar Association.

As advisor to the Law Review for the last decade, I can personally attest to the high level of conscientiousness and selflessness evidenced by the talented editors and staff members of the *Law Review*, epitomized most recently by the Editor-in-Chief, Barry Kubicki, class of 1993. The student members and editors have added measurably to the legal literature by their published casenotes and comments, while at the same time enhancing their own analytical, research, communicative and business skills by organizing, editing and publishing the three annual issues of the *Law Review*. It has been an honor and a most rewarding professional experience to be affiliated with these fine, bright young women and men who have been the heart and soul of the *Law Review* and who have developed its reputation as a distinguished legal periodical.

To all who have served, I give you my personal thanks and that of the College of Law for a job extraordinarily well done!

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FOREWORD: TAKING EXCEPTION TO THE ANTITRUST LAWS

by Charles J. Kubicki, Jr., and John H. Watson

The year 1993 marks not only the centennial of Chase College of Law, but the centennial of the federal courts' struggle to define the bounds of the application of the antitrust laws.¹ The Northern Kentucky Law Review presents four articles on the continuing contest to refine or confine the scope of the antitrust laws as applied to state actions, professional baseball, and health care.

Section 1 of the Sherman Act proscribes:

[...]very contract, combination ... or conspiracy, in restraint of trade or commerce among the several States." Any "person" who makes any such contract or engages in any such conspiracy "shall be deemed guilty of a felony."²

Section 2 provides that:

[...]very person who shall monopolize or attempt to monopolize, or ... conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states ... shall be guilty of a felony ...."³

The Sherman Act's common law roots, complicated legislative history, and all-encompassing words have invited litigants to beseech Court and Congress to carve exceptions from the scope of the Act. The first judge to grapple with the Act's scope hesitated to take up all the power apparent in the language:

Careless or inapt construction of the statute as bearing on this case, while it may seem to create but a small divergence here, will, if followed out logically, extend into very large fields; because, if the proposition made by the United States is taken with its full force, the inevitable result will be that the federal courts will be compelled to apply this statute to all attempts to restrain commerce among the states, or commerce with foreign nations, by

¹. U.S. v. Patterson, 55 F. 605 (C.C. Mass. 1893).
strikes or boycotts, and by every method of interference by way of violence or intimidation. It is not to be presumed that Congress intended thus to extend the jurisdiction of the courts of the United States without very clear language. Such language I do not find in the statute. 4

This willingness to mitigate the full force of the words of the Act could not but spur ingenious theories to dilute it.

The first exception to the Sherman Act considered and denied by the federal courts was ironic indeed. The Act passed to cure the most flagrant abuses of 19th Century capitalists was first enforced by its literal terms against the fledgling labor movement. 5 Labor won an effective exception from the antitrust laws from Congress only in the 1933 Norris-LaGuardia Act. 6

The Supreme Court's first Sherman Act decision excepted intra-state "manufacture" as opposed to interstate "commerce" from the Sherman Act's scope. 7 This exception would wither as the Court's view of the Commerce Clause expanded through Houston E. & W. Texas Ry. v. United States (The Shreveport Rate Case), 8 Wickard v. Filburn, 9 and Heart of Atlanta Motel v. United States. 10

Defendants have relied upon extant acts of Congress for exception in court and have sought Congressional exception when the courts had denied it. The railroads, which epitomized interstate commerce in the 1890s, sought exemption by reason of their recent subjection to federal regulation under the Interstate Commerce Act. 11 However, the Court rejected the special claims of railways as a regulated industry just as English courts had rejected the special claims at common law of another regulated industry, the making of playing cards. 12 The Trans-Missouri court made it clear that the exemption from the Act depended upon

7. U.S. v. E.C. Knight Co., 156 U.S. 6 (1895) (acquisition of four sugar mills in one state did not affect interstate commerce).
8. 234 U.S. 342 (1914).
the commercial rather than the regulated nature of the activity: "Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce."\(^\text{13}\) Regulated industries continue to ask the Court for exception from the Sherman Act, some more successfully than others.\(^\text{14}\)

By far the most important court-fashioned exception to the Act is the exception for "reasonable restraints." After struggling with the sweeping terms of the act in *U.S. v. Trans-Missouri Freight Association*,\(^\text{15}\) *U.S. v. Joint Traffic Association*,\(^\text{16}\) and *Northern Securities Co. v. United States*,\(^\text{17}\) the Court decided in *Standard Oil Co. of New Jersey v. United States*\(^\text{18}\) that the Congress could not have meant to outlaw all restraints of trade, as had seemed Congress’ intent from the words of the Act, but only the unreasonable ones.

Excepting reasonable restraints from the scope of the Sherman Act so as to avoid the statute’s seemingly harsh results necessarily created the task of distinguishing, without statutory guidance, between the proscribed and the permitted. Whether so distinguishing is a task any more bearable for the Court than was applying the Act strictly by its terms is debatable at best. As Justice Harlan prophesied in *Standard Oil*:

> But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry—difficult to solve by proof—whether the particular contract, combination, or trust involved in each case is or is not an “unreasonable” or “undue” restraint of trade. Congress, in effect, said that there should be no restraint of trade, in any form, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it could not add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraints of interstate commerce as are shown not to be unreasonable or undue.\(^\text{19}\)

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15. 166 U.S. 290 (1897).
16. 171 U.S. 505 (1898).
17. 193 U.S. 197 (1904).
18. 221 U.S. 1 (1911).
Today, Chief Justice Rehnquist would join Justice Harlan in opposing the Court's judicial amendment of the antitrust laws. In *J. Truett Payne Co. v. Chrysler Motors Corp.*, the plaintiff-petitioner sought damages under the Robinson-Patman Act in the amount of treble the alleged amount of the price discrimination without an actual showing that he himself had been injured thereby. Justice Rehnquist observed that "proof of a violation does not mean that a disfavored purchaser has actually been 'injured,'" and pointed out that just such a damage provision had been considered and rejected by Congress:

The provision however, encountered such strong opposition in both Houses that the House Committee eliminated it from its bill, ... and the Senate Committee modified the provision .... The Conference Committee eliminated even that compromise and § 2(a) was passed in its present form. Congress thus has rejected the very concept which petitioner seeks to have the court judicially legislate.

Legislating modifications to the scope of the antitrust laws, in Chief Justice Rehnquist's view, should be left to the Congress.

Four articles in this issue of the Northern Kentucky Law Review examine the range of interaction between the courts and the legislatures in demarcating exceptions from the antitrust laws. The first traces the development of the court-devised state action exemption and the consequences of its inconsistency with the words of Congress in the Sherman Act. The second article examines the interaction among court, legislature and constitution at the state level where the Congress has repealed a statutory exemption to the Sherman Act for certain state laws at the same time the federal courts have revived the court-devised state action exemption. The third article examines the court-

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21. Id. at 562.
22. Id. at 562-63 (citations omitted). See also Vendo Co. v. Lektro Vend Corp., 433 U.S. 623 (1977) (The Court cannot infer from the Clayton Act's passage since the Anti-Injunction Act that the injunction provision of the Clayton Act is an exception to the Anti-Injunction Act "expressly authorized" by Congress.).
made antitrust exemption for professional baseball and suggests
consequences of Congressional efforts to revoke it. The fourth
article examines potential antitrust liability in the age of "man-
aged" health care, notes the bounds of the limited antitrust
immunity for health care providers granted by Congress, notes
the efforts of Ohio to create expanded health care exemptions
through the state action exemption, and suggests means of avoid-
ing antitrust liability within these parameters.

The state action exemption is found nowhere in the Sherman
Act, but was conjured by the Supreme Court as a corollary of
federalism. The exception has, in the absence of Congressional
action since the Depression, enjoyed a contentious revival since
1975. The disarray springing from the Supreme Court’s contor-
tions of statute and precedent in this area might have been
expected to inspire corrective action from the Congress, but the
Congress has not acted. M. Shawn McMurray posits that the
confusion in the state action area would not require Congressional
remedy if the Court simply applied the Sherman Act as written.
The statute itself offers a clear guide for adjudicating business
conduct in the presence of some form of state regulation.

State regulation for which the state action exception is an
issue may also face state constitutional requirements. Resolving
both sets of issues can confound state courts and state legisla-
tures alike. Whether economic regulations enacted by the state
legislature under a now-repealed Congressional exception to the
Sherman Act can remain valid under the court-devised state
action exemption has been a vexing question for Kentucky courts.
Donald K. Kazee describes how the interaction of Kentucky’s
constitution and the Sherman Act has led to the Kentucky Su-
preme Court’s substitution of state constitutional analysis for
Sherman Act analysis where the state action exemption would
ordinarily be at issue. As a result, the legislature’s powers of
economic regulation have been significantly curtailed, though new
legislation has sought to restore that power.

25. Myron L. Dale and John Hunt, Antitrust Law and Baseball Franchises: Leaving
(1993).
The exception for baseball, also found nowhere in the statutes, stems from the Supreme Court's decision that baseball is sport rather than commerce. If this was true in the days of Babe Ruth, it is no longer true now, nor has it ever been true so far as the Court is concerned for basketball or football. Perhaps the exception stems from due deference to another team of nine. In any event, the Congress periodically reviews the exception and has thus far left it intact. Myron L. Dale and John Hunt argue that, even were the exception reversed by proposed legislation currently before Congress, recent Supreme Court cases in the sports industry may nonetheless effect a limited exception from antitrust liability for major league baseball.

A professional exception for lawyers and doctors and others has been urged on the Court, but was rejected in Goldfarb v. Virginia State Bar,29 and Arizona v. Maricopa County Medical Society.30 For the purposes of the antitrust laws, the selling of professional services is no different from the selling of goods, in the Court's view, regardless of how "learned" the profession is. The Congress responded with limited exceptions for certain medical personnel peer reviews in the Health Care Quality Improvement Act in 1986, but Justice Marshall noted in Patrick v. Burget,31 that the exception was limited and medical professionals contemplating risky "contracts" or "combinations" should seek additional relief from the Congress rather than expect the Supreme Court to mitigate the effect of the antitrust statutes' language. The views of Justice Marshall, Chief Justice Rehnquist, and Justice Harlan are thus in accord as to the source of any further exceptions from the antitrust statutes.

In view of the Court's hostility, Murray Monroe describes measures that the prudent health care provider must take to minimize antitrust liability while working in conjunction with other health care providers and government to enhance health care quality while minimizing costs. Monroe's guidance is possible only because Congress has to this point explicitly spelled out the parameters of the exception. Dale and Hunt suggest that without explicit language, Congress may be unable to effectively countermand baseball's court-devised exception. And, as McMurray

and Kazee demonstrate, explicit statutory guidance would be welcome in the state action sphere, not only by potential litigants, but by courts and legislatures as well.
THE PERILS OF JUDICIAL LEGISLATION: THE
ESTABLISHMENT AND EVOLUTION OF THE
PARKER V. BROWN EXEMPTION TO THE SHERMAN
ANTITRUST ACT

by M. Shawn McMurray*

The Sherman Antitrust Act, passed by Congress in 1890, is extremely short. Its words appear straightforward. Section 1 makes unlawful “[e]very contract, combination ... or conspiracy, in restraint of trade or commerce among the several States.” Any “person” who makes any such contract or engages in any such conspiracy “shall be deemed guilty of a felony.” Section 2 states that “[e]very person who shall monopolize or attempt to monopolize, or ... conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States ... shall be guilty of a felony ....”

The text of the Act gives no hint of any exceptions: all restraints of trade and all monopolies are declared to be unlawful. After flirting with such a literal interpretation for some years, however, the Supreme Court of the United States began to carve out exceptions to the statute, picking and choosing which restraints it would outlaw and which monopolies it would break up.

The dangers of picking and choosing without looking to the language of the statute are demonstrated in the history of the state action doctrine, announced by the Court in Parker v. Brown. Parker held that the Sherman Act was not applicable to actions imposed by the a state as sovereign. Pursuant to the doctrine,

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4. See discussion infra section I.A.
5. 317 U.S. 341 (1943).
6. Id. at 351-52.
the Court has often declined to apply the Sherman Act to states and municipalities and to private persons subject to state and municipal regulations. Yet, both when it has refused to apply the antitrust laws and when it has applied them, the Court has consistently failed to base its decisions upon the language of the Sherman Act itself, or even upon its legislative history. As a result, the Court's attempts to judicially establish a workable standard of conduct to substitute for the forgotten statutory standard have only led to confusion and indeterminacy, further attempts to establish standards, increased confusion, and ultimately, error.

The Parker Court held that the Sherman Act did not apply to price fixing activity by California raisin growers at the behest of an agency of the State of California. The Court could have reached this result merely by holding that the regulation challenged was not a "contract, combination ... or conspiracy" in restraint of trade. The Court might have held that the Act was not violated because the State of California was not a "person" under the Act. Instead, the Court decided that, as a matter of policy, the antitrust laws should not be applied to the states in that specific situation.

Had the Court in subsequent cases based its holdings upon the language of the Sherman Act rather than on policy assumptions, the Court might have reached substantially the same results in most cases. The analysis, however, would have been simpler, more honest, and more easily applied. The lack of textual statutory authority has yielded split decisions, plurality decisions, multiple opinions, and an accelerating decay in the value of each succeeding case as legal precedent or as a guide for state and business conduct.

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7. Id. at 352.
9. Id.
10. The Court began by stating that: "[i]n a dual system of government in which ... the states are sovereign ... an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. It then noted that "[t]he Sherman Act makes no mention of the State as such," and "[t]here is no suggestion of a purpose to restrain state action in the Act's legislative history." Id. Therefore, it concluded, "the state command to the Commission" at issue was "not rendered unlawful by the Sherman Act since ... [the Act] must be taken to be a prohibition of individual and not state action." Id. at 352. See discussion, infra section I.B.
11. For examples of split decisions and multiple opinions, see the 4-2-3 split and four
Subsequent attempts to create a workable standard have led to mistake and mystery in the Court's most recent decisions and more mischief is likely. This paper will show how the Parker doctrine came to this pass and will offer an alternative frame of analysis which is a more predictable guide for business conduct in an era when partnerships between government and business are the order of the day.

I. THE FOUNDATION OF THE STATE ACTION DOCTRINE

A. The Early Sherman Act Cases: Strict Construction to "Rule of Reason"

For the first twenty years following the passage of the Sherman Act in 1890, the courts strictly applied the language of the Act: all restraints on trade were illegal, as long as they affected interstate commerce, the scope of which was strictly construed in those days. The defendants in most of the cases contended that arguably all contracts, agreements or other relationships between competitors were in restraint of trade. Congress, therefore, could only have intended to outlaw unreasonable restraints of trade.

The courts responded that if Congress had intended to limit the statute as defendants had requested, "Congress is the body
to amend [the statute] and not this court.”

William Howard Taft, then a Circuit Court Judge, and later Chief Justice of the Supreme Court, expressed why it was unwise for courts to impose their judgment upon the words of the statute:

[T]he courts ... [by] determining the unreasonableness of restraints of trade, have set sail on a sea of doubt .... The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it ....

Over time, these words went unheeded. The Supreme Court deserted this strict constructionist approach in favor of a “rule of reason” test: only restraints of trade that the Courts found unreasonable were illegal.

Justice Harlan vigorously criticized the “rule of reason” test as judicial legislation, in his opinion in Standard Oil:

[This] will throw the business of the country into confusion and invite widely extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited every contract, combination or monopoly, in restraint of commerce, it prescribed a simple definite rule that all could understand ....

[This constitutes] the usurpation by the judicial branch of the Government of the functions of the legislative department.

Nevertheless, the “rule of reason” test has remained the law, except in cases of price fixing. In Trenton Potteries, the Supreme Court found that price fixing was so pernicious and dangerous to competition that it declared price fixing agreements to be illegal per se, regardless of the reasonableness of the price fixed.

15. Id. at 340.
17. See, e.g., Northern Securities Co. v. United States, 193 U.S. 197, 360-63 (1904) (Brewer, J., concurring); id. at 364-111 (dissenting opinion) (Brewer provided the fifth vote for the result because he considered the restraint to be unreasonable, while the dissenters would have allowed the restraint because they considered it to be reasonable); Standard Oil of New Jersey v. United States, 221 U.S. 1, 64-68, 70-82 (1911) (Sherman Act only outlawed unreasonable restraints of trade, but oil trust in question was illegal because it was not a reasonable restraint of trade); United States v. U. S. Steel Corp., 251 U.S. 417, 451, 455-57 (1920) (holding company was a reasonable restraint and therefore not illegal).
20. Id. at 396.
In establishing this rule, however, the Court made the policy judgment that price fixing agreements should be illegal per se, "in the absence of express legislation requiring [a test of unreasonableness]." Thus, the Court did not reverse the "rule of reason" approach, but defined an exception to it. The Court's rule that price fixing was per se illegal, regardless of the price's reasonableness, remained the law for many decades.

During the Great Depression, however, the Court departed from the per se rule in two peculiar contexts. One of these two cases was *Parker v. Brown*.

**B. Parker v. Brown**

In response to the Great Depression, the State of California passed the California Agricultural Prorate Act. The Act created an oligopoly (the Prorate Commission, composed of raisin growers) and awarded it an annual price floor.

Parker was engaged in producing, purchasing and packing raisins for sale and interstate shipment. He complained that the Prorate Commission fixed prices, a per se violation of the Sherman Act, following *Trenton Potteries*.

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21. *Id.*


23. 317 U.S. 341 (1943). The other was *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933). In the latter, the Court refused to enjoin the creation of Appalachian Coals, Inc., which as exclusive selling agent for 137 producers of bituminous coal in a four-state region fixed prices and methods of marketing and distribution. The Court placed great emphasis on the depressed "economic conditions peculiar to the coal industry," and refused to condemn the admitted combination "merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils...." 288 U.S. at 361, 373-74.


25. In order to "prevent waste in the marketing of agricultural crops," state officials were to establish marketing programs which would "restrict competition among the growers and maintain prices" of certain agricultural products. *Parker v. Brown*, 317 U.S. 341, 346 (1943). The prorate marketing program for raisins classified them as "standard," "substandard," or "inferior," and set the price which the government would pay for them, depending on their class. *Id.* at 347-49. The Prorate Commission had the ability to eliminate, and thus control, the surplus supply of the regulated crop, and this control was enforced by state law. *Id.*

26. *Id.* at 347-49.

The plan, of course, did fix prices. However, the Supreme Court refused to invalidate this program even while assuming, arguendo, that the California prorate program "would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate."28 Its discussion consisted of approximately one page of text. Apparently desiring this desperate, depression-era legislation to survive antitrust scrutiny,29 the Court held "that the prorate program here was never intended to operate by force of individual agreement or combination."30

This was all the Court needed to say. Since there was no "combination" or "conspiracy" by "persons" to restrain trade under the terms of the Sherman Act, the Act was not violated. Instead, the Court continued,31 in expressing its assumption that, as a matter of policy, the Act should not apply to the actions of states as such:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a State or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a State's control over its officers and agents is not lightly to be attributed to Congress.32

31. At least the Parker Court addressed the issue of whether the challenged actions violated the Sherman Act as written. The next two state action cases, discussed infra section II.A., Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 and Cantor v. Detroit Edison Co., 428 U.S. 579, 601-02 (1976), did discuss whether the challenged actions violated the antitrust laws, but almost as an afterthought; the question was not dispositive. The cases since Cantor have failed to even discuss the issue, with the exception of Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985). Justice Stevens, in his dissent in Southern Motor Carriers, argued that the words of the Sherman Act should determine the result (see discussion infra section IV.A.), but Justice Powell criticized Justice Stevens' reliance on the statute:
[The logical result of [Stevens'] reasoning would require us to overrule Parker v. Brown and its progeny, for the state action doctrine is an implied exemption to the antitrust laws. After over 40 years of congressional acquiescence, we are unwilling to abandon the Parker doctrine. Id. at 55, n.18.
(Cf. Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992)).
32. 317 U.S. at 350-51 (emphasis added).
The Court did not say that the Sherman Act or its legislative history indicated that the actions of states were exempted from the statute. Instead the Court declined to apply the Act to the states, absent an expressed purpose by Congress to "nullify a State's control over its officers and agents." Future Courts would only discuss the Parker Court's assumption of non-applicability and make no effort to discover Congress' expressed purpose.

The Court noted that the Sherman Act "makes no mention of the state as such ...." The legislative history also gave "no suggestion of a purpose to restrain state action." Therefore, the Court held that "the Sherman Act must be taken to be a prohibition of individual and not state action."

It was in the context of this refusal to apply the Sherman Act to sovereign state actions that the Court reached its conclusion:

The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

The Court could have reached the same substantive result by holding either that (a) the state as actor is not a "person;"

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33. Id.
34. Id. at 351 (citing 15 U.S.C. §§ 7, 15 and cases interpreting the word "person" as used in the statute).
35. Id. (citing four pages of the Congressional Record, and three Supreme Court cases).
36. Id. at 352.
37. Id. Almost as an afterthought, the Parker Court also hinted that its result was limited to its specific circumstances, and that it was not merely the state's involvement, but its effort to substitute its own regulation for free competition, that provided the Court's rationale. It stressed that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is unlawful ...." Id. at 351. "[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others in restraint of trade." Id. at 351-52 (citations omitted). The Court did not state how this language limited its holding, but these quotes were discussed in later cases. See, e.g., City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 441-43 (1978) (Blackmun, J., dissenting), discussed infra section II.B.
38. This would be consistent with the definitional sections of the Sherman Act § 7, 15 U.S.C. § 7 (1988) and of the Clayton Act § 1, 15 U.S.C. § 12 (1988), which define "person" or "persons" to include "corporations and associations," but not to include states themselves. But see Georgia v. Evans, 316 U.S. 159, 162 (1942) (a state could sue as a "person" damaged by antitrust violations).
(b) there was no "conspiracy" or "combination," because the private, individual actors were merely abiding by a state statute and regulations passed thereunder. Either approach would have rendered the Sherman Act inapplicable under its own terms and would have enabled the Court in later decisions to look to the Sherman Act itself for guidance in deciding whether or not to apply the doctrine to other specific circumstances. 39

Instead, *Parker* held that, at least where the state legislature as sovereign had established a system of conduct which restrained trade, the Sherman Act would not apply to such conduct. In crafting this holding, the Court assumed as a matter of policy that the Sherman Act did not apply to these particular activities and then searched in vain for language of the Act to contradict its assumption. Future justices would look to this example as a license to impose their own policy assumptions on the scope of the antitrust laws in cases involving state entities. 40 This is a perfect prescription for confusion, as demonstrated in the first cases in which the court vainly attempted to establish a workable standard by which to apply *Parker*.

39. For example, the Court in *Goldfarb* v. Virginia State Bar, 421 U.S. 773 (1975), and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), would have applied the Sherman Act because the fee or price schedules at issue were set by a combination of private persons; in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the Court would also have applied the antitrust laws because the allegation was that a private party was abusing its monopoly power to restrain trade; in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) and *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) the Court would have allowed the suits to proceed because it was alleged that "persons" had engaged in a combination or conspiracy to restrain trade; the Court would have refused to apply the Sherman Act in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1975) because the restrictions at issue were established and enforced by the states and were not the result of any combination or conspiracy among persons. See discussion infra section II.B.

40. For example, in *Goldfarb* and in *Bates*, the Court's decisions rested upon the justices' assumption that the Sherman Act reached the actions of non-sovereign state agencies but not sovereign state agencies and upon their assumptions as to which were which; in *Cantor* some justices reached their decision because they assumed that the antitrust laws applied as long as no state entity was a named defendant, and other justices joined in the result because they assumed that the Sherman Act applied, unless there was a statewide regulatory policy overseeing the activities in question. The majority in *City of Boulder* and a plurality in *City of Lafayette* reached their result because they also assumed that the Sherman Act applied unless there was a statewide regulatory policy overseeing the challenged activities; yet another justice concurred in the result in *City of Lafayette* because he assumed that the Sherman Act applied to state entities, so long as the state entity was a participant in the private marketplace; in *Midcal*, the Court applied the Sherman Act because it assumed that the restraint would be unlawful unless it were "actively supervised by the state itself." See discussion infra section III.
II. THE FIRST ATTEMPTED STANDARD: GOLDFARB AND ITS PROGENY

While Parker was cited over twenty-five times over the next thirty years, the Court made no effort to rule on how far the Parker exemption to the Sherman Act extended. It appeared that Parker, insofar as it addressed the application of the Sherman Act to state action, was an anomaly: a vehicle for the Supreme Court to preserve a specific California statute that was a creature of the Great Depression. Goldfarb v. Virginia State Bar was the first case to consider Parker as precedent outside the Depression context.

A. Goldfarb

Goldfarb sued the Virginia State Bar Association and the Fairfax County Bar Association, claiming that a minimum fee schedule for title searches published by the county bar association


42. 421 U.S. 773 (1975).
and enforced by the state bar constituted price fixing in violation of section 1 of the Sherman Act.\(^{43}\)

The Supreme Court held that the minimum fee schedule and the mechanism for its enforcement through the prospect of professional discipline by the state bar association constituted "a classic illustration of price fixing,"\(^{44}\) and that the activities of neither the county bar association nor the state bar were exempt from the Sherman Act as state actions under \textit{Parker}.\(^{45}\)

The Court inferred from the rationale of \textit{Parker} a distinction between two types of state entities.\(^{46}\) The \textit{Parker} exemption, it reasoned, was limited to actions of the states as sovereign: "It is not enough that ... anticompetitive conduct is 'prompted' by state action; [to be immune,] the anticompetitive activities must be compelled by direction of the State acting as sovereign."\(^{47}\) \textit{Goldfarb} thus distinguished between sovereign branches of the state on the one hand and non-sovereign state agencies on the other. The state legislature's actions had been immune under \textit{Parker} because they were acts of the sovereign. But since the state bar association in \textit{Goldfarb} lacked sovereign status, its actions were not immune from antitrust liability.\(^{48}\)

This reasoning was unnecessary to the Supreme Court's result. The Court could have rejected the \textit{Parker} doctrine itself as a

\(^{43}\) Id. at 776-78. The United States District Court for the Eastern District of Virginia agreed that the defendants violated the Sherman Act, but the actions of the state bar were exempt under \textit{Parker}. 355 F. Supp. 491, 493-94 (E.D. Va. 1973). The court of appeals agreed that the state bar's actions were not subject to liability because of \textit{Parker}, relying on what it saw as a three-pronged \textit{Parker} test: (1) "[T]he Legislature has made suggested fee schedules and economic reports a part of the regulatory power of the Virginia court and its administrative agency, the State Bar." 497 F.2d 1, 9 (4th Cir. 1974); (2) "The Virginia Court has the authority to regulate and supervise the State Bar." Id. at 11; and (3) "[T]he regulations program here received its authority to regulate and efficacy from legislative command." Id. at 12. The Fourth Circuit also relieved the county bar association of liability because the practice of law was not "trade or commerce" under the Sherman Act, as law was a "learned profession." Id. at 13-15.

\(^{44}\) Id. at 788-92. The Court rejected the Fourth Circuit's "learned profession" exception for the County bar with refreshing directness: "The language of § 1 of the Sherman Act, of course, contains no [such] exception." Id. at 787. As the Sherman Act contains no state-action exemption, the Court could have rejected \textit{Parker} itself on the same basis.

\(^{45}\) Id. at 788-92.

\(^{46}\) Id. at 791.

\(^{47}\) Id. at 789-92.
product of its own peculiar times and circumstances.\textsuperscript{49} It could have criticized the reasoning in \textit{Parker} as being based on policy assumptions rather than the Sherman Act. It then could have ruled that the fee schedules were set by private persons acting in "a conspiracy" and so were outlawed by the Sherman Act, in contrast to the prorate requirements in \textit{Parker}, which were set by state agencies and so were not subject to the antitrust laws.

Instead, the \textit{Goldfarb} Court\textsuperscript{50} created a distinction between different categories of state entities which was based neither on the Sherman Act nor on the language of \textit{Parker}. It was difficult to apply and unclear as precedent. Under this new standard, the result would depend upon the status of the state entity rather than the challenged conduct of the actor.

Conduct would be exempt from antitrust liability in two circumstances: first, if the actor were sovereign, and second, if non-sovereign actors were compelled by a sovereign authority. Actions taken by the legislature of the State were deemed to fall in the first category by definition, but the Court failed to specify how the attribute of sovereignty might be ascertained for other agencies or arms of state government. As to the second category for non-sovereign entities, actions would be exempt only if the court determined that the act was "compelled" by the "State as sovereign." Not only did \textit{Goldfarb} fail to define sovereignty, but it gave no guidance as to how forceful a sovereign directive had to be to qualify as having compelled the action. These omissions, perhaps necessary to achieve consensus, would be the undoing of \textit{Goldfarb} as a workable standard.

\section*{B. The Unworkability of the Goldfarb Standard}

Two cases decided in the Court's next two terms, \textit{Bates}\textsuperscript{51} and

\begin{itemize}
\item \textsuperscript{49} In United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), the Court reaffirmed the \textit{per se} illegality of price fixing and relegated Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) which had winked at price fixing in tough times, to its own Depression era facts.
\item \textsuperscript{50} At the time, the members of the Court were Chief Justice Burger and Justices Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell and Rehnquist. 421 U.S. at iii. The \textit{Goldfarb} decision was unanimous, except for Justice Powell who took no part in the case. \textit{Goldfarb}, 421 at 775, 793.
\end{itemize}
Cantor,52 demonstrated the limited workability of the Goldfarb standard. A third case, City of Lafayette,53 showed the Goldfarb standard to be divisive and unadaptable to new circumstances.

Bates presented a relatively easy application of the Goldfarb rule: The Court was asked to consider an action taken by a coequal branch of state government deemed by the Court to be sovereign by definition.54 Two attorneys sued the Arizona State Bar to enjoin enforcement of a prohibition of attorney advertising imposed and enforced by the Arizona Supreme Court.55 The United States Supreme Court held that the action of the Supreme Court of Arizona was "sovereign" by definition in the same sense that an act of the legislature was:

[The Arizona Supreme Court ... is the ultimate body wielding the State's power over the practice of law ... and, thus, the restraint is 'compelled by direction of the State acting as sovereign.'56

Thus Bates established one circumstance under which the Goldfarb sovereignty prong could be met: when the challenged agency is the ultimate authority in the state. In that circumstance, the Court would inquire no further into the degree of compulsion required for immunity.

In Cantor, the actor was not sovereign by definition, in the opinion of most members of the Court, and the Goldfarb rule proved unworkable. The case featured four opinions, none of which was endorsed by a majority.57 Cantor was a retail seller of light bulbs who sued Detroit Edison, a utility which, in addition to supplying electricity to its customers, also provided them with a limited number of free light bulbs.58 Cantor claimed that the utility was using its monopoly power in the distribution of electricity to restrain competition in the sale of bulbs in violation of the Sherman Act.59 Detroit Edison claimed that it was not subject to a Sherman Act claim because its rates and policies, including

54. The opinion was unanimous on the issue of Parker applicability. Justices Burger, Powell, Stewart and Rehnquist dissented from the portion of the opinion which dealt with the issue of whether the operation of the bar association's regulations violated the First Amendment. Bates, 433 U.S. at 389-405 (dissenting opinion).
55. Id. at 353-57.
56. Id. at 360 (citing Goldfarb, 421 U.S. at 791).
57. Cantor, 428 U.S. at 579, 581, 603, 605, 614.
58. Id. at 581-82.
59. Id. at 581.
the policy of not charging for light bulbs, had been approved by the public service commission. Furthermore, it argued, these policies could not be changed without the approval of the public service commission. 60

Had the Court decided Cantor by comparing its facts to the language of the Sherman Act, its decision could have been as simple and noncontroversial as was its decision in Bates. The case involved an allegation that a private party, Detroit Edison, was taking advantage of its monopoly power in one industry to attempt to monopolize in another industry. Even though Detroit Edison’s action had been approved by a state agency, it was an attempt to monopolize prohibited by the Sherman Act. 61 In contrast, in Bates (as in Parker), the plaintiff had not alleged any conspiracy or monopoly, but merely complained of regulations established and enforced by the states. Therefore, applying the Sherman Act to those cases would have been inappropriate. Instead of applying this straightforward analysis based upon statutory interpretation, the Cantor Court fecklessly attempted to apply the Goldfarb test.

Justice Stevens’ plurality opinion had two bases. 62 First, he denied the applicability of Parker because no state entity was named as a defendant and there was no claim that any state action violated the antitrust laws. 63 Second, the mere fact that the state of Michigan had approved the tariff filed by Detroit Edison did not provide “a sufficient basis for implying an exemption from the federal antitrust laws for that program.” 64

Chief Justice Burger concurred in the second ground for Justice Stevens’ opinion, because the Michigan Public Service Commission did not “implement any statewide policy relating to light bulbs . . . . [T]he State’s policy is neutral on the question of whether

60. Id. at 581-85.
63. Id. at 590-91 (plurality opinion).
64. Id. at 598 (plurality opinion). Justice Stevens pointed out that “[T]he option to have . . . such a program is primarily respondent’s, not the Commission’s.” Id. at 594. He then emphasized how subjective his test was:

[T]hough there may be cases in which the State’s participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it, this record discloses no such unfairness.

Id. at 594-95 (emphasis added).
a utility should, or should not, have such a program.” Burger declined to join the first part of Stevens’ opinion, because he contended that it misrepresented Parker’s holding. Id. at 603-04.

66. Id. at 604-05 (Burger, J., concurring) (quoting id. at 585 (plurality opinion)). Burger thus not only required a state nexus for the exemption, but also required that the application of the exemption be good antitrust policy.

Justice Blackmun concurred in the result for his own peculiar reasons. He found the legislative history of the Sherman Act to be of little assistance. His solution was “a rule of reason, [contending] that state-sanctioned anti-competitive activities must fall like any other if its potential harms outweigh its benefits.” He reasoned that the harms of the state-sanctioned anti-competitive activity in this case outweighed the benefits. This approach was the least substantive yet devised. No other justice has followed it to date.

The dissenters contended that all utilities operating pursuant to the legislative authority of the several states should be granted immunity from the antitrust laws; i.e., that their actions were “sovereign” by definition under Goldfarb. The dissenters would reach the same result applying the Goldfarb requirement that the anti-competitive activities be “compelled” by the direction of the state “acting as a sovereign.” In their view, the Parker doctrine applied since the free light bulb program was compelled

65. Id. at 604-05 (Burger, J., concurring) (quoting id. at 585 (plurality opinion)). Burger declined to join the first part of Stevens’ opinion, because he contended that it misrepresented Parker’s holding. Id. at 603-04.

66. Id. at 605 (Burger, C.J., concurring).

67. Id. at 605-14 (Blackmun, J., concurring). Like Burger, he criticized the first part of Stevens’ opinion as misrepresenting Parker. Id. at 609.

68. Id. at 605 (Blackmun J., concurring).

69. Id. at 610 (Blackmun, J., concurring).

70. Id. at 612-14 (Blackmun, J., concurring).

71. See cases described infra.


73. Id. at 615-16. In his dissent, Stewart correctly exposed many of the flaws in the reasoning of the plurality and of the two concurring justices. “The plurality opinion would hold that [Goldfarb] decided only that ‘the sovereign State itself’ . . . could not be sued under the Sherman Act,” wrote Stewart. “This view of Parker” he correctly noted, “would trivialize [Parker] to the point of overruling it.” Id. at 616. He also justly criticized Justice Blackmun’s “rule of reason” test, as inconsistent with the legislative history of the Sherman Act and “with well-settled principles of stare decisis.” Id. n.4.

74. Id. at 624 (Stewart, J., dissenting).
by the state. The justices endorsing the plurality decision clearly held the opposite view.

Cantor demonstrates how far the Court had departed from the language of the Sherman Act. The greater part of all the opinions treated the question of whether the particular governmental regulations were sufficiently pervasive and mandatory to require Detroit Edison's particular actions, and whether applying the antitrust laws to these actions was good policy. Whether the Sherman Act forbade Detroit Edison's actions was hardly addressed. Such an approach inevitably proved unworkable.

The Goldfarb test proved particularly cumbersome in City of Lafayette, which involved political subdivisions of states, specifically municipalities. The petitioners were the cities of Lafayette and Plaquemine, Louisiana, which were organized under the laws of the state and had been granted the right to own and operate electric utility systems both within and beyond their city limits. The cities claimed that Louisiana Power & Light ("LP&L"), a private utility with which the cities competed beyond their city limits, had committed various antitrust offenses.

LP&L counterclaimed, alleging, *inter alia*, that the cities conspired with a non-party electric cooperative to restrain trade. The cities moved to dismiss the counterclaim against them on the grounds that, as cities and subdivisions of the state of Louisiana, they were protected from federal antitrust liability under *Parker*.

The nature of municipalities presented novel issues in the *Parker* context: The cities were public entities, but were com-

75. *Id.* (The utility was only complying "with the terms of the tariff under the command of state law.") *Id.*

76. *Id.* at 593-94 (plurality opinion) ("[T]here can be no doubt that the ... program is primarily respondent's, not the Commission's."). *Id.* at 594.


78. *Id.* at 391.

79. *Id.* at 391-92.

80. *Id.* at 392 n.6. Specifically, LP&L claimed that the conspirators engaged in sham litigation to prevent LP&L's building a nuclear plant, excluded competition in certain markets by long-term supply agreements and illegally required LP&L customers to purchase electricity from petitioners as a condition to their supplying water and gas service. *Id.*

81. *Id.* at 392. The District Court agreed, and dismissed the claim against the cities on *Parker* grounds. The Fifth Circuit reversed. *Id.* at 392-93. The district court opinion is not reported. The court of appeals decision is found at 532 F.2d 431 (5th Cir. 1976).
peting against private utilities in the market. Applying the lan-
guage of the Sherman Act directly to the facts, the analysis
should still have been simple: As corporations, the municipalities
had to be considered "persons." 82 "Persons" engaged in a "com-
bination" or "conspiracy" to restrain trade in interstate commerce
incurred liability under the Sherman Act. 83 Therefore, the Sher-
man Act would apply to the facts as alleged, and Parker would
not.

The Supreme Court declined to apply Parker. However, be-
cause they tried to follow their own Goldfarb test rather than
Congress' words in the Sherman Act, the justices were unable
to agree on a rationale for the decision. They issued four opinions,
not one of which was accepted by a majority. 84

Justice Brennan wrote the plurality opinion. 85 The decision
should be made "in light of the presumption against implied
exclusions from coverage under the antitrust laws," 86 he began,
while acknowledging that the state action doctrine, as expressed
in Parker and interpreted in later cases, created an "implied
exclusion from coverage under the antitrust laws." 87 This implied
exclusion had been established by the Court in only two circum-
stances:

[First,] the Court held that . . . a concerted effort by persons to
influence lawmakers to enact legislation beneficial to themselves
or detrimental to competitors was not within the scope of the antitrust
laws. 88

Parker v. Brown identified a second overriding policy, namely
that "[i]n a dual system of government in which, under the Con-

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82. Section 8 of the Sherman Act, 15 U.S.C. § 7 (1988) and Section 1 of the Clayton
Act, 15 U.S.C. § 12 (1988) both define "person" to include a state-authorized corporation
or association. See also Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S.
390 (1906) (municipality was a "person" so as to be entitled to sue under the Sherman
Act).


84. City of Lafayette, 435 U.S. at 391, 417, 418, 426.

85. Id. at 391. Justices Marshall, Powell and Stevens joined. Justice Marshall also
wrote a concurring opinion to emphasize what he thought the plurality opinion meant.
Id. at 417-18 (Marshall, J., concurring).

86. Id. at 398 (plurality opinion).

87. Id. at 399-400 (plurality opinion). As noted above, however, the Parker holding
could have rested on the Sherman Act's language, rather than on an "implied exclusion"
from its coverage. This would have obviated the convoluted argument which Brennan
followed.

88. Id. at 399 (plurality opinion) (quoting United Mine Workers v. Pennington, 381
U.S. 657, 669-672 (1965)); see also Eastern R.R. Presidents Conference v. Noerr Motor
Freight, Inc., 365 U.S. 127 (1961) (forming the other leg of the so-called Noerr-Pennington
doctrine).
stitution, the states, [sic] are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." \(^{89}\)

The first issue was whether cities enjoyed the status of sovereign state entities such as the state legislature in *Parker* or the state supreme court in *Bates* enjoyed. \(^{90}\) After a lengthy discussion of empirical evidence and policy considerations, \(^{91}\) Brennan concluded as a matter of policy that state subdivisions should not "simply by reason of their status as such" be exempt from the antitrust laws under *Parker*. \(^{92}\)

Brennan then attempted to fashion a rule to determine when cities would be exempt. Reviewing some of the facts in *Parker*, *Goldfarb*, and *Bates*, he reasoned that those cases rested upon the following rule:

> We therefore conclude that the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. \(^{93}\)

The Court would hold that the anti-competitive conduct was "pursuant to state policy" only if it found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." \(^{94}\)

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89. *Id.* at 400 (plurality opinion) (citing *Parker*, 317 U.S. at 351).


91. Justice Brennan rejected the position that "it would be anomalous to subject municipalities to the criminal and civil liabilities imposed upon violators of the antitrust laws," 435 U.S. at 400, based on a review of empirical evidence: Several federal statutes, he noted, had imposed such liabilities in the past. *Id.* He also dismissed the argument that the Sherman Act and the Clayton Act were "intended to protect the public only from abuses of private power and not from actions of municipalities that exist to serve the public weal." *Id.* at 403. He opined that the public could suffer theoretical harm as a result of antitrust violations by cities, as well as private entities:

> [T]he economic choices made by public corporations [such as cities] in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.

*Id.* at 402.

92. *Id.* at 408 (plurality opinion).

93. *Id.* at 413 (plurality opinion).

94. *Id.* at 415 (plurality opinion) (citing City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)).
The Brennan plurality thus established another gloss on the Parker doctrine. It is difficult to ascertain any source other than the plurality's opinion that this was good policy. Though it is probably true that the California legislature intended to "displace competition with regulation or monopoly public service," Parker mentions no such requirement. Bates is of no moment because the acts at issue were those of the state supreme court which were considered sovereign per se. Perhaps there was not a comprehensive system of regulation in Goldfarb, but Cantor featured a comprehensive system of regulation and the Court had refused to apply Parker immunity.

The other opinions failed to clarify the City of Lafayette holding. Justice Marshall joined in Brennan's opinion, but wrote a concurrence stressing what he considered to be the limited nature of the exemption authorized by the plurality.

Chief Justice Burger provided the fifth vote for the result. He concurred with Brennan only insofar as the plurality held that municipalities were not exempt from the antitrust laws simply because they were political subdivisions of the state. However, Burger believed that when the cities "are engaging in what is clearly a business activity ... in which a profit is realized," the city could be immune only if it showed that immunity was "necessary in order to make the [state's] regulatory Act work, and even then only to the minimum extent necessary." His position implied (he did not address this issue directly) that municipalities would retain their antitrust immunity when they were not engaged in proprietary enterprises or business activities. No other justice adopted his analysis.

97. See Bates, 433 U.S. at 359-60.
99. See Cantor, 428 U.S. at 582-98. Brennan attempted to explain away Cantor in a footnote. He said that Cantor's regulations did not apply to light bulb sales, and that the case was concerned only with anti-competitive activity by "purely private parties." 435 U.S. at 410-11 n.40. This narrow reading of Cantor's facts was justifiably criticized by the concurring and dissenting justices. See discussion infra.
100. "For there to be an antitrust exemption, the State must 'impose' the practices 'as an act of government.'" 435 U.S. at 418 (Marshall, J., concurring). This requirement is found neither in the Sherman Act nor in Parker.
101. This is the holding of Part I of Justice Brennan's opinion in which the Chief Justice joined. 435 U.S. at 394-408 (plurality opinion). Id. at 418 (Burger, C.J., concurring).
102. Id. at 418, 425-26 (Burger, C.J., concurring) (citing Cantor, 428 U.S. at 597).
103. Id. at 427 (Stewart, J., dissenting).
The dissenters\textsuperscript{104} favored an entirely different approach. Focusing on language in \textit{Parker} referring to the actions at issue as “act[s] of government,”\textsuperscript{105} they would apply \textit{Parker} to exempt actions taken by any governmental entity, whether it be a municipality, another political subdivision, or the state itself.\textsuperscript{106}

Writing for the dissenters, Justice Stewart claimed that he was returning to \textit{Parker}, “which is based on an interpretation of the Sherman Act itself.”\textsuperscript{107} However, as has been demonstrated, the Court in \textit{Parker} had actually only searched the Sherman Act for a contradiction of its initial policy assumption that the Act would not apply to actions taken by the state. The dissenters assumed as a matter of policy\textsuperscript{108} that the Act should not apply to acts of government at any level. Purportedly finding nothing in the Sherman Act or in its legislative history to contradict their assumption, they concluded that the antitrust laws should not be applied to state or local governments.\textsuperscript{109}

Justice Blackmun joined nearly all of Stewart’s dissenting opinion, but wrote an additional opinion.\textsuperscript{110} He noted that the case did not involve a question of whether cities should be immune under the Sherman Act if they were found acting in

\textsuperscript{104} Justice Stewart wrote a dissent, in which Justices White and Rehnquist joined. \textit{Id.} at 426 (Stewart, J., dissenting). Justice Blackmun joined all but one particular portion. \textit{Id.} n. *.

\textsuperscript{105} Id. at 426. This ignores the regulatory activities present in \textit{Parker} and the \textit{Parker} Court’s emphasis upon the “State as sovereign in our dual system of government.” \textit{Parker}, 317 U.S. at 350-51.

\textsuperscript{106} \textit{City of Lafayette}, 435 U.S. at 426-27 (Stewart, J., dissenting).

\textsuperscript{107} Id. at 427 n.1 (Stewart, J., dissenting).

\textsuperscript{108} Cities are “subject to direct popular control through their own electorates and through the State legislature” and the “State itself acts through one of its governmental subdivisions.” \textit{Id.} at 430, 432. Stewart warned of the perceived dangers posed by the plurality opinion to the functioning of all American cities. The prospect of antitrust liability, he claimed, would paralyze the states from making rules and regulations and would result in “staggering costs in the thousands of municipal governments in our country.” \textit{Id.} at 439-40.

\textsuperscript{109} Id. at 428 (Stewart, J., dissenting). The dissenters did not search very diligently; their discussion of the Sherman Act’s legislative history encompasses one footnote. \textit{Id.} n.2. In fact, the statute itself gives explicit support for the contrary position that it should be applied to cities: the definitional section, defined “person” or “persons” to include “corporations and associations,” without making an exception for municipal corporations. Sherman Act § 8. 15 U.S.C. § 7 (1988) See also Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) (a municipality is a “person” which has standing to sue under the Act).

\textsuperscript{110} \textit{City of Lafayette}, 435 U.S. at 441.
concert with private parties.\textsuperscript{111} "[T]o grant immunity to municipalities in such a circumstance," he wrote, "would go beyond the protections previously accorded officials of the States themselves."\textsuperscript{112} City of Lafayette set no standards that lower courts or potential litigants could follow.

Only four justices supported the Brennan formula: anti-competitive acts of a state subdivision would be exempt from the antitrust laws only when (1) the act was taken "pursuant to state policy to displace competition with regulation or monopoly public service;"\textsuperscript{113} and (2) it was clear "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."\textsuperscript{114} The Chief Justice joined to form a majority, but only for the proposition that the Brennan formula applied so long as the city was engaged in a proprietary enterprise. Neither Brennan's formula nor Burger's "proprietary enterprise" gloss was based on the text of the Sherman Act.

Three justices believed that any actions taken by municipalities were \textit{per se} exempt from the antitrust laws. Another would agree, except when the municipality was acting in concert with private parties. These opinions also failed to reflect the text of the Sherman Act.

Had the justices applied the language of the Sherman Act, the result would have been the same: application of the antitrust laws to the cities of Lafayette and Plaquemine, Louisiana. The analysis, however, would have been much clearer: The cities ("persons" under the statute) were charged with conspiracy in restraint of trade. Because the Sherman Act outlaws persons from conspiring to restrain trade, the Act proscribes the conduct. This standard would have been faithful to the statute and would have established clear and useful precedent. Instead, the Court's

\textsuperscript{111} Id.
\textsuperscript{112} Id. at 441 (Blackmun, J., dissenting, citing Parker, 317 U.S. at 351-52). Blackmun was right. Yet, in \textit{City of Columbia v. Omni}, the Court did grant immunity to a municipality in just such a circumstance and Blackmun voted with the majority. \textit{See City of Columbia v. Omni Outdoor Advertising Inc.}, 111 S. Ct. 1344 (1991), discussed infra section IV.B.
\textsuperscript{113} \textit{City of Lafayette}, 435 U.S. at 413 (plurality opinion).
\textsuperscript{114} Id. at 415 (plurality opinion) (quoting \textit{City of Lafayette v. Louisiana Power & Light Co.}, 532 P.2d 431, 434 (1978)).
attempt to apply the Goldfarb test to municipalities resulted in an entirely unworkable 4-1-3-1 split of opinion.

Cantor had fractured the Court as to statewide entities nearly as badly as City of Lafayette fractured the Court as to municipalities. Clearly there was no consensus as to the application of the Goldfarb standard when the Court was confronted with new facts. Recognizing this, the Court two years later attempted to craft a new standard in Midcal, but the results were equally fruitless.

III. THE SECOND ATTEMPTED STANDARD: MIDCAL

Midcal was a local wine distributor that challenged a California statute requiring wine producers, wholesalers and rectifiers to file “fair trade contracts” or price schedules with the state. If the wine producer had not set prices through a fair trade contract, the wholesalers were required to post a resale price schedule for that producer’s brand. No state-licensed wine merchant could sell wine to a retailer at other than the price set either in an effective price schedule or in an effective fair trade contract. Thus, the state required that the prices be fixed, but private companies did the fixing. The California Department of Alcoholic Beverage Control charged Midcal with selling wine at other than the set price, and Midcal sought to enjoin the state’s wine pricing scheme.

Justice Powell wrote the opinion for a unanimous court. He established a new two-pronged standard for applying antitrust immunity under Parker: “First, the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’ [i.e., not requiring there to be a state policy to displace competition with regulation]; second, the policy must be ‘actively supervised’ by the State itself.” Justice Powell found that the California system satisfied the first standard, but did not satisfy

116. Id. at 99.
117. Id.
118. Id.
119. Id. at 100.
121. Id. at 105, citing City of Lafayette, 435 U.S. at 410 (plurality opinion).
the second. Therefore, Parker did not shield the defendants from the Sherman Act.\footnote{\textit{Midcal}, 445 U.S. at 105-06.}

The Court was able to issue a unanimous opinion in \textit{Midcal} only because the case's unusual facts did not require a result which would have disturbed the strong policy concerns of individual justices. For example, petitioners did not seek to impose treble damages upon government officials, the prospect of which had alarmed the dissenters in \textit{Cantor}.\footnote{Id. at 99-102. See \textit{Cantor}, 428 U.S. at 614-15. See also, \textit{e.g.}, Community Communications Co. v. City of Boulder, 455 U.S. 40, 60 (1982) (Rehnquist, J., dissenting) discussed infra.} Nor was there any issue in \textit{Midcal} as to whether the challenged restraint was "clearly articulated and affirmatively expressed as state policy."\footnote{The Court simply said that "[t]he California system for wine pricing satisfies the first standard." \textit{Midcal}, 445 U.S. at 105. In \textit{City of Boulder} and in \textit{Omni} this would be the major area of disagreement among the justices.}

A more fundamental problem with the opinion in \textit{Midcal} was that it continued to focus upon the identity of the actors and their relationship to the state, rather than upon whether the alleged activities were illegal. In setting forth its two-pronged test, the Court lost track of the fact that, as in \textit{Goldfarb}, the fee schedules were set by private persons acting in concert, which constituted "a classic illustration of price-fixing."\footnote{\textit{Goldfarb}, 421 U.S. at 782-83.} Even in such a case, Parker would apply if the challenged restraint were "clearly articulated and affirmatively expressed as state policy," and the policy were "actively supervised" by the state itself. The Court had completely ignored whether the action in question was forbidden by the Sherman Act. Its focus was solely on the relationship between the defendants and the state, creating an opportunity for error.

The \textit{Midcal} standard failed to be any more workable or adaptable than \textit{Goldfarb}. Another municipality case, \textit{City of Boulder},\footnote{Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).} presented novel circumstances for which the \textit{Midcal} standard proved too unwieldy. The petitioner in \textit{City of Boulder}, Community Communications Company (CCC), unlike Louisiana Power and Light in \textit{City of Lafayette}, was not competing against the city in the marketplace. Rather, the Boulder City Council had, through an ordinance, granted a permit to conduct a cable tele-
vision business in the city to CCC's predecessor in interest.\textsuperscript{127} Subsequently, the Council considered issuing a permit to CCC's competitor and, as part of this consideration, enacted an emergency ordinance which, \textit{inter alia}, prohibited CCC from expanding its business operations.\textsuperscript{128} CCC sought to enjoin the enactment of the ordinance, claiming that it illegally restrained trade.\textsuperscript{129}

The City of Boulder had claimed that its enactment of any ordinance was exempt from the prohibitions of the antitrust laws because it was organized as a "home rule" municipality under the Colorado State Constitution, and as such was entitled to exercise "the full right of self-government in both local and municipal matters."\textsuperscript{130}

Had the courts looked to the text of the Sherman Act, they would have quickly concluded that despite the Home Rule Charter, the City of Boulder was a "person" which was not immune from the antitrust laws. They would have further concluded that mere enactment of an ordinance, without more, would not constitute a "conspiracy" or "combination" in restraint of trade. Therefore, while it was possible, albeit unlikely,\textsuperscript{131} that CCC could establish a violation of the Sherman Act, the action should be allowed to proceed to trial. A majority of the United States Supreme Court eventually reached that result,\textsuperscript{132} but with an analysis that did nothing to clear up the indeterminacy and confusion caused by \textit{Goldfarb} and \textit{City of Lafayette}.\textsuperscript{133}

\begin{footnotes}
\textsuperscript{127} Id. at 44.
\textsuperscript{128} Id. at 44-46.
\textsuperscript{129} Id. at 46-47.
\textsuperscript{130} Id. at 43-44.
\textsuperscript{131} CCC also alleged, \textit{inter alia}, that the city had engaged in a conspiracy with its private competitor, Boulder Communications Company, but the District Court found that the evidence it had reviewed was insufficient to establish a probability that petitioner would prevail on this claim. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1038 (D. Colo. 1980).
\textsuperscript{132} 455 U.S. at 43-60.
\textsuperscript{133} This confusion and uncertainty are reflected in the decisions in the lower courts. The U.S. District Court in \textit{City of Boulder}, 485 F. Supp. 1035 (D. Colo. 1980) correctly found that the city's actions were not immune \textit{per se}, but for the wrong reason. It read \textit{City of Lafayette} as holding that immunization under \textit{Parker} "is limited to governmental acts" that are "appropriate." Id. at 1039. Because the approach [to regulation] taken is not an "appropriate exercise and articulation of a policy of regulation," the city's acts were not governmental acts, and consequently "\textit{Parker} is wholly inapplicable" under \textit{City of Lafayette}. Id.

This "appropriate exercise" gloss was not found in any previous decision. The result
Justice Brennan wrote the opinion for the majority of five justices.\footnote{134} He applied the \textit{Midcal} test, holding that municipal conduct would be shielded from antitrust liability only if taken pursuant to a state policy “clearly articulated and affirmatively expressed” by the state government.\footnote{135} Because the Home Rule amendment to the Colorado Constitution, upon which the city relied, made no mention of and directed no particular action regarding cable television, the state’s position was one of “mere neutrality respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have ‘contemplated’ the specific anticompetitive actions for which municipal liability is sought.”\footnote{136} Therefore, the city was not entitled to an exemption from the antitrust laws under \textit{Parker}.\footnote{137}

reached by the district court was, in fact, right, but only because Colorado had imposed no system of regulation of the cable industry. See 455 U.S. at 54-56.

On the other hand, the district court probably erred in granting the preliminary injunction. While focusing on how the \textit{City of Lafayette-Mideal} test should be applied, the Court failed to address the question of whether the enactment of the ordinance constituted an illegal restraint of trade. Having rejected the immunity argument, it found with little analysis that a preliminary injunction was appropriate. \textit{City of Boulder}, 485 F. Supp. at 1039-40.

The Tenth Circuit Court of Appeals reversed the district court’s holding in a split decision. 630 F.2d 704 (10th Cir. 1980). The majority recognized that the lower court had misread \textit{City of Lafayette}, explicitly rejecting the “appropriate exercise . . . of regulation” gloss. \textit{Id.} at 706. However, it, too, misread \textit{City of Lafayette}. Ignoring \textit{City of Lafayette’s} holding that cities are not immune from antitrust liability simply because their status as such, \textit{City of Lafayette}, 435 U.S. at 408 (plurality opinion), the Tenth Circuit distinguished \textit{City of Lafayette} from the facts in the case at bar on the basis that “no proprietary interest of the City [of Boulder] is here involved.” \textit{City of Boulder}, 630 F.2d at 708. This distinction had been made by only Justice Burger. See \textit{City of Lafayette}, 435 U.S. at 418 (Burger, C.J., concurring). See discussion supra section II.B.

Having wrongly determined \textit{City of Lafayette} to be inapposite, the Tenth Circuit Court of Appeals misapplied \textit{Parker} and \textit{Midcal}. \textit{Midcal} had required a “clearly articulated and expressed . . . State policy” which was “actively supervised by the State itself” for immunity to apply. \textit{Midcal}, 445 U.S. at 105 (emphasis added) (internal quotations omitted). The Tenth Circuit held that the actions of the City of Boulder were “clearly articulated and expressed” as \textit{city} policy and “actively supervised” by the \textit{city} and therefore found that the city was immune under \textit{Parker}. 630 F.2d at 708.

\footnote{134} Comprised of the four justices who formed the plurality in \textit{City of Lafayette} (Justices Brennan, Marshall, Powell and Stevens), along with Justice Blackmun who had dissented in \textit{City of Lafayette}. \textit{City of Boulder}, 455 U.S. at 40, 43, 57, 58, 60.
\footnote{135} \textit{Id.} at 51 (quoting the first prong of the \textit{Midcal} test, 445 U.S. at 105).
\footnote{136} \textit{City of Boulder}, 455 U.S. at 55. Cf. \textit{Goldfarb}, 421 U.S. at 790-91 (State Supreme Court assigned an administrative role to state bar, but did not require minimum fee schedules.).
\footnote{137} \textit{City of Boulder}, 455 U.S. at 55-57.
Justice Stevens joined with the majority but also wrote a concurring opinion. He noted that the majority was not "holding that the antitrust laws have been violated." He hinted that the CCC might have difficulty in proving an antitrust violation, but refused to look at the Sherman Act's text to determine whether CCC could prove an antitrust defense.

Justice Blackmun’s vote in City of Boulder is inconsistent with his dissent in City of Lafayette, in which he had implied that Parker would not allow conspiracies between governments and private persons. It is possible that he changed his vote because CCC had alleged a conspiracy between its private competitor and the City of Boulder. His reasons do not appear in any opinion, but his vote made the Brennan plurality in City of Lafayette a majority in City of Boulder.

Justice Rehnquist wrote a dissenting opinion. He was dismayed that the majority’s opinion made it possible to hold municipalities liable under the antitrust laws merely for passing ordinances:

As I read the Court’s opinion, a municipality may be said to violate the antitrust laws by enacting legislation in conflict with the Sherman Act, unless the legislation is enacted pursuant to an affirmative state policy to supplant competitive market forces in the area of the economy to be regulated.

This was a justifiable concern, despite the fact that CCC was not seeking damages against the City of Boulder, and despite Justice Stevens’ concurrence. The Sherman Act only prohibits "persons" from acting in "combination" or "conspiracy" to restrain trade or to establish a monopoly. It does not prohibit

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138. Id. at 58 (Stevens, J., concurring).
139. Id. at 59 (Stevens, J., concurring) ("It would be premature at this stage to comment on the question whether petitioner will be able to establish that respondents have violated the antitrust laws.").
140. 435 U.S. at 441 (Blackmun, J., dissenting).
141. See discussion supra note 133.
142. Chief Justice Burger and Justice O'Connor joined in this opinion. 455 U.S. at 60.
143. Id. (emphasis in original).
144. See discussion supra note 40.
145. 455 U.S. at 58 (Stevens, J., concurring) ("[T]he Court's analysis of the exemption issue is [not] tantamount to a holding that the antitrust laws have been violated.").
146. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,
public entities from passing ordinances. However, the Sherman Act does say that cities (as "persons") do violate the Act when they conspire with private parties to restrain trade (even if one method of restraining trade is through legislation).

Justice Rehnquist did not base his argument on the Act. He purported to review Parker and its progeny (entirely ignoring City of Lafayette). These cases, he claimed, only addressed the question of whether statutes, ordinances and regulations were "preempted" and rendered invalid by the Sherman Act, not whether a state or local government was exempt from the Act. By forming the question in these terms, Rehnquist would never impose liability on a city or other governmental entity; if the Parker doctrine did not apply, preempted legislation would be "simply invalid and unenforceable." Moreover, Rehnquist would decide whether a city's ordinance was preempted based upon the same standard that would apply in judging a state's laws:

is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.


147. Id.

148. Id.; Parker v. Brown, 317 U.S. 341, 351-52 (1943) ("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful ... and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade. . . .") (emphasis added); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 441 (1978) (Blackmun, J., dissenting) ("To grant immunity to municipalities [acting in concert with private parties] would go beyond the protections previously accorded officials of the States themselves.").

149. City of Boulder, 455 U.S. at 62-64 (Rehnquist, J., dissenting).

150. Id.

151. Id. at 68-69 (Rehnquist, J., dissenting).

152. City of Boulder, 455 U.S. at 68-69 n.4 (Rehnquist, J., dissenting) ("a municipality does not violate antitrust laws [even] when it enacts legislation pre-empted by the Sherman Act, . . . ").
[The ordinance survives if it is enacted pursuant to an affirmative policy on the part of the city to restrain competition and ... the city actively supervises and implements this policy .... The standards applied by this Court are the same regardless of whether the challenged enactment is that of a State or one of its political subdivisions.¹⁵³

Not only did this analysis ignore the rationale for the opinion expressed in *Parker*, it was contradicted by the text of the Sherman Act. The definitional section defined “persons” to include “corporations,” making no exceptions for municipal corporations.¹⁵⁴

Chief Justice Burger joined the dissent.¹⁵⁵ He gave no reasons for his vote. The difference in facts may provide a clue as to why he changed his vote from his position in *City of Lafayette*: The City of Boulder did not have a “proprietary interest” in the transaction in question, as the two cities had in *City of Lafayette.*

*City of Boulder*, like *City of Lafayette*, presented the Court with facts to which the standards of the day, *Midcal* and *Goldfarb*, respectively, could not be adapted. After *City of Boulder*, the *Midcal* standard could not be applied by a lower court with any confidence. A court could only guess how the individual justices would apply the standard to particular facts through the prisms of their policy concerns.¹⁵⁶

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¹⁵³. Id. at 69-70 (Rehnquist, J., dissenting) (emphasis added).
¹⁵⁴. 15 U.S.C. § 7 (1988); see discussion supra notes 147, 149.
¹⁵⁵. *City of Boulder*, 455 U.S. at 60 (Rehnquist, J., dissenting).
¹⁵⁶. After *City of Boulder* and *City of Lafayette*, the Supreme Court split 3-1-3-1-? in applying *Parker* to municipalities:

3 -(Justices Brennan, Marshall, and Powell) - held that cities were not *per se* exempt from the Sherman Act, but would be exempt if the anti-competitive actions were clearly contemplated and authorized by the state.

1 -(Justice Stevens) - followed the same standard, except that he was not certain whether cities could be liable merely for passing an ordinance, as the Brennan group seemed to suggest.

3 -(Justices Rehnquist, O'Connor, and White) - believed that cities were never liable under the Sherman Act. [White is placed with this group based only on his vote in *City of Lafayette*; he did not participate in *City of Boulder*.]

1 -(Chief Justice Burger) - opined that cities could be liable but only if they had a “proprietary interest” that they were protecting by participating in the marketplace; cities would be exempt if they had no “proprietary interest.”

? -(Justice Blackmun) - was equivocal. He had sided with Rehnquist in *City of Lafayette*, but with Brennan in *City of Boulder*. There were two plausible explanations:

A. He agreed with Rehnquist that a city could not be liable under the Sherman Act unless (as in *City of Boulder*) there was an allegation of a conspiracy with private
For the justices writing in *City of Boulder*, the question of whether CCC had alleged a combination or conspiracy in restraint of trade or to establish monopoly received scant attention. The only issue was the identity of the defendants: For the dissenters, if the defendant were a city, it could not be liable under the Sherman Act, no matter what petitioner alleged. For the majority, the city could not be liable if its anti-competitive actions were "clearly contemplated and authorized by the state," no matter what those actions were.\(^1\)\(^5\)\(^7\) Both groups had abandoned the admonition of *Parker* that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it...."\(^1\)\(^5\)\(^8\)

The Supreme Court could have avoided this possible error and provided some clear guidance to the lower courts had it strictly construed the statute: A city which participates in a conspiracy or combination to restrain trade or to effect a monopoly or attempt to monopolize could be liable under the antitrust laws. A city which does not could not be liable. This rule would not have changed the result in *City of Boulder*. However, such a rule would have applied the Sherman Act to cities which violated the Act. Such a rule would also have given *City of Boulder* some value as precedent.

The Court's failure to strictly construe the Sherman Act had two results. One result was that the standard was unworkable as a guide to conduct for businesses and lower courts.

The other effect of the Court's failure to strictly construe the Sherman Act was to set the stage for error. The framework of the debate had been entirely altered since *Parker*. While the Court in *Parker* said a great deal about principles of federalism and the states as sovereign, it also rested its decision upon the

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persons; or

\(1\) Conversely, the majority implied that the city could be liable if its actions were not contemplated and authorized by the state, even if all it did was pass an ordinance. As Stevens' concurring opinion noted, there was some question whether merely passing an ordinance, without more, could be an antitrust violation. *City of Boulder*, 455 U.S. at 59 (Stevens, J., concurring).

fact that the state "made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly . . ." 159 The Midcal Court refused to consider this aspect of Parker. It found that the challenged actions did constitute price maintenance in violation of the Sherman Act, but went on to "consider whether the state's involvement in the price-setting program is sufficient to establish antitrust immunity under Parker v. Brown." 160 The Midcal Court thus violated (as did the City of Boulder Court) Parker's admonition that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it," 161 while citing this very language in the Parker decision! 162 In the next attempt to define a standard, the Court would not even cite Parker's language, let alone the Sherman Act.

IV. THE THIRD ATTEMPTED STANDARD: THE TOWN OF HALLIE-SOUTHERN MOTOR CARRIERS COMPROMISE AND ITS CONSEQUENCES

The City of Lafayette and City of Boulder debacles left lower courts with no rule to follow. One of the Supreme Court's next two state action cases involved municipalities, 163 while another involved private actors claiming that their actions were caused by state laws and regulations. 164 The various factions compromised, the Court issuing both opinions on the same day in a third grand effort to establish a workable standard for lower courts to follow.

The effort failed. Where before the Court had muddled through to results consistent with the words of the Sherman Act, the tradeoffs among factions effectively (and ineffectually) relegislated the Sherman legislation. In its effort to resolve the confusion heretofore, the Court established a dichotomy in analysis between state subdivisions (cities and counties) and statewide entities (functional agencies) not necessarily demanded by previous holdings and certainly not demanded by the words of the

159. Id. at 352.
161. Parker, 317 U.S. at 351; see discussion supra note 37.
162. Midcal, 445 U.S. at 104.
Sherman Act or by Parker itself. First, actions by cities would be held to a minimal standard: A municipality's action need only be foreseeable by the state in a grant of general powers and need not be actively supervised by the state to enjoy Parker immunity. Indeed in Town of Hallie, Midcal's first prong of clear articulation would be reduced to an evidentiary function.165

Yet, persons acting at the behest of statewide entities would be perversely held to a higher standard than would cities or towns: Liability for conduct under the aegis of a statewide entity would turn, not upon the conduct of the persons, but upon the vigor with which the state officers had pursued their mandate of "active supervision," subjectively judged post hoc by the court.

This dichotomy would lead to error in both Town of Hallie and Southern Motor Carriers, as measured by the text of the Sherman Act, and to rudderless confusion for states, parties and lower courts in subsequent cases. The Court's effort to justify the ad hoc treatment of cases will be shown to be the best argument for a clear and simple application of the words of the Sherman Act.

A. Town of Hallie and Southern Motor Carriers

In Town of Hallie, the plaintiffs were towns in Wisconsin located adjacent to the City of Eau Claire.166 The city provided sewage treatment services and sewage collection and transportation services inside its municipal borders and in other areas which agreed to be annexed to the city.167 The towns alleged that the city violated the Sherman Act by acquiring a monopoly over the provision of sewage treatment services and by tying the provision of such services to the provision of sewage collection and transportation services.168 They filed suit against the city, seeking injunctive relief.169 The city claimed that it was merely providing sewage treatment service in accordance with state statutes so that its actions were exempt from Sherman Act scrutiny.170

165. Town of Hallie, 471 U.S. at 46.
166. Id. at 36.
167. Id. at 36-37.
168. Id.
169. Id. at 36.
170. Id. at 37. The district court agreed and dismissed the complaint in an unreported opinion. Id. The United States Court of Appeals for the Seventh Circuit affirmed the dismissal. Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983).
The unanimous Supreme Court, in an opinion written by Justice Powell, applied *Parker* to exempt the City of Eau Claire from any potential liability under the Sherman Act, because the cities' tying of the provision of sewage treatment services to the provision of sewage collection and transportation services was a foreseeable result of the state's authorizing the cities to provide those services. In crafting the opinion, Justice Powell carefully gave something to every faction. He held, as had Brennan's group in *City of Lafayette*, that municipalities were not beyond the reach of the antitrust laws solely because they were subdivisions of the state. On the other hand, Powell swallowed many of Rehnquist's policy arguments. "[R]equiring ... explicit authorization by the State" for the particular actions complained of, Powell wrote, "might have deleterious and unnecessary consequences." Also, "[w]e may presume, absent a showing to the contrary, that the municipality acts in the public interest." To be exempt, municipalities would have to demonstrate that the anti-competitive activities were authorized "pursuant to State policy to displace competition with regulation or monopoly public service," and that the specific activities were expressly authorized.

The Powell Court retreated from the *Midcal* standard in three substantive ways. First, Powell's interpretation of how state policy was "clearly expressed" in the case of cities was extremely elastic. The state did not have to contemplate the specific actions complained of. Instead, all the city needed to show was that the state had "contemplated" the kind of action complained of, i.e., that the conduct engaged in was "a foreseeable result of empowering the City to refuse to serve in the unannexed areas." Second, Powell held that active state supervision should not be required in cases in which the actor was a municipality. Third,

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172. Id. at 38.
173. Id. at 44.
174. Id. at 45.
175. Id. at 38-39 (citing *City of Lafayette*, 435 U.S. at 389, 413).
177. Id. at 42. Cf. Justice Powell’s majority opinion in *Midcal*, 445 U.S. at 104 ("It is not enough that ... anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign.") (quoting *Goldfarb*, 421 U.S. 773, 791 (1975)).
the Court rejected the requirement that the action be “compelled” by the state for all persons.\textsuperscript{179}

The compromise in \textit{Town of Hallie} resulted in one opinion, rather than four. While this arguably made the opinion more valuable as precedent, applying the “foreseeable” standard created even greater difficulties. The \textit{Town of Hallie} standard allowed a city to engage in a naked conspiracy in restraint of trade, even when the state had not specifically authorized the city to do it. Under the words of the Sherman Act, towns and cities as municipal corporations, \textit{i.e.}, “persons,” are prohibited from combinations in restraint of trade. If the Sherman Act is applied as Congress wrote it, the holding in \textit{Town of Hallie} is in manifest error. \textit{Hallie’s} companion case, \textit{Southern Motor Carriers}, allowed \textit{private} “persons” to conspire in restraint of trade with the fig leaf of state policy. This result is also flatly at odds with the words of the Sherman Act.

The petitioners in \textit{Southern Motor Carriers} were rate bureaus, composed of motor common carriers operating in four southeastern states.\textsuperscript{180} Like the bar association in \textit{Goldfarb} and the wine merchants in \textit{Midcal}, the rate bureaus agreed on joint rate making (some might say price-fixing), which was authorized (some might say encouraged), but not expressly compelled, by the states in which the rate bureaus operated.\textsuperscript{181} These proposals were submitted to the public service commission of each state for approval or rejection,\textsuperscript{182} just as the utility’s policy of giving away light bulbs was submitted to the Michigan Public Service Commission in \textit{Cantor}. As in \textit{Goldfarb}, the case clearly involved a conspiracy or combination among private persons to fix prices, which is forbidden by the text of the Sherman Act.\textsuperscript{183} Therefore, as in \textit{Goldfarb}, the Sherman Act should have been applied to the defendants in \textit{Southern Motor Carriers}.


\textsuperscript{180} \textit{Southern Motor Carriers}, 471 U.S. at 50-51.

\textsuperscript{181} Id. at 50-52.

\textsuperscript{182} Id. at 51-52.

\textsuperscript{183} 15 U.S.C. § 1 (1988) (“Every contract, combination, ... or conspiracy, in restraint of trade or commerce among the several States ... is declared to be illegal.”).
The Southern Motor Carriers Court, in a seven to two decision, nevertheless applied Parker to render the defendants’ actions immune from the Sherman Act. Goldfarb had explicitly required that the anti-competitive activity be “compelled by direction of the state acting as sovereign,” and not just prompted by state action for immunity to apply. The Southern Motor Carriers Court reduced the Goldfarb language from a requirement to mere evidence that “the state acting as sovereign” intended to displace competition. Because Goldfarb would have reached the same result without the compulsion requirement, the Southern Motor Carriers Court applied the two-pronged Midcal test and dropped Goldfarb’s requirement of compulsion: “[A] state policy that expressly permits, but does not compel, anti-competitive conduct may be ‘clearly articulated’ within the meaning of Midcal.”

The majority recognized that it was not following the terms of the Sherman Act, but decided that it was too late to go back to the statutory language:

[The logical result of [applying the literal terms of the Sherman Act] would require us to overrule Parker v. Brown and its progeny, for the state action doctrine is an implied exemption to the antitrust laws. After over 40 years of congressional acquiescence, we are unwilling to abandon the Parker doctrine.]

By phrasing the debate in language which failed to take account of the Sherman Act itself, the Court had set the stage for the result in Southern Motor Carriers. The Southern Motor Carriers Court focused to such an extent upon the identity of the actors and their relationship to the states that it lost sight of the fact that the Parker Court’s primary inquiry was whether Congress had intended to apply the Sherman Act to California’s regulations.

The truce built on error in Town of Hallie and Southern Motor Carriers could not long survive because the cases afford no guide to conduct for states, businesses, or lower courts. For cities, Town of Hallie borrowed from tort a foreseeability standard to
apply to the legislative mind, effectively requiring each reviewing court to relegislate the appropriate policy toward the challenged actions. In *Omni Outdoor Advertising*, the Court abandoned altogether *Town of Hallie*’s requirement that the state have a policy to displace competition with regulation, leaving only the too easily satisfied standard of foreseeability.

For state agencies, cases after *Southern Motor Carriers* would turn no longer on state compulsion, but upon the far more elastic gauge of state permission. State permission would be, paradoxically, easier to satisfy in the abstract and sometimes harder to prove in practice. What seemed a more lax standard in *Southern Motor Carriers* would prove surprisingly stringent in *Patrick v. Burget*, and utterly confounding and divisive in *Federal Trade Commission v. Ticor Title Insurance Co.*, the Court’s most recent state agency case.

