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Casenotes and Statute Notes

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COURT PROCEDURE—EVIDENCE OF HYPOTHETICAL TAX LIABILITY & CAUTIONARY JURY INSTRUCTION ON NON-TAXABILITY OF AWARD PERMISSIBLE—Evidence of Decedent's Hypothetical Federal Tax Liability Is Admissible To Aid Computation of the Survivor's Pecuniary Loss and a Jury Instruction that the Award Is Non-Taxable Is Permissible in a Wrongful Death Action Tried under Illinois Law by a Federal Court Sitting in Diversity. *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 701 F.2d 1189 (7th Cir.), *cert. denied,* 104 S. Ct. 204 (1983).

On May 25, 1979, American Airlines Flight 191 lost an engine and crashed shortly after takeoff from Chicago's O'Hare International Airport, killing all two hundred seventy-one passengers.[1] Among those killed was Victoria Chen Haider, a resident of Illinois.[2] A wrongful death action brought by her husband[3] against American Airlines and McDonnell Douglas Corporation (MDC) was consolidated in federal district court for pretrial purposes with over one hundred other pending actions[4] by order of the Judicial Panel on Multidistrict Litigation.[5] The DC-10 jet involved in the crash was designed and built by MDC, and American Airlines was the owner of the jet.[6] Federal jurisdiction was based on diversity of citi-

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[1] *In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 644 F.2d 594, 604 (7th Cir. 1981).

[2] *In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 526 F. Supp. 226, 227 (N.D. Ill. 1981).

[3] *Id.*

[4] *Id.*

[5] *In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 476 F. Supp. 445 (J.P.M.D.L. 1979). When several civil actions are pending in different districts involving common questions of fact, the Judicial Panel on Multidistrict Litigation may transfer the pending actions to any district for coordinated or consolidated pretrial proceedings upon the panel's determination that such a transfer would further ends of convenience of witnesses and parties and would promote justice and efficiency. 7 WEST'S FEDERAL PRACTICE MANUAL. § 8616 (M. Volz 2d ed. 1970) Such transfers are often made in the case of air disasters.

[6] 644 F.2d at 604. MDC is a Maryland corporation with its principal place of busi-

zenship.[7] The Illinois wrongful death statute was found applicable.[8]

Plaintiff Haider sought to block MDC and American Airlines from submitting evidence regarding decedent's hypothetical federal tax liability and to preclude a cautionary jury instruction on the non-taxability of the award.[9] The United States District Court for the Northern District of Illinois held it was bound to apply Illinois law[10] under the principles of *Erie Railroad v. Tompkins*.[11] The district court determined that Illinois law would bar both the evidence and the jury instruction.[12] The district court, however, confessed its own uncertainty in its characterization of both the evidence and

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ness in Missouri. *Id.* American Airlines is a Delaware corporation with New York as its principal place of business at the time of the crash. *Id.*

[7] 526 F. Supp. at 227; 28 U.S.C. § 1332 (1976).

[8] 526 F. Supp. at 228. The Illinois Wrongful Death Act, ILL. ANN. STAT. ch. 70 § 2 (Smith-Hurd 1982), provides in part:

> Every action shall be brought by and in the names of the personal representative of such deceased person, and except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injures resulting from such death, to the surviving spouse and next of kin of such deceased person.

Id.

[9] 526 F. Supp. at 226-28. Both plaintiff Haider and defendant MDC filed motions *in limine* seeking pre-trial determinations of both issues. *Id.*

A motion *in limine* is usually made before or shortly after the beginning of a jury trial for a protective order against the introduction of questions and statements which are irrelevant or prejudicial. BLACKS LAW DICTIONARY 914 (5th ed. 1979). Defendants MDC and American Airlines sought to have the following instructions given:

> If you decide to award any damages to the plaintiff, your award will be exempt from any income taxes; therefore, in fixing the amount of your award, you should not be concerned about or consider the effect of taxes on the award.