**B. Patrick, Omni and Ticor: The Court in Compromising Positions**

*Patrick v. Burget*, the first state action case to come before the Supreme Court after the *Town of Hallie-Southern Motor Carriers* compromise, maintained the Court’s unanimity by reaching the right result for the wrong reason. The cost of consensus was consistency: Though the case was factually analogous to *Southern Motor Carriers*, the Court distinguished this apposite if erroneous precedent from the case at bar with new sophistry based on *Midcal*. The standard set in the *Hallie-Southern* compromise was thus compromised.

The standards for state agency cases had appeared to be relaxed in *Southern Motor Carriers* where the Court applied the *Parker* doctrine to private motor carriers fixing prices with the passive acquiescence, but not the affirmative command, of state agencies. Yet, in *Patrick*, the Court subjected physicians, who combined to exclude a rival through the use of a peer review process compelled by Oregon statute, to antitrust liability. The majority, in an opinion by Justice Marshall for a nearly unanimous Court, held that Oregon had failed to supervise the peer review

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194. *Id.*
195. Justice Blackmun took no part. *Id.* at 94.
process with sufficient vigor. It is difficult to distinguish the general authority of the Oregon health division over the hospital peer review process from the "ultimate authority and control over all intra-state rates" permitted in Southern Motor Carriers.

The conspiracy to misuse the hospital peer review board would have been easily found illegal had the standard of the words of the Sherman Act been applied to this combination of "persons." As written, Patrick required that "state official[s have] and exercise... power... to review [particular anticompetitive acts of private parties] and overturn a decision that fails to accord with state policy." This standard (1) begs the question of whether the state might have adopted so broad a policy that "fail[ure] to accord" is rare, and therefore (2) places the Court in the role of determining what the state's policy should be. Southern Motor Carriers and Patrick, read together with related cases, signalled that the Court would subjectively weigh whether the state exerted "significant control" over the private parties' conduct. The outcome might vary from the laxness of Southern Motor Carriers to the stringency of Patrick.

For the third time, a carefully wrought judicial substitute for a statutory standard came to nought in a municipality case, Omni

196. Id. at 105.
197. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. at 51. Cf. Town of Hallie, 471 U.S. 34 (1985) (allegedly illegal denial of sewage treatment services to neighboring towns held immune because state authorization for the town to provide sewage services was found to be sufficient articulation of policy), discussed supra section IV.A; Omni Outdoor Advertising, 111 S. Ct. 1344 (1991) (conspiracy of city with private persons to restrain trade by ordinances restricting billboards held immune because state's authorizing cities to pass zoning ordinances was found to be sufficient articulation of policy), discussed infra.

198. Ironically, Justice Marshall makes, by unintended analogy, the best case for applying the plain words of the Act to state actions. In rejecting a policy argument that peer review is essential to quality medical care and should be exempt from antitrust scrutiny on those grounds, he noted: "[T]his argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch." Patrick, 486 U.S. at 105.

Indeed, Justice Marshall points out that Congress had, since the events of the case, prospectively limited antitrust liability for medical peer review in some cases in the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152 (Supp. 1987) in response to "concern that the possibility of antitrust liability will discourage effective peer review." Id. at 105 n.8. He directed physicians dissatisfied with the limited immunity to seek relief from the Congress. So might the states.

199. Patrick, 486 U.S. at 102.
201. Id.
Outdoor Advertising. This is not surprising in hindsight since a judicially composed standard based on statehood cannot be cleanly applied to a municipality simultaneously possessing both state and non-state attributes. Having discarded consistency with regard to precedent and fact in Patrick, the Court sacrificed faithfulness to precedent and statute in Omni. As the Patrick Court had paid lip service to Southern Motor Carriers while abandoning it, the Omni majority deserted Town of Hallie while professing to follow it.

The Supreme Court in Omni held that all a municipality had to show to be exempt under Parker was that it was authorized to take an action by the state, a foreseeable result of which could be anti-competitive, even though the municipality's action was taken in a conspiracy with private persons to restrain trade. The decision is inexplicable under the plain meaning of the Sherman Act. The minority took exception.

Columbia Outdoor Advertising (COA) had entered the billboard business in the City of Columbia, South Carolina, in the 1940s. By 1981, COA controlled more than 95 percent of the market. In 1981, Omni Outdoor Advertising, Inc. (Omni), a Georgia corporation, began erecting billboards in and around the city. According to the finding by the jury, COA executives improperly conspired with city officials to induce the city to pass ordinances which restricted the size, location and spacing of billboards to the severe detriment of Omni's ability to compete in the market.

Omni sued under Sections 1 and 2 of the Sherman Act and obtained a jury verdict against the city and COA on these claims, as well as state antitrust claims. "The jury also answered two special interrogatories, [expressly] finding that the city and COA had conspired to restrain trade and to monopolize the market." The district court granted the defendants' motion for judgment.

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203. Id. at 1350.
204. Id. at 1347.
205. Id.
206. Id.
207. Id. at 1347-48.
208. Id. at 1348.
209. Id.
notwithstanding the verdict. On appeal, the Fourth Circuit reversed and reinstated the jury's verdict.

The Supreme Court reversed the Fourth Circuit's opinion and granted the judgment notwithstanding the verdict on the Sherman Act claims on the basis of *Parker*. Justice Scalia wrote the opinion for the majority. While following the holdings of *Town of Hallie, City of Boulder,* and *City of Lafayette* that *Parker* immunity did not automatically apply to local governments, Scalia proposed a loose standard for determining when *Parker* immunity applied to local governments. Scalia found that the South Carolina legislature had enacted statutes which authorized the City of Columbia to pass zoning regulations to regulate the use of land and construction of buildings and other structures within its boundaries. Even though these statutes authorized zoning regulations that were to be enacted only to improve the public health and safety, and though there was no mention of billboards and no mention of any specific industry, the Court held that this was enough to immunize the City's actions:

> Suppression of competition is the 'foreseeable result' of what the statute authorizes. That condition is amply met here. The very purpose of the zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants.

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210. *Id.* The district court's opinion is not reported.
213. Chief Justice Rehnquist and Justices O'Connor, Souter, Kennedy, and Blackmun joined the majority opinion. *Id.* at 1347.
214. *Id.* at 1349.
215. *Id.*
216. *Id.* at 1350.
217. *Id.* at 1350 (citation omitted). Scalia thus ironically echoed the following language of Justice Brennan in *City of Lafayette* while ignoring the emphasized phrase:

> The *Parker* doctrine ... preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals.

The discussion on this issue was very short. Scalia phrased the question so as to reach his desired answer. The dissent, he insisted, would apply *Parker* immunity if a municipality failed to follow the dictates of the state regulations granting it authority.\footnote{218. *Omni Outdoor Advertising*, 111 S. Ct. at 1349. This is not the argument made by the dissent. *Id.* at 1356-64 (Stevens, J., dissenting).} Scalia responded that such an expansive interpretation has "unacceptable consequences:"

If the antitrust court [requires that the municipality stay within the state's] 'authority' in this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law.\footnote{219. *Id.* at 1349 (quoting PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 212.3b at 145 (Supp. 1989)). Scalia himself joined an opinion which authorized just such an inquiry into the activities of state agencies in applying the Mideal active supervision test in Federal Trade Commission v. Ticor Title Insurance Co., 112 S. Ct. 2169, 2179-80 (1992); see discussion infra.}

As a matter of policy, Scalia would apply *Parker* immunity to cities unless forbidden by statute.

Scalia thus deserted *Town of Hallie's* requirement that the anti-competitive activities be authorized by the state, pursuant to a state policy to displace competition with regulation or monopoly public service. The new rule applied the language of *Town of Hallie* in a very different context. State-authorized actions of a municipality would be exempt under *Parker* if the suppression of competition might be a "foreseeable result."\footnote{220. *Omni Outdoor Advertising*, 111 S. Ct. at 1350.} There need no longer be a state policy to displace competition.\footnote{221. *Id.*. Cf. *Town of Hallie*, 471 U.S. at 44 ("we conclude that the Wisconsin statutes evidence a 'clearly articulated and affirmatively expressed' state policy to displace competition with regulation.... These statutory provisions plainly show that the legislature contemplated the kind of action complained of.")} Relying on treatises and on public policy arguments, Scalia and the majority of the Court went far beyond the exemption outlined in *Parker*.

One of *Parker's* essential bases was the Court's holding that the Sherman Act was not meant to apply where the state had shown that its policy was "to displace competition with [economic] regulation" and that the state policy was "clearly articulated and
affirmatively expressed." Of course, as the Court held in *Town of Hallie*, to demonstrate such a state policy, the economic regulation had to be in a specific industry. Scalia dispensed with the specificity requirement in a casual footnote. The bulk of Scalia's opinion in *Omni* dispensed with the explicit "conspiracy" exception articulated by *Parker*. *Parker* had provided:

[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade.

The state in adopting and enforcing the prorate program made no contract or agreement, and entered into no conspiracy in restraint of trade or to establish a monopoly but as sovereign, imposed the restraint as an act of government.

With no support but a theoretical economic analysis, Justice Scalia severely limited the application of these two sentences to the situation "where the State acts not in a regulatory capacity but as a commercial participant in a given market." *Parker* could not apply, Scalia argued, to the situation where the state or its subdivision was imposing some type of regulation.

Justice Blackmun joined in the desertion of *Parker*’s explicit conspiracy exception. His vote is particularly inconsistent as he had expressly noted in his *City of Lafayette* dissent that the case before him did not involve the question of whether the cities were acting in concert with a private person: "To grant immunity

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222. *Town of Hallie*, 471 U.S. at 44.

223. As Justice Stevens noted in the dissent, the Court in *Town of Hallie* went to great lengths to emphasize that the state policy in *City of Boulder* was not clearly articulated, in part because it did not address the regulation of cable television, while the state policy in *Town of Hallie* specifically referred to the provision of sewage services. *Omni Outdoor Advertising*, 111 S. Ct. at 1359-60 (Stevens, J., dissenting) (citing *Town of Hallie*, 471 U.S. at 41-43).

224. *Omni Outdoor Advertising*, 111 S. Ct. at 1350 n.4. Scalia stated that the "specificities" which Justice Stevens insisted were necessary "are without support in our precedents," ignoring, *inter alia*, *Town of Hallie*, 471 U.S. at 41-43, and *Community Communications Co. v. Boulder*, 455 U.S. 40, 56 (1982).


228. Id.
to municipalities in such a circumstance would go beyond protections previously accorded officials of the States themselves." The Court in *Omni* granted immunity to the City of Columbia in just such a circumstance. Moreover, Blackmun had voted with the majority in the *City of Boulder*, which held, in language patently ignored in *Omni Outdoor Advertising*:

Acceptance of . . . a proposition that the general grant of power to enact ordinances necessarily implies State authorization to enact specific anti-competitive ordinances would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.230

Justice Stevens wrote the dissenting opinion.231 He correctly argued that the holding in *Omni Outdoor Advertising* represented a radical departure, not just from *Parker* and the Sherman Act, but also from the common law of restraint of trade which was in effect at the time that the Sherman Act was passed.232 He noted that the *Case of Monopolies* prohibited a public official, the Queen of England, from granting a subject a monopoly in the making, importation and sale of playing cards.234 In contrast, in *Omni* the majority refused to apply the Sherman Act to prohibit an agreement between private parties and a local government to stifle competition.235

Stevens at last argued for a strict interpretation of the Sherman Act. The Act reflected a basic national policy in favor of free markets over regulated markets. It should apply to all restraints of trade, he argued, unless it was demonstrated that Congress intended that "specific industries . . . [be] exempted from the antitrust laws and subjected to regulatory supervision over price and output decisions."236 He interpreted the state action

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229. *City of Lafayette*, 435 U.S. at 441 (Blackmun, J., dissenting).
230. *City of Boulder*, 455 U.S. at 56.
231. The dissenters were Justices Stevens and Marshall, who (along with Blackmun) were the only members of the *City of Boulder* majority still on the Court, and Justice White, who had not participated in *City of Boulder* (but who had been a dissenter in *City of Lafayette*), *Omni Outdoor Advertising*, 111 S. Ct. at 1356.
234. 111 S. Ct. at 1357 (Stevens, J., dissenting) (citing Case of Monopolies, 11 Coke Rep. 84, 77 Eng. Rep. 1260 (Q.B. 1602)).
235. *Id.*
236. *Id.* at 1358 (Stevens, J., dissenting). Examples include the maritime industry and the railroads, which are subject to pervasive regulation by the ICC, FMC, and other agencies.
exemption as reflecting "the Court's understanding that Congress did not intend the statute to preempt a State's economic regulation of commerce within its own borders." 237

Stevens was right. However, Stevens himself had participated in many of the majority holdings in post-Parker cases which had laid the foundation for Omni Outdoor Advertising. These cases had framed the issues so as to present the Omni Court with an apparent Hobson's Choice: Be faithful to the statute and risk division, or abandon the statute entirely in favor of an apparent unity of opinion. The Court chose the latter and would obtain neither.

Any remaining consensus, consistency, or consonance with the Sherman Act collapsed in Federal Trade Commission v. Ticor Title Insurance Co., 238 which epitomizes how the Parker-Goldfarb-Bates-Midcal-Hallie-Southern Motor Carriers-Patrick-Omni state action standard can be twisted in lower tribunals before the truth is revealed by a divided high Court. This is not the hallmark of a clear guide for conduct.

Ticor involved private parties who claimed they were acting pursuant to state directives. 239 The Federal Trade Commission (FTC) sued several title insurance companies, claiming that they fixed prices for their services through rating bureaus in several states 240 (similar to the rating bureaus in Southern Motor Carriers). By the time the case proceeded to hearing, at issue were the activities in four states: Wisconsin, Montana, Arizona and Connecticut. 241 The bureaus were private entities, organized by the insurance companies to establish uniform rates. 242 In each of the four states, the bureaus were licensed and authorized to establish joint rates for members, which became effective unless the state regulator rejected them within a given time period (a so-called negative-option system). 243

The extent of regulatory supervision varied in the several

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237. Id. In other words, the statute was not intended to prevent health and safety regulation, but to prevent conspiracies or combinations in restraint of trade or to create monopolies.
239. Id. at 2172.
240. Id. at 2172-73.
241. Id. at 2174.
242. Id.
243. Id.
states. In Connecticut, the State Insurance Department had the authority to audit the rating bureau and hold hearings regarding rates, but had not done so. The Wisconsin agency was required to regularly examine the bureau and was authorized to reject rates, but did neither. One rate increase of the rating bureau was approved, subject to the bureau providing certain information, which was never provided. The Arizona regulator was required to regularly examine the rating bureau but had never done so, although a comprehensive investigation was announced. The bureau, in fact, made no major rate filings. In Montana, the bureau made only one major rate filing. The State Insurance Department allowed the rates to be increased, if certain financial statements were provided, but in fact the information was never given to the regulator.

The defendant insurance companies argued, inter alia, that their rate-making activities were authorized and supervised by state officials, and therefore the activities were exempt from antitrust scrutiny under Parker.

Had the courts analyzed the case in terms of the language of the Sherman Act, the insurers' contention would have been quickly dismissed: The defendants were engaged in a conspiracy among private persons to fix prices, and therefore the Sherman Act forbade their actions. Because the courts were attempting to apply the standards of Goldfarb, Midcal, et al., however, the actual results of the litigation were as confused as it is possible to be.

First of all, the FTC conceded that each of the states had "articulated a clear and affirmative policy to allow the anticompetitive conduct," the first prong of the Midcal/Southern Motor Carriers test for private parties allegedly acting pursuant to

244. Id.
245. Id. at 2174-75.
246. Id.
247. Id.
248. Id.
249. Id.
250. Id.
251. Id.
252. Id. at 2174.
statewide regulations. The agency argued, however, that the second part of the *Midcal* test was not met, i.e., that the state had not provided "active supervision of anticompetitive conduct undertaken by private actors." The Administrative Law Judge (ALJ) held that the 'active supervision' test was met in Arizona and in Montana but not in Connecticut or Wisconsin. The FTC held that none of the four states supervised sufficiently and found no immunity. The Third Circuit Court of Appeals reversed and found that sufficient supervision was present in all four states to entitle each of the defendants to state action immunity.

The United States Supreme Court reached a different result from all the lower jurisdictions: It reversed with regard to Wisconsin and Montana (one state from each of the ALJ's categories!), finding that there was not sufficient supervision in those states, and remanded with respect to Arizona and Connecticut to allow the court of appeals to reexamine its findings regarding those two states "in light of the views we have expressed."

The Supreme Court's reasoning was as confusing as its result. The majority, in an opinion by Justice Kennedy, essentially told the lower courts what were not proper standards for applying the *Midcal/Southern Motor Carriers* active supervision test, but steadfastly refused to render any guidance.

Justice Kennedy quoted *Patrick v. Burget* to the effect that "[t]he mere presence of some state involvement or monitoring does not suffice," without indicating what level would suffice. The Court was not establishing an objective standard, Kennedy cautioned, but a subjective one. In each case, a court was to determine whether the state "exercised sufficient independent judgment and control" and "played a substantial role in deter-

253. *Id.* at 2175 (citing *Midcal*, 445 U.S. at 105).
255. *Id.* at 2176.
256. *Id.*
257. *Id.*
258. *Id.* at 2179-80.
259. The unusual combination of Justices Kennedy, White, Blackmun, Stevens, Scalia and Souter. *Id.* at 2172.
261. *Id.* at 100-101 (emphasis added).
mining the specifics of" a policy, so that the anticompetitive scheme did not operate "simply by agreement among private parties." 

Adhering to this non-standard, Kennedy proclaimed, would improve Congress' antitrust statutes by making them more subjective: "By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust law, we increase the States' regulatory flexibility." 

Turning to the specific type of regulation present in the case before him, Kennedy continued:

Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate setting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State.

Kennedy then reviewed the specific factual findings by the ALJ with regard to each state. He found that there was in fact insufficient supervision in Wisconsin and Montana and therefore reversed the Third Circuit's decision as to those two states.

The Court cautioned that its decision was entirely limited to its specific facts, i.e., "in light of the gravity of the antitrust offense [the result might be different were the offense less "pernicious"], the involvement of private actors throughout [presumably the result could change had the private actors been involved to a lesser degree], and the clear absence of state supervision [would some presence of supervision change the result?]."

The decision was even limited to the specific pleadings of the parties. Southern Motor Carriers, which also involved price-fixing through rate bureaus that were subject to negative-option regulation, was "not to the contrary" because of the legal contentions of the parties:

263. Id. (emphasis added).
264. Id. at 2178 (emphasis added).
265. Id. at 2179 (emphasis added).
266. Id. at 2179-80.
267. Id. at 2180 (commentary added).
The question [in Southern Motor Carriers] was whether the first part of the Midcal test was met. We undertook no real examination of the active supervision aspect of the case, for the Government conceded that the second part of the test had been met. In the case before us, of course, the Government conceded the first part of the Midcal requirement and litigates the second.

Thus Kennedy imposed a final level of uncertainty: whether the lawyers arguing a case at trial would make the correct concession of law.

The dissenters justly criticized much in the majority opinion, and would have imposed a more objective standard. The “active supervision” test was met, they argued, so long as state officials had the authority to review and regulate prices or conduct. However, their justification was based on arguments of policy, not law. Chief Justice Rehnquist argued that the majority’s decision was “neither supported by our prior precedent [sic], nor sound as a matter of policy.” In her dissenting opinion, in which she failed to cite even one case or statute, Justice O’Connor criticized the majority’s standard as bad policy: “The practical effect of today’s decision will likely be to eliminate the so-called ‘negative option’ regulation from the universe of schemes available to a State.”

The evolution from a court interpreting the law to a court legislating legislation was now complete. In Ticor, the Court was reduced to handing down a particular result in a particular case, based solely on its subjective judgment that the result was right as a matter of policy. The intricate and inconsistent opinions presented no standard of conduct, no thread to follow from the labyrinth, but a Gordian Knot of policy for lower courts to unravel. Justice Scalia pointed out the confusion that would ensue because of the majority opinion in which he had joined:

270. Kennedy tailors for the Court a peculiar role analogous to the Midcal test. The Court declined to clearly articulate a rule to follow, but insists on actively supervising the states’ policies.
272. Id. at 2182-83 (Rehnquist, C.J., dissenting).
273. Id. at 2181 (Rehnquist, C.J., dissenting) (emphasis added). Justices O’Connor and Thomas joined in this opinion.
274. Id. at 2183 (O’Connor, J., dissenting). Justice Thomas joined in this opinion.
The Chief Justice and Justice O'Connor are correct that [the Court's] standard will be a fertile source of uncertainty and (hence) litigation... [Private participants in regulatory schemes] may not know until after their participation has occurred (and indeed until after their trial has been completed) whether the state's supervision will be 'active' enough.

...I see no alternative within the constraints of our 'active supervision' doctrine which has not been challenged here; and...

I am skeptical about the Parker v. Brown exemption for state-programmed private collusion in the first place.276

CONCLUSION

The history of the evolution of the State Action Doctrine set forth in Parker shows how uncertainty, confusion and error can result from a doctrine which is not firmly grounded on statutory or constitutional authority. Parker ostensibly reviewed the Sherman Act. However, no words in the Sherman Act say that the Act shall not apply to the actions of the States. The Court found that because the Sherman Act did not explicitly state that it was intended to apply to the States, the Court would not apply the Act to the actions of States "as sovereign." At the same time, the Court implied that if the State officials were to conspire with private persons to violate the antitrust laws, this exception from the Sherman Act would not apply.

Parker was, in Justice Harlan's words, "judicial legislation."276 The opinion was based not upon a statute, but upon what would now be called "reasoned judgment," which Justice Scalia described in another context "to be nothing but philosophical predilection and moral intuition."277 Those who wanted to apply Parker immunity resolved to apply the doctrine unless there was something in the Sherman Act or in Parker which explicitly held that the doctrine should not apply. On the other hand, those who did not want to apply Parker immunity refused to apply it unless some language in the Sherman Act or in Parker explicitly applied immunity to the circumstances before them.

275. Id. at 2180-81 (Scalia, J., concurring).
The judicial legislation of *Parker* led to rudderless confusion as the courts attempted to apply the doctrine to new circumstances. For years, the Supreme Court felt its way through a maze of multiple opinions and unclear precedent. After confusion came error. The members of the Court agreed to a compromise in *Town of Hallie* and *Southern Motor Carriers* in an effort to reach an opinion which would have some use as precedent. In *Southern Motor Carriers*, the Court admitted that it was ruling for reasons of inertia. It refused to consider applying the literal terms of the Sherman Act to the state-action case before it, because to do so would require it to abandon altogether the *Parker* doctrine which it had been so fecklessly following:

[The logical result of [applying the literal terms of the Sherman Act] would require us to overrule *Parker v. Brown* and its progeny, for the state action doctrine is an implied exemption to the antitrust laws. After over 40 years of congressional acquiescence, we are unwilling to abandon the *Parker* doctrine.]

In the process of deciding on the basis of inertia, the Court lost track of the meaning of the words of the Sherman Act and even of the words of *Parker*. It radically limited the reach of the antitrust laws in *Town of Hallie*, *Southern Motor Carriers* and *Omni Outdoor Advertising*, while it failed to establish useful precedent, as evinced by *Ticor*.

In retrospect, the Court in *Parker* could have avoided the confusion and error by relying upon the statute itself to reach its result: it only needed to hold that the regulation challenged was not a "contract, combination ... or conspiracy" of "persons" in restraint of trade and decline to apply the Sherman Act for that reason. This would have prevented the Court's subsequent "set[ting] sail on a sea of doubt," with the result being "manifest danger [to] the administration of justice."  

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THE SHERMAN ACT AND THE ARBITRARY POWER SECTION OF THE KENTUCKY CONSTITUTION AS APPLIED TO KENTUCKY FAIR TRADE LAWS

by Donald K. Kazee*

Kentucky and other states responded to the Great Depression with a system of economic regulation termed collectively as fair trade laws. Some statutes concerned key industries: liquor, tobacco, milk; others applied to commerce in general. Some statutes forbade within the Commonwealth practices prohibited by the federal antitrust laws in interstate commerce. Other statutes authorized practices within the state ordinarily forbidden by federal antitrust law, as permitted under the Parker v. Brown state action exemption to the federal antitrust laws. Still others, as invited by the Congress in the Miller-Tydings Act, legalized practices heretofore held to violate the federal antitrust laws.

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1. KY. REV. STAT. ANN. §§ 244.380-470 (Michie/Bobbs-Merrill 1981) (rejected in Alcoholic Beverage Control Bd. v. Taylor Drug Stores, Inc., 635 S.W.2d 319 (Ky. 1982)).
6. 317 U.S. 341 (1943). Parker held that the Sherman Act did not apply to price fixing activity by California raisin growers done under the aegis of an agency of the State of California.
All had the intent of arresting the downward price spiral that plagued producers and vendors during the Depression.

During the 1980s Kentucky's courts have reviewed the fair trade laws under evolving modern views of the federal antitrust laws and the state action exemption. During the same time, Kentucky's courts have made increasing use of § 2 of the Kentucky Constitution (the Arbitrary Power Section) to effect broad social change in areas where the General Assembly is deemed to have exercised power arbitrarily. The dual application of the Sherman Act and the Kentucky Arbitrary Power Section to the fair trade laws has given rise to a paradoxical series of cases which has significantly curtailed the General Assembly's powers of economic regulation.

Section 2 of the Kentucky Constitution provides that "[a]bsolute and arbitrary power over the lives, liberty, and property of free men exists nowhere in a republic, not even in the largest majority." As originally conceived during the 1849 constitutional convention, this section was meant to enshrine the property rights of slave owners against any legislative interference. Paradoxically, it has come to be interpreted as "a bulwark of liberty ... broad enough to embrace the traditional concepts of both due process of law and equal protection of the law." Yet, as an echo of its origin, § 2 retains a greater emphasis on the preservation of economic rights than is evident in its federal due process and equal protection counterparts.

Applying the Sherman Act requires a court to consider whether a restraint of trade is "unreasonable;" section 2 of the

8. Ky. Const. § 2 provides: "Absolute and arbitrary power over the lives, liberty, and property of free men exists nowhere in a republic, not even in the largest majority."

9. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989) (Kentucky school finance system arbitrarily and unconstitutionally denied individual schoolchildren from property-poor districts a fundamental right to education such as that provided in wealthier school districts); Kentucky v. Wasson, 842 S.W.2d 487 (Ky. 1993) (Sodomy statute, Ky. Rev. Stat. Ann. § 510.100 (Michie/Bobbs-Merrill 1981), arbitrarily and unconstitutionally criminalized sexual activity solely on the basis of majoritarian sexual preference).

10. KY. CONST. § 2.


13. Dyche, supra note 11, at 504.

Kentucky Constitution requires a determination of what is "arbitrary."16 A court must not be arbitrary or unreasonable when applying both powerful provisions at once. A court must have an articulable and practicable gauge for assessing arbitrariness or unreasonableness lest it practice what is proscribed.

This article examines the Kentucky Supreme Court's use of the Sherman Act and the Arbitrary Power Section to invalidate portions of four fair trade statutes: the Kentucky Fair Trade Act,17 the Kentucky alcoholic beverage resale price statute,18 the Kentucky Milk Marketing Law,19 and the Kentucky Unfair Trade Practices statute.20 While the Kentucky courts began with an articulable and practicable gauge for the arbitrary and the unreasonable, this standard was abandoned during the 1980s. This article will identify such a standard and describe how its continued application would have resulted in a more consistent and defensible line of cases in the fair trade area during the 1980s. Specifically, a statute is arbitrary if it has "no reasonable relation" to a proper legislative purpose, i.e., a policy grounded in the common law, state or federal constitution, or state or federal statute.

Since the last of these cases was decided in 1989, the General Assembly has rewritten the Milk Marketing Law21 and has re-

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

... 

Section 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony....

15. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).
16. KY. CONST. § 2.
18. KY. REV. STAT. ANN. §§ 244.380-470 (Michie/Bobbs-Merrill 1981) (rejected in Alcoholic Beverage Control Bd. v. Taylor Drug Stores, Inc., 635 S.W.2d 319 (Ky. 1982)).
formed the Kentucky Unfair Cigarette Sales Law.\textsuperscript{22} An examination of the rationales for the recent fair trade law cases may shed light on whether the two new statutes can win the Kentucky Supreme Court’s approval, especially in light of an imminent cigarette price war.\textsuperscript{23}

\section{I. THE ARBITRARY POWER SECTION APPLIED TO A SHERMAN ACT EXCEPTION: GENERAL ELECTRIC}

The Arbitrary Power Section’s guaranty of economic rights incident to property ownership is central to the first case in which § 2 of the Kentucky Constitution was applied to fair trade laws, \textit{General Electric Co. v. American Buyers Cooperative, Inc.}\textsuperscript{24} The \textit{General Electric} court faced two issues of relevance here: (1) whether fair trade or resale price maintenance contracts authorized in the Fair Trade Act, Kentucky Revised Statutes Annotated (hereinafter KRS) §§ 365.080 violated the Arbitrary Power Section as to signatories to those contracts, and (2) whether KRS § 365.090 making resale price maintenance contracts binding upon non-signatories violated the Arbitrary Power Section as to non-signatories.

The Fair Trade Act was passed in response to the Miller-Tydings Act of 1937,\textsuperscript{25} in which Congress specifically amended the antitrust laws to permit states to legalize resale price maintenance contracts.\textsuperscript{26} KRS § 365.080 permitted producers of trademarked goods to lawfully require by contract that (a) the vendee may not resell the goods at a price lower than that stipulated in the contract by the original vendor, and that (b) any contract for resale to a subsequent vendee would likewise require resale at the price stipulated by the original vendor.\textsuperscript{27}

\textsuperscript{24}General Elec. Co. v. American Buyers Coop., Inc., 316 S.W.2d 354 (Ky. 1958). General Electric, a manufacturer of trademarked goods, sought enforcement of a Fair Trade contract between General Electric and its dealers not to resell the goods below a specified price against a buyers’ cooperative which, having never signed such a contract, persisted in selling below the stipulated price.
\textsuperscript{26}In 1937, Congress added lengthy provisions to § 1 granting antitrust exemptions to state fair trade laws. These provisions were deleted in 1975. Pub. L. No. 94-145, § 2, 89 Stat. 801 (1975).
\textsuperscript{27}KY. REV. STAT. ANN. §§ 365.050-.080 (Michie/Bobbs-Merrill 1981).
These provisions of the Act were found in *General Electric* not to be violative of either the Sherman Act by reason of the Miller-Tydings Act or of the Arbitrary Power Section. The Fair Trade Act provided in KRS § 365.090, however, that the resale price maintenance contracts were enforceable not only against signatories to the contracts, but against non-signatories as well. This provision was found in *General Electric* to be an arbitrary exercise of power offensive to § 2 of the Kentucky Constitution.

A. The Arbitrariness of Resale Price Maintenance Contracts as to Signatories

Before considering KRS § 365.080 as applied to contracting parties, the Court of Appeals made two important distinctions. First, it distinguished the effect of the resale price maintenance contract statute from the statute forbidding below cost sales for the purpose of injuring competition, KRS § 365.030. A below cost sales statute forbids the sale of articles for less than their statutorily defined costs, and the *General Electric* court’s distinction would be of ironic importance when the Kentucky Supreme Court considered below cost sales statutes in the 1980s.

Second, the *General Electric* court noted that while the “statute mandating minimum markup resale prices for alcoholic beverages,” KRS §§ 244.380-.470, was “comparable” to the resale price maintenance statute, it was “distinguishable,” for the “con-
stutional validity [of the alcoholic beverage statute] rests on the broad legislative power to regulate and control liquor." 35

Turning to the arbitrariness of KRS § 365.080, the General Electric court applied the standard for arbitrariness that had been set forth in Reeves v. Simon: 36 "Unless it is clear the statute has no reasonable relation to a proper legislative purpose and is arbitrary and discriminatory and without substantial basis, the courts will not interfere." 37 The word "arbitrary" is found in Reeves in series with three other phrases 38 of similar and overlapping meaning. "Arbitrary" is found with the phrase "no reasonable relation" on two other occasions in the opinion. 39 If "arbitrary" and "no reasonable relation" are not synonymous, then they are qualities found one with the other. If the phrase "no reasonable relation" does not define "arbitrary," then it is at worst an articulable and practicable proxy for that idea.

The General Electric court searched for and found a "reasonable relation" 40 between § 365.080 and proper legislative purposes: First, § 198 of the Kentucky Constitution "forbid[s] trusts and other combinations formed 'to depreciate below its real value any article, or to enhance the cost of any article above its real value..." 41

Second, the court distinguished horizontal price fixing from vertical price maintenance agreements, 42 noting that vertical price

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35. General Elec., 316 S.W.2d at 357 (citing Reeves v. Simons, 160 S.W.2d 149, 151 (Ky. 1942)).
36. 160 S.W.2d 149 (Ky. 1942).
37. Id. at 151.
38. (1) "no reasonable relation," (2) "discriminatory," and (3) "without substantial basis."
39. Id. at 151-52.
40. Id. at 151.
41. The General Electric court stated:
Section 198, Kentucky Constitution, imposes the duty upon the General Assembly to enact such law as it deems necessary to prevent trusts and other combinations formed "to depreciate below its real value any article, or to enhance the cost of any article above its real value." This constitutional provision is not self-executing. The General Assembly is left to its discretion to determine the need for legislation upon the subject.... The present statute does not appear to conflict with any other. If it does, of course, it is, nevertheless, within the power of the Legislature to enact the statute unless it offends § 198 or some other provision of the Constitution.... The common law, prior statutes and the public policy growing out of them all must yield to the superior authority of a later enacted statute which declares the particular character of contract shall not be deemed unlawful.
42. The General Electric court stated:
maintenance agreements receive far more lenient treatment than do horizontal price fixing arrangements which are per se illegal.

Third, the court observed that vertical price maintenance agreements had not been forbidden by the then repealed Kentucky anti-monopoly statute.43

Fourth and most importantly, KRS § 365.080 was reasonably related to a policy on contracts expressly permitted by Congress under the Miller-Tydings Act44 and consistent with Kentucky's "general liberty of contract."45 The reasonable relation of KRS § 365.080 to consistent federal statutory and state constitutional policies evinced the non-arbitrariness and constitutionality of the statute.46

B. The Arbitrariness of Resale Price Maintenance Contracts as to Non-Signatories

Enforcement of KRS § 365.090 against non-signatories, however, was found to violate both § 1 and § 2 of the Kentucky Constitution. The right of "acquiring and protecting property" guaranteed by § 1 protects [property] not only from confiscation by legislative edicts and from physical taking for public or private use, but ... from any unjustifiable impairment or abridgement of this right, such as

We agree that these contracts are not to be regarded as a monopolistic scheme of price fixing. The economists and the courts recognize a difference between what are termed "horizontal" and "vertical" price maintenance agreements. The former are cross-agreements between competitors or between the same class of persons, such as producers and wholesalers, or persons or concerns in competition with each other with like commodities. The latter are agreements between a producer or manufacturer of a particular commodity and those handling the product in a straight line down to and including the retailer. The present scheme is regarded as "vertical" price fixing.

Id. at 358 (citations omitted).

Indeed, horizontal price fixing is illegal per se under the Sherman Act, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), while vertical price restraints are given considerably more leeway under, e.g., the Colgate rule. See United States v. Colgate & Co., 250 U.S. 300 (1919); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); see also Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723-727 (1988).

43. Kentucky v. Grinstead, 63 S.W. 427 (Ky. 1901) (citing KY. STAT. §§ 3915 (repealed prior to General Electric)).

44. Miller-Tydings Act, supra note 25. As the Miller-Tydings Act was a permissive rather than prescriptive or proscriptive federal statute, there was no issue of federal pre-emption of state constitutional interests.

45. General Elec., 316 S.W.2d at 357. Moreover, "[w]hile the term 'freedom of contract' does not appear in the federal or state constitutions, it is always embraced in the meaning of 'liberty' [KY. CONST. § 1] as employed in those instruments, and is safeguarded by the constitutional guarantee of the 'pursuit of happiness' [KY. CONST. § 1]. . . ." Id. at 361.

46. Id. at 357-61.
depriving the owner of its essential attributes or such as restricts or interrupts its common, necessary private use. . . . The right of the owner to fix the price at which his property shall be sold is an inherent attribute of the property itself.47

To so infringe on these attributes of property was held an exercise of arbitrary power by the court, thus violating § 2 of the Kentucky Constitution.

When ABC (a non-signing party) acquired those commodities with General Electric's brand and symbol upon them, the articles - brand and all - became the purchaser's property.... We think the statute is the antithesis of 'fair trade.' It forces price fixing. It is arbitrary for the Legislature to say that by force of law no [non-signatory] person may sell or trade his own property for whatever he pleases, whether the sale be in 'fair and open competition' [in trademarked goods] with a party to a [resale price maintenance] contract with a third party or be in competition with commodities made or produced by a manufacturer who is not a party to such a contract.48

Rather than a reasonable relation to a proper state legislative purpose, the court found forced price fixing to be the "antithesis" of state policy. Specifically, requiring non-signatories to be "bound by a contract of strangers" offended the "constitutional guaranty of the 'pursuit of happiness,' so one has the right to refuse to accept a contract or to assume such liability as may be proposed...."49 A statute thus contrary to a proper legislative purpose was therefore arbitrary under § 2.

C. The Significance of General Electric

The General Electric court thus (1) observed that the resale price maintenance contract law was factually distinct from the statute proscribing below cost sales and secret rebates, (2) noted that statutes must conform to § 198 of the Kentucky Constitution

47. Id. at 360 (citing City of Jackson v. Murray-Reed-Slone & Co., 178 S.W.2d 847 (Ky. 1944) and Tyson & Br. United Theatre Office v. Banton, 273 U.S. 418 (1927)).

48. Id. at 361.

charging the legislature to prohibit combinations or trusts from depreciating any article below its real value, (3) found that the resale price maintenance contracts as applied to contract signatories were neither arbitrary nor violative of the Sherman Act as amended by the Miller-Tydings Act since they are "reasonably related" to the Miller-Tydings Act, and (4) found that the contracts as applied to non-signatories offended §§ 1 and 2 of the Kentucky Constitution.

These four principles offer a starting place for the analysis of the three fair trade law cases of the 1980s: Alcoholic Beverage Control Board v. Taylor Drug Stores, Inc.,50 Kentucky Milk Marketing and Anti-Monopoly Commission v. Kroger Co.,51 and Remote Services, Inc. v. FDR Corp.52 Finding KRS §§ 365.050-.080 valid under the Arbitrary Power Section as to signatories was consistent with precedent (Reeves) and was followed as precedent in Taylor Drug as to the Arbitrary Power Section. Kentucky Milk Marketing ignored General Electric's distinction between resale price maintenance and below cost sales statutes and ignored General Electric's finding of resale price maintenance not to be arbitrary. Instead, Kentucky Milk Marketing found below cost sales statutes to be a type of resale price maintenance (minimum markup) and for that reason arbitrary by definition. Remote Services would make general the effect that Kentucky Milk Marketing had upon the regulation of milk.

II. THE ARBITRARY POWER SECTION AND THE SHERMAN ACT APPLIED TOGETHER: TAYLOR DRUG

Taylor Drug53 considered the validity of the alcoholic beverage minimum resale markup statute to which the General Electric court alluded.54 KRS §§ 244.380-.470 required a system of minimum markups in the sale and resale of branded alcoholic beverages. Distillers, rectifiers, blenders or vintners of alcoholic beverages (hereinafter producers) were required to sell their wares to wholesalers (and wholesalers to retailers) by means of "fair trade contracts" stipulating (1) the producer's price, (2) that

50. 635 S.W.2d 319 (Ky. 1982).
51. 691 S.W.2d 893 (Ky. 1985).
52. 764 S.W.2d 80 (Ky. 1989).
53. Taylor Drug, 635 S.W.2d 319.
54. General Elec., 316 S.W.2d at 357.
resales be made only by means of fair trade contracts, (3) that wholesalers add to their statutorily defined cost a markup of not less than fifteen percent and twenty percent for liquor and wine respectively, and (4) that retailers mark up their statutorily defined cost by thirty-three and one-third percent or ten percent for case lots. Each contract must be filed with the Department of Alcoholic Beverage Control and must show the stipulated minimum resale price as calculated according to the statute. Under this scheme, only the producer set his price without statutory directive.

The Taylor Drug court faced two issues relevant here: (1) whether the minimum markup law was arbitrary so as to violate § 2 of the Kentucky Constitution, and (2) whether, since the state law had been passed under the now repealed Miller-Tydings Act, the statute might yet be valid under the state action exemption to the Sherman Act as interpreted by the landmark Midcal\(^\text{55}\) case. While the court correctly found the minimum markup law not to violate the Arbitrary Power Section, the Taylor Drug court's misapplication of the Midcal test so as to find the statute in violation of the Sherman Act led subsequent courts to misapply the Arbitrary Power Section.

A. The Validity of the Liquor Minimum Markup Statute under the Arbitrary Power Section

The Taylor Drug court first emphatically rejected the notion that the statute violated § 2 of the Kentucky Constitution,\(^\text{56}\) noting that the Reeves court had considered constitutional issues rooted in §§ 1 and 2. "We cannot say that the instant law calling for strict price control and the elimination of ruinous competition has no relation to the subject or that it is arbitrary and discriminatory and not based upon substantial grounds."\(^\text{57}\) The Taylor

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56. The Taylor Drug court approved the General Electric court's citation of Reeves v. Simon, 160 S.W.2d 149 (Ky. 1942), as to the state's special powers to regulate the sale of liquor. "By distinguishing Reeves v. Simon the [General Electric] court made a conscious choice not to override it, and we do not see any sound reason for not according this particular bit of 'dictum' a reasonable degree of precedential weight." Taylor Drug, 635 S.W.2d at 322. Yet, the Taylor Drug court dismissed in one sentence any claim that the Twenty-First Amendment of the United States Constitution gave Kentucky any special power to preserve that statute from invalidity under the Sherman Act. Id. at 324.
57. Id. at 324 (citing Reeves v. Simon, 160 S.W.2d at 152) (emphasis added).
Drug court thus declined to overrule Reeves and General Electric and found the minimum resale price law for liquor consistent with the Arbitrary Power Section.

In considering whether Reeves v. Simon should now be overruled after the passage of 40 years we find ourselves facing the same bedrock principle of constitutional jurisprudence that the court faced then — that is, if there is any reasonable basis for legislation that treats one class of people or their business or occupation differently from another, the courts should uphold the legislative choice. It is well known and long recognized that the liquor business warrants closer supervision and control by the state than most other commercial pursuits. Whether the pricing of commodities in that business ought to be separated out from the other areas of state control may be a fair question, but at least it is arguable, and we think it is an argument that falls within the prerogative of the General Assembly to decide. Our conclusion is that the spirit of Reeves v. Simon reaches beyond those constitutional provisions specifically mentioned in the opinion and calls for the same answer with respect to Secs. 1 and 2 of the Kentucky Constitution. And we decline to overrule it.

Due to the repeal of the Miller-Tydings Act, there was in Taylor Drug no federal statute or policy to which KRS §§ 244.380-.470 might be found to reasonably relate. Nonetheless, the Taylor Drug court correctly found KRS §§ 244.380-.470 not to be arbitrary since there was a reasonable relation between the pricing statute at issue and the state interest in controlling liquor as an intoxicating substance. However, the court erred in finding that the liquor resale markup law offended the federal Sherman Act.

B. The Validity of the Liquor Minimum Markup Statute under the Sherman Act

The Kentucky Supreme Court determined first that resale price maintenance was a practice ordinarily illegal under § 1 of the Sherman Act, noted that Congress' invitation to the states in the Miller-Tydings Act to legalize such practices had been repealed, and then found the statute not to be exempt from the Sherman Act under the Parker v. Brown state action action.

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58. Id. at 322-23.
59. Minimum markups are a form of resale price maintenance. Midcal, 445 U.S. at 97.
61. 317 U.S. 341.
doctrine as most recently interpreted in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc. However, the court’s rejection of the state action exemption for the statute has been criticized as a misapplication of Midcal. Such criticism calls into question the reliance by the Kentucky Milk Marketing and Remote Services courts upon Taylor Drug’s Sherman Act analysis.

The Taylor Drug court first cited Midcal for the propositions that (1) “resale price maintenance illegally restrains trade,” and (2) the Miller-Tydings Act had been repealed so that “the Sherman Act’s ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special anti-trust immunity.”

Second, the court examined whether such a “special anti-trust immunity” were possible under Parker v. Brown as interpreted in Midcal. Midcal required that for state actions to be exempt from the Sherman Act, the actions must be (1) clearly articulated and affirmatively expressed as state policy, and (2) actively supervised by the state. The Taylor Drug court characterized the facts of Midcal:

In Midcal, the statutes bound all wholesalers to a resale price set in one of two ways—either the producer and a wholesaler entered into a fair trade contract setting the price or the wholesaler posted a resale price schedule for that producer’s brands. Once the wholesale price was fixed in this manner, all other wholesalers and licensed merchants in the trade area (as defined by the state) were prohibited from selling, and retailers were prohibited from buying at a lower price.

The Kentucky statute in Taylor Drug, like the California statute, was deemed to satisfy Midcal’s first prong that the state

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65. Taylor Drug, 635 S.W.2d at 323 (quoting Midcal, 445 U.S. at 97).
67. Taylor Drug, 635 S.W.2d at 323 (citations omitted).
policy be clearly articulated and affirmatively expressed. As in *Midcal*, only the second "active supervision" prong was at issue. The *Midcal* court held that the California price policy did not meet the second requirement for *Parker* immunity. The State simply authorizes price setting and enforces prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any pointed reexamination of the program.

By analogy, the *Taylor Drug* court rejected *Parker* immunity for the Kentucky statute:

It seems to us that the critical test of 'state action' must be whether the state exercises some reasonable degree of control over the prices. Somewhere along the line an agency of the state must possess and must exercise the right to pass judgment, either by itself establishing the price, or by reviewing and accepting, rejecting or modifying a price set by someone else. Without this ultimate power no amount of monitoring, supervision, re-examination, or prescribing of contract terms can have any meaningful effect. In the California wine case the state did nothing but enforce prices fixed by private individuals. In the instance of Kentucky the state participates in fixing prices only to the extent that it adds statutory minimum markups to prices fixed by private individuals.... [T]here is no fundamental basis upon which we can distinguish this case from *Midcal*.71

Shaw's survey72 of cases applying the *Midcal* "active supervision" prong to state statutes reveals that state supervision far less active than Kentucky's mandate of definite percentage markups actionable at law have been held to satisfy *Midcal* and *Parker*.73 Shaw distinguishes cases failing the "active supervision" prong of *Midcal* from the Kentucky statute:

69. *Taylor Drug*, 635 S.W.2d at 324 n.8.
71. *Taylor Drug*, 635 S.W.2d at 324.
72. Shaw, supra note 64, at 714-16.
73. Id. at 712-17 (discussing Rice v. Alcohol Control Bd., 579 P.2d 476 (Cal. 1978)) (case predating and influencing *Midcal*) (no immunity since state played no role whatever in setting retail prices); M.H. Gordon & Son, Inc. v. Alcoholic Beverage Comm'n, 434 N.E.2d 986 (Mass. 1982) (Commission having no direct control over prices nonetheless exercised "active supervision" since it acted as final arbiter of prices at which suppliers sold to wholesalers); Benson & Gold Chevrolet v. Louisiana Motor Vehicle Comm'n, 463 So. 2d
The common thread in these cases is that state enforcement of manufacturer-posted prices is not sufficient active state supervision to overcome the anticompetitive effect of these statutes and be shielded by *Parker* immunity. This thread does not run to the Kentucky Act which, instead of protecting producer-posted prices, enforces state-mandated minimum markups by wholesalers and retailers.\(^{75}\)

Rather, Shaw likens the statute in *Taylor Drug* to the Connecticut statute\(^ {76}\) in *Morgan v. Division of Liquor Control*.\(^ {77}\) The Connecticut statute mandating minimum markups at each resale\(^ {78}\) was upheld by the United States Court of Appeals for the Second Circuit which distinguished it from the California statute in *Midcal*:

> It may appear that the Connecticut system permits beer and wine producers and shippers to establish resale prices. The automatic application of the statutory markup to the initial offering price would seem to allow those who set the price to determine ultimate resale prices by adjusting their offering price. But this result occurs only because the State has dictated the markups, not because any producers or shippers have formed a conspiracy or combination. Moreover, the fierce competitive pressures at the retail level should prevent manufacturers from conspiring to establish prices for alcoholic beverages.\(^ {79}\)

Shaw notes that the Connecticut statute differed from the Kentucky statute only in that in addition to the price filing

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13 (La. 1981) (since state agency rather than private parties exercised statutory duties, supervision sufficiently active); and George W. Cochran Co. v. Comptroller of the Treasury, Alcohol & Tobacco Tax Div., 437 A.2d 194 (Md. 1981) (comptroller statutorily charged with enforcement and equipped with inspectors and a variety of enforcement remedies sufficiently active in supervision to be immune under *Parker*).

74. *Id.* at 718 (citing Miller v. Oregon Liquor Control Comm'n, 688 F.2d 1222 (9th Cir. 1982) (wholesale prices posted, quantity discounts prohibited, and reasonableness of price set unreviewed); and Knudsen Corp. v. Nevada State Dairy Comm'n, 676 F.2d 374 (9th Cir. 1982) (state enforces privately set prices through mechanism of advance filing)).

75. *Id.* at 718-19. Shaw’s cogent analysis of the active supervision clause was justified given the development of state action precedent to that point. Unfortunately, the United States Supreme Court proceeded to muddle *Midcal’s* practicable state action test in the next round of cases leading to *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), and *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985). See generally McMurray, *supra* note 62, at 269-82.


77. 664 F.2d 353 (2d Cir. 1981) (discussed in Shaw, *supra* note 64, at 710-12).

78. *CONN. GEN. STAT. ANN.* §§ 30-1 to 30-113 (repealed 1981).

79. 664 F.2d at 355-56 n.2 (opinion of Kaufman, J.).
required in Connecticut, the Kentucky statute would "go further and require contracts between the producers, wholesalers and retailers to ensure enforcement [at law] of the markups set by the state," a use of the state courts as agents of active supervision. Shaw thus concludes that the Kentucky liquor resale price maintenance statute passed any reasonable interpretation of Midcal's "active supervision" test and implies that Taylor Drug was wrongly decided as to the validity of the statute under the Sherman Act.

Shaw's conclusion that the statute should have satisfied the Midcal test and that the Kentucky Supreme Court incorrectly rejected the statute's Parker state action exemption from the Sherman Act is persuasive given the state of the law on the Parker exemption at that time. Since that time, however, the Parker doctrine has evolved or perhaps degenerated to such an extent that predicting whether any statute including this one can satisfy the current form of the Midcal test is an exercise in frustration.

The import of Shaw's analysis is not, however, whether the statute would be exempt under Parker in 1993, but that the misapplication of the Midcal test in 1982 to find a markup statute invalid under the Sherman Act led later courts to presume that markup statutes are inherently invalid under the Arbitrary Power Section, regardless of whether General Electric and Taylor Drug expressly found resale price maintenance contracts and markup statutes, respectively, to be valid under the Arbitrary Power Section.

C. The Significance of Taylor Drug

The principles announced in General Electric and Taylor Drug may be thus harmonized:

(1) A resale price maintenance contract law is factually distinct from a statute proscribing below cost sales and secret rebates.

80. Shaw, supra note 64, at 710 n.51.
81. Id. at 719-20.
83. General Electric found resale price maintenance contracts valid as to contract signatories. General Elec., 316 S.W.2d 354.
84. Id. at 357.
(2) Resale price maintenance contracts as applied to contract signatories do not violate the Sherman Act provided the Congress expressly permits the states to authorize them, but such permission has since been rescinded.

(3) Resale price maintenance contracts as applied to contract signatories do not violate § 2 of the Kentucky Constitution, the Arbitrary Power Section, when there is a reasonable relation to federal or state law, but do violate the Arbitrary Power Section as applied to non-signatories where there is no relation to federal law or state constitutional policy.

(4) A resale markup statute violates the Sherman Act as unlawful vertical price maintenance and fails the Midcal "active supervision" test for exemption from the Sherman Act under the Parker doctrine, despite persuasive precedent noted by Shaw that the statute in fact satisfied the active supervision test as interpreted by state and federal courts at the time.

(5) However, such a resale markup statute, a form of resale price maintenance, does not violate § 2 of the Kentucky Constitution, the Arbitrary Power Section, due in part to the special role of the state in regulating liquor.

(6) While § 198 of the Kentucky Constitution was among the state policies linked to the statute in General Electric's upholding of the resale price maintenance contracts, it was not mentioned in Taylor Drug.

This state of precedent as to the application of the Sherman Act and the Arbitrary Power Section to the fair trade laws provides a benchmark against which the Kentucky Milk Marketing case can be considered. Statutes reasonably related to state and federal polices did not violate the Arbitrary Powers Section; statutes having no such relation did violate § 2 of the Kentucky Constitution.

85. Id.
86. Id.
87. Id. at 361.
88. Taylor Drug, 635 S.W.2d at 323-24.
89. Shaw, supra note 64, at 710-12.
90. Taylor Drug, 635 S.W.2d at 322-23 (citing Reeves v. Simon, 160 S.W.2d at 152: "We cannot say that the instant law calling for strict price control and the elimination of ruinous competition has no relation to the subject or that it is arbitrary and discriminatory and not based upon substantial grounds." (emphasis added)).
III. THE ARBITRARY POWER SECTION AS A SUBSTITUTE FOR THE SHERMAN ACT: KENTUCKY MILK MARKETING

The *Kentucky Milk Marketing* decision was both a factual and a legal departure from *General Electric* and *Taylor Drug*. The facts differed from prior cases in that the statute at issue was a proscription of sales below cost rather than a prescription for resale price maintenance or minimum markups. The decision marked a legal departure in two senses. First, the factual distinction between resale price maintenance and proscriptions of below cost sales noted in *General Electric* was ignored and the below cost sales statute was found to be a minimum markup statute, a type of resale price maintenance. Second, while the *Taylor Drug* court found that the liquor minimum markup statute did *not* violate the Arbitrary Power Section but *did* violate the Sherman Act, the *Kentucky Milk Marketing* court, citing *Taylor Drug*, found that the below cost sales statute *did* violate the Arbitrary Power Section since it was found to be a minimum markup statute. The court did not reach Sherman Act issues.

Both legal departures will be shown to be in error after the factual context, the legal context and the Kentucky Supreme Court's analysis are set forth.

A. Factual Context of Kentucky Milk Marketing.

While the *General Electric* case concerned a statute permitting producers to set prices to be charged upon resale, and *Taylor Drug* concerned a statute directing specific markups over the producer's price, *Kentucky Milk Marketing and Anti-Monopoly Commission v. Kroger Co.* concerned a statute forbidding sales below cost, statutorily defined, of dairy products at the distributor, wholesale, and retail levels for the purpose of injuring competition.\(^1\)

The Kentucky Milk Marketing Law established a commission\(^2\) to oversee, *inter alia*, the below cost sales prohibition. The commission did not set prices, but reviewed filed prices and related cost information\(^3\) to enforce the below cost sales ban.

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Bulk milk handlers, processor-distributors, and retailers were forbidden to sell dairy products "at less than the cost thereof to such vendor." 94 "Costs" were defined as the price paid for the milk product (hereinafter invoice price) plus the cost of doing business by bulk milk handlers,95 by processors or distributors,96 and by retailers,97 respectively.

Until the instant case, the commission as a matter of practice, but not by written regulation, had apportioned the cost of doing business among the individual products sold on a pro rata basis in terms of the percentage of gross sales.98 For example, if dairy products accounted for twenty-five percent of gross sales of a retailer, then the minimum lawful price for a dairy product was set at twenty-five percent above invoice price, i.e., the minimum lawful price must not be less than 125 percent of the invoice price.

In Kentucky Milk Marketing, the commission, upon complaint of a competitor, investigated the Kroger Co. for below cost dairy sales. The vice-chairman of the commission, a businessman who was one of Kroger's competitors, declined to recuse himself as

96. Ky. Rev. Stat. Ann. § 260.680(12) (Michie/Bobbs-Merrill 1981) provides in part: 'Cost to the processor or distributor' means the price paid for raw materials, plus the cost of doing business, as evidenced by the standards and methods of accounting regularly employed by such processor or distributor. The cost of doing business means all costs of doing business incurred in the conduct of the business and shall include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, power, supplies, maintenance of equipment, selling costs, transportation, delivery cost, credit losses, all overhead expense, and all types of licenses, taxes, insurance and advertising ....
'Cost to the store' means the invoice price paid by the retailer plus retailer's cost of doing business, as evidenced by the standards and methods of accounting regularly employed by such store, including, but not limited to, all costs incurred in the conduct of said store such as labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, power, supplies, maintenance of equipment, selling costs, advertising, transportation, delivery costs, credit costs, credit losses, all overhead expenses, and all types of licenses, taxes, insurance and advertising ....
98. Kentucky Milk Mktg., 691 S.W.2d at 897.
he had done in past cases involving his competitors. Moreover, despite a lack of published regulations on setting minimum prices, the vice-chairman applied the cost of doing business percentage differently and more stringently to Kroger than in any prior investigation.

By the vice-chairman's policy, the excess of the minimum lawful retail price over invoice price had to equal the pro rata sales percentage as applied to the retail price, rather than to the invoice price. To show the effect by example, consider the sale of a carton of ice cream with an invoice price of $1.00. If the invoice price to Kroger of a carton of ice cream were $1.00, and if dairy products accounted for twenty-five percent of Kroger's gross sales, the excess of minimum lawful retail price over invoice price under the new policy would have to equal 25 percent of the minimum lawful retail price (rather than 25 percent of the invoice price under the former policy). In other words, the invoice price would have to be 75 percent (100% - 25%) of the minimum lawful retail price. The minimum lawful retail price would be $1.33 since $1.00 is 75 percent of $1.33.

Previously, the minimum lawful retail price need only have exceeded the invoice price by 25 percent of the invoice price (25 cents). The minimum lawful retail price under the former policy would have been $1.25. Kroger's transgression, in terms of this hypothetical, was to set its retail price greater than $1.25 but less than $1.33. Kroger's allegedly violative price of ice cream would have met the old statutory standard; it did not meet the new more stringent standard implemented by the vice-chairman.

B. The Kentucky Statute in the Context of the Federal Antitrust Law.

The Kentucky Milk Marketing court declined to reach Sherman Act issues since the decision was rejected on state constitutional grounds. In doing so, however, that court abandoned its standard for arbitrariness: the state statute was held arbitrary even though it was consistent with and related to a federal statute, the Sherman Act.

99. Id. at 898 n.8.
100. On one other occasion the executive director had ordered a blanket 15% markup over invoice price for all retailers, but the commission rescinded the markup after sixteen months. Id. at 897.
Section 2 of the Sherman Act provides:

> every person who shall monopolize or attempt to a monopolize, or ... conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states ... shall be guilty of a felony ... ¹⁰¹

The federal courts have recognized a number of practices by which the crime of monopolization or its attempts or conspiracy may be undertaken: boycotts,¹⁰² tying arrangements,¹⁰³ and exclusive dealing contracts.¹⁰⁴ Conduct undertaken with the goal of driving rivals from the market is considered "predatory" conduct. [U]nder certain conditions, low prices may have anticompetitive effects. A firm which drives out or excludes rivals by selling at unremunerative prices is not competitive on the merits but engaging in behavior that may properly be called predatory. There is, therefore, good reason for including a 'predatory pricing' antitrust offense within the proscription of monopolization or attempts to monopolize in section 2 of the Sherman Act.¹⁰⁵

While it is acknowledged that predatory pricing is an offense under § 2 of the Sherman Act, the level below which prices become predatory, whether intent is required for an offense, the rationality of undertaking such a strategy and the measure of gains to be earned at a later date to replace immediate revenues foregone are subjects of lively contention. In areas of contention, it is the role of legislatures to enter the fray to determine, at least for the time being, a rule of law by which citizens may guide their conduct. Kentucky's General Assembly did so as to the pricing of dairy products by prohibiting below cost sales. Such a statute will be shown to have a reasonable relation to the proscription of predatory pricing under § 2 of the Sherman Act in that the price below which Kentucky forbids sales is a benchmark price in the Sixth Circuit's enforcement against ²⁵ ²⁶ predatory pricing.¹⁰⁶ As Kentucky's below cost sales law was

“reasonably related” to the Sherman Act, the Kentucky Supreme Court should have found the statute to comport with the Arbitrary Power Section. 107

C. The Analysis of the Kentucky Milk Marketing Court

Nonetheless, the Kentucky Milk Marketing court found the below cost sales law to be arbitrary and therefore invalid. It first noted that the commission’s change in the application of the cost of doing business percentage would have resulted in a higher price than before to the purchaser of Kroger ice cream without a commensurate increase in Kroger’s cost of selling ice cream.

[If the invoice cost of a gallon of ice cream was [sic] increased from $1.65 to $1.75, the law as applied would require an increase in selling price from $2.05 to $2.19. As the trial court opined, ‘obviously, the cost of selling the ice cream could not have increased but the law requires the consumer to pay 14 cents more for the product because of a 10 cent increase in price.

Under these circumstances, we have no problem in concluding that the Kentucky Milk Marketing Law, while ostensibly and facially an anti-monopoly law, is in actuality and practice a minimum mark-up law. 108

The Kentucky Milk Marketing court premised its conclusion that the below cost sales statute was a minimum markup statute upon no more than these last two paragraphs. Its reasoning that minimum markup statutes are per se arbitrary is confined to the following policy declarations:

The effect of the Kentucky Milk Marketing Law is price fixing by requiring minimum mark-ups. This certainly, by any criteria, is arbitrary and is inimical to the public interest. It is an invasion of the right of merchants to sell competitively, and of the public to buy competitively in the open market.

... The Kentucky Milk Marketing Law, whether interpreted as a minimum mark-up law or as simply requiring that a retailer may not sell ‘below cost,’ is clearly an arbitrary interference with ‘the right of the owner to fix the price at which his property shall be

108. Kentucky Milk Mktg., 691 S.W.2d at 898 (emphasis added).
sold.’ [citing General Electric at 360]. It is an arbitrary interference with the free flow of commerce—the free enterprise system—and is not justified by the police power of the state. It is clearly a violation of the letter and the spirit of our Section 2 of our Bill of Rights.109

The Kentucky Supreme Court had but four years earlier in Taylor Drug gone out of its way to declare a genuine minimum markup statute consistent with § 2 of the Kentucky Constitution110 even though it was found to violate the Sherman Act.111 In Kentucky Milk Marketing, a statute mandating merely that all costs be reflected in the price was forced into the minimum markup mold and, as such, found per se arbitrary and violative of § 2 of the Kentucky Constitution.112 Such a result is without evident precedent or reason in the Kentucky Milk Marketing opinion other than as a policy preference.113

D. The Kentucky Milk Marketing Opinion Is in Error

The Kentucky Milk Marketing opinion manifests confusion on five levels. First, there is confusion between the Sherman Act and the Arbitrary Power Section. The Kentucky Supreme Court first announces that the opinion does not reach Sherman Act issues,”4 assumes, citing to Taylor Drug, that the statute violates the Sherman Act,115 ignores the state action exemption116 and any

109. Id. at 900.
110. Taylor Drug, 635 S.W.2d at 322-23 (citing Reeves v. Simon, 160 S.W.2d at 152: “We cannot say that the instant law calling for strict price control and the elimination of ruinous competition has no relation to the subject or that it is arbitrary and discriminatory and not based upon substantial grounds.” (emphasis added)).
111. Moreover, General Electric had found minimum resale price maintenance contracts consistent with § 2 of the Kentucky Constitution in part because it was consistent with § 198 of the Kentucky Constitution. 316 S.W.2d at 358.
112. Kentucky Milk Mktg., 691 S.W.2d at 900.
113. In its analysis of the state constitutionality of the below cost sales law, the court made no mention of § 198 of the Kentucky Constitution. Section 198, forbidding the depreciation of articles below their value, had been a key element in the General Electric case, and would seem an obvious point of analysis for a below cost sales statute.
114. “Because we decide this case on the basis of the Kentucky Constitution, we need not discuss contentions (1) and (4), which relate to the Sherman Anti-Trust Act.” Kentucky Milk Mktg., 691 S.W.2d at 895.
115. “Even though we decide this case on Kentucky Constitutional grounds, we are cognizant that minimum mark-up laws (unless authorized as state action) are violative of the Sherman Anti-Trust Act.” Id. at 900.
116. Id.
factual difference between the Milk Marketing Law and the alcoholic beverage markup statute in *Taylor Drug*, then boots-straps the assumed Sherman Act violation into a fatal finding of arbitrariness. In effect, the *Kentucky Milk Marketing* court used the Arbitrary Power Section as a substitute for the Sherman Act and thereby avoided the increasingly enigmatic evolution of the state action exemption and the *Midcal* test.

Second, there is confusion between facial invalidity of the statute and invalidity of the statute as applied. The opinion is replete with misdeeds by the commission which would justify the invalidity of the statute as applied: the vice-chairman’s refusal to recuse himself, the application of a more stringent non-statutory cost formula to Kroger, the temporary attempt to mandate a fifteen percent markup over invoice regardless of the actual cost of doing business, the lack of regulations regarding the cost formula, the lack of forms or standardized procedures to facilitate a vendor in justifying his costs, and the lack of findings of fact in the enforcement order against Kroger.

This litany indeed supports the *Kentucky Milk Marketing* court’s finding the commission’s actions to be arbitrary and capricious and support its finding the statute invalid as applied. But none of these defects is mandated by the statute and all could be cured by following, rather than changing, the statute. None suggests the statute’s facial invalidity under the Arbitrary Power Section.

Indeed the only nexus the *Kentucky Milk Marketing* court attempts to construct between the arbitrary conduct and the statute’s facial “invalidity” under § 2 is a strained inference of

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117. The *Kentucky Milk Marketing* court failed to note the *General Electric* court’s distinction between a resale price maintenance statute and a below cost sales statute. See *General Elec.*, 316 S.W.2d at 357.

118. “The effect of the Kentucky Milk Marketing Law is price fixing by requiring minimum mark-ups. This certainly, by any criteria, is arbitrary and is inimical to the public interest. It is an invasion of the right of merchants to sell competitively, and of the public to buy competitively in the open market.” *Kentucky Milk Mktg.*, 691 S.W.2d at 900.

119. Id. at 901.

120. Id. at 900-01.

121. Id. at 897.

122. Id. at 899.

123. Id. at 900.

124. Id. at 901.
legislative intent from an isolated arbitrary and ultra vires act by the executive director which the full commission took pains to correct:

A review of the proceedings of the Commission for the previous thirteen years reveals that it followed the statutory definition [of costs prior to the Kroger case]. However, in a directive to all retail stores, dated May 19, 1974, the appellant, Claycomb, as Executive Director of the Commission, declared that a figure of fifteen percent over the invoice cost of milk would... ‘be needed in order for the retailer to realize a reasonable profit on the sale of the product.’ Apparently recognizing that this directive revealed the real purpose of the Act, the Commission rescinded it on September 15, 1975. The trial court found, and we agree, that the ‘mark up’ required does include an actual profit over and above the cost of selling milk products.\textsuperscript{125}

It is not clear why or how a legislative intent to assure “actual profits”\textsuperscript{126} from markups is to be inferred from a rescinded ultra vires directive issued fourteen years after legislative passage.\textsuperscript{127} A clear understanding of “the real purpose of the Act”\textsuperscript{128} likely depends upon a clear understanding of “actual profit,” and its relation to “the cost of selling milk products.”\textsuperscript{129}

Thus, the third level of confusion in the Kentucky Milk Marketing opinion is the failure to recognize that a vendor’s cost of procuring a gallon of ice cream for sale is distinct from the cost of selling a gallon of ice cream. The Kentucky Milk Marketing Court appears to regard any excess of revenue over the invoice cost of the ice cream as “actual profit.” Yet, acquiring his wares is just the beginning of the vendor’s costs.

Unless refrigeration equipment is rented and electricity is supplied, there can be no ice cream for sale. Unless employees are paid to insure compliance with health codes, run the cash register, insure security, and do the accounting, there can be no sale. Unless the rent and the interest on borrowed capital are

\textsuperscript{125} Id. at 897 (ellipsis and quotation in original, emphasis added).
\textsuperscript{126} Id.
\textsuperscript{127} The Act had been passed in its most recent form in 1960 (Enact. Acts 1960, ch. 193, § 1, effective June 18, 1960). Moreover, it is not clear why the twelve years’ balance of recorded proceedings during which the commission followed the statutory cost formulas might not suffice to ascertain “the real purpose of the Act.”
\textsuperscript{128} Kentucky Milk Mktg., 691 S.W.2d at 897.
\textsuperscript{129} Id.
paid, there can be no place for a sale. Unless consumers are informed through advertising, there will be no buyers. The Milk Marketing Law required nothing more than payment of these and other costs necessary to be able to sell ice cream.\(^\text{130}\)

There can be no thought of "profit," as defined by either accountants or economists until all these statutory costs are paid for.\(^\text{131}\) Accountants speak of profits as the excess of revenues over total explicit costs, \textit{i.e.}, monies actually paid out in a given time frame. Economists consider not only explicit costs, \textit{i.e.}, the cost of using one's own resources in an enterprise instead of renting them outside the firm to earn revenues,\(^\text{132}\) plus the cost of attracting and retaining investment capital.\(^\text{133}\) Only when these opportunity costs of capital are paid would economists call the excess revenues over the sum of these costs "profits."\(^\text{134}\)

Any excess of revenue above invoice costs that is attributable to the business expenses exemplified in the statute is thus not justified unless those statutory costs have been paid.

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130. The Milk Marketing Law explicitly required the price of dairy products to include not only explicit costs paid out for raw materials and labor, but also capital depreciation, interest on borrowed capital, and all overhead expenses. \textit{KY. REV. STAT. ANN.} §§ 260.680(12) & (17) (Michie/Bobbs-Merrill 1981). Not all possible economic costs are listed by the statute, but the statute provides that the listed costs are exemplary rather than exhaustive so as to give meaning to "cost of doing business." If dividends sufficient to attract capital is a cost of doing business, then they, too, may reasonably be imputed to the amount charged over invoice cost prescribed in \textit{KY. REV. STAT. ANN.} §§ 260.680(12), (14) and (17) (Michie/Bobbs-Merrill 1981). However, dividends or payments to retain capital participation were not at issue.

131. "Economic profit is defined to be the difference between the revenue a firm receives and the costs that it incurs. It is important to understand that all costs must be included in the calculation of profit. If a small businessman owns a grocery store and he also works in the grocery, his salary as an employee should be counted as a cost. If a group of individuals loans a firm money in return for a monthly payment, these interest payments must be counted as a cost of production. "Both revenues and costs of a firm depend on the actions taken by the firm. These actions may take many forms: actual production activities, purchases of factors, and purchases of advertising are all examples of action undertaken by a firm." \textit{HAL R. VARIAN, MICROECONOMIC ANALYSIS} 6 (2d ed. 1984).

132. If you mow your own lawn, you give up the income you could have received by mowing your neighbor's lawn during the same time period. What the neighbor might have paid you is your opportunity cost or implicit cost or economic cost of mowing your lawn. Your explicit or accounting cost of mowing your own lawn is zero since you paid out no money. The economic cost is, however, the more accurate measure since one's resources include not only money, but time, labor, and capital.

133. To mow your lawn, you must induce someone to put up a lawn mower or its money equivalent. This inducement (or cost of capital) is also an economic cost.

134. \textit{See generally} \textit{VARIAN, supra} note 131.
profit in the economic sense. Since a firm must meet its economic costs to survive in an "actual" sense, a price war among competitors could under certain conditions force some competitors unable to meet their costs from the market, leaving the field to survivors with increased market power and the ability to use that power against consumers and the remaining competitors. For these reasons, predatory pricing as a means of monopolization is proscribed under § 2 of the Sherman Act. The Kentucky statute forbidding below cost sales is thus not a price fixing statute, but a predatory pricing statute consistent with and supplemental to the Sherman Act.¹³⁵

Thus, the opinion's fourth level of confusion is to fail to distinguish between a statute prescribing price-fixing via markups¹³⁶ and a statute proscribing predatory pricing. It is clear from the detail of the cost definitions that the General Assembly passed a predatory pricing statute consistent with the Sherman Act rather than a minimum markup statute in conflict with the Sherman Act. The Milk Marketing Law requiring that prices reflect average total costs¹³⁷ can supplement the Sherman Act in


¹³⁶. Kentucky Milk Mktg., 691 S.W.2d at 900.

¹³⁷. Three types of costs are relevant:

Marginal cost is the increase in the firm's total cost of either producing or acquiring and selling the product unit for sale. It is attractive as a predatory pricing threshold since (1) if a producer/vendor cannot recover marginal costs, the producer/vendor would be better off by forgoing production or acquisition of the unit, and (2) if price equals marginal costs, allocative efficiencies associated with competitive conditions can optimize consumer welfare. Sales below marginal cost can lead to allocations of resources that reduce allocative efficiency and consumer welfare. The drawback of marginal cost as a threshold for predatory pricing is that it is quite difficult to measure for any particular good and thus difficult to use as an enforcement tool.

Average variable cost is the cost per unit of resource which varies with the level of production or sales in the short term. Costs which do not vary with the level of production or sales are called fixed costs. In the short term for vendors, invoice price, labor costs, some supplies, and delivery costs would vary with the volume of goods. The costs of power and supplies and advertising may or may not vary with production or sales in the short term, depending on contract length. Regular maintenance costs would be fixed costs while maintenance costs varying with the intensity of use can be counted as variable
intrastate commerce provided that the costs included are less than or equal to the level below which predatory pricing may be proven according to cases interpreting the federal antitrust law.

Fifth, the standard for arbitrariness was confused. The opinion's definition of "arbitrary" in fact failed to define at all by seeking instead to be comprehensive:

Whatever is contrary to democratic ideals, customs and maxims is arbitrary. Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary.

Rather than place limits on the word "arbitrary" so as to give meaning to § 2 of the Kentucky Constitution, the opinion reserves to the court a power without discernable limit. This leaves the great risk that "the court itself will appear to be arbitrary in its interpretation of a constitutional provision which denies the existence of arbitrary power."

An articulable, practicable standard for the meaning of "arbitrary" was at hand as stated in Reeves and as applied in General Electric. Reeves provided that "[u]nless it is clear the statute costs. Average variable cost is an attractive predatory pricing threshold since (1) it is easier to measure than marginal cost, and (2) a firm charging a price equal to or greater than average variable cost can survive to produce or sell another day even if fixed costs are not met, but a firm having to charge less than average variable cost loses more in the immediate time period by continuing to produce than by shutting down to minimize losses. A drawback is that fixed costs, i.e., costs such as rent and license fees which do not vary with production or sales, are real costs that must be recouped by sales revenues, borrowings, or cash reserves before the costs fall due. A firm which must charge between average variable costs and average total costs may for that reason not be viable as a practical matter in the medium or long term.

Average total cost is the sum of average variable cost and average fixed cost. With the passage of time, costs fixed with respect to production or sales in the short term become variable with respect to production as equipment wears out and requires replacement (depreciation), as capital must be sought (interest), as the physical plant may require major adaptation (rent), and as the firm copes with technological change (research and development costs). Average total cost is also easier to measure than marginal cost, is equal to marginal cost for long-term profit-maximizing firms under competitive conditions, and captures the cost of all resources devoted to the product.


139. Kentucky Milk Marketing, 691 S.W.2d at 899.

140. Dyche, supra note 11, at 524.

141. See General Electric, 316 S.W.2d 354.
has no reasonable relation to a proper legislative purpose and is
arbitrary and discriminatory and without substantial basis, the
courts will not interfere."142 In General Electric, the limitation of
KRS § 365.080 on the right of property was found not to be
arbitrary due in significant measure to its "reasonable relation"
to federal law, i.e., the Sherman Act as amended by the Miller-
Tydings Act, and to § 198 of the Kentucky Constitution, forbid-
ding the depreciation of the value of an article. As the limitations
on property in KRS § 365.090 were not required by federal law
and were in fact contrary to state constitutional policy as to
liberty of contract, the limitations on property were unjustifiable
by a "reasonable relation" to federal or state law and were
therefore properly held arbitrary.

The Kentucky Milk Marketing opinion, in fact, cited language
from that part of General Electric finding KRS § 365.090 arbi-
trary,143 but misunderstood the relevance of General Electric's
application of the Reeves standard for arbitrariness to the below
cost sales statute before the Kentucky Milk Marketing court. As
the below cost sales statute in Kentucky Milk Marketing was
consistent with, supplemental to, and thus reasonably related to
the Sherman Act's proscription of predatory pricing, the Kentucky
Milk Marketing court should have looked to that part of General
Electric addressing KRS § 365.080,144 rather than KRS § 365.090.

The Milk Marketing Law can best be described as establishing
average total cost as the threshold below which prices of dairy
products were deemed predatory.145 Such a statute bears as

142. Reeves, 160 S.W.2d at 151.
143. The Kentucky Milk Marketing court stated:
    Our Bill of Rights declares as one of the "great and essential principles of liberty
    and free government" and as "inherent and inalienable ... the right of acquiring
    and protecting property".... This is free enterprise. Our economic system is
    founded upon competition—"the life of trade." It is an established principle that
    the constitutional guaranty of the right of property protects it ... from any
    unjustifiable impairment or abridgement of this right, such as depriving the owner
    of any of its essential attributes or such as restricts or interrupts its common
    necessary or profitable use.... The right of the owner to fix the price at which
    his property shall be sold is an inherent attribute of the property itself....

    Kentucky Milk Mktg., 691 S.W.2d at 900 (citing General Elec., 316 S.W.2d at 360).
144. Where the Court undertook to search for a reasonable relation between § 365.080
    and state constitutional and federal statutory law. Id. at 357-59.
145. See supra notes 95, 96, 97, and 137.
reasonable a relation to goals of §2 of the Sherman Act as did the General Electric resale price maintenance statute toward §198 of the Kentucky Constitution and the Miller-Tydings Act. Such a "reasonable relation" should under General Electric comport with §2 of the Kentucky Constitution. Reading §2 and §2 together should have clearly rendered valid the below cost sales statute for milk, but the court's finding of invalidity created a most confusing precedent instead.

A state law establishing the same predatory pricing threshold for goods for sale in general as in the Milk Marketing Law in Kentucky was at issue in the most recent fair trade case, Remote Services, Inc. v. FDR Corp.146 Relying upon Kentucky Milk Marketing, the Supreme Court overruled the Court of Appeals and found the statute arbitrary and unconstitutional per se.

IV. THE ARBITRARY POWER SECTION AS A PER SE RULE:

Remote Services

A. The Supreme Court's Analysis

The Unfair Trade Practices statute challenged in Remote Services147 is analogous to the below cost sales statute in the Milk Marketing Law in that by forbidding sales below cost,148 it established for general goods and services a predatory pricing threshold at average total cost.149

146. 764 S.W.2d 80 (Ky. 1989).
147. KY. REV. STAT. ANN. § 365.030 (Michie/Bobbs-Merrill 1981) (rejected in Remote Services, 764 S.W.2d 80 (Ky. 1989)).
148. KY. REV. STAT. ANN. § 365.030(1) (Michie/Bobbs-Merrill 1981) provided:

[N]o person engaged in business within this state shall sell, offer for sale or advertise for sale any article or product, or service or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade, for the purpose of injuring competitors and destroying competition.

149. KY. REV. STAT. ANN. § 365.030(3) (Michie/Bobbs-Merrill 1981) provided:

As applied to production, "cost" includes the cost of raw materials, labor and all overhead expenses of the producer. As applied to distribution, "cost" means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by the distributor and vendor. The "cost of doing business" or "overhead expense" means all costs of doing business incurred in the conduct of the business and must include without limitation the following items of expense: Labor (including salaries of executives
The Remote Services court followed Kentucky Milk Marketing rather than General Electric in overruling the Kentucky Court of Appeals and determining the arbitrariness of § 365.030. Rather than observe the reasonable relation between the below cost sales statute and both the predatory pricing aspect of the Sherman Act and § 198 of the Kentucky Constitution, the Kentucky Supreme Court decided that below cost sales statutes were markup statutes by definition and that markup statutes were illegal per se.

Judge Vance's dissent characterized the Unfair Trade Practices Act in terms that could also describe the Milk Marketing Law:

I am astounded that the majority can find anything about the statute which requires any mark-up whatever above cost. The majority opinion does not specify in any particular where a mark-up of any kind occurs by reason of the statute.

As I read the statute it would permit the appellants to sell their product at exactly cost. It does not require them to make a profit to comply with the law. What it does require is that appellants do not sell their product at a price below their cost for the purpose of destroying competition by the appellee. This is exactly what the appellants admit they have been doing.\textsuperscript{150}

The confusion as to costs and profits persisted in the majority opinion of the Kentucky Supreme Court as it discussed the similarity between the Milk Marketing Law and the Unfair Trade Practices law:

The [Milk Marketing] statute carefully defined 'below cost;' cost was said to include the invoice price of milk, plus the cost of doing business, including labor, salaries, rent, interest, depreciation, power, supplies, maintenance, selling costs, transportation, delivery costs, leases, taxes, etc. It was the definition of 'cost,' which was not confined to cost of the product, but included other legitimate competitive advantage, that abrogated the constitutionality of the statute.\textsuperscript{151}

The Kentucky Court of Appeals had seen through the confusion when the statute's validity had come before that court after summary judgment:

\textsuperscript{150} Remote Services, 764 S.W.2d at 83 (Vance, J., dissenting).

\textsuperscript{151} Id. at 82.
[T]he monopolistic potential of price undercutting is, in the long run, more hostile to public interest than is the value of temporarily low prices. The benefits to be gained from transiently low prices are so Lilliputian as to be grossly outweighed by the potential for an economic leviathan to destroy all competition and thus to consume the consuming public. 152

The Kentucky Supreme Court’s majority opinion, however, was contemptuous of the Court of Appeals:

Analyzing the legislative policy of the General Assembly in enacting the statute, [the Court of Appeals] concluded, in a quantum leap of logic and with a considerable amount of fact finding on its own, that temporary price cutting would lead to monopolies which would ‘consume the consuming public.’ There is no basis for such a conclusion in the record before us and no such conclusion can be justified by the wording of the statute. That statement, at best, represents a subjective view of the majority, and does not comport with either the facts or viable economic theory. 153

B. Predatory Pricing as “Viable Economic Theory”

Yet, monopolization via price predation is indeed a most viable area of research in economics.

Among economists, ... it is generally agreed that the argument that predation is impossible is incorrect, at least as a matter of economic theory. The economics literature is filled with articles containing models of predation in which predation is a rational strategy. By way of illustration, the recently published Handbook of Industrial Organization, something like a ‘Restatement of Industrial Organization,’ contains a survey article on predatory pricing that is some fifty-five pages long and contains more than 130 references. ... From an economics perspective, predatory pricing is simply a temporarily low price aimed at eliminating rivals and obtaining a monopoly. The economics literature referred to earlier contains many theoretic models in which successful predation occurs without a monopolist having to reduce price below the level of its own costs. 154

Predatory pricing is viable in the courts as well as in economic theory. The United States Supreme Court’s seminal predatory

152. Id. at 81 (citations omitted).
153. Id. at 82.
154. George A. Hay, The Cutting Edge of Antitrust: Exclusionary Practices, 58 Anti-
pricing case, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, found that a Japanese manufacturer was unlikely to be capable of predatory pricing where prices exceeded marginal cost and American firms remained active in the market after two decades of the alleged scheme. However, the United States Supreme Court has reserved whether "recovery should ever be available ... when the pricing in question is above some measure of incremental (marginal) cost," or "whether above cost pricing coupled with predatory intent is ever sufficient to state a claim of predation." Thus a predatory pricing statute using average total cost is still quite "viable."

This is especially so in applicable Sixth Circuit cases. The Sixth Circuit Court of Appeals has adopted one of the multiple court-devised variations of the influential Areeda-Turner model of predatory pricing and held in *D.E. Rogers Associates., Inc. v. Gardner-Denver Co.* that:

If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

In the Sixth Circuit, therefore, prices between average variable cost and average total cost may be found predatory if the plaintiff shoulders his proof. The Sixth Circuit Court of Appeals added in *Arthur S. Langenderfer, Inc. v. Mac Ritchie Materials, Inc.*, that "there is no violation [of § 2 of the Sherman Act] where a monopolist sells above average total cost, as in the instant case,"

157. Id. (quoting *Matsushita*, 475 U.S. at 585 n.9).
158. Id. (quoting *Cargill*, Inc. v. Montfort of Colorado, Inc., 479 U.S. 104, 117-18 n.12 (1986)).
159. Areeda & Turner, *supra*, note 105. See also *Hovenkamp, supra* note 137, at 172-86.
160. 718 F.2d 1431 (6th Cir. 1983).
161. Id. at 1436 (citations omitted).
162. 729 F.2d 1050 (6th Cir. 1984).
163. Id. at 1056 n.12.
but “expressly” rejected the notion that “pricing above average total costs may be deemed predatory upon clear and convincing proof of predatory intent.”164 The Kentucky statutes’ average total cost threshold for predatory pricing lies at the Sixth Circuit’s margin between prices which are deemed not to be predatory165 and prices below which the plaintiff may prove predation.166

Given the statute’s demonstrable consonance with the bounds of predatory pricing in Sherman Act § 2 federal court holdings, a state court might have remanded a case on appeal from summary judgment for the economic factual development attainable only at trial,167 or else might well have afforded the legislature deference on a close policy question168 as had the Taylor Drug court in deciding the Arbitrary Power Section issue:

Whether the pricing of commodities in that business ought to be separated out from the other areas of state control may be a fair question, but at least it is arguable, and we think it is an argument that falls within the prerogative of the General Assembly to decide.169

Instead, the Remote Services court, like the Kentucky Milk Marketing court, assumed the role of arbiter of the arbitrary:

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164. Id.
165. Id.
166. D.E. Rogers, 718 F.2d at 1436.
167. Justice Vance wrote in his Remote Services dissent:

The majority places great reliance upon the similarity of the statute in question here to the statute which was held unconstitutional in Kentucky Milk Marketing v. Kroger Co. In that case, however, there was a trial on the merits and evidence which showed that the statute as applied by the milk marketing commission resulted in a mark-up for profit. There is no marketing commission to regulate the enforcement of the statute in question, and there is no evidence in the record which shows that any mark-up results from compliance with the statute.

I would reverse the summary judgment and remand to the trial court for further proceedings.

Remote Services, 764 S.W.2d at 84 (Vance, J., dissenting) (citations omitted, emphasis added). Vance’s dissent focuses on the fact that the Kentucky Milk Marketing majority necessarily used arbitrariness in the application to find facial invalidity.

168. “We are not concerned with the economic and social philosophy of such laws or the wisdom of the legislation. We are concerned only with the question of whether it is within the power of the Legislature under the Kentucky Constitution to enact a statute which sanctions the fixing of minimum retail prices as described.” General Electric, 316 S.W.2d at 357.
169. Taylor Drug, 635 S.W.2d at 322-23.
In *Milk Marketing* as noted, we declared the statute to be a minimum mark-up law. Since the statutes are so similar, we must, a fortiori conclude that KRS 365.030 is also a minimum mark-up law. It clearly is. . .

We therefore conclude that since KRS 365.030 is a minimum mark-up law, it is facially unconstitutional as being violative of Section 2 of the Kentucky Constitution.\(^{170}\)

Rather, a reasonable relation between the statute and both the predatory pricing aspect of the Sherman Act and § 198 of the Kentucky Constitution should have established the non-arbitrariness of KRS § 365.030 and its harmony with § 2 of the Kentucky Constitution. Once non-arbitrariness had been established, the Kentucky Supreme Court could have gone on to examine validity under the Sherman Act and the state action exemption under the standards of the time.\(^{171}\)

The use of a per se approach to the validity of minimum markup and/or below cost sales statutes is further evidence of the Kentucky Supreme Court's substitution of state constitutional analysis for federally developed Sherman Act analysis. As Kentucky law now stands, below cost sales statutes are definitionally minimum mark-up statutes which facially violate § 2 of the Kentucky Constitution per se.\(^{172}\) It is therefore of interest that the Kentucky General Assembly passed two below cost sales statutes in 1990, the new Milk Marketing Law\(^{173}\) and the revised Unfair Cigarette Sales Law.\(^{174}\)

V. THE ARBITRARY POWER SECTION, THE SHERMAN ACT AND THE NEW FAIR TRADE LAWS

Kentucky's fair trade laws have been subject to a rather surprising course of judicial review. Resale price maintenance contracts applied to third parties offend the Arbitrary Power

\(^{170}\) *Remote Services*, 764 S.W.2d at 82-83 (citation omitted).


\(^{172}\) Notwithstanding § 198 of the Kentucky Constitution forbidding the depreciation of an article below its value.


Section of the Kentucky Constitution, but resale price maintenance contracts between signatories do not, so long as there is a reasonable relation to a legitimate state or federal purpose. Resale price maintenance contracts between signatories satisfy the Sherman Act when there is specific congressional authorization for them, but minimum resale markup statutes do not, in the absence of congressional authorization, qualify for the *Parker v. Brown* state action exemption from invalidity under the Sherman Act, persuasive authority notwithstanding.

Minimum resale markup statutes do not offend the Arbitrary Power Section, but below cost sales statutes which are not actual markup statutes actually are markup statutes as applied since they mandate "actual profits" and therefore facially offend the Arbitrary Power Section, but not necessarily the Sherman Act, though it is assumed so, thus rendering the statutes arbitrary. Below cost sales statutes are definitionally markup statutes and therefore are facially invalid as arbitrary despite the lack of a factual record, even though actual markup statutes are not arbitrary but instead invalid on other grounds. The fate of the new Milk Marketing Law and the revised Unfair Cigarette Sales Law is all but certain.

A far more articulable, practicable, and therefore reliable guide to the validity of economic regulations under § 2 of the Kentucky Constitution is offered by *General Electric* than by subsequent cases: A state law having a reasonable relation to federal antitrust law, to § 198 of the Kentucky Constitution or other state constitutional interest is not arbitrary; a state law lacking such a reasonable relation violates the Arbitrary Power Section.

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175. *General Elec.*, 316 S.W.2d 354.
176. *Id.*
177. *Id.*
178. 317 U.S. 341.
180. Shaw, supra note 64.
182. *Kentucky Milk Mktg.*, 691 S.W.2d 893.
So formulated, the resale price maintenance contracts as to signatories in *General Electric* were properly found constitutional at the time. Since the repeal of the Miller-Tydings Act, the resale price maintenance could no longer satisfy the Sherman Act, but nonetheless, as reasoned in *General Electric*, could by consistency with § 198 satisfy the Arbitrary Power Section.\(^\text{187}\) The resale markup statute for liquor in *Taylor Drug* could not, absent the Miller-Tydings Act, be consistent with the Arbitrary Power Section simply as a markup statute, but could be found to have a reasonable relation to the state interest in the control of liquor,\(^\text{188}\) following *Reeves*.\(^\text{189}\) The below cost sales statutes in *Kentucky Milk Marketing* and *Remote Services*, having a reasonable relation both to the Sixth Circuit's interpretation of the Sherman Act's proscription of predatory pricing and to § 198, should be held to be consistent with the Arbitrary Power Section.

However, the new Milk Marketing Law\(^\text{190}\) and the Unfair Cigarette Sales Law\(^\text{191}\) will be judged valid or invalid on the impracticable and well nigh inarticulable basis of the 1980s cases rather than *General Electric*. The new Milk Marketing Law differs from the invalidated Milk Marketing Law in but two respects: The Kentucky Milk Marketing and Anti-Monopoly Commission has been abolished\(^\text{192}\) and its duties and powers assigned verbatim to the Commissioner and Department of Agriculture.\(^\text{193}\)

Given the arbitrariness of the conduct of the Milk Marketing Commission in *Kentucky Milk Marketing*, the reassignment of

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\(^{187}\) Ultimate validity would then depend on qualifying for the state action exemption from the Sherman Act.

\(^{188}\) "It is well known and long recognized that the liquor business warrants closer supervision and control by the state than most other commercial pursuits." *Taylor Drug*, 635 S.W.2d at 322-23.

\(^{189}\) Here, too, the statute's final validity would hinge on the state action exemption. *Shaw*, *supra* note 64, argues persuasively that it should have been exempt in the early 1980s under *Midcal*, 445 U.S. 97. *Ticor*, 112 S. Ct. 2169, makes this assessment less sure. *See* McMurray, *supra* notes 62 and 82.


responsibilities to the Department of Agriculture may be hoped to insulate the below cost sales provision from the offenses which rendered the Commission's actions arbitrary and thus invalid under § 2 of the Kentucky Constitution. It was from arbitrariness in application that the *Kentucky Milk Marketing* court inferred facial invalidity. However, the *Remote Services* court used the facial invalidity finding in *Kentucky Milk Marketing* to define below cost sales statutes as markup statutes and ruled them facially invalid per se. Thus even with non-arbitrary enforcement by the Department of Agriculture, the Kentucky Supreme Court could well cite the per se rule in *Remote Services* to find the new Milk Marketing Law facially invalid under the Arbitrary Power Section.

The same analysis may be applied to the below cost sales sections in the revised Unfair Cigarette Sales Law. The minimum markup sections face a more ironic prospect. Should the Kentucky Supreme Court rely on the last case concerning a genuine markup statute, *Taylor Drug*, the markup provisions of the cigarette law would be found consistent with the Arbitrary Power Section. Yet subsequent factually distinct cases not actually concerned with markup statutes, *Kentucky Milk Marketing* and *Remote Services*, have held minimum markup provisions to be arbitrary per se. Having emphatically embraced that rule in *Kentucky Milk Marketing* and *Remote Services*, the court may find it easier to ignore its Arbitrary Power holding in *Taylor Drug*, just as the *Kentucky Milk Marketing* court ignored the Arbitrary Power result of *General Electric.*

Even if both new statutes pass muster under the current interpretation of § 2 of the Kentucky Constitution, their survival under the Sherman Act is problematic. If analyzed in state court, the markup provisions of the cigarette law could hardly survive the precedent on markup statutes in *Taylor Drug*. Below cost sales provisions of the cigarette law and the milk law could be easily defined as markup laws under *Kentucky Milk Marketing* and *Remote Services*, and thus be found invalid under the Sherman Act via *Taylor Drug*.

195. *Taylor Drug*, 625 S.W.2d 319, held the minimum markup statute for alcoholic beverages to violate the Sherman Act since the statute, in the court's view, did not pass the *Midcal* test for the state action exemption. *Midcal*, 445 U.S. 97.
If Sherman Act issues are analyzed in federal court, then interesting issues develop indeed. As the markup provisions can be construed to be a type of resale price maintenance, illegality under the Sherman Act would be easy to show and validity of the statute would thus depend upon the effect of FTC v. Ticor Title Insurance Co.\textsuperscript{196} on current interpretation of the Parker state action exemption. If the below cost sales provisions were proven illegal under the Sherman Act, they, too, would be subject to the confusion in Ticor. However, should the below cost sales provisions be found to be predatory pricing statutes consistent with the Sixth Circuit’s formulation of the Areeda-Turner rule, then the issue would not be one of Parker exemption, but, rather, federal preemption.\textsuperscript{197} under principles set forth in Rice v. Norman Williams Co.,\textsuperscript{198} and English v. General Electric Co.\textsuperscript{199}

CONCLUSION

The words of the Sherman Act have “a generality and adaptability comparable to that found to be desirable in constitutional provisions.”\textsuperscript{200} This quality has cast the courts as policy makers in antitrust litigation rather more often than as interpreters of statutes and has sometimes led to such aberrations as Appalachian Coals.\textsuperscript{201} The words of § 2 of the Kentucky Constitution are also general and adaptable so as to permit the Kentucky Supreme Court to use broad policy making powers to curtail the power of the legislature in social and economic areas. When the

\textsuperscript{197} See generally Shaw, supra note 64, at 720-25.
\textsuperscript{198} 102 S. Ct. 3294 (1982).
\textsuperscript{199} 496 U.S. 72 (1990).
\textsuperscript{200} Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).
\textsuperscript{201} Appalachian Coals, 288 U.S. 344, departed from the per se rule against price fixing followed since the 1890s, U.S. v. Trans-Missouri Freight Ass’n, 166 U.S. 290 (1897), U.S. v. Joint Traffic Ass’n, 171 U.S. 505 (1898), U.S. v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), U.S. v. Trenton Potteries Co., 273 U.S. 392 (1927), on the grounds that the practices of a depression era coal cartel were good for the general welfare under the rule of reason. The Supreme Court returned to the per se rule against price fixing in U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), once the depression was over. Parker v. Brown, 317 U.S. 341 (1943), can also be seen as an aberrant depression era suspension of the Sherman Act similar in purpose to Appalachian Coals and the Miller-Tydings Act. In recent years, only Justice Stevens’ opinion in NCAA v. Bd. of Regents of the University of Oklahoma, 468 U.S. 85 (1984) (the marketing of sports competition necessarily involves the reasonable limitation of economic competition) has used the rule of reason in a price fixing case to find a sports cartel’s restraints unreasonable.
court has had occasion to apply both the "charter of freedom"\textsuperscript{202} and the "bulwark of liberty,"\textsuperscript{203} there have been few bounds on the court's role as policy maker.

While the General Electric court was inclined to show deference to the legislature on close questions of policy, more recent courts have shown little hesitation to do away with the legislature's economic policies if an appropriate label can be made to fit the facts. As Kentucky's Supreme Court is an elected court, there are fewer concerns regarding accountability for policy decisions than there would be for federal judges appointed for life. Yet what Kentucky thereby gains in accountability of the bench is purchased at the evident cost of consistency in precedent and the function of law as anarticulable, practicable, and reliable guide for legitimate economic conduct.

\textsuperscript{202} Appalachian Coals, 288 U.S. at 359 (referring to the Sherman Act).

\textsuperscript{203} Kentucky Milk Mktg., 691 S.W.2d 899 (citing Pritchett v. Marshall, 375 S.W.2d at 258) (referring to § 2 of the Kentucky Constitution).
Contentious relocations of franchises are not new to professional baseball. Over the past forty years, several major league teams have changed their civic affiliations, leaving fans, local businesses and city fathers with bitter feelings.¹ The recent attempt to move the San Francisco Giants to St. Petersburg, Florida,² has returned to the national spotlight the issues of the granting and relocation of Major League Baseball ("MLB") fran-

¹ In the 1950s, for example, the Brooklyn Dodgers and the New York Giants moved to Los Angeles and San Francisco, respectively. The 1960s witnessed the relocation of the Milwaukee Braves and Hank Aaron to Atlanta and the Washington, D.C., Senators to Arlington, Texas, where they changed their name to the Rangers. The expansion Seattle Pilots moved to Milwaukee to become the Brewers.

² Bob Lurie, owner of the MLB's San Francisco Giants, wanted to sell his franchise. He claimed that he had to sell the Giants because no community in the San Francisco Bay area was willing to build a new stadium for his team and cold and windy Candlestick Park dampened attendance. See generally Van Vliet, 1992 Was The Year To Set Sale, Sacramento Bee, Dec. 27, 1992, at E1 (summarizing some of the many stadium measures put before voters of northern California). A group of Tampa businessmen led by Vincent Naimoli offered to buy the Giants for $115 million on the condition that the team move to St. Petersburg, Florida, and play in that city's new Suncoast Dome. Lurie and the St. Petersburg group reached an agreement to sell and move the team, but the rules governing MLB first required the other MLB franchise owners to approve that agreement. On November 10, 1992, the other owners vetoed the move, and Naimoli's group sued MLB, its teams individually, their owners, and the National Association of Professional Baseball Leagues, Inc., which oversees professional minor league baseball. Morsani v. Major League Baseball, No. 92-9631 (Cir. Ct. Fla. Nov. 10, 1992) (alleging violations of state antitrust law claims, among others). Ten days later, Lurie agreed to sell the Giants to a San Francisco group led by Peter Magowan for $100 million. See generally Mizell, The Word Of A Giants [sic] Insider, St. Petersburg Times, Dec. 19, 1992, at 1C (summarizing the proposals from the groups from St. Petersburg and San Francisco and the position taken by Bob Lurie). On January 12, 1993, MLB's owners, with the Kansas City owner abstaining, unanimously approved the sale of the Giants to Magowan's group. San Francisco Chron., Jan. 13, 1993, at A11.
chises, together with MLB's antitrust exemption. That incident has raised such a furor that several members of Congress have questioned whether MLB's system of awarding and controlling the movement of franchises is an unfair manipulation of its exemption from the antitrust laws, and they have introduced legislation to eliminate that exemption.

This Article examines the application of the antitrust laws to the granting and relocation of MLB franchises by first examining the historical application of the antitrust laws to professional baseball. Second, the article discusses the most recent Congressional initiative and whether it is desirable to have the antitrust laws apply to the placement of baseball franchises. Finally, it is posited that removing MLB's antitrust exemption will not likely achieve the ends its supporters advocate.

I. HISTORICAL PERSPECTIVE OF THE ANTIRUST EXEMPTION AND THE PLACEMENT OF SPORT FRANCHISES

Major League Baseball has been exempt from the antitrust laws since the 1920s. In the world of professional sports, however,

3. Technically, MLB's federal antitrust "exemption" is not an exemption but rather an exception to the antitrust laws. It appears, however, that current antitrust nomenclature has characterized it as an exemption, and, for the purposes of this article, it will be referred to as an exemption.

4. Since MLB received its antitrust exemption in 1922, there have been many instances in which Congress has questioned MLB's antitrust exemption in one form or another. Hearings were held on December 10, 1992, before the Senate Judiciary Committee, Subcommittee on Antitrust, following which, on March 4, 1993, Senator Howard Metzenbaum and nine other senators, including the two senators from Florida, Bob Graham and Connie Mack, introduced in the Senate the Professional Baseball Antitrust Reform Act, S. 500, 103d Cong., 1st Sess. (1993) ("Reform Act"). Other issues apparently contributed to the senators' decision to challenge MLB's antitrust exemption, such as the dismissal of MLB's Commissioner, Fay Vincent, MLB's acrimonious labor negotiations and the racial remarks allegedly made by Cincinnati Reds general partner, Marge Schott. See, e.g., Truex, Baseball's Burning Questions, Houston Chron., Feb. 28, 1993, sec. 2, at 17 ("Burning Questions") (quoting Senators Metzenbaum and Mack who have advocated eliminating the exemption); Sandalow, Baseball Owners And Foes Debate Before Senate Panel, San Francisco Chron., Dec. 11, 1992, at A3 (also noting congressional concern over treatment of minor league players and attempts to charge television viewers for games watched on a pay-per-view basis). Initial reaction from the public and sports media to eliminating MLB's antitrust exemption appears mixed. See, e.g., Burning Questions, supra, at 17. (noting apathy in the press and public to removing baseball's antitrust exemption).

5. The scope of this article is limited to the federal antitrust laws generally, and in particular to Sections 1 and 2 of the Sherman Act, codified at 15 U.S.C. §§1 and 2 (1992), respectively.
MLB's status is unique. The other major professional sports in the United States, football, basketball and ice hockey, do not enjoy MLB's antitrust exemption. Thus, when making decisions regarding the granting and movement of franchises, leagues in other professional sports must adhere to the expanding body of sports antitrust case law. To understand how MLB's franchising decisions would be affected by the removal of its antitrust exemption, it is instructive to examine the foundation of MLB's exemption and then the application of the antitrust laws generally, and the Sherman Act in particular, to other professional sports leagues.

A. Major League Baseball's Antitrust Exemption

An exemption to the antitrust laws initially was created for MLB by the United States Supreme Court in the 1921 case Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs. In Federal Base Ball, several teams of a defunct league that had competed against the National and American Leagues sued those leagues claiming that they had monopolized, or attempted to monopolize, the business of baseball, thus violating Section 2 of the Sherman Act. In a cursory opinion, however, a unanimous Court determined that the National and American Leagues did not violate the Sherman Act because the antitrust laws did not have any application to professional baseball. The linchpin of the Court's opinion was that professional baseball did not involve interstate commerce.

7. The presidents of the National and American Leagues of Professional Base Ball Clubs (respectively, the "National League" and "American League"), the then Commissioner, and three former executives from the plaintiff, the Federal League of Professional Baseball Clubs ("Federal League") also were named as defendants in this suit. Id. at 207.
8. The allegation stated that the owners of the National and American League teams, the leagues' presidents and the Commissioner conspired with certain executives of the Federal League, including its president, to induce the teams of the Federal League to abandon it, leaving the plaintiff's team unaffiliated with a league. Id.
Section 2 of the Sherman Act provides that "[e]very person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States ... shall be deemed guilty of a felony ...." 15 U.S.C. §1 (1992). There exists a private right of action under Section 2, which entitles a successful plaintiff to treble damages. 15 U.S.C. §15(a).
10. Id. at 208-09. In arriving at his conclusion that baseball was a purely intra-state affair, the Court stated that
Since its decision in Federal Base Ball, the Supreme Court has twice revisited the issue of whether professional baseball was exempt from the antitrust laws. In 1953, in the case Toolson v. New York Yankees, Inc., the Court expressly upheld Federal Base Ball on the grounds that by refraining from taking action despite a clear opportunity to act, Congress had given its tacit approval to the exemption.\(^1\) Thus, in the Court's opinion, the decision of whether baseball was exempt from the antitrust laws was no longer the Court's, but Congress'.\(^2\) Similarly, in the 1973 case of Flood v. Kuhn, the Court maintained its reluctance to remove MLB's exemption and insisted that Congress determine whether the antitrust laws should apply.\(^3\)

Although the Supreme Court chose in Toolson and Flood to follow its decision in Federal Base Ball and uphold MLB's exemption, the foundation of those decisions appears to have eroded. First, in Toolson and Flood, the Court questioned, if not abandoned, the cornerstone of its Federal Base Ball decision, namely, that MLB is not interstate commerce.\(^4\) Second, in Flood, the

\(^{11}\) In order to attain for these exhibitions [of professional baseball] the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of their business[…] the transport [of such persons] is a mere incident [to the exhibition], not the essential thing. Id.

\(^{12}\) Toolson involved several suits brought by baseball players which challenged the system of reserve clauses in players' contracts, which gave the baseball clubs the exclusive and continuous rights to players' services. 346 U.S. at 362-63, 362 n.10 (Burton, J., dissenting). A reserve clause was included in every player's contract pursuant to the players' labor agreement. Id. at 362 n.10 (Burton, J., dissenting).

The Court in Toolson even extended the application of Federal Base Ball to Section 1 claims of the Sherman Act, alleging a restraint of trade. The players had alleged that the reserve clauses violated Sections 1 and 2 of the Sherman Act. Id. at 363 (Burton, J., dissenting). Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States […] is declared illegal." 15 U.S.C. §1 (1992).

\(^{13}\) Flood, 407 U.S. at 283 ("[p]rofessional baseball is a business and is engaged in interstate commerce."); Toolson, 346 U.S. at 364 (Burton, J., dissenting) ("[p]rofessional
Court expressed some concern that MLB was being treated differently than the other professional sports, that is, football, basketball, hockey, boxing and golf. Finally, the Court in Flood also recognized that changing circumstances, such as the expanding influence of the electronic media on sports, may require the Court to overrule Flood even if Congress does not address MLB's exemption. Since Flood, however, the Supreme Court has so modified the way in which the antitrust laws are applied, that it is uncertain whether a continued absolute exemption of professional baseball, by the Court or by Congress, would materially alter its current ability to choose the locations of its member teams.

B. Antitrust Treatment Of The Award and Relocation of Sports Franchises: How The Other Half Lives

One effect of MLB's antitrust exemption has been its ability to decide the number of its franchises, their locations and the ownership requirements without concern for interference from the antitrust laws. Other professional sports leagues, however,
have not enjoyed the explicit shield against liability that baseball has had.\textsuperscript{18} Although the number of cases that have addressed the issues of the relocations and awarding of franchises is small, a court has in at least one case denied a professional sports league the right to control the movement of an existing franchise. In order to evaluate the effect on MLB of losing its antitrust exemption, it is important to examine the latitude other professional sports leagues have had under Sections 1 and 2 of the Sherman Act.

1. Restraints of Trade: Sherman Act Section 1

Section 1 of the Sherman Act has been held to prohibit all unreasonable contracts, combinations or conspiracies in restraint of trade.\textsuperscript{19} A prima facie claim under Section 1 requires proof that (a) there is a contract, combination or conspiracy, (b) which unreasonably restrains trade, and (c) the restraint is in or affects interstate commerce.\textsuperscript{20} As the courts have held plainly that professional sports leagues other than baseball are in or affect interstate commerce,\textsuperscript{21} this analysis will focus on the other two factors.

(a) The Combination or Conspiracy Element

The first factor to consider is whether a league composed of independently owned sports franchises can contract, combine or conspire in violation of Section 1.\textsuperscript{22} On one hand, a league may

\textsuperscript{18} E.g., Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir. 1984) (football); San Francisco Seals, Ltd. v. National Hockey League, 379 F.2d 966 (C.D. Cal. 1974) (hockey).

\textsuperscript{19} Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911). 15 U.S.C. §1. For the text of Section 1, see supra, note 11.

\textsuperscript{20} See, e.g., Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

\textsuperscript{21} See supra, notes 10-15 and accompanying text.

\textsuperscript{22} In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), the Supreme Court distinguished Sherman Act Section 1 and Section 2 claims. The Copperweld Court said:

The Sherman Act contains a "basic distinction between concerted and independent action ...." The conduct of a single firm is governed by [Section] 2 alone and is unlawful only when it threatens actual monopolization .... Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination or conspiracy" between separate entities. It does not reach conduct that is "wholly unilateral." Id. at 767-68 (citations omitted) (emphasis in original).
be viewed as a single entity pursuing a single purpose; on the other, it may be viewed as a group of independent entities, each pursuing different, competing purposes. Section 1 prohibits concerted action by the latter which unreasonably restrain trade; it does not apply to single entities.23

There are three reported cases in which sports league relocation rules were challenged under the antitrust laws. In *San Francisco Seals, Ltd. v. NHL*, the NHL's practice that a team seeking to relocate secure unanimous league approval was upheld.24 In *Seals*, the owner of the California Golden Seals, San Francisco Seals, Ltd. ("Seals"), had the NHL's exclusive franchise for the San Francisco Bay area.25 After operating in San Francisco for several years, the Seals sought to move the franchise to Vancouver, British Columbia.26 The NHL's constitution, however, prohibited the movement of a franchise, so the Seals asked to exchange the franchise for a new franchise in the Vancouver area.27 To effectuate this exchange, the constitution required the Seals to receive the approval of three-quarters of the league's members.28 When the Seals failed to get such approval, they sued the NHL and its members under the Sherman Act.29

To determine whether the Seals had a valid claim, the United States District Court for the Central District of California considered whether the NHL was a single entity and thus, could

23. See United States v. Colgate & Co., 250 U.S. 300 (1919); see also Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 774-775 (1984) ("the Sherman Act ... leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to §1 liability."); American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946) ("[a conspiracy requires] a unity of purpose or a common design and understanding, a meeting of the minds in an unlawful arrangement.").
25. Id. at 968.
26. Id. The reasons the Seals gave for wanting to move was that they believed that Vancouver offered larger live gate revenues. Id. at 969.
27. Id. at 967-68.
28. Id. at 968. Section 4.2 of the NHL's constitution said, in relevant part, that "[n]o member shall transfer its club and franchise to a different city or borough. No additional cities or boroughs shall be added to the League circuit without the consent of three-fourths of all the members of the League." Id.
29. Id.
not be sued under Section 1.\textsuperscript{30} Important to the \textit{Seals} court was the fact that the Seals were a member of the NHL and sought to participate with the NHL, not compete against it.\textsuperscript{31} As the court noted, the franchise and the NHL had one single business enterprise, were competing together against other professional leagues, and thus, had to be considered as a single entity.\textsuperscript{32}

The \textit{Seals} approach, however, was rejected by the Ninth Circuit ten years later in the well known \textit{Raiders} case,\textsuperscript{33} the only case in which a sports league relocation decision was successfully challenged. In \textit{Raiders}, Al Davis, owner of the then Oakland Raiders of the National Football League ("NFL"), an unincorporated association, sought to move his franchise to the Los Angeles Coliseum, which was within the territory reserved for the Los Angeles Rams.\textsuperscript{34} The other NFL owners vetoed the move pursuant to the NFL's constitution, which required a supermajority vote to approve the relocation.\textsuperscript{35}

Davis, the Raiders and the Los Angeles Coliseum sued the NFL claiming that it impermissibly conspired to restrain trade in violation of Section 1 of the Sherman Act.\textsuperscript{36} The NFL defended on the grounds that it was a single entity and thus was incapable of conspiring to restrain trade.\textsuperscript{37} The Ninth Circuit, however, disagreed and determined that the NFL was not a joint venture but a combination of separate business entities.\textsuperscript{38} Although the entities worked toward a common goal, each entity was held to sell a product with a value independent of the products of the others.\textsuperscript{39}

The \textit{Seals} case differed from the \textit{Raiders} case in two respects. First, the Seals had sought to move to an area where there was

\begin{itemize}
  \item \textsuperscript{30} \textit{Id.} at 969. It is unclear from the district court's opinion whether it raised the issue \textit{sua sponte} or whether the NHL raised the issue as a defense.
  \item \textsuperscript{31} \textit{Id.}
  \item \textsuperscript{32} \textit{Id.}
  \item \textsuperscript{33} \textit{Los Angeles Memorial Coliseum Comm'n v. National Football League}, 726 F.2d 1381 (9th Cir. 1984).
  \item \textsuperscript{34} \textit{Id.} at 1384.
  \item \textsuperscript{35} Section 4.3 of the NFL's constitution stated that "[a]ny transfer of an existing franchise to a location within the home territory of any other club shall only be effective if approved by a unanimous vote ... of the member clubs of the League." \textit{Id.} at 1385 n.1.
  \item \textsuperscript{36} \textit{Id.} at 1389.
  \item \textsuperscript{37} \textit{Id.} at 1387.
  \item \textsuperscript{38} \textit{Id.}
  \item \textsuperscript{39} \textit{Id.} at 1387-90.
\end{itemize}
no existing franchise while the Raiders sought to move to an area where a franchise was in place. Second, perhaps for that reason, the *Seals* court did not address in detail the relevant product and geographical markets in which the NHL competed, whereas the *Raiders* court did when discussing the NFL. In *Seals*, the court established as a preliminary matter the NHL’s relevant product and geographical markets following *United States v. E.I. DuPont de Nemours & Co.*, (products that are reasonably interchangeable by consumers are in related markets), and *Brown Shoe* (products may also be in related markets when sales of one product have an effect on sales in another product). The *Seals* court determined conclusorily that the relevant product market for the NHL was the production of professional hockey games before live audiences, and the relevant geographical market was the United States and Canada.

The Ninth Circuit in *Raiders* also relied on the *DuPont* and *Brown Shoe* standards for determining the league’s relevant product and geographic markets. The *Raiders* court also appears to have accepted the *Seals* court’s position that the relevant product market was a professional sport played by the league, or football in *Raiders*. Yet on the issue of the relevant geographic market, *Raiders* and *Seals* differ sharply. In *Raiders*, the Ninth Circuit implicitly rejected the *Seals* analysis that determined the market to be the entire United States, and instead it focused on the potential for competition between franchises in the more limited market of southern California. The Ninth Circuit found it important that the NFL, through its constitution and through its policies, deliberately tried to limit the number of franchises in

40. 379 F. Supp. at 968-69.
41. Id. (quoting United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 395 (1956)).
42. Id. at 969 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (describing the cross-elasticity of demand)).
43. Id.
44. 726 F.2d at 1392-93.
45. Id. at 1993. As mentioned supra, the owners of the Coliseum also brought an antitrust claim against the NFL. Regarding that claim, the Ninth Circuit determined that the relevant product was NFL franchises that were potential tenants, which was what the Coliseum sought, and the relevant geographic market was the United States. Id.
46. Id. at 1393-94. The Ninth Circuit treated the coliseum’s claims differently, determining that the relevant product was NFL franchises and the relevant geographic market was the United States. Id.
particular territories, thus acknowledging that competition took place in a market that was smaller than the United States.47

Just a year before Raiders, the Third Circuit adopted an approach to combination and conspiracy closer to that of Seals than that of Raiders. Unlike Raiders and Seals, Mid-South Grizzlies v. National Football League concerned not the relocation of an existing franchise, but a petition for a non-league team to join the league.48 The Grizzlies, a professional football club previously associated with the defunct World Football League ("WFL"), sought admission to the NFL.49 The Grizzlies were located in Memphis, and the closest NFL franchise was located more than two hundred miles away in St. Louis.50 The NFL, however, refused to admit the Grizzlies and the club sued the league alleging in part that the NFL had violated Section 1.51 As a defense, the NFL claimed that it was a "single entity" joint venture.52

Taking its cue from Seals, the Third Circuit held in Grizzlies that the NFL was a single entity and, therefore, could not violate Section 1.53 The Third Circuit recognized that within some markets and in certain situations, there may exist non-athletic competition among franchises in which case the NFL could not be viewed as a single entity.54 The Third Circuit specifically noted that analyzing the NFL as a single entity would be inappropriate in the situation where a potential owner was seeking to place a new franchise in an area already served by an existing franchise.55 The court determined, however, that with regard to a potential site for a franchise which did not compete with any existing

47. Id. at 1393-94.
49. Id. at 776.
50. Id. at 787.
51. Id. at 776. The Grizzlies also alleged that the NFL teams participated in a group boycott to prevent the Grizzlies from playing professional football, which also is a violation of Section 1. Id. at 783 n.6. This claim of a group boycott, however, was not brought before the Third Circuit. Id.
52. Id. at 787.
53. Id. at 786-87. Curiously, the Third Circuit did not expressly decide the issue of single entity but it did raise and discuss it. See id. at 786.
54. Id. at 786-87.
55. Id. at 787. Cf. United States v. Topco Associates, Inc., 414 U.S. 801 (1972) (permitting a cooperative association of independent regional supermarkets to coordinate their activities as long as such activities did not promote territorial exclusivity).
franchise, the NFL's franchises must coordinate their actions with each other, and thus, had to be considered a single entity.66

The district court's decision in Seals, the Third Circuit's decision in Grizzlies and the Ninth Circuit's decision in Raiders can be harmonized. Seals and Grizzlies suggest that sports leagues be considered as single entities in situations involving interleague competition whereas Raiders suggests that courts look beyond the leagues to their components, the other franchises, in cases involving intraleague competition. The weakness of this interpretation, however, is that it fails to explain why franchise owners' interests would be mutual when the move or award is to a territory not currently occupied by another franchise and adverse when deciding whether to approve the relocation of a team to an area reserved for an existing franchise.57

(b) The Unreasonable Restraint Issue

The second factor in determining whether a league violates Section 1 of the Sherman Act is whether a given restraint unreasonably restrains trade. The United States Supreme Court has stated that the Sherman Act only reaches those restraints that are unreasonable.8 In determining whether a restraint is reasonable, the Supreme Court applies one of two tests, the Rule of Reason test or the per se illegal test. The Rule of Reason test compares the anticompetitive consequences of a given restraint...

56. Id.

57. It is arguable that the interests of the franchise owners become more closely aligned when the issue involves the movement or award of a franchise in the territory reserved for an existing franchise. No owner would vote for a move or an award in another's territory out of fear that the same could be done to his territory.

58. Standard Oil, 221 U.S. at 58. The Supreme Court has determined that only when a restraint promotes competition is it reasonable and thus permitted under Section 1. See, e.g., National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691 (1978) (Rule of Reason analysis requires determination whether restraint "is one that promotes competition or one that suppresses competition."). Furthermore, the Court requires that any restraint be evaluated based upon its impact on competition, both in terms of its impact on competitive products and on similar products in the same geographical market. E.g., United States v. Columbia Steel Co., 334 U.S. 495, 519 (1948). The Court recognizes, however, that products and markets are sufficiently varied to preclude using a single standard list of indicia and criteria to determine whether a given restraint of trade is reasonable. See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (market for men's shoes distinct from markets for women's and children's shoes because not all shoes interchangeable); United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 395 (1956) ("[t]he varying circumstances of each case determine the result.").
with its procompetitive impact and business justifications. The per se illegal test prohibits those restraints that are so pernicious so regularly that the court's effort to discover procompetitive aspects in any given case is not justified. For per se illegal restraints, a plaintiff does not have to establish the restraint's unreasonableness, but simply whether the restraint has occurred at all.

Horizontal restraints are restraints among direct competitors. They include agreements to fix prices, limit output, divide markets, allocate customers or otherwise set the rules of competition. Such restraints generally have been considered per se illegal. The Supreme Court, however, has acknowledged that in the case of sports leagues, certain types of joint action by league franchises may have procompetitive justifications.


61. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1977); see Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979) ("[the] inquiry must focus on whether the effect and ... the purpose of the practice are to threaten the proper operation of our predominantly free-market economy — that is, whether the practice facially appears to be one that would always or almost tend to restrict competition and decrease output, ... or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'") (quoting United States v. United States Gypsum Co., 438 U.S. 332, 334 n.16 (1978)).


63. Id.


65. See National Collegiate Athletic Ass'n v. Board of Regents, 486 U.S. 85, 101 (1984) (Rule of Reason invoked because association of competing college football teams is "industry in which horizontal restraints on competition are essential if the product is to be available at all."); cf. Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1395-98 (9th Cir. 1984) (invalidating NFL rule requiring approval of three-quarters of teams before one team could move into territory of another), cert. denied, 469 U.S. 990 (1984); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 504 (E.D. Pa. 1972) (court struck down league rule that "had a serious anticompetitive effect and did not serve any legitimate purposes that could not be achieved by less restrictive means.").

Courts have upheld sport leagues' decisions disciplining players and owners. See, e.g., M&H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 980 (1st Cir. 1984) (stating that "in the sports area various agreed-upon procedures may be essential to survival" and holding that it was reasonable to require all auto racing competitors to use the same tire where the tire was picked in a competitive process); Smith v. Pro Football, Inc., 593
The Seals and Grizzlies courts did not have to address the issue of whether the respective leagues unreasonably restrained trade because both courts had determined that since the league was a single entity, no combination or conspiracy in restraint of trade was possible. The Raiders court, however, did address the issue of unreasonableness. At issue was a provision in the NFL's constitution which required any franchise seeking to move its team to another city to have prior approval from three-fourths of the league's franchise owners. The NFL claimed that it needed to restrict the movement of teams because such restriction (1) allowed the league to spread itself throughout the country and serve a variety of markets, (2) allowed new franchises the opportunity to become financially secure, (3) induced fan loyalty, which promoted the product of professional football, (4) protected local communities that invest in stadiums and other facilities to accommodate the franchises, and (5) allowed the franchises in the league to make joint marketing decisions, which were important to the league's television contracts.

The court accepted the NFL's various arguments that territorial divisions were beneficial. It found, however, that those benefits could be achieved by less restrictive means, most notably in the adoption of objective criteria the league would use in determining whether a franchise move was acceptable. Thus,

F.2d 1173, 1179 (D.C. Cir. 1978) (stating that “cooperation is essential” for the success of a sports league, though still holding the NFL player draft unreasonable); North Am. Soccer League v. NFL, 465 F. Supp. 665, 674 (S.D.N.Y. 1979) (stating that “members of a professional team sports league are more like economic joint ventures than competition”).

Courts have also upheld league rules that regulate the type of equipment participants may use. See, e.g., M&H Tire Co., 733 F.2d at 979-80 (regulating tires in auto racing); Gunter Harz Sports, Inc. v. United States Tennis Ass’n, 511 F. Supp. 1103 (D. Neb. 1981) (regulating racquets in tennis), aff’d, 665 F.2d 222 (8th Cir. 1981) (per curiam). Finally, courts have upheld league rules that establish eligibility requirements for players. Neeld v. National Hockey League, 594 F.2d 1297, 1300 (9th Cir. 1979) (barring player with one eye from league because of concern for safety of other players upheld); Hailey v. American Quarter Horse Ass’n, 552 F.2d 646, 652-53 (5th Cir. 1977) (rule concerning markings on quarterhorse to qualify for breed certification held not unreasonable).

67. For a discussion of the general facts involving Raiders, see supra, notes 33-47 and accompanying text.
68. Id. at 1395-96.
69. Id. at 1396.
70. Id. at 1395-96. The NFL claimed that even though its constitutional provision was a territorial restraint, it was permissible under the ancillary restraint doctrine. Id. at 1395. Ancillary restraints usually appear in employment contracts as covenants not to
the Ninth Circuit held that the franchise move provision in the NFL's constitution was an unreasonable restraint of trade.\(^{71}\)

Without question, there is a paucity of cases discussing the issues of awarding and relocating franchises in the context of Section 1 of the Sherman Act. It appears, however, that courts allow professional sports leagues greater discretion in cases where the destination of the franchise is a community not currently served by that league than in cases where the destination is a community where there is already a franchise. This rationale is more descriptive than persuasive. Furthermore, only the Raiders case discusses the criteria that would apply to determine whether a sports league is acting reasonably in making a determination to prevent a move.

2. Monopoly Power: Sherman Act Section 2

Although many of the claims brought against sports leagues involving restrictions on franchise moves and the granting of league franchises have involved Section 1 of the Sherman Act as restraints of trade, some claims have also involved Section 2, which involves monopolies. Section 2 of the Sherman Act prohib-

\(^{71}\) 726 F.2d at 1298.
its persons from monopolizing, attempting to monopolize or con-
spiring to monopolize any part of interstate trade or commerce. 72
The Supreme Court has defined monopoly power as the power
to control prices and exclude competition. 73 A prima facie case
under Section 2 requires proof that the defendant (1) possess
monopoly power in a relevant market and (2) willfully maintain
such power. 74 Furthermore, to violate Section 2, a defendant must
intend to acquire its monopoly power or, 75 if already acquired, to
use it to restrain competition. 76 It is not a Section 2 offense to
acquire or maintain monopoly power by means of a superior
product, business acumen or by historical accident. 77

Claims under Section 2 generally allege that a league has or
is attempting to acquire monopoly power with the purpose of
discouraging new teams and leagues from competing against it.
In Seals, a case involving the movement of an existing franchise,
the Seals, alleged that the NHL attempted to monopolize the
business of major league hockey by attempting to discourage the
formation and growth of rival leagues in the Vancouver area. 78

The Seals court, however, never determined whether the NHL
violated Section 2 because it first decided that the Seals did not
have standing to bring such a claim. 79 According to the Seals
court, in order to have standing to bring a Section 2 claim, the
Seals had to allege that the team's business had been injured
and that such injury was caused by the NHL's actions. 80 As the
court recognized, the Seals team was not a competing league nor
a competitor to the NHL, but rather, the Seals sought the NHL's
monopolistic protection. 81 Thus, it did not have standing to bring
a Section 2 claim against the NHL. 82

In comparison to Seals are two cases that addressed a Section
2 claim brought by a team that failed to receive a franchise from
a professional sports league. In *Grizzlies*, the Grizzlies' Section 2 claim summarily was dismissed by the Third Circuit because Congress had specifically permitted the NFL's monopoly.\(^8^3\) In *Seattle Totems Hockey Club, Inc. v. National Hockey League*, however, the Ninth Circuit adopted reasoning similar to the district court's language in *Seals* and dismissed the Section 2 claim.\(^8^4\)

The Totems, located in Seattle, were a team in the Western Hockey League ("WHL"), a league of minor league teams.\(^8^5\) The Totems and the other members of the league sought entry into the NHL and entered into an agreement whereby the NHL promised to give the WHL one-half of all new franchises if it expanded before 1976.\(^8^6\) The Totems alleged that they gave up the opportunity to join a league that competed with the NHL, the World Hockey Association ("WHA") in order to enter the NHL.\(^8^7\) The NHL never expanded and the Totems and the WHL eventually folded. The Totems sued the NHL alleging that the league was attempting to monopolize major professional hockey, thus violating Section 2 of the Sherman Act.\(^8^8\)

The Ninth Circuit denied the Totems' claim.\(^8^9\) According to the court, the Totems' claim was filed because the Totems were seeking to join the NHL, rather than compete against it.\(^9^0\) Furthermore, the Ninth Circuit, relying on and expanding its decision in *Raiders*, stated that the Totems had to demonstrate that the NHL was attempting to protect an existing franchise.\(^9^1\) Since no NHL franchise existed in Seattle, the Totems' allegation failed.\(^9^2\)

The *Seals* and *Totems* cases addressed the issue of monopolization in the contexts of the movement of franchises and franchise awards to communities which, at the time, did not have an existing franchise. But, the *Totems* court further noted that a sports league may violate Section 2 if it attempts to use or gain

\(^8^3\) 720 F.2d at 788.
\(^8^4\) 783 F.2d 1347 (9th Cir. 1986).
\(^8^5\) Id. at 1349.
\(^8^6\) Id.
\(^8^7\) Id.
\(^8^8\) Id. at 1349-50.
\(^8^9\) Id. at 1349.
\(^9^0\) Id. at 1350. Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (purpose of antitrust laws is not to protect competitors but competition).
\(^9^1\) Totems, 783 F.2d at 1350 (citing Raiders, 726 F.2d at 1381) (violation of antitrust laws to restrict entry of one NFL team into territory reserved for another).
\(^9^2\) Id.
monopoly power to the detriment of another league. In *Hecht v. Pro-Football, Inc.*, the NFL was alleged to have restrained trade with a competing league because it had an exclusive lease on the only available stadium in the franchise area. An owner of the NFL's Washington Redskins was alleged to have prevented the owner of a competing league's franchise from using the RFK Stadium, the only suitable site in the Washington market.

The plaintiff charged that the Redskins franchise had violated Section 1 of the Sherman Act because it refused to share this "essential" RFK facility on fair terms. The court of appeals held that failing to share the stadium constituted a Section 1 violation. It declared that when a facility is indispensable to a competitor because duplication of such a facility is economically infeasible and sharing the facility would not be impractical, then the facility must be shared on reasonable terms with the new market entrant.

Predatory practices by a league with an existing monopoly to the detriment of a competing league have also been considered actionable in the context of sports franchises. In *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, the United States District Court for the Eastern District of Pennsylvania considered whether the dominant league's expansion at the time a competing league was forming, together with the dominant league's control of the supply of players, may be considered as monopolization in violation of Section 2 of the Sherman Act.

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93. See id. at 951, 951 n.4.
94. 570 F.2d 982 (D.C. Cir. 1977).
95. 570 F.2d 982, 986-87 (D.C. Cir. 1977). The owner of the franchise from the competing league also alleged a claim under Section 2 of the Sherman Act. Id. at 990.
96. Id. at 992.
97. Id. at 993.
98. Id. at 992-93. See Mid-South Grizzlies v. National Football League, 720 F.2d 772, 788 (3d Cir. 1983) (claim under essential facilities doctrine fails when plaintiff fails to show that competition will be improved if allowed to share in monopoly power), cert. denied, 467 U.S. 1215 (1984).
In Philadelphia Hockey, NHL had an agreement with the players' union that provided for reserve clauses in all players' contracts. The NHL also had contracts with all of the minor professional leagues in North America and with the three most competitive amateur hockey leagues.100 The WHA was formed in the early 1970s as a competing league to the NHL. Naturally, this competition extended to vying for players' rights.

The WHA alleged that the NHL's contracts with its players and the minor leagues and its expansion program at the time the WHA was forming had prevented the WHA from competing fairly with the NHL.101 After finding that the NHL possessed monopoly power, the district court stated that its contracts with its players and the minor leagues and its expansion program established that the NHL had wilfully acquired and maintained its monopoly power, thus violating Section 2 of the Sherman Act.102

As is the case with Section 1 claims, there are few cases which discuss Section 2 claims in regard to the relocation and awarding of professional sports franchises. Those courts that have addressed those issues, however, have clearly held that groups attempting to acquire a franchise and join the league do not have standing to sue under Section 2 because they are not seeking to compete with the league. The only permissible claims under Section 2 are those from competing leagues and from teams in such leagues.

II. THE CONGRESSIONAL RESPONSE

While courts have entertained challenges to franchising decisions in other professional sports under Sections 1 and 2 of the Sherman Act, Major League Baseball, armed with the Federal Base Ball decision and its progeny, has remained above the fray. Under a bill recently introduced in the Senate, however, MLB would be subject to the antitrust laws just as other sports leagues are.

100. Id. at 478-86 (discussing the NHL's contracts with the various minor leagues, professional and amateur).

101. Id. at 487-89 (discussing the NHL's expansion program). The NHL had six teams from 1942 to 1967, at which point it expanded to fourteen teams. Id. at 486. In the next two years, that is, the time when the WHA was forming, the league expanded to sixteen teams. Id.

102. Id. at 510.
Senate Bill 500, the “Professional Baseball Reform Act of 1993” (“Baseball Reform Bill”), was introduced on March 4, 1993, by ten senators including Senator Howard Metzenbaum of Ohio, and Senators Bob Graham and Connie Mack of Florida. The Reform Act provides that “the business of professional baseball is in, or affects, interstate commerce....” This would effectively countermand the Supreme Court’s decision in Federal Base Ball, which excepted MLB from the antitrust laws on the grounds that MLB did not involve interstate commerce.

The Reform Act applies to “professional baseball:"

The Clayton Act is amended by adding at the end the following new section: 'Sec. 27. Except as provided in [The Sports Broadcasting Act of 1961], the antitrust laws shall apply to the business of organized professional baseball.’

The definition of “professional baseball” conceivably extends beyond MLB to include professional minor leagues as well. The Reform Act further provides that the antitrust laws do not apply to conduct occurring before its enactment.

The terms of the proposed Act do not of themselves portend a radical change in the ability of MLB to govern the expansion and location decisions of its clubs. The two sections together place professional baseball on equal footing with other sports in terms of potential antitrust liability. The foregoing cases demonstrate that absent predatory practices as in Hecht or Philadelphia Hockey, professional sports leagues are able to coordinate schedules, draft players, contract for facilities with cities, and expand without a significant fear of antitrust liability. A summary

104. Id. § 2(1).
107. S. 500, supra § 3 (“The Clayton Act is amended by adding at the end the following new section: ‘Sec. 27. Except as provided in [Sports Broadcasting Act of 1961], the antitrust laws shall apply to the business of organized professional baseball.’” (Citations omitted)). The Sports Broadcasting Act of 1961, Pub. L. 87-331 (currently codified at 15 U.S.C. §§ 1291-1295), permits organized sports franchises to combine to negotiate television broadcasting rights.
of the likely effect of current antitrust case law on baseball follows.

III. THE EFFECT OF APPLYING CURRENT ANTITRUST CASE LAW

For Section 1 liability, there is a split in the circuits as to whether a conspiracy is possible within the league, but conspiracy has been found only where one team seeks to move into another's territory. No conspiracy has been found where outside teams wish to enter the league. Restraints have been found unreasonable where legitimate goals of cooperation could have been achieved through less restrictive means, but again only where one team sought to invade another's market. Even so, the Raiders court applied the rule of reason in recognizing a series of legitimate beneficial goals of cooperation.

For Section 2 liability, leagues are shielded from liability from would-be entrants in that plaintiffs wish to share in, not break up, the alleged existing monopoly power and thereby lack antitrust injury and standing to sue. Predatory practices against rivals can incur Section 2 liability, but only where the effect of the practice is to quash an existing local rival team or where the dominant league employs restrictive player contracts and expands into key markets at the specific time a rival league is seeking to establish itself. Conspicuous by its absence is any challenge by the Federal Trade Commission or the Department of Justice to league practices in the awarding or location of franchises.

Thus even if the antitrust cases on the books were applied to MLB as prescribed in the Reform Act, the impact on MLB's practices in the awarding or location of franchises would be minimal. Judge Bork cogently states the reason for the lack of a successful challenge to sports league franchising decisions:

111. *Raiders*, 726 F.2d 1381 (9th Cir. 1984); and *Grizzlies*, 720 F.2d 772, 786 (3d Cir. 1983).
112. *Raiders*, 726 F.2d 1381 (9th Cir. 1984).
113. *Id.*; *Seals*, 379 F.2d 966 (C.D. Cal. 1974).
114. *Raiders*, 726 F.2d 1381 (9th Cir. 1984).
115. *Id.*
116. *Totems*, 783 F.2d 1347 (9th Cir. 1986); and *Seals*, 379 F.2d 966 (C.D. Cal. 1974).
Agreements to refuse to deal are essential to the effectiveness and sometimes to the existence of many wholly beneficial economic activities. All league sports from the Ivy League to the National Football League, an increasingly wider spectrum, rest entirely upon the right to boycott. Members of the league agree not to play with nonmembers or to limit the number of games with nonmembers. Were leagues denied the power to enforce such agreements, they would have to admit any and all applicants, regardless of qualifications or the manageable size of the league. No court is likely to hold that every sandlot team in America is given a right by the Sherman Act to play baseball in the American League. The league would be destroyed.

* * *

The explanation for the legality of these group refusals to deal is that they benefit consumers by enhancing the efficiency of the organizations adopting them. 119

Judge Bork's insight into the intrinsic nature of the business of competitive sport was adopted by the Supreme Court when rejecting the per se rule and adopting the rule of reason in NCAA v. Bd. of Regents of the University of Oklahoma: 120

Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal per se" approach because the probability that these practices are anticompetitive is so high; a per se rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." ... Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

As Judge Bork has noted: "[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a

120. 468 U.S. 85 (1984) College Football Association of some 60 major college football powers challenged NCAA sanctions preventing them from negotiating a more lucrative television contract than the NCAA had imposed on them. NCAA's restrictions were so narrow as to even violate the rule of reason standard announced for sports enterprises in that case. While the hundreds of NCAA member schools were restricted to a handful of television appearances over a multi-year cycle, the 28 Major League teams can be seen on two broadcast networks, ESPN, the "Superstations," local market stations and on cable. While the legal standard announced in NCAA is the appropriate one to apply to league sports, the restrictive television arrangement at issue in NCAA could not be more different from the numerous opportunities for fans to see MLB teams from across the country on television.
league of professional lacrosse teams is formed, it would be point-
less to declare their cooperation illegal on the ground that there
are no other professional lacrosse teams." R. Bork, The Antitrust
Paradox. What the NCAA and its member institutions market in
this case is competition itself—contests between competing insti-
tutions. Of course, this would be completely ineffective if there
were no rules on which the competitors agreed to create and
define the competition to be marketed.121

All sports league cases noted thus far, save one,122 must thus
be interpreted in light of the Supreme Court’s most recent
standard on intrinsically cooperative behavior by sports leagues.
The Supreme Court in NCAA, however, goes beyond simply
recognizing the necessity of cooperative behavior in sports leagues.
In discussing how the conduct of the NCAA is procompetitive
under the Rule of Reason, the Court recognizes that cooperation
among sports leagues or associations of teams can create a unique
product that might otherwise be unavailable:

[The NCAA seeks to market a particular brand of football—college
football. The identification of this “product” with an academic
tradition differentiates college football from and makes it more
popular than professional sports to which it might otherwise be
comparable, such as, for example, minor league baseball.... [T]he
NCAA plays a vital role in enabling college football to preserve
its character, and as a result enables a product to be marketed
which might otherwise be unavailable. In performing this role, its
actions widen consumer choice—not only the choices available to
sports fans but also those available to athletes—and hence can be
viewed as procompetitive.123

Certainly Major League Baseball is a product with tradition
and quality that differentiate it from other sports. Major League
Baseball “plays a vital role” in enabling a product to be marketed
which might otherwise be unavailable and thus widens consumer
choice.

Beyond having little if any positive effect on MLB, the Reform
Act may in fact have several adverse effects. If permitted to
control the growth and placement of its franchises, MLB can

121. NCAA, supra note 65, 486 U.S. at 100-101, (quoting Broadcast Music, 441 U.S. 1
at 19-20, and Bork, supra note 119, at 278).
122. Totems, 783 F.2d 1347 (9th Cir. 1986), is governed by and consistent with NCAA.
123. NCAA, supra note 65, 486 U.S. at 101.
better preserve the rivalries among teams. As the Ninth Circuit acknowledged in *Raiders*, rivalries among fans in different cities is critical to the interest in professional sports.\(^{124}\) Allowing leagues the right to control the movement of franchises also discourages cities from building stadiums with taxpayer money when such cities have no guarantee that there will be tenants to occupy them.\(^{125}\)

Finally, limiting franchise relocations forces team owners to develop the market for which such franchises were awarded. The threat of treble damages would surely chill MLB's legitimate efforts to restrict the movement of franchises. This appears to be the legacy of the *Raiders* decision in the case of other professional sports. Even though *Raiders* acknowledges that sports leagues can place certain controls on the movement of franchises, the unwillingness of the NFL to stop the notorious relocations of the Baltimore Colts and the St. Louis Cardinals, and the NHL's refusal to keep the North Stars in Minneapolis, suggest that sports leagues today would rather appease individual team owners seeking more lucrative markets than insist on franchise stability at the risk of a legal challenge.

In the end, markets which consistently fail to support their MLB teams will lose them, whether MLB franchising decisions

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\(^{124}\) Professional teams must play against each other frequently enough to foster such rivalries. When additional franchises are added to a league, the teams necessarily have fewer games among one another. A league that reduces the number of games that each team has with each of the others weakens the rivalries which it needs to promote its product. Alternatively, a league must increase the number of games. To do so may, however, dilute fan interest or extend the baseball season into other sports seasons.

\(^{125}\) The costs of building and maintaining stadiums can be staggering even when occupied. SkyDome cost the citizens of Toronto more than C$500 million to build, and despite a metropolitan population of 3.8 million, the highest attendance in professional baseball for the past several years, and the tenancy of two professional sport franchises, Torontonians are forced to subsidize SkyDome each year. St. Petersburg, Florida, built the $140 million Suncoast Dome in an attempt to be more attractive than Miami and Orlando, Florida, as a venue for an MLB franchise. Its citizens are now forced to pay several million dollars per year to maintain it. Only those stadiums for which there are guaranteed tenants should be built. Allowing MLB the unfettered right to restrict the movement of its franchises only reinforces this public policy by increasing the cities' potential losses on the stadiums.

MLB has placed new franchises in cities with minor league ball parks on the understanding that newer and larger facilities will be built. The Toronto Blue Jays played in an old football stadium, Exhibition Stadium, from 1977, the team's first year in the American League, to June 5, 1989, when it moved to the SkyDome. The Montreal Expos played in Park from 1969, the team's first year in the National League, to 1973, when the team moved to Olympic Stadium.
are protected or not. The MLB exception permits league rules to insure that such moves are made on the basis of genuine long term trends among fans rather than upon temporary downswings in attendance combined with an eager checkbook and a greedy owner. As Judge Easterbrook observes, "markets slowly but surely undermine practices that injure consumers. Competition does not undermine judicial decisions so the cost of wrongfully condemning a beneficial practice may exceed the cost of wrongfully tolerating a harmful one."  

It appears then, that existing sports league precedent under the Sherman Act offers little chance that the Reform Act will result in the rapid expansion of MLB as the Reform Act's sponsors claim. Beyond that, even if MLB's antitrust exemption were repealed and a colorable Sherman Act allegation could be made, the courts have shown great flexibility in their application of the antitrust laws to unique products with unusual consumer appeal. Where that consumer appeal or benefit is necessarily rooted in the practice giving rise to the allegation, such as the cooperation among teams inherent in franchising decisions, the courts have eschewed a mechanistic application of the antitrust laws.

For example, in Broadcast Music, Inc. v. CBS, Inc., a blanket licensing agreement for copyrighted songs (whereby the purchaser of the blanket license was entitled to use all songs marketed through BMI) was alleged to have been a horizontal price fixing agreement. Ordinarily, such a restraint would be per se illegal; thousands of copyrighted works were marketed jointly at a fixed price. Nonetheless, in upholding the practice, Justice White pointed to the lowering of costs and the benefits to the consumer occasioned by the arrangement:

This substantial lowering of costs ... differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is,


Professor Areeda has argued the same point: "Unlike the defendant, [judges and juries] do not suffer for their mistakes, which have no tendency toward self-correction in the marketplace." PHILIP A. AREEDA, ANTITRUST LAW, 856 (1992 Supplement).
128. Id. at 5.
129. Id. at 4.
to some extent, a different product. The blanket license has certain unique characteristics: it allows the licensee immediate use of covered compositions without the delay of prior individual negotiations, and great flexibility in the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of this marketable package, and even small performing-rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses.\textsuperscript{130}

Certainly Major League Baseball can be considered a whole greater than the sum of its parts, a different product with unique characteristics that consumers clearly prefer.\textsuperscript{131} Certainly the franchising practices of Major League Baseball take care to present to the public high quality entertainment, the value of which does not evaporate after one visit to the ball park or one telecast viewed with the family, but endures for decades. Individual clubs may, by the intrinsic nature of athletics, endure slumps or lose key players which may cause temporary attendance declines for clubs like the Pittsburgh Pirates. But every fan within 100 miles of Three Rivers Stadium knows the very curvature of the outfield wall over which Bill Mazerowski launched his Series-winning homer in 1960, because 30 years after the homer and 20 years after the Pirates moved to Three Rivers Stadium and the rest of Forbes Field was demolished, the wall is preserved as a monument.

Such tradition and devotion cannot be reproduced in a new city should the highest bidder spirit the team away unchallenged during a temporary decline in fortunes. Nor, if teams are able to force entry into a league at will, can the faithful be stirred to come root against fly-by-night teams of dubious quality. Team loyalty sufficient for a successful franchise must be developed over time, taking care not to dilute the available player talent, so that fans may always enjoy high quality competition. The successes of the expansion teams, the Mets in 1969, the Royals in 1985, and the Blue Jays in 1992, demonstrate the effectiveness of Major League Baseball's expansion policies. Through its franchising decisions, MLB, mindful of the unique nature of its product, has safeguarded the tradition of high quality athletics as player development and marketing potential permit.

\textsuperscript{130} Id. at 21-22.
\textsuperscript{131} Cf. Id.
Broadcast Music's recognition that a consumer convenience that might be technically termed a proscribed practice should nonetheless be permitted in view of its consumer benefits is echoed in *Principe v. McDonald's Corp.* In *Principe*, involving an allegedly illegal tie-in under Section 3 of the Clayton Act, the Fourth Circuit observed that the McDonald's restaurant chain offered the public a system of services including "site selection, ... the building of the stores by McDonald's, and substantial investment by both McDonald's and its franchisee" and that the system was essential to the success of local restaurants in providing family dining. Certainly site selection and investment by MLB are essential to a system whereby the local MLB clubs offer high quality family entertainment.

A final example of the courts' flexibility in accommodating means of competition that may be technically viewed as violations of existing antitrust standards is the series of so-called *IBM Peripherals Cases.* Suits were filed under Section 2 of the Sherman Act by a number of IBM's competitors challenging IBM's design and sales policies allegedly intended to stem the rise of so-called peripheral products that were "plug compatible" with IBM mainframe computer systems. In response to the inroads made by these firms, IBM substantially cut prices, moved from 30-day to long-term leases with cancellation penalties to reduce the demand available to competitors and "bundled" previously separate units to combat the use of competitors' interfacing units.

In rejecting the plaintiffs' claims, the Ninth and Tenth Circuits upheld all three practices and in so doing set a dramatic new course for the courts under Section 2. In the courts' view, no longer was it necessary to protect small firms from the competitive advantages of larger firms, which was implicit in earlier


134. *Principe, supra* note 132, 631 F.2d at 309-311.


cases. Henceforth, dominant firms would be free to compete vigorously. 137

* * *

Thus, application of the antitrust laws to Major League Baseball is unlikely to achieve the goals of those who see the Sherman Act as a panacea for all baseball's ills. If the perceived solution is thus elusive, then leaving the current legal structure in place is the most prudent course for Congress to take. Even should the Reform Act be passed, the courts should, as they have in the context of other competitive sports and with products with especial consumer benefits, reject antitrust challenges so as to preserve Major League Baseball's unique tradition, quality, and appeal.

137. Id. at 181. See also Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).
HEALTH CARE: CURRENT ANTITRUST ISSUES

by Murray S. Monroe*

I. INTRODUCTION

We all note daily newspaper reports that health care costs are rising and are having a far reaching impact on the United States economy. In the current budget, health care benefits have now reached the point where they account for one third of the entire federal budget.¹ Many major companies lament that health care benefits are among their biggest expenses.² The expenses are rising at rates that far exceed the increase in the cost of living.³ Perhaps more important, because the federal enforcement agencies and many state agencies stress that antitrust enforcement has an important role to play in encouraging and facilitating competition in the health care industry, this industry is the primary focus of much of their enforcement activities⁴. Practices within the health care industry represent a significant and grow-

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2. It has been reported that in 1989 health care spending by U.S. business rose 12.3% to $173.4 billion (based on an HCFA report), that the amount spent for health care services and supplies was nearly equal to total corporate after-tax profits for 1989, and that federal and state governments and consumers paid approximately 13%, 11% and 10% more respectively for health care in the same year. Bloch, supra note 1, at 169 n. 1.

3. Id.

ing number of the government enforcement actions brought under the antitrust laws in the last few years.\(^5\) It is not possible to cover this entire subject in a single article; however, the areas which have attracted the most attention are set forth below. These have been divided into the issues which principally affect hospitals, physicians' groups and medical associations, in that order. Section VI serves as an overall guide as to what an organization should do to protect itself and what conduct it should avoid.

II. HOSPITALS\(^6\)

A. Staff Privileges — Reviewing Committees

Numerous antitrust cases involve the denial of an application by a professional to be admitted to the staff of a hospital or involve the revocation of privileges to serve on the staff.\(^7\) They

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5. Bloch, supra note 1, at 170. A number of such cases are cited infra notes 65, 71, 72, 84, 96, 100, 101, 102, 114, 115.

6. Hospitals owned and controlled by state and local governmental entities may be immunized from antitrust liability by the state action doctrine. E.g., Parker v. Brown, 317 U.S. 341 (1943); Bolt v. Halifax Hosp. Medical Ctr., 851 F.2d 1273 (11th Cir. 1988), vacated, 861 F.2d 1233 (11th Cir. 1988) (en banc) reinstated in part, 874 F.2d 755 (11th Cir. 1989) (en banc) on remand, 891 F.2d 810 (11th Cir. 1990), cert. denied, 495 U.S. 924 (1990), vacated and remanded, 1993-1 Trade Cas. (CCH) ¶ 70,092 (11th Cir. 1993); Cohn v. Bond, 953 F.2d 154 (4th Cir. 1991); Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991); Griffith v. Healthcare Auth., 705 F. Supp. 1489 (N.D. Ala. 1989); but see, Lancaster Community Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397 (9th Cir. 1991), cert. denied, 112 S. Ct. 1169 (1992); Wicker v. Union County. Gen. Hosp., 673 F. Supp. 177, 184 (N.D. Miss. 1987). This issue arises most frequently in the case of peer review. Approximately 38 states have statutes which provide for peer review in hospitals. In addition, the Local Government and Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1988) has been held to grant immunity from damages to a local public hospital under some circumstances. In some cases, the protection of the statute has been held to extend to community hospitals. Cohn, 953 F.2d at 157; Sandcrest Outpatient Services v. Cumberland Cty. Hosp. System, Inc., 853 F.2d 1139, 1142 (4th Cir. 1988); Griffith v. Healthcare Auth., supra, at 1492; Wicker, 673 F. Supp. at 186. Private hospitals have not been so fortunate. Even in the face of a state statute immunizing a private hospital engaged in peer review, the supreme court has upheld the liability of the hospital because the alleged anti-competitive conduct was not "actively supervised" by the state. Patrick v. Burget, 486 U.S. 94 (1988). That case significantly narrows the situations in which the defense will be available to private hospitals. Active state supervision is also discussed in the text starting infra note 50; see also infra note 53.