526 F. Supp. at 227.

[10] 526 F. Supp. at 232.

[11] Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The Court in *Erie* held that federal courts in diversity cases must apply state substantive law (whether statutory or common) to issues not governed by federal law. *Id.* at 78. *Erie* overruled Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), which held that in matters of general jurisprudence federal courts were not bound by state common law as declared by its highest courts. 304 U.S. at 79. The twin aims of *Erie*, as enunciated in Hanna v. Plumer, 380 U.S. 460 (1965), were the "discouragement of forum shopping and avoidance of inequitable administration of the laws [as between citizens and non-citizens]." *Id.*

[12] 526 F. Supp. at 231.

instruction issues as substantive rather than procedural.[13] The characterization of the two issues as substantive would mean that Illinois law would control instead of the law of the federal forum.[14] Because of its uncertainty in the correctness of its characterization, the district court granted both plaintiff's and defendent's motions for certification of the question to the Court of Appeals for the Seventh Circuit for resolution.[15]

The Seventh Circuit Court of Appeals was faced with two issues.[16] First, whether, in a diversity action applying the Illinois wrongful death statute,[17] evidence could be introduced regarding decedent's hypothetical tax liability on projected earnings.[18] Second, whether a proposed cautionary jury instruction that any award would be non-taxable to the recipient was properly excluded.[19] *Held, reversed.* Evidence of decedent's hypothetical federal tax liability is admissible to aid computation of the survivor's pecuniary loss and a cautionary jury instruction that the award is non-taxable is permissible in a wrongful death action tried under Illinois law by a federal court sitting in diversity. *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 701 F.2d 1189 (7th Cir.), *cert. denied*, 104 S. Ct. 204 (1983).

I. THE INCOME TAX PROBLEM—STOKES TO LIEPELT

One of the recognized elements of recovery in both personal injury[20] and wrongful death actions is compensation for loss of future earnings.[21] In the case of airline disasters, there are typically citizens of many states and countries involved.[22]

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[13] *Id.* at 233-34.

[14] *See supra* note 11.

[15] 526 F. Supp. at 233-34. The district court certified the questions to the Court of Appeals for the Seventh Circuit under 28 U.S.C. § 1292(b) (1976). 526 F. Supp. at 234.

[16] *See infra* notes 194-196.

[17] *See supra* note 8.

[18] *See infra* note 195.

[19] *See infra* note 196.

[20] J. STEIN & R. CHASE, DAMAGES AND RECOVERY §§ 58, 59 (Supp. 1982).

[21] W. PROSSER, TORTS § 127 (4th ed. 1971).

[22] *E.g., In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 644 F.2d 594

Because Congress has declined to enact a "federal aviation disaster law" which would provide for uniformity of liability and damages,[23] the measure of damages in the case of each plaintiff is determined by the wording of the applicable state statute creating the right of action and its case law interpretation.[24] Thus, there is often great disparity between awards.[25]

In most states, the measure of damages in wrongful death actions is based upon the pecuniary losses[26] to the survivor

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(7th Cir. 1981). Victims were residents of ten of the United States, Puerto Rico, Japan, the Netherlands and Saudi Arabia. *Id.* at 604.

[23] H.R. 10917, 95th Cong., 2d Sess. 124 CONG. REC. 3382 (1978) (bill died in committee).

In a connected case dealing with the issue of punitive damages, the Court of Appeals for the Seventh Circuit stated:

> In conclusion, we agree with the district court's comments on the problems involved in determining choice-of-law issues in airplane crash cases. Airline corporations and airplane manufacturers are subject to uniform federal regulation in almost every aspect of their operations, except their liability in tort. As recently as 1978, a bill was introduced in Congress to establish a federal cause of action for injuries suffered through aviation activity. *See* H.R. 10917, 124 Cong. Rec. No. 17 (February 14, 1978). If this bill, or any of its predecessors, had passed, those actions would all be governed by federal law, uniform as to liability and damages, rather than by the varying laws of a number of states. *See* Note, 28 Vand. L. Rev. 621, 625 (1975). Along with the district court, we conclude that it is clearly in the interests of passengers, airline corporations, airplane manufacturers, and state and federal governments, that airline tort liability be regulated by federal law. Of course, we are well aware of the fact that it is up to Congress, and not the courts, to create the needed uniform law.