7. Summit Health, Ltd. v. Pinhas, 111 S. Ct. 1842, 1854 (1991); Patrick v. Burget, 486 U.S. 94 (1988) (involving a small hospital in Oregon which was found to be liable for several million dollars in damages for its action involving hospital privilege and peer review.)
are alleged to be conspiracies between the hospital and the medical staff or its members. One of the critical issues in such cases is whether the hospital can conspire with its staff or whether staff members can conspire among themselves. The courts of appeal have split on this issue. The Sixth Circuit (Tennessee, Kentucky, Ohio, Michigan) has found that such a conspiracy may exist between members of the staff (but not with the hospital) under certain circumstances. A conspiracy is most

8. See cases cited supra, note 7.

9. In addition to arguing conspiracy, professionals whose applications have been rejected or their privileges revoked have also argued that the hospital had violated § 2 of the Sherman Act by monopolizing or attempting to monopolize the market. The most popular alternative theory seems to be that the hospital constituted an “essential facility” and that it had a “duty” under § 2 of the Sherman Act to allow the professional to practice at the hospital. This theory, as well as other claims under § 2, have been almost universally rejected in health care cases. McKenzie v. Mercy Hosp. of Independence, Kansas, 854 F.2d 365 (10th Cir. 1988); Registered Physical Therapists, Inc. v. Intermountain Health Care, Inc., 1988-2 Trade Cas. (CCH) ¶ 68,233 (D.C. Utah 1988). In Pontius v. Children’s Hosp., 552 F. Supp. 1352, 1370 (W.D. Pa. 1982), the court stated that “[t]he essential facilities doctrine is inapplicable to hospital privileges decisions.”

10. The Ninth and Eleventh Circuits have held that medical staff members are capable of conspiring with the hospital for purposes of violating the federal antitrust laws. Bolt v. Halifax Hosp. Medical Ctr., 851 F.2d 1273 (11th Cir. 1988), vacated, 861 F.2d 1233 (11th Cir. 1988) (en banc, reinstated in part, 874 F.2d 755 (11th Cir. 1989) (en banc, on remand, 891 F.2d 810 (11th Cir. 1990), cert. denied, 495 U.S. 924 (1990), vacated and remanded, 1993-1 Trade Cas. (CCH) ¶ 70,092 (11th Cir. 1993); Oltz v. St. Peter’s Community Hosp., 861 F.2d 1440 (9th Cir. 1988). In Bolt, the Eleventh Circuit held that the hospital and medical staff “are legally separate entities” and that members of the medical staff are capable of conspiring with one another. Bolt, 851 F.2d at 1280. In Oltz, the Ninth Circuit found that a group of the hospital’s anesthesiologists were capable of conspiring with the hospital to unlawfully deny a nurse anesthetist staff privileges. Oltz, 861 F.2d at 1450. In Pinhas v. Summit Health, Ltd., 894 F.2d 1024 (9th Cir. 1989), aff’d on other grds., 111 S. Ct. 1842 (1991), the 9th Circuit held that attorneys advising a hospital on a staff privilege case and an attorney who served as a hearing officer could be named as defendants. Id. at 1033.

The Third, Fourth and Sixth Circuits, however, have held that hospitals are not capable of conspiring with their medical staff during peer review. Weiss v. York Hosp., 745 F.2d 786 (3rd Cir. 1984), cert. denied, 470 U.S. 1060 (1985); Nanarath v. Burdette Tomlin Memorial Hosp., 857 F.2d 96, 118 (3rd Cir. 1988); Oksanen v. Page Memorial Hosp., 945 F.2d 696 (4th Cir. 1991); Nurse Midwifery Assoc. v. Hibbett, 918 F.2d 605 (6th Cir. 1990), modification on reh’g, 927 F.2d 904 (6th Cir. 1991), cert. denied, 112 S. Ct. 406 (1991); Pudlo v. Adamski, 789 F. Supp. 247 (N.D. Ill. 1992). The Sixth Circuit extended the intracorporate conspiracy doctrine not only to hospitals, but also to peer review participants who do not actually “compete” with the aggrieved practitioner. The Third, Fourth and Sixth Circuits, like the Eleventh Circuit in Bolt, did hold that individual health care practitioners could conspire among themselves, and they could be held liable under the antitrust laws. Weiss, 745 F.2d at 814; Oksanen, 945 F.2d at 706; Hibbett, 918 F.2d at 614.

likely to be found when at least some of the members of the medical peer review/staff privilege committee are competitors with the applicant and, in making the decision to exclude the applicant, have an economic interest separate and apart from the hospital. In order to avoid such a finding, the hospital should bar the applicant's direct competitors from serving on the reviewing committee. Another approach may be to make it clear in the hospital's documents that the reviewing committee only recommends actions and that any final decision is made by the board of directors.

Staff privilege issues also arise in the context of a decision by a hospital not to allow a class of professionals to practice at the hospital. In certain circumstances, podiatrists, chiropractors, nurse-midwives, and other professionals have, at various times, successfully challenged exclusion from hospital practice. While the antitrust issues are analyzed in essentially the same manner as determinations involving a single applicant, the hospital may

12. E.g., Bolt, 851 F.2d at 1285; Pinhas, 894 F.2d at 1032. See also, Patrick v. Burget, 486 U.S. 94 (1988); Hibbett, 918 F.2d at 614. In Oltz, the court discussed the principle of separate economic interest as follows: "St. Peter's did not pay the anesthesiologists a salary; they billed the patients they served directly. The anesthesiologists were independent contractors pursuing their personal economic interests when they pressured St. Peter's to eliminate Oltz as a direct competitor. Those interests were sufficiently independent so that the collaborated conduct between the anesthesiologists and St. Peter's coalesced economic power previously directed at disparate goals." Oltz, 861 F.2d at 1450.

13. See Oksanen, 945 F.2d at 705; see also Michael M. Briley, Antitrust Risks in Closing Access to the Medical Staff, 1992 OHIO BAR ASSOC. ANTITRUST LAW SEC. 2.21; M. Elizabeth Gee, Medical Staff Relationships/Antitrust Issues in Medical Practice, 1992 OHIO BAR ASSOC. ANTITRUST LAW SEC. 1.15; See infra text accompanying note 28 for possible shelter under the Health Care Quality Improvement Act.


16. E.g., Oltz v. St. Peter's Com. Hosp., 861 F.2d 1440 (9th Cir. 1988) (exclusion of nurse anesthetists); In re Medical Staff of Memorial Medical Ctr., 110 F.T.C. 541 (1988) (consent order governing privilege restrictions on nurse midwives)

be able to justify its decision not to allow a class of professionals to practice at the hospital by presenting evidence that a new service would be counterproductive to its mission.\(^\text{18}\)

Courts generally will give great deference to the hospital's rationale for its action in such cases.\(^\text{19}\) A number of reasons for exclusion have been discussed favorably by the courts and include the following: exclusion of a new practice which is little known and/or its field unclearly defined;\(^\text{20}\) exclusion where proper supervision and back-up is unavailable,\(^\text{21}\) including instances in which applicants who fail to meet a high level of advanced medical training must employ the use of sensitive instruments;\(^\text{22}\) exclusion on the basis of holistic patient treatment, in that quality care demands physicians/surgeons be educated in treating the whole person;\(^\text{23}\) exclusion based upon a hospital's mission statement;\(^\text{24}\) exclusion where the new practice would not contribute to furtherance of the institution's long-range plan;\(^\text{25}\) and finally, exclusion where the applicant's practice has other hospitals or treatment facilities available for use.\(^\text{26}\)


\(^{21}\) Smith v. Northern Michigan Hosp., Inc. 703 F.2d 942 (6th Cir. 1983).


Therefore, if this issue is presented, the hospital should form a committee or employ outside consultants to investigate, and, if justified, document that the new group of professionals would interfere with the operation of the hospital or otherwise reduce either its efficiency or quality of care.

As discussed in the preceding paragraphs, numerous antitrust cases brought against hospitals have involved (1) the denial of staff privileges to allied health care providers, and (2) the denial of an application by a professional to be admitted to the staff or the revocation of a staff member's privileges. Many of the cases involving denial or the revocation of privileges arise in the context of peer review. Principally because of the impact of the multi-million dollar verdict in Patrick v. Burget,27 Congress enacted the Health Care Quality Improvement Act of 1986.28 One of its purposes was to encourage physicians to participate vigorously in effective peer review,29 and as such it focuses on the problems of peer review. To create appropriate incentives and protection, Congress immunized from civil damages under the antitrust and certain other designated laws30 any good faith actions taken by a qualified professional review body or by individuals associated with it.31 Only professional peer reviews dealing with actions involving physicians and dentists32 are immune and only then if they meet at least four requirements: The review action must be taken "in the reasonable belief that the action was in the furtherance of quality health care;"33 the action must be taken "after a reasonable effort to obtain the facts of

30. The statute states that a person covered by the statute "shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with certain exceptions. Id. § 11,111 (a)(1). The statute specifically does not apply to damages arising under various civil rights laws. Id. It probably is inapplicable to causes of action based upon contract. Clarke, supra note 19, at 267 n.82. It does not apply to antitrust claims arising out of the relationship of the physician to the defendants unrelated to the peer review process and decision. Austin v. McNamara, 979 F.2d 728 (9th Cir. 1992).
32. Id. §§ 11,115(c), 11,151(8). This includes osteopaths.
33. Id. §§ 11,112(a)(1).
the matter;"34 adequate notice of a hearing and an effective opportunity to be heard must be afforded to the physician being reviewed;35 and the prior and current results of the reviewing boards' disciplinary actions must have been properly reported to authorities.36

To date, the Act's apparent requirement of good faith has seldom been interpreted by the courts.37 The one court that dealt directly with it held that it was not intended to test the "subjective state of mind of the physicians conducting the professional review," but was intended to identify a more objective reasonable belief standard which was satisfied if the reviewers, based on the facts available to them, concluded that denial would restrict incompetent behavior or would protect patients in the hospital.38 Significantly, the court held that this decision should, in that case, be made prior to full trial.39 Consequently, if the provisions of the Act are satisfied, a full trial may become unnecessary. However, there are certain built-in restrictions in the statute. It does not prevent government action, action for injunctive relief, actions for damages as to nurses or other health care providers (except physicians and dentists), civil rights claims, action for damages under state law under some circumstances,40 and some other forms of liability.41 Because of these limitations and technical requirements for compliance,42 a hospital probably should not rely solely on the statute as a defense to liability in making

34. Id. § 11,112(a)(2).
36. 42 U.S.C. §§ 11,111(b), 11,133(a) & (c) (1988).
37. See Austin v. McNamara, 731 F. Supp. 934 (C.D. Cal. 1990), aff'd, 979 F.2d 728 (9th Cir. 1992).
39. Id. at 938 (quoting John Neff, Note, Physician Staff Privilege Cases: Antitrust Liability and the Health Care Quality Improvement Act, 29 WM. & MARY L. REV. 609, 628 (1988)); but see, Manion v. Evans, 1993-1 Trade Cas. 70,135 (6th Cir. 1993); Decker v. IHC Hospitals, Inc., 928 F.2d 933 (10th Cir. 1992) (peer review participants protected from liability - not from suit).
40. E.g., 42 U.S.C. 11111, 11151(b).
41. No cases have been found interpreting these limitations in the statute.
42. See supra text accompanying notes 32, 36, 40, 41.
a decision not to hire a professional or to revoke his privileges.43

B. Exclusive Agreements With Physicians' Groups

Hospitals frequently seek to give a specific group exclusive privileges to provide services within the hospital. For example, an anesthesia group is often given exclusive privileges. This type of an agreement has been attacked on several theories based on the concept that the exclusive contract excludes other anesthesiologists from practicing their profession in the area and thus restrains trade.44

Where the hospital can demonstrate that the duration and terms are not excessive and that it is necessary to adopt an exclusive arrangement in order to improve its delivery of services, courts have usually found for the hospital.45 This is particularly true if the hospital is only one of a number of such organizations in the area and the "excluded" professional has alternative employment opportunities.46 The fact that a number of cases have been brought on one or more of these theories indicates that a hospital should be careful in entering into this type of arrangement, documenting the reasons for its decision, and identifying why the arrangement will improve the efficiency of the hospital's operation.

C. Joint Allocation of Services Between Hospitals

Historically, agreements among competitors to allocate services, equipment, or facilities among themselves and not to invade

43. J. MILES, HEALTH CARE & ANTITRUST LAW §10.04(4) at 10-42 (1992) - Good faith peer review decisions should not violate the antitrust laws.

44. The three theories most often argued are (a) the contract, being exclusive, is unreasonable because it eliminates competition with the anesthesiologist, (b) the contract represents an unlawful tying arrangement (use of the hospital's surgical facilities are available only if the patient accepts the services of the designated anesthesiologist - i.e., they are tied together) and, under Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), is evaluated under a modified per se rule, and (c) the hospital and the anesthesiologists who have received the contract are engaged in a conspiracy. See, Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1449 (9th Cir. 1988).

45. In general, exclusive contracts are upheld if they are awarded on the merits and their duration and terms are not excessive. E.g., Collins v. Associated Pathologists, Ltd., 844 F.2d 473 (7th Cir. 1988); Smith v. No. Mich. Hosp., Inc., 703 F.2d 942 (6th Cir. 1983); Dos Santos v. Columbus-Cuneo-Cabrini Medical Ctr., 684 F.2d 1346 (7th Cir. 1982); Castelli v. Meadville Medical Ctr., 702 F. Supp. 1201 (W.D. Pa. 1988); 10 F.T.C. Op. 991 (1983).

the “territory” of the others have been viewed as per se unlawful.\textsuperscript{47} Agreements among competing hospitals to engage in that type of conduct also have been viewed as per se unlawful by the enforcement agencies.\textsuperscript{48} If arrangements are undertaken pursuant to a direct regulatory mandate, the legality will depend on a number of factors, but the agreements at best are suspect.\textsuperscript{49} The Ohio Legislature recently attempted to address some of these problems. In July of 1992, Governor Voinovich signed a bill\textsuperscript{50} which attempted to immunize voluntary agreements between two or more hospitals to take certain cooperative action including agreements to allocate the distribution of health care equipment or health care services. The basic purpose of the statute was to provide antitrust immunity for cooperative efforts between competing hospitals which were designed to reduce health care costs, improve access to health care, or improve the quality of patient care.\textsuperscript{51}

In granting such antitrust immunity, Ohio and other state legislatures should note that the United States Supreme Court has narrowly restricted the areas in which a state may grant antitrust immunity. First, the state must articulate a clear and affirmative policy to allow the anti-competitive conduct, and second, the state must actively supervise that conduct.\textsuperscript{52} The United States Supreme Court's latest pronouncement as to active state supervision was in 1992 in \textit{FTC v. Ticor Title Insurance Company}.\textsuperscript{53} In that case, the Court indicated that active state supervision means more than authority to supervise - the state must actively engage in the supervision. An after-the-fact evaluation and a state's actual exercise of its supervisory powers must show

\textsuperscript{47} E.g., Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 231 (1899); United States v. Suntar Roofing, Inc., 897 F.2d 469, 472 (10th Cir. 1990).

\textsuperscript{48} The Department of Justice and the Federal Trade Commission have specifically declined to approve such efforts; see letter from Sanford M. Litvack, Assistant Attorney General, Antitrust Division, Department of Justice to William G. Kopit (May 6, 1980) and letter from Mark J. Horoschak, Asst. Dir. FTC to F. Tim Witsman, Pres., Wichita Area Chamber of Commerce (May 22, 1991) (Horoschak letter).

\textsuperscript{49} See supra note 6 and infra note 53.


\textsuperscript{51} Id. § 3727.21(A).


that the state has played a substantial role in determining the specifics of the involved economic policy. Under the Ohio statute, the first contact with the state occurs only after the cooperating hospitals have already formulated a proposed agreement to undertake the cooperative action, resulting from their previous discussions or negotiations; the director of health may, but is not required to, adopt rules establishing procedures and criteria for the review and evaluation of proposed cooperative agreements; the director may, but is not required to, request periodic written updates of the progress of the approved cooperative agreement; the director may, but is not required to, rescind a prior approval, even though it is determined that the approved cooperative agreement does not meet any of the stated policy goals. Silence by the Attorney General on whether the director should approve or disapprove shall constitute the Attorney General's approval of the hospitals' request. The courts have yet to rule on this statute, but there clearly is a substantial argument that the statute does not meet the rigorous standard of active supervision laid down by the Court in Ticor.

Thus, even in Ohio there are substantial legal and practical problems associated with agreements between hospitals to al-

54. Releases from the State indicated that regulations under the Ohio Act would be issued in the first quarter of 1993. It is possible, albeit doubtful, that regulations can cure the problem of "active supervision."

55. The statutes prenotification problems could prove cumbersome. OHIO REV. CODE ANN. § 3727.22 provides in part as follows:

(A) Directors or trustees ... may submit a request to the Director of Health on behalf of the hospitals for approval of the agreement to undertake the cooperative action. The request shall include ... (2) an implementation plan that states how and when the cooperative action ... will meet one or more of the goals specified in (the statute) ... (3) any additional information the boards ... wish to present; (4) any additional information the Director of Health considers necessary ....

(B) If the Director of Health determines ... that one or more of the goals set forth in (the statute) ... is likely to be met, the Director shall submit the request for approval ... to the Attorney General for review. The Attorney General shall review the request not later than thirty days after he receives it ... at the end of the thirty-day period, the Director of Health shall issue an order ... approving or denying the cooperative agreement ...

(D) The Director of Health may request periodic written updates of the progress of the approved cooperation agreement ...

(E) The Director of Health may rescind an order approving a cooperative agreement (for a number of reasons) ...
locate services, equipment or facilities between themselves.

Recent years have seen the emergence of a variety of hospital joint ventures.56 "Joint ventures, networks, or alliances have long been attractive mechanisms for individual hospitals to obtain efficiencies similar to those enjoyed by multi-hospital systems."57

Traditionally, these relationships have joined noncompeting hospitals into large scale groups capable of engaging in group purchasing and sharing certain services, such as education and training, economic forecasting, and consulting. On the local level, these groups, often including competitors, have engaged in a variety of shared service arrangements typically including imaging technology, laboratory facilities, and laundry or food services.58

To the extent that these arrangements generate efficiencies they generally have not been seen to raise serious antitrust problems even when they involve competitors.59 Some hospitals have joined together in Certificate Of Need applications which, if granted by the state, may further protect the participating hospitals from antitrust claims.60

Nevertheless, some hospitals have entered into networks which go beyond the familiar shared service arrangements and engage directly or indirectly in joint marketing, joint planning, and joint

56. Broadly construed, the term joint venture may be applied to any collaborative effort among firms, short of full merger. In the health care field, to withstand antitrust scrutiny, the joint venture apparently must involve some pooling of capital and the sharing of risk of adverse results. See In re Preferred Physicians, Inc., 110 F.T.C. 157, 162 (1988) (consent).


58. Id.


negotiating with third party payers.61 As horizontal agreements relating directly to competitive strategy, these arrangements raise potential antitrust concerns. If the network is involved in the development of pricing methodologies for its members, or even the mandatory exchange of price information, its goals are even more suspect.62 The Department of Justice and the Federal Trade Commission have recently indicated that they intend to pursue the investigation of this type of activity, and have cautioned that only where there is a genuine degree of risk sharing and fairly substantial economic integration of the formerly independent competitors' business will such arrangements be unlikely to be challenged.63

D. Joint Advertising

A number of hospitals have entered into agreements to limit the amount and type of advertising that each hospital will do.64 The enforcement agencies view such agreements as tantamount to price fixing and have filed at least one suit recently to enjoin that practice.65 This type of conduct is discussed in more detail in connection with medical and dental associations at Section IV below.

E. Durable Medical Equipment (DME)

Hospitals increasingly have diversified into other lines of business, including the provision of durable medical equipment or

61. Owen, supra note 57, at 166; Bloch, supra note 1, at 170. See also Glen Eden Hosp. v. Blue Cross and Blue Shield of Mich., 740 F.2d 423 (6th Cir. 1984).
63. E.g., Bloch, supra note 1, at 172-5.
64. Bloch, supra note 1, at 175.
appliances (DME). In some instances, the hospital will refer most DME business to its own company. Within the last several years several DME dealers have filed antitrust suits alleging that they were foreclosed from this market. Typically, the competing dealer claims that it can furnish the same product at lower prices or with higher quality but it has been improperly excluded from making the sales. It is argued that nurses or doctors fail to inform the patients at or before discharge that there are alternative sources of the DME. Complete disclosure before discharge of the alternative sources of the equipment and non-discriminatory access of the vendors to the patients would go far toward defusing suits of this nature.

**F. Mergers**

If a hospital merger would substantially increase concentration in a market and entry into that market is difficult, government enforcement agencies are likely to challenge the merger absent

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68. See cases cited supra note 67.

69. When considering a joint venture or similar enterprise ("enterprise") of the nature referred to in the text, a professional/investor who may be referring patients or other people to the enterprise should also consider the applicability of the laws of Medicare fraud and abuse, particularly the safe harbor rules. Among other things, § 112B(b) of the Social Security Act, 42 U.S.C. § 1320a-7(b) (1988), makes it a felony to knowingly and willfully "receive any remuneration in return for referring an individual to a person for the furnishing of . . . service . . . " for which payment may be made under Medicare or a state health care program. The statute is potentially applicable to joint ventures which own durable medical equipment and which pay dividends or interest to investors which refer business to the joint venture and to similar enterprises. See, 42 C.F.R. § 1001.952, and Inspector General v. Hanlester Network, et al., Medicare and Medicaid Guide, (CCH) ¶ 39,566 (1991). The Inspector General has promulgated safe harbor rules in the foregoing regulations and explanations which exempt payments from certain "small entities" as well as from large publicly traded entities from the prohibitions of the Act. Interestingly, he specifically rejected a requirement of disclosure as a condition of qualifying for the safe harbor. A detailed explanation of the safe harbor rules is beyond the scope of this paper. In July, 1991, Taft, Stettinius & Hollister issued a Newsletter from its Washington, D.C. office which summarized the safe harbor rules.
efficiencies unique to the transaction.\textsuperscript{70} In the last several years, the Department of Justice has tried two hospital merger cases\textsuperscript{71} — both involving nonprofit hospitals — and the Federal Trade Commission has prosecuted approximately seven such cases.\textsuperscript{72} Nonetheless, the vast majority of hospital mergers have not been challenged.

Antitrust review of proposed hospital mergers presents unique and difficult questions. The government agencies will follow the 1992 merger guidelines.\textsuperscript{73} These guidelines emphasize market concentration but also consider other factors which are relevant to whether the merger has the potentiality to “adversely affect competition.”\textsuperscript{74} While the agencies consider any resulting effi-


\textsuperscript{72} The Commission has limited its enforcement actions to hospital mergers that were likely to be harmful to consumers. In the 1980s the Commission successfully challenged anticompetitive acquisitions by for-profit hospital chains. American Medical Int’l, Inc., 104 F.T.C. 1 (1984); Hospital Corp. of America, 106 F.T.C. 361 (1985); aff’d, 807 F.2d 1381 (7th Cir. 1986), and cert. denied, 481 U.S. 1038 (1987); Hospital Corp. of America, 106 F.T.C. 298 (1985) (consent order). More recently, the FTC has challenged acquisitions by non-profit hospitals as merger activity in the non-profit sector of the industry has increased. See FTC v. Univ. Health, Inc., 938 F.2d 1206 (11th Cir. 1991); Ukiah Valley Medical Ctr. v. FTC, 911 F.2d 261 (9th Cir. 1990) (later opinion same acquisition - Adventist Health System/West, 5 Trade Reg. Rep. (CCH) ¶ 23,300 (1992); FTC v. Columbia Hosp. Corp., 5 Trade Reg. Rep. (CCH) ¶ 23,326 (M.D. Fla. 1993); In re Columbia Hosp., 5 Trade Reg. Rep. (CCH) ¶ 23,333 (1993); In re Dominican Santa Cruz Hospital, FTC File No. 901-0069, 64 BNA Antitrust Tr. Reg. Rep. 254 (3/93); The Reading Hosp., 5 Trade Reg. Rep. (CCH) ¶ 22,785 (1990).

\textsuperscript{73} 4 Trade Reg. Rep. (CCH) ¶ 13,104 (merger guidelines); see, F.T.C. v. University Health Inc., 938 F.2d at 1211.

\textsuperscript{74} Some of the factors which are normally considered or may be considered include the extent of the geographic “market” from which the hospitals draw patients, the number of other hospitals which draw from that area and effectively compete, the number of other health care providers who offer some or all of the same services, the ease or lack thereof of entry by a potential competitor, scale economies which will result from the merger, and other efficiencies. See Mark J. Horoschak, Antitrust & Health Care: Policy and Enforcement, 1992 Ohio Bar Assoc. Antitrust Law Sec. 6.8.
ciencies, they take a much narrower view of this issue than do proponents of hospital mergers. Any hospital contemplating such a merger in a geographical area in which there are few other hospitals should carefully review whether the merger has a deleterious effect on competition, and look at the various economic issues involved in making such a determination.

III. PROFESSIONALS AND PROFESSIONAL GROUPS - CURRENT ISSUES

A. Alternative Delivery Systems - Antitrust Issues

Ten years ago health care predominantly was paid for on a fee for service basis. Most patients had unlimited indemnity insurance. In the face of phenomenal cost increases, employers and insurers are re-writing those rules. They are trimming benefits, raising deductibles and co-payments, and adopting more managed health care. Managed care includes alternative delivery systems, such as Health Maintenance Organizations (HMOs), Preferred Provider Organizations (PPOs), and Independent Practice Associations (IPAs), which may limit the patient's treatment options but offer the cost advantage of discounts and fixed fees. Managed care also includes utilization review - the short name for a long list of techniques to monitor and control employee/patient health care. With these changes has come much litigation under the antitrust laws directed at or by these new organizations. This section will first sketch the characteristics of these organizations. It will then identify some of the major antitrust issues relating to them, emphasizing the delivery of service aspect - and leaving the insurance, indemnity, and financing problems to other articles.

HMOs, PPOs, and IPAs each take many forms and the individual organization may be *sui generis*. As a result, the following comments generalize as to characteristics which are most common in each type of organization.

75. Horoschak, *supra* note 74 at 6.11. In court, the Commission has argued that the antitrust laws in a merger context do not recognize an efficiency defense in any form. FTC v. University Health, Inc., 938 F.2d at 1222.

76. For a detailed analysis of the economic issues of a merger in the health care field, see Michael G. Vita et al., *Economic Analysis in Health Care Antitrust*, 1992 A.B.A. SEC. ANTITRUST L. 49-78.
HMO - Generally a legal entity which both finances and provides health care. A member pays a predetermined fee to the HMO at regular intervals. The service is provided through a closed panel of providers. Members choose a primary care physician from those included in the panel. Often a member can only receive specialized care if the primary care physician approves and refers the member to another provider on the panel. The financial risk of cost overrun is borne by the HMO and by the providers. In many cases, the HMO is established at a centrally integrated facility at which members receive all services from salaried physicians.77

PPO - Usually a loose combination of physicians and hospitals (providers) which is formed for the purpose of coordinating the delivery of services, marketing of the services, negotiating contracts with payors, and responding in a coordinated way to payors. A PPO may be sponsored by providers, by payors, or by neutral brokers. It is an open system. Any enrollee may receive care from other providers and a physician may see other patients. Participating providers agree to accept a fee for each service which is based on a negotiated fee schedule. Services are generally discounted - typically 5 to 20%. The fee is usually accepted as full payment (in absence of an agreed co-payment). The PPO's services are in turn offered to third party payors - usually an employer or insurance company. Individual physician providers continue their office practice.78

IPA - A physician or group of physicians similar to a PPO, except that an IPA is usually under contract to an HMO. It frequently receives advanced fixed monthly capitation payments from each enrolled member or from the HMO as full payment for its services.79

The federal enforcement agencies generally have encouraged the formation of HMOs, PPOs, IPAs, and other organizations of health care providers so as to form alternative delivery systems.80

77. The general characteristics of HMOs, PPOs and IPAs are discussed in the following authorities. See Healthcare, Inc. v. Health Source, Inc., 1993-1 Trade Cas. 70,142 (1st Cir. 1993); Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., 784 F.2d 1325, 1329-30 (7th Cir. 1986); Clifford D. Stromberg, Health Care Provider Networks; Antitrust Issues and Practical Suggestions, Developments in Antitrust Law, 1990 ABA SEC. ANTITRUST L. 73, 108.
78. Id.
79. Id.
80. Bloch, supra note 1, at 174; C. Rule - address to Conn. Health Lawyers Ass'n
The agencies believe that such organizations can reduce the cost to a third party payor of transacting business individually with each provider. By partially integrating a number of providers, such an organization can enhance the ability of the group to compete both against individual providers and against alternative delivery systems and thereby increase competition. Problems arise under at least three circumstances.

First, if the PPO comprises too great a percentage of the number of providers in a specific area or specialty, it will prevent the formation of other alternative delivery systems and generate sufficient market power so as to inhibit competition.Originally, the Department of Justice said it would not take action if a PPO had less than thirty-five percent of the providers in the relevant market. The Department now states that it will use a more flexible approach.

Second, if the PPO is not sufficiently "integrated" or is a sham, it may be considered a loose confederation of professionals put together for the purpose of fixing prices. What constitutes sufficient integration is a question of fact which has not been resolved by the courts. At the least, "integration" probably requires some pooling of resources and sharing the risks of

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81. See Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pa., 574 F. Supp., 457 (M.D. Pa. 1983) (40% market share for the sale of dental care insufficient to show monopolization), aff'd, 745 F.2d 248 (3d Cir. 1984), and cert. denied, 471 U.S. 1016 (1985); Hoffman v. Delta Dental Plan of Minn., 517 F. Supp. 564, 573 (D. Minn. 1981) (market share of 40% of prepaid dental coverage insufficient to establish dangerous probability of success in attempted monopolization case); Anderson v. Medical Serv. of D.C., 1976-1 Trade Cas. ¶60,884 (E.D. Va. 1976), aff'd without op., 551 F.2d 304 (4th Cir. 1977) (37% of the market of prepaid medical-surgical insurance is "far below" monopoly power). Cf. Reazin v. Blue Cross & Blue Shield of Kan., Inc., 635 F. Supp. 1287 (D. Kan. 1986) (61% market share sufficient to deny defendants' motion for summary judgment). Market share is a means of estimating market power. Other factors, such as ease of entry, should also be considered. Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., 784 F.2d 1325, 1335 (7th Cir. 1986).


adverse financial results. It is critical that its members not use the PPO simply to allocate the market among themselves.

Third, if membership in the PPO is essential to the practice of a professional or group of professionals, or if the PPO has "market power," refusal of admission to or expulsion from the PPO and discrimination in reimbursement can be a source of litigation. The risk is limited if competitors of the applicant do not influence the decision and the PPO can also document a plausible justification for its decision which is not based on competitive considerations. While a number of cases have been filed under these concepts, few have been successful.

B. Concerted Action - Horizontal Relationships

In the absence of a properly "integrated" organization, professionals may not legally agree on prices (fees), whether maximum or minimum, or agree to exchange price information with a view toward fixing prices. Similarly, PPOs and other integrated organizations may not engage in such conduct with each other.


86. Market power is frequently defined as the ability to raise prices above the levels that would be charged in a competitive market or the ability to exclude competitors from that market. Jefferson Parish Hosp. Dist., No. 2 v. Hyde, 466 U.S. at 27; U.S. v. DuPont, 351 U.S. 377 (1956). For a discussion of this subject in reference to the health care field, see Neil P. Montenko, Market Definition and Market Power, 1992 A.B.A. Sec. Antitrust L., 139.


88. See cases cited supra note 13.

89. Supra note 84. The position of the Department of Justice may be in conflict with the position of private plaintiffs on the issue of membership. "Antitrust enforcement agencies consider exclusion of physicians from HMO's and other managed care delivery systems as procompetitive." Capital Imaging Assoc. 725 F. Supp. at 673; See Bloch, supra note 1, at 175.

90. Bloch, supra note 1, at 175. See cases cited supra note 62 and 84.
There has been one criminal prosecution against a group of dentists based on these concepts\(^91\) and a number of grand jury investigations.\(^92\) A leading case - albeit a civil case - is *Arizona v. Maricopa Medical Society.*\(^93\) In that case, the Court found that an agreement among members of a local medical society regarding the maximum fees they would charge patients was *per se* illegal price fixing.

The use of relative value scales has also been disapproved by the enforcement agencies because of a concern that they lead to price fixing.\(^94\) While the majority of cases brought by the government have been civil cases, the fact that there have been some criminal proceedings underscores the potential seriousness of these types of conduct. The Department will not accept as a defense that the price fixing was necessary to generate sufficient profits to insure a high level of quality of service or to safeguard ethical norms.\(^95\)

The enforcement agencies have also taken action on a number of occasions against "coercive boycotts."\(^96\) This type of conduct usually constitutes a collective action by a group of health care

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91. United States v. Alston, et al., 974 F.2d 1206 (9th Cir. 1992). Ultimately, one corporate defendant pled *nolo* and the case was dismissed as to the other defendants (64 Antitrust & Trade Reg. Rep. (BNA) No. 1602, at 169 (Feb. 18, 1993)).


95. *See FTC v. Indiana Fed'n of Dentists,* 476 U.S. 447, 463 (1986). In Wilks, the 7th Circuit imposed such limitations on the "patient care" defense as to make it virtually useless *Wilk v. American Medical Ass'n,* 895 F.2d 352, 362 (7th Cir. 1990). *See also,* Chiropractic Co-op Ass'n of Michigan v. American Medical Ass'n, 867 F.2d 270 (6th Cir. 1989); Bloch, *supra* note 1, at 174.

professionals against a perceived competitor or a payor. It includes boycotts designed to deny admission of a competitor to the hospital staff, to defeat new entry by health care professionals, or health care facilities, to resist cost containment efforts by payors, or to obtain higher levels of reimbursement from payors. In *Indiana Federation of Dentists*, the Supreme Court upheld an FTC ruling that an agreement among dentists not to submit x-rays to an insurance company was illegal. In at least one case the FTC obtained a consent decree prohibiting the members of a PPO, which was found not to be “integrated,” from jointly dealing with any third-party payor on collectively determined terms - apparently on any subject.

C. Ancillary Service Joint Ventures Formed by Professionals

Professionals own in increasing numbers joint ventures that provide services or goods in markets that are ancillary to their professional practice and to which the professional can refer patients. The joint ventures engage in a wide range of busi-

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99. See id.
103. See cases cited supra n.98.
105. Arquit, * supra* note 97, at 629; *Langenfeld*, reported 63 Antitrust & Trade Reg. Rept. 624 (1992); see also *Diversification*, supra note 66.
nesses including clinical laboratories, diagnostic imaging centers, kidney dialysis machines, lithotripers, durable medical equipment (DME) supply, and home infusion therapy services. The Federal Trade Commission has several pending investigations of this form of joint venture. The core argument is that the joint venture may be able to raise its prices or reduce its quality if the professionals who own the joint venture are in a position to refer a substantial number of patients to the joint venture.

The court decisions considering this problem are sparse. The legality will depend, among other things, on whether the participants agree on the price for the service, their market share, whether they are free to refer their patients to others providing similar services, whether they hold positions with area hospitals which enable them to influence the hospital to recommend their facility, and similar factors. The risks go down substantially if the participant’s market share is below thirty-five percent, the arrangement is non-exclusive, and there is no agreement on price. Federal and some state legislation has been enacted which prohibits or limits referrals of this nature by professionals.

IV. MEDICAL AND DENTAL ASSOCIATIONS AND THEIR MEMBERS

Associations of professionals and their members have also been the focus of much litigation. In addition to the matters identified above, a number of cases have been brought to challenge various

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106. Langenfeld, supra note 102; Grady, supra note 89, at 423.
107. Arquit, supra note 102.
108. See cases cited supra note 66. There are at least three cases involving “self referral” by hospitals which own or have agreements with providers of ancillary services.
109. E.g., "An agreement among the venturers to impose the same charges for use of the equipment would not appear to be reasonably necessary to accomplish the purpose of the venture. Such an agreement, standing alone, would be unlawful..."; Horoschak, supra, note 48. The doctor shouldn't have "too large a percentage of that ... market". Langenfeld, supra note 102. The aggregation of "referral power" in the joint venture may itself be subject to challenge. Horoschak, supra note 74 at 6.7.
110. Bloch, supra note 79, at 106.
111. The state of Florida recently enacted legislation that prohibits physicians from referring patients to an entity for clinical laboratory, physical therapy, comprehensive rehabilitation, diagnostic imaging, and radiation therapy services if the physician has an “investment” interest in the entity. Illinois, Michigan, New York and perhaps other states have passed similar legislation and the Maryland General Assembly is currently considering doing so.
association bans and codes of conduct. Among other things, these cases have attacked bans which prohibit members from advertising, from engaging in comparative advertising or from advertising fees or discounts, from using testimonials in the ads, from submitting x-rays to insurers, from referring patients to a given type of health care provider, and related matters. Association-sponsored surveys of price and some types of costs may also be suspect.

V. ENFORCEMENT BY STATE AGENCIES

Not only are the Department of Justice and the Federal Trade Commission in the forefront of bringing antitrust suits in the health care industry, but a number of states are also conducting antitrust investigations of health care providers. Ohio is a leader of this movement. Targets of the investigations include physicians, hospitals, and pharmacies. Several of the cases involve boycotts or price-fixing directed toward third-party payors, or boycotts directed at lower-cost allied health professionals. As
evidenced by current levels of activity, the states' interest in enforcing antitrust laws and competition policy in health care is strong and can be expected to remain strong.

VI. STEPS TO MINIMIZE THE ANTITRUST RISK

There are a number of steps which an organization can and probably should take to minimize its risk of exposure. This will vary from organization to organization; however, the following is a list of some things which might be considered.

A. The organization's procedures and past actions should be reviewed to determine whether there is existing exposure. The major issues are raised above. This probably should be done with the advice of counsel.

B. Most organizations should adopt a program to insure future compliance. The content of these programs will vary. The one common denominator is that they must be accepted and promoted by the chief executive in charge of the organization. Ordinarily, the program will include a written policy, written instructions as to the most obvious issues, a program to follow up in which employees are given an opportunity to ask questions, and a procedure for documenting critical decisions. The effectiveness of such a program will depend directly on how much effort is put into it.122

C. Employees at all levels should attend meetings of competitors only with great care.

D. Employees at all levels should not discuss with competitors or exchange information as to:

1. current or prospective prices (fees)
2. collective or threats of collective actions against another competitor or supplier
3. collective actions or threats of collective actions to refuse to participate in an insurance or reimbursement plan

4. market allocation — *e.g.*, geographic areas to be served or specialties to be practiced.

The exchange of competitive information that is historical, particularly if available publicly, creates minimal risks.

E. The organization should only belong to trade associations involving competitors if there is a positive business reason for the affiliation and the association has its own counsel who advises and assists the association on antitrust problems.

F. The organization should record the reasons for important decisions which might be questioned at a later date. This includes the reason for decisions as to closing the staff, firing staff members and participating in joint ventures.\(^\text{123}\)

G. The organization should adopt a file retention procedure to retain needed records and to discard nonessential records.\(^\text{124}\)

H. Hospitals should establish and follow a firm procedure for hiring and firing professional staff. In case of firing, a *final* decision should not be made by competitors of the person under review. The person under review should be given notice of the impending review and an opportunity to be heard.\(^\text{125}\)

I. The organization should enter into exclusive contracts only if there is a valid business reason for the contract related to improved efficiency of the operating facilities.

J. If professionals decide to form a PPO, IPA, or similar organization, and to provide services based on an agreed fee schedule, the group should consult antitrust counsel. Consideration should be given, among other things, to the purpose of forming the organization, the degree to which it is integrated, the percentage of professionals in each association who are included, and related matters. Whether an applicant should be admitted depends on a variety of factors including the organization's market share, whether membership is essential to the

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\(^\text{124}\) The issue of adopting and implementing a file retention procedure is beyond the scope of this paper. Among other things, it involves categorization of the documents, the length of retention, routine and systematic elimination of unnecessary documents, and the prohibition of the elimination of records under certain circumstances. John M. Fedders and Lauryn H. Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 NOTRE DAME LAW REVIEW 5 (1980) (treating these issues in depth). See also, Monroe, *supra* note 119, at 421.

\(^\text{125}\) *E.g.*, 42 U.S.C. §11112(b).
success of the applicant's practice, the reasons for the action, and whether the applicant's competitors influenced the decision.\textsuperscript{126} Similar issues arise as to the expulsion of a member.\textsuperscript{127}

\textbf{CONCLUSION}

With the growth of health care, the increase in the number of antitrust cases brought against members of the industry is staggering. Cases are being brought not only by the federal and state agencies, but by private parties who claim to be injured by various practices. A few of the judgments against the defendants have been enormous. The time, expense and effort necessary to deal with those problems are extensive. All of the members of the profession should be aware of the problems. Most need to have some form of compliance program.

\textsuperscript{126} See cases cited supra note 87.

\textsuperscript{127} Expulsion may present a greater practical problem. Because of emotional considerations, the risk of a suit from expulsion is probably greater than the risk arising from denial of admission.
HYBUD EQUIPMENT CORPORATION V. SPHERE DRAKE INSURANCE COMPANY: THE MEANING OF THE POLLUTION EXCLUSION ESTABLISHED IN OHIO

by Joseph C. Gruber*

I. INTRODUCTION

The Supreme Court of Ohio, in its unanimous decision in *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, marked a return to sanity in the judicial interpretation of insurance contracts by rejecting the result-oriented rationale of previous Ohio appellate decisions and enforcing the clear language of the standard pollution exclusion clause found in typical comprehensive general liability policies. In so holding, Ohio joins its industrial neighbor to the north, Michigan, and a growing number of states whose highest courts have failed to find ambiguity in the standard pollution exclusion clause typically contained in insurance policies. As a result, these courts have denied coverage to policyholders, for claims made against insurers for the recovery of damages stemming from incidents of gradual pollution.

Although this article will focus on the judicial interpretation of the pollution exclusion clause included in standard insurance policies beginning in approximately 1970, it is important to analyze the insuring agreements as a whole in order to fully discern whether any ambiguity exists in the policies as written when applied to claims arising from incidents of pollution.

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The standardized insuring agreements issued across the country from the early 1970s through 1986 provided that the insurer will “[p]lay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence....”

An “occurrence” is defined as “[a]n accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”

The policies also contain numerous exclusions. The exclusion at issue here is the so-called “pollution exclusion” which excludes coverage “for bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water; but this exclusion [from coverage] does not apply if such discharge, dispersal, release or escape is sudden and accidental.”

These provisions, read together, would seem to set forth a straightforward insuring scheme. Coverage under the standard policy is granted if the insured becomes legally obligated to pay for damages due to property damage caused by an accident neither expected nor intended from the standpoint of the insured. If the particular incident meets that threshold of coverage, the focus of the analysis shifts to the exclusions contained in the policies. Where pollution is involved, the insurance will only apply if the bodily injury or property damage arises out of “sudden and accidental” discharges, dispersals, releases or escapes of the enumerated pollutant.

However, this fairly simple contractual arrangement has spawned much litigation and controversy across the country. When courts have been inclined to find coverage, they have found

5. Id. at 409.
6. Id. at 411.
7. Id. at 409, 411.
8. Id. at 411.
9. Id.
ambiguity in the language quoted above. Where courts have examined the language and found no ambiguity, the pollution exclusion has been upheld and coverage has been denied.

This dynamic is best illustrated by examining the treatment of the standard pollution exclusion clause in the courts of Ohio prior to *Hybud*.

II. PRE-*HYBUD*

The courts of Ohio first addressed the standard "pollution exclusion" clause in insurance policies in *Buckeye Union Ins. Co. v. Liberty Solvents & Chemicals Co.*. There, the Court of Appeals for Summit County was asked to interpret an insurance policy issued by Buckeye Union to Liberty Solvents. Liberty Solvents was one of a number of defendants sued by the State of Ohio and the United States in two separate lawsuits filed in Ohio federal court. Liberty Solvents notified Buckeye and requested a defense. Buckeye filed a declaratory judgment action seeking a determination that it had no duty to defend and/or indemnify Liberty Solvents for the damage claims set forth in the two complaints.

Both Liberty Solvents and Buckeye Union filed motions for summary judgment. The trial court granted Buckeye Union's and denied Liberty Solvents', finding Buckeye Union had no duty to defend the claims against Liberty Solvents and no duty to indemnify Liberty Solvents as a result of the litigation filed against it by the State of Ohio and the United States. Liberty Solvents appealed.

On appeal, the Court dealt only with Buckeye Union's duty to defend, reserving decision on the duty to indemnify. The Court noted, citing *Willoughby Hills v. Cincinnati Ins. Co.*, that the underlying complaints must only "potentially or arguably" state a claim within the policy coverage or create some "doubt as to

11. Id. at 1229.
12. Id.
13. Id. at 1229-30.
14. Id. at 1230.
15. Id.
16. Id.
17. Id.
whether a theory of recovery within the policy coverage has been pleaded” in order to trigger a defense duty.\textsuperscript{19} With this standard in mind, the Court turned to the underlying allegations of the complaint. The state’s complaint alleged in part:

Chemical wastes, including wastes containing hazardous substances, arrived at the Chem-Dyne site in drums, barrels, tank trucks, railroad cars and other containers. Waste materials including “hazardous substances” were mixed, blended or co-mingled in open pits, loading docks and bulk storage tanks. Thousands of drums and other containers have been stored on the Chem-Dyne site for prolonged, indefinite periods, exposed to the weather. Many drums are now in a rusted or corroded condition. Drums were placed in stacks as tall as four drums high and were sometimes creased, dropped and ruptured or otherwise punctured by Chem-Dyne or its affiliates. Many drums at the Chem-Dyne site are missing tops or bungs or otherwise lack secure and proper closures.\textsuperscript{20}

Based upon these allegations, the Court found there was an “occurrence” within the meaning of the policies at issue.\textsuperscript{21} It then turned to a discussion of the pollution exclusion clause, identical to the clause quoted above.\textsuperscript{22}

The Court first noted policy provisions which “exclude coverage are to be strictly construed against the insurer where the language is ambiguous.”\textsuperscript{23} The Court then stated the terms “sudden” and “accidental” in the exception to the pollution exclusion were not defined in the policy and concluded that this fact alone rendered the exclusion ambiguous.\textsuperscript{24} In so doing, the Court adopted the following language from a New Jersey decision:

When viewed in light of the case law cited, the clause can be interpreted as simply a restatement of the definition of “occurrence”—that is, that the policy will cover claims where the injury was “neither expected nor intended.” It is a reaffirmation of the principle that coverage will not be provided for intended results

\textsuperscript{20} Id. at 1229-30.
\textsuperscript{21} Id. at 1233.
\textsuperscript{22} Id. See supra note 6.
\textsuperscript{23} Id.
\textsuperscript{24} Id. at 1234.
of intentional acts but will be provided for the unintended results of an intentional act.25

Having determined that the "sudden and accidental" language of the pollution exclusion clause was merely a restatement of the "expected or intended" language of the "occurrence" definition, the court did not have to go far to find a duty to defend the state and federal complaints, stating:

There are no allegations in the complaint that compel the conclusion that Liberty Solvents intended or expected the releases of hazardous waste substances by Chem-Dyne or the damages that such releases would cause. Construing the words "sudden and accidental" most favorably to the insured and in accordance with the interpretation afforded to the polluter's exclusion [sic] clause by other jurisdictions, we conclude that the release and result in property damages could be found to be "sudden and accidental" from the standpoint of Liberty Solvents.26

The court in *Buckeye Union* made no attempt to analyze the insuring agreements and the pollution exclusion independently of case law from New Jersey.27 It further made no attempt to examine the intent of the parties to the contract. Having found an ambiguity, the court immediately construed the language against the insurer and, in effect, read the entire exclusion out of the policy. The court stated that "[t]he term 'sudden and accidental' must be construed in its relevant context. The relevant context to be considered is the fact that it is a term employed by an insurer in the contract and should be given the construction most favorable to the insured."28

Interestingly, although the court acknowledged that one must look to the context in which the "sudden and accidental" language appears in order to interpret its meaning, the Court in fact did nothing of the kind.29 Instead, the Court merely concluded that because the language appears in a contract of insurance, the policyholder should receive the benefit of the interpretation of

29. Id. at 1235.
the clause.\textsuperscript{30} The court conducted no independent analysis of the words used or of the relationship between the language of the exclusion and the language of the coverage grant.\textsuperscript{31} It arrived at its result without recognizing that the term "sudden and accidental" in the exclusion applies to the discharges of the pollution, not to the intent of the policyholder.\textsuperscript{32}

The next treatment of the pollution exclusion in Ohio appears in \textit{Kipin Industries, Inc. v. American Universal Ins. Co.}\textsuperscript{33} The \textit{Kipin} case arose out of the same hazardous waste site (Chem-Dyne) as in \textit{Buckeye Union} and involved the same two underlying federal complaints and the same policyholder attorney.\textsuperscript{34} Not surprisingly, the Hamilton County Court of Appeals, relying both upon \textit{Willoughby Hills}\textsuperscript{35} and \textit{Buckeye Union}\textsuperscript{36} found that the insurer owed a duty to defend the same two federal suits.\textsuperscript{37}

After finding that the underlying complaints arguably alleged an "occurrence," the court adopted the identical interpretation of the pollution exclusion as did the court in \textit{Buckeye Union}. The court stated:

\begin{quote}
We interpret the non-applicability clause (the "sudden and accidental" exception) in the same way as does the Court of Appeals for Summit County in \textit{Buckeye Union}, an interpretation that is with the weight of authority. In brief, this interpretation is that an event is "sudden and accidental" and thus not excluded from comprehensive coverage if the damaging result is neither expected nor intended by the insured.\textsuperscript{38}
\end{quote}

As did the court in \textit{Buckeye Union}, once the \textit{Kipin} court found an ambiguity in the pollution exclusion, it construed the clause strictly against the insurer and determined that there was coverage for the claim.\textsuperscript{39} The \textit{Kipin} court conducted no independent analysis of the language to determine whether it was ambiguous,

\begin{footnotes}
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} 535 N.E.2d 334, 335 (Ohio Ct. App. 1987).
\textsuperscript{34} \textit{Id.}
\textsuperscript{36} \textit{Buckeye}, 447 N.E.2d 1227.
\textsuperscript{37} \textit{Kipin}, 535 N.E.2d at 335.
\textsuperscript{39} \textit{Kipin}, 535 N.E.2d at 338.
\end{footnotes}
relying predominantly upon the conclusion reached by the *Buckeye Union* court, which had relied upon New Jersey court decisions for its conclusion.\(^\text{41}\)

However, not all courts were convinced by the rationale of the *Buckeye* and *Kipin* decisions. Shortly after the *Kipin* decision, the United States District Court for the Southern District of Ohio, Eastern Division announced its decision in *Borden, Inc. v. Affiliated FM Ins. Co.*,\(^\text{42}\) rejecting the rationale of both *Kipin*\(^\text{43}\) and *Buckeye Union*.\(^\text{44}\) Although the court acknowledged that the opinions of the Ohio courts of appeal were entitled to some deference, it recognized they were not binding and that district courts were permitted to conduct an independent analysis as to what the Ohio Supreme Court would do when faced with the particular issue.\(^\text{45}\)

The court first addressed the Supreme Court of Ohio's pronouncements on the interpretation of insurance contracts:

> It is well-settled in Ohio that insurance policies should be enforced in accordance with their terms as are other written contracts. Where the provisions of the policy are clear and unambiguous, courts cannot enlarge the contract by implication so as to embrace an object distinct from that originally contemplated by the parties.\(^\text{46}\)

The court further noted that language in an insurance policy is to be given its “commonly accepted meaning unless that would lead to an absurd result.”\(^\text{47}\)

Examining the policy language, the court found the language of the pollution exclusion unambiguous, noting specifically that the “sudden and accidental” exception applied to the discharge of the pollutants,\(^\text{48}\) not to the expectations or intent of the insured. Commenting on the definitions of the terms “sudden” and “accidental,” the court noted:

\(^{40}\) *Buckeye*, 447 N.E.2d 1227.
\(^{41}\) *Kipin*, 535 N.E.2d at 338.
\(^{43}\) *Kipin*, 535 N.E.2d at 338.
\(^{44}\) See supra notes 10–41 and accompanying text.
\(^{45}\) *Borden*, 682 F. Supp. at 927.
\(^{46}\) Id. (quoting Rhodes v. Equitable Life Ass'n Soc'y, 374 N.E.2d 643, 644 (Ohio 1978)).
\(^{47}\) Id. at 929-30.
\(^{48}\) Id. at 930.
"Sudden," in its common usage, means "happening without previous notice of with very brief notice," while "accidental" means "occurring sometimes with unfortunate results by chance alone." The meaning of these terms is clear and should not be twisted simply to provide insurance coverage when the courts deem it desirable.49

Thus, the court joined the Supreme Court of North Carolina in pointing out the error in interpreting the standard pollution exclusion clause to be merely a restatement of the definition of "occurrence."50 Quoting the North Carolina high court's decision in Waste Management v. Peerless Ins. Co.,51 the court stated: "Unlike the focus of the ‘occurrence’ language and definition in the policies’ broad coverage provisions, the focus of the ‘pollution exclusion’ is not upon intention, expectation or even foresight."52

Thus, the court recognized the clear distinction between the grant of coverage in the insuring agreement and the elimination of coverage in the pollution exclusion clause.53 In the former, the intent of the policyholder was an important factor in making the initial determination that a specified event is arguably covered under the policies; in the latter, the intent of the policyholder should be ignored and the focus of the inquiry should shift to the suddenness or gradualness of discharge, dispersal, release or escape of the particular pollutant or contaminant at issue.54 Thus, under this rationale, whether the policyholder knew about the particular pollution involved is central to establishing an “occurrence” under the policy, but irrelevant when examining whether the pollution exclusion applies to deny coverage. The Sixth Circuit Court of Appeals later affirmed the Borden decision, specifically adopting the opinion of the district court decision.55

The Sixth Circuit Court of Appeals more fully explained its rationale for upholding Borden in United States Fid. & Guar. Co. v. Star Fire Coal, Inc.56 Applying Kentucky law, the court applied

49. Id. (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2284 (3d ed. 1968)).
54. Id.
56. 856 F.2d 31 (6th Cir. 1989).
familiar principles to resolve the problems presented by the interpretation of insurance contracts:

Courts in Kentucky are required to examine insurance policies as complete instruments to determine the extent of the coverage offered. Ambiguous language in an insurance contract, however, will be construed in favor of the insured. The canon of construing insurance provisions in favor of the insured operates, however, only where there is latent ambiguity. It must not become an overarching policy determination justifying the use of tortured logic to find ambiguity where in fact none exists.\(^5\)

Thus, courts are charged with examining language in contracts to determine whether any ambiguity exists. Courts must not initially invoke the canon of construction that one construes policies against the drafter. Rather, the court’s first duty is to determine whether any ambiguity exists at all. In so doing, the court must give the language used by the parties its usual and ordinary meaning.

In rejecting the policyholder argument that the definition of occurrence and the pollution exclusion create a “circle of ambiguity,”\(^6\) the Sixth Circuit stated:

We do not find the pollution clause to be riddled with ambiguities despite the best efforts of Star Fire to create them. Specifically, we believe the district court erred when it treated the pollution exclusion and the “occurrence” definition provisions as interchangeable. . . . We have no difficulty reconciling the two provisions. We believe the “occurrence” definition results in a policy that provides coverage for continuous or repeated exposure to conditions causing damages in all cases except those involving pollution, where coverage is limited to those situations where the discharge was “sudden and accidental.” We fully agree with the conclusion that this “language is clear and plain, something only a lawyer’s ingenuity could make ambiguous.” “It’s strange logic to perceive ambiguity” in this clause.

We believe the every day meaning of the term “sudden” is exactly what this clause means. We do not believe that it is possible to define “sudden” without reference to a temporal element that joins together conceptually the immediate and the unexpected. It must also be emphasized that the focus of this “sudden and accidental” exception to the general pollution exclusion clause is

\(^{57}\) Id. at 33 (citations omitted) (emphasis in original).

\(^{58}\) Id. at 34.
on the nature of the discharge of the pollution itself, not on the nature of the damages caused.

We believe that the phrase "sudden and accidental" is not a synonym for "unexpected and unintended," and that it should not be defined by reference to whether the accident or damages were expected. That precise argument has been rejected by numerous other courts and we join them today.59

Against this precedential backdrop, the Ohio Supreme Court heard oral argument in *Hybud*60 in March of 1992.

However, one week prior to the announcement of the *Hybud* decision, in a ruling which perhaps foreshadowed the *Hybud* result, the Ohio Supreme Court issued its opinion in *Shifrin v. Forest City Ent., Inc.*61 There, the Supreme Court was faced with an apparently unrelated issue: the interpretation of a release contained in a Partnership Agreement.62 However, in rendering its decision, the court, in language echoing that of the Federal Courts in *Borden* and *Star Fire Coal*, took the opportunity in *Shifrin* to restate the cardinal principles of contract interpretation in Ohio:

Generally, courts presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement. Only when the language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement invests the language of the contract with a special meaning will extrinsic evidence be considered in an effort to give effect to the parties' intentions. When the terms in a contract are unambiguous, courts will not in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.

Accordingly, the threshold issue controlling our determination of the contractual intent of the parties herein is whether the releases in the auction agreement and assignment instrument are ambiguous.... [W]e set forth a test for determining whether contract terms are ambiguous: "[C]ommon words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." If no ambiguity appears on the face of the instrument, parol evidence cannot

59. *Id.* (citations omitted).
62. *Id.* at 500.
be considered in an effort to demonstrate such an ambiguity.63

The court then determined that the language in the releases was unambiguous, giving the terms of the release their ordinary meaning.64

One week later, the Supreme Court announced its decision in Hybud.65

III. HYBUD

Hyman Budoff was an officer and director of the Industrial Excess Landfill, Inc. ("IEL") and of the Hybud Equipment Corporation ("Hybud").66 IEL owned and operated the Industrial Excess Landfill.67 Hybud built and leased various equipment for solid waste and operated numerous vehicles which collected and transported waste from various local commercial and industrial entities.68 Hybud took its waste to either IEL or the Montville Landfill located in Medina County, Ohio.69

In November, 1987, an individual filed suit in Ohio federal district court against IEL, Hybud, and Budoff alleging she suffered bodily injury and property damage as a result of leakage of certain pollutants from the Industrial Excess Landfill over a 14 year period.70

In October of 1989, in the same Ohio district court, the United States brought an action against the same three entities, predicated on an administrative order issued by the Environmental Protection Agency in which it found the landfill had accepted various waste materials over a twelve year period and that IEL had caused various contaminants to migrate into residential water wells near the landfill.71

In April of 1989, Hybud was named as a third party defendant in an action filed by the State of Ohio against the Montville Landfill in the Medina County Court of Common Pleas.72 After
receiving service in each of these lawsuits, IEL, Hybud, and Budoff notified its carrier, Sphere Drake, requesting Sphere Drake to defend them in the litigation, and, in each instance, Sphere Drake denied any duty to defend.\textsuperscript{73}

The three policyholders then instituted a declaratory judgment action in the Summit County Court of Common Pleas, seeking a declaration that Sphere Drake was required to defend them in each of the cases mentioned above.\textsuperscript{74} Sphere Drake replied it had no duty to defend any of the actions because coverage was excluded by the pollution exclusion clause.\textsuperscript{75}

The trial court ordered Sphere Drake to provide a defense and awarded damages to the policyholders in the amount of $181,287.76.\textsuperscript{76} Both sides appealed.\textsuperscript{77} The Ninth Appellate District, relying on \textit{Buckeye Union}, affirmed.\textsuperscript{78} Both sides appealed and the Supreme Court granted the motion and cross-motion to certify the record in July of 1991.\textsuperscript{79}

After explaining the rationale of \textit{Buckeye Union}, the Supreme Court rejected its holding.\textsuperscript{80} The court first noted that the authority from other jurisdictions no longer supported the interpretation of the "sudden and accidental" phrase espoused by the \textit{Buckeye Union} court.\textsuperscript{81}

The court cited \textit{Waste Management of Carolinas, Inc. v. Peerless Ins. Co.}, a decision of Supreme Court of North Carolina, as a "prime example" of the recent trend toward upholding the pollution exclusion.\textsuperscript{82}

In a remarkably similar factual situation, the North Carolina Supreme Court had upheld the pollution exclusion, finding the word "sudden" must be given a "temporal aspect," and that it could not be read to include releases which occur over a long period of time: "The exception also describes the event—not only
HYBUD

in terms of it being unexpected, but in terms of its happening instantaneously or precipitantly.\textsuperscript{83}

The Supreme Court discussed opinions from other courts which had found the pollution exclusion unambiguous by giving the term "sudden" its temporal meaning when used in conjunction with "accidental."\textsuperscript{84} These included the state Supreme Courts of Michigan\textsuperscript{85} and Massachusetts,\textsuperscript{86} the various decisions from the Sixth Circuit Court of Appeals applying Kentucky\textsuperscript{87} and Michigan\textsuperscript{88} law, as well as decisions of the First\textsuperscript{89} and Second\textsuperscript{90} Circuits Courts of Appeal.

The court then applied Ohio's rules of construction with regard to insurance contracts. It first noted that Ohio courts have consistently held that insurance contracts are to be construed in accordance with the same rules as other written contracts.\textsuperscript{91} According to the court, the "most critical rule" of contract construction is the principle that courts should not rewrite contracts where the language of the policy's provisions are clear and unambiguous.\textsuperscript{92}

By applying these principles of contract interpretation, the court concluded that the Buckeye Union\textsuperscript{88} court had erred in holding that the pollution exclusion was merely a restatement of the "occurrence" definition.\textsuperscript{94} The court found that the word "sudden" as used in the pollution exclusion exception is not synonymous with the word "unexpected" in the typical definition of "occurrence."\textsuperscript{95}

The court set forth three main reasons for reaching this conclusion,\textsuperscript{96} all revolving around a definitional analysis of the term

\textsuperscript{83. Id. at 1100 (citing Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 379 (N.C. 1986)).}
\textsuperscript{84. Id. at 1101.}
\textsuperscript{87. U.S. Fidelity and Guar. Co. v. Star Five Coals, Inc., 856 F.2d 31 (6th Cir. 1988).}
\textsuperscript{88. FL Aerospace v. Aetna Casualty and Sur. Co., 897 F.2d 214 (6th Cir. 1990); Grant-Southern Iron and Metal Co. v. CNA Ins. Co., 905 F.2d 954 (6th Cir. 1990).}
\textsuperscript{89. A. Johnson and Co. v. Aetna Casualty and Sur. Co., 933 F.2d 66 (1st Cir. 1991).}
\textsuperscript{90. New York v. Amro Realty Co., 936 F.2d 1420 (2nd Cir. 1991).}
\textsuperscript{91. Hybud Equip. v. Sphere Drake Ins., 597 N.E.2d 1096, 1102 (Ohio 1992).}
\textsuperscript{92. Id.}
\textsuperscript{93. See supra notes 10-32.}
\textsuperscript{94. Hybud, supra note 91.}
\textsuperscript{95. Id.}
\textsuperscript{96. Id. at 1103. The Court added a "public policy" reason for upholding the pollution
“sudden.” First, the court held that the term “sudden” should be read to give effect to its most common meaning: happening “quickly, abruptly, or without prior notice.”97 Second, the court found that the term “sudden” must be given a temporal aspect in order for it to be not merely surplusage, given its use with the term “accidental.”98 By contrast, under the Buckeye Union interpretation, the term “sudden” would have the same meaning as “accidental” and would therefore serve no purpose in the clause.99 Finally, the court recognized that if the term “sudden” were given its Buckeye Union meaning, the entire pollution exclusion would serve no purpose since “the pollution exclusion would exclude only bodily injury or property damage that was already excluded by the common definition of ‘occurrence.’”100

Having established the meaning of the “sudden and accidental” exception to the pollution exclusion, the court was readily able to declare Sphere Drake owed no duty to defend the three complaints at issue, since none of the complaints made any allegation that the release or discharges of the wastes “happened abruptly or instantaneously.”101

Having reached this conclusion, the court refused to reconsider its opinion, despite determined arguments for rehearing from numerous friends of the court.102 The focus of these motions for rehearing centered on the policyholders’ almost religious belief that the Supreme Court of Ohio only need re-examine the drafting history of the policy provisions at issue in order to reverse its decision.103 Such arguments are interesting in two respects: First, many of the documents in which the policyholders relied were not related to the drafting of history of the pollution exclusion at all. Rather, they were documents culled from searches of insurer files from around the country containing isolated statements from various insurer personnel regarding coverage. They

97. Id. at 1102.
98. Id.
99. Id.
100. Id.
101. Id. at 1103.
also included articles written by policyholder attorneys. In general, these documents had little to do with the historical drafting of the clause.

Second, the arguments ignored the effect of the Shifrin case decided one week prior to Hybud which reaffirmed Ohio’s long-standing rule of contract interpretation that courts need not resort to extrinsic evidence where words used in a contract are unambiguous. The Supreme Court of Ohio found the pollution exclusion to be unambiguous. No amount of extrinsic evidence, drafting history or not, could therefore appropriately be reviewed by the court when interpreting the language.

CONCLUSION

The Supreme Court of Ohio reached its decision in Hybud because it stayed true to the following rules of contract interpretation:

1. Words used in contracts are to be given their ordinary and everyday meaning.
2. Words in contracts are to be given meaning so as to not be mere surplusage.
3. Where words in a contract are unambiguous, extrinsic evidence is not permitted to change the clear meaning of the parties as reflected in the language of a contract.
4. Rules of construction, such as construing words of a contract against the drafter, are not employed until the contract itself is determined to be ambiguous and the intent of the parties is not discernible from extrinsic sources.

Where courts employ these rules of construction and refuse to engage in result oriented analyses, the terms of the pollution exclusion become clear and unambiguous and work to preclude coverage for claims stemming from gradual pollution.

104. Id.
105. Id.
107. Id.
STATE V. SOLOMON: THE NEW BASES FOR EXPERT TESTIMONY

by Lawrence A. Glassmann*

I. INTRODUCTION

On May 1, 1991, the Ohio Supreme Court decided State v. Solomon.1 In its unanimous decision, the court took a giant stride toward liberalizing Rule 703 of the Ohio Rules of Evidence2 by judicially engrafting on the Rule a broad new category for the permissible bases of expert testimony.3 The Solomon decision thus brings Ohio a step closer to the majority of states and the federal courts.4

This note will begin with a brief review of the early Ohio cases dealing with the permissible bases of expert testimony. A discussion of the differences between the Ohio and federal versions of Rule 703 will be followed by a review of how Ohio courts prior to Solomon have interpreted Rule 703. Finally, this note will analyze the Solomon decision with an emphasis on the questions that remain unanswered.

II. BACKGROUND

A. Cases Prior To The Adoption Of The Ohio Rules Of Evidence

Prior to the adoption of the Ohio Rules of Evidence in 1980, practitioners had a fairly consistent body of case law to rely on

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2. OHIO R. EVID. 703 provides that "the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing."
3. Essentially, the basis of an expert's opinion is the underlying information he relies upon to reach a conclusion. See Stephen A. Saltzburg & Kenneth R. Redden, FEDERAL RULES OF EVIDENCE MANUAL Rule 703 at 425-27 (2d ed. 1977).
4. In addition to the federal courts, the following states have adopted FED. R. EVID. 703 without change: Arizona, Arkansas, Colorado, Delaware, Idaho, Maine, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. Numerous other states have adopted FED. R. EVID. 703 with minor modifications. 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 703(05) (1992).
with respect to the permissible bases of expert testimony. The common law was succinctly summarized by the Ohio Supreme Court in the syllabus of *Burens v. Industrial Commission.* It stated "[t]he hypothesis upon which an expert witness is asked to state an opinion must be based upon facts within the witness' own personal knowledge or upon facts shown by other evidence."

The first permissible basis for an expert's opinion — facts within the expert's own personal knowledge — is exemplified by the physician who personally examines a party and then renders an opinion based upon that personal examination. The second permissible basis for an expert's opinion — facts shown by other evidence — is most often accomplished in practice by having the expert attend trial, listen to testimony establishing certain facts and then render an opinion interpreting those facts. The same thing could also be accomplished by asking the expert a hypothetical question closely tailored to the facts already in evidence.

The courts limited the bases of expert opinions because of fears that allowing an expert to base an opinion on facts made known to him out of court would "open too wide a door to the receiving of unreliable testimony and prevent effective cross-examination as to the validity of the underlying data." As the

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5. The syllabus, not the body of the decision, states the law of the case in a decision by the Ohio Supreme Court. See *Ohio Supreme Court Rules For The Reporting Of Opinions,* rule 1(B); *Smith v. Klem,* 6 Ohio St. 3d 16, 450 N.E.2d 1171 (Ohio 1983).

6. 124 N.E.2d 724, ¶ 1 Syllabus (Ohio 1955).


9. *Id.*

Ohio Supreme Court noted, "the opinion of the expert does not constitute proof of the existence of the facts necessary to support the opinion." Thus, at the time Ohio Evidence Rule 703 was first proposed, the permissible bases of expert testimony were facts within the experts' personal knowledge or facts shown by other evidence.

B. Rule 703

Rule 703 of the Ohio Rules Evidence was adopted in 1980. As originally proposed, the rule was to be identical to Federal Evidence Rule 703 and would have significantly liberalized the permissible bases for expert opinion testimony in Ohio. Federal Evidence Rule 703 provides as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

However, the drafters of Ohio Evidence Rule 703 ultimately rejected the Federal model and codified instead the then existing common law of Ohio with respect to the permissible bases for expert opinion. The Ohio rule, as finally adopted provides "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted into evidence at the hearing." The critical difference between the language of the Ohio and Federal versions of Rule 703 is that only the Federal Rule permits an expert to base an opinion on facts that have neither been admitted into evidence nor personally perceived by the expert. Thus, in contrast to the Ohio Rule, the language of the Federal Rule permits an expert to base his opinion on all types of

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14. Ohio R. Evid. 703 Staff Note.
16. Weinstein, supra note 4, ¶ 703(05) ("Ohio's rule is inconsistent with the Federal Rule. It is highly restrictive and omits the liberalizing elements found in the second sentence of Federal Rule 703.").
inadmissible hearsay evidence as long as the evidence relied upon is of a type reasonably relied upon by experts in that field.17

C. Cases Interpreting Ohio Evidence Rule 703

In the years immediately following the adoption of Ohio Evidence Rule 703, the Ohio courts continued with rare exception to strictly apply the long-standing rule that an expert must base his opinion on facts or data either 1) perceived by him, or 2) admitted into evidence.18 Since Ohio Rule 703 was looked upon as a mere codification of previously existing law, the courts during this time period often based their rulings on common law precedent rather than the plain language of the Rule. Indeed, the courts frequently did not even mention Rule 703 in their decisions. For example, in State v. Chapin,19 the Ohio Supreme Court, relying on common law precedent, ruled that a psychiatrist could not testify about the contents of writings which he did not prepare, but which aided him in formulating his opinion.20 The reports referred to included histories prepared by other mental health professionals, hospital records, United States Marine Corps clinical records, and high school records.21

17. See, e.g., United States v. Gavic, 520 F.2d 1346 (8th Cir. 1975) (drug enforcement officer identified substance from chemical test that officers performed and that were not admitted into evidence); United States v. Genser, 582 F.2d 292 (3rd Cir. 1978) (results of audit performed by others).

18. See, e.g., State v. Chapin, 424 N.E.2d 317 (Ohio 1981) (court disallowed expert testimony based on unadmitted reports); Price v. Daugherty, 450 N.E.2d 296 (Ohio Ct. App. 1982) (court found trial court had committed prejudicial error by allowing expert to give opinion based, in part, on unadmitted evidence); State v. Jones, 459 N.E.2d 526 (Ohio 1984) (court disallowed expert opinions based partially on various reports not admitted into evidence and not prepared by experts); State v. Joseph, No. C-84 0751, slip op. (7-24-85 Hamilton Co. App.) (court disallowed expert opinion based in part on unadmitted evidence of tests conducted by expert's assistants); Firemen's Fund Insurance Co. v. BPS Co., 491 N.E.2d 365 (Ohio Ct. App. 1985). But see Seley v. G.D. Searle, 43 N.E.2d 831, 842 (Ohio 1981) (characterized an objection to the basis of expert's opinion as "a technical objection which would require us to unduly emphasize form over substance."); Lanning v. Matlack, No. 49068, slip op. at 23-24 (Cuyahoga Co. App. October 1, 1981) ("The application of this rule [Ohio R. Evid. 703], with Fed. R. Evid. 703, allows the expert to base his opinion upon the data supplied to him or in evidence at the hearing.").


While the years immediately following the adoption of Rule 703 were met with a continued application of the strict common law rule, some judges began to suggest it was time for a change. One such suggestion emanated from the Franklin County Court of Appeals in the case of State v. Jones. There, Jones had been found not guilty by reason of insanity on two counts of aggravated murder. As a result, he was committed to the Lima State Hospital pursuant to Ohio Revised Code § 2945.39. In January, 1982, a hearing was held on application of the Lima State Hospital for Jones' continued commitment in a maximum security facility. The trial court allowed into evidence the opinions of three separate psychiatrists, testifying for the state, who based their evaluation of Jones' mental state in part on their own observations of him but also in part on documents and records not admitted into evidence. Recognizing the Supreme Court's recent reaffirmance of the strict common law rule in State v. Chapin, the Franklin County Court of Appeals reversed the trial court's admission of the psychiatrists' testimony holding that under Chapin, expert opinion testimony based in part on reports neither prepared by the experts nor admitted into evidence, was inadmissible. Moreover, the Court of Appeals rejected the appellee's argument that the admission of the testimony was harmless error.

However, in his concurring Court of Appeals opinion, Judge Strausbaugh made the following plea for a departure from such a strict application of the common law rule:

[T]he Supreme Court should limit the application of the language of Chapin to allow the admission of reports by expert psychiatric witnesses, where the report was not based upon the expert's personal knowledge or upon facts shown by other evidence, in a case such as this one. In my opinion, the results brought about by this and similar cases will substantially endanger the general public. I would urge the Supreme Court to reexamine and limit

24. Id.
25. Id. at 528.
28. Id. at 3.
the breadth of the law set forth in *Chapin* by reversing this opinion.29

The more recent case of *Department of Mental Health v. Mil-\ldots ligan*,30 factually very similar to *State v. Jones*, seemed to answer Judge Strausbaugh’s call for a more flexible rule. There, the State attempted to prove that the defendant should be confined to a maximum security mental institution by utilizing the testimony of an expert who had examined the defendant, examined the defendant’s medical records and talked to several other doctors and individuals who knew the defendant.31 The medical records had been admitted into evidence, but the testimony of the other people with whom the State’s expert had talked was not admitted into evidence.32 The defendant therefore objected on the basis that the State’s expert relied in part upon facts not within his personal knowledge and not shown by the evidence, namely the conversations with individuals who did not testify at trial.33 The trial court overruled the objection and permitted the expert’s testimony.34

The Franklin County Court of Appeals affirmed, finding that it was impossible to distinguish that part of the expert’s testimony based on permissible grounds (for example, personal examination and medical records admitted into evidence) from that part of the testimony based on impermissible grounds (for example, the expert’s discussions with the above-mentioned persons).35 The court distinguished *Jones* by confining the case to its facts.36 The court further noted that the majority of defendant’s experts had based their opinions on precisely the same grounds.37 Therefore, the court concluded that any error committed by the trial court with respect to the testimony of the state’s expert

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29. *Id.* at 4 (citation omitted).
31. *Id.* at 969.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. The court noted that the Supreme Court’s decision in *Jones* did not address the situation where the expert relied on his personal examination of the defendant as in the case *sub judice*. *Id.* Moreover, the court found the *Jones* decision was distinguishable since the experts in that case based their opinion in part on records not admitted into evidence. *Id.* at 969.
37. *Id.* at 969-70.
was not prejudicial.\textsuperscript{38} While the court set forth no firm rule that would be useful for precedential purposes, it clearly relaxed the application of the strict common law rule by allowing the expert to render an opinion which was not strictly based solely on personal observation and/or facts already in evidence.

Other courts refused to apply Ohio's strict rule either under a common law analysis or an application of the plain language of Ohio Rule 703. For example, in \textit{Ratka v. Cleveland Builders Supply Co.},\textsuperscript{39} the Cuyahoga County Court of Appeals permitted an expert to base his opinion on tests done by his assistants which were not admitted into evidence. The court distinguished the Supreme Court's decision in \textit{State v. Jones}\textsuperscript{40} by noting that the experts in \textit{Jones} relied on reports that were prepared by independent parties, not under the direction and control of the experts.\textsuperscript{41} This distinction is questionable. As the Washington County Court of Appeals later noted, the \textit{Ratka} decision is simply a departure from \textit{Jones} and the plain language of Rule 703.\textsuperscript{42}

Even more questionable, in light of Supreme Court precedent and the plain language of Rule 703, was the Hamilton County Court of Appeals decision in \textit{Brant v. Benedict}.\textsuperscript{43} There, the Court permitted an expert to base his opinion on estimates supplied to him by subcontractors.\textsuperscript{44} The estimates were not admitted into evidence.\textsuperscript{45} The court held that Rule 703 permitted an expert "to base his opinion upon the data supplied to him or in evidence at the hearing."\textsuperscript{46} The judicially engrafted phrase "supplied to him" is far outside the letter and intent of Rule 703,\textsuperscript{47} as well as any

\textsuperscript{38} \textit{Id.} at 969. \textit{See also}, Bomanite Designs, Inc. v. LeBail, No. 89-L-14-139, slip op. (Lake Co. App. Oct. 26, 1990) (court found trial court erred by allowing expert to base opinion on unadmitted evidence, but because expert did not attach much importance to evidence, trial court's error was harmless).

\textsuperscript{39} No. 55554, slip op. (Cuyahoga Co. App. Aug. 10, 1989) (expert permitted to base opinion on tests done by his assistants which were not admitted into evidence).

\textsuperscript{40} 459 N.E.2d 526 (Ohio 1984).

\textsuperscript{41} \textit{Ratka}, No. 55554, slip op. at 5.

\textsuperscript{42} \textit{State v. Underwood}, 598 N.E.2d 822, 828 (Ohio Ct. App. 1991) ("Although the \textit{Ratka} court characterized its facts as distinguishable from \textit{Jones}, we question whether \textit{Ratka} is instead a departure from \textit{Jones} and Evid. R. 703.").


\textsuperscript{44} \textit{Id.} at 3.

\textsuperscript{45} \textit{Id.}


\textsuperscript{47} \textsl{Ohio R. Evid.} 703 provides "[t]he facts or data in the particular case upon which
Supreme Court precedent interpreting the Rule prior to Solomon.

III. STATE V. SOLOMON

A. Facts

On June 28, 1987, John Solomon was indicted on four counts of abduction with a firearm specification. On June 26 and 27, 1987, Solomon held five individuals, including his mother, sister and niece, at gunpoint against their will. The incident emanated from a domestic dispute between Solomon and his mother over the whereabouts of Solomon's common law wife and two children. In September 1987, Solomon was evaluated by a psychiatrist, Dr. G.M. Sastry. Solomon was subsequently found by the trial court to be incompetent to stand trial. After some six weeks of court-ordered treatment, Solomon entered pleas of not guilty and not guilty by reason of insanity. The court found Solomon competent to stand trial.

The trial court then ordered a second psychiatric evaluation of Solomon to be conducted by Dr. Sastry. Dr. Sastry submitted a report which indicated that Solomon was legally insane. A second doctor confirmed this opinion. Solomon then privately retained Dr. Arthur Schramm for another evaluation.

Subsequent to these evaluations, Solomon was brought to trial before a jury and found guilty of four counts of abduction with a firearms specification as to each count. At trial, both Dr. Sastry and Dr. Schramm testified that, in their opinions, Solomon...
was legally insane. The trial judge, however, sustained a prosecution objection to the opinions of Drs. Sastay and Schramm, based on Rule 703. Specifically, the trial judge found the opinions were "based on such things as hospital status report, witness's statements which are not in evidence and the police report, not in evidence." The trial court, therefore, struck both expert opinions with instructions to the jury to disregard the expert testimony.

Solomon was found guilty by the jury on all counts. He appealed, assigning as error, inter alia, the disallowance of the expert testimony.

While the facts noted above are undisputed, there is great confusion in the record revolving around the critical issue on appeal — what did the doctors testify they were basing their opinions upon? The prosecution claimed in its brief to the Supreme Court that both Dr. Sastry and Dr. Schramm based their opinions on "hearsay statements by others, opinions of other experts or assumed facts from Appellee's hospital record and the reports of other experts who had examined Appellee." The Montgomery County Court of Appeals found that while Dr. Sastry and Dr. Schramm had access to police reports, hospital records, and other unadmitted evidence, they testified at trial that their opinions were based either on their own perceptions or evidence that was or should have been admitted at trial. In his brief to

60. Id.
61. Id.
63. Id. at 7-8.
64. Solomon, 570 N.E.2d at 1119.
65. Id.
67. State v. Solomon, No. 11331, slip op. at 3, (No. 11331) (Montgomery Co. App. March 12, 1990). Based on this reading of the record, the court of appeals had no hesitancy in reversing the trial court. The court of appeals, relying on the plain language of Rule 703 and State v. Jones, 459 N.E.2d 526 (Ohio 1984), applied the strict common law rule regarding the permissible bases of expert testimony. The court found that because Dr. Sastry based his opinions on his own examination of Solomon, the trial court erred in striking his testimony. Similarly, the court found that since Dr. Schramm based his opinion only on his own observations and his consideration of other doctors' opinions which had been or should have been admitted into evidence (for example, Dr. Sastry's opinion), the trial court erred as well in striking his testimony. Id.
the Supreme Court, Solomon took a position somewhere in between. He claimed that Dr. Sastry's testimony was based solely on his personal examination, but that Dr. Schramm's testimony was based on personal observation and "information of the type that an expert in his field would reasonably rely upon in making a determination of Appellee's sanity." 68

While the Supreme Court's decision in Solomon never directly addresses which version of the facts it agrees with, it is apparent that the court believed that at least one of the doctors relied, at least in part, on inadmissible evidence. 69

B. The Court's Decision

The court's decision is very brief. It begins by addressing the prosecution's contention that the opinion of an expert witness must be based on the expert's own personal knowledge or on facts admitted in evidence and may not be based on hospital records and/or opinions of other experts. 70 The court initially responded to this argument by stating its agreement with the contention "in a general sense." 71 Nevertheless, the court immediately distinguished, on their facts, the two Supreme Court cases relied on by the prosecution — State v. Chapin 72 and State v. Jones. 73

According to the court in Solomon, the Chapin decision differs factually from Solomon because "there is no indication that the psychiatrists called to testify [in that case] ever personally ex-
amined the defendant" as had the experts in *Solomon*. 74 *Jones* 75 was likewise deemed to be inapposite because "while the court in *Jones* held that a medical opinion based upon reports not in evidence was not admissible, the court did not meet or discuss the issue as to whether such testimony is admissible where the doctors have personally examined the defendant and have arrived at their opinions based, in whole or in major part, on their perceptions gained from their direct personal examinations of the defendant." 76 Having thus distinguished the state's two major precedential supports, the court held that "[w]here an expert bases his opinion, in whole or in major part, on facts or data perceived by him, the requirement of Evid. R. 703 has been satisfied." 77

C. Analysis Of The Decision

The court's decision is troubling and difficult to analyze because of its brevity and consequent lack of explanation. The holding of the case, which is clearly not confined to the facts, is somewhat confusing as precedent. In light of the *Solomon* holding, the obvious question is: is it now permissible in Ohio for an expert to base his opinion, in part, on facts that were neither perceived by him nor admitted into evidence? The answer appears to be "yes" so long as the "major part" of the expert's opinion is founded on the bases which were always permissible under the old common law rule: facts actually perceived by the expert or facts admitted into evidence.

Most lower court decisions decided after *Solomon* have heralded the case as creating a "major part" exception to Rule 703. For example, in *Lambert v. Goodyear Tire and Rubber Company*, 78 the

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76. *Solomon*, 570 N.E.2d at 1120. It should be noted that all three experts whose testimony was ruled inadmissible by the *Jones* court on the basis that they had improperly based their opinion of the defendant's mental condition upon records and reports not in evidence, had in fact also conducted their own personal examinations of the defendant in the case. State v. *Jones*, 459 N.E.2d 526, 528 n. 2 (Ohio 1984). Thus, *Jones* and *Solomon* were factually very similar in that in both cases the experts had conducted personal examinations of the respective defendants as well as reviewed other reports and records in order to form their opinions.
77. *Solomon*, 570 N.E.2d at Syllabus (emphasis added).
Jackson County Court of Appeals noted that "the Ohio Supreme Court re-examined Evidence Rule 703 in State v. Solomon and created a 'major part' exception to the rule."79 The Washington County Court of Appeals reached a similar conclusion, holding that "[r]ecently, the Ohio Supreme Court re-examined Evid.R. 703, Jones80 and Chapin.81 In State v. Solomon ... the court created a "major part" exception of Evid. R. 703 ...."82 Interestingly, the author of the Solomon decision did not intend to create any exception.83 Rather, Justice Douglas saw Solomon as a routine case wherein the traditional practice was continued with respect to the permissible bases for expert testimony.84 Whatever the Supreme Court may have thought about the effect of Solomon on the practice relating to the permissible bases of expert testimony, it is clear from the discussion above that lower courts saw the Solomon decision as an announcement of a new, broader rule. Yet, the propriety of the Supreme Court judicially legislating an exception to Rule 703 is suspect for several reasons. First, Rule 102 of the Ohio Rules of Evidence requires courts to construe the Rules so that they follow Ohio's common law unless the rule clearly indicates a change was intended.85 As previously noted, the language of Rule 703 was generally in accord with Ohio common law and thus no change was intended by the Rule.86

Second, and even more troubling than the propriety of judicially creating a "major part" exception to Rule 703, is the

79. Id. at 993.
83. Telephone Interview with Justice Andrew Douglas, Ohio Supreme Court Justice (Nov. 24, 1992).
84. Id.
85. OHIO R. EVID. 102 provides:
The purpose of these rules is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined. These rules shall be construed to state the common law of Ohio unless the rule clearly indicates that a change is intended and shall not supersede substantive statutory provisions.
86. See notes 6-7 and accompanying text.
prospect of how the exception will be applied. Aside from simply
guessing, how will a court know the degree to which an expert
has based his opinion on inadmissible evidence? Even if trying
to answer truthfully, will an expert really be able to say with
any precision how much weight he has given a particular piece
of data in formulating his opinion? Finally, what is a “major
part?” More than fifty percent? Seventy-five percent? Solomon
provides no guidance.

While the common law rule had its downsides, it did provide
more certainty than the Solomon exception. The “major part”
exception is so broad that it may well have liberalized the
permissible bases for expert testimony beyond even what the
Federal Rules allow. As previously noted, the Federal Rule at
least requires that evidence relied upon by an expert which is
outside the expert’s personal observations and not admitted into
evidence must be “of a type reasonably relied on by experts in
the particular field” of expertise. No such limiting language is
found in Solomon. As a result, it appears that it would be
acceptable for an expert testifying in an Ohio court to rely, at
least in minor part, on any type of data (regardless of whether
the data is relied on by any other expert in the field).

Practically oriented attorneys may now try to bring evidence
before the jury that had no chance of seeing the light of day
prior to Solomon. All that must be done is to have the expert
rely, in minor part, on the otherwise inadmissible testimony or
documents. At trial, the testimony might proceed as follows:

Q: Doctor X, do you have an opinion to a reasonable degree of
medical certainty, as to whether the defendant is insane?
A: Yes.

Q: Upon what do you base your opinion?
A: I base it in “major part” on my personal examination of the
defendant. I base my opinion in ”minor part” on the National
Enquirer article I read and the segment I saw on T.V.’s Inside
Edition.

Q: What did the article and television show disclose?

87. The practice of limiting the bases of expert testimony to personal observations
or admitted evidence generally leads to “the expenditure of substantial time in producing
and examining various authenticating witnesses.” Fed. R. Evid. 703, advisory committee’s
note.

88. Fed. R. Evid. 703.
State's Attorney: Objection. That questions calls for inadmissible hearsay.

Judge: Overruled. Under State v. Solomon, an expert can rely on inadmissible evidence in minor part. The witness may answer.

A: The television spot I saw on Inside Edition and the article I read in the National Enquirer told about how the defendant had climbed a 100 foot flag pole in the dead of winter without any clothes on and then began singing "I Feel Pretty" on his portable karaoke machine.

Q: Doctor, what is your opinion as to the defendant's sanity?

A: It is my opinion, to a reasonable degree of medical certainty, that the defendant is insane.

A more emboldened attorney may actually try to show the jury the Inside Edition videotape or a blowup of the National Enquirer article. These tactics could arguably be of help to the jury and therefore admissible so long as the attorney and his expert are careful to use the magic language of Solomon.

Though exaggerated somewhat for illustrative purposes, the above example demonstrates how Solomon's unchecked "major part" exception could create a heyday for creative lawyers and their experts that was never contemplated by the drafters of Ohio Evidence Rule 703. As already noted above, even the more liberal Federal Evidence Rule 703 would not permit this result since it at least retains the requirement that any facts relied on by the expert outside of personal observations and facts admitted into evidence be "of a type reasonably relied upon by experts in the particular field ...." 89 Added to this difficulty are the questions already posed above: what constitutes a "major part" in determining whether an expert properly relied on permissible bases in forming an opinion? How will courts determine whether the expert did in fact rely in "major part" on permissible bases? How can experts themselves, not to mention attorneys preparing cases for trial, quantify the same issue for themselves? Solomon provides no guidance.

89. See Young, Opinion and Expert Testimony, 6 CAPEL. REV. 579 (1977). See also FED. R. EVID. 703, advisory committee's note ("If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data 'be of a type reasonably relied upon by experts in the particular field.' The language would not warrant admitting in evidence the opinion of an 'accidentologist' as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied." See Comment, Cal. L. Rev. Comm'n, Recommendation Proposing an Evidence Code 148-50 (1965)).
CONCLUSION

It is imperative that the courts act quickly to answer the many questions left open by Solomon. At present, Ohio practitioners are left without sufficient guidance to adequately prepare, elicit testimony from, and cross-examine experts at trial.

The Ohio Supreme Court must firmly decide if it intends to abandon the plain language of Ohio Evidence Rule 703. If it does, it needs to at least adopt the safeguards of reliability contained in Federal Evidence Rule 703.
JURORS ASKING QUESTIONS: REVOLUTIONARY OR EVOLUTIONARY?

by Judge Anthony Valen*  

I. INTRODUCTION

Many within the legal profession and most outside it may be surprised to learn that attorneys and judges are not the only ones in the courtroom permitted to ask questions of witnesses. Jurors have been allowed to question witnesses as far back as the late nineteenth century.¹ Juror questions have only recently however, become the subject of widespread experimentation and serious discussion.² This article will sketch the evolution of trial procedure from trial by combat through jurors asking questions. The current status of the law regarding the questioning of witnesses by jurors will be reviewed both in the federal courts and in the state courts of Ohio and Kentucky. There will also be a discussion of the commonly raised concerns regarding the asking of questions by jurors. These concerns will be answered and advantages of the procedure will be presented. A recommended jury instruction is included.

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II. JURORS ASKING QUESTIONS: A NATURAL PROGRESSION

The goal of our judicial system, simply stated, is to ascertain the truth and preserve a fair, equitable trial for all. Through the use of modern procedure, modern discovery techniques and practices such as judicial questioning, trials are made more effective than ever at exposing the truth. Jurors asking questions may seem unorthodox at first. It is this author's opinion, however, that such practice should be viewed as merely the next step toward a system wherein informed decisions and determinations are made based on all relevant facts.

A. The Evolution of Trial Procedures and Discovery

In ancient times, justice was sought through such absurd means as trial by battle, in which the battlefield victor was the legal victor. Trial by ordeal vindicated those who survived a drowning, burning or some other punishment. Trial by compurgation ex-

3. United States v. Callahan, 588 F.2d 1078, 1086 (5th Cir. 1979) ("Trials exist to develop truth.") Callahan is an important federal appellate case upholding the right of jurors to ask questions.
4. Simon v. United States, 123 F.2d 80, 83 (4th Cir. 1941), cert. denied, 314 U.S. 694 (1941). ("[T]he function of a federal trial judge is . . . to see that justice is done in the cases heard before him, and to see that a case on trial is presented in such a way as to be understood by the jury, as well as by himself."). Id.
5. Blackstone argues that the institution of trial by jury of "twelve good men" was used in England "time out of mind" and from the very beginning of English government. 3 BLACKSTONE, COMMENTARIES 349 (Lippincott 1881). He blames the Norman Conquers for the introduction of knightly tradition of trial by battle. Id. Other authors are more inclined to argue the reverse and credit the Normans with the introduction of the jury system. ROBERT VON MOSCHZISHER, TRIAL BY JURY, § 7 (1922). Von Moschzisher claims that trial by battle was also popular with the Scandinavian ancestors of the Saxons, especially among men of rank. Trial by jury and other alternative dispute resolution techniques were claimed by the weak and the aged. Id. § 17.

In the courts of feudal Germany, when witnesses were heard under oath, if their testimony was conflicting, the court did not weigh the evidence, but rather the question was decided by combat or ordeal. Even the judge could be challenged to fight by the accused and six of his friends. Id. § 26. The times called for a strong judiciary. Id.

Dueling remained popular in England into modern times. Trial by battle was not officially abolished in England until the early part of the Nineteenth Century. 59 Geo. 3, ch. 46 (Eng.); VON MOSCHZISHER, supra, § 60a.
6. The theory of trial by ordeal, which was usually employed as a method of determining whether the accused was speaking falsely, was absurdly simple. The accused's innocence would protect him from harm and guilt would be revealed in the weakness of the flesh. The accused would first swear to his innocence and then submit to the ordeal.
culpated the defendant fortunate enough to procure persons willing to swear under oath to the defendant's veracity or innocence. From this evolved trial by jury.

Trial by fire took many forms. In ordeal by hot iron the accused was required to carry a piece of red-hot iron, of from one to three pounds, for a distance of nine paces. The hand was then wrapped. After three days the accused went before the altar and the hand was unwrapped. If the wound was free of infection or festering, the accused was proclaimed innocent. LLOYD E. MOORE, THE JURY 31 (1973). In another variation the accused was required to walk, barefoot and blindfolded, over nine red-hot plowshares laid lengthwise at unequal distances. Id. Trial by water came in both hot and cold varieties. In the ordeal by hot water the accused was made to take from a pail of boiling liquid, a stone sunk to a depth equaling the length of his hand or forearm. If the accused was burned, he was declared guilty. Id. In trial by cold water, the accused's thumbs and toes were tied securely together and he was thrown into a pond. On the theory that the pure element of water would not receive into its bosom anyone stained with the crime of false oath, if the accused floated, he was considered guilty. If he sank his truthfulness was vindicated, especially if he were fished out before he drowned. Id. See also VON MOSCHZISHER, supra note 5, § 49.

Ordeal of corned or consecrated morsel was accomplished by forcing the accused to swallow a piece of bread accompanied by a prayer that it might choke him if guilty. Id. § 50. This method of ordeal was popular among the clergy, perhaps because it was the safest. However, Goodwine, Earl of Kent and Wessex, is reported to have died by this ordeal in 1053. MOORE, supra, at 31-32.

One form of trial by ordeal bore strong resemblance to trial by combat. This was the ordeal of the cross. Both litigants were placed standing before a crucifix with their arms outstretched. The one who was able to maintain this position for the longest won the case. VON MOSCHZISHER, supra note 5, app. 2, § B.

Use of ordeals to prove the accused's veracity came to an end in the early part of the Thirteenth Century. Id. § 50.

7. Trial by compurgators or "wager of law" marked a significant step in the direction of the modern jury. A defendant would first deny the accusations against him under oath and then would call other witnesses, known as compurgators or "oath helpers," usually twelve in number, to whose testimony credit was attached according to rank. These witnesses vouched for the truthfulness of the oath of the party on whose behalf they testified. VON MOSCHZISHER, supra, note 5, § 43. The accused's rank and character determined the number of compurgators required. Persons of bad reputation might be required to obtain three times the ordinary number. MOORE, supra, note 6, at 29.

If the defendant could not produce the right compurgators, he had to go to the ordeal. VON MOSCHZISHER, supra note 5, § 45. Wager of law fell into disuse and was abolished in England in 1833. 3 & 4 Will. 4, ch. 42, § 13 (Eng.).

8. The final phase of the evolution involved the transition from a jury of "compurgators" whose purpose was to attest to the veracity of witnesses to the jury of today whose duty is to weigh facts presented in evidence. Von Moschzisher argues that the role first expanded to include evaluation of evidence as well as the veracity of witnesses and from this gradually evolved the system whereby juries were solely "judges of the evidence, and were not supposed to have any personal knowledge of the facts involved." VON MOSCHZISHER, supra, note 5, § 70. A major step was taken when a juror who had personal knowledge of the facts which were the subject matter of inquiry, was obliged to offer himself as a witness, so as to bring his testimony in front of the other jurors within the framework of evidentiary rules. Bushell's Case, Vaughan, 135, 6 How. St. Tr.
At common law justice became dependent on advocates who sought it on behalf of their clients at any cost or by any means. In the words of Lord Henry Brougham:

An advocate, in the discharge of his duty, knows but one person in all the world. And that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

The common law emphasis on advocacy allowed, and, at times, encouraged litigant parties to conceal evidence, witnesses and documents. Courts were powerless to compel either side to supply the opposing side with evidence to assist them in the preparation of their case.

999 (approx. 1670); Von Moschzisher, supra note 5, § 72. Finally, Lord Ellenborough, in the reign of George III, held that a verdict based on the juror's own knowledge, rather than evidence produced at trial, ought not be sustained. Rex v. Sutton, 34 Eng. Rep. 931, 934-35 (K.B. 1816); Von Moschzisher, supra note 5, § 72.

If the jury is only to consider evidence presented in court, it follows that private questioning outside the courtroom must be discouraged. There is, however, no logical connection between precluding jury members from searching for evidence outside the courtroom and the decline of juror questioning inside the courtroom. Jeffrey S. Berkowitz, Note, Breaking the Silence: Should Jurors Be Allowed to Question Witnesses During Trial?, 44 Vand. L. Rev. 117, 124 (1991).

9. Milton Green agrees:

There was a time when issues of fact in a lawsuit were decided by trial by battle. This primitive method has long since been replaced by trial by jury. Nevertheless, our modern system has within it traces of our barbaric past. We still subscribe to the adversary theory of justice which is bottomed on the implicit assumption that a lawsuit is a fight, that each party must exert his utmost energy to overcome his opponent, and that when the dust of battle settles in the legal arena, justice will emerge triumphant. The theory possesses a certain charm and it frequently works, at least in the cases in which the parties are evenly matched. Where, however, one party is represented by a seasoned veteran of many legal battles and the other is represented by a tyro fresh from law school, justice is often smothered in the dust, and the decision in the case is awarded as a prize for the skill of counsel.


11. Berkowitz concurs:

This process has inherent limitations stemming primarily from the nature of the adversarial process, which gives the attorneys a strong incentive to slant the evidence in their favor. The adversarial system also creates an incentive for lawyers to omit important, but potentially damaging pieces of evidence in the hope that their opponents also will fail to elicit the information.

Berkowitz, supra note 8, at 124.

12. "[T]he common law depended almost entirely on pleadings to give advance notice
Courts always strove to achieve just results. Although everyone spoke of justice and fairness, the pleadings, rules of procedure and discovery methods worked against that goal. Dissatisfaction with the overwhelming amount and complexity of procedures in use even after the merger of the courts of law and equity led to the adoption of the simplified and condensed Federal Rules of Civil Procedure in 1938 and Criminal Procedure in 1944. Practitioners entering the legal arena subsequent to the adoption of the 1938 and 1944 rules have very little appreciation for the complex nature of the steps once necessary to even bring a case to trial.

Even after the adoption of the 1938 and 1944 rules, however, discovery was virtually nonexistent. The tangled legal practicalities of procedure made it essentially impossible to obtain discovery or disclosure prior to trial without endless legal maneuvering. In both civil and criminal trials, the trial attorney could only guess at what witnesses were to be presented and the nature of their testimony. The trial attorney could only speculate as to cross-examination. More often than not, the case was won by the party with the trial lawyer who was more skilled, not necessarily the party with the just cause.

of the parties’ claims and defenses. There were almost no common law devices for probing the adversary’s claims or knowledge of relevant information until the trial itself.” FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE, § 5.1 (1992).


14. The stated purpose of the Federal Civil Rules was “to secure the just, speedy, and inexpensive determination of every action.” FED. R. CIV. P. 1. This was accomplished largely by the simplification of pleadings, FED. R. CIV. P. 7, 8.

15. “[These rules] shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.” FED. R. CRIM. P. 2.

16. At common law the procedural system was based on a complex system of writs. Every type of action had its own writ with its own rules of pleadings and its own procedures. There was no coherent set of pleading rules for all cases in the common law courts. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.1 (1985). In federal court, prior to the reform of civil procedure in 1938, procedure in actions at law was governed by the rules of practice of the state in which the court was located. Id.

17. GREEN, supra note 9, at 138.

For centuries, under our adversary system of justice, surprise has been regarded as a legitimate trial tactic. The biographies of great trial lawyers are full of instances of how they carried the day by taking their opponents unawares. The reason they could do this was that there was no effective way in which opposing counsel could find out, in advance of trial, the nature of the evidence which would be presented.

Id.
The next step in the evolutionary process was the adoption of the new federal discovery rules in 1970.18 Full disclosure became full disclosure. The liberal rules of discovery are so accepted now that attorneys have forgotten how revolutionary they once were. When the new discovery rules were adopted, the trial attorney was heard to say, “It’s not fair that the other side knows who my witnesses are going to be. It’s not fair that he can depose my client and my witnesses. It’s not fair that the other side can examine the evidence I’m going to present at trial.” Today, this author hears the same litany, “It’s not fair that jurors are allowed to ask questions.” I ask why. Most of the time, the answer is, “The jurors may ask a question that I don’t want asked.” Has not our present system of trial procedure and discovery eliminated that concern? In today’s trial the purpose is not to keep relevant evidence out but to make sure that all relevant evidence is presented to the jury.19

The next logical step toward a legal system in which the truth is ascertained and a fair trial is preserved is permitting jurors to ask questions. Juror questioning is just one more tool which can be used to insure that justice is achieved.

B. Comparison of Judicial and Juror Questioning

No one disputes the authority of a judge to question witnesses.20 One argument in support of juror questions is that

18. Revised Rule 26 grants sweeping discovery powers.

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

19. Green argues that the availability of all relevant evidence makes the adversarial system work.

The new rules did not abolish the adversary theory of justice, but they provided a handicapping device by means of which the battle in the judicial arena became a fairer contest and greatly enhanced the possibility that at the end justice would, in fact, emerge triumphant. In short, they eliminated surprise as a legitimate courtroom tactic. They did this by providing tools, available to both parties, for discovering in advance of the trial all of the relevant facts about the case.

Green, supra note 9, at 139.

20. “The court may interrogate witnesses, whether called by itself or by a party.”
jurers asking questions is analogous to a judge asking questions and the practice should therefore be permitted. Critics, however, emphasize the different roles of judge and jury. In a jury trial, it is the jury’s duty to decide issues of fact and the judge’s duty to resolve questions of law. This, critics conclude, distinguishes the judge from the jury to the extent that allowing questions from the former does not necessarily sustain allowing questions from the latter.

The argument in favor of juror questions is strengthened, however, when the judge is viewed in the context of a bench trial. In a bench trial the judge assumes the jury’s role of fact-finder in addition to his/her responsibility of deciding issues of law. Even as a fact-finder the judge is permitted to ask questions of witnesses. This illustrates that the propriety of judges asking questions does not depend on the role judges play. Judges are not permitted to ask questions because of their role, but, rather, because asking questions gets at the truth. The distinction between the judge and jury based on their different roles, therefore, is not a legitimate reason to allow questions from one and not the other. Allowing jurors to question witnesses is merely a

FED. R. EVID. 614(b). Some courts have elevated this right to an affirmative duty. United States v. Ostendorff, 371 F.2d 729, 732 (4th Cir. 1966) (judge must pursue issues insufficiently developed by counsel), cert. denied, 386 U.S. 982 (1967); United States v. Stitone, 311 F.2d 277, 279 (3rd. Cir. 1962)."It is the right and duty of the judge to act in the interrogation of witnesses to the end that the truth emerge and be reflected in the judgment."), cert. denied, 372 U.S. 935 (1963).

21. "The search for truth is of such importance that the judge is empowered with the ability to interrogate. The jury, his partners in the search, should also be endowed with such power." Lisa M. Harms, Comment, Questioning of Witnesses by Jurors, 27 AM. U. L. REV. 127, 141 (1977).


One simply cannot compare the questioning by the trial judge—who is trained in the law and instructed to "see that justice is done"—with the questioning by members of the jury—who are untutored in the law, and instructed to sit as a neutral fact-finding body. Thus, we believe that juror questioning and questioning by the trial judge are clearly and properly distinguishable, although both forms of questioning are matters within the trial court’s discretion.

Id. at 516.


24. DeBenedetto, 754 F.2d at 516. "Notwithstanding our belief that juror questioning is a matter within the trial court's discretion, we believe that the practice of juror questioning is fraught with dangers which can undermine the orderly progress of the trial to verdict." Id.

logical extension of the well-established truth seeking tool of judicial questioning.26

III. OVERVIEW OF THE USE OF JUROR QUESTIONS

A. Federal Courts

The Federal Rules of Evidence offer little guidance for courts attempting to determine the propriety of jurors questioning witnesses. Rule 611(a) requires the court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence."27 At least one federal court has interpreted this rule as granting judges the discretion to allow or disallow juror questions.28 Six United States Circuit Courts have allowed questions from jurors.29 The United States Supreme Court has passed up many opportunities to rule on the issue.30

B. State Courts

In most states, whether or not juror questions are permitted in a particular case is an issue within the discretion of the trial

26. Judge Frankel agrees:

In a bench trial setting, no one could legitimately question the wisdom or authority of the trial judge to ask questions of a witness to clarify testimony, or to test the judge's understanding of complex testimony as it comes into evidence . . . Why, then, are lawyers and judges reluctant to give jurors the same tools available to the trial judge when she sits as a finder of fact without a jury?

I suggest the reluctance to expand the powers of totally passive and unenlightened juries stems from three sources: (1) the tremendous inertia of long-standing legal tradition; (2) a basic distrust of juries; and (3) trial attorneys' and judges' fear of loss of control of the trial process.


27. FED. R. EVID. 611(a).

judge. Although many state courts have allowed jurors to ask questions in some form, each state generally adopts a view either encouraging or discouraging the practice.

1. Kentucky

In Miller v. Commonwealth, one of the earliest reported cases to address the issue, the Supreme Court of Kentucky declared that "[a]ny member of the jury has the right, during the examination of a witness to ask any competent, pertinent question." That court went so far as to allow the jury to recall a witness after the jury had retired to consider their verdict. Three years later the same court reasoned that the practice of jurors asking questions should be encouraged "in the interest of justice and fair play," and since "it is often necessary to a fair understanding of the issues." It has been held in Kentucky that an appellant cannot complain about incompetent questions in the absence of an objection at trial.

It has been held in Kentucky that an appellant cannot complain about incompetent questions in the absence of an objection at trial. In Slaughter v. Commonwealth, the Supreme Court of Kentucky reiterated its support of juror questions and held that a procedure for such questioning is unnecessary. As these cases seem to indicate, Kentucky has one of the most established and liberal policies towards jurors asking questions in the United States.


32. Purver, supra note 31, at 875.
33. 222 S.W. 96 (Ky. 1920).
34. Id. at 99.
35. Id.
36. Stamp v. Commonwealth, 253 S.W. 242, 246 (Ky. 1923); accord Louisville Bridge & Terminal Co. v. Brown, 277 S.W. 320 (Ky. 1925). "We have not only failed to condemn the practice of jurors asking questions of witnesses, but have approved it, regarding it as likely to aid the jury in finding out and learning the real facts and especially enabling them to understand the evidence that is being given." Id. at 322.
37. Stamp, 253 S.W. at 246.
38. 744 S.W.2d 407 (Ky. 1988).
39. Id. at 414.
2. Ohio

In contrast to Kentucky's policy of sanctioning juror questions, the state of Ohio has adopted the view that although allowing or disallowing jurors to ask questions is within the judgment of the trial court, the practice of allowing questions should not be encouraged. In *State v. Sheppard*, the defendant argued that the trial court erred in refusing to allow a juror to question the defendant during his testimony. The court of appeals sustained the defendant's conviction and the authority of the trial court to permit or deny jurors to ask questions. However, the court of appeals declared juror questions to be "dangerous to the rights of the litigant" because of jurors' unfamiliarity with the rules of evidence and because of counsel's natural hesitation to object to incompetent questions.

Another Ohio authority which addresses jurors asking questions is the Ohio Jury Instructions, which are a compilation of pattern instructions "designed to state in simple, direct and straightforward language the established law" for the bench and bar of Ohio. Ohio Jury Instructions provides three different instructions with regard to jurors asking questions in both civil and criminal trials. One instruction is recommended when questions are prohibited, one when the court gives a preliminary instruction permitting questions from jurors, and one when the
court has not given a preliminary instruction but permits ques-
tions upon the asking of a spontaneous question.\textsuperscript{47} The instruc-
tions were authoritatively interpreted by the Ohio appellate
courts in the cases of \textit{State v. Sheppard}\textsuperscript{48} and \textit{State v. Kain}.\textsuperscript{49} In
the latter case, the court of appeals found that the trial court
did not abuse its discretion when it allowed a juror to ask
questions during a criminal trial.\textsuperscript{50}

IV. CONCERNS AND ANSWERS

Practitioners, when first confronted with the novel idea of
jurors asking questions, usually respond with a host of questions.
The following represent the most frequent objections raised and
some suggestions of how they can be effectively dealt with.

\textit{What if the juror asks a question which is irrelevant,
inadmissible, improper or prejudicial?}

If that were a valid reason for jurors not to be permitted to
ask questions, then very few attorneys would be permitted to
question witnesses. In every trial at which I have presided, there
are several questions that are asked which are not relevant or
admissible. Ah, but the critics will argue that attorneys are
trained and that the likelihood of error is less than if jurors were
to ask questions. This is easily solved by the method in which
jurors are allowed to ask questions.

Never should a juror be permitted to interrupt the proceedings
or verbalize a question. If a juror's question is improper or not
permitted, the court will either state the question and inform all
jurors why the question is not permitted or may ignore the
question altogether. If the question is ignored then the juror can

\begin{itemize}
\item \textsuperscript{47} Please (wait until the attorneys have finished their questioning of this witness
and then) write your question with the pencil and paper brought to you by the
Bailiff. The written question will be delivered to me for consideration, and I will
decide whether the question may be asked of the witness and in what (form)
(language), in accordance with the law.
\item \textsuperscript{1} O.J.I. 2.53(3)(civil); see also 4 O.J.I. 402.53(3)(criminal).
\item \textsuperscript{48} 128 N.E.2d 471 (Ohio Ct. App. 1955), qff'd, 135 N.E.2d 340 (Ohio 1956).
\item \textsuperscript{49} No. CA-418, 1990 WL 200359 (Holmes Co. Dec. 5, 1990).
\item \textsuperscript{50} Id. There is no Ohio authority which deals with the procedural aspects of jurors
asking questions. Likewise, there is no authority which speaks to the form of objection
required, if any, before reversible error may be preserved for appeal.
\end{itemize}
assume that the question is not permitted and not for the jury’s consideration.

It is essential that all questions be in writing for the court’s review. This eliminates improper, irrelevant, prejudicial or inadmissible questions from being presented in open court. The attorney may be trained in the law, but the jurors are responsible for making judgments on the facts. Unless they have all the facts that are permitted for them to make a decision, we have not allowed a fully-disclosed, fair trial.

The procedure of the judge reviewing each question also lessens the problem of the ineffectiveness of remedial instructions to the jury. Every jury trial has improper questions which the court instructs the jury to disregard. The remedial instructions present more of a problem with counsels’ questions than with jurors’ questions since the jurors’ questions are in writing and are phrased in a non-prejudicial manner by the court or otherwise not allowed. Questions from trial counsel, on the other hand, are presented to the witness unedited.

Attorneys are concerned that if they object to a juror’s question, they risk offending or alienating a juror. And if they do not object, they have not preserved a possible error for appeal.

The recommended procedure allows counsel to preserve his objection for appeal without making obvious which attorney objected. This court is well aware of this concern of counsel and has eliminated it. Counsel do not have to state that they are objecting to the question, but must merely ask the court if they may approach the bench. Upon approaching the bench, the attorneys may preserve their objection out of the hearing of the jury. If the court is concerned as to whether or not the question should be asked, the court calls counsel for a bench conference out of the hearing of the jury, at which time counsel can object and put on the record any statement that they wish.

Will jurors’ asking questions delay trials?

I personally have found that juror questions do not actually delay trials. However, if jurors asking questions adds another five minutes or half an hour to each trial, but makes the trial fairer, then we must take the extra time.

Many times the jurors will be in deliberation, discussing the evidence or facts, and knowledge of the answer to a certain
question would enable them to decide the case. For example, in a multiple-defendant auto accident where one defendant has settled and is no longer in the case, jurors have asked, "What happened to the other defendant and do we deduct damages that the other defendant caused?" The court then instructs the jury that this is not for their consideration. If the jurors had asked that question in trial, they would have been properly instructed during trial and time would not have been wasted in deliberations or, more importantly, they would not have speculated and made a decision on improper evidence or on a misunderstanding.

A good example of how a little time spent on juror questions during a trial can save time in deliberation and more importantly serve the interest of justice came during a personal injury case over which I presided. It was disclosed during the trial that the plaintiff had filed a Workers' Compensation claim. Legally, any benefits paid were not admissible and were not an offset as a collateral source. One juror questioned, "How much did the plaintiff receive from Workers' Compensation?" The court was able to repeat the question to the entire panel of jurors and to instruct the jury that this was not for their consideration. They were to consider the damages without any deduction for the collateral source benefit of Workers' Compensation.

The jurors later told me that it made deliberation easier because every time a juror would bring up the Workers' Compensation matter, another juror would say, "The judge has told us that we're not to consider it, we're just to consider damages on the facts presented."

Wouldn't it be natural for jurors to attach more importance to questions asked by fellow jurors?

In questioning after trials, jurors have stated that they place no emphasis as to who presents the evidence but more on what evidence was presented. There is no question, however, that the prospect of asking questions does alter the attitude of jurors about themselves and each other. Jurors have a better understanding of the facts and of the issues being presented. They do not have the feeling that something is being hidden from them and that the truth is being masked by trickery. Most jurors are interested in rendering a proper verdict and not a verdict based upon the skill of the lawyer. The jurors feel more involved in the case, do not become indifferent, do not become bored, and
are more confident about the verdicts since they feel that they have all the facts necessary, or all the facts that are permitted, for their verdict. If a material fact is omitted from a trial through inadvertence and the jurors elicit the fact through questions, the end result is good. A fully informed jury leads to just results.

Isn't there a danger that jurors will assume the role of advocates?

I have found that with proper instructions, this does not occur. I have had many trials where the jurors have asked no questions and only a few trials where many questions were asked. Even in those cases, when jurors asked a relatively large number of questions, their questions were primarily informational not persuasive. In their sincere quest to ascertain the truth, questions from jurors may provide important information to the attorneys concerning the jurors' understanding of the case. A juror's question may allow both the trial counsel and the court to evaluate the juror's comprehension of the case. This is essentially important in complex litigation, when many times the expert and counsel are unable to make a presentation that is clear and on a level of the average juror's understanding. Even in simpler trials juror's questions can lead counsel to discover areas where the jury may be confused or where they have neglected to present their case effectively.

An arson trial presents another example. Counsel for both sides had conducted extensive discovery and had examined all the evidence to be presented. One piece of evidence was the fire marshall's report of the arson, which was admitted by agreement, but was not shown to the jury. Into the second day of trial, it became critical as to the time that the fire was reported. A juror asked the question, "What time was the fire reported?" The answer was in the piece of evidence that was admitted but not shown to the jury. Both counsel had prepared their cases so extensively that they knew when the fire was reported but inadvertently failed to disclose that fact to the jury. Therefore, the evidence as presented caused confusion for the jury.

This is an example of where the question by the juror made the trial clear and fair to both sides. It did not mean that either the plaintiff would win or defendant would win. It merely gave an essential fact which the jury needed to evaluate the evidence as it was being presented; not a fact to be speculated on in the jury room during deliberations.
What if the jurors become too involved in the trial and lose their impartiality?

This type of reasoning is condescending to the jurors. The trial lawyer's purpose is to persuade the jury toward his client's cause or his client's point of view from voir dire through the court's charge to the jury. The whole process is geared toward persuading the jurors. But the thrust of modern procedural reform favors full discovery and a fair trial, not advocacy. Therefore, if a juror's question clarifies reasonable doubt in a criminal case, or destroys an attorney's strategy by bringing forth previously undisclosed information, the interests of justice are served. Objections based on strategy are well founded in a system which promotes advocacy but are unfounded in a system which promotes full disclosure and fair trial.

If an attorney fails to present a piece of evidence which is crucial to his case, why should the jury be allowed to save his case?

Is that what we're looking for? Attorneys don't lose; clients and our system of justice lose. If jurors asking questions is a practice that will benefit the litigants, then this is a practice for which we should endeavor. After all, the courts are not just for the attorneys, and not just for the judges, but for the people. If juror questions make for a better, fairer trial, then they should be permitted in all courts.

V. RECOMMENDED JURY INSTRUCTIONS

The following is a recommended jury instruction currently used by this judge when allowing jurors to ask questions of witnesses:

51. Judge Frankel expresses a similar sentiment: "It has always struck me as highly ironic that our legal system vests such a large degree of confidence in and deference to the jury's final decision, yet has so little confidence in the ability of jurors to arrive at this sacrosanct result by impartial, nonadversarial, and thoughtful means." Mark A. Frankel, A Trial Judge’s Perspective on Providing Tools for Rational Jury Decisionmaking, 85 NW. U. L. REV. 221, 223 (1990).

52. The elimination of the requirement for special charges is another example of the court's tendency toward full disclosure and a fair trial as opposed to an advocacy type of trial. FED. R. CIV. P. 51. Before the special charge requirement was eliminated, the court was compelled to instruct the jury not only in the court's general instructions, but also in the exact words (however slanted) of each of the attorney's as long as their words were not contrary to the law. Id.
Ladies and Gentlemen of the Jury: You will be permitted to submit written questions. I caution you that just because the court is permitting you to ask questions, you are not to consider yourselves advocates. It is primarily the attorneys' responsibility for the presentation of their case and the evidence, but if you have a question which you think you need to have answered in order to obtain all of the facts necessary for your deliberations, you are permitted to do so.

It is not necessary that you spell each word correctly. Please try to be specific with your questions and cover only one subject with each question. Phonetic spelling is acceptable. Do not concern yourselves with the form of the question because I will reword the question so that it is presented to the witness in the proper manner.

When you have questions, you may write them as you think about them. Many times jurors will write two or three questions of a witness and because the attorneys, through direct examination and cross-examination, answer those questions, jurors decide to scratch them out. If you do this, it is not necessary that you erase the question that you scratched out and rewrite the remaining question on another piece of paper. Form is not as important as the court understanding the question.

Do not ask questions just to be asking questions; ask questions only if you feel that it's necessary. The court gives these instructions neither to discourage nor encourage asking questions.

After the attorneys have finished their examination of a witness, the court will ask the jury if there are any questions. If you have a question, raise your hand and give your question in writing to the bailiff, who will present it to the court. The court will read the question and, if the court needs to confer with the attorneys, the court will confer privately with them. Otherwise, the court will ask the question of the witness. After the question has been answered, the court may either ask follow-up questions or will permit the attorneys to ask follow-up questions.

CONCLUSION

Throughout the years, people have striven to find effective methods of resolving disputes and ascertaining the truth. Trial procedures are constantly evolving and many times seem revolutionary. Jurors asking questions is no exception. Since the inception of the use of juries, however, the role of juries as fact-
finders has remained constant. Viewed in light of the goal of trials and the duty imposed on juries, jurors asking questions is not as radical as it first seems. "The jury—of all people—has the right to have questions—proper questions—answered. Such can only further their duty, their purpose, their raison d'etre, to search out the truth."

The law and lawyers are slow to change. Allowing jurors to ask questions makes jurors feel more like a part of the judiciary, and less like helpless outsiders trying to penetrate a sanctimonious institution. This type of change can only bring us closer to the ultimate goal of our legal system: justice.

MANDATORY ARBITRATION UNDER ERISA:
PAY NOW, DISPUTE LATER

by Robert S. Marsel*

"The risk that thousands of American workers may not receive the retirement benefits they were promised continue[s] to worsen . . . ." The Pension Benefit Guaranty Corporation, the federal insurance corporation that protects the retirement security of 40 million Americans . . . has a serious problem. The facts are clear: Back-to-back annual termination losses of $1 billion, a $2.5 billion deficit, and an estimated growth in that deficit to more than $18 billion by the end of 1997 from underfunded pension plans [which the Pension Benefit Guaranty Corporation] insures.2

In the past year the shortfall from underfunded pension plans grew twenty-eight percent from $40 billion to $50 billion.3 Although the overall pension system guaranteed by the Pension Benefit Guaranty Corporation is on sound footing "with $1.3 trillion in assets to back up some $900 Billion in benefit liabili-
ties,"4 "[t]he growth of pension fund liabilities has outpaced assets each year . . . since 1988."5

The Pension Benefit Guaranty Corporation "was created in 1974 [under the auspices of the Employee Retirement Income

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1. U.S. Pension Threat Continues to Grow, NEWSDAY (New York), Nov. 20, 1992, at 44.

2. James B. Lockhart, Pensions-Preempt The Crisis Now, WASH. POST, April 28, 1992, at A15 (this article was an opinion editorial by Mr. Lockhart, the Executive Director of the Pension Benefit Guaranty Corporation). See Pension Agency Posts Big Loss in '91, DETROIT FREE PRESS, Feb. 19, 1992 (Pension Benefit Guaranty Corporation reported 1991 losses of more than $1 billion and total underfunding increase to $40 billion).


4. Lockhart, supra note 2, at A15.

5. U.S. Pension Threat Continues to Grow, supra note 1, at 44. See, e.g., Pension Agency Posts Big Loss in '91, DETROIT FREE PRESS, Feb. 19, 1992 (deficit in single-employer pension plan insurance increased 127 percent over last two years).
Security Act] to guarantee payment of basic private, defined-benefit pension programs. [These] programs cover more than 40 million workers in about 85,000 pension plans. The Employee Retirement Income Security Act of 1974 (ERISA), enacted to protect American employees' retirement benefits, was amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). The MPPAA protects "the financial interests" of multiemployer pension plan participants by regulating the operation of these pension plans. In particular, the MPPAA governs the withdrawal of an employer from a multiemployer pension plan, the assessment of withdrawal liability against such an employer, and the resolution of any disputes arising between the plan trustees and an employer due to the withdrawal.

This article will first address the need for Congressional action generally in the area of pension plans and specifically in the area of multiemployer plans. Second, statutory framework of ERISA and the MPPAA, both created in response to this need, will also be considered. Third, the role of statutorily mandated arbitration in the MPPAA dispute resolution process will be explored. Finally, consideration will be given to several important cases which have clarified the role of arbitration. Specifically, attention will be given to Teamsters Joint Council No. 83 v. Centra, Inc. and McDonald v. Centra, Inc., two cases which provide a basis for the conclusion that the MPPAA's command to arbitrate must

6. U.S. Pension Threat Continues to Grow, supra note 1, at 44.
9. I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus., 727 F.2d 1204, 1206 (D.C. Cir. 1984). In re T.D.M.A., Inc., 66 B.R. 992, 993 (Bankr. E.D. Pa. 1986) "ERISA and MPPAA were designed by Congress to 'ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans ...'" Id. (citing Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361-62 (1980)).
10. 29 U.S.C. §§ 1381-1453 (1985 & Supp. 1992) (determining partial or complete withdrawal from plan; calculation of employers' withdrawal liability; exceptions and limitations to withdrawal liability; multiemployer plan rules; reorganization of multiemployer plans; notice and collection of withdrawal liability; and dispute resolution).
be followed in any dispute involving issues under sections 1381 through 1399 of the Act.\textsuperscript{14}

I. STATUTORY FRAMEWORK

A. The Need for Congressional Action

In the early 1970's, Congressional concerns regarding the solvency of pension plans culminated in the enactment of ERISA.\textsuperscript{15} ERISA was promulgated for the "continued well-being and security of millions of employees and their dependents directly affected by those plans."\textsuperscript{16} The impetus for this legislative action stemmed from financial cataclysms such as the "Studebaker Disaster" and other pension plan terminations which caused thousands of workers to lose pension benefits with no other source of remuneration or redress.\textsuperscript{17} Approximately 13,000 pension plans

\textsuperscript{14} See Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 122-23 (4th Cir. 1991) (issue of whether employer remains an "employer" for statutory purposes of collecting withdrawal liability after employer has divested itself of ownership of company is arbitrable); McDonald v. Centra, Inc., 946 F.2d 1059, 1063-64 (4th Cir. 1991) (question of whether a corporation was a member of a "control group" with a bankrupt employer for purposes of collecting withdrawal liability should be arbitrable). See also 29 U.S.C. § 1401(a)(1), supra note 11.


\textsuperscript{16} Id. See Banner Indus., Inc. v. Central States, Southeast & Southwest Areas Pension Fund, 875 F.2d 1285, 1290 (7th Cir. 1989), cert. denied, 493 U.S. 1003 (1989) (ERISA enacted "to guarantee that employees who had been promised certain benefits upon their retirement actually received those pension benefits.").

\textsuperscript{17} 136 CONG. REC. S14, 396-02 (daily ed. Oct. 2, 1990) (statement of Sen. Coats) (discussing the need in the 1990's for a Pension Restoration Act to assist those persons whose lost pension benefits prior to 1974 led to the passage of ERISA; but whose pension benefits were not covered or insured by ERISA because their pension plans terminated prior to ERISA's enactment).

On the morning of December 9, 1963, the 11,000 employees at the Studebaker auto plant in South Bend, Indiana, reported to work only to be told that the company was closing its plant and moving to Canada, and they discovered suddenly that they had not only lost their jobs, but also their pensions as well. As a consequence of this experience, and similar disasters that befell retiring workers in other States, the Congress in 1974 passed ERISA.

Id.

See also 137 CONG. REC. S16, 411-02 (daily ed. Nov. 12, 1991) (statement of Sen. Riegle) (employees worked 20 to 40 years for employers such as Georgia Pacific, Borg Warner Corporation's Norge Refrigerator Division, and the Packard Motor Car Company, only to lose their pensions when these companies failed during recession); 137 CONG. REC. S16, 398-02 (daily ed. Nov. 12, 1991) (statement of Sen. Cochran) (data shows loss of pension benefit a nationwide problem; employees of Studebaker, Allied Mills, American Store...
terminated between the years 1942 and 1974 causing 115,000 Americans to lose their vested benefits under these plans.18

On the basis of this information, Congress concluded:

owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans.19

Thus, ERISA was enacted with the intent that if an employee is promised a defined pension retirement benefit, and if the employee fulfills the conditions precedent to receipt of the vested retirement benefit, then that employee will actually receive the benefit, or the statutorily guaranteed benefit portion.20 The result was a comprehensive body of regulations and administrative procedures governing virtually every aspect of pension benefit plans concisely set out in the Act.21 In addition to the preemption
of "state laws regulating benefit plans, ERISA set[] standards for [reticulated] reporting and disclosure, participation and vesting, funding [requirements], and fiduciary responsibility."\(^\text{22}\)

**B. The Employee Retirement Income Security Act of 1974**

Congress provided for the administration and implementation of ERISA and its pension plan termination insurance program by creating the Pension Benefit Guaranty Corporation (PBGC).\(^\text{23}\) The PBGC is an independent corporation, wholly-owned by the United States government, within the Department of Labor.\(^\text{24}\) The corporation's purpose, as defined by Congress, is: "(1) to encourage continuation and maintenance of voluntary private pension plans, (2) to provide for timely and uninterrupted payment of pension benefits to participants and beneficiaries, and (3) to maintain premiums established by the PBGC under § 1306 at the lowest level consistent with carrying out its obligations."\(^\text{25}\)

Under ERISA's pension plan insurance scheme, payment of benefits was guaranteed by mandating that employers pay prem...
iums into a fund under the auspices of the PBGC. If insolvency or termination of a pension plan made benefit payment by the plan impossible, the PBGC would pay guaranteed benefits by drawing from the premium fund. "Although payment of the required premiums [was] mandatory for both multiemployer and single-employer defined benefit plans ... the guarantee of


The term "multiemployer plan" means a plan —

(i) to which more than one employer is required to contribute,

(ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(iii) which satisfies such other requirements as the Secretary may prescribe by regulation.

Id.


29. 29 U.S.C. § 1002(41) (Supp. 1992). "The term 'single-employer plan' means an employee benefit plan other than a multiemployer plan." Id. A single employer plan is a pension plan maintained, and contributed to, by one employer for the benefit of, and covering, only its employees.

See 29 U.S.C. § 1001b(a)-(c) (Supp. 1992). Congress found that

(1) single-employer defined benefit pension plans have a substantial impact on interstate commerce and are effected with a national interest;

(2) the continued well-being and retirement income security of millions of workers, retirees, and their dependents are directly affected by such plans;

(3) the existence of a sound termination insurance system is fundamental to the retirement income security of participants and beneficiaries of such plans ....

Id. § 1001b(a)(1), (2), (3).


The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based
benefits under a terminated multiemployer plan ... [was] at the discretion of the PBGC until January 1, 1978, under original ERISA provisions. After this January 1, 1978 deadline, the benefits guarantee was to be mandatory.

**C. The Recurring Need for Congressional Action**

As the January 1, 1978 mandatory pension benefit guarantee date for multiemployer plans approached, it became apparent that Congress would need to take action in the form of additional legislative measures. The date for lifting the PBGC's discretion-
The PBGC report submitted to Congress on July 1, 1978 reviewed the corporation’s experience with discretionary coverage[,] analyzed the impact of certain provisions of ERISA ... and explored the proposals for remedying defects in existing law ... .

On February 27, 1979, the corporation submitted overall recommendations to Congress for revisions to ERISA generally and Title IV in particular applicable to multiemployer plans. As specific legislative recommendations were not forthcoming until May 3, 1979, Congress subsequently further extended discretionary coverage ... .

Id.

See Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 721 (1984) (concisely discusses delay of mandatory guarantee of multiemployer pension plan benefits and Congress’ concerns); Crown Cork & Seal Co. v. Central States Southeast & Southwest Areas Pension Fund, 881 F.2d 11, 13 (3d Cir. 1989) (“MPPAA was ‘Congress’ response to the growing problem of financial insolvency of multiemployer pension plans’ caused by the withdrawal of contributors ... .”); H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 51 (1980), reprinted in 1980 U.S.C.C.A.N. at 2919 (recognized “multiemployer plans are an important and viable mechanism for providing retirement income to millions of ...” Americans, but a number of “plans in certain industries or geographic areas are experiencing or are likely to experience serious financial ...” hardship).
Such financial instability, when coupled with ERISA's "provisions governing plan termination insurance, ... [created a possibility of further] deterioration of a plan's financial condition and [would give employers an] incentive[] to terminate a plan ...."35

As originally enacted in 1974, ERISA did not impose withdrawal liability upon an employer contributing to a multiemployer plan.36 An employer could, with impunity, withdraw from a mul-

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The committee has concluded that existing law, and particularly the provisions governing plan termination insurance, do nothing to strengthen financially weak [multiemployer] plans, and in some cases may actually cause further deterioration of a plan's financial condition and create incentives to terminate a plan in financial difficulty.

* * *

The financial instability of some multiemployer plans was not an identifiable problem prior to the passage of ERISA, because participation in such plans and the industries they covered generally continued to grow in the 2-1/2 decades before passage.

* * *

In recent years, however, external economic factors such as technological obsolescence in certain crafts such as printing, foreign competition or changing consumer or distribution patterns in other industries such as millinery or milk delivery, have resulted in a significant decline in the number of contributors or the number of active employees in the contribution base, and an increasing proportion of retirees to active workers. ERISA restricts the flexibility such plans had to defer funding, restrict vesting or reduce benefits to ease the funding burdens on remaining contributors and active employees.

The financial problems in declining industries arise in part because plans have been funding benefit obligations over too long periods of time. ERISA's current funding standards are inadequate to strengthen the financial position of multiemployer plans.

36. Banner Indus., Inc. v. Central States, Southeast & Southwest Areas Pension Fund, 875 F.2d 1285, 1290 (7th Cir. 1989) (ERISA needed amendment to resolve problem of employer withdrawal from multiemployer plans); I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus., 727 F.2d 1204, 1206 n.1 (D.C. Cir. 1984) (under ERISA withdrawing employer from multiemployer plan suffers no liability unless within five years of withdrawal entire plan terminates; under these circumstances employer's liability limited to only 30 percent of net worth); Republic Indus., Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628, 632 (4th Cir. 1983), cert. denied, 467 U.S. 1259 (1984) (ERISA imposed no withdrawal liability on employer under multiemployer plan unless entire plan terminated within five years of withdrawal and liability limited to 30 percent of employer's net worth); H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 51 (1980), reprinted in 1980 U.S.C.C.A.N. at 2922 (termination liability only applies to employers who withdraw within five years of plan termination or stay with plan until it terminates; liability to PBGC for these employers limited to 30 percent of their net worth; assessment of termination liability against employers who stay with financially troubled plan creates an additional incentive for employer to withdraw from plan and do it early).
tiemployer plan, owe no further contributions "for any part of the unfunded liabilities of the plan[,]"37 and leave the employers remaining in the plan liable for funding "past service liabilities, including liabilities created by" the withdrawing employer.38 This increased contribution liability to the remaining employers "[could] force further withdrawals, triggering a vicious downward spiral which [could] kill the pension plan."39

With this concern, the PBGC reported to Congress that:

The combined effect of the availability of guaranteed benefits, limited employer liability on termination, and ERISA restrictions on the ability of a plan to reduce its liabilities has made termination attractive for multiemployer plans covering workers in declining industries .... In a significant number of cases, plan termination will be less expensive[] for employers maintaining a particular multiemployer plan[,] than continuation of the plan.40

Once ERISA's discretionary period for PBGC guarantee of payment of pension benefits under multiemployer plans expired, "virtually 100 percent of the vested benefits ... in certain multiemployer plans" would be guaranteed to participants if these plans terminated.41 The PBGC had determined that an application of ERISA to multiemployer pension plans, "might induce several large plans to terminate, thus subjecting [the PBGC and its] insurance system to liability beyond its means."42 This possible

threat to the solvency of the PBGC, the proliferation of multiemployer pension plans, and increasing Congressional concerns about the viability and solvency of these plans, led to the enactment of the MPPAA.43

D. The Multiemployer Pension Plan Amendments Act of 1980

The basic policy underlying the MPPAA was to foster “the growth and continuance of multiemployer plans” in order to protect the retirement benefits of employees who were covered by these plans.44 The primary objectives of the MPPAA are “to insulate plans to the extent possible from declines, through sounder funding, employer withdrawal liability, and plan reorganization, to eliminate incentives to terminate financially troubled plans, and to provide assistance at affordable costs in the event of unavoidable plan insolvency, [and] to maintain benefits at adequate levels.”45 To this end, “the MPPAA 1) imposes withdrawal liability on an employer that ceases participation in a multiemployer pension plan,46 2) assigns initial responsibility to


45. Id.

[The act] deals with [the] problems of multiemployer plans by (1) increasing the funding requirements for multiemployer plans in most cases, (2) requiring further, accelerated funding of plans in financial distress, subject to restrictions designed to avoid undue financial strain on employers maintaining seriously overburdened plans, (3) relaxing the vesting rules of ERISA to permit benefit reductions in limited circumstances, (4) modifying the level of benefits guaranteed so that in most cases, continuation of a plan will be more beneficial to employees than plan termination, (5) requiring continued funding of terminated plans, and (6) making plan insolvency the only insurable event.


46. The Act originally made the imposition of withdrawal liability retroactive from its effective date of September 26, 1980, and imposed liability on any employer which
the plan for determining the amount of the employer's withdrawal liability, and 3) establishes procedures, centering on arbitration, for resolving disputes over withdrawal liability between employer and plan sponsor.\footnote{47}

1. Imposition of Withdrawal Liability

The key to discouraging employer withdrawal from, and encouraging the continuation of, multiemployer plans, is the MPPAA's requirement "that an employer who either completely terminates or partially reduces its contributions to a multiemployer pension fund pay its proportional share of the plan's unfunded but vested benefit liability at the time of the employer's termination or reduction of contributions."\footnote{48} This withdrawal withdraw from a plan on or after April 29, 1980. Republic Indus., Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628, 632 (4th Cir. 1983); accord Crown Cork & Seal Co. v. Central States Southeast & Southwest Areas Pension Fund, 881 F.2d 11, 14 (3rd Cir. 1989). Congress applied withdrawal liability retroactively in order to prevent employer withdrawals during the time period of Congressional debates leading up to the enactment of the MPPAA. \textit{Id.} Although this retroactive application of withdrawal liability was upheld as constitutional, Congress amended the MPPAA to eliminate such retroactive liability. \textit{Id.} (citing Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) for upholding constitutionality of retroactive withdrawal liability; and citing Deficit Reduction Act of 1984, Pub. L. No. 98-369, tit. V, S 558, 98 Stat. 494, 899, \textit{reprinted in} 29 U.S.C.A. S 1381 historical note at 478 (West 1985) for amending MPPAA and eliminating retroactive liability). Section 558 of the Deficit Reduction Act goes beyond removing retroactive liability and exempts from withdrawal liability any employer which had a "binding agreement to withdraw" from a plan on September 26, 1980, so long as the employer actually withdrew by December 31, 1980. \textit{Id.} (citing Deficit Reduction Act of 1984, Pub. L. No. 98-369, tit. V, S 558, 98 Stat. 494, 899, \textit{reprinted in} 29 U.S.C. S 1381 historical note at 478 (West 1985)).

Since the retroactive imposition of withdrawal liability has been eliminated by amendment to the statute, it will not be discussed in the body of the paper. However, for a discussion of the application of retroactive withdrawal liability under the MPPAA and its elimination under the Deficit Reduction Act, see Robbins v. Admiral Merchants Motor Freight, Inc., 846 F.2d 1054, 1056-57 (7th Cir. 1988); Crown Cork & Seal Co. v. Central States Southeast & Southwest Areas Pension Fund, 881 F.2d 11, 14-18 (3rd Cir. 1989); Republic Indus., Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628, 632, 635-39 (4th Cir. 1983).


\footnote{48} Banner Indus., Inc. v. Central States, Southeast & Southwest Areas Pension Fund, 875 F.2d 1285, 1290 (7th Cir. 1989). \textit{See} 29 U.S.C. § 1381 (1985) (provision governing withdrawal liability criteria and definition); Masters, Mates & Pilots Pension Plan v. USX Corp., 900 F.2d 727, 735-36 (4th Cir. 1990) (motivating purpose behind MPPAA is mandate that withdrawing employers pay their proportional share in form of withdrawal liability);
liability, however, is imposed only upon an "employer" withdrawing from a multiemployer pension plan. ERISA defines an "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." A "person" for purposes of this definition means "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, [or] association...." For purposes of determining withdrawal liability, the MPPAA further defines the term "employer" as, not only the entity contributing to a pension plan, but "all trades or businesses (whether or not incorporated) under common control," with that entity, and treats

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 225 (1986) (safeguarding remaining employers in multiemployer plan is met by imposition of withdrawal liability); Crown Cork & Seal Co. v. Central States Southeast & Southwest Areas Pension Fund, 881 F.2d 11, 13 (3rd Cir. 1989) (MPPAA requires "withdrawing employers to pay a withdrawal liability sum"); I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus., 727 F.2d 1204, 1206 (D.C. Cir. 1984) (employer withdrawing from multiemployer pension plan will have withdrawal liability imposed on it under MPPAA); Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund, 893 F.2d 290, 292 (3d Cir. 1982) (withdrawing employer required to pay withdrawal liability equal to its "allocated portion of the fund's unfunded vested benefit liability" under MPPAA).

The purpose of this withdrawal liability provision is threefold: (1) to remove incentives for employers to withdraw from financially troubled plans; (2) to assure new employers contemplating entry into a plan that they will not be assuming vast obligations incurred by the plan prior to that entry; and (3) to ensure, in effect, that a withdrawing employer will continue to fund its proportional share of the plan obligations incurred during its association with the plan, rather than shift those obligations to the remaining contributing employers or to the Pension Benefit Guaranty Corporation, the federal insurer of multiemployer plans.

Id. at 292 (citing 29 U.S.C. § 1001(a) and Peick v. Pension Benefit Guaranty Corp., 539 F.Supp. 1025, 1029-34 (N.D. Ill. 1982), aff'd, 724 F.2d 1247 (7th Cir. 1983), cert. denied, 467 U.S. 1259 (1984)).


51. Id. § 1002(9).


Section 1301(b) further states that the implementing regulations which are to be developed by the Pension Benefit Guarantee Corporation (PBGC) are to be consistent and coextensive with regulations promulgated by the Treasury Department.
“all such [commonly controlled] trades and businesses as a single employer.” Thus, the members of a “commonly controlled group of corporations” or businesses are jointly and severally liable for the withdrawal liability assessed against any other member of

under 26 U.S.C. § 414(c) that define “trades or businesses under common control.” Because the PBGC has not yet issued regulations on the matter, courts supply the relevant Treasury Department regulations when discussing common control. These regulations, in pertinent part, amplify the meaning of common control as follows: [T] he term “two or more trades or businesses under common control” means any group of trades or businesses which is either a “parent-subsidiary group of trades or businesses under common control [...]” a “brother-sister group of trades or businesses under common control [...]” or a combined group of trades or businesses under common control [...]” 26 C.F.R. § 1.414(c)-2(a) (1990).

(1) The term “parent-subsidiary group [...]” means one or more chains of organizations conducting trades or businesses connected through ownership of a controlling interest with a common parent organization if —

(i) A controlling interest in each of the organizations, except the common parent organization, is owned by one or more of the other organizations; and (ii) The common parent organization owns a controlling interest in at least one of the other organizations, excluding, in computing such controlling interests, any direct ownership in interest by such other organizations.

(2) Controlling interest defined—

(A) In the case of an organization which is a corporation, ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all classes of stock of such corporation.

26 C.F.R. § 1.414(c)-2(b) (1990).

Id. at 120 n.5.


The term “brother-sister group of trades or businesses under common control” means two or more organizations [the term organization means, inter alia, a partnership or a corporation] conducting trades or businesses, if (i) the same five or fewer persons who are individuals ... own ... singly or in combination, a controlling interest of each organization, and (ii) taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such organization, such persons are in effective control of each organization.

Id.

the control group. Even a discharge in bankruptcy of the original entity contributing to the pension plan, will not relieve the other members of the control group of liability for the bankrupt member’s withdrawal liability.

In order to trigger the assessment of withdrawal liability, an employer must either completely or partially withdraw from contributing to the pension plan. An employer completely withdraws from a plan “when it either '(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan.” The Act defines an employer’s “obligation to contribute under the plan” as “an obligation to contribute arising under one or more collective bargaining agreements.”

This definition of an obligation to contribute has been strictly construed when considered by the courts in determining complete withdrawal by an employer. In I.A.M. National Pension Fund Benefit Plan C v. Stockton TRI Industries, the employer was

54. McDonald v. Centra, Inc., 946 F.2d 1059, 1065 (4th Cir. 1991). Accord I.A.M. Nat'l Pension Fund v. Slyman Indus., Inc., 901 F.2d 127, 128 (D.C. Cir. 1990) (all members of commonly controlled group are jointly and severally liable for withdrawal of any member because all businesses under common control are treated as single employer).


59. Id. at 1210-11. See also Parmac, Inc. v. I.A.M. Nat'l Pension Fund Benefit Plan A, 872 F.2d 1069, 1071-72 (D.C. Cir. 1989) (MPPAA withdrawal liability “determined by looking at the employer's collective bargaining agreement” under clear mandate of law).

60. 727 F.2d 1204 (D.C. Cir. 1984).
contractually obligated under its collective bargaining agreement to contribute to the pension plan until April 30, 1980. On April 14, 1980, the employer expressed its intent to withdraw from the plan. The District of Columbia Court held the "expression of intent to withdraw [is] irrelevant to the determination of the date of actual withdrawal." "Under the definition of complete withdrawal ... the [employer] could not have 'permanently cease[d] to contribute under the plan' until ..." April 30, 1980 for purposes of determining its withdrawal liability.

On the other hand, permanently ceasing all covered operations has not been strictly construed by the courts when determining complete withdrawal by an employer. In the case of Speckman v. Barford Chevrolet Co., a Chevrolet dealership terminated its dealership agreement effective April 7, 1980, and by April 28, 1980 had terminated all of its employees except for a single employee to wind-up its business affairs. A dispute arose with the pension plan sponsor over the date on which the employer had permanently ceased all covered operations under the plan since the employer was still making contributions for the single employee in May of 1980. The court held the employer had permanently ceased all operations on or before April 28th although it still had one employee left. Thus, under the court's interpretation the employer had completely withdrawn from the plan on or before April 28th. This liberal construction was based on the MPPAA's legislative history indicating that a significant reduction in contributions would be considered a complete withdrawal.

61. Id. at 1211.
62. Id. at 1210.
63. Id. at 1211.
64. Accord Pharmac, Inc. v. I.A.M. Nat'l Pension Fund Benefit Plan A, 872 F.2d 1069, 1072 (D.C. Cir. 1989) (under collective bargaining agreement employer's obligation to contribute to pension plan lasted until January 1, 1983; thus preventing employer from ceasing to have an obligation to contribute until that date for withdrawal liability determination).
67. Id. at 489-90.
70. Id. See H.R. REP. NO. 899, 96th Cong., 2d Sess., pt. 1, at 51 (1980), reprinted in
The other statutory trigger for withdrawal liability is a partial withdrawal by an employer.71 Partial withdrawal by an employer from a pension plan occurs "when there is a 70 [percent] contribution decline or a partial cessation of the employer's contribution obligation."72 A partial cessation of the employer's contribution obligation for a plan year occurs under the Act when:

(i) the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location, or

(ii) an employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more but fewer than all of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased.73

The harshness of the imposition of withdrawal liability is mitigated under the statute by several moderating provisions.74 The Act provides an exemption which excuses liability under $50,000, allows the plan trustee discretion to alter the exemption amount, authorizes payment out of the liability over time instead of in a lump sum, and allows for reduction of liability if withdrawal is precipitated by an employer's dissolution.75

1980 U.S.C.C.A.N. at 2941 (a virtually complete cessation of contributions, e.g., a 98% reduction, will be treated as a complete withdrawal from a plan).

74. Republic Indus., Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628, 639 (4th Cir. 1983).
75. Id. at 637 n.10 (citing Shelter Framing Corp. v. Pension Benefit Guaranty Corp., 705 F.2d 1502 (9th Cir. 1983), rev'd on other grounds sub nom., Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) and 29 U.S.C. §§ 1389, 1405 (1985)). These moderating provisions and their statutory section numbers are as follows:

a mandatory "de minimis" exemption excusing all liability under $50,000.00, § 1385(a); the trustees of the pension plan may grant a higher exemption, § 1389(b); withdrawal liability is payable over a period of time, § 1389(c)(1); liability is limited to the first twenty annual payments if more than twenty years is needed to amortize the employer's liability, § 1389(c)(1)(B); and liability is reduced if the employer withdraws because it liquidates or dissolves its business, § 1405.

Id. at 637 n.10. See 29 U.S.C. §§ 1389, 1399, 1405 (1985).
In addition to these moderating provisions, "Congress . . . ameliorate[d] the substantial impact of withdrawal liability" by providing certain safe harbor provisions or exemptions from liability. 76 Under the MPPAA, an employer's withdrawal liability is limited by making its liability "proportionate to its past annual contributions" under a pension plan. 77 Additionally, withdrawal liability is not generally triggered "when an employer ceases covered operations as a result of a bona fide sale of assets to an unrelated party which assumes the obligation to continue contributions." 78 Withdrawal liability is not triggered by "an employer's change in corporate structure or change to an unincorporated form of business enterprise . . . if the successor continues to contribute to the plan." 79 Further, no withdrawal liability is imposed upon

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77. Republic Indus., Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628, 639 (4th Cir. 1983) (citing 29 U.S.C. § 1399(c)(1)(C) (1985)). Under the statute the plan sponsor in calculating the employer's withdrawal liability, will take:

- the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.


78. Id. (citing 29 U.S.C. § 1384 (1985)). See Banner Indus., Inc. v. Central States, Southeast & Southwest Areas Pension Fund, 875 F.2d 1285, 1290 (7th Cir. 1989) (withdrawal liability not triggered where "bona fide, arm's-length sale" to unrelated third party causes employer to cease having obligation to contribute to plan); I.A.M. Nat'l Pension Fund v. Clinton Engines Corp., 825 F.2d 415, 420 n.11 (D.C. Cir. 1987) (to fall within safe harbor sale of assets must be bona fide, arm's-length transaction, purchaser must have obligation for substantially same contributions to plan as seller had, purchaser must provide bond to secure contributions, and seller must remain secondarily liable for purchaser's contributions for 5 years after sale); Grand Union Co. v. Food Employers Labor Relations Ass'n, 808 F.2d 66, 68 (D.C. Cir. 1987) (withdrawal liability not incurred when employer sells assets and ceases contributions to plan, if sale meets MPPAA exemption requirements).

an employer which ceases contributions to a plan during a labor dispute involving its employees.80 "Finally, with respect to certain industries, an employer is excused from withdrawal liability if the plan's contribution base will not be harmed by the withdrawal."81

2. Determination of Amount of Withdrawal Liability

Upon withdrawal by the employer, the plan sponsors82 or trustees83 are to determine the amount of liability, and this includes taking into consideration any applicable statutory moderating provisions or exemptions.84 However, withdrawal liability

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81. Republic Indus., Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628, 69 (4th Cir. 1983) (citing 29 U.S.C. § 1382(1) (1985); I.A.M. Nat'l Pension Fund v. Clinton Engines Corp., 825 F.2d 415, 416 (D.C. Cir. 1987) (plan sponsor to "promptly determine ... amount of liability" when employer withdraws from plan); Grand Union Co. v. Food Employers Labor Relations Ass'n, 808 F.2d 66, 68 (D.C. Cir. 1987) (Act places responsibility of determining employer's withdrawal liability amount with plan sponsor); Republic Indus., Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628, 632 (4th Cir. 1983) (plan's sponsor, i.e., Board of Trustees
is to be determined and collected without regard to any transaction by the employer, a principal purpose of which is to evade or avoid such liability.\textsuperscript{85} The actual computation and collection of an employer's withdrawal liability, or an employer's owed share of the unfunded vested liability of the plan, is carried out by a plan's sponsor, or trustees, and actuaries.\textsuperscript{86} This withdrawal liability is calculated by finding the difference between the present value of vested benefit obligations and the current value of the fund's assets.\textsuperscript{87}

3. Procedures for Withdrawal Liability Dispute Resolution

Once the withdrawal liability is calculated, the plan sponsor is to notify the employer of its liability.\textsuperscript{88} Notification to the em-

\textsuperscript{85} 29 U.S.C. §\textsuperscript{1392}(c) (1985). See Banner Indus., Inc. v. Central States, Southeast & Southwest Areas Pension Fund, 875 F.2d 1285, 1288 (7th Cir. 1989) (pension fund determines and attempts to collect withdrawal liability from parent corporation after determining that parent's primary purpose in divesting itself of withdrawing employer subsidiary was to evade or avoid withdrawal liability).