In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 644 F.2d at 632-33, *quoted in* Brief for Appellee at 7, *In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 526 F. Supp. 226 (N.D. Ill. 1981).

[24] RESTATEMENT (SECOND) OF TORTS § 925 (1977). Comment, *Income Taxes and the Computation of Lost Future Earnings In Wrongful Death and Personal Injury Cases,* 29 MD. L. REV. 177 (1969).

[25] *See supra* note 23

[26] "Pecuniary Loss" is defined as :

> Loss of money or something by which money or something of money value may be acquired. As applied to a dependent's loss from death pecuniary loss means the reasonable expectation of pecuniary benefit from the continued life of the deceased; such includes loss of services, training, future education, guidance, and society.

BLACK'S LAW DICTIONARY 1018 (5th ed. 1979).

"Pecuniary damages" are those which "can be estimated in and compensated by money." *Id.* at 353. "Compensatory damages" are "those that will compensate the injured party for the injury sustained. . . such as will make good or replace the loss

due to the premature death of his decedent.[27] Historically, the rule has been that the measure of damages is in terms of projected gross earnings, minus the amount decedent would have spent on himself, discounted to present value[28] with no consideration of tax liability nor jury instruction to that effect.[29] This rule has been particularly appealing in the personal injury context where, unlike in the wrongful death action, the injured person himself is the recipient of the award[30] and personal expenses are not netted out.[31] In a wrongful death action, however, decedent's personal expenses, such as food and shelter, are deducted in arriving at the award.[32] Controversy has arisen because, to the extent

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caused by the wrong or injury." *Id.* at 352. The term "pecuniary"is often used interchangeably with the term "compensatory".

[27] Burns, *A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We tell the Jury?*, 14 DE PAUL L. REV. 320, 320-21 (1965).

[28] Dennis, Sirmon & Drinkwater, *Wrongful Death Damages — Fair Compensation for Future Pecuniary Loss Requires Consideration of Economic Trends and Income Tax Consequences*, 47 MISS. L.J. 173, 174-75 (1976).

[29] *See generally* Annot., 63 A.L.R.2d 1394 (1959) & A.L.R.2d Later Case Series.

[30] Damages in personal injury cases could be considered as compensation for a loss of capital when they "make the taxpayer whole from a previous loss of personal rights," Comment, *supra* note 24 at 178 (quoting Starrels v. Commissioner, 304 F.2d 574, 576 (9th Cir. 1962)). *See also* Erickson v. United States, 504 F. Supp. 646 (D.S.D. 1980) (tax evidence admissible in wrongful death case to compute loss of support suffered by wage earner's dependents is not necessarily admissible in personal injury action seeking recovery for loss of wages suffered by wage earner himself); Louissaint v. Hudson Waterways Corp., 111 Misc. 2d 122, 443 N.Y.S.2d 678 (1981) (while recovery for wrongful death action might logically be limited to net after taxes, personal injury recovery should be based upon gross income); Annot., 63 A.L.R.2d 1394 (1959) & A.L.R.2d Later Case Series.

[31] RESTATEMENT (SECOND) OF TORTS § 924 (1977). In a personal injury action, the injured plantiff is the recipient of the award. Personal expenses, like food and clothing, are not deducted in arriving at an award for a personal injury action because the injured plaintiff is still alive to consume those items. If personal expenses were deducted, the award would not compensate the plaintiff for what was taken away from him by the tortfeasor. *See generally* 3 L. FRUMER, R. BENOIT & M. FRIEDMAN, PERSONAL INJURY § 3.05 (1965).