\textsuperscript{86} 29 U.S.C. §§\textsuperscript{1382, 1391, 1393, 1399} (1985) (governing determination, computation, actuarial assumption, notice and collection of withdrawal liability); Republic Indus., Inc. v. Teamsters Pension Fund, 693 F.2d 290, 292 (3d Cir. 1982) (duty to compute and collect withdrawal liability falls on trustees and actuaries). See Republic Indus., Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628, 632, 640-41 (4th Cir. 1983) (employers owe share of plan's unfunded vested liability and must pay this share upon withdrawal; under MPPAA trustees or sponsor required to employ actuary to compute unfunded vested liability of plan and determine withdrawal liability).

\textsuperscript{87} 29 U.S.C. §\textsuperscript{1381}(a), (b) (1985). See Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund, 693 F.2d 290, 292 n.1 (3d Cir. 1983). "A fund's vested liability is the actuarial present value of the benefit obligations which have vested. The difference between this figure and the value of the fund's assets is the unfunded vested benefit liability. Withdrawal liability is the withdrawing employer's proportional share of the latter figure." Id. (citing 29 U.S.C. §\textsuperscript{1393}(c) (1985)). "The term 'vested liabilities' means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable." 29 U.S.C. §\textsuperscript{1002}(25) (1985). "The term 'present value', with respect to a liability, means the value adjusted to reflect anticipated events. Such adjustments shall conform to such regulations as the Secretary of the Treasury may prescribe." 29 U.S.C. §\textsuperscript{1002}(27) (1985).

\textsuperscript{88} 29 U.S.C. §\textsuperscript{1382}(2) (1985). If the withdrawing employer is a member of a control group, the notice of withdrawal liability sent to the withdrawing employer is effective as notice to all other non-contributing trades or businesses in the control group. Thus, the plan sponsor is required to send only a single notice of withdrawal liability, and does not need to notify each member of the control group in order to file collection proceedings
ployer "shall be as soon as practicable after" its withdrawal and shall include: "the amount of the liability, and ... the schedule for liability payments, and ... [a] demand [for] payment in accordance with the schedule." The MPPAA provides for the quick resolution of withdrawal liability disputes by allowing an employer only 90 days from the date of notification by the plan sponsor to request a review by the sponsor of the determination of withdrawal liability, question the payment schedule, or furnish the sponsor with additional information. The plan sponsor is required to make a reasonable review of its determination of liability and notify the employer of its decision, the reasons for that decision and for any change in its determination of withdrawal liability. Although this informal review by the plan sponsor is not required and is only the initial resolution process, such a review serves to pare down and clarify the issues involved in the dispute. Regardless of whether or not an employer requests a review by the plan sponsor, it must begin making interim payments on the withdrawal liability pursuant to the plan sponsor's payment schedule within 60 days of the date of demand for payment.

Any disputes remaining between a dissatisfied employer and the plan sponsor concerning withdrawal liability "shall be re-

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solved through arbitration." 94 Once again, time deadlines are short, and arbitration must be initiated by a party within 60 days of the plan's response to the employer's requested review, or 120 days after the date of the request for review itself, whichever is earlier. 95 Should the parties decide to jointly initiate arbitration, they must do so within 180 days of the demand for payment of withdrawal liability by the plan sponsor. 96 If arbitration is initiated, the plan sponsor's determination of liability is presumed correct unless rebutted by a preponderance of evidence establishing that the sponsor's determination is "unreasonable or clearly erroneous." 97

The consequences of failing to initiate arbitration are very straight-forward. The employer waives any defenses it may have to the plan's assessment of withdrawal liability. Also, the amount of liability determined and demanded by the plan sponsor becomes due and payable. 98 Once the liability amount becomes due, "[t]he plan sponsor may bring an action in State or Federal court of competent jurisdiction for collection." 99 Additionally, whether or not a party initiates arbitration, the statute provides that if payments are not timely made by the employer in compliance with the payment schedule, the plan sponsor has the responsibility to "collect the amount of the withdrawal liability from the employer." 100 This requirement of "pay now, dispute later" man-

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94. 29 U.S.C. § 1401(a)(1) (1985); see supra note 11. "Either party may initiate the arbitration proceeding . . . [or] [t]he parties may jointly initiate arbitration . . . ." Id.
96. Id.
97. Id. § 1401(a)(3)(A).
98. Id. § 1401(b)(1).
Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of amount of such liability or of the schedule.

Id. § 1399(c)(2).
In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest . . . . For purposes of this section, the term "default" means—
(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written
ifests the balance Congress "deems appropriate with respect to which party should have use of the money during the pendency of a dispute over withdrawal liability."\textsuperscript{101} The Act tips the balance

\textit{notification from the plan sponsor of such failure}....

\textit{Id.} § 1399 (c)(5).

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan....

\textit{Id.} § 1401(d). See \textit{supra} note 90 and accompanying text (employer must start interim payments within 60 days of demand for payment by plan sponsor).

\textit{But see Republic Indus., Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628, 641 n.16 (4th Cir. 1983) (stating an ambiguity exists between the meaning of sections 1401 and 1399 of MPPAA regarding payment of liability while an appeal or review of that liability is pending).}

The first sentence [of section 1401(d)] plainly requires that installment payments be made pending the arbitrator's final decision. The second sentence, however, apparently contemplates that it is the failure to render payments upon that final decision which constitutes default. That installment payments must be made pending arbitration is further suggested by § 1399(c)(2), which [requires payments to begin within 60 days after the date of demand by the plan sponsor regardless of any request for review or appeal of that liability].

However, apparently to the contrary is § 1401(b)(1) which implies that requested sums are not due while arbitration is pending [by stating that withdrawal liability amounts demanded become due and owing if arbitration is not initiated].

\textit{Id.}

\textit{Contra} United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128 (3d Cir. 1986), \textit{aff'd}, 481 U.S. 735 (1987). Although the \textit{United Retail} Court agreed with the opinion in \textit{Republic} to the extent that it found the MPPAA provisions unclear, it resolved any doubts in favor of the pay now dispute later scheme.

While the conflicting provisions within the MPPAA render this question difficult, we have found strong authority for the proposition that there is a cause of action to collect withdrawal liability payments pending arbitration. In addition to the courts in \textit{Pantry Pride}, \textit{Hertz} and \textit{Lazar-Wisotsky}, the PBGC, while acknowledging the lack of clarity on this point in the statutory scheme, has stated its view that there exists a right of action to collect payments pending arbitration. 49 Fed. Reg. 22,644 (1984). In light of Congress's obvious desire to ensure the solvency and stability of pension plans, ... we believe this statutory interpretation is correct. Accordingly, we will affirm the district court's grant of summary judgment for the Plan with respect to an interim liability payment. However, we hope that Congress will soon clarify the confusion resulting from conflicting provisions within the MPPAA.


\textit{101. Banner Indus., Inc. v. Central States Pension Fund, 663 F. Supp. 1292, 1297-98}
in favor of the plan sponsor and beneficiaries during the dispute resolution process, regardless of the basis for dispute raised by the employer.\textsuperscript{102}

If arbitration is initiated, according to the PBGC's regulations, the proceeding under the MPPAA is a plenary, trial-type proceeding, where a record is made for the first time.\textsuperscript{103} A full range of pre-hearing discovery is available to the parties, including depositions, interrogatories, and requests for production of documents.\textsuperscript{104} During the arbitration proceeding, the parties are entitled to present both testimonial and documentary evidence, and to cross-examine witnesses.\textsuperscript{105} After the proceeding is complete, the parties may submit post-hearing briefs.\textsuperscript{106} The arbitrator will then issue a "written award," including required findings of fact and conclusions of law.\textsuperscript{107} In sum, the arbitrator acts in the manner of "a judge[,] applying applicable law to the facts presented."\textsuperscript{108}

After a decision is issued by the arbitrator, any party to the arbitration proceeding "may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court ... to enforce, vacate, or modify the

\begin{footnotes}
\item[102] See Robbins v. Admiral Merchants Motor Freight, Inc., 846 F.2d 1054, 1057 (7th Cir. 1988) (purpose of "pay now, dispute later" scheme is "to ensure the stability of multiemployer pension plans when withdrawals occurred, as well as to create disincentives for employers to abandon such plans. Confronted with the choice of who should bear the economic burden of unfunded pension liability left by withdrawing employers, Congress did not in our view act inequitably in requiring that employers who received the full benefit of their employees' services should bear the cost rather than the employees who provided their services on the actual or implied promise that they would ultimately enjoy their vested, accrued pension benefits.
\item[103] See 29 C.F.R. §§ 2641.2, 2641.5(d) (1985).
\item[105] See 29 C.F.R. § 2641.5 (1985).
\item[106] See 29 C.F.R. § 2641.5(g) (1985).
\item[107] See 29 C.F.R. § 2641.7(a)(1) (1985).
\end{footnotes}
arbitrator’s award.” In the subsequent court proceeding there exists a presumption that the arbitrator’s findings of fact are correct unless rebutted by “a clear preponderance of the evidence.” Thus, arbitration and the findings therefrom should have a primary role in court proceedings regarding withdrawal liability disputes.

Unfortunately, arbitration is often not timely invoked or parties simply attempt to fly in the face of the plain language of the MPPAA and bypass it altogether. This failure to arbitrate first, has prompted consideration by several courts of the role and treatment of arbitration under the MPPAA in light of prior judicial treatment of other statutorily prescribed arbitration requirements.

II. THE ROLE OF ARBITRATION

A. As A Means of Dispute Resolution

The arbitration process, whether prescribed under a clause in a contract or in a provision of a statute, is reputed to be a panacea for the time and expense of commercial litigation. The

110. Id. § 1401(c). See Grand Union Co. v. Food Employers Labor Relations Ass’n, 808 F.2d 66, 68 (D.C. Cir. 1987) (presumption in favor of arbitrator’s determination can be overcome by a preponderance of the evidence establishing determination was unreasonable or clearly erroneous).
112. There are two primary models of arbitration, one which is initiated primarily under the terms of labor contracts, and the other which is initiated under the terms of either commercial contracts or statutory arbitration provisions. See Shell supra note 111 at 512-16.

Scholars have long recognized the existence of two conceptually different models of arbitration. The first model finds the arbitrator acting as an agent of the parties, formulating compromises on difficult matters of contractual interpretation. A primary goal of the arbitrator under this model is to preserve the relationship between the parties. Generally, labor arbitration has developed in line with this model of arbitration. Operating under this model, labor arbitration is the heart of “industrial self-government . . . [because] [t]he processing of disputes through the grievance machinery is actually a
motivation underlying the use of arbitration is to avoid the formalities, delay, and expense of ordinary litigation.\textsuperscript{113} To this end, there is a strong federal policy favoring the enforcement of arbitration agreements based upon contractual bargaining agreements.\textsuperscript{114} As to arbitration under collective bargaining agreements, Congress has mandated that decisions under such contractual methods of dispute resolution be "final."\textsuperscript{115} Thus, vehicle by which meaning and content are given to the collective bargaining agreement."\textit{Id.} at 512 (quoting United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960)).

The second model is much more analogous to civil litigation. The arbitrator is required to act as a judge resolving transactional disputes without regard for the parties' relationship. Under this model, "arbitration is a cheap and efficient form of trial ...." Commercial arbitration has followed this model in developing its arbitration procedures and is actually "the substitute for litigation ... [when] there has been a breakdown in the working relationship of the parties."\textit{Id.} at 512-13 n.17 (quoting United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 581 (1960)).

Shell points out that these two models of arbitration can give rise to two different answers when determining "the proper role of statutory law in the decision-making process of arbitrators."\textit{Id.} at 513. In labor arbitration, the application of public statutes to disputes is not only external to the relationship of the negotiating parties, but is an unwanted and improper intrusion to the dispute resolution process in the opinion of a majority of labor arbitrators.\textit{Id.} at 514, 521 n.66.

Under statutes such as ERISA, which have a wide scope, claims arise in both union and non-union settings, in both labor and commercial arbitration fields, and often end up in court without ever being submitted to the grievance arbitration system.\textit{Id.} at 515. Shell states that "[t]he Supreme Court has endorsed commercial arbitration as a tribunal competent to handle disputes under the federal securities, racketeering and antitrust laws."\textit{Id.} at 516 (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227-42 (1987) and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638-40 (1985)). Although Shell's article does not discuss the role of arbitration under the MPPAA, his counsel, regarding the role of arbitration under ERISA, that careful scrutiny is required of all federal employment statutes for evidence of Congressional intent regarding commercial arbitration of claims is equally applicable to the MPPAA.\textit{Id.}

\textsuperscript{113} Shell, \textit{supra} note 111 at 516.

\textsuperscript{114} Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (Congress, in enacting Federal Arbitration Act, "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration" and therefore, only Congress can limit application of the Act); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (Federal Arbitration Act is "federal substantive law" and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" under the Act); Alexander v. Gardner-Denver Co., 415 U.S. 36, 46 n.6 (1974) (Supreme Court reaffirmed holding favoring arbitration as a means of resolving contractual disputes under collective bargaining agreements); Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 694 (9th Cir. 1986) (strong Federal presumption favoring the enforcement of arbitration agreements); I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus., 727 F.2d 1204, 1207 n.7 (D.C. Cir. 1984) (judicial deference to arbitration based upon contractual provisions of collective bargaining agreements is mandated by Congress).

\textsuperscript{115} I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus., 727 F.2d 1204,
arbitration provisions in collective bargaining agreements are enforced routinely by federal courts, and their decisions are subjected to only limited judicial review.\textsuperscript{116}

In contrast to contractual agreements to arbitrate, statutorily prescribed arbitration, like that set out in the MPPAA, receives a different type of consideration and treatment by the courts. Statutorily prescribed arbitration, mediation and other administrative review processes are not routinely enforced by the courts, and decisions from these proceedings are subjected to complete judicial review.\textsuperscript{117} Prior to the MPPAA, Congress, in such statutes as the Social Security Act,\textsuperscript{118} the Railway Labor Act,\textsuperscript{119} and the Department of Energy Organization Act,\textsuperscript{120} prescribed arbitration and other administrative review proceedings as a means of dispute resolution. Prescription of these proceedings by Congress, pronounced its clear preference for arbitration and other such administrative review processes as a superior means of resolving disputes.\textsuperscript{121}

In attempting to determine the primacy and enforceability of such statutorily prescribed dispute resolution proceedings, however, Federal Courts "have uniformly analyzed the question as an issue of exhaustion of administrative remedies, not as an issue of an absolute jurisdictional bar vel non."\textsuperscript{122} The exhaustion of

\begin{itemize}
\item \textsuperscript{116} Id. (citing United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) and United States v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)).
\item \textsuperscript{117} Id. (citing 29 U.S.C. \$ 1401(a)(3)(A) (1985)).
\item \textsuperscript{118} 42 U.S.C. \$ 405(h) (1991) (originally enacted Aug. 14, 1935).
\item \textsuperscript{119} 45 U.S.C. \$ 153 (1986) (originally enacted May 20, 1926).
\item \textsuperscript{120} 42 U.S.C. \$ 7193 (1983) (originally enacted Aug. 4, 1977).
\item \textsuperscript{121} See Union Pacific R.R. v. Sheehan, 439 U.S. 89 (1978) (Congress promoted stability of labor-management in railroad industry by providing efficient and effective dispute resolution processes under railway labor act); Weinberger v. Salfi, 422 U.S. 749 (1975) (Congress clearly stated judiciary barred from hearing disputes until administrative agency has come to decision under Social Security Act); Gulf Oil Corp. v. United States Dept' of Energy, 663 F.2d 296 (D.C. Cir. 1981) (Congress expressed clear preference for administrative review but did not bar judiciary from hearing disputes arising under Department of Energy Organization Act if administrative review procedures not followed).
\item \textsuperscript{122} I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus., 727 F.2d 1204, 1207 (D.C. Cir. 1984). In other words, the courts have treated the arbitration requirement set out in Federal statutes as an administrative remedy to be exhausted before pursuing the dispute in court, instead of treating arbitration as a requirement which must be followed before the courts have jurisdiction to hear the dispute. Id. at 1207 & n.6 (citing Republic Indus., Inc. v. Teamsters Joint Council No. 83 Pension Fund, 718 F.2d 628, 634
remedies doctrine is based on "the 'long settled rule ... that no one is entitled to judicial relief ... until the prescribed administrative remedy has been exhausted.'"123

This rule is based upon three strong policy concerns. "First, adherence to the doctrine shows appropriate deference to Congress' decision, embodied in statute, that an independent administrative tribunal, and not the courts, should serve as the initial forum for dispute resolution."124 By complying with this policy concern, courts are avoiding acting prematurely and undermining the separation of powers.125 The second policy concern is that "the exhaustion doctrine illustrates respect for administrative autonomy by forbidding unnecessary judicial interruption of the administrative process."126 Such "autonomy allows the administrative tribunal to exercise its own discretion, apply its own special expertise, and correct its own errors, thereby promoting administrative responsibility and efficiency and minimizing the frequent and deliberate flouting of administrative processes which could weaken the tribunal's effectiveness."127 This policy comports with the ripeness doctrine and prevents courts from becoming involved in administrative policy disputes before an administrative decision has been reached.128 The third policy concern is that "the exhaustion requirement fosters judicial economy both by permitting the administrative tribunal to vindicate a complaining party's rights in the course of its proceedings, thereby obviating


125. Id. (citing First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 695 n.3 (3d Cir. 1979) and K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 20.01-08 (1976)).


128. Id. at 293 n.2 (citing A.O. Smith Corp. v. FTC, 530 F.2d 515 (3d Cir. 1976) as quoting Abbott Lab. v. Gardner, 387 U.S. 136, 148 (1967)).
judicial intervention, and by encouraging the tribunal to make findings of fact on which courts can later rely in their decision-making.”¹²⁹

There are three exceptions to the exhaustion of remedies doctrine which override or defeat the policies underlying the doctrine, but these exceptions are applied “only in extraordinary circumstances.”¹³⁰ The first exception is “when the nonjudicial remedy is clearly shown to be inadequate to prevent irreparable injury;”¹³¹ the second is when resort to the nonjudicial remedy would “clearly and unambiguously violate statutory or constitutional rights;”¹³² and the third is “when exhaustion would be futile.”¹³³

In considering the exhaustion of remedies doctrine, the Supreme Court has differentiated between exhaustion requirements which are a statutorily mandated condition precedent to judicial review of disputes, and those exhaustion requirements which are imposed by the judiciary and are not a condition precedent of judicial review, but are of prudential concern only.¹³⁴ In a majority of cases, the Supreme Court has treated the exhaustion of remedies “as a jurisprudential doctrine and evaluat[ed] the specific circumstances of the particular case to determine whether the [doctrine] should be applied.”¹³⁵ The only time the exhaustion of

¹²⁹. McKart v. United States, 395 U.S. at 194-95; Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund, 693 F.2d at 293.
¹³¹. Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund, 693 F.2d at 293 (citing American Fed'n of Gov't Employees v. Resor, 442 F.2d 993, 994 (3d Cir. 1971)).
¹³². Id. (quoting Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 907 (3d Cir. 1982) and citing Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128, 1137 (3d Cir. 1979); First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 696-97 (3d Cir. 1979); and Barnes v. Chatterton, 515 F.2d 916, 921 (3d Cir. 1975)).
¹³³. Id. (citing United States ex rel. Marrero v. Warden, Lewisburg Penitentiary, 483 F.2d 656, 659 (3d Cir. 1973)).
¹³⁵. Id. at 1208 (citing e.g., United States v. McKart, 395 U.S. 185, 193 (1969)). See Gulf Oil Corp. v. United States Dep't of Energy, 663 F.2d 296 (D.C. Cir. 1981). A statute in which Congress set out provisions for non-judicial review of disputes is the Department of Energy Organization Act. 42 U.S.C. § 7193 (1991). In Gulf Oil Corporation, the Department of Energy argued that Gulf Oil's failure to exhaust the non-judicial reviews established under the statute prevented the court from exercising jurisdiction over the dispute. The court held the review provisions of the statute were not an absolute bar to its jurisdiction, falling far short of the strong language used by Congress in the Social
remedies doctrine is treated as a complete jurisdictional bar is when Congress has made it clear in unequivocal statutory terms that judicial review of a dispute shall not occur until after the administrative agency or arbitrator has reached a final decision.\footnote{136}

An example of such a statute is the Social Security Act which states that "[n]o findings of fact or decisions of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided."\footnote{137} The Social Security Act, in the immediately preceding subsection, provides that a party may obtain a review only after a final decision has been reached by the Secretary.\footnote{138} Thus, under the plain language of the Social Security Act, the only decisions which may be judicially reviewed are those which are made final by the exhaustion of administrative remedies.

The Supreme Court recognizes that the failure to exhaust administrative remedies is an absolute bar to judicial review only when this requirement is clearly stated in a statute because traditionally the exhaustion of remedies doctrine has been treated as a jurisprudential doctrine applied to the specific facts of a particular case.\footnote{139} Thus, the Court presumes that Congress will clearly state under what circumstances it wants this judicial treatment of the doctrine to change and the exhaustion of remedies doctrine to be an absolute bar to judicial review.\footnote{140} Additionally, since a major policy underlying the exhaustion of remedies doctrine is judicial economy, the judiciary is best situated to make a determination of when the doctrine should or should not be applied.\footnote{141}


\footnote{139 I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus., 727 F.2d 1204, 1208-09 n.11 (D.C. Cir. 1984) (citing L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 426 (1965)).}

\footnote{140 Id. at 1209 n.11.}

\footnote{141 Id.}
B. Under the MPPAA

Federal courts, utilizing this type of analysis, have determined that the language of the MPPAA does not clearly and unequivocally state that withdrawal liability disputes must be arbitrated to a final decision before the judiciary has jurisdiction to review these disputes. The statutory requirement of arbitration under the MPPAA is not expressly made a condition precedent to judicial review of withdrawal liability disputes, but is a jurisprudential matter. Thus, the courts have jurisdiction to consider withdrawal liability disputes which have not been submitted to arbitration; the only question is, should a court exercise that jurisdiction?

This question was addressed, under the context of the exhaustion of administrative remedies, in the case of Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund. In Republic, the employer challenged the facial constitutionality of the MPPAA in federal court without first exhausting its arbitrative remedies. The district court, applying the exhaustion of remedies doctrine, dismissed the case and refused to consider the constitutional challenge. On appeal, the Third Circuit examined the policies underlying, and the judicial treatment of, the exhaustion of remedies doctrine, and held that the exhaustion of remedies doctrine speaks only to the timing of judicial review and should only be invoked after analysis. An analysis of the MPPAA by the Court, led to the conclusion that the Act man-

144. Id. (citing Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1157 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980)).
145. 693 F.2d 290 (3d Cir. 1982).
147. Id. at 1350.
dated exhaustion of remedies, presumed the administrative remedy would be adequate, and expected the doctrine to be excused only in extraordinary circumstances when a litigant could satisfy one of the narrow exceptions.\textsuperscript{149}

However, where the policies underlying the doctrine are not satisfied or are not applicable, the court found compliance with the exhaustion of remedies doctrine unnecessary before filing suit.\textsuperscript{150} A challenge to the constitutionality of legislation, like the complaint raised by the employer in this case, is generally committed to the courts for resolution and not to an administrative tribunal.\textsuperscript{151} The court found arbitration under these circumstances would be a useless act because the arbitrator cannot alter the provisions of the statute if determined to be unconstitutional.\textsuperscript{152} Further, the court held "that arbitration cannot moot [the employer's] constitutional claims by deciding the case on nonconstitutional grounds because the claims are purely constitutional."\textsuperscript{153} Thus, under the "rare posture of this case..." arbitration is not an adequate administrative remedy and therefore the district court should have addressed the employer's constitutional challenge.\textsuperscript{154}

A different approach than that taken by the Third Circuit was used by the District of Columbia Court, in the case of \textit{I.A.M. National Pension Fund Benefit Plan C v. Stockton TRI Industries,}\textsuperscript{155} to determine whether it should exercise its jurisdiction over a withdrawal liability dispute which had not been submitted

\begin{itemize}
  \item \textsuperscript{149} Id. at 294-95.
  \item \textsuperscript{150} Id. at 297-98.
  \item \textsuperscript{151} 3 Kenneth C. Davis, Administrative Law Treatise § 20.04, at 74 (1958).
  \item \textsuperscript{152} Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund, 693 F.2d 290, 296-97 n.5 (3d Cir. 1982) (citing Shelter Framing Corp. v. Carpenters Pension Trust, 543 F. Supp. 1234, 1241 (C.D. Cal. 1982), aff'd in part, rev'd in part, 705 F.2d 1502 (9th Cir. 1983), rev'd on other grounds sub nom., Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) ([To] make these Plaintiffs go through the ... process of arbitration ... would be unfair ... when [it] could not adjudicate their principal grievance, which is that the basic statutory scheme is unconstitutional)).
  \item \textsuperscript{153} Id. at 296.
  \item \textsuperscript{154} Id. at 297-98. See Republic Indus., Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628, 634-35 (4th Cir. 1983), cert. denied, 467 U.S. 1259 (1984) (stating that exhaustion of arbitration requirement under MPPAA unnecessary as prerequisite to judicial consideration of employer's facial constitutional challenge to the Act because arbitration could neither moot constitutional question nor develop relevant factual context to assist in judicial resolution). The Third Circuit also held the Act was constitutional as to the employer's challenges in the Teamsters Joint Council No. 88 case. Republic Indus. Inc., 718 F.2d at 635-43.
  \item \textsuperscript{155} 727 F.2d 1204 (D.C. Cir. 1984).
\end{itemize}
to arbitration. In the *Stockton* case, the pension fund brought a collection action for withdrawal liability under the MPPAA. The district court granted the employer's motion for summary judgment on the basis that it had completely withdrawn from the plan before the date on which the MPPAA imposed mandatory withdrawal liability.\footnote{See I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus., 598 F. Supp. 267 (D.D.C. 1984), rev'd, 727 F.2d 1204 (D.C. Cir. 1984).}

On appeal, the court, before giving an extensive discussion of the exhaustion of remedies doctrine, pointed out an analogy between giving judicial deference to arbitration prescribed under the MPPAA and giving judicial deference to dispute resolution powers delegated to administrative agencies.\footnote{I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus., 727 F.2d 1204, 1207 (D.C. Cir. 1984). "Under MPPAA, ... the decisions of the arbitrator, like the decisions of a typical administrative agency, are fully reviewable to determine whether applicable statutory law has correctly been applied and whether the findings comport with the evidence." Id. at 1207 n.7. See Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund, 693 F.2d 290, 293-95 (3d Cir. 1982) (analyzing MPPAA arbitration scheme within the context of exhaustion of administrative remedies doctrine and comparing arbitration under MPPAA to administrative proceedings).} Three reasons were given to explain why judicial treatment of these two alternative methods of dispute resolution are similar:

First, in establishing the arbitrative scheme, as in establishing an administrative agency, Congress has expressed a preference for initial resolution of the dispute in a non-judicial forum. Second, an arbitrator skilled in pension and labor matters, like an agency in a given administrative area, is in theory likely to fashion superior resolutions of disputes within the arbitrator's area of expertise. Third, initial resort to arbitration, like initial resort to an administrative tribunal, promotes judicial economy both because an arbitrator's decision may dispose of the dispute, and because, even if one party appeals the arbitral decision, courts will have the benefit of the arbitrator's sifting of the facts.\footnote{Id. at 1208 n.8.}

As this opinion points out, however, there is a basic difference between the provisions of most arbitration and administrative review processes.\footnote{29 U.S.C. § 1401(b)(2) (1985). See I.A.M. Nat'l Pension Fund v. Stockton TRI Indus., 727 F.2d 1204, 1208 n.8 (D.C. Cir. 1984).} Under the MPPAA, any party to arbitration has a statutory right to bring a court action to "enforce, vacate, or modify the arbitrator's award."\footnote{See I.A.M. Nat'l Pension Fund v. Stockton TRI Indus., 727 F.2d 1204, 1208 n.8 (D.C. Cir. 1984).} Thus, no matter which party the arbitrator's decision favors, the other party will generally be
disgruntled and exercise its statutory right to judicial review. On the other hand, under an administrative proceeding, the agency is one of the parties to the dispute, making an agency decision in favor of the complaining citizen an effective end to the dispute. Therefore, even though the same policy considerations support judicial deference to both arbitration and administrative proceedings, courts are less likely to abate a trial for arbitration because another "judicial action to vacate the award will ... immediately follow on the heels of the arbitrator's decision" defeating the policy of promoting judicial economy.

Based on the facts of the Stockton case, the Court found "the reasons supporting the doctrine are ... inapplicable," and exhaustion of arbitrative remedies should not be required. The District of Columbia Court noted the issue raised in the district court did not involve questions of fact or contractual interpretation, but was one of pure statutory interpretation, that is "whether an employer 'permanently cease[d] to have an obligation to continue under the plan' under section 1383(a)(1) when the employer expressed the intent to withdraw from the [plan] but was still contractually bound to make contributions." Thus, the decision of the district court to address the statutory issue on the merits was approved by the appellate court for two reasons: (1) "an arbitrator skilled in pension and labor matters would have no superior expertise to offer" to a purely statutory question, and (2) "under the specific circumstances present here, it is unlikely in the extreme that requiring arbitration will promote judicial economy ... [since] it seems highly improbable that a judicial action to vacate the award will not immediately follow on the heels of the arbitrator's decision."

Generalizations are a dangerous precedent, however, and the Stockton Court's generalization about the reluctance to abate a trial for arbitration, and the absence of justification for arbitration when the issue under consideration involves only a question

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162. Id.
163. Id. at 1210 (footnote omitted). See 29 U.S.C. 1401(b)(1), (2) (1985) (stating that any party may bring judicial action to vacate, enforce or modify arbitrator's decision).
165. Id.
of statutory interpretation, were taken to task in the case of *Crown Cork & Seal Co. v. Central States Southeast & Southwest Areas Pension Fund*.\textsuperscript{166} The employer, in *Crown Cork & Seal*, bypassed arbitration and filed suit for a declaratory judgment that it did not owe any withdrawal liability to the pension fund. The employer raised as a defense to liability the newly enacted Deficit Reduction Act of 1984 (DEFRA) which eliminated retroactive withdrawal liability under the MPPAA.\textsuperscript{167} The Third Circuit found that failure to timely seek arbitration before DEFRA was enacted, did not bar the employer from raising the Act as a defense to liability.\textsuperscript{168} Additionally, the court held that since DEFRA was silent as to a time deadline within which arbitration should be initiated, the employer was not barred from raising the Act as a defense to liability even though it did not "timely" initiate arbitration.\textsuperscript{169} The court went on to determine that a date of withdrawal question under DEFRA was arbitrable even it were a purely statutory question as alleged by the employer.\textsuperscript{170} Borrowing from one of its earlier opinions the court stated "it should be beyond cavil that the existence of an issue of statutory interpretation, standing alone, does not justify bypassing arbitration."\textsuperscript{171} Thus, the final issue to be considered was should there be arbitration of the dispute at this late date?\textsuperscript{172} The answer pronounced was a resounding yes. The exhaustion of remedies doctrine was found to apply to this case and none of its exceptions were found to excuse MPPAA arbitration. The court held arbitration should not "be bypassed on the ground that judicial economy might not be served by remanding the case at this stage of the proceedings," reasoning that any other result "would
... leave the arbitrability of MPPAA disputes to the unfettered discretion of the district court, a result which Congress plainly did not intend ..."\(^{173}\)

The decision by the Third Circuit, in *Crown Cork & Seal*, to reverse at the appellate level and send the dispute to arbitration is unusual in an MPPAA case. A trial is generally stayed for MPPAA arbitration of a dispute at the district court level, and the appellate court is simply reviewing the district court’s exercise of its equitable discretion to stay its proceedings.\(^{174}\) Just such a decision by the district court to stay its proceedings for MPPAA arbitration, was affirmed by the appellate court in the case of *Banner Industries, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*.\(^{175}\) The first issue in the case was “whether a control group employer remains subject to MPPAA arbitration requirements when that corporation has divested itself of its subsidiary before the subsidiary’s withdrawal” from the pension plan.\(^{176}\) Both the district court and the Seventh Circuit based their decisions on the opinion in *Flying Tiger Line v. Teamsters Pension Trust Fund*\(^{177}\) which addressed the identical statutory issue.\(^{178}\) The district court found, and the appellate court agreed:

the question of whether one remains an employer as of a withdrawal date,... [unlike] the question of whether one ever became an employer for MPPAA purposes ... is an arbitrator’s issue because its resolution hinges upon applying the MPPAA provisions concerning employer withdrawals specifically assigned by Congress to the arbitrator’s purview.\(^{179}\)

\(^{173}\) *Id.*

\(^{174}\) See *Banner Indus., Inc. v. Central States, Southeast & Southwest Areas Pension Fund*, 875 F.2d 1285 (7th Cir. 1989), *cert. denied*, 493 U.S. 1003 (1989) (holding trial court did not abuse its discretion in referring employer’s dispute of withdrawal liability to arbitration); *Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241 (3d Cir. 1987) (holding district court properly stayed first count of employer’s suit pending arbitration of withdrawal liability question).

\(^{175}\) 75 F.2d 1285 (7th Cir.), *cert. denied*, 493 U.S. 1003 (1989).

\(^{176}\) *Id.* at 1286.


\(^{179}\) *Banner Indus., Inc. v. Central States, Southeast & Southwest Areas Pension Fund*,
After determining the arbitrability of the issue, the court went on to address the pension fund's argument that the employer had waived the right to arbitrate its withdrawal liability by failing to timely initiate arbitration. The appellate court upheld the district court's finding that the statutory time periods for initiating arbitration were tolled by the employer filing suit "within the statutory time period for arbitration." The court reasoned the employer "did not simply rest upon its rights" but "moved decisively" to legitimately question the arbitrator's jurisdiction to decide its employer status since the MPPAA only mandates arbitration for disputes between a plan sponsor and an employer. Thus, fairness dictated tolling the deadline to initiate arbitration until the statutory issue of whether arbitration applied to the question of continued employer status had been decided. The Seventh Circuit held the trial court did not abuse its discretion in exercising its equitable powers in favor of tolling, but did recognize that the employer risked waiving its right to arbitrate and the district court would have been entitled to decide the question either way. Further, the court gave a warning to future litigants that "[n]ot every imaginable question of statutory construction will toll the period during which arbitration must begin." "Litigation under similar circumstances could be considered frivolous, and any hardship suffered by avoiding arbitration would be a 'self-inflicted wound.'"
Such a warning should be heeded in light of the decisions in cases such as *Crown Cork & Seal*, 185 *Flying Tiger Line*, 186 and *I.A.M. National Pension Fund v. Clinton Engines Corp.* 187 which have applied the exhaustion of remedies doctrine to questions of statutory construction under the MPPAA, and found the failure to timely arbitrate barred the employer from bringing its withdrawal liability disputes to court. 188 The District of Columbia Court, in *Clinton Engines Corp.*, 189 a consolidated opinion, addressed the sole issue of “whether an employer that has been assessed ‘withdrawal liability’ within the meaning of the MPPAA must arbitrate its asserted defenses to liability in order to preserve those defenses for ultimate judicial consideration.” 190 In answering this question, the court reiterated its holding, like that of “all other circuits courts that have considered the issue,” that MPPAA arbitration is “not an ‘absolute jurisdictional bar,’ but instead constitute[s] an ‘exhaustion of administrative remedies’ requirement.” 191 Relying on its recent opinion in *Grand Union Co. v. Food Employers Labor Relations Ass’n*, 192 the court stressed “‘[a]rbitrate first’ is indeed a rule Congress stated unequivocally...” 193

In both *Clinton* and *Grand Union*, the pension fund insisted that the employer raise its defenses initially to an arbitrator in compliance with the statute, and the employer refused. 194 The *Clinton* court stated that an employer which merely establishes that its case raises “only questions of statutory interpretation will not, standing alone, suffice to remove [the] case from the

187. 825 F.2d 415 (D.C. Cir. 1987).
188. See *Coles Express v. New England Teamsters & Trucking Indus. Pension Fund*, 702 F. Supp. 355 (D. Me. 1988) (explaining that employer’s defenses should have been arbitrated prior to filing suit in district court thus barring employer from pursuing court action).
190. Id. at 416.
191. Id. at 417 n.4 (quoting *I.A.M. Nat’l Pension Fund Benefit Plan C v. Stockton TRI Indus.*, 727 F.2d 1204, 1207 (D.C. Cir. 1984)).
192. 808 F.2d 66 (D.C. Cir. 1987).
194. Id. at 422. See *Grand Union*, 808 F.2d at 70.
arbitrability requirement" of the MPPAA.\textsuperscript{195} "[S]uch an exception [to the arbitrability requirement] would sap judicial resources by requiring case-by-case determinations of arbitration's utility ... [and] would yield few countervailing benefits."\textsuperscript{196} The Court concluded that "arbitration reigns supreme under the MPPAA[,]" even in cases involving no questions of fact, and an employer's failure to arbitrate its defenses makes the withdrawal liability amount assessed by the pension fund "due and owing . . . ."\textsuperscript{197} The District of Columbia Court, by reaffirming its opinion in \textit{Grand Union}, limited its holding in \textit{Stockton TRI Industries} to the facts of that particular case.\textsuperscript{198} In an innovative analysis of its own opinion, the court in \textit{Grand Union} stressed that the pension fund in \textit{Stockton} had "waived" arbitration by refusing

\textsuperscript{195} \textit{I.A.M. Nat'l Pension Fund}, 825 F.2d at 422.
\textsuperscript{196} \textit{Id.} (citing \textit{Grand Union Co. v. Food Employers Labor Relations Ass'n}, 808 F.2d 66, 70 (D.C. Cir. 1987) and \textit{Combs v. Bowling & Hildebrand Trucking Co.}, No. 84-1451, slip op. at 10 (D.D.C. Feb. 21, 1985)).
\textsuperscript{197} \textit{Id.} (quoting 29 U.S.C. § 1401(b)(1) (1985)). The Court's finding is consistent with Congress' intent to expedite resolution of disputes and minimize the delay to pension plans in receiving withdrawal liability payments. \textit{Id.} at 426.

Among other things, the legislative history makes clear that in enacting the MPPAA, Congress was animated by dissatisfaction with procedures for collection than in place:

Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Senate Labor Committee, Summary and Analysis of S.1076 (April 1980), reprinted in \textit{BNA Pension Reporter}, Supp. No. 310 (Sept. 29, 1980), at 91.

\textit{Id.} at 426 n.20.

This [Congressional] intent . . . has led courts to characterize the MPPAA as a "pay-first-question-later" statute [citations omitted]. It should go without saying that the value of arbitration in fulfilling Congress' intent to provide an efficient, expeditious dispute resolution mechanism lies in initial resort to that mechanism. The National Legislature's intent would not, we believe, be furthered by requiring resort at this late stage. Indeed, permitting the employers now to do battle on the arbitration front would further prolong what have already become highly protracted proceedings.

\textit{Id.} at 426-27.

\textit{See Bowers v. Transportacion Maritima Mexicana, S.A.}, 901 F.2d 258, 265 (2d Cir. 1990) (holding an employer which fails to comply with statutory arbitration requirements forfeits any right to contest existence or amount of withdrawal liability, and debt is due and owing).

\textsuperscript{198} \textit{See I.A.M. Nat'l Pension Fund v. Clinton Engines Corp.}, 825 F.2d 415 (D.C. Cir. 1987) (explaining in depth how \textit{Grand Union} case clarified and explained \textit{Stockton} case).
the employer's request for arbitration, and not even showing any interest in arbitration until the case was on appeal from a district court decision on the merits in favor of the employer.\textsuperscript{199} However, the issue of waiver by the pension fund of its right to arbitrate was not even mentioned by the District of Columbia Court in the \textit{Stockton} opinion.\textsuperscript{200} That court, in both the \textit{Grand Union} and \textit{Clinton} opinions, distinguished the facts in those cases from the facts in \textit{Stockton}, by pointing out that "[i]n no manner did the [pension] [f]und waive its right to insist that employers honor Congress' 'statutory direction'" to arbitrate first.\textsuperscript{201} Further, the rule pronounced in \textit{Stockton}, that cases involving issues of purely statutory interpretation need not go to arbitration before coming to court because deferral to arbitration provided no assistance to the court and did not promote judicial economy,\textsuperscript{202} was emasculated in \textit{Grand Union} and \textit{Clinton} with the court's holding that "an exception for cases raising questions of statutory interpretation would 'drastically diminish the prime role Congress so plainly assigned to arbitration in the MPPAA dispute resolution scheme.'"\textsuperscript{203} While recognizing that "losing the opportunity to defend against" the assessment of withdrawal liability "visits an obvious hardship upon the[] parties[,]" the court refused to find that "bearing this hardship would work an inequity ..." because "as to ... [the employer] this unhappy result is in the main a 'self-inflicted wound.'"\textsuperscript{204} The employer could have timely initiated

\textsuperscript{199} Grand Union Co. v. Food Employers Labor Relations Ass'n, 808 F.2d 66, 69 n.2, 70 (D.C. Cir. 1987).
\textsuperscript{201} I.A.M. Nat'l Pension Fund v. Clinton Engines Corp., 825 F.2d 415, 422 (D.C. Cir. 1987); Grand Union Co. v. Food Employers Labor Relations Ass'n, 808 F.2d at 70-71.
\textsuperscript{203} I.A.M. Nat'l Pension Fund v. Clinton Engines Corp., 825 F.2d 415, 422 (D.C. Cir. 1987) (quoting Grand Union Co. v. Food Employers Labor Relations Ass'n, 808 F.2d 66, 70 (D.C. Cir. 1987)).
\textsuperscript{204} Id. at 427 (citing IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118, 129 (3d Cir. 1986)). The employers in this consolidated opinion alleged it would be inequitable for the court to deny them the opportunity to raise defenses to the withdrawal liability in a lawsuit even though they had not raised these defenses initially in arbitration. The Court found these arguments unpersuasive, although the trial court had already ruled in favor of one of the employers on the merits of its defenses, and the other employer's defenses were similar to those upheld by the Sixth Circuit Court in 888 Corp. See Central States, Southeast & Southwest Areas Pension Fund v. 888 Corp., 813
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arbitration under the statute and preserved its right to raise its defenses in the collection action brought by the pension fund.\textsuperscript{205} Having failed to do so, the employer is barred from raising its defenses in court and the district court must find in favor of the pension fund.\textsuperscript{206}

C. Under Recent Court Analysis of MPPAA

In two recent cases, Teamsters Joint Council No. 83 v. Centra, Inc.\textsuperscript{207} and McDonald v. Centra, Inc.,\textsuperscript{208} the Fourth Circuit had an opportunity to review the role of arbitration as a means of withdrawal liability dispute resolution under the MPPAA. The Centra cases were a series of actions arising out of the withdrawal of Mason & Dixon Lines, Inc. (M&D) from a Teamsters pension fund; the assessment of withdrawal liability by the pension fund; and collection attempts by the pension fund against the solvent members of a group of corporations under common control with M&D.\textsuperscript{209}

In McDonald v. Centra, Inc.,\textsuperscript{210} the district court granted summary judgment in favor of the pension fund.\textsuperscript{211} The district court held arbitration to be a jurisdictional bar to Centra’s right to raise defenses to the fund’s collection action or in the alternative, if arbitration is not a jurisdictional bar, Centra’s defenses do not come within one of the narrow exceptions to the exhaustion of remedies doctrine. According to the district court, the Centra defendants were a control group of corporations on the date in question, the fact that M&D was discharged in bankruptcy was irrelevant to the other members’ liability, and equitable tolling
is inapplicable to suits involving the collection of withdrawal liability.\textsuperscript{212}

The Fourth Circuit affirmed on the basis of the trial court's alternative finding that Centra's defenses did not fall within an exception to the exhaustion of remedies doctrine.\textsuperscript{213} The court, in reaching this conclusion, pointed out that the language of the MPPAA "pales beside the text of the Social Security Act held to bar jurisdiction in \textit{Weinberger v. Salfi} ...".\textsuperscript{214} Arbitration under the MPPAA, according to the court, is merely "compulsory" and not a "jurisdictional prerequisite."\textsuperscript{215} Thus, the exhaustion of remedies doctrine is applicable to MPPAA arbitration and is the appropriate method of analysis.\textsuperscript{216}

In response, the Centra defendants alleged they were not members of a control group with M&D on the date of withdrawal and even if they were, notice to M&D was insufficient to notify the control group of the withdrawal liability. Centra based its control group status contention on an affidavit which stated Central Transport, Inc., one of its subsidiaries, owned no stock in M&D on the relevant date. The stock Central Transport owned was cancelled and reissued to Centra in compliance with the reorganization plan for M&D in the bankruptcy court. The court

\begin{itemize}
\item \textsuperscript{212} See McDonald v. Centra, 118 B.R. 903 (D. Md. 1990).
\item \textsuperscript{213} McDonald v. Centra, Inc., 946 F.2d 1059, 1063 (4th Cir. 1991). ("[C]ircuit courts have construed the § 1401 provision [of the MPPAA] ... 'as a prudential rather than a jurisdictional prerequisite' to which the doctrine of administrative remedies exhaustion applies ... ") See, e.g., I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus., 727 F.2d 1204, 1207-09 (D.C. Cir. 1984); T.I.M.E.-D.C., Inc. v. Management-Labor Welfare & Pension Funds, 756 F.2d 939, 944-45 (2d Cir. 1985); Central States, Southeast & Southwest Areas Pension Fund v. 888 Corp., 813 F.2d 760, 764 (6th Cir. 1987); Robbins v. Admiral Merchants Motor Freight, Inc., 846 F.2d 1054, 1056 (7th Cir. 1988); Crown Cork & Seal Co. v. Central States Southeast & Southwest Areas Pension Fund, 881 F.2d 11, 19 (3d Cir. 1989).
\item \textsuperscript{215} McDonald v. Centra, Inc., 946 F.2d 1059, 1063 (4th Cir. 1991). This holding is consistent with other circuit courts which have come to the same conclusion. \textit{See}, e.g., I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus., 727 F.2d at 1207-09; T.I.M.E.-D.C., Inc. v. Management-Labor Welfare & Pension Funds, 756 F.2d 939, 944-45 (2d Cir. 1985); Central States, Southeast & Southwest Areas Pension Fund v. 888 Corp., 813 F.2d 760, 764 (6th Cir. 1987); Robbins v. Admiral Merchants Motor Freight, Inc., 846 F.2d 1054, 1056 (7th Cir. 1988); Crown Cork & Seal Co. v. Central States Southeast & Southwest Areas Pension Fund, 881 F.2d 11, 19 (3d Cir. 1988).
\item \textsuperscript{216} McDonald v. Centra, Inc., 946 F.2d 1059, 1063 (4th Cir. 1991).
\end{itemize}
found such reissuance of the stock to the parent corporation did not destroy control group status with M&D.217 Further, the court negated Centra's contention that it had no notice of the withdrawal liability assessment by stating that the rule is well settled that "notice to one member of the control group constitutes notice to all members of the group."218 Notice sent to M&D complied with the MPPAA and the Act does not require the pension fund to notify members of the control group other than the withdrawing employer.219

After settling Centra's control group allegations, the court addressed Centra's defenses to withdrawal liability.220 The court began by recognizing that "the exhaustion doctrine acts as a prudential rule that provides the courts 'with a method to exercise comity toward administrative agencies and to promote efficient use of judicial resources while protecting the rights of parties who have come before the court seeking relief.'"221 Of the three exceptions to the exhaustion of remedies doctrine,222 Centra alleged that the statutory construction exception applied to its case.223 Centra argued the discharge in bankruptcy of M&D's withdrawal liability, discharged all members of the control group224 and analogized its situation to the defendants in Central States, Southeast & Southwest Areas Pension Fund v. 888 Corp.225 Centra contended it was entitled to raise M&D's discharge in bankruptcy as a defense in the district court even though it did not raise

217. Id. at 1062.
  221. Id. (quoting Morrison-Knudson Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1223 (9th Cir. 1987), cert. denied, 488 U.S. 935 (1988)).
  222. See Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund, 693 F.2d 290, 293-94 (3d Cir. 1982) (discussing each of three exceptions to exhaustion of remedies doctrine); First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 696 (3d Cir. 1979) (discussing three exceptions to exhaustion of remedies doctrine and how they are rarely applied).
  224. Id. at 1064.
  225. 813 F.2d 760 (6th Cir. 1987).
such a defense at arbitration, because the consequence of the discharge was an issue of statutory interpretation.\textsuperscript{226}

The court first distinguished this case from the \textit{888 Corp.} case by pointing out that \textit{888 Corp.} was based on a DEFRA defense to withdrawal liability. In \textit{888 Corp.} the statute making retroactive liability under the MPPAA inapplicable had not even been enacted until after the pension fund had filed its collection suit.\textsuperscript{227} The \textit{McDonald} Court stated “that even if Chapter 11 discharges one or all members of the control group, the statute does not render the MPPAA inapplicable.”\textsuperscript{228} Further, simply alleging that the MPPAA and Chapter 11 of the Bankruptcy Code require interpretation, does not by itself invoke the exception to the doctrine of exhaustion of remedies.\textsuperscript{229}

The only way to avoid arbitration is if “neither party timely presses the [arbitration requirement], and the court finds that deferring a court contest while the parties repair to arbitration will neither lead to the application of superior expertise nor promote judicial economy.”\textsuperscript{230} In the \textit{McDonald} case, the pension fund raised the arbitration requirement and judicial economy would have been served if the corporate group would have sought arbitration in a timely manner. Thus, the court held the “defenses do not fall within the statutory construction exception of the doctrine of exhaustion of administrative remedies.”\textsuperscript{231}

Centra also alleged the time for it to initiate arbitration was equitably tolled by the pension fund filing a claim in the M&D bankruptcy proceeding.\textsuperscript{232} The Court found “[t]he MPPAA was created ‘(1) to protect the interests of participants and beneficiaries in financially distressed multiemployer plans, and (2) ... to ensure benefit security to plan participants.”\textsuperscript{233} The Act specifi-

\textsuperscript{226} McDonald v. Centra, Inc., 946 F.2d 1059, 1064 (4th Cir. 1991).
\textsuperscript{227} Id. See also Central States, Southeast & Southwest Areas Pension Fund v. \textit{888 Corp.}, 813 F.2d 760, 766-67 (6th Cir. 1987).
\textsuperscript{228} McDonald v. Centra, Inc., 946 F.2d 1059, 1064 (4th Cir. 1991).
\textsuperscript{229} Id.
\textsuperscript{231} McDonald v. Centra, Inc., 946 F.2d 1059, 1064 (4th Cir. 1991).
\textsuperscript{232} Id.
\textsuperscript{233} Id. (quoting IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d
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Mandatorily provides for expeditious resolution of withdrawal liability disputes, and unlike most statutes of limitations time deadlines, it was designed to protect the plaintiff, that is, the collecting pension plan. Therefore, the court held that "allowing a defendant to toll the period for arbitration during bankruptcy proceedings and a collection suit undercuts the purpose of the statute, the timely adjudication of withdrawal liability disputes to insure the security of multiemployer plans." The end result of the court's analysis is that equitable tolling does not apply to MPPAA arbitration.

The court concluded that M&D's discharge in bankruptcy did not discharge the withdrawal liability of the other control group members. The discharge of a withdrawing employer cannot affect "the derivative legal liability of a nonbankrupt affiliate, for the same reason that one tortfeasor would not be protected" by the bankruptcy of a fellow tortfeasor. The Centra defendants are simply jointly and severally liable for the withdrawal liability.

Finally, the district court's award of attorney's fees was upheld because the case did not fall within an exception to the exhaustion of remedies doctrine. Thus, the suit was primarily a collection action and as such the award of attorney's fees to the pension fund was mandatory. Additionally, based on an abuse of discretion standard the amount of fees awarded by the district court was found to be appropriate.


236. Id.

237. Id.

238. Id. See I.A.M. Nat'l Pension Fund v. Slyman Indus., Inc., 901 F.2d 127, 129 (D.C. Cir. 1990) (stating that joint and several liability between members of control group precludes M&D's bankruptcy discharge from discharging other members withdrawal liability).

239. Id. ("While a control group may be treated as a 'single employer' under the MPPAA, it is a defendant with many pockets. Were all members of the group discharged, this court would allow the defendant to mark its front pockets bankrupt, while removing assets to its back pockets.").

240. Id.

241. McDonald v. Centra, Inc., 946 F.2d 1059, 1065 (4th Cir. 1991) (citing Trustees of
In *Teamsters Joint Council No. 83 v. Centra, Inc.*, the related case to *McDonald*, the pension fund brought suit to compel the Centra defendants to make interim withdrawal payments pending arbitration. Centra counterclaimed seeking declaratory and injunctive relief against arbitration and payment of the interim withdrawal liability. The district court denied Centra any relief and granted summary judgment in favor of the pension fund. That court found that Centra’s defenses must be arbitrated, and Centra was delinquent in its obligation to make interim payments on the withdrawal liability. Additionally, the district court held the pension fund was entitled not only to unpaid interim payments with interest, but also liquidated damages of 20 percent of the unpaid amount, and attorney’s fees and costs.

Centra, in disputing its liability to the pension fund, raised two defenses which are familiar from the *McDonald* case. First, it alleged that M&D’s discharge in bankruptcy discharged any liability Centra might have; and second, Centra alleged it was not an “employer” under the MPPAA because it bought M&D’s reissued stock “free and clear of all pre-confirmation liability[,]” by purchasing after confirmation of the reorganization plan by the bankruptcy court. The Fourth Circuit Court recognized that the MPPAA requires these types of disputes to the assessment of withdrawal liability to be subjected to mandatory arbitration, and such defenses “are not cognizable in the Pension Fund’s action to compel interim withdrawal payments.”


“[A]ttorney’s fees are not permitted when a delinquent contribution action constitutes an insignificant part of a case, and, instead, the predominate issue is statutory interpretation.” *Id.* (citing H.C. Elliott, Inc. v. Carpenters Pension Trust Fund, 663 F. Supp. 1016 (N.D. Cal. 1987), aff’d, 859 F.2d 808 (9th Cir. 1988), cert. denied, 490 U.S. 1036 (1989)). See 29 U.S.C. § 1132(g) (1985) (making award of attorney’s fees mandatory in suit to recover delinquent contributions).

244. *Teamsters Joint Council No. 83, 947 F.2d at 118.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id. at 119. See McDonald v. Centra, Inc., 946 F.2d 1059, 1062-64 (4th Cir. 1991); McDonald v. Centra, 118 B.R. 903, 914-27 (D. Md. 1990) (same allegations also raised by Centra in both cases).*
According to the court, the MPPAA "unambiguously established a 'pay now, dispute later' dispute resolution procedure designed to protect the financial stability of multi-employer pension plans from unnecessary risk caused by protracted delay in the collection of withdrawal liability payments." The only exception recognized to this procedure is "where an employer makes a facial constitutional attack or shows that irreparable injury will result from being forced to make the interim payments." There is a heavy burden which must be met in order to qualify for these exceptions and as the court noted, Centra made no allegations of unconstitutionality or irreparable injury in this case.

The court went on to address Centra's employer status under the MPPAA. The well established rule "that each member of a control group is jointly and severally liable under ERISA for withdrawal liability generated by any member's activities," was restated by the court. After a review of the definition of the terms "employer," and "trades and businesses ... under common control," the court found that "as long as Centra, [whether through subsidiaries or directly] was a control group member with M&D when M&D withdrew from the Pension Fund, Centra

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250. Id.

When the sponsors of a multi-employer pension fund issue a withdrawal liability assessment to an employer pursuant to 29 U.S.C. § 1399(b)(1), the MPPAA requires that such withdrawal liability "shall be payable in accordance with the schedule set forth by the plan sponsor ... beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal .... " 29 U.S.C. § 1399(c)(2) (1985). If the employer wishes to challenge the sponsors' determinations, the Act further provides that "[a]ny dispute between an employer and the plan sponsor ... concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration." 29 U.S.C. § 1401(a)(1) (1985) ....

Courts in the majority of circuits have held that ERISA empowers a court to order the making of interim withdrawal liability payments.


252. Id. See Connors v. Brady-Cline Coal Co., 668 F. Supp. 5, 8 (D.D.C. 1987) (finding employer forced to pay interim withdrawal payments during dispute resolution process, even though employer alleged it would be forced to cease operations if it made interim payments); Robbins v. Pepsi-Cola Metro. Bottling Co., 637 F. Supp. 1014, 1020 (N.D. Ill.), aff'd, 800 F.2d 641 (7th Cir. 1986) (finding employer must either make interim withdrawal payments or establish that making such payments would either bankrupt it or essentially leave it in financial ruin).


254. Id.
is jointly and severally liable on the withdrawal obligation."255

In a real stretch of imagination, Centra alleged that the sale of M&D's stock fell under the MPPAA's sale of assets exception to withdrawal liability.256 As the Court stated, the sale of the stock "is irrelevant when the sale is to a control group member ... [because] [c]ontrol group members [are not an unrelated third party and] are plainly liable for withdrawal liability of other members."257

Centra, once again raised the same old tired argument that M&D's discharge in bankruptcy discharged Centra of its withdrawal liability.258 Such an argument was held by the court to be "meritless[,]" based upon "the congressional intent of holding employers accountable for the pension benefits they promise[,] to ensure that employees can safely rely on these promises in their retirement planning."259

Finally, the court reach Centra's petition to enjoin further arbitration, even though it had originally initiated arbitration.260 Centra's request was based on the contention that its employer status under the MPPAA is an issue of statutory construction to be determined by the district court, not by an arbitrator.261 The Fourth Circuit Court reiterated the applicability of the exhaustion of administrative remedies doctrine and acknowledged that one of the exceptions to the doctrine is where a "legitimate

255. Id. at 120, 121 (citing Connors v. Brady-Cline Coal Co., 668 F. Supp. 5, 9 (D.D.C. 1987)). See 29 U.S.C. § 1301(b)(1) (stating supplemental MPPAA definition of employer as all trades and businesses under common control). See also supra notes 51, 52, 53 and accompanying text.


259. Id. at 121-22 (quoting Pension Benefit Guaranty Corp. v. Ouimet Corp., 711 F.2d 1085, 1092 (1st Cir.), cert. denied, 464 U.S. 961 (1983)). See Republic Indus., Inc. v. Teamsters Joint Council No. 83, 718 F.2d 629, 635-39 (4th Cir. 1983), cert. denied, 467 U.S. 1259 (1984). The Republic Court stated, "[w]e have no doubt of the heavy weight to be given to employees' reliance on ultimate realization of their vested benefits. Conversely, [the employer]'s reliance on its unqualified right to withdraw from a multiemployer pension plan is not as weighty." Id. at 638.


261. Id.
legal question of statutory interpretation" is raised. The question of whether Centra remained an employer for MPPAA purposes on the date of M&D's withdrawal from the pension fund, however, does not fall within the statutory interpretation exception. The court pointed out that even if such a question fell under the exception, the issue of whether the stock repurchase by Centra was designed to avoid withdrawal liability would destroy the purely legal withdrawal liability payments during the pending arbitration.

CONCLUSION

The courts in all of these opinions take the long route to get to the answer plainly stated in the MPPAA. These courts have addressed whether the statutory arbitration requirements are jurisdictional, or are prudential in nature implicating the exhaustion of administrative remedies doctrine, and they have considered whether the arbitration deadlines are, like a statute of limitations, subject to tolling. Such questions are really academic if the courts would simply enforce the unambiguous terms of the statute.

Under the plain language of the statute any dispute regarding withdrawal liability "shall be resolved through arbitration." An employer that fails to timely initiate arbitration, waives any defenses it may have to the plan's assertion of withdrawal liability, and forfeits the right to contest the existence or the

262. Id. See I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus., 727 F.2d 1204, 1208 (D.C. Cir. 1984) (finding issue involving only statutory interpretation makes exhaustion of arbitrative remedies a futile exercise). But see I.A.M. Nat'l Pension Fund v. Clinton Engines Corp., 825 F.2d 415, 422 (D.C. Cir. 1987); Grand Union Co. v. Food Employers Labor Relations Ass'n, 808 F.2d 66, 70 (D.C. Cir. 1987) (both cases limit holding in Stockton case and state an exception for cases raising only issues of statutory interpretation would diminish role Congress intended for arbitration); Crown Cork & Seal Co. v. Central States Southeast & Southwest Areas Pension Fund, 881 F.2d 11, 19 (3d Cir. 1989) (finding even pure issues of statutory interpretation were intended by Congress to be initially resolved by arbitrator).


264. Id.

265. See Hallstrom v. Tillamook County, 493 U.S. 20, 28 (1989) (citing Consumer Products Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) (holding plain meaning of statute prevails unless there is an ambiguity and the Congressional purpose or intent is not served by such an interpretation). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Id. at 108).

amount of its withdrawal liability. Further, "the amounts demanded by the plan sponsor ... shall be due and owing ... [and] [t]he plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection." These rules of waiver, debt due and owing, and collection, are important because they give teeth to Congress' unequivocal command for withdrawal liability disputes to be resolved in timely initiated arbitration. Clearly, arbitration is the sole and exclusive means of resolving any dispute over any determinations made under sections 1381 through 1399 of the MPPAA.

A review of the legislative history, as well as the statutory language, makes this the only possible conclusion. Arbitration is central to the statutory scheme and the statutory purpose of securing the financial stability of multiemployer pension plans. Consistent with Congress' intent to protect the financial health of multiemployer pension plans by limiting withdrawal liability collection costs to the plan, defenses to liability may only be asserted in arbitration. As the district court in the *McDonald* case stated, "the plain meaning of the [MPPAA] statute" leads to the inescapable conclusion that "the legislature's decision [was] that arbitration, and not the courts, is the proper forum for the initial resolution of disputes." By reviewing the MPPAA's arbitration requirement under the exhaustion of administrative remedies doctrine, the courts have weakened Congress' absolute command to arbitrate withdrawal liability disputes.

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269. See Flying Tiger Line v. Teamsters Pension Trust Fund, 830 F.2d 1241, 1248-49 (3d Cir. 1987) ("Arbitration of withdrawal liability disputes" results in a substantial reduction of costs to multiemployer pension plans while relieving the federal courts of litigation these disputes would otherwise create).

270. *McDonald* v. Centra, Inc., 118 B.R. at 918 (quoting Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund, 693 F.2d 290, 295 (3d Cir. 1982)).

Now the arbitration requirement has become subject to review based on the facts and circumstances of each case to determine if submitting to arbitration before resorting to a federal court is even necessary. Additionally, there are three exceptions applicable to the exhaustion of remedies doctrine into which litigants can attempt to squeeze their defenses in order to avoid arbitration and go directly to court. Such a scheme of review defeats the purpose of mandating initial resort to arbitration in order to save pension plans the time and expense of commercial litigation.

Even in this weakened state there are several strong rules that have evolved from MPPAA cases of which employers, their managers, and attorneys should be aware. The failure to timely initiate arbitration can still be a dangerous proposition and bar the employer from raising its defenses to withdrawal liability in court. The consensus is now that even questions of purely statutory interpretation are subject to MPPAA arbitration and may not be raised for the first time in a judicial proceeding. Only a facial constitutional attack may be raised in court by an employer without first submitting to arbitration. The MPPAA provisions have been construed to establish a “pay now, dispute later” scheme, under which even an employer who has timely initiated arbitration is required to make interim liability payments. Failure to make interim payments will result in a collection action, and defenses to withdrawal liability either con-

currently being raised in an arbitration action, or not previously raised, may not be raised in the pension plan’s collection suit.278 Additionally, members of a control group of businesses are jointly and severally liable for the withdrawal liability of a withdrawing member, notice to one member of the group is notice to all members, and the bankruptcy of one member will not discharge the other members liability for withdrawal payments.279 Finally, divestiture of ownership in an employer company may not excuse the need to arbitrate disputes over withdrawal liability, since the question of whether the entity remains an employer for withdrawal liability purposes is arbitrable.280 Even managers of an employer, aware of the MPPAA and its withdrawal liability provisions, must be cautious when tailoring a sale of assets to meet the statutory exemption, lest the pension plan find the sale was a transaction designed to evade or avoid liability under the statute and assess liability without regard to the sale.281

A final word of caution for the attorney who represents employers in the MPPAA arena. The time deadlines for arbitration are short, and failure to timely initiate arbitration either accidentally or on purpose could be an unwise gamble exposing a large employer to possibly millions of dollars in withdrawal liability without the opportunity to raise its defenses. The wisest course of action is to be aware of the time deadlines, timely initiate arbitration, preserve the employer’s defenses to liability, and avoid malpractice exposure. The court’s consideration of defenses brought forward in an action to enforce, vacate or modify an arbitrator’s decision is a sure thing.

278. I.A.M. Nat’l Pension Fund v. Clinton Engines Corp., 825 F.2d 415, 427 (D.C. Cir. 1987); Grand Union Co. v. Food Employers Labor Relations Ass’n, 808 F.2d at 70.


280. Banner Indus., Inc. v. Central States, Southeast & Southwest Areas Pension Fund, 875 F.2d 1285, 1291-92 (7th Cir. 1989); Flying Tiger Line v. Teamsters Pension Trust Fund, 830 F.2d 1241, 1247 (3d Cir. 1987).

Statistics tell us what most people already know — the court system is overloaded with lawsuits that are taking an increasing amount of time and money to litigate. Damage awards are also skyrocketing with the courts and the law recognizing punitive and compensatory damages in employment cases. The Civil Rights Act of 1991 provides a good example of the increase in damage awards. Between 1981 and 1991, the number of cases filed in federal district courts increased by 17 percent. From 1990 to 1991, "the number of civil cases pending more than 3 years increased substantially, up 13 percent." In his speech to the American Bar Association, former Vice-President Quayle estimated that 80 billion dollars was spent in direct litigation costs in 1991. Interestingly enough, in 1991, approximately 96 percent of all federal lawsuits filed were resolved without a trial.

In consideration of these factors, employers are searching for ways to decrease the time and cost of resolving disputes between themselves and employees. Alternative Dispute Resolution (hereinafter ADR) is an attractive, low cost alternative to the traditional adjudication of disputes through the court system. However, despite recent court decisions in support of alternative dispute resolution methods and has represented them in many Alternative Dispute Resolution forums.

3. Id.
5. Supra note 2, app. 1 at 36 (calculating number of cases disposed of at trial as percentage of total number of cases).
6. A mediation or arbitration could cost as little as several hundred to several thousand dollars compared with $25,000 - $50,000 for a case going to trial.
resolution, such as *Gilmer v. Interstate/Johnson Lane Corp.*\(^7\), many employers are hesitant to expand their use of ADR techniques.\(^8\)

Many employers are familiar with ADR techniques, such as arbitration and mediation, in union settings. However, a new opportunity for the use of ADR in a non-union setting has arisen due to the increasing number of lawsuits filed under exceptions to the employment-at-will rule.\(^9\)

Much of employers' reluctance to extend their use of ADR to the non-union setting stems from uncertainties that exist in both union and non-union settings over the types of claims that are arbitrable and the finality of arbitration awards. "[T]he perception of employers [is] that arbitration of state law tort claims will be of little benefit if employees can bypass arbitration and independently pursue federal or state statutory discrimination claims. Employers also fear that an arbitrator's decision on statutory claims might not receive any deference in a later lawsuit."\(^10\) This article will briefly address the viability of ADR techniques, particularly arbitration and mediation, in the area of employment law and examine federal and state efforts to encourage its use.

I. PROS AND CONS OF ADR

The benefits of ADR make it conducive to the resolution of employment disputes. First of all, it allows the participants to exercise a great deal of control over the process in comparison to a trial which is controlled by codified rules of procedure.

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\(^7\) 111 S. Ct. 1647 (1991). (An agreement to arbitrate in a securities registration application was binding and precluded the plaintiff's lawsuit claiming violation of the Age Discrimination in Employment Act (ADEA)); See infra note 36 and accompanying text.

\(^8\) *Gilmer Aftermath*, 10 ALTERNATIVES TO THE HIGH COST OF LITIGATION 6, 87 (1992). In a nationwide survey conducted by the American Bar Association, only three of sixty-eight companies changed their ADR policies in response to *Gilmer*. "A number expressed concern that *Gilmer* is too narrow a decision to apply outside the securities industry." Id.


Participants may agree upon details such as who will facilitate the process, what rules will be followed, the extent of discovery and the role of the mediator or arbitrator. The American Arbitration Association (hereinafter AAA) provides lists of skilled arbitrators and mediators as well as model rules for arbitration and mediation in areas including labor and employment disputes. In 1991, according to the AAA, it handled 562 non-union employment-related cases. In addition, many local agencies around the country, such as the Center for Resolution of Disputes in Cincinnati, Ohio, participate in and are available for the mediation and arbitration of employment disputes and lawsuits. These are either done privately by agreement of the parties or by referral from state or federal judges.

Secondly, experts in the field may be selected to arbitrate or mediate the dispute. This is advantageous as it eliminates the need for expert testimony. Third, because no jury is involved, ADR provides for more predictable, consistent adjudication or resolution. Moreover, “employers should consider that arbitrators are less likely to impose huge awards” and mediation leaves a party free to walk away. Fourth, the decision of the arbitrator is final and binding and thus avoids the uncertainty of the appeals process. These benefits clearly reflect the goal of ADR which is not to “arrive at a decision about who is right and who is wrong,” as with litigation, but to “produce a more durable solution by restoring, preserving, or enhancing the parties’ relationship.” Such a goal is of particular importance in employment disputes where disputants may have to work together in the future. As a result of these characteristics, “ADR is generally informal, speedier, [and] less expensive” and provides greater

15. Evan J. Spelfogel, Alternative Dispute Resolution and Deferral to Arbitration, 6 LAB. LAW. 87, 88 (1990). But see Court-Adjunct Arbitration, 7 INDIV. EMPLOY. RTS. NEWSL. 18 d11 (B.N.A.) (Sept. 22, 1992) (The advantage of court ordered arbitration may not be an increased efficiency but rather the public’s perception that litigants will get a fair hearing).
privacy than litigation because there is no public record and it can be agreed to keep the decision and process confidential.

Opponents of ADR criticize the lack of regulatory controls over the process, the limited scope of judicial review, and facilitators' (arbitrators or mediators) lack of legal experience. Critics also believe that the “outcomes of ADR do not give proper deference to ‘substantive legal norms.'” Opponents have also criticized the “secrecy” involved in ADR as it prevents the creation of precedent and avoids the negative aspects of public knowledge.

ADR proponents have answered some of these criticisms by pointing out that “most arbitrators in the labor field are highly qualified, very experienced, capable persons of the highest moral character” and that the market for arbitrators and mediators polices itself, in that good arbitrators and mediators are hired over and over again while incompetent/biased arbitrators and mediators are not selected again.

II. FEDERAL EFFORTS TO ENCOURAGE ADR

In light of the congested court system and the noted benefits of ADR, the federal government has taken steps to encourage its use. In 1925, the Federal Arbitration Act (hereinafter FAA) was enacted to provide guidelines for the enforcement of arbitration clauses in contracts and transactions. Much later, the Judicial Improvement Act of 1990 (hereinafter JIA) was passed to empower federal district courts to refer cases to ADR. The Administrative Dispute Resolution Act was also passed in 1990.


17. Speidel, supra note 16, at 164. In reference to arbitration, one court stated that it is “not the most perfect alternative to adjudication” and “an inferior system of justice structured without due process, rules of evidence, accountability of judgment or rules of law.” Id. at 159.


19. Id. at 96. This information is exchanged between practitioners in the labor and employment law area and is developed from actual experience with these arbitrators and mediators.


and authorizes the use of binding arbitration and other ADR techniques by federal agencies. Finally, in 1991, President Bush signed an executive order authorizing the use of ADR techniques to resolve civil claims involving the United States Government, including the resolution of federal contract disputes.\(^{23}\)

In addition to these acts of Congress and of the President, administrative agency action has been taken. Notably, in consideration of the "[t]ens of thousands of cases backlogged at the EEOC,"\(^{24}\) the Equal Employment Opportunity Commission is currently developing a pilot program in to help reduce its case load.\(^{25}\) This pilot program will be started in four cities and provides an opportunity for the charging party and the employer to attempt early resolution. Also, the U.S. Department of Health & Human Services has initiated an ADR program to resolve discrimination complaints by patients receiving medical care. The purpose of this program is to reduce case processing time and expense.

Of all these new developments, however, the FAA is the statute that has been at the center of litigation in the area of employment law.

### III. THE FAA

The FAA was enacted in 1925. In 1947, it was codified in Title 9 of the U.S. Code. Section 2 of the FAA provides that:

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Act excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce ...,"\(^{26}\) and does not apply to labor arbitrations arising under collective bargaining agreements.\(^{27}\) While it does not create federal jurisdiction, the Act applies to arbitration

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27. Speidel, supra note 16, at 199.
agreements under state laws. Two of the major criticisms of the FAA concern the scope of claims to which it is applicable and the finality and extent of judicial review of arbitration awards.

A. Arbitration of Claims Under the FAA

The FAA seeks to preclude the litigation of claims that parties previously agreed to arbitrate. Similarly, for employees under a union collective bargaining agreement, "the employee is precluded from instituting court action in lieu [of arbitration] or seeking de novo court review after an unfavorable award (except where the employee alleges a union breach of its duty of fair representation)." Questions concerning an employee's ability to file a court action have arisen, however, when a union employee brings a claim involving both contract and statutory rights and when a non-union employee brings a statutory claim where a non-union agreement to arbitrate is involved.

In a union contract, when both statutory National Labor Relations Act and contract claims have been brought under a collective bargaining agreement, the National Labor Relations Board's policy has been to defer all issues to arbitration. In the past, the courts did give Title VII claims special attention. In Alexander v. Gardner-Denver, the Supreme Court held that arbitration did not preclude a federal suit under Title VII of the Civil Rights Act of 1964. However, this position has subsequently been altered, making arbitration difficult to avoid. In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, the court held that "all contractual questions must go to arbitration under a general contract arbitration clause unless Congress expressly excluded arbitration in the statute." In 1987, Mitsubishi was extended to require that claims under the anti-fraud provisions of section 10(b)(5) of the Securities and Exchange Act and under RICO be sent to arbitration. The Court continued to chip away at an

28. Id. at 170-71.
29. Spelfogel, supra note 15, at 89.
30. Id. at 90.
33. Spelfogel, supra note 15, at 91.
34. Id.
employee's ability to avoid arbitration in *Gilmer v. Interstate/Johnson Lane*. In that case, the "Court ruled that parties may use FAA compulsory arbitration provisions in the context of age discrimination allegations brought under the ADEA."  

Two recent court of appeals cases indicate that soon the Supreme Court may rule that all statutory claims are subject to compulsory arbitration. In *Willis v. Dean Witter Reynolds, Inc.*, the Sixth Circuit Court of Appeals ruled that the plaintiff's Title VII claim was subject to the compulsory arbitration clause in her securities registration application and that the FAA did not exempt her claims.

Similarly, in *Mago v. Shearson Lehman Hutton, Inc.*, the employee sought to preclude the enforcement of an arbitration clause in a privately negotiated individual employment contract. The Ninth Circuit found "no meaningful distinction between the two laws [Title VII and the Age Discrimination Employment Act] that would permit a different approach under Title VII than the United States Supreme Court has announced in an age discrimination case."  

Thus, it appears that the FAA could apply to all claims whether arising from a contract or a statutory right. *Willis* and *Mago* should answer any employer's concerns with an employee's possible avoidance of arbitration through the submission of statutory claims.

**B. Finality of Arbitral Award: Statutory and Non-Statutory Routes of Appeal**

As noted, a criticism of arbitration is the finality of and limited scope of judicial review of arbitration awards. "Finality is part of the package that supposedly gives arbitration an advantage over litigation." Opponents of arbitration maintain that the limited scope of review fails to "offer a reliable corrective for

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37. 948 F.2d 305 (6th Cir. 1991).
38. 956 F.2d 932 (9th Cir. 1991).
39. Id.
41. Speidel, supra note 16, at 191.
capacity defects which emerge during the course of the arbitration."\(^42\)

Congress has addressed these concerns in the FAA. "Under FAA section 10, there are two potential opportunities to obtain judicial review of claimed defects in capacity in the arbitrator's award. They are where the arbitrators 'exceeded their powers' or engaged in 'misconduct' in the conduct of the hearing."\(^43\) Non-statutory grounds for the reversal of awards also exist. "They include claims that the award was 'completely irrational' or 'against public policy' or that the arbitrator was in 'manifest disregard' of the law."\(^44\) Thus, while opportunity for review is not as extensive as in the case of traditional adjudication, it does exist in the extreme case in arbitration.

The justification for such limited review was discussed at length in Judge Reinhardt's opinion in Stead Motors v. Automotive Machinist Lodge No. 1173.\(^45\) In that opinion, Judge Reinhardt noted that a labor contract is different from a typical commercial contract, which is designed to be a comprehensive distillation of the parties' bargain. Instead, Judge Reinhardt [found] the collective bargaining agreement to be 'a skeletal, interstitial document,' with the labor arbitrator being the person selected by the parties to 'fill in the gaps.'\(^46\) "It is the arbitrator's construction [of the agreement] that was bargained for; and so as far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."\(^47\)

Thus, because of this interpretation of an agreement to arbitrate, Judge Reinhardt and many proponents of arbitration support "a narrow scope of review and great judicial deference to labor arbitration awards."\(^48\)

\(^{42}\) Id. at 198.
\(^{43}\) Id. at 193.
\(^{44}\) Id. at 196.
\(^{45}\) 886 F.2d 1200 (9th Cir. 1989), cert. denied, 495 U.S. 946 (1990).
\(^{47}\) Id. at 233 (citing Stead Motors, supra note 45, at 1205 (quoting San Francisco-Oakland Newspaper Guild v. Tribune Pub. Co. 407 F.2d 1327 (9th Cir. 1969))).
\(^{48}\) Estes and Mills, supra note 46, at 237.
Despite the benefits of arbitration, some have warned against its use by employers.

It is important for employers to be aware that this form of dispute resolution could very well work to their disadvantage in situations involving allegations of 'wrongful termination.' Specifically, employers should note that an arbitrator... may apply standards of review that differ substantially from those that would possibly be applied in a judicial proceeding.... In a traditional arbitration proceeding, the burden of proof rests with the employer to prove that the employee is actually guilty of the alleged misconduct... In contrast, in a judicial proceeding, the burden would rest with the plaintiff to establish that he or she had been wrongfully terminated.49

However, if the goal is to avoid unnecessary and protracted litigation, this disadvantage may be a small concession in light of the significant costs that litigation may entail.

IV. OTHER EFFORTS TO ENCOURAGE ADR

Several state and local governments have enacted statutes to encourage the use of ADR.50 "Some of these statutes favor private ADR which is voluntary and occurs by mutual agreement of the parties, either before or after suit has commenced.... Other statutes provide for mandatory court-ordered ADR."51 Courts and local bar associations in several communities have also set aside settlement weeks during which an effort is made to use ADR techniques to resolve cases that have been on the court docket for a long time.52 It has also been reported that from 1986 to 1992, 89 items from 27 bar associations involving various means of ADR have been reported to the American Bar Association.53

50. Thomas D. Boyle, Mediation and the Legal System: New Tricks for an Old Dog, 39 FED. BAR NEWS & J. 165 (1992). ("[A]t least twenty-five states and Congress have enacted or are considering legislation to encourage or mandate various forms of alternative dispute resolution.....") Id.
51. Devine, supra note 14 at 86.
V. MEDIATION

The focus of many states' efforts to increase the use of ADR has been on mediation. Mediation differs from arbitration in that the mediator does not pass judgment, but rather, facilitates a settlement agreement between the parties. "[The] [a]dvantages of mediation are that it is relatively inexpensive, fast, the parties control the process, and it allows for creative solutions...."\(^{54}\)

Experts in the field have reported that "[t]he success rate of mediation in resolving business disputes ... is about 80 percent."\(^{55}\)

Mediation is a particularly attractive procedure in the area of employment law. At the very least, mediation allows an employer to review an employee's complaint in a setting that is conducive to resolution.\(^{56}\) In the event that an employer and employee cannot resolve their differences, the mediation process may help to prepare participants for trial by defining and narrowing the issues.\(^{57}\) From an economic point of view the cost of mediation is considerably lower than litigation. A mediator may serve for $500.00 to $1,000.00 per day. The author has mediated several employment disputes in the range of $750.00 to $1,000.00 per day. The cost of a mediator in a more complex matter can be $3,000 to $4,000. The cost of litigating a case can be easily ten times that amount.

In addition, the expediency of ADR can save an employer money in backpay when the dispute is resolved in favor of an employee.\(^{58}\) This method has been particularly successful in the resolution of sexual harassment cases making for simpler, cheaper, quicker, and fairer resolutions.\(^{59}\) ADR will also be an ideal way to resolve disputes under the Americans with Disability Act because early resolution will be beneficial and more easily accomplished due to a more cooperative spirit on both sides. The United States Department of Labor has also initiated a pilot test of

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56. Bakaly, supra note 9, at 47.
57. *Id.* at 47-48.
mediation in the Philadelphia area involving disputes with that agency.60

CONCLUSION

In consideration of the facts and opinions presented, employers and lawyers should consider increasing their use of ADR techniques. As a practitioner who has arbitrated and mediated many employment disputes, my experience is that ADR does work given the right situation. Many employers and employees who have participated in either arbitration or mediation find it to be a less painful, less expensive and quicker way to resolve their dispute.

Though employers must consider the deficiencies of ADR, for most cases, the benefits far outweigh any drawbacks. Employers should also consider making it a part of their employment contracts. ADR is quick and inexpensive and thus less disruptive to both employer and employee. Because of these characteristics, ADR is able to provide for the resolution of more disputes; disputes that might otherwise "fester and add to a company's mediocrity"61 and increase the cost of litigating employment disputes.

To make ADR more effective, the courts and legislatures must recognize it as a viable and final method for resolving statutory and common law employment disputes. They will have to give guidance on what procedures will be acceptable and give employers some confidence that if they rely upon some ADR method, they will not end up in litigation over the same issues. Both sides want some finality to the resolution of their disputes. With these considerations in mind, a bright future is predicted for the resolution of employment disputes through ADR.

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61. Connors, supra note 9, at 339.
SPECIAL COMMENT

SELLING JUSTICE: WILL ELECTRONIC MONITORING LAST?

by J. Robert Lilly* & Richard A. Ball**

I. INTRODUCTION

Ten years ago no justice system in the world was confining criminals to their homes with the aid of electronic monitoring devices. Today in the United States alone, more than 70,000 people per day are reportedly being electronically monitored by some segment of the criminal justice system, and the numbers continue to increase worldwide. There is no indication that this trend has peaked. Yet the question remains whether this innovation is another criminal justice fad or a permanent trend.

This paper argues that electronic monitoring (EM) is not like other criminal justice fads. It is different. To understand this and EM's rapid development and staying power, it must be located within a context broader than "the new surveillance." "The new surveillance" context, described by Marx and his colleagues, is a sub-context of the late 20th-century arms and security industry, a part of the military industrial complex identified by President Eisenhower in 1961. To more clearly and accurately locate EM's role in world-wide criminal justice, it must also be understood that it is part of a "corrections-commercial complex." This complex in turn is part of the transnational criminal justice enterprise which has direct connections to the modern arms and security industry. Recognition of these connections does not di-

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minish the importance of the "technofallacies," but it does inform a broader context with which to assess them.

II. THE "NEW AGE OF SURVEILLANCE"

Marx's perspective on this topic has been long on detailed description, highly sensitive, and indeed prophetic in its policy implications. To this extent his and his colleagues' work has been unparalleled in recent criminal justice policy studies. To fully understand the "new age of surveillance," including police surveillance in America, this surveillance must be placed within a more informed transnational framework of politics and enterprise.

When describing the "current context" of undercover police surveillance in America, in his prize-winning book, for example, Marx indicates that it includes federal sources of support. These include, but are not limited to, the Federal Protection Program; the Federal Law Enforcement Training Center in Georgia; offices of Inspector general; and the Central Intelligence Agency. However, Marx makes no effort to tease out the intra- and/or interconnections among these agencies and their agendas, and larger domestic and foreign political and entrepreneurial agendas. No effort is extended, for example, to exploring connections among the features of the "new age of surveillance" and the vast worldwide network of micro-electronic firms and military defense contractors which profit from selling products and services support-


5. Id.
ing the new surveillance. Indeed, it is no easy task to identify and analyze these influences.\(^6\)

What follows is a summary of a broader and more circumspectful context for understanding why EM is not a passing fad like the "scared straight" programs offered as panaceas in the 1970s for deterring juvenile delinquency. Second, is a review of why corrections\(^7\) should be perceived as an international market. Third, these points will help illuminate how EM and corrections are connected to transnational criminal justice enterprises with direct links to the arms and security industry. It is the links among these factors and the present age of entrepreneurialism which makes EM different and distinguishes it from previous fads in criminal justice.

One way to examine these connections is to first consider the literature debating the privatization of criminal justice, especially private prison management and ownership. Here much attention has been addressed to the issues of cost and efficiency, quality of services, accountability, profitability, and civil liability among others.\(^8\) More directly important here is the extent to which private enterprise is already involved in corrections, including electronic monitoring. To address this, the concept of subgovernmental policy-making is used to describe the rapidly emerging alliance between government and private enterprise in criminal justice.\(^9\)

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\(^7\) For purposes of this discussion, the term "corrections" will be used in referencing prisons and jails.


\(^9\) Given the historic pattern of interaction between prisons and private companies, it is more accurate to say "re-emerging alliance between government and private enterprise." Throughout the nineteenth and early twentieth centuries, contract and lease agreements between prison authorities and private entrepreneurs for the use of inmate
III. SUBGOVERNMENTS AND THE CORRECTIONS-COMMERCIAL COMPLEX

Subgovernments are defined as "clusters of individuals that effectively make most of the routine decisions in a given substantive area of policy." Subgovernments are defined as "clusters of individuals that effectively make most of the routine decisions in a given substantive area of policy." Decision making within a given policy arena rests within a closed circle or the elite of government bureaucrats, agency heads, interest groups, and private interests that gain from the allocation of public resources. These include bureau chiefs, administrators, university academics, private contractors, and members of state and local governments. They exist in many arenas of national policy making, including military defense, agriculture, banking, organized labor, education, international business, and scientific research. They also operate at both the state and national levels, with stable alliances between legislators, state agencies, private enterprises, and other interest groups.

Corrections policy is often fashioned within a correction-commercial complex akin to the military-industrial complex. Research suggests that corrections subgovernments are comprised of legislators, governor's task forces, correctional administrators, and interest groups operating within particular states and na-

Space precludes a detailed review of the participants in the corrections subgovernment, but these include: (1) private corporations devoted to profiting from imprisonment, such as Space Masters Enterprises and Adtec Incorporated; (2) government agencies anxious to maintain their continued existence, nationally the National Institute of Justice (NIJ) and the Law Enforcement Assistance Administration (LEAA) prior to it, and (3) professional organizations which sew together and otherwise fragmented group into a powerful alliance, especially the American Correctional Association. These national level players are in turned linked to corrections subgovernments within states and form a massive policy-making alliance.

tionally. The pattern of interaction among the participants in the corrections-commercial complex fits features of subgovernments in other national policy making arenas.

Each of the participants in the corrections subgovernment shares a close working relationship supported by the flow of information, influence, and money. Just as protecting the nation from foreign enemies is a major industry, punishing people in the United States, Canada and the United Kingdom is big business. During the 1980's, corrections in the United States became a multi-billion dollar industry. Total capital and operational expenditures by county, state, and federal correctional systems for 1990 was estimated to be more than twenty-five billion dollars.

Where does all the money go? Private vendors receive a significant part of it. In 1987 when the Texas legislature passed a bill to create an additional 2,000 prison beds, a legislative aide commented that sales associates wearing "funky perfume and strange polyester suits" descended on the state capitol to hawk corrections products such as electronic wristbands that monitor released inmates. Health care and food service are two of the fastest growing sectors in the corrections industry. The revenue for one prison health care provider, Prison Health Services Incorporated, jumped from five and one-half million dollars in 1983 to nineteen million dollars in 1988. It is estimated that prison food service is a one billion dollar enterprise that is growing between ten to fifteen percent each year. In June 1988, the Campbell Soup Company reported that the nation's prison system was the fastest growing food service market.

The biggest profits are not in providing prison services, however, but in new construction. Direct expenditures for the construction of new prison facilities rose from 7.7 percent in 1977

16. Corrections Today, July 1990 at 201. This figure may be closer to $47 billion when the costs of private enterprise marketing and employment are considered. J. Robert Lilly, Power, Profit and Penalty: A Beginning, Address at the 50th Annual Meeting of the American Society of Criminology (Nov. 20, 1991); J. Robert Lilly, The Corrections Complex, 1 Inter AlA 1992.
19. Id. at 27.
to 12.9 percent in 1988. Not surprisingly, more than a hundred firms specialize in prison architecture alone. These firms now receive between four and six billion dollars in prison construction business a year. Other firms profit indirectly from the rapid increase in facilities’ expansion by financing prison construction. E.F. Hutton, Merrill Lynch, and Shearson Lehman/American Express have arranged millions in corrections financing by orchestrating lease-purchase deals. The profits earned from government contracts and construction deals keep the subgovernmental participants working closely with one another.

There is a distinct overlap between the interests of for-profit companies and professional organizations and the interests of the federal agencies maintained by the flow of influence and personnel. As with the earlier military-industrial complex and the current arms and security industry, there is a constant flow of personnel between the public and private correctional governments. American Bar Association (ABA) representatives are high status lawyers often having prestigious individuals and organizations for clients. ABA leaders are often associated with large private firms that not only have successful business enterprises as clients, but corrections enterprises as well.

The revolving-door characteristics of the defense industry also characterize the corrections subgovernment. The heads of private prison firms are often former government officials or corrections administrators who have left public service for private interest. Ted Nissen, President and Founder of Behavior Systems Southwest Incorporated (BSS), a private prison firm, is a former employee of the California Corrections Department. Tamara S. Lindholm, Vice President of BSS also had a long career in the California Department of Corrections. Craig Dobson, a 20-year

24. RYAN & WARD, supra note 8, at 13.
25. LOGAN, supra note 8, at 22.
veteran of the U.S. Bureau of Prisons, operates a detention facility in Aurora, Colorado, owned by Wackenhut Corrections Corporation, a company that expanded its operation from private security to prison incarceration. Dobson is also the founder and first director of the National Institute of Corrections Jail Center in Denver. T. Don Hutto, executive vice-president of Corrections Corporation of America, is a former commissioner of corrections in Arkansas and Virginia. Hutto also served as President of the American Correctional Association from 1984 to 1986. Richard Mulcrone, former chairman of the Minnesota State Corrections Authority, manages a corrections system division of Control Data Corporation. Maurice Sigler, former chair of the Federal Parole Commission, serves on the Corrections Corporation of America's board of directors.

This list goes on. James K. “Chip” Stewart, who served as the Director of the National Institute of Justice (NIJ) from 1982 to 1990 recently announced that he was leaving NIJ to become the director of Justice Systems Technology Practice at Booze-Allen & Hamilton, a corrections consulting firm. Charles DeWitt, the new NIJ director, had been project director for a cooperative effort between NIJ and the American Correctional Association to produce the National Directory of Corrections Construction. Hallem H. Williams, former director of the District of Columbia Department of Corrections, heads International Corrections Services, a company organized by Carter Goble Associates. Based in Columbia, South Carolina, Carter Goble is known worldwide for criminal justice consulting and plans to capitalize on the operation of private prisons in the United States. Robert Britton served as Alabama Prison Commissioner in the early 1980s during which he urged a massive ten-year construction program for the state. Britton then left public service to head a medical firm that

27. Logan, supra note 8, at 23; Ryan & Ward, supra note 8, at 37.
30. Firms Pursue Prison Business, State, Sept. 1990. Carter Goble is one of a number of private firms that have actively sought business in an international corrections market. Further research may show that an international corrections-commercial complex is emerging.
as chief warden at three federal prisons, now runs Buckingham Security, along with his brother Joseph Fenton, a Pennsylvania businessman.\textsuperscript{32} Buckingham Security operates private corrections and detention facilities in several states.

As a final example, in early December 1991, Kentucky’s new governor, Brereton Jones, was sworn into office and on the next day he appointed a new chief for Kentucky’s prison system. He appointed Jack C. Lewis, former deputy corrections secretary for Kentucky, who had been working as a Vice president for a private prison company, Concept, Inc., of Louisville, Kentucky.\textsuperscript{33}

Any issue of \textit{Corrections Today}, the official publication of the ACA, contains many examples of the triangular arrangement between government, commerce, and this organization. In ACA’s July 1990 “Annual Security and Buyers Guide Issue,” employees of private firms published articles describing technological and product developments, and a special section described the products and services of hundreds of companies that profit from the deprivation of liberty.

Along with the ACA, the National Institute of Justice has done its part to boost the corrections industry. A 1987 study, publicized by this federal agency, claimed that society spends an average of $25,000 a year to confine an inmate, while it costs $430,000 for that individual to remain free to commit crimes. The NIJ also calculated that the average crime costs society a whopping $2,300.\textsuperscript{34} While the accuracy of these figures remains questionable, the implication was clear: every available dollar should be spent on prisons. California’s Governor George Deukmejian cited the study in a 1989 speech justifying the state’s one and one-half billion dollar prison operating budget. Assistant Attorney General Richard B. Abell used it in a letter mass-mailed to policy makers across the country, arguing that “the costs to society of nonimprisonment are significantly higher than the costs of prison construction.”\textsuperscript{35} James K. Stewart, while directing NIJ, also took the message of merging corrections with private enterprise di-

\textsuperscript{32} Becker & Stanley, \textit{supra} note 22, at 729.
\textsuperscript{33} Governor Picks Head of Prisons, Ky. Post, Dec. 12, 1991, at 14K.
\textsuperscript{34} The NIJ distributed this study to the public by Associated Press and United Press International; it provided valuable support for states rapidly building prisons.
ELECTRONIC MONITORING

rectly to the public. In 1985, Stewart appeared in the New York Times, arguing that "the private sector is able to meet the demand [for correctional institutions] quicker [than the government]" and "[t]he private sector ... can build and maintain a prison for about ten to fifteen percent—maybe twenty percent—less."36

The corrections-commercial complex operates without public scrutiny and exercises enormous influence over corrections policy. Neither the American Bar Association, the American Correctional Association, or the American Jail Association have any official power to make policy decisions. The fact is, however, that these organizations effectively make many of the decisions that affect the lives of lawbreakers in this country.

Because the activities of subgovernmental participants are by definition low-profile, they are difficult to document. Yet on occasion, these activities come to light. Professor Emeritus Livingston Hall of Harvard Law School and chairman of the ABA committee on Reform of the Criminal Law gave extensive testimony on diverse issues ranging from conspiracy to federal jurisdiction. Senator Roman Hruska (R-Neb), a ranking member of the Senate Subcommittee holding the hearings, said to Hall: "We are gratified at the number of instances when we conform to your recommendations of today. We will take under advisement those instances where we have not conformed." Professor Hall later commented of the ABA committee's work: "Our committee believes that its work ... was well worth the time and effort that it spent, because we are very pleased to see that a substantial number of our recommendations have been adopted in both bills."37

Likewise, the ACA is not an agency of government, yet it probably has as much to do with the experience of prisoners in this country as the agencies of government with nominal control. One of the ways the ACA exerts major influence is in the setting of standards. Published ACA standards cover such areas as security and control, food service, sanitation and hygiene, medical and health care, inmate rights, work programs, educational programs, recreational activities, library services, records, and per-

37. Melone, supra note 23, at 41.
sonnel issues. ACA also sets standards that relate to crowding, including the size of cells, recreational space, and the total floor space per unit.\textsuperscript{38}

Reliance on ACA standards by government agencies and private contractors promotes a close working relationship between the ACA, government agencies and private companies. Essentially, this arrangement means that the policy adhered to is made by a private organization rather than public officials. Contracts for the operation of private prisons often include a requirement to adhere to ACA standards. This may be stipulated by the government agency involved, or by the contractor.\textsuperscript{39} Compliance with these standards is necessary to receive accreditation from the Commission on Accreditation for Corrections. While accreditation is seldom required, it often paves the way for increased funding. It also has been recognized by the courts as one indicator of the acceptability of an institution’s conditions which provides an excellent defense against civil suits by inmates for violations of constitutional rights.\textsuperscript{40} Recently, Thomas Boshell of Liberty Healthcare Corporation attributed his company’s growth to correctional officials’ fear of litigation. Contracting with private health care services affords prison officials some protection against malpractice suits by prisoners.\textsuperscript{41}

The corrections-commercial complex shows signs of becoming a fixture within the national policy area of punishing lawbreakers, as the participants define their activities in the public interest. Like the military-industrial complex Eisenhower worried about in 1961,\textsuperscript{42} the alliance of private profit and public punishment has

\textsuperscript{39} Logan, supra note 8, at 128-129.
\textsuperscript{40} Todd Clear & Patricia M. Harris, The Cost of Incarceration, American Correctional Crisis 44 (1987); John DiIulio, What’s Wrong with Private Prisons, 92 Public Interest 215.
\textsuperscript{41} Asinof, supra note 18, at 1.
\textsuperscript{42} President Eisenhower coined the term “military-industrial complex” in his 1961 Farewell Radio and Television Address to the American People. He warned that government must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. Eisenhower was concerned that university researchers would become captives of government lured by desire for project allocations. At the same time, he worried that a “scientific-technological elite” immune from accountability would dictate national policy. “Only an alert and knowledgeable citizenry,” he insisted, “can compel the proper meshing of the huge industrial and military machinery of defense with peaceful methods and goals, so that security and liberty may prosper together.”
been forged. The production of specialized products and lease-purchase financing are two examples. For example, in January 1988 Armco Incorporated, the only producer of double-ribbed steel window bars used in jail construction, announced that it would no longer produce them. Such window bars are utilized in no other type of construction. Jail builders feared a major crisis—fifty new detention facilities were planned for that year alone and maintenance of existing facilities required a supply of this specialty product. But a month later, Commercial Metals Incorporated, a specialty steel producer, said it would make the bars and thereby alleviate concern that the bars would be unavailable.

Lease-purchase financing first appeared in the 1980s. E.F. Hutton orchestrated one of the first such deals in Jefferson County, Colorado, in 1983. The $30 million lease-purchase contract was divided into $5,000 certificates of participation that were sold to investors. The proceeds were funneled into jail construction, and the building leased to the county for yearly payments. At the end of the ten-year lease, the county will own the jail. Lease-purchase financing schemes have become indispensable in allowing governments to establish new prisons and avoid legislated debt ceilings and voter referenda. Such services strengthen the relationship between public and private interests.

Private companies and professional organizations are unabashed in their claim to be operating in the public interest. Private prison officials claim not to be operating in their own interest, but rather, claim to provide a public good. Defending the activities of Behavior Systems Southwest, a private prison management company, Ted Nissen has written: "Private corrections management gets the public involved. It gets us involved as citizens, as taxpayers, as concerned Americans. The prison system is a disaster. I want to make it better and to do it at a profit." Hugh J. Swink, national director of a management consulting division of the accounting firm of Touche Ross, specializing in corrections, has said of private financing of prison construction: "Where it's done right, you're going to see a great

44. Duffy, supra note 21, at 20.
benefit to government and a chance for the private sector to make money." 46 Tom Beasley, founder of the Corrections Corporation of America, expressed this unity of interest somewhat more eloquently: "There are rare times when you get involved in something that is productive and profitable and humanistic. We're on the verge of a brand new industry." 47

Besides the official statements of corporate corrections leaders, there are the advertising slogans of the private companies they operate. These slogans demonstrate to those with a public duty to punish, that those devoted to the private pursuit of profit actually share the same goals. Promotional literature for E.F. Hutton offered "Exciting New Ways to Finance New Jails"—new jails the company claims the public sorely needs: "As a nation, we have an unprecedented need to acquire new jails and prisons." 48 Kullman Industries, a prison construction business, sells "The Fastest Way To Put Offenders Behind Bars." 49 "Move'em Securely..." is the byline for Blue Bird Body Company, a manufacturer of "security transfer vehicles." Electronic Control Security, a company that specializes in security fencing, says "We Help Separate the Outside World from the Inside World." 50 Gelco Space, a prison construction firm, simply asserts: "Gelco Space Solves Overcrowding." 51

Each of these subgovernment characteristics exists within the EM industry itself. 52 These products, for example, are touted with predatory, security-laden and sexist metaphors and imagery. Names like "The Hawke," "House Escort" and "On Guard," appear on products and marketing literature. 53 One international vendor used Vargas-like color drawings of women wearing monitoring devices to persuade government officials to accept its products. 54 Other vendors employ family scenes of idealized do-

49. CORRECTIONS TODAY, April 1990, at 120-121; CORRECTIONS TODAY, July 1990, at 157.
50. Id. at 165.
51. Id.
54. The author possesses copies of these sexist drawings which were created in the
mestic tranquility, replete with two children and pets. So far these “families” are depicted as being middle-class whites. All advertising slogans promise outcomes consistent with “public interest.”

IV. THE INTERNATIONAL CORRECTIONS MARKET

To more fully describe the context and influences affecting EM’s development, it is useful to conceive North America and England as an international corrections market. Each presents favorable aspects for market growth. Pressure to expand prisons and favorable political climates make for favorable correctional markets, although relative size and the degree of administrative centralization within corrections present additional considerations. While United Kingdom, Canada and the United States each have relatively similar correctional systems that originated in common law, the exact configuration and extent of private sector involvement differs according to the size and organization of each nation’s corrections system(s), recent correctional populations trends and the specifics of political climates for privatization schemes. The for-profit sector is, however, involved in the corrections systems of each country.

A. Size and Organization

The United States has by far the largest correctional population of the three nations, with a current [1992] prison and jail popu-
lation of more than a million people.6 In 1988, United States corrections employed more than 482,600.57 Canadian prisons currently incarcerate about 30,000 and employ more than 20,000 people.58 English prisons confined 48,000 prisoners in 1985 and 55,729 by 1988, a number reflecting a 98.2 per 100,000 incarceration rate, the highest in Western Europe.59 This pattern did not vary in 1991 when it was reported that England had a prison population of 53,670.60 Besides the differences in the absolute number of offenders, there are differences in the administration of the three countries.

The corrections system, or non-system, in the United States is extremely fragmented. The federal government, all fifty states, the District of Columbia, most of the 3,050 counties, and most cities have some responsibility for corrections and incarceration facilities.61 But there is often little supervision or coordination among the different correctional systems. For example, the federal Bureau of Prisons operates 38 facilities ranging from secure adult institutions to short-term camps and community treatment centers.62 Additionally, each state has a centralized department of the executive branch to administer corrections that may or may not include probation and parole; these may be organized within the judicial branch. In addition to the federal and state systems which cover a great range of facilities and programs, the more than 3,500 local correctional facilities, namely city and county jails, are not centrally coordinated nor guided by a coherent corrections philosophy. Furthermore, most local government jails offer only limited rehabilitation programs and services.

Canada’s correctional system, on the other hand, is bifurcated into federal and provincial divisions. The federal government operates the penitentiary system and the provinces operate jails, reformatories, training schools and other correctional facilities.

59. IMPRISONMENT IN WESTERN EUROPE: SOME FACTS AND FIGURES, NACRO BRIEFING 1 (March 1989).
61. There are at least 3,510 jails in the U.S.
Federal penitentiaries are located across the country and are generally medium and maximum security institutions. They are administered by a commissioner of penitentiaries under the department of the Solicitor General of Canada. Most offenders are sentenced to the provincial correctional centers. Provincial jails are administered by the Corrections Branch of the Provincial Department of Health and Welfare. Both federal penitentiaries and provincial correctional centers provide training opportunities for offenders as well as some type of work programs. Additionally, many provincial institutions have an industrial or farm annex where the least dangerous offenders work.

There are three agencies responsible for prisons in the United Kingdom: the Home Office for England and Wales, the Scottish Office and the Northern Ireland Office. In England, the Home Secretary is the minister ultimately responsible for the treatment of offenders. Prison policy and the administration of custodial institutions are carried out by the Home Office Prison Department and probation is administered by the Home Office Probation and After-Care Department. The main distinction is made between open and closed prisons. Open prisons house prisoners who are not deemed to be dangerous. Closed prisons house dangerous offenders or those considered likely to escape. There are prisons for those on remand, for those with psychiatric problems, for those suitable for industrial trades and others.

The absolute number of facilities, inmates and the size of the United States corrections administrative organization, make it the most attractive and accessible correctional market. True, the diversity of governments in the United States responsible for corrections presents difficulty for corporations wishing to corner the "U.S. corrections market," but this is less a problem in the United Kingdom or Canada. These systems are quite centralized by comparison. Yet, had Corrections Corporation of America been successful in the buyout of California's prison system (rather than failing to purchase Tennessee's in 1985), this company would have controlled around 90,000 prisoners. This would have amounted to

64. Brian A. Grosman, Canada, MAJOR CRIMINAL JUSTICE SYSTEMS 64, 83 (1981).
about as many prisoners as in the United Kingdom and Canada combined.

The pressure on local and state governments to themselves finance corrections presents unique opportunities for the for-profit companies. These opportunities are not available in the United Kingdom or Canada because in these countries corrections funding generally comes from public revenues. In the United States, local and state officials can avoid unpopular tax levies or bond referenda by delegating correctional services to private corporations.66

B. Pressure to Expand

Corrections as a market is also influenced by pressures to expand. Each nation has experienced a rapid rise in correctional populations during the past decade or so, leading to severe overcrowding. In the United States, the prison population has set a new record high every year since 1975. During the 1980’s, the prison population more than doubled from about 330,000 inmates in 1980 to more than 710,000 in 1989.67 By 1993, the prison population alone is currently projected to reach 857,159 inmates.68 England has experienced a severe overcrowding problem as well. More than one-third of the custody population sleep with one or two others in a cell originally designed for one.69 “In June 1989 Wandsworth prison in London had only eight cells with access to sanitation at night and 1,149 without.”70 Several commentators have observed that there are now more people imprisoned in England than any other western European country.71

Overcrowding has led to pressure for new construction. In the United States, fifty of fifty-two federal and state systems reported that approximately $6.8 billion was allocated for new facilities or additions in 1991-92.72 This represents an increase of

67. Camp, supra note 63.
68. Id. at 105.
69. Freeman, supra note 65, at 62.
70. Behind Bars, supra note 60.
72. Su Perk Davis, Prison Construction Reaches $6.8 Billion; Rate of Increase Down, CORRECTIONS COMpendium 9 (February 1991).
fourteen and one-half percent over the $5.93 billion reported by the same systems in 1989-90. This money buys 127,790 new beds in 152 new facilities, plus 142 new additions. Canada's thirteen systems reported expenditures of $3.88 billion for 78,872 new beds. The same systems planned to spend $106.4 million for prison construction in 1991-92, compared to $157.9 million in 1989-90. Canada will add 1,350 new beds, up from 1,161 beds two years before.

The situation is similar in England. In 1988, then Home Office Secretary D. Hurd announced that the government was embarking on the largest program of prison building and modernization since the last century. Four more were under construction or about to open. Home Office spending on jails increased from 59.5 million pounds in 1988-89 to 92 million pounds in 1989-90. The prison program announced by Hurd was designed to produce more than 10,000 places at new prisons and more than 7,000 places at existing establishments by 1995.

Overcrowding in general not only places pressure on governments to consider private prisons, but also to develop alternatives to incarceration. These alternatives represent significant opportunities for for-profit companies.

B. Political Contexts

The current political climate in each country generally favors increased privatization. In the United States, former-President Reagan’s Commission on Privatization, convened by an executive order in 1987, solidly endorsed privatization. The Commission concluded that “contracting should be regarded as an effective and appropriate form for the administration of prisons and jails at the federal, state and local levels” and that “proposals to contract for the administration of entire facilities at the federal, state, or local level ought to be seriously considered”.

73. Id.
74. Davis, supra note 72, at 19.
76. Id.
78. Id.
the United States National Institute of Justice has solidly endorsed private sector involvement in corrections.

There is some political opposition, coming mostly from corrections and related agencies. Among the leading opponents of privatization in the United States are, senior executives of the Federal Bureau of Prisons, the leadership of many state corrections departments, state and national organizations representing local sheriffs and public employee unions including the American Federation of State and Municipal Employees. 79

In England, privatization of corrections is consistent with the conservative government’s overall denationalization agenda, an agenda intended to radically reduce public ownership of various industries. British Gas, British Airways, British National Oil and British Aerospace are examples of the sale of state-owned enterprises to private buyers. In September 1986, Prime Minister Thatcher sent Lord Glenarthur, the Home Office Minister, to the United States to visit private prisons as part of an overall fact-finding tour. 80 In September 1987, Lord Caithness, then junior Home Office Minister, visited the United States to see how commercial prisons were operating, among other things. 81

The lobby for private prisons in the United Kingdom has come mainly from the “New Right.” In the early days, this cause was championed by the Adam Smith Institute (ASI), a right-wing think tank supported by the American-based Heritage Foundation. ASI is small, but claims to have influenced several important areas of public policy while Thatcher was in office. The recent and unprecedented Conservative election victory in Britain by John Major, Thatcher’s successor, virtually guarantees ASI’s continued influence and an expansion of privatization in prisons and other areas of criminal justice including policing.

Political support for privatization also came from England’s Home Affairs Select Committee. Select committee members visited the Corrections Corporation of America’s prisons in Tennessee and eventually recommended that the English government experiment with remand prisons. These efforts have been opposed by the influential volunteer and highly respected, reform-

oriented Howard League, and the powerful Prison Officers Association. By lobbying, an alliance of political and business interests apparently gained the upper hand, as the United Kingdom government has proceeded with privatizing the management of remand centers. This development was preceded by Douglas Hurd's, former Home Secretary, dismissal of the idea of privatization of prisons as unacceptable, to announcing he had no objection in principle to a private company running a remand center.

In 1984, the Canadian government under Prime Minister Mulroney adopted privatization as part of its election platform and it became bullish on further privatizing corrections. Privatization was the favorite theme of the 1980s government as a means to reduce the national deficit. Evidence of the federal government's interest in privatization was found in the massive Neilsen reports on privatization initiatives within the Canadian government. At a meeting between interested community organizations and officials for the Alberta Ministry of the Solicitor General in 1986, officials stated "there's nothing not on the agenda for privatization".

Favorable governmental attitudes to privatization in these countries not only has significance for private prisons, but for Electronic Monitoring and the level of privatization already in place.

C. Electronic Monitoring and the Arms/Security Industry

Electronic Monitoring has generated significant commercial interest along side institutional corrections. In 1987, three American vendors, BI Incorporated (BI), Correctional Services Incorporated (C.S.I.) and Digital Products, controlled the market in criminal offender "tagging" devices. Since then, two United States vendors have combined with British companies to produce and market improved devices. In 1988, United States-based C.S.I. joined with British-based Marconi Microsystems Division, a subdivision of world-wide electronic technology leader and defense contractor, GEC Plessey. Since then, BI has purchased or merged with several United States-based monitoring firms, most recently

82. Ryan and Ward, supra note 66, at 4.
Guardian Technologies, a subdivision of Cincinnati Microwave, the auto radar detection company.84 This move reportedly boosted BI’s U.S. market share to around seventy-five percent.85

Preceding this development in 1989, C.S.I. again expanded its international business connections with Japanese-based Mitsubushi. In 1990, C.S.I. further expanded its international business dealings with an agreement with Electron Dart, Ltd. in Tel Aviv, Israel. Guardian Technologies (Guardian) acquired the largest single contract for tagging in the history of this new industry. In July, 1991, it received the contract to provide approximately 3,000 home monitoring units to the Prisons Department of the Government of the Republic of Singapore within three years. By early March 1992, the delivery and implementation of half of the 3,000 units had been so successful that plans were underway for Guardian to deliver an additional 7,000 within the original three-year time frame.86 These developments, along with persistent reports that other transnational corporations are preparing to enter the tagging business, indicate that tagging has already become an international enterprise.

Not all government efforts to implement EM have been successful, most noticeably in England and Wales. EM was tried in three places in England and Wales, but rejected. The Netherlands considered EM but has yet to use it. In the face of acknowledged European resistance, it seems unlikely EM will soon be used there in criminal justice.

At first glance, these examples of resistance appear to support Corbett and Marx’s claim that EM may be a fad. To the contrary, the technology is now being used without objections in England to protect hospitalized babies from kidnapping and the elderly from wondering beyond the boundaries of nursing homes.87

The new electronic monitoring market failures, nevertheless, illuminate some of the international financial and commercial dimensions of contemporary corrections. It also points to connections with the military industrial complex. Two international defense contractors, Racal-Chubb and GEC Plessey via its Mar-

coni Electronic Devices Ltd, neither of which University of Birmingham Professor Mike Nellis states had prior involvement with the “soft” side of criminal justice, contracted in 1989 with the Home Office respectively for the Tower Bridge tagging site and for Nottingham and North Tynside. Additionally, Securicor, a long established security guard company with prisoner escort contracts, received subcontracts to make home visits if computer records showed violations.

These connections, while clear and obvious, should not be thought of as isolated incidents, but rather as examples of not-so-obvious connections between corrections and participants in the military industrial complex. Security firms which specialize in technology for access control, alarm sensors, closed circuit t.v., communications, fire protection, manned security/valuables-in-transit, and especially perimeter protection just as eagerly sell these products to the military as they do to prison wardens and shopping malls and private homes.

High-tech security marketing by military contractors should not be construed to indicate that security firms are a relatively recent involvement in corrections and jail/prison markets. Long before Chubb Locks joined Racal in 1984, it had an illustrious and profitable world-wide history of exclusive government contracts for prison locks, military security, handcuffs, leg irons, munitions, bank vaults, government property security and post office security. It reportedly also had long enjoyed a monopoly for the security and fire protection of all of the world-wide property belonging to the British royal family.

Instructive here for EM’s development and future, are significant changes in the military and the economy during the last few decades and the non-military markets, for example corrections, which are increasingly targeted for sales by defense contractors. Space limitations preclude an extended discussion of major changes within the military-industrial complex since Eisen-

89. Id. at 172.
hower's 1961 warning. Suffice it to say that three major changes have recently placed some sectors of the complex in an excellent position to want and to be able to influence criminal justice.

First, although military budgets have grown over the years, the economy itself, especially in the U.S., has grown faster. The military and its suppliers now make up only about 5 percent of the $five and one-half trillion dollars in goods and services the U.S. produces each year.\textsuperscript{92}

Second, some arms contractors have been re-making themselves and diversifying by steadily de-emphasizing their roles as builders of "platforms" - the basic structures of planes, tanks, ships and missiles. "Nowadays, contractors consider themselves primarily technology companies, adept at making their military hardware more effective through advances in electronics."\textsuperscript{93} This particular refocusing and the need to find new markets enlightens our understanding of the connections between the post-cold war "peace dividend" and criminal justice control technology.\textsuperscript{94}

Third, and most importantly for locating EM, is the shift from the circa 1961 importance of the military, to the 1980s-1990s focus on industry, especially the electronic-based industries. One small but telling manifestation of this shift appearing in the civilian market is the new homeowners growing preference for home security systems, including motion detectors, burglar and fire alarm systems.\textsuperscript{95} These products including car alarms represent new markets for defense contractors' diversification efforts.

As an example of military defense contractor diversification, The Right Honorable Lord Prior's GEC Plessey Chairman's Statement of September 30, 1990, is exemplary. In addition to stating

\textsuperscript{92} Richard W. Stevenson, \textit{In the Age of the "Black Box" War}, N.Y. TIMES, Jan. 20, 1991, § 3, at 6; \textit{Crimes Can Pay}, \textit{SECURITY SALES} (Feb. 1992). With Congressional acceptance of Pentagon recommendations for military cuts, the military's share of the gross national product will fall to 3.6 percent by 1996, down from 6.5 percent in 1985 and about 5.5 percent in 1990. In other words, new markets for military related products are needed for some contractors.

\textsuperscript{93} Richard N. Stevenson, \textit{In the Age of the "Black Box" War}, N.Y. TIMES, Jan. 20, 1991, § 3 at 6.


that GEC had record outstanding orders of £10.8 billion of which "approximately £4.8 billion represents our share in joint ventures associated companies," and also stated:

GEC-Marconi will continue to seek opportunities in civil markets to exploit technologies in which it is expert. This process of 'conversion' has been underway for sometime, and already more than 20 per cent of the group's sales are to non-military customers.

The successful demonstration of flexibility in adapting defence orientated technologies and management techniques to different imperatives of civil products provides GEC-Marconi with the necessary confidence to tackle a wide variety of projects. One such project is the development of the London Autoguide System by GEC Traffic Automation to give drivers in-vehicle information on the best route to follow depending upon traffic conditions.96

Indicative of the interconnections between criminal justice and the security firm portion of the military-industrial complex in the United Kingdom is Home Office Secretary Baker's answer to a recent request to list the number of private security firms employed by his department, including the number of employees for each contract and its total value. He identified eleven firms, but declined to provide the number of employees and the value of the contracts.97

Nor is there a lack of interest in some circles to expand the connections between criminal justice and security firms.98 The

96. GEC Plessey Chairman's Statement (December 4, 1990).
97. Hansard, Private Security Firms, October 22, 1991. The firms identified were: Lisburn Security Services, Securicor, Group 4, Security Wales, Security Express Guards Ltd., Security Express, Chubb, Reliance, Defence Security Services, Securite Security Limited and Potton Leisure Limited. Mr. Baker's colleague Mr. Leigh, Secretary of State and Trade and Industry, didn't hesitate in responding to the same question. He not only provided the number of private security firms currently employed by his department, he provided the number of employees and the total value of each contract and the total value of all contracts for each financial year since 1984-1985. Identified were Thorn Security Services Limited (36 guards), Centuryan Security Ltd. (18). Chubb Wardens Ltd. (23), Euroguard Ltd (10), Securiguard Services, Ltd (7), Mint Security Ltd (3), and Sterling Guards Ltd (2). The final estimated figure for 1989-90 was £1,325,220; and for 1990-91, £1,678,930. Several of these security firms appear in Security Management Today's list of the top 100 security firms in Britain/Europe.
98. While the focus here is on the connections between the arms and security industries and corrections, a more accurate portrait would include the entirety of public and private policing as a rich and growing market place for arms and defense related technology. Instructive here is the current effort to sell helicopters used in the Persian
Adam Smith Institute's recent report, *An Arresting Idea*, argued that police forces should allow private security firms to take over court duties, abnormal load escorts, training and the registration of aliens.99 Part of the free market think tank's justification was a number of successful experiments in the U.S. in which small towns favored private firms instead of a police force to maintain law and order. One of the more intriguing sources of support for the tagging industry, surprisingly, came from defense attorneys who sought this alternative to incarceration for their clients.100

CONCLUSION

The characteristics earmarking a criminal justice fad, according to Corbett and Marx, include "broad media attention, quick, widespread adoption, rapid expansion and diversification of the product."101 Examples offered included pretrial diversion in the late 1960s, mandatory sentencing in the mid-1970s and intensive probation supervision in the early 1990s. A roughly similar trajectory for these fads includes: great early enthusiasm, widespread adoption, less-than-positive evaluations followed by disillusionment and finally downscaling or elimination and receptiveness to the next panacea.102 With these observations, there is little disagreement, except that EM is fundamentally similar and different.

EM indeed has come on the corrections scene with rapidly increasing support and growth. In 1987, within the United States, only 800 people per day were monitored. Today the figure has been reported to be greater than 70,000 per day.103 The numbers,
however, tell only part of the story. An increasingly broader range of offenders are now being electronically monitored through home incarceration. No longer are the offenders, in the home incarceration programs, from the “soft” end of the crime scale; they increasingly include prisoners of greater risk.

In support of Corbett and Marx’s comments on EM as a potential fad there are some signs of it weakening, even from some of its earliest and most experienced supporters, including its early investors. Pride, Inc., of West Palm Beach, Florida, one of the earliest EM enthusiasts, recently discontinued its EM program because the “get tough” attitude identified by Pride, Inc.’s Director, Fred Rassmussen, is “now so akin to a ‘police state’ there is no place left for caring for people. No doubt, the present emphasis on control and subgovernments leaves the caring professions in a disadvantage for competing for scarce resources and endangers the presence of their voice in the future.

But EM is different. It is intricately connected to a commercial corrections complex, transnational criminal justice enterprise and the world of military-industrial business and technology. This argument does not claim that EM is here to stay, but it has a better chance of lasting than the fads identified by Corbett and Marx. Its support is clearly tied to an enterprise ideology and institutional supports much stronger and well-funded than any of the above fads. None of these were, of course, created in an entrepreneurial or institutional vacuum, but neither were they born in an entrepreneurial spirit that was transforming the public sector.104

In the present period of emphasis on enterprise, the logic of technofallacies, while ringing true for responsible conservatives, seems to resemble more the quaint and unrealistic logic of a David and Goliath confrontation sponsored by the centuries-old war industries. It is not the new age of surveillance that is to be so feared, it is the confluence of it with the transnational entrepreneurialship of both criminal justice and the re-shaped industrial-military complex.

Unlike the fads identified by Corbett and Marx, EM may drop out of criminal justice, but as witnessed by its usage with

hospitalized babies and the elderly, it will be marketed anew in a more acceptable arena. Its successes there will be stressed along with its successes in criminal justice and it will likely return stronger than before. One of the major supports for this scenario is the ever-expanding enabling legislation for intermediate punishments and community corrections. This development coupled with the deliberate fragmentation of governmental bureaucracies into subgovernments as witnessed by the United Kingdom's decision to relinquish its day-to-day management of prisons and inmates, gives clear meaning to a early 1992 report in a leading security industry trade publication. This report stated "[a]s a result of these increasing sentences, a new revenue opportunity has opened up for security dealers...."

In the interim, academics and practitioners would do well to establish access to criminal justice policy-making subgovernments where generally they have not treated. Otherwise, they will likely find themselves excluded from the agencies and forums to which they have often been invited.

I. INTRODUCTION

"Shots are fired into an elderly black man's home, with a cross—topped by a dog's severed head—burned on the property."\(^1\) "A white mob attacks the home of an interracial couple. A black-owned home is firebombed and an attempted firebombing is foiled at the home of an Hispanic family."\(^2\) "Four skinheads are arrested for beating an Iranian couple they mistook for Jews."\(^3\)

These are but a few examples of the bias-related crimes reported across America in recent years.\(^4\) Due to the rising tide of bias-related violence throughout the country,\(^5\) and recognizing the serious impact such crimes have on both the victim and the community, the majority of state legislatures have passed laws that in some way attempt to deal with bias-related crimes.\(^6\) In 1987, Ohio's legislature adopted an ethnic intimidation statute which enhances the criminal penalties for the offenses of aggravated menacing, menacing, criminal damaging or endangering, criminal mischief, and telephone harassment, if such offenses are

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2. Id. at 633.
3. Id. at 650.
4. See generally Chronology, supra note 1. The examples cited above are among the less-violent of the recorded bias-related crimes. This source lists numerous incidents of lynching, maiming, and murder.
5. According to the Federal Bureau of Investigation, more than 4,000 hate crimes were reported in 1991. Because many jurisdictions did not provide the relevant data, this number is inconclusive. Racial Bias Cited in Hate Crimes, CINCINNATI ENQUIRER, Jan. 5, 1993, at A-2.
committed by reason of the race, color, religion, or national origin of another person or group of persons. 7

On August 26, 1992, in State v. Wyant, 8 the Ohio Supreme Court found the state's ethnic intimidation statute unconstitutional. 9 The court held that the effect of the statute was to punish the actor for his viewpoint, thereby creating a “thought crime” in violation of the free speech guarantees of the Ohio and United States Constitutions. 10

II. BACKGROUND AND FACTS

A. An Historical Perspective

Historically, attempts to punish a person for his thoughts or beliefs have met mixed results under First Amendment challenges. 11 In Chaplinski v. New Hampshire, 12 a Jehovah's Witness was convicted for violating a statute making it unlawful to address anyone on a street or other public place with offensive, derisive, or annoying language. 13 In upholding Chaplinski's conviction, the Court stated that “the right of free speech is not absolute at all times and under all circumstances.” 14 The Court held that there was no constitutional problem with narrowly tailored statutes that define and punish specific conduct, such as the use in a public place of “fighting words” that would likely cause a breach of the peace. 15

9. Id. at 452.
10. Id. at 459.
13. Id. at 569. While Chaplinski was distributing leaflets which denounced all religions as a "racket," a disturbance occurred. Chaplinski referred to the marshal who responded to the scene as a "God damned racketeer" and a "damned Fascist." Id. at 569-70.
14. Id. at 571.
15. Id. at 571-72. “Fighting words” are those likely to cause a breach of the peace because an average person would be provoked to retaliate. Id. at 574. Along with “fighting words,” categories of speech not protected by the First Amendment include the lewd and obscene, the profane, and the libelous. Id. at 572.
In *Beauharnais v. Illinois*, a closely divided Court held that group defamation is a category of speech not protected by the First Amendment. Beauharnais was convicted for distributing a leaflet in violation of a statute outlawing the dissemination in a public place of any publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion" which would expose such citizens to contempt or lead to a breach of the peace or riots. The Court upheld the statute, reasoning that the history of racial strife in Illinois gave the state a legitimate interest in protecting the state's peace and well-being through legislation such as the statute at issue.

Another Supreme Court decision relevant to the issue of ethnic intimidation is *Brandenburg v. Ohio*. Brandenburg, a Ku Klux Klan (KKK) leader, was convicted for violating a statute aimed against the advocacy of political reform through violence and assembling to teach or advocate criminal syndicalism. The Court overturned Brandenburg's conviction on First Amendment grounds. The statute was held invalid because the constitutional guarantee of free speech does not allow a state to "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action" and is likely to do so.

Perhaps the most notorious of cases dealing with ethnic intimidation statutes and the First Amendment was *Collin v. Smith*.

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18. *Beauharnais*, 343 U.S. at 251-52. The leaflet called for the white people of Chicago to unite, and stated that "[i]f persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions ... rapes, robberies, knives, guns and marijuana of the negro surely will." *Id.* at 252.
19. *Id.* at 261-62.
21. *Id.* at 444-45. Entered as evidence were two films, openly recorded by a television newsman, of KKK rallies led by Brandenburg. They showed weapons and ammunition and recorded derogatory remarks, such as "[p]ersonally, I believe the nigger should be returned to Africa, the Jew returned to Israel." *Id.* at 445-47. Also recorded was the statement that the KKK would take "revengeance" if the government continued to suppress the Caucasian race. *Id.* at 446.
22. *Id.* at 449.
23. *Id.* at 447.
The National Socialist Party of America, a neo-Nazi organization, planned a march in Skokie, Illinois, a predominately Jewish community which is home to many Holocaust survivors. In an effort to prevent this march, the Village passed a series of ordinances, requiring parade permit seekers to obtain a significant amount of insurance; prohibiting the dissemination of any material promoting or inciting "hatred against persons by reason of their race, national origin, or religion, and is intended to do so;" and prohibiting "public demonstrations by members of political parties while wearing 'military-style' uniforms."

The Seventh Circuit Court of Appeals affirmed the lower court's holding that the Skokie ordinances violated the First Amendment. The court found the insurance requirement to be an "insuperable obstacle" to free speech. The ordinances' other requirements were held to violate the First Amendment because they were impermissible content-based restrictions on free speech. While expressing disdain for bigoted thoughts and behavior, the court reaffirmed the "fundamental proposition that if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises."

B. The ADL Model and Ohio's Statute

Following the Collin decision, the Legal Affairs Department of the Anti-Defamation League (ADL) of B'nai B'rith drafted a model statute that could be used by the states in formulating their own statutes aimed at curbing ethnic intimidation and violence. One component of the ADL model is a "penalty enhancement" pro-

25. 578 F.2d at 1198-99.
26. Id. at 1199.
27. Id.
28. Id. at 1200.
29. Id. at 1210. The Beauharnais group defamation doctrine which, if applied, would have saved the ordinances, was rejected by the court. Id. at 1204. The Chaplinski "fighting words" exception and the "imminent lawless action" exception from Brandenburg were also found by the court to be inapplicable to this case. Id.
30. Id. at 1208.
31. Id. at 1203-10.
32. Id. at 1210.
33. Gellman, supra note 11, at 339.
Statutes based on this ADL model increase the penalty for the specified criminal offenses where the offender was motivated by bias.\textsuperscript{35}

Ohio's ethnic intimidation statute was based on the ADL model.\textsuperscript{36}

The Ohio statute read:

(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.\textsuperscript{37}

Thus, a person is guilty of ethnic intimidation in Ohio if he commits, by reason of his bias, the predicate offense of aggravated menacing,\textsuperscript{38} menacing,\textsuperscript{39} criminal damaging or endangering,\textsuperscript{40} criminal mischief,\textsuperscript{41} or certain forms of telephone harassment.\textsuperscript{42}

\section*{C. The Facts Before the Court}

The Ohio Supreme Court was asked to certify the record on the constitutionality of the ethnic intimidation statute in \textit{State v. Wyant}.\textsuperscript{43} The \textit{Wyant} case represented a consolidation of cases involving First Amendment challenges to the ethnic intimidation

\textsuperscript{34} Id. at 339-40. The latest revisions to the ADL model legislation include four provisions: criminal penalties for institutional vandalism; enhanced penalties for intimidation; creating a civil cause of action for victims; and procedures for bias crime reporting and training. Goldberg, \textit{supra} note 6, at 88.

\textsuperscript{35} Gellman, \textit{supra} note 11, at 344. The ADL revised model intimidation statute reads:

(A) A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section — of the Penal Code ....

(B) Intimidation is a — misdemeanor/felony [the degree of criminal liability ....]

\textsuperscript{36} Gellman, \textit{supra} note 11, at 350.


\textsuperscript{38} \textit{Ohio Rev. Code Ann.} § 2903.21 (Baldwin 1992).

\textsuperscript{39} \textit{Ohio Rev. Code Ann.} § 2903.22 (Baldwin 1992).

\textsuperscript{40} \textit{Ohio Rev. Code Ann.} § 2909.06 (Baldwin 1992).


\textsuperscript{43} 597 N.E.2d 450 (Ohio 1992).
statute that had received conflicting treatment in the lower courts.\textsuperscript{44}

The defendant in \textit{Wyant} rented a campsite in one of Ohio's state parks.\textsuperscript{45} The neighboring campsite was rented to a black couple.\textsuperscript{46} The couple complained to park officials about loud music coming from Wyant's campsite.\textsuperscript{47} Later, the couple heard racial slurs made by Wyant (who is white), including "I ought to shoot the black mother fucker" and "I ought to kick his black ass."\textsuperscript{48} The couple left the park after complaining to park officials.\textsuperscript{49} Wyant was convicted for ethnic intimidation, based on the predicate offense of aggravated menacing.\textsuperscript{50} The Delaware County Court of Appeals affirmed the conviction, believing the ethnic intimidation statute to be a legislative attempt to preserve the public peace, and that the statute was not so vague and overbroad as to violate the First Amendment.\textsuperscript{51}

In the case of \textit{State v. Van Gundy},\textsuperscript{52} there is no factual record, but the defendants were each charged with seven counts of ethnic intimidation, predicated on the offense of aggravated menacing.\textsuperscript{53} The trial court dismissed these charges upon finding the ethnic intimidation statute unconstitutionally vague and overbroad.\textsuperscript{54} The Franklin County Court of Appeals affirmed.\textsuperscript{55} The appellate court found the statute void for vagueness because it failed to give a person of ordinary intelligence fair warning as to what conduct is prohibited and because it threatened to encourage arbitrary and discretionary enforcement.\textsuperscript{56} The court also found


\textsuperscript{45} \textit{Wyant}, 597 N.E.2d at 450.

\textsuperscript{46} Id.

\textsuperscript{47} Id.

\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} Id.


\textsuperscript{53} Id. at 2.

\textsuperscript{54} Id.

\textsuperscript{55} Id. at 6.

\textsuperscript{56} Id. at 3.
the statute overbroad because it criminalized constitutionally protected activity.\footnote{Id. at 5.}

In \textit{State v. May},\footnote{No. 12239, 1991 WL 116653 (Ohio App. June 27, 1991).} the defendant May, a landlord, and several other white men made racial slurs against Mr. Crawford and some of his friends.\footnote{Id. at 1.} Crawford, a tenant of May's, and his friends are black.\footnote{Id.} A gun was pulled on Crawford, and he and his friends were threatened with a tire iron.\footnote{Id.} May was charged with ethnic intimidation, based on the predicate offense of aggravated menacing.\footnote{Id. at 2.} The trial court dismissed the charge, finding the statute unconstitutionally void for vagueness.\footnote{Id.}

In the case of \textit{State v. Staton},\footnote{Id.} Bowlin, a white man, had black visitors in his home.\footnote{Id. at 1.} Staton and other white neighbors yelled racial slurs at Bowlin's visitors.\footnote{Id.} The lives of Bowlin and his visitors were threatened, a rock was thrown through Bowlin's window, and a visitor's car was damaged.\footnote{Id.} Staton was charged with ethnic intimidation, again, predicated on the offense of aggravated menacing.\footnote{Id. at 2.} Based on the disposition of the \textit{May} case, the charge against Staton was dismissed.\footnote{Id.}

The \textit{May} and \textit{Staton} cases were consolidated on appeal.\footnote{Id. at 1.} The Montgomery County Court of Appeals affirmed the trial court's holding that the ethnic intimidation statute was unconstitutional on vagueness grounds.\footnote{Id. at 3.} Because of the conflicting opinion of the appellate court in \textit{Wyant}, the court made a motion to the Ohio
Supreme Court to certify the record on the constitutionality of the statute.  

D. Setting the Stage for the Ohio Supreme Court

It is worthy of mention at this point that after the Wyant case was submitted to the Ohio Supreme Court, but prior to the court’s ruling, two decisions concerning the constitutionality of hate crime statutes were handed down by other courts. These decisions would prove to have an impact on the Wyant ruling.

In June 1992, in R.A.V. v. City of St. Paul, the United States Supreme Court issued a 9-0 decision striking down a St. Paul, Minnesota, hate crime ordinance as being an unconstitutional content-based restriction on expression. The case involved a juvenile who burned a cross on the lawn of a black family living in a white neighborhood. He was charged with violating an ordinance prohibiting the display of a symbol, such as a burning cross or swastika, which one knows or has reason to know "arouses anger, alarm, or resentment in others" on the basis of race, color, creed, religion, or gender. The Minnesota Supreme Court had ruled the statute constitutionally valid, based on the Chaplinski "fighting words" exception to the First Amendment.

Writing for the majority, Justice Scalia asserted that there are no areas of speech totally beyond the reach of the First Amendment. However, the ordinance was found to be "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." An ordinance proscribing only some "fighting words," such as those based on race, color, creed, religion, or gender, while not including other forms of "fighting words" is clearly a form of content-based
discrimination not permitted by the First Amendment.81

The other recent case having an impact on the Wyant decision was State v. Mitchell,82 decided in June 1992. In that case, a young black man was successfully prosecuted under Wisconsin's penalty enhancement-type hate crime statute,83 loosely based on the ADL model,84 for a racially motivated assault on a white youth.85 The appellate court ruled that the penalty enhancement statute was constitutional.86

The Wisconsin Supreme Court struck down the statute because it directly violated the First Amendment by punishing a defendant's constitutionally protected thoughts.87 The statute also failed on overbreadth grounds because, aside from punishing thought, the statute threatened to punish speech as well.88 This indirectly violated the First Amendment because of its chilling effect on free speech.89 The court voiced its regrets on its ruling, but stated that as deplorable as hate crimes are, “the greater evil is the suppression of freedom of speech for all of us.”90

Thus, in the legal aftermath of R.A.V. and Mitchell, the Ohio Supreme Court reached its decision in Wyant ....

III. THE COURT'S REASONING

In State v. Wyant,91 the Ohio Supreme Court expressed its abhorrence for racial and ethnic hatred and for the crimes motivated by such hatred,92 but held that the effect of Ohio's ethnic intimidation statute was to create a “thought crime” in violation

81. Id. at 2547. Justice Scalia's opinion is worthy of much greater discussion than the scope of this work allows. The concurring opinions read more like dissents: "Any contribution of this holding to First Amendment jurisprudence is surely a negative one..." Id. at 2553 (White, J., concurring); "I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns..." Id. at 2561 (Blackmun, J., concurring); "The Court today turns First Amendment law on its head..." Id. at 2564 (Stevens, J., concurring).
82. 485 N.W.2d 807 (Wis. 1992), cert. granted, 113 S. Ct. 810 (1992).
84. Mitchell, 485 N.W.2d at 812.
85. Id. at 809.
86. Id. at 810.
87. Id. at 814.
88. Id. at 815.
89. Id.
90. Id. at 817.
91. 597 N.E.2d 450 (Ohio 1992).
92. Id. at 452.
of the Ohio and United States Constitutions. The Ohio court cited the rationale of the R.A.V. and Mitchell courts in its decision.

Before beginning its analysis, the court identified precisely what aspect of the ethnic intimidation statute was at issue. Since the underlying predicate offenses to ethnic intimidation were already punishable under other statutes, the enhanced penalty provision of the ethnic intimidation statute punished something more than the elements constituting the underlying offenses. This "something more" was the actor's reason, or motive, for committing the underlying offense. The constitutionality of this punishment of motive was the issue facing the court. The court's reasoning began with a lengthy analysis of the criminalization of motive, followed by an analysis of the constitutional objection to the punishment of thought.

A. The Criminalization of Motive

The court began by stating that in criminal law, motive is not an element of the crime, and thus is not punished, while other thought-related concepts, such as intent and purpose, are used in criminal laws as elements of crime or as penalty-enhancing criteria. The court noted that there is a great difference between why a person commits a crime (motive) and whether he intentionally commits the act. Since a crime can be committed intentionally with any number of motives, enhancing the penalty for a crime because the actor acted due to a particular motive amounts to nothing less than punishing the actor's thoughts,

93. Id. at 459.
94. Id. at 458-59.
95. Id. at 453.
96. Id.
97. Id.
98. Id. at 453-59. This portion of the court's analysis appears to be a summary of the section of Prof. Gellman's article dealing with this topic. Compare the court's reasoning, id. with Gellman, supra note 11, at 363-68. It is interesting to note that Prof. Gellman served as counsel for the defendant in Wyant and as co-counsel for the defendant Culp in Van Gundy, both cases now before the court. Id. at 333, biographical note.
100. Id. at 453 (citing 1 W. LaFave & A. Scott, Substantive Criminal Law § 3.6, at 318-24 (2d ed. 1986)).
101. Id.
rather than his actions or intent.\textsuperscript{102} Several examples meant to clarify the distinctions between motive and intent and between a thought and an act were given by the court.

First, the court distinguished between motive and criminal intent.\textsuperscript{103} The court stated that intent is the culpable mental state that is normally required in order to find a person guilty of a crime.\textsuperscript{104} The court illustrated the fact that an actor can have motive without intent or intent without motive by saying “the wife of a wealthy but disabled man might have a motive to kill him, and yet never intend to do so. A psychopath, on the other hand, may intend to kill and yet have no motive.”\textsuperscript{105}

Next, the court distinguished between motive and the intent to commit another criminal act.\textsuperscript{106} Often, while committing one crime, an actor may act with the purpose to commit a further criminal act.\textsuperscript{107} This can be the basis for an enhanced penalty, or for the creation of a separate, more serious crime.\textsuperscript{108} The court cited burglary—an act of trespass committed for the purpose of committing a theft—as an example.\textsuperscript{109} What is being punished is two criminal acts.\textsuperscript{110} The actor’s motive for the theft, such as to get drug money or money to pay debts, is irrelevant and is not punished.\textsuperscript{111}

The court then proceeded to distinguish between motive and criminal acts.\textsuperscript{112} The legislature can determine that certain criminal acts, when committed under aggravating circumstances, become more serious crimes and are deserving of an enhanced penalty, regardless of the actor’s motive or lack of motive.\textsuperscript{113} Following this analysis, the court reasoned that the legislature

\begin{footnotesize}
\textsuperscript{102} Id. at 454.
\textsuperscript{103} Id. “Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.” BLACK’S LAW DICTIONARY 810 (6th ed. 1990).
\textsuperscript{104} Wyant, 597 N.E.2d at 454. Under Ohio criminal law, a person acts with a culpable mental state if he acts purposely, knowingly, negligently, or recklessly. OHIO REV. CODE ANN. § 2901.21 (Baldwin 1992).
\textsuperscript{105} Wyant, 597 N.E.2d at 454.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Wyant, 597 N.E.2d at 454-55.
\textsuperscript{110} Id. at 455.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Wyant, 597 N.E.2d at 455-56.
\end{footnotesize}
could determine that a particular minority group required special protection, and enhance the penalty for criminal acts committed against members of this group.\textsuperscript{114} The court stated that such a statute could pass muster under the First Amendment because the actor's motive would not be called into question, but would fail under the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{115}

Finally, the court discussed motive and the federal and state anti-discrimination laws.\textsuperscript{116} While these statutes do prohibit acts committed with a discriminatory motive, the court distinguished these statutes from the ethnic intimidation statutes, because the former target the act of discrimination, not the motive behind the act.\textsuperscript{117} Bigoted motive by itself is not punished under anti-discrimination statutes, and proof of a discriminatory motive does not enhance the penalty when a discriminatory act is punished.\textsuperscript{118}

Having firmly established that the ethnic intimidation statute punished only the actor's motive or thoughts, not his criminal intent or the criminal act itself, the court moved forward in its analysis to determine the constitutionality of the punishment of thought.

**B. The Constitutional Objection to the Punishment of Thought**

The court began its constitutional analysis by expressing the long-held principle of First Amendment jurisprudence that "the freedom of speech presupposes the freedom of thought."\textsuperscript{119} The court then narrowed the focus of its analysis to the question of whether the government can punish already regulated criminal conduct more severely based on the thoughts which motivated the actor's behavior.\textsuperscript{120}

While citing \textit{Chaplinski}\textsuperscript{121} in support of the proposition that there are unprotected forms of expression under the First

\begin{footnotesize}
\begin{enumerate}
\item[114.] \textit{Id.} at 456.
\item[115.] \textit{Id.}
\item[116.] \textit{Id.}
\item[117.] \textit{Id.}
\item[118.] \textit{Id.}
\item[119.] \textit{Id.}
\item[120.] \textit{Id.} at 457.
\item[121.] 315 U.S. 568, 572 (1942).
\end{enumerate}
\end{footnotesize}
ETHNIC INTIMIDATION

Amendment, the court did not extend this argument to the next step by concluding that there are "unprotected forms of belief."122 The freedom of an individual to frame his thoughts and beliefs is a core value shared by all the freedoms of the First Amendment of the United States Constitution.123 The court reasoned that since the Ohio Constitution guarantees to every citizen the freedom to "speak, write, and publish his sentiments on all subjects," it follows that he is free to have sentiments on all subjects.124

The court stated that this basic liberty has been infringed upon by the ethnic intimidation statute, since once the actor committed the predicate offense, the statute criminalized his underlying thoughts by enhancing the penalty based on his viewpoint.125 The court went on to say that "[t]his is dangerous. If the legislature can enhance a penalty for crimes committed 'by reason of' racial bigotry, why not 'by reason of' opposition to abortion, war, the elderly (or any other political or moral viewpoint)?"126

In other words, the court reasoned, if the legislative majority could enact statutes that punish the thought or motive behind the crime separately from the crime itself, it could conceivably punish any viewpoint it deemed unacceptable.127 This is precisely the type of governmental action the First Amendment was designed to prohibit.128 After stating that "[t]he constitutional protection accorded to beliefs is most important when beliefs are reviled by society," the court held that no matter how well-meaning the legislature's intention may be in enacting a statute that punishes belief, such a statute will necessarily fail under the First Amendment.129

The court then cited the holdings from the recent R.A.V. and Mitchell decisions.130 The court concluded that Ohio's ethnic intimidation statute was a greater infringement on speech and thought than either of the hate crime statutes struck down in those

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123. Id.
124. Id. (quoting OHIO CONST. art. I, § 11).
125. Wyant, 597 N.E.2d at 457.
126. Id.
127. Id.
128. Id.
129. Id. at 457-58.
130. Id. at 458-59.
decisions.\textsuperscript{131} The statute at issue in \textit{R.A.V.}, which was aimed at specific bias-motivated conduct that could be construed as "fighting words," was struck down because the government may not regulate unprotected speech, such as "fighting words," based on the message conveyed.\textsuperscript{132} The penalty enhancement-type statute in \textit{Mitchell} was held to punish speech or thought, even though its wording could be construed as addressing the conduct of "intentionally selecting" the victim for bias-related reasons.\textsuperscript{133}

Motive, and motive alone, the court concluded, is what the Ohio statute criminalized, by singling out bigotry as a viewpoint to be punished.\textsuperscript{134} In effect, then, the statute created a "thought crime," in violation of Article I of the Ohio Constitution and the First and Fourteenth Amendments to the United States Constitution.\textsuperscript{135}

The court held that the government is not free to punish a thought, although it may punish acts that are motivated by the thought.\textsuperscript{136} Since the predicate offenses enumerated in the ethnic intimidation statute are already punished under the criminal code without resort to a thought crime, the court agreed with Justice Scalia's remark that the government "has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."\textsuperscript{137}

\section*{IV. ANALYSIS}

\textbf{A. An Unfortunate, But Necessary, Conclusion}

The serious impact that bias-related crime has on its victims and on society as a whole makes the court's decision a bitter pill to swallow. The decisions of the Wisconsin court in \textit{Mitchell}\textsuperscript{138} and of the Ohio court in \textit{Wyant}\textsuperscript{139} could signal a trend in holding

\textsuperscript{131} Id. at 459.
\textsuperscript{132} Id. at 458 (citing \textit{R.A.V. v. City of St. Paul}, 112 S. Ct. 2538, 2543 (1992)).
\textsuperscript{133} Id. at 458-59 (citing \textit{State v. Mitchell}, 485 N.W.2d 807, 813 (Wis. 1992)).
\textsuperscript{134} Id. at 459.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 458.
\textsuperscript{137} Id. at 459 (quoting \textit{R.A.V. v. City of St. Paul}, 112 S. Ct. 2538, 2550 (1992)).
enhanced penalty-type intimidation statutes unconstitutional.\(^{140}\)
The final word on the constitutionality of such statutes will come from the United States Supreme Court, as the *Mitchell* case is now pending before the Court.\(^{141}\) In light of the Court's ruling in *R.A.V. v. City of St. Paul*,\(^{142}\) the future of enhanced penalty-type ethnic intimidation statutes appears bleak.

As to the Ohio court's decision in *Wyant*, the state's ethnic intimidation statute was found to punish only motive, and, as already noted, such punishment is not a recognized feature of criminal law.\(^{143}\) The effect of punishing motive is to create a "thought crime," in violation of the free speech guarantees of the Ohio and United States Constitutions.\(^{144}\) Proponents of penalty enhancement-type statutes disagree, arguing that such statutes do not suppress free expression or punish a defendant for his beliefs, but punish only the criminal conduct resulting from those beliefs.\(^{145}\)

A simple example shows the weakness in the proponents' argument. Defendants X and Y are both racists. Motivated by racial hatred, in separate incidents, each commits the same predicate offense of ethnic intimidation against a member of a minority group. However, only Defendant X hurls racial epithets at his victim while committing the criminal act. Defendant X is charged with ethnic intimidation. Defendant Y can only be charged with the predicate offense, as there is no proof that he acted "by reason of" his racial hatred.

Based on this example, it cannot be said that the ethnic intimidation statute punishes only the conduct resulting from the racial hatred. Both defendants committed the same criminal acts, with both acts resulting from the same racial hatred, yet only Defendant X is charged with ethnic intimidation. As the criminal act is already punishable under the criminal code, clearly it is

\(^{140}\) But see *State v. Plowman*, 838 P.2d 558 (Or. 1992), *petition for cert. filed*, 61 U.S.L.W. 2149 (Or. Nov. 23, 1992) (No. 92-6702). A statute making it a crime for two or more persons, acting together, to cause physical injury to another because of their perception of that person's race, color, religion, national origin, or sexual orientation was upheld. *Id.* at 560.


\(^{143}\) *State v. Wyant*, 597 N.E.2d 450, 453-56, 459.

\(^{144}\) *Id.* at 459.

\(^{145}\) See, e.g., Goldberg, *supra* note 6, at 88.
Defendant X’s expression of his racial hatred that is punished, although expression is protected under the First Amendment.

While the above example bolsters the court’s decision that the statute violates the First Amendment, it does so by exposing a shortcoming in the court’s reasoning. In the example, it is not motive that is being punished by the statute. Both defendants acted with the same bigoted motive, but only Defendant X faces the enhanced penalty. The effect of the statute is not to create a “thought crime,” as reasoned by the court, since both defendants harbor the same racist thoughts and beliefs. It is not the thoughts of Defendant X, but his expression of those thoughts, that is being punished by the statute.

Because the statute was invalidated on First Amendment grounds, the court did not address other constitutional issues raised by the ethnic intimidation statute.\textsuperscript{146} The above example illustrates two such issues: the statute does not provide equal protection\textsuperscript{147} and it is overbroad.\textsuperscript{148} The statute does not afford Defendant X equal protection under the law.\textsuperscript{149} He is being treated differently than Defendant Y, even though both defendants committed the same criminal act. His use of racial slurs, a right protected under the First Amendment, is the cause of this difference in treatment. The very proof that a defendant acted “by reason of” his bigotry—his speech, a profession of his beliefs, or even his associations, such as membership in the KKK—are all forms of constitutionally protected activity. Thus, the ethnic intimidation statute is overbroad because it sweeps within its reach the constitutionally protected rights of speech, belief, and association.\textsuperscript{150}

The above illustrations by no means exhaust the constitutional infirmities of the ethnic intimidation statute. They do show,

\textsuperscript{146} Wyant, 597 N.E.2d at 459.

\textsuperscript{147} "The constitutional guarantee of ‘equal protection of the laws’ ... simply means that similarly situated persons must receive similar treatment under the law.” BLACK’S LAW DICTIONARY 537 (6th ed. 1990).

\textsuperscript{148} The overbreadth doctrine "serves to invalidate legislation so sweeping that, along with its allowable proscriptions, it also restricts constitutionally protected rights of free speech, press, or assembly.” Id. at 1103.

\textsuperscript{149} See Gellman, supra note 11, at 379-80.

\textsuperscript{150} Id. at 358-62. See also James Morsch, Comment, The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation, 82 J. CRIM. & CRIMINOLOGY 659 (1991) [hereinafter Morsch], for a discussion of the various problems posed when trying to prove motive in bias-related crimes.
however, that regardless of the line of reasoning followed, such as the First Amendment approach used by the Wyant court, penalty enhancement-type ethnic intimidation statutes have little hope of surviving constitutional challenge in the United States Supreme Court.