In the case of a wrongful death action, however, the recipient of the award is the decedent's survivor who would not have had use of the amount decedent spent on food and clothing had decedent continued living. Therefore, decedent's personal expenses are deducted in arriving at an award in a wrongful death action. *See generally* 3 M. MINZER, J. NATES, C. KIMBALL, D. AXELROD & R. GOLDSTEIN, DAMAGES IN TORT ACTIONS § 22.11. *But see* 22 Am. Jur. 2d *Death* § 153 (1965) (in some jurisdictions there is no requirement that personal expenses be deducted in arriving at an award in a wrongful death action).

[32] RESTATEMENT (SECOND) OF TORTS § 925 (1977).

that the survivor is awarded an amount based upon decedent's gross income instead of net after taxes,[33] the survivor receives a windfall.[34] The windfall consists of the amount of federal income tax the decedent would have paid had he lived.[35] In a purely monetary sense, as one commentary has noted,[36] the decedent is worth more dead than alive.[37] This anomaly exists because the survivor would never have had the benefit of the amount of federal tax liability had the wrongful death not occurred;[38] the decedent, had he lived, would have continued to pay federal income tax.[39] Consequently, the federal tax paid would not have been available to the survivor as an element of the decedent's pecuniary contributions to him.[40]

Because compensation is the basic theory of tort damages,[41] defendants have sought to introduce evidence of decedent's hypothetical tax liability and/or to have the jury instructed that any award will not be taxable to the recipient.[42] Such awards are non-taxable because of section 104 of the Internal Revenue Code of 1954, [I.R.C.] which states:

> Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—. . .

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[33] *See* Norfolk & W. Ry. v. Liepelt, 444 U.S. 490 (1980). For a discussion of *Liepelt*, see *infra* notes 112-143 and accompanying text.

[34] 444 U.S. at 497-98.

[35] Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L.J. 212, 219 (1958).

[36] Dennis, Sirmon & Drinkwater, *supra* note 28, at 197.

[37] *Id. See infra* note 39.

[38] Nordstrom, *supra* note 35, at 219.

[39] Take, for example, the case of a decedent who is in the 50% tax bracket. If an award is based upon gross earnings, instead of net, the windfall to the survivor is particularly obvious. *E.g.*, Floyd v. Fruit Indus., 144 Conn. 659, 136 A.2d 918 (1957) (tax evidence held admissible where decedent averaged gross income above $50,000 per year and paid in excess of $38,000 in state and federal income tax).

[40] *Id.*

[41] W. PROSSER, TORTS § 1 (4th ed. 1971). The theory of compensation seeks to return to the injured party, in the form of dollars, that which was taken away from him by the tortfeasor. It is often spoken of as making the injured party "whole again." *Id.*

[42] Nordstrom, *supra* note 35, at 212-13. When defendants seek to introduce tax evidence, the purpose is to reduce the amount of damages the defendant will have to pay by the amount of tax decedent would have paid had he lived. *Id.*

(2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness . . . .[43]

This section is held to apply to damages received in wrongful death actions as well.[44]

Section 104 of the I.R.C. has sometimes been interpreted as expressing Congress' intent to confer a positive benefit upon the plaintiff.[45] In basing awards on a decedent's gross earnings, courts have reasoned that plaintiffs were entitled to the excess over net earnings as a sort of "bonus"[46] although Congress has never articulated such an intent.[47] It has also be argued that Congress itself considered the issue too speculative[48] and that it was "simply not worthwhile to enact

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[43] 26 U.S.C. § 104(a) (2) (1980). Many states have the same sort of exclusionary tax law regarding personal injury and wrongful death awards. *See e.g.*, Ark. Stat. Ann. § 84-2008(2)(g) (1980); MD. ANN. CODE art. 81, § 280(a) (1980)); N.Y. TAX LAW § 359(2)(e) (McKinney 1975).

[44] *See* Rev. Rul. 54-19, 1954-1 C.B. 179; Norfolk & W. Ry. v. Liepelt, 444 U.S. 490, 492, 496 n. 12 (1980).

[45] See, e.g., Norfolk & W. Ry. V. Liepelt, 444 U.S. 490, 498 (1980) (Blackmun, J., dissenting) (wrongful death action under FELA); Haynes v. United States, 353 U.S. 81, 84-85 n.3 (1957) (disability payments under employee disability plan); Epmeier v. United States, 199 F.2d 508, 511 (7th Cir. 1952) (sickness benefits paid by employer); Huddell v. Levin, 395 F. Supp. 64, 87 (N.J. 1975), *vacated on other grounds*, 537 F.2d 726 (3d Cir. 1976); Raines v. N.Y.C. R.R., 51 Ill. 2d 428, 283 N.E.2d 230 (personal injury action under FELA), *cert. denied*, 409 U.S. 983 (1972); Christou v. Arlington Park-Washington Park Race Tracks Corp., 104 Ill. App. 3d 257, 432 N.E.2d 920 (1982) (personal injury action under state law); Newlin v. Foresman, 103 Ill. App. 3d 1038, 432 N.E.2d 319 (1982) (personal injury action under state law); Louissaint v. Hudson Waterways Corp., 111 Misc. 2d 122, 443 N.Y.S.2d 678 (N.Y. Sup. Ct. 1981) (limits *Hall* to personal injury actions arising under state law); South v. National R.R. Passenger Corp., 290 N.W.2d 819 (N.D. 1980) (personal injury action under state law); Barnette v. Doyle, 622 P.2d 1349 (Wyo. 1981) (personal injury action under state law).

[46] *E.g.*, Hall v. Chicago & N.W. Ry, 125 N.E. 2d at 86 (personal injury action under FELA); South v. National R.R. Passenger Corp., 290 N.W.2d 819, 827 (N.D. 1980) (personal injury action under state law).

[47] Norfolk & W. Ry. v. Liepelt, 444 U.S. at 500 (Blackmun, J., dissenting); *cf.* Barnette v. Doyle, 622 P.2d 1349, 1367 (Wyo. 1981) (if juries are not to be instructed about insurance or that plaintiff must bear his own attorneys fees, there is no reason to instruct regarding non-taxability of award); McWeeney v. New York, N.H. & H. R.R., 282 F.2d 34 (2d Cir. 1960) (survivor in wrongful death action under FELA is not overcompensated when award is based upon gross income because of offsetting factors of attorneys' fees, inflation). *But see* Burlington N. v. Boxberger, 529 F.2d 284, 293 (9th Cir. 1975) (attorneys' fees, unlike inflation and taxation, are not relevant to calculation of decedent's pecuniary contributions to survivor).

[48] Norfolk & W. Ry. v. Liepelt, 444 U.S. at 501 (Blackmun, J., dissenting); *See also* McWeeney v. New York, N.H. & H.R.R., 282 F.2d at 36 (where injured bachelor's

a complex and administratively burdensome system in order to approximate the tax treatment of the income if, in fact, it had been earned over a period of time by the decedent."[49]

Upon initial examination the tax evidence issue and the cautionary instruction issue seem to be one and the same.[50] Professor Nordstrom, however, points out that the evidentiary issue seeks to decrease the amount of the verdict by the amount of taxes saved due to the wrongful death,[51] whereas the cautionary instruction seeks to prevent a jury from improperly inflating a verdict by the amount a jury might mistakenly believe the recipient would have to pay in taxes to the federal government.[52] Therefore, the evidentiary issue deals with the mitigation of damages,[53] and the instructionary issue deals with cautioning the jury against overcompensating the plaintiff.[54]

As jury verdicts increased and tax rates climbed,[55] courts began to address these two issues. One of the earliest cases to address the evidentiary issue was *Stokes v. United States*,[56] a

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projected tax liability could fluctuate with advent of marriage, children and other exemptions allowable under tax code, tax evidence was too complex for jury to consider); *c.f.* Montellier v. United States, 315 F.2d 180, 186 (2d Cir. 1963) (citing with approval McWeeney v. New York, N.H. & H.R.R.; where projected tax liability is *de minimis*, failure to admit evidence is not error in wrongful death actions under Federal Tort Claims Act).