B. The Decision’s Impact

Statistics show that the level of all types of bias-related crime is on the rise across America,

in spite of the fact that almost all states have some form of hate crime statute. By and large, these statutes have failed to address the problem of bias-related crime. Obviously, “prejudice and hatred cannot be legislated out of existence ....” Thus, the court’s decision in Wyant to strike down Ohio’s ethnic intimidation statute will apparently have little, if any, impact on the level of bias-related crime in Ohio.

However, the loss of the ethnic intimidation statute does not leave Ohio’s prosecutors and hate crime victims without legal ammunition to combat the effects of bias-motivated crime. Although the ethnic intimidation statute is invalid, the predicate offenses are still punishable under other statutes. Also, when the legislature adopted the ethnic intimidation statute, several other statutes were amended or created that can be used to prosecute offenders and to provide monetary relief to victims for the damage inflicted upon them in bias-related offenses. These statutes have not caused the constitutional problems raised by the ethnic intimidation statute.

Ohio’s vandalism statute now contains a provision aimed specifically at cemetery desecration, a not uncommon juvenile

151. Intelligence Report: Hate, Violence, and White Supremacy: A Decade Review (Klanwatch/Southern Poverty Law Center Montgomery, Ala.), Dec. 1989, at 1, 1. See also Hate Crimes on the Rise, USA WEEKEND, Jan. 8-10, 1993, at 5. A study by the National Institute Against Prejudice and Violence shows seven percent of the responding adults had been the victim of bias-related abuse or violence within the preceding year. Id.
152. Klanwatch, supra note 6, at 12.
153. Morsch, supra note 150, at 660. The main reason for this failure is the problem of proving bias-related motive. Id.
154. Goldberg, supra note 6, at 88 (quoting Melvin Salberg, ADL’s national chairman).
157. OHIO REV. CODE ANN. § 2909.05(C) (Baldwin 1992).
prank, with Jewish cemeteries being the usual target. Another statute makes it unlawful to vandalize houses of worship and their contents.\textsuperscript{158} Victims of either of these offenses now have a civil cause of action against the offender and may recover full damages, including punitive damages and damage for emotional distress.\textsuperscript{159} If the offender is a juvenile, the parents and child are jointly and severally liable for this amount.\textsuperscript{160} The victim also has a cause of action against the parents alone, for an amount not to exceed five thousand dollars, in addition to any amount recovered in an action against the child.\textsuperscript{161} Ohio's criminal mischief statute now has a provision that makes it unlawful to set a fire on someone else's property or to place personal property that has been set on fire on someone else's property with the purpose of interfering with the use or enjoyment of the property.\textsuperscript{162} This statute could reach intimidating cross burnings on another's private property without raising the constitutional problems of \textit{R.A.V}. because it is not based on the actor's viewpoint or the contents of the message he conveys.

None of these statutes will stop bias-related crime. However, these statutes can serve as a useful tool for prosecuting bias-motivated offenders and for providing monetary relief for their victims. These statutes do not suffer the constitutional infirmities of the ethnic intimidation statute, as none require proof that the offender acted "by reason of" his bigotry.

Perhaps the greatest impact of the \textit{Wyant} decision could come from the message the decision might send to the community. Most people do not take the time to read the text of court opinions. Without reading the court's opinion in \textit{Wyant}, bigots and those subjected to bigotry might get the very mistaken impression that the court is condoning racial and ethnic hatred. A reading of the opinion, however, will prove this far from true. In fact, in protecting the constitutional rights of even the most reviled members of our society by striking down the ethnic intimidation law, the court does not condone bigoted thoughts

\textsuperscript{159} \textit{Ohio Rev. Code Ann}. § 2307.70(A) (Baldwin 1992). Victims of ethnic intimidation were also given a civil cause of action against the offender under this statute.
\textsuperscript{160} \textit{Ohio Rev. Code Ann}. § 2307.70(B) (Baldwin 1992).
\textsuperscript{161} \textit{Id}.
and behavior, but, rather, protects the constitutional rights of us all.

CONCLUSION

“Our whole constitutional heritage rebels at the thought of giving the government the power to control men's minds.”163 This bedrock principle of First Amendment jurisprudence led the Ohio Supreme Court to strike down the state's ethnic intimidation law. By enhancing a defendant's penalty for an already punishable criminal act solely because he acted “by reason of” his bias, the statute has the effect of punishing the defendant for his thoughts. This is an infringement on the defendant's core First Amendment freedoms. The ethnic intimidation statute could also be held void under other constitutional challenges, including the arguments that it is overbroad and does not afford defendants equal protection under the law.

There are unprotected forms of expression under the First Amendment,164 but no matter how contemptible bigotry might be, it is not an unprotected class of speech or thought.165 Therefore, the state cannot punish the bigoted defendant for his thoughts, but is free to punish him for the criminal acts motivated by his bigoted thoughts.166 Ohio has statutes to punish these criminal acts without having to resort to the creation of a “thought crime.”

The ethnic intimidation statute was the Ohio legislature's well-intentioned response to the society-threatening problem of abhorrent racial and ethnic hatred and the crime motivated by this hatred.167 However, the greater societal problem is the “suppression of freedom of speech for all of us.”168 By invalidating the ethnic intimidation statute, the court has saved us from starting down that “slippery slope.” The court is protecting the First Amendment rights of speech and thought for all Ohio citizens by protecting those same rights for those who hold ideas we disdain.

164. Id.
165. Gellman, supra note 11, at 371.
166. Wyant, 597 N.E.2d at 458.
167. Id. at 451.
CREMEANS v. WILLMAR HENDERSON MFG. CO.: MUST MANUFACTURERS BECOME INVOLUNTARY INSURERS OF THEIR PRODUCTS IN OHIO'S EMPLOYMENT SETTINGS?

by Terese M. Wells

I. INTRODUCTION

If an employee voluntarily uses a machine which is required for him to perform his job, knowing that a safety device has been removed which exposes him to grave risk of injury, should he be able to recover from the manufacturer when he does in fact become injured by the machine? The effect of plaintiff's conduct on his recovery is a disputed issue in products liability actions arising from workplace injuries. The issue is especially controversial when the suit is grounded in strict liability in tort.


A manufacturer's liability under section 402A remains the same even when the product is used in an industrial employment setting.
setting. Moreover, Ohio recognizes that an "employer's intentional tort does not always relieve the manufacturer of strict products liability." Manufacturer's liability, therefore, is a separate and distinct issue from the employer's liability. The text of the Restatement, however, does not address the effect of plaintiff's conduct on recovery in a strict products liability action. Comment n to section 402A, however, rejects contributory negligence as a defense, but it permits voluntary and knowing assumption of risk to completely bar recovery.

Recently, plaintiffs injured in workplace settings have counteracted the assumption of risk defense. Attacking its harsh result, these plaintiffs have tried to carve out an exception to the assumption of risk defense in employment settings. Several courts which have faced the issue of whether manufacturers may raise the defense in cases arising from workplace injuries have reached varied results. Meanwhile, commentators have urged abrogation of assumption of risk in employment settings.

12. See, e.g., Micallef, 348 N.E.2d at 571. Plaintiff sustained injuries on the job while using equipment patently dangerous. He argued lack of volition on his part, claiming that subordinate workmen have little choice in obeying superior's instructions. The New York court rejected this argument. Id.
Ohio addressed this issue on February 6, 1991, when it decided Cremeans v. Willmar Henderson Mfg. Co.\textsuperscript{15} In Cremeans, the Supreme Court of Ohio held that “[a]n employee does not voluntarily or unreasonably assume the risk of injury which occurs in the course of his or her employment when that risk must be encountered in the normal performance of his or her required job duties and responsibilities.”\textsuperscript{16}

While this holding seems clear enough, the decision is significant since the court was divided on how the rule should be applied. Two of the justices held that economic compulsion on an employee’s volition is \textit{an issue to be determined by the fact-finder}, thus keeping the defense intact.\textsuperscript{17} Two other justices, however, held that the economic reality of today’s job marketplace makes it impossible, \textit{as a matter of law}, for an employee to voluntarily assume a known risk.\textsuperscript{18} If the court were to move toward this latter approach, manufacturers would be left without a viable defense and essentially become involuntary insurers of their products in Ohio’s employment settings.

To put the Cremeans decision into perspective, this casenote first presents a historical overview of the assumption of risk doctrine and its application to strict products liability actions. It then presents analyses of each of the views presented by the divided Cremeans court.

II. ASSUMPTION OF RISK DOCTRINE

The early English maxim \textit{volenti non fit injuria},\textsuperscript{19} together with common law negligence principles, gave rise to assumption of risk as a recognizable defense separate and distinct from contributory negligence.\textsuperscript{20} The term “assumption of risk” has been used by the courts to represent several different concepts, thus

\begin{itemize}
\item \textsuperscript{15} 566 N.E.2d 1203 (Ohio 1991).
\item \textsuperscript{16} \textit{Id.} at 1204, syllabus.
\item \textsuperscript{17} \textit{Id.} at 1209-10 (Brown, J., concurring). \textit{See infra} notes 100-109 and accompanying text.
\item \textsuperscript{18} \textit{Id.} at 1207. \textit{See infra} notes 80-99 and accompanying text.
\item \textsuperscript{19} “[I]f one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.” \textsc{Black’s Law Dictionary} 1412 (5th ed. 1979).
\item \textsuperscript{20} \textsc{Keeton et al., Prosser and Keeton on the Law of Torts} § 65 (5th ed. 1984).
\end{itemize}
creating a cloud of confusion around the doctrine. 21 Comment n to section 402A of the Restatement (Second) of Torts, the basis for Willmar's defense, adopted a very specific meaning of assumption of risk. 22

A. Historical Development

The defense of assumption of risk “finds its roots in the employee/employer relationship.” 23 “[B]eing a manifestation of laissez-faire economics,” 24 its purpose was to “give maximum freedom to expanding industry.” 25 United States courts held early on that as a matter of public policy, “an opposite doctrine would not only subject employers to unreasonable and often ruinous responsibilities,’ but would also encourage carelessness on the part of the employee.” 26

The earliest manifestation of the assumption of risk doctrine in master-servant situations was found in the English case of Priestley v. Fowler. 27 In Priestley, the English court developed the fellow-servant rule and held that the negligence of one servant causing injury to a fellow servant is not imputed to the

21. Id. § 68 (5th ed. 1984). (Prosser categorized the doctrine by three different perspectives: (1) The Express Consent Perspective, where the plaintiff gives express consent to the defendant in advance; (2) The Duty Perspective, where plaintiff impliedly consents by voluntarily entering a relationship with defendant knowing he will not protect him, and (3) The Misconduct Defense Perspective, where plaintiff is aware of the risk created by the defendant but he chooses to enter it anyway.).


24. Williamson v. Smith, 491 P.2d 1147, 1149 (N.M. 1971). Laissez-faire economics is a “doctrine that opposes governmental regulation of or interference in commerce beyond the minimum necessary for a free-enterprise system to operate according to its own economic laws.” THE AMERICAN HERITAGE DICTIONARY 711 (2d college ed. 1985). See also 13 ENCYCLOPEDIA BRITTANICA 598 (1957); and KEETON ET AL., supra note 20, § 80 (5th ed. 1984).

25. Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 59 (1943). See also 35 AM. JUR. 717; and Roscoe Pound, Economic Interpretation of Torts, 53 HARV. L. REV. 365, 373 (1940). The common law courts of the late nineteenth century created the doctrine to “insulate the employer as much as possible from bearing the ‘human overhead’ which is an inevitable part of the cost ... of the doing of industrialized business.” Tiller, 318 U.S. at 59.

26. Tiller, 318 U.S. at 59 (citing Tuttle v. Detroit, Grand Haven & Milwaukee Ry., 122 U.S. 189 (1887)).

master.28 The duty owed by a master to his servant was limited to “those matters in which the servant was unable to protect himself.”29 Thus, the general rule in master-servant situations was where a servant was able to protect himself, he was under a legal obligation to do so.

Shortly thereafter the United States adopted Priestley’s fellow-servant rule;30 however, the courts soon restricted it.31 Additionally, distaste for the harsh results of the defense influenced courts to further restrict assumption of risk as varied meanings of the doctrine developed.32

B. The Varied Meanings of Assumption of Risk

There are four distinct meanings of assumption of risk.33 The first distinction is based on the type of consent given by the plaintiff (express or implied). Implied assumption of risk is further distinguished by whether or not the defendant owes a duty to the plaintiff (primary or secondary implied assumption of risk). Finally, secondary implied assumption of risk is distinguished by the reasonableness of plaintiff’s conduct (strict or qualified secondary implied assumption of risk).


29. See Bohlen, supra note 27, at 461 (explaining Lord Abinger’s opinion in Priestley v. Fowler). “The duty ends where the servant’s power of self-protection begins.” Id.


31. Keeton et al., supra note 20, § 80, at 572. See Berea Stone Co. v. Kraft, 31 Ohio St. 287 (1877) and Union Pacific R.R. Co. v. Daniels, 152 U.S. 684 (1894). This trend in the case law to limit employer liability in negligence actions has subsequently been superseded by modern workers’ compensation statutes. Keeton, et al., at § 80. Workers’ compensation law is beyond the scope of this casenote. Generally, these statutes provide a compromise whereby the employee forgoes the opportunity to sue his employer for negligence in court. In turn, the employer must provide a safe workplace. Id.

32. This distaste was further reflected by use of the term “unholy trinity” to refer to the three common law defenses — contributory negligence, assumption of risk and the fellow-servant doctrine — which shielded employer liability prior to workers’ compensation legislation. See Keeton et al., § 80, at 569.

33. See infra notes 34-48 and accompanying text. Much of the controversy over the use of assumption of risk stems from its similarity to contributory negligence. See Blackburn v. Dorta, 348 So. 2d 287, 292 (Fla. 1977) (“We find no discernible basis analytically or historically to maintain a distinction between the affirmative defense of contributory negligence and assumption of risk.”). The distinction is minute. Contributory negligence is based on the objective reasonableness of plaintiff’s conduct, while assumption of risk is based on plaintiff’s subjective consent to encounter the risk. See Hildebrand v. Minyard, 494 P.2d 1328, 1330 (Ariz. Ct. App. 1972). Assumption of risk can exist regardless of the due care plaintiff owes himself. Id.
Consent\textsuperscript{34} manifests itself in one of two ways. Express consent occurs when the parties agree to relieve the defendant of a duty which would otherwise exist.\textsuperscript{35} Implied consent "is manifested by plaintiff's actions after he has been informed of the nature and magnitude of the specific danger involved."\textsuperscript{36} Since implied consent requires analyzing plaintiff's conduct to draw the inference, some courts liken it to contributory negligence and ignore its true basis and distinction in the common law.\textsuperscript{37}

Further confusion arises since, under common law, implied assumption of risk defines two different concepts.\textsuperscript{38} Primary assumption of risk means that the defendant was not negligent.\textsuperscript{39} It is premised on the notion that some activities have inherent risks which cannot be eliminated even with the utmost care, much less with reasonable care.\textsuperscript{40}

Implied assumption of risk also embraces the concept of secondary assumption of risk, an affirmative defense.\textsuperscript{41} Secondary assumption of risk applies when the defendant in fact breaches an owed duty to the plaintiff.\textsuperscript{42} Since the plaintiff realizes the posed risk and, nonetheless, willingly encounters it, plaintiff consents to the risk, thereby preventing his recovery.\textsuperscript{43}

\footnotesize{34. Consent is a "willingness in fact that an act or an invasion of an interest shall take place." RESTATEMENT (SECOND) OF TORTS § 10A (1965).
36. Hildebrand v. Minyard, 494 P.2d at 1330. Implied consent requires that (1) there was a risk of harm to plaintiff caused by defendant, (2) plaintiff had actual knowledge and appreciation of the risk and (3) plaintiff manifested his consent by voluntarily encountering the risk. Id.
37. Blackburn v. Dorta, 348 So. 2d at 292.
39. Id. Either defendant did not owe a duty or he did not breach a duty. Id.
40. Id. The typical example applying this doctrine is the spectator who attended a baseball game and sustained injuries from a flying baseball. The spectator assumed the risk of his injuries since the stadium owner could not reasonably make the activity safer. See Cincinnati Baseball Club Co. v. Eno, 147 N.E. 86, 87 (Ohio 1925). This meaning of assumption of risk formed the basis for the master-servant cases in the late nineteenth century. See Blackburn v. Dorta, 348 So. 2d 287, 290 (Fla. 1977).
41. Blackburn, 348 So. 2d at 290.
42. Id.
43. Id.}
Strict secondary assumption of risk is distinguished from qualified secondary assumption of risk.44 *Strict secondary assumption of risk* applies when plaintiff's conduct is reasonable under the circumstances.45 *Qualified secondary assumption of risk* applies when plaintiff's conduct is not reasonable under the circumstances.46 Because of this reasonableness element, courts find little analytical significance in distinguishing secondary assumption of risk from contributory negligence.47 Comment n to section 402A, however, explicitly retains the distinction for strict products liability actions.48

C. Assumption of Risk in Strict Products Liability Actions

Strict products liability actions under section 402A focus on the defective and unreasonably dangerous nature of the product.49 Mere contributory negligence is not a defense to a strict products liability claim.50 However, as stated in comment n to section 402A, the restaters adopted the affirmative defense of qualified secondary implied assumption of risk51 as a complete bar:

The form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.52

44. *Id.* at 291.
45. *Id.*
46. *Id.* Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977), illustrates the distinction with the following example. Defendant-landlord breached his duty of due care by allowing his tenant's premises to catch on fire. Plaintiff-tenant sustained injuries when he rushed into the burning house. Plaintiff's conduct was reasonable if he entered the flaming house to save his infant. Plaintiff's conduct was unreasonable if he entered the house to save a fedora. In both situations the courts deny plaintiff's recovery since he assumed the risk of injury by entering a burning house.
47. *Id.* at 292.
48. Restatement (Second) of Torts § 402A cmt. n (1965).
49. Restatement (Second) of Torts § 402A cmt. i (1965): "The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer." *Id.*
50. Restatement (Second) of Torts § 402A cmt. n (1965).
51. See supra notes 44-48 and accompanying text.
52. *Id.* Not all states still adhere to the harsh all-or-nothing rule. Comparative fault principles have muddied the waters and no national standard has emerged. *See Kenneth*
III. FACTUAL SUMMATION

In 1983, plaintiff-appellee Michael Cremeans was an employee of the Sohio Chemical Company ("Sohio"). In 1981, Sohio purchased a Wrangler front-end loader from Willmar Henderson Manufacturing Company ("Willmar") to retrieve fertilizer from its storage bins. Because of the low clearance and vertical obstructions at the bin’s entrance, Sohio ordered the front-end loader equipped without the standard roll over protective system ("ROPS"). Willmar agreed to take off the ROPS provided that Sohio assumed any liability arising from its removal.

Michael Cremeans' job was to operate the Wrangler loader. The fertilizer removal process required him to drive the loader into the bins, scoop up a bucket of fertilizer, back out of the bin, haul it to another location and dump the fertilizer into a weigh/mixing hopper.

On November 30, 1983, Michael Cremeans was transferring fertilizer from the bins to the hopper. The air that day was "moist" and "muggy" causing the stored fertilizer to become firmly compacted. Cremeans drove the Wrangler loader into the bin and scooped up a bucket of fertilizer. As he was backing
out, an avalanche occurred inside the bin. Large quantities of compacted fertilizer landed on the scoop of the loader and the back wheels raised off the ground from the weight on the bucket. Cremeans became wedged between the seat of the loader and either the door or one of the support bars.

Cremeans brought an action against Willmar under a strict liability in tort theory, alleging that the absent protective cage created a manufacturing defect. At the trial, Cremeans acknowledged that he was aware of the possibility of an avalanche occurring inside the bin when the fertilizer was moist and compacted. He also admitted that he was aware of the danger of operating the loader in the bins without its protective cage. He continued to operate the loader under these conditions despite his knowledge and appreciation of the risk of injury.

Willmar raised the affirmative defense of assumption of risk and the trial court granted Willmar summary judgment. On Cremeans' appeal, the court reversed the judgment, finding that a genuine issue of material fact existed as to whether Cremeans assumed the risk of his injuries. On February 6, 1991, the Supreme Court of Ohio, in a 5-2 decision, affirmed the court of appeals and remanded the cause for further proceedings.

IV. ANALYSIS

The Ohio Supreme Court, in Cremeans, held that "(a) employee does not voluntarily or unreasonably assume the risk of injury which occurs in the course of his or her employment when that risk must be encountered in the normal performance of his or

63. Id. at 3.
64. Id.
66. Id. at 1204. Cremeans also sought recovery from Willmar on a negligence theory and from Sohio on an intentional tort theory. Id. Since only the strict products liability action is of interest here, these actions will not be discussed.
68. Cremeans, 566 N.E.2d at 1205.
69. Id.
70. Id.
71. Id.
72. Id. at 1209.
her required job duties and responsibilities.” 73 Five justices agreed on the decision to remand the case, but only four agreed with the court’s rule. 74

Of the four justices creating the rule, two justices would bar the assumption of risk defense as a matter of law in employment settings. 76 These justices believe that an employee’s volition is destroyed and he is economically coerced into using a defective product else lose his job. 76 The other two justices would bar the defense of assumption of risk only when the employee was, in fact, forced to use the defective product. 77 A fifth justice would permit the defense of assumption of risk, but would allow the factfinder to consider working conditions and economic necessity in determining the employee’s volition. 78 Finally, the two dissenters would permit the defense of assumption of risk, disallow consideration of economic necessity, and authorize summary judgment if there were no genuine issues of material fact. 79 These differing views are the result of each justice focusing on a different aspect of the problem as they saw it. Each view will be discussed in the material which follows.

A. The Majority View — Make an Economic Necessity Exception

1. Justice Douglas’ Opinion

Justice Douglas 80 focused on the workplace setting to carve out an exception to the use of the assumption of risk defense as to both employers and manufacturers in any tort action against

73. Id. at 1204 (syllabus).
74. Id. at 1209. Justices Douglas, Sweeney, Brown, Resnick and Wright agreed to affirm the decision of the court of appeals. Chief Justice Moyer and Justice Holmes dissented.
75. Id. at 1207 (Douglas, J., with Sweeney, J., concurring).
76. Id.
77. Id. at 1209-10 (Brown, J., concurring and Resnick, J., concurring with Justice Brown’s opinion).
78. Id. at 1210-12 (Wright, J., concurring in part, dissenting in part). This moderate view comprised the fifth vote in the majority decision to remand the case and to allow the factfinder to determine the issue of assumption of risk.
79. Id. at 1212-13 (Holmes, J., dissenting). Chief Justice Moyer dissented “based upon the analysis of the law stated in the opinions of Justices Holmes and Wright.” Id. at 1212.
80. Justice Douglas was joined by Justice Sweeney. Id. at 1209.
them. Justice Douglas would bar use of the defense in the employment setting. According to Justice Douglas, policy considerations of today's marketplace dictate a change in the rule for this setting.

During the industrialization period of the early nineteenth century, there was complete mobility of labor, the supply of work was unlimited, and workers were viewed as free agents who accepted known risks of their chosen trade. Justice Douglas claimed that those factors are no longer prevalent in the job marketplace of the 1990s.

Advocating the elimination of the assumption of risk defense in employee/employer tort actions, Justice Douglas cited with approval a passage from a Washington case which identified current social policies to support abrogation of the defense. According to Justice Douglas, the defense of assumption of risk is no longer necessary or desirable in cases where injuries are sustained in the employment relationship.

81. Id. at 1205-09. Ironically, the defense evolved in this setting with the purpose of maximizing freedom to expanding industry. Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 59 (1943).
82. Id. at 1207.
83. Cremeans v. Willmar Henderson Mfg. Co., 566 N.E.2d 1203, 1206 (Ohio 1991) (quoting Siragusa v. Swedish Hosp., 373 P.2d 767 (Wash. 1962): In almost all areas of industrial activity, social insurance has replaced the common law rules of liability and defenses which grew out of the judicial inclination to foster a growing economy. No longer can it be said that a judicially-imposed doctrine of assumption of risk is necessary or desirable to protect expanding industry from being crippled by employers' responsibility for tortious conduct toward their employees. (Emphasis added.)
85. Cremeans, 566 N.E.2d at 1206.
86. Id. (citing Siragusa v. Swedish Hosp., 373 P.2d 767 (Wash. 1962). In Siragusa, the Supreme Court of Washington abolished the defense in an employee's negligence suit against her employer. Siragusa, 373 P.2d at 774. A nurse's aid was working at a wash basin when a patient pushed the door inward causing the metal door hook to strike the nurse in the back. Id. at 768-70. The court held that a servant does not assume the risks which arise from the master's negligence. Id. at 774.
Justice Douglas pointed to a recent Ohio appellate decision as support for the proposition that the abrogation of the assumption of risk defense in employment settings is not a foreign concept in Ohio. In *Prentiss v. Kirtz*, one of the three justices stated that assumption of risk in the employment setting should be abrogated as a matter of law because of economic compulsion on the employee. Justice Douglas quoted the passage as the opinion of the court.

Justice Douglas' point is well taken with respect to employee suits against employers. The defendant here, however, is not the employer, Sohio, but rather it is Willmar, the manufacturer of the allegedly defective product. To extend the rule and hold the manufacturer to the same degree of responsibility for safe workplaces as the employer, Justice Douglas relied on section 496E of the *Restatement (Second) of Torts* and his interpretation of comment b to that section.

The pertinent part of section 496E(2) provides: "The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct. . . ." Comment b to Section 496E provides:

The plaintiff's acceptance of the risk is to be regarded as voluntary even though he is acting under the compulsion of circumstances, not created by the tortious conduct of the defendant, which have left him no reasonable alternative. Where the defendant is under no independent duty to the plaintiff, and the plaintiff finds himself confronted by a choice of risks, or is driven by his own necessities

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(89. *374 N.E.2d 429* (Ohio Ct. App. 1977).)

(90. *Id.* at 431.)


(92. *Cremeans*, 566 N.E.2d at 1208.)

(93. *Restatement (Second) of Torts* § 496E(2) (1965).)
to accept a danger, the situation is not to be charged against the defendant.\textsuperscript{94}

Justice Douglas found significant the fact that Willmar demanded indemnity from Sohio before agreeing to the sale of the loader without its protective cage.\textsuperscript{95} He reasoned that Cremeans was put at risk as a result of the sale or by a combination of the sale of the loader and the conduct of Cremeans' employer.\textsuperscript{96} Willmar owed a duty to Cremeans to place safe products into the stream of commerce.\textsuperscript{97} Willmar breached this duty by selling the loader to Sohio without its protective cage.\textsuperscript{98} Therefore, Willmar's tortious conduct left Cremeans with no reasonable alternative course of conduct but to operate the loader in its unsafe condition.\textsuperscript{99}

2. Justice Brown's Opinion

Justice Brown\textsuperscript{100} concurred in the syllabus and judgment only.\textsuperscript{101} His opinion focused on the element of volition of the assumption of risk defense, rather than the setting where the injury occurred.\textsuperscript{102} He proposed a two-prong analysis which asks whether the employee truly voluntarily assumed the risk of dealing with the product or was forced to act by economic compulsion associated with the job.\textsuperscript{103} By examining the employee's behavior, his election to use the defective product can be categorized as either forced or voluntary.\textsuperscript{104} If his election was forced by economic necessity, then he did not voluntarily assume the risk.\textsuperscript{105}

\begin{itemize}
\item \textsuperscript{94} RESTATEMENT (SECOND) OF TORTS § 496E cmt. b (1965).
\item \textsuperscript{95} Cremeans v. Willmar Henderson Mfg. Co., 566 N.E.2d 1203, 1208 (Ohio 1991). Willmar's duty to Cremeans, however, arises from the manufacturer's putting the loader into the stream of commerce and not from the indemnification agreement between Willmar and Sohio. \textit{Id.} at 1209. See Volter v. C. Schmidt Co., 598 N.E.2d 35 (Ohio Ct. App. 1991) (a later consistent case holding that an employer's intentional tort does not always relieve a manufacturer from strict liability in tort).
\item \textsuperscript{96} Cremeans, 566 N.E.2d at 1208.
\item \textsuperscript{97} Id. at 1209.
\item \textsuperscript{98} Id. at 1208.
\item \textsuperscript{99} Id.
\item \textsuperscript{100} Justice Resnick agreed. \textit{Id.} at 1209.
\item \textsuperscript{101} \textit{Id.}
\item \textsuperscript{102} \textit{Id.} "The focus should not be directed to the setting where the injury occurs, but to whether the employee has voluntarily assumed the risk of using the defective product." \textit{Id.}
\item \textsuperscript{103} \textit{Id.} at 1209-10.
\item \textsuperscript{104} \textit{Id.} at 1210.
\item \textsuperscript{105} \textit{Id.} The doctrine "loses its basis in logic" where the election is involuntary. \textit{Id.}
\end{itemize}
other hand, if the employee's election was truly voluntary, then
the defense is available for use against him.\textsuperscript{106}

Justice Brown agreed with Justice Douglas that it does not
matter whether the defendant was the employer or the manu-
facturer.\textsuperscript{107} "It should make no difference whether the lack of
voluntary assumption stems from (1) conduct by the manufacturer
of the defective product, (2) conduct by the employer, or (3) some
other source such as unavoidable emergency. Volition is the
touchstone."\textsuperscript{108} Volition, however, according to Justice Brown, is
a question to be resolved by the factfinder.\textsuperscript{109}

\textbf{B. Dissenting View — Leave Assumption of Risk Intact}

\textit{1. Justice Wright's Opinion}

Although Justice Wright agreed with the judgment to remand
the case and deny Willmar summary judgment, he "vigorously"
dissenting from the syllabus law.\textsuperscript{110} Justice Wright focused on the
elements of assumption of risk and the factual nature of those
elements in his rationale.\textsuperscript{111} He proposed that the assumption of
risk defense remain intact and the elements of the defense be
resolved by the jury.\textsuperscript{112}

Justice Wright criticized the majority for "launch[ing] into a
diatribe about masters and servants and the horrors of laissez-
faire economics."\textsuperscript{113} Justice Wright pointed out that the defendant
in this appeal was not the oppressive employer trying to avoid
liability; rather it was the manufacturer, who does not owe the
same duties to employees as does an employer.\textsuperscript{114} According to
the majority, in Justice Wright's opinion, providing safe work-
places is the responsibility of everyone but the employee.\textsuperscript{115}

Using the exact same cases cited by the majority, Justice
Wright set forth the underlying proposition that most jurisdic-

\textsuperscript{106. Id.}
\textsuperscript{107. Id.}
\textsuperscript{108. Id.}
\textsuperscript{109. Id.}
\textsuperscript{110. Id. According to Justice Wright, the majority's rule "would turn a manufacturer
into a virtual insurer of its product in the workplace." Id.}
\textsuperscript{111. Id. at 1212.}
\textsuperscript{112. Id.}
\textsuperscript{113. Id. at 1210.}
\textsuperscript{114. Id.}
\textsuperscript{115. See Id.}
tions do not follow the "trend" desired by the majority. Justice Wright also had a problem with the majority's misuse of dictum from the Prentiss decision where only one justice proposed abrogating assumption of risk in employment settings.

In Justice Wright's opinion, the majority has "point[ed] the way the state should go without leaving manufacturers bereft of a defense in such situations." Although assumption of risk is harsh, even Justice Douglas would agree that strict liability in tort is not the sole means of redress for an injured employee. Justice Wright proposed that a plaintiff's knowing, voluntary, and unreasonable assumption of risk should remain intact; that it should be available as a defense to a defendant-manufacturer who does not control the injured employee; and that it should be resolved by a jury.

2. Justice Holmes' Opinion

Justice Holmes dissented from the majority and focused on the distinction between the relationship of an employee with his employer and that of an employee with the manufacturer of a

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116. Id. at 1210-11. In Johnson v. Clark Equip. Co., 547 P.2d 132 (Or. 1976), the Oregon court permitted consideration of working conditions as a factor in assessing the reasonableness of the employee's acceptance of a job-related danger. It did not eliminate assumption of risk as claimed by the majority. Cremeans, 566 N.E.2d at 1210-11. In Scott v. Dreis & Krump Mfg. Co., 326 N.E.2d 74 (Ill. App. Ct. 1975), the Illinois court did not abrogate the defense; it merely held that it was inappropriate when employee's injury was the result of inadvertence and momentary inattention. Cremeans, 566 N.E.2d at 1211. Even in Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140 (N.J. 1979), New Jersey "stopped short of abolishing the defense." Cremeans, 566 N.E.2d at 1211. In both Brown v. Quick Mix Co., 454 P.2d 205 (Wash. 1969) and Kitchens v. Winter Co. Builders, Inc., 289 S.E.2d 807 (Ga. Ct. App. 1982), the courts had a problem with applying assumption of risk as a matter of law. Cremeans, 566 N.E.2d at 1211. Even Jane P. North, Comment, Employees' Assumption of Risk: Real or Illusory Choice?, 52 TENN. L. REV. 35 (1984), cited by the majority to show a trend toward abrogation should be more carefully read to see that only one case (Suter) tends to support the majority's proposition. Cremeans, 566 N.E.2d at 1212. What the comment really points out is that most courts "have been reluctant in many cases to apply the doctrine as a matter of law." Id.


118. Id.

119. Id. Justice Wright noted Justice Douglas' opinion in Onderko v. Richmond Mfg. Co., 511 N.E.2d 388 (Ohio 1987): "It must be remembered, however, that this foreclosure of recovery on a strict liability theory does not deprive an injured plaintiff of all possible remedies. A plaintiff injured by a product is not limited to the theory of strict liability as the sole means of redress." Id.

120. Id. at 1212.

121. Chief Justice Moyer agreed. Id.
product used by the employee. According to Justice Holmes, the Ohio courts have never recognized an economic necessity exception to assumption of risk when the defense was raised by an employer. It is, therefore, inappropriate to extend this concept and negate the defense of assumption of risk when raised by a manufacturer.

For Justice Holmes, it was Sohio that was really the tortfeasor in this case. Sohio had a duty to provide a safe workplace, including safe tools and equipment. Sohio intentionally requested and purchased the loader to be equipped without its standard safety system. According to Justice Holmes, the majority is too "result-oriented," and it "ignores remedies available to injured employees under workers' compensation, or under intentional tort law...." "The unbelievably bad result of the majority opinion here is that the manufacturer becomes an insurer of his product whenever an employer coerces his workers into exposing themselves to unconscionable risk of injury." Justice Holmes also addressed the effect of comment b to section 496E of the Restatement (Second) of Torts. The key part, in Justice Holmes' opinion, is: "... plaintiff's acceptance of the risk is to be regarded as voluntary even though he is acting under the compulsion of circumstances, not created by the tortious conduct of the defendant ...." In Justice Holmes' opinion, placing a defective product into the stream of commerce, albeit tortious conduct, is not the equivalent of creating the compulsion of circumstances which deprived Cremeans of voluntary action. Cremeans was not compelled by Willmar to use the loader with-

122. Id. at 1212-14. The employer's duty to make the workplace safe is not imputed to the manufacturer. Id.
123. Id. at 1213.
124. Id.
125. Id.
126. Id.
127. Id. at 1204.
128. Id. at 1213. In the recent Ohio case, Van Fossen v. Babcock & Wilcox, 522 N.E.2d 489 (Ohio 1988), the court permitted an employee to recover from his employer on an intentional tort theory. It is clear from Van Fossen that the Ohio court has never intended to hold manufacturers liable for the tortious conduct of the employer.
129. Id.
130. Id. at 1213-14.
131. Id. at 1214 (quoting Restatement (Second) of Torts § 496E cmt. b (1965)).
132. Id.
out its protective cage. If there was any economic coercion, it was exerted by Sohio, not Willmar. Therefore, under section 496E, the concept of economic necessity does not prevent Willmar from raising the defense of assumption of risk. Justice Holmes concluded his opinion by citing cases from other jurisdictions which follow his views.

CONCLUSION

The Cremeans decision is important because it indicates Ohio's willingness to protect injured plaintiff-employees at the expense of defendant-manufacturers. Michael Cremeans sustained severe injuries while doing his job; this cannot be denied. However, it is equally unfortunate that Ohio's product liability laws are vulnerable to far-reaching theories to negate available defenses.

In Cremeans, the court tried to carve out an exception to its steadfast rule of assumption of risk. At the very least, the court frayed the edges of the doctrine by presenting a wide spectrum of views on the issue. Instead of focusing on how and why Cremeans sustained his injuries, the Ohio Supreme Court focused primarily on the setting where Cremeans was injured. If Ohio was concerned with the harsh treatment of assumption of risk, it could have chosen one of the other more palatable options on

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133. Id.
134. Id.

The defect was open and obvious, and the plaintiff knew about the hazards when he began employment and at all times thereafter. If he was unsatisfied with the conditions of labor, he might have chosen to work elsewhere. The defendant did not make him use the press. The fact that he chose to work suggests that he accepted the risks that were routinely incident to his employment in order to obtain the financial and other benefits of that employment. The various economic pressures of the labor market do not stem from the defendant manufacturer, but from the employers with whom the plaintiff does or might do business. The workers' compensation laws and the labor laws were designed to respond to those pressures, and there is no reason to modify the products liability law to make manufacturers responsible for the possible sins of employers.

RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 145 (1980).
its plate instead of leaving manufacturers to shoulder the burden.

136. The national trend is to merge assumption of risk with contributory negligence or comparative fault for strict products liability actions. The effect of plaintiff's conduct under this approach is to reduce rather than bar his recovery. Lewis Bass, Products Liability - Design and Manufacturing Defects § 4.33 (1986). See, e.g., Daly v. General Motors Corp. 575 P.2d 1162 (Cal. 1978); Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978); Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140 (N.J. 1979); and Dippel v. Sciano, 155 N.W.2d 55 (Wis. 1967). The court could have left assumption of risk completely intact and deferred to the Ohio General Assembly to fashion any exceptions to the doctrine or modify other applicable legislation (e.g., workers' compensation).
OHIO BLOWS THE LID OFF THE MEDICAL MALPRACTICE DAMAGE CAP: MORRIS v. SAVOY

by Lisa T. Meeks

I. INTRODUCTION

Nineteen seventy-five saw the medical and legal communities and the insurance industry in the United States in a turmoil dubbed by the media as the "medical malpractice crisis." Physicians, faced with escalating malpractice insurance premiums, threatened, and in some instances followed through with, work slow-downs and stoppages. Insurance carriers, faced with loss of profits, pulled out of the malpractice market. State legislatures rushed to avert what the media characterized as a national crisis threatening the quality of health care in our nation by enacting legislation that supposedly would alleviate the crisis. Ohio was no exception.

4. For more information on insurance carriers withdrawing from the malpractice market, see Glen O. Robinson, The Medical Malpractice Crisis of the 1970's: A Retrospective, 49 LAW & CONTEMP. PROBS. 5, § 9 n.23 (1986).
Legal scholars debated the merits and constitutionality of these reactions to the crisis following the onslaught of legislation. Ohio's hastily drafted Medical Malpractice Act [hereinafter "Act"] became effective on July 28, 1975. Ironically, it was not until 1991 that the Ohio Supreme Court considered the constitutionality of two of the Act's more controversial statutes enacted during the medical malpractice melee of 1975.

This article presents an analysis of the Morris v. Savoy decision against the backdrop of the perceived medical malpractice crisis of the mid-1970s. Other authors have noted the apparent cyclical nature of increases in medical malpractice insurance premiums. This article will attempt to explore the impact of the Morris decision within the context of the medical malpractice insurance crisis of the mid-1970s. It is hoped that in light of the decision in Morris and other state supreme courts considering similar topics, the next "crisis" will prompt the state legislatures to tackle the economic causes of the problem rather than apply a "band-aid" to the symptoms.

II. BACKGROUND

A. The Medical Malpractice Crisis

Until relatively recently, there was no such thing as a medical malpractice problem in the United States. Beginning in the 1930s

7. See Stephen R. Ripps, The Ohio Medical Malpractice Statute: An Analysis, 4 OHIO N.U. L. REV. 24 (1977) (predicting that the Ohio Medical Malpractice Act will inevitably face challenges to its constitutionality); See also, Stocker, supra note 2 (predicting that the cap on general damages would be found to be unconstitutional); See also, Martin H. Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications, 55 TEX. L. REV. 759 (1977) (Professor Redish's article was prepared for and funded by the American Hospital Association and predictably takes a more favorable view of the constitutionality of much of the types of legislation enacted during the "crisis" of the mid-1970s.).

8. Passage of the Act was completed in a little less than four months. See infra part II.C. The Ohio Legislative Services, primary drafters of the Act, studied the Act's potential problem areas and several members of the committee realized that "not all the problems had been resolved prior to passage." Stocker, supra note 2, at 669 n.4.


11. Id.

12. Robinson, supra note 4, at 5 ("The recent declaration by the American Medical Association of a medical malpractice 'crisis' requiring major legal reform inspires a sense of deja vu. We have, it seems, been here before."). See generally, Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988) (reviewing the constitutionality of tort reforms enacted to combat the medical malpractice "crisis" of the mid-1980s).

and escalating in frequency throughout the post-World War II era and into the 1960s, medical malpractice claims began to be perceived as a pervasive problem in the United States.\textsuperscript{14} In February of 1971, President Richard Nixon directed the Secretary of Health, Education, and Welfare to establish a Commission on Medical Malpractice.\textsuperscript{15} The purpose of the Commission was "to undertake an intensive program of research and analysis of the problems associated with malpractice claims against all categories of health care providers and institutions in both the Federal and private sectors."\textsuperscript{16} The results of the Commission's findings were contained in its report published in 1973 [hereinafter "HEW Report"].

Although the HEW Report found that there was less than one chance in 100,000 of a medical malpractice claim arising when a physician or dentist treated a patient,\textsuperscript{17} "the number of malpractice claims [had] been increasingly [sic] steadily, especially in certain parts of the country."\textsuperscript{18} In a comparison of percentage changes in claim files opened to claim files closed in 1970 for states with more than 100 files closed, Ohio ranked sixth overall with an 8.50\% increase in 1970.\textsuperscript{19}

Ironically, the Commission found that a medical malpractice incident was still a relatively rare event.\textsuperscript{20} However, the cost of premium rates from 1960 to 1970 increased 115\% for dentists, 262.7\% for hospitals, 540.8\% for physicians other than surgeons, and 949.2\% for surgeons.\textsuperscript{21} The situation was worsened by the fact that many insurers were "unwilling to accept the tremen-

\textit{Comm'n on Medical Malpractice} 1, 2 (1973) (Public Document reference: P.D. HE1.2: M46/ 10) [hereinafter "HEW"].
\textsuperscript{14} \textit{Id.} at 3.
\textsuperscript{15} \textit{Id.} at 2.
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.} at 6. The Commission’s study was based on a sampling of 20\% of the medical malpractice files closed in 1970 by 26 health-care providers.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.} at 7.
\textsuperscript{20} \textit{Id.} at 12. The Commission noted that in 1970 "a malpractice incident was alleged or reported for one out of every 158,000 patient visits to doctors." Further, a claim was "asserted for one out of every 226,000 patient visits to doctors." "Most patients have never suffered a medical injury due to malpractice . . . ." Finally, it was claimed that "if the average person lives 70 years, he will have approximately 400 contacts as a patient with doctors and dentists" yet "[t]he chances that he will assert a medical malpractice claim are one in 39,500." \textit{Id.}
\textsuperscript{21} \textit{Id.} at 13.
ously high risk associated with this type of coverage."’

Some insurers abandoned the market altogether.

The Commission reported that "[m]edical malpractice clearly has increased the cost of medical care" and that "the overall impact on the health-care delivery system is significant." The combination of the increases in premiums, some medical insurance carriers leaving the market, and intensive lobbying by the insurance and medical communities created a flurry of activity in state legislatures. "Something had to be done, or at least something had to appear to the relevant constituencies to be done." 

Although the leading study on a national level was that conducted by the Secretary of Health, Education, and Welfare, during 1975 more than forty states, including Ohio, conducted their own formal study of the malpractice problem in their individual states. Doctors, insurers, and attorneys pointed to each other as the root of the evil. The best characterization of the medical malpractice "crisis" is that there was not one "uniquely identifiable 'malpractice problem,' but rather, a complex of prob-

22. Redish, supra note 6, at 761 (quoting All Indus. Medical Malpractice Ins. Comm., The Problems of Insuring Medical Malpractice 1 reprinted in Hearing on Examination of the Continuing Medical Malpractice Insurance Crisis Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare, 94th Cong., 1st Sess. 184 (1975)).

23. Morris, 576 N.E.2d at 776 & n.13 (Holmes, J., concurring in part, dissenting in part) ("Buckeye Union Insurance Inc., one of Ohio's largest medical insurers, left the medical market." (quoting PICO: Just What Doctors Ordered, COLUMBUS DISPATCH, May 8, 1983 at H1, col. 3).)

24. HEW, supra note 11, at 12.

25. By 1975, the approximately eight-five insurance carriers on the national level who wrote malpractice insurance had decreased to five. Redish, supra note 7, at 760 n.4 (quoting Oregon Medical Ass'n v. Rawls, No. 421-496, slip op. at 1 (Ore. Cir. Ct. May 4, 1976), rev'd on other grounds, 276 Or. 1101, 557 P.2d 664 (1976) (remanded for further factual findings)).


27. Robinson, supra note 4, at 7.

28. This report was presented orally, no record of the presentation was made, and attempts in 1978 by David E. Stocker to obtain information from Senator Neal Zimmers, a co-sponsor of the Act, were unsuccessful. Stocker, supra note 3, at 675 n.38.


lems involving interacting medical, legal, sociological, psychological, and economic factors."  

The medical profession had undergone tremendous changes since the 1950s, including drastically expanded surgical techniques. These highly innovative techniques increased the time a patient was in the hospital, increased the cost of medical treatment (and therefore correspondingly increased the amount of a malpractice verdict), and increased the opportunity for physician error. Also cited was the deterioration of the doctor/patient relationship which resulted from the impersonal treatment given to many patients as they received medical treatment from a team of physicians and specialists.

Some commentators pointed to the insurance companies themselves for their participation in precipitating the "crisis." Because medical malpractice reflects only a small part of the insurance industry, insurance companies gave "scant attention ... to the risk and loss evaluations for this relatively minor line of insurance." Others noted that the insurance companies were unable to offset their losses by their investment returns due to their own inadequate investment strategies.

The role of the legal profession in the "crisis" was also evaluated. The HEW Report flatly stated that "[t]here is little doubt

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31. HEW, supra note 13, at 4. It is not the purpose of this article to provide the definitive analysis of what spawned the medical malpractice crisis in the 1970s. Rather, the causes cited by the HEW Report and other legal scholars are mentioned to provide a backdrop for an analysis of Morris v. Savoy.


33. Id.; Robinson, supra note 4, at 11-13.

34. The HEW Report noted four factors which may stimulate malpractice claims:

1) interpersonal problems between provider and patient leading to a breakdown in rapport during the course of therapy;

2) frustration with the manner in which specific complaints about ongoing or proposed modes of treatment, including complications, are handled or not handled;

3) unrealistic expectations by patients regarding the outcomes of medical treatment, based in part on misinformation and in part on problems of communication between patient and physician (including problems relating to obtaining consent for surgery);

4) a growing national trend toward suit-consciousness, health care consumerism, and other sociological stimuli to litigation.

HEW, supra note 13, at 25; see also Stocker, supra note 3, at 669-70.

35. Robinson, supra note 4, at 9.

that the law, lawyers, and the legal system are integral parts of the malpractice problem." The medical community attributed the increase in medical malpractice claims to aggressive lawyers. Expanded legal doctrines, such as res ipsa loquitur, the liberalization of the locality rule, and the expansion of the discovery rule, were all touted as being the source of the malpractice dilemma.

B. Legislative Responses

Different states facing different variations of the so-called "crisis" enacted a variety of legislative changes. A survey conducted from correspondence sent to the legislatures in all fifty states found that the reactions of the legislatures could be grouped under three general headings: limitations on amounts recoverable in a medical malpractice action; changes in substantive or procedural law; or alterations in the dispute resolution mechanism.

In general, the plethora of medical malpractice legislation took one or more of the following forms: the creation of commis-

37. HEW, supra note 13, at 27.
38. "A common assertion, especially in the medical community, is that the increase in malpractice claims in the 1960's or 1970's was the product of more aggressive pursuit of these claims by lawyers." Robinson, supra note 4, at 14.
40. Gouldin, supra note 32, at 527-30; Robinson, supra note 4, at 17. The locality rule (as it relates to medical malpractice) imposes a geographic limitation on those determining the standard of care required of a physician. A physician from a rural area would be held to a different standard of care than that required of a physician from a large urban area. Presumably, the physician from the large urban area has a greater opportunity to keep abreast of changes within his area of expertise. See Robinson, supra note 4, at 16.; See also, Gouldin, supra note 32, at 527-30.
41. HEW, supra note 13, at 30; Gouldin, supra note 32, at 525-27.
43. Carter et al., supra note 42, at 1417-18 (the division is for simplicity's sake as any comprehensive statute would be made up of several components which would interact to some extent. Id.).
sions to study the situation in the respective state; the creation of pooling devices such as Reinsurance Exchanges and Joint Underwriting Associations; the revision of the powers of professional licensing agencies and continuing education requirements; changing the methods of reporting malpractice claims; promotion of pretrial settlements through the use of medical malpractice screening panels or arbitration panels; changes in the state's civil practice such as revising what is contained in the complaint; modifying the applicable Statute of Limitations; revising the collateral source rule; limiting attorney's contingency fees; revamping consent requirements; and/or limiting the amount of damages that could be recovered.

C. Ohio's Medical Malpractice Act

Amended Substitute House Bill No. 682 [hereinafter "H.B. 682"] was introduced in the General Assembly of Ohio on April 15, 1975. As originally introduced, H.B. 682 did not contain a provision to cap damages, although the original proposal did abrogate the collateral source rule. Two months later, the House's Elections, Financial Institutions and Insurance Committee submitted a version of H.B. 682 to the House for approval. This

45. See, e.g., Am. Sub. H.B. No. 682, § 6(A) and (B).
46. See, e.g., N.Y. INS. LAW § 5501-5515 (McKinney 1985).
47. See, e.g., ARK. CODE ANN. § 17-80-104 (Michie 1992).
52. See, e.g., ILL. ANN. STAT. ch. 83, para. 22.1 (Smith-Hurd 1987), repealed by P.A. 82-280, § 19B-101 (effective July 1, 1982).
55. See, e.g., FLA. STAT. ANN. § 768.46 (West 1986), renumbered as FLA. STAT. ANN. § 766.103 (West Supp. 1993).
57. Supra note 6.
59. H.B. No. 682, lines 199 to 201, proposed R.C. 2743.02(C). The collateral source rule prevents an award to an injured person from being reduced by any compensation that the injured person may receive from a source wholly independent of the tortfeasor.
60. 136 House Journal 1217.
version contained a cap on general damages\(^6\) of $200,000. On June 17, 1975, the House approved this version by a ninety-two to two vote and H.B. 682 was sent to the Senate.\(^6\)

While in the Ohio Senate, section 2305.27, the section dealing with the collateral source rule, was amended to require "an award of damages [to be] reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery by the plaintiff, except life insurance or accidental death insurance proceeds."\(^6\) This motion passed by a vote of twenty-five to eight.\(^6\) The final form for the collateral source rule did not require an award to be reduced by insurance proceeds or by benefits received from an insurance policy or contract that had been paid for by the plaintiff or by the plaintiff's employer on his behalf.\(^6\)

Additionally, an attempt was made to limit "any medical claim not involving death" to a recovery of not more than "the total sum of five hundred thousand dollars for all classes of damages."\(^6\) The motion was defeated fourteen to eighteen.\(^6\) The final form of the damage cap limited recovery of general damages to $200,000.\(^6\)

House Bill 682, Ohio's Medical Malpractice Act, was signed into law on July 28, 1975. Section 8 of the Act declares it to be "an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity lies in the fact that immediate action is necessary to insure a continuance of health care delivery to the citizens of Ohio."\(^6\) House Bill 682 went into effect immediately.\(^7\) In the fifteen years that have followed, the Ohio Supreme Court has

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61. General damages are those which "naturally and necessarily result from the wrongful act or omission." 30 OHIO JUR. 3d Damages § 10 (1981). General Damages are apparently designed to compensate the injured party for his pain and suffering, rather than any economic harm that he or she may have suffered. Compare 30 OHIO JUR. 3D Damages §171 (1981) with 30 OHIO JUR. 3D Damages §172 (1981).

62. 136 House Journal 1217.
63. 136 Senate Journal 888.
64. Id.
65. 136 Senate Journal 950; 136 House Journal 1643-44.
66. Id. at 889 (emphasis added).
67. Id.
68. H.B. 682, supra note 6, at 2813.
69. Id. at 2843-44.
70. Id. at 2844.
ruled on the constitutionality of only three of the thirty-six statutes contained in the Act.  

III. MORRIS V. SAVOY  

A. Factual Background  

Ralph Morris was injured in an automobile accident on May 7, 1987. On May 12, neurosurgeon Dr. John A. Savoy operated on the broken bone in Morris' neck. The surgery left Morris paralyzed from the neck down. Morris and his wife sued Dr. Savoy for medical malpractice in United States District Court. Because malpractice was admitted, the case was tried only as to the question of damages. After the jury returned its damage award, Judge Sam Bell withheld final entry of the judgment pending certification to the Ohio Supreme Court of the following three questions:  

1. Whether R.C. § 2307.43, which limits recovery of general damages in any medical claim to two hundred thousand dollars ($200,000), violates the Ohio Constitution?  

2. If R.C. § 2307.43 is constitutional, does its limitations on awards of general damages apply to limit the aggregate recovery by all claimants for general damages arising out of a single medical claim to $200,000?  

3. If R.C. § 2305.27 is constitutional, does it compel the reduction of an award of damages in a medical claim by the amount of

71. See, Denicola v. Providence Hosp., 387 N.E. 2d 231 (Ohio 1979) (upholding R.C. 2743.43 regarding qualifications for expert medical witnesses); Beatty v. Akron City Hosp., 424 N.E. 2d 586 (1981) (upholding R.C. 2711.21(C) establishing arbitration panels in medical malpractice cases); see also a series of four cases dealing with various elements of R.C. 2305.11(A) and (B), Vance v. St. Vincent Hosp. & Medical Ctr., 414 N.E.2d 406 (Ohio 1980) (upholding the one-year statute of limitations for minors ten years or older); Schwan v. Riverside Methodist Hosp., 452 N.E.2d 1337 (Ohio 1983) (overruling Vance and holding that the different treatment afforded minors ten years and younger as compared to those over ten was unconstitutional); Opalko v. Marymount Hosp., Inc., 458 N.E.2d 847 (Ohio 1984) (explaining the holding in Schwan as invalidating only the pre- and post-ten year old distinction rather than the four-year limitation itself); Mominee v. Scherbarth, 503 N.E.2d 717 (Ohio 1986) (holding R.C. 2305.11(B) as unconstitutional as applied to minors).  
73. Id.  
74. Id.  
75. Id.
collateral benefits as defined in R.C. § 2305.27 that are payable in the future[7]

B. Holding

The Ohio Supreme Court held that R.C. 2307.43, which capped general damages in a medical malpractice action at $200,000, was an unconstitutional violation of the due process clause of the state constitution. This holding served as their response to the first and second questions. The court also held in considering the third question that R.C. 2305.27, which set limitations on the collateral source rule, was constitutional. The court found that the legislative intent in enacting the collateral source limitation was to reach future payments capable of being calculated with reasonable certainty.

1. The Majority Opinion

a. R.C. 2307.43—The Damage Cap

The first statute considered by the Ohio Supreme Court in Morris was section 2307.43 which limited the plaintiff's recovery of general damages to $200,000. The constitutionality of the statute was analyzed on both due process and equal protection grounds.

For the due process analysis to the damage cap, the standard of review was that applied by the court in Mominee v. Scherbarth. The standard required a twofold analysis. A "legislative enactment will be deemed valid on due process grounds '... [1] if it bears a real and substantial relation to the public health,

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76. Id.
77. Id. at 768. The court "stopped short of finding the statute defective on equal protection grounds, despite the disparate treatment within the class." Id. at 772.
78. Id. at 768.
79. Id.
80. Id.
81. H.B. 682, supra note 6, at 2813.
82. Mominee v. Scherbarth, 503 N.E.2d 717 (Ohio 1986). Mominee combined the appeals of four different medical malpractice actions of minors that had been barred by the Act's statute of limitations. The single issue certified for appeal was whether R.C. 2305.11(B) violated the due process or due course of law provision of the Ohio Constitution as applied to minors. Id. at 717-19.
safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary." 83

For the first part of the due process analysis, the court noted that the language of H.B. 682 indicated the legislature clearly intended to try to control malpractice insurance rates. 84 H.B. 682 required the state Superintendent of Insurance to report annually on the effectiveness of sixteen of the act's thirty-six statutes, 85 although the damage cap was not among the sixteen statutes. 86 The court placed great importance on the fact that because the damage cap was not included among these statutes, the legislature "obviously believed" that the damage would not have an impact on insurance premiums. 87 Noting that a similar observation provided the rationale for the Mominee court's decision, the Morris court concluded that there was no rational connection between medical malpractice insurance rates and damage awards exceeding $200,000. 88

The Court noted the lack of evidence to support the proposition that a rational connection existed between awards over $200,000 and medical malpractice insurance rates. 89 In support of its rationale, the court cited Lucas v. United States, a Texas Supreme Court decision which struck down the Texas statutory limitation on medical malpractice damages. 90 In Lucas, the Texas court claimed that the limitation on damages was "unreasonable and arbitrary." 91 The court concluded that "there [was] no relationship between a damage cap and increases in insurance rates ... given that less than .6% of all claims brought are for over $100,000." 92 Likewise, information contained in three amici briefs in the instant case noted a 1987 study of the Insurance Service Organization that found that the savings from a $250,000 damage cap was "marginal to nonexistent." 93

84. Id. at 770.
85. H.B. No. 682, supra note 6, at 2842.
86. Id.
87. Morris, 576 N.E.2d at 770.
88. Id.
89. Id. at 770 (Lucas v. United States, 757 S.W.2d 687 (Tex. 1988)).
91. Id. at 691.
92. Id. (citing Michael T. Sumner, The Dollars and Sense of Hospital Malpractice Insurance, 9 (1979)).
In examining the second part of the due process analysis, that is, whether the legislation is irrational and arbitrary, the court quoted with approval an opinion of the Court of Appeals for Stark County. The court of appeals determined that the damage cap "irrationally and arbitrarily impose[d] the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice."94

Based on these two conclusions, the court determined that section 2307.43, the Act's cap on general damages, was an unconstitutional violation of due process in that "it [did] not bear a real and substantial relation to public health or welfare and further because it [was] unreasonable and arbitrary."95

The damage cap was also submitted to an equal protection challenge.96 The standard of review for such a challenge is that articulated in Schwan v. Riverside Methodist Hospital.97 In Schwan, an equal protection analysis that does not involve either a fundamental right98 or a suspect class99 must employ the "rational basis" test.100 The "rational basis" test requires that the statute be upheld "if there exists any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective."101 The burden is on the one challenging the statute to show that there is no rational basis for creating the class, or that those within the class are receiving unequal treatment.102

94. Id. (quoting Nervo v. Pritchard, No. CA-6560, slip op. at 8 (5th Dist. Ohio Ct. App. June 10, 1985)).
95. Id.
96. Id.
97. 452 N.E.2d 1337 (Ohio 1983).
98. See, Fundamental rights are those rights "explicitly or implicitly guaranteed by the Constitution." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). Examples of those rights deemed "fundamental" are the right to vote (see, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)), the right of interstate travel (see, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969)), and the right to criminal appeal (see, e.g., Griffin v. Illinois, 351 U.S. 12, reh'g denied, 351 U.S. 958 (1956)).
99. A class is suspect when the class is saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). Examples of suspect classes include classes based on race, see, e.g., McLaughlin v. Florida, 379 U.S. 184 (1964), nationality, see, e.g., Korematsu v. United States, 323 U.S. 214 (1944); or alienage, see, e.g., Graham v. Richardson, 403 U.S. 365 (1971).
At the outset, the court acknowledged that the Act juxtaposed the class of medical malpractice victims against the class of all other tort victims. The threshold inquiry must then be whether reasonable grounds existed for the distinction made between those within and those without the class. The court refused to question the legislature’s determination that a medical malpractice crisis existed. Nor did the court choose to second-guess the legislature’s determination to respond as it did in enacting the Act. The court did state, though, that the “[l]egislation must apply alike to all persons within a class.”

The Morris majority found that the damage cap distinguished within the class of medical malpractice claimants on two levels. First, it applied only to claims not involving death. Second, the limitation on damages treated those more seriously injured by medical malpractice differently from the rest of the class by possibly denying these victims a full recovery.

Justice Wright reiterated that the court’s role in reviewing the equal protection challenge did not include ruling on the wisdom of a legislative pronouncement. Applying the Schwan standard in which “any conceivable set of facts” allows the legislation to pass a “rational relationship” review, the court stopped short of finding the damage cap in violation of equal protection. The court did, however, urge legislative “consideration” of a statute that created such disparate treatment among members of the class.

b. R.C. 2305.27—The Collateral Source Rule

The Morris court considered two questions concerning section 2305.27, the section which deals with the partial abrogation of

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103. Id.
104. Id. (citing State v. Buckley, 243 N.E.2d 66 (Ohio 1968). “Class Legislation [must] apply alike to all persons within a class, and that reasonable grounds exist for making a distinction between those within and those without a designated class.” Id. at 71.
105. Id.
107. Id. (quoting Porter v. Oberlin, 205 N.E.2d 383, para. 2 of syllabus (Ohio 1965)).
108. Id. at 771-72.
109. Id. at 771.
110. Morris, 576 N.E.2d at 772.
111. Id.
112. Id.
113. Id.
the collateral source rule.\(^{114}\) First, the court was asked to determine its constitutionality.\(^{115}\) Second, if the section was found to be constitutional, was it then applicable to collateral benefits that were payable in the future.\(^{116}\)

The court's constitutional analysis of the collateral source rule employed both an equal protection and due process approach.\(^{117}\) In considering the equal protection challenge, the court noted that although the Act created a class distinction between medical malpractice victims and all other tort victims, within the class of medical malpractice victims itself no internal distinction among class members existed.\(^{118}\) In other words, the court determined that because all class members must "confront the same setoff of benefits from collateral sources ... no constitutional infirmities involving equal protection" exist.\(^{119}\)

As a threshold matter to its due process analysis, the court noted that the collateral source rule, like the damage cap, was not included in the list of statutes to be surveyed by the state Superintendent of Insurance.\(^{120}\) However, in contrast to the damage cap, the collateral source rule's limitation on only certain types of double recovery was found to pass the due process analysis.\(^{121}\) Although the court could not conclusively determine that there was "a substantial relationship between the setoff and malpractice insurance rates," neither was it "unreasonable or arbitrary to deny a double recovery."\(^{122}\)

The court distinguished the damage cap from the collateral source limitation by noting that the damage cap clearly was detrimental to the victim of medical malpractice.\(^{123}\) In the case of partially abrogating the collateral source rule, "[s]uch a setoff may inure to the benefit of the tortfeasor, but it does not do so to the detriment of the victim."\(^{124}\) The court, therefore, found the section constitutional.

\(^{114}\) Morris, 576 N.E.2d at 768.
\(^{115}\) Id.
\(^{116}\) Id.
\(^{117}\) Id. at 772.
\(^{118}\) Id.
\(^{119}\) Id.
\(^{120}\) Id.
\(^{121}\) Id.
\(^{122}\) Id.
\(^{123}\) Id.
\(^{124}\) Id.
As for the majority's consideration of whether future payments from collateral sources should reduce the damage award, the court first looked to the language of the statute. The statute provides that "an award of damages ... shall be reduced by any other collateral recovery for medical and hospital care, custodial care or rehabilitation services, and loss of earned income." The court determined that the language of the statute supported its holding that any future payments from worker's compensation should be deducted from the jury award for future lost wages. The only caveat to this was that the future payments must be ascertainable within a reasonable degree of certainty.

2. The Concurring Opinions

Morris elicited three additional opinions. Justice Brown concurred separately; Justice Holmes concurred in part and dissented in part; Justices Sweeney and Resnick concurred in part and dissented in part.

Justice Brown's concurrence dealt with the effect of the collateral source rule on workers' compensation benefits, an issue that had not been certified for consideration by the district court. Because this facet was not certified for review, Justice Brown warned that any pronouncement that the court might make on the subject would be purely advisory and "it is well-settled that this court does not indulge itself in advisory opinions."

Justice Holmes agreed with the majority's findings as to the constitutionality of R.C. 2305.27 and the application to future

125. Id. at 773.
126. Id. (emphasis added by the Court) quoting OHIO REV. CODE ANN. § 2305.27 (Baldwin 1991).
127. Id.
128. Id.
129. Id. (Justice Douglas did not participate).
130. Justice Brown reviewed the court's position on workers' compensation laws, noting that the workers' compensation laws are "‘founded upon the principle of insurance.’” (quoting, State, ex rel. Crawford v Indis. Comm’n. 143 N.E. 574, 575 (Ohio 1924)). Workers' compensation falls within the purview of "‘an insurance scheme whereby employers pay for ‘insurance’ coverage to compensate their employees for injuries sustained during the course of employment.’" Morris v. Savoy, 576 N.E.2d 765, 774 (Ohio 1991). Therefore, workers' compensation benefits may actually fall within the collateral benefits excluded from reduction by the collateral source rule. Id. at 773-774 (Brown, J., dissenting) (citation omitted).
payments of the collateral source rule, as well as the constitutionality of the damage cap under the equal protection analysis.\textsuperscript{132} He dissented, though, from the majority finding that the damage cap was unconstitutional under the due process analysis.\textsuperscript{133}

Justice Holmes criticized the majority for its lack of deference to legislative enactments as being presumptively constitutional.\textsuperscript{134} According to Justice Holmes, the fact that the statute capped only noneconomic harm was an important distinction in applying the "rational basis" standard of review. Applying a rational basis standard of review,\textsuperscript{135} Justice Holmes would hold that the damage cap passed both an equal protection and due process analysis.\textsuperscript{136}

In a lengthy opinion, Justice Sweeney, joined by Justice Resnick, concurred in part and dissented in part. Justice Sweeney agreed that the damage cap violated the Due Process Clause of the Ohio Constitution.\textsuperscript{137} Unlike the majority, he also concluded that the statute violated several other provisions of the Ohio Constitution,\textsuperscript{138} most notably the Ohio Constitution's guarantee

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\textsuperscript{132} Id. (Holmes, J., concurring and dissenting in part).
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 775-77. Under this standard of review, the statute should be upheld absent proof of arbitrariness, irrationality or unreasonableness of the legislature. Legislatures can modify common law so long as the legislation does not interfere with vested property rights and the legislation rationally relates to permissible legislative objectives. First, Justice Holmes determined that the limitation did not interfere with a vested property right. Second, citing the reports and analysis given the "crisis" by the General Assembly, Justice Holmes concluded that the damage cap was reasonably related to a legitimate legislative objective. Justice Holmes noted with approval the California Supreme Court decision of \textit{Fein v. Permanente Medical Group} upholding a legislative cap on general damages as opposed to a cap on all damages. (\textit{Fein v. Permanente Medical Group}, 695 P.2d 665, 681 (Cal. 1985)).

\textsuperscript{136} Morris v. Savoy, 576 N.E.2d 765, 774 (Ohio 1991). Noting that the cap applied only to noneconomic rather than economic damages, medical malpractice victims may recover all of their pecuniary harm, all expenditures for medical treatment, and any other loss due to the injury. The medical malpractice plaintiff whose injury resulted in death could recover all of both his economic and noneconomic damages. Additionally, Justice Holmes noted that the damage cap does not eliminate the victim's recovery for general damage, but merely limited the recovery to $200,000. \textit{Id}. at 774-775.

\textsuperscript{137} \textit{Id}. at 777 (Sweeney, J., dissenting).

\textsuperscript{138} Just to highlight the extensive dissent, Justice Sweeney agreed that the damage cap violated due process, but disagreed as to the standard of review to be used. Because a fundamental right, \textit{i.e.}, trial by jury, was implicated, Justice Sweeney would have subjected the statute to strict scrutiny. Again, under the equal protection analysis where a fundamental right is involved, the correct standard would be strict scrutiny. Justice Sweeney also found the damage cap to violate the Ohio Constitution's open courts and special privileges provisions. \textit{Morris}, 576 N.E.2d at 777-788.
of trial by jury. Additionally, Justice Sweeney would have held the collateral source rule unconstitutional for many of the same reasons.

C. Analysis and Impact of the Morris Decision

A function of the law of torts is to provide compensation for an individual’s losses that occur within the scope of that individual’s legally protected interests. A major consideration in distributing the loss is the relative capacity of the parties to bear the loss.

The Ohio General Assembly, in enacting the Ohio Medical Malpractice Act, attempted to alleviate a problem in the medical malpractice insurance industry and the medical profession. Part of the General Assembly’s solution was to limit the recovery available to the medical malpractice plaintiff. The Act, therefore, was an attempt to distribute the loss among the parties affected by a medical malpractice damage award: the victim, the physician, and the insurance industry.

The Act itself, like similar legislation from the mid-1970s exists as a response to a crisis, the legitimacy of which is at least arguable. In hindsight it is unfair to try to debate the relative merits of the General Assembly’s reaction to the crisis. However, all state legislation can ultimately be measured against the mandates of that state’s constitution. Morris v. Savoy presented the Ohio Supreme Court the opportunity to consider the constitutionality of the Act’s damage cap and the collateral source rule.

The most interesting aspect of the majority’s decision is that the court achieved different results in each of its analyses. First,

139. Id. at 784 (citing OHIO CONST. art. I, § 5.) Justice Sweeney first examined article I, section 5, of the Ohio Constitution which he asserted protected a fundamental constitutional right, i.e., the right to a trial by jury. Acknowledging that not all causes of action are protected by article I, section 5, Justice Sweeney reasoned that plaintiff’s medical malpractice action in the instant case fell within the purview of actions protected by the constitutional guarantee. Therefore, allowing the damage cap to reduce damages awarded by the jury “substantially erodes that sacred and fundamental constitutional right.” Id. at 777-779.


142. Id. § 4, at 24.

143. See supra part II.A-B and accompanying notes 13-56.
the damage cap was found to be unconstitutional under a due process analysis, yet constitutional under an equal protection challenge. Second, the collateral source rule was held constitutional under both provisions.

A cursory reading of the opinion would credit the disparate results to the fact that a more rigorous standard of review was employed in the due process analysis. However, the disparate results occurred because the ultimate underlying purpose of the court was to once again fairly allot the losses in a medical malpractice action. Consistent with this objective, the court reached different conclusions as to the constitutionality of the two provisions.

For instance, although the collateral source rule does limit the plaintiff’s recovery, it limits the recovery only as to certain sources, and in a sense, only as to what would amount to a double recovery in some instances. The damage cap, in the worst case scenario, would actually prevent the full recovery of a grossly injured malpractice victim.

To accomplish the objective of fairly allocating costs, in considering the damage cap, the court narrowly defined the legislative purpose of the Act. In the “substantial relation” prong of the due process challenge to the damage cap, the court looked outside the stated purpose of the Act as contained in section 8 which declared “the Act to be an emergency measures ... to insure a continuance of health care delivery to the citizens of Ohio.” Instead, the court narrowly articulated the legislative objective of the Act (and therefore the damage cap) to be the lowering of medical malpractice insurance premiums. The narrow definition of the legislative purpose allowed the court to determine that no “substantial relation” existed and therefore the damage cap was declared unconstitutional under a due process analysis.

144. Justice Sweeney noted that “the majority cannot reasonably conclude that R.C. 2307.43 violates due process on the one hand but does not violate equal protection on the other hand. It is literally ‘hornbook’ law that the analyses for due process and equal protection are identical, and that the only substantial difference between substantive due process and equal protection is that legislation reviewed under equal protection always involves a classification.” Morris, 576 N.E.2d at 781-82. (citing JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW §§10.7 & 11.4, at 348 and 369 (4th ed. 1991).
145. H.B. 682, supra note 6, at 2843-44 (emphasis added).
The court's articulation of the legislative objective was based on section 5 of the Act which required a report to the General Assembly by the Superintendent of Insurance. The superintendent was to assess the effectiveness of sixteen sections of the Act "in reducing medical malpractice insurance premiums." Because the damage cap was not listed among those provisions contained in section 5 and because no independent evidence was submitted "to buttress the proposition that there [was] a rational connection between awards over $200,000 and malpractice insurance rates," no substantial relationship was found to exist.

Narrowly articulating the objective allowed the court to more closely scrutinize the link between the legislation and the objective as well as, in a sense, conduct its own judicial fact-finding. As Justice Holmes noted, "[t]he first general principle which this court must adhere to in ... any review of the constitutionality of a legislative enactment is the firmly established rule that legislative acts enjoy a strong presumption of constitutionality .... Although the majority seems to acknowledge this standard of review, it proceeds to give it little heed."

It is in the second prong of the court's due process analysis and also in the rationale of the collateral source rule part of the opinion, that the court's concern for fairly allotting the losses in a malpractice damage award is most clearly seen. The only rationale offered for the "irrational and arbitrary" nature of the damage cap is an excerpt from an unreported decision. The court noted with approval that "it is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice."

The class created by the collateral source rule consists of plaintiffs asserting a "medical claim." The court is careful to note that the plaintiff's recovery is not reduced by benefits from insurance policies that have been purchased by either the plaintiff or his employer. No "substantial relationship between the setoff

147. H.B. 682, supra note 6, at 2842.
149. Id. at 774 (Holmes, J., concurring and dissenting in part).
151. Id. at 772.
152. Id.
and malpractice insurance rates" clearly exist. However, the court is satisfied that the collateral source rule passed constitutional muster on the basis that "[s]uch a proposition surely does not offend fundamental fairness. Such a setoff may inure to the benefit of the tortfeasor, but it does not do so to the detriment of the victim as does the damage cap."\(^{154}\)

Clearly, the court is concerned with notions of fairness as it relates to the allocation of the burden of loss. While the damage cap unfairly shoulders the plaintiff with that burden, the collateral source rule is at least one means of spreading the burden among the plaintiff and the other parties without unduly burdening the innocent party.

**CONCLUSION**

One commentator has noted that "[b]y the end of the 1970s, the momentum for institutional change and legal reforms was spent. Whether the changes and reforms solved the underlying problems or merely appeared to do so, they did have the immediate effect of dissipating the crisis atmosphere that had earlier prevailed."\(^{155}\) Unfortunately, dissipating a crisis atmosphere and unwinding the tangle of factors that precipitated the crisis in the first place are two distinct concepts.

By declaring Ohio's general damage cap on medical malpractice claims unconstitutional, the Ohio Supreme Court sent a resounding message to tort reformers who would cure the "crisis" at the expense of the plaintiff. Justice Holmes correctly noted that other state legislatures that have invalidated damage caps have been much more likely to do so when the caps were on the victims total recovery, rather than limited to general damages. However, it is important to remember that although pain and suffering, loss of society and companionship and mental anguish are not economic damages, they are still damages.

The *Morris* decision places the plaintiff back in an equation that previously considered the physician, the insurance company, and the perception of the legislator's constituency. It is decidedly unfair to put society's burden on the shoulders of the one least

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153. Id.
154. Id.
155. Robinson, supra note 4, at 6.
able to bear that burden—the grossly injured medical malpractice victim, especially in light of evidence that limiting damages does not reduce medical malpractice premiums.156 Hopefully the next medical malpractice “crisis” will be met with thoughtful legislation that attempts to solve the underlying problems and spreads society’s burden among those who can better afford their fair share.

156. “In 1980, a study of closed insurance claims released by the National Association of Insurance Commissioners indicated that the wave of legislative reform enacted in the mid-1970’s had done little to alleviate the problems state legislatures had set out to cure.” O’Connell et al., supra note 5, at 386.