[49] Norfolk & W. Ry. v. Liepelt, 444 U.S. at 501.

[50] Nordstrom, *supra* note 35, at 219-21.

[51] *Id.* at 212-13, 219 . For example, if tax evidence were not admissible a jury would base its award upon evidence of the decedent's *gross* earnings. If the decedent were in the 50% tax bracket it is evident that a defendant would endeavor to admit tax evidence to reduce the amount of damages he would have to pay should the plaintiff win the suit.

[52] *Id.* at 234. Take, for example, the case of a jury which believes that based upon the evidence the plaintiff is entitled to an award of $100,000. If the jury were not instructed regarding the non-taxability of the $100,000 in the hands of the plaintiff, it might mistakenly believe that taxes would take half of the award, leaving the plaintiff with only $50,000. Consequently, in order to fully compensate the plaintiff, the jury might add on the amount it mistakenly believes would be taken in taxes so that the plaintifff would receive the full $100,000 in the end. Thus, in order to make sure the plaintiff receives his full $100,000, the jury might double the amount to $200,000.

[53] *Id.* at 231.

[54] *Id.*

[55] *Id.* at 212; Annot., 63 A.L.R.2d 1363 (1959).

[56] 144 F.2d 82 (2nd Cir. 1944).

personal injury action brought under federal law[57] which was decided in 1944.[58] The Second Circuit Court of Appeals held simply and without explanation that evidence of the decedent's potential tax liability was too conjectural for the jury's consideration.[59]

Ten years after *Stokes* the Supreme Court of Illinois decided *Hall v. Chicago & N.W. Ry.*,[60] a personal injury action arising under the Federal Employers Liability Act (FELA).[61] Hall was a railroad switchman who was injured when he was pressed between a freight platform and a moving freight car.[62] The court held that the defendant's closing argument to the jury that any award would not be subject to federal income taxes was improper,[63] and a new trial was granted for fear that the jury's award had been tainted by the remark.[64] Noting that the case was one of first impression in Illinois,[65] the court held that consideration of federal tax liability was not proper either in oral argument or in a written instruction to the jury.[66]

In reaching its decision, the Supreme Court of Illinois reasoned that: 1) this type of evidence was too conjectural;[67] 2) the status of the parties to a lawsuit was of no concern to the court or jury[68]—thus whether defendant was insured or what

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[57] *Id.*

[58] *Id.*

[59] *Id.* at 87.

[60] 5 Ill. 2d 135, 125 N.E.2d 77 (1955).

[61] 45 U.S.C. §§ 51-60. FELA, when applicable, is the exclusive remedy against a railroad for injuries to its employees caused by negligence on the part of the employer railroad when both are engaged in interstate or foreign commerce. Metropolitan Coal Co. v. Johnson, 265 F.2d 173 (5th Cir. 1959), *cited in* 1 WEST'S FEDERAL PRACTICE MANUAL § 1401 (M. Volz 2d ed. 1970).

[62] 125 N.E.2d at 78-79.

[63] *Id.* at 86.

[64] *Id.*

[65] *Id.* at 85.

[66] *Id.* at 86.

[67] *Id.* at 85-86 In citing *Stokes*, the court did not explain why it though tax evidence was too conjectural, but only stated that "We are of the opinion that incidence of taxation is not a proper factor for a jury's consideration, imparted either by oral argument or written instruction. It introduces an extraneous subject, giving rise to conjecture and speculation." *Id.* at 86.

[68] *Id.*

plaintiff did with his award (including whether or not he paid taxes on it) was immaterial to the computation of damages;[69] 3) Congress intended a benefit to accrue to the injured party which would be reaped instead by a tortfeasor if consideration of income taxes were injected into the trial;[70] 4) the integrity of the jury's decision-making process must be presumed when it is properly instructed on the measure of damages—thus there could be no purpose served in mentioning the non-taxability of the award.[71] Finally, the court reasoned that even though it is a correct statement of the law that any award would not be taxed, such a determination does not automatically make it a proper subject for a closing argument.[72]

In *Hall*, the Illinois court seemed to have adopted the majority rule, since at the time *Hall* was decided the vast majority of American courts denied the admissibility of evidence of a decedent's hypothetical potential tax liability and refused a jury instruction regarding the non-taxability of any award.[73] This was dictum,[74] however, as the only issue before the court

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[69] *Id.*

[70] *Id.*

[71] The Illinois Supreme Court quoted with approval Mr. Justice Holmes who stated, "But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved." 125 N.E.2d at 85 (quoting Aikens v. State of Wisconsin, 195 U.S. 194, 206 (1904)).

[72] 125 N.E.2d at 86. The court stated:

> It does not necessarily follow that the argument is proper because it correctly states the law. For if the defendant's argument is proper on the basis that it tells the jury what the law is then what objection can there be for plaintiff's counsel to state that the expense of trial is not provided for in the instruction concerning damages, that the cost of medical witnesses is not paid by the defendant, that the expense of taking depositions, as well as court reporting at the trial, must be borne by the individual litigants, that the fees of plaintiff's attorney are not recognized as an element, that the defendant can deduct any award it pays from its income and excess profits tax return and that the amounts of awards are allowed as expenses in providing for increasing railroad fares? This could be developed *ad infinitum*, and all this is the law.

Id.

[73] *Id.* at 85. *See also* Annot., 63 A.L.R. 1393 (1959).

[74] "Dictum" is an abbreviated form of the latin word "obiter dictum." It means:

> [A]n observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of

was the propriety of an oral argument on the non-taxability of the award.[75] The Illinois Supreme Court thus interpreted section 104 of the I.R.C.[76] to authorize a plaintiff's entitlement to some sort of windfall in excess of compensation.[77]

Two years after *Hall*, the Supreme Court of Errors of Connecticut[78] decided *Floyd v. Fruit Industries*,[79] a wrongful death action brought under Connecticut law.[80] Plaintiff's decedent was a passenger in the defendant's automobile which collided with a truck.[81] The court in *Floyd* held that because of the compensatory nature of Connecticut's wrongful death statute,[82] evidence of taxes "are an important factor which must be offset against probable . . . earnings."[83] The court expressly declined to follow the *Stokes* reasoning,[84] stating that juries are forced to decide many other matters no less speculative than the approximation of tax liability such as the decedent's probable future earnings and his probable future personal living expenses.[85] Instead of following *Stokes*, the court focused on the fact that had the decedent lived, the survivor would not have had the use of the amount decedent would have paid to the federal government in taxes.[86] Thus, the court found the tax evidence admissible.[87]

> the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion. Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are *obiter dicta*, and lack the force of any adjudication . . . .

BLACKS LAW DICTIONARY 409 (5th ed. 1979).

[75] 125 N.E.2d at 84; *In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 701 F.2d at 1196.

[76] See *supra* text accompanying note 43 for relevant portion of section 104.

[77] 125 N.E.2d at 86.

[78] The Connecticut Supreme Court of Errors is now the Connecticut Supreme Court.

[79] 144 Conn. 659, 136 A.2d 918 (1957).

[80] 136 A.2d at 921.

[81] *Id.*

[82] CONN. GEN. STAT. § 3230d (Supp. 1955) (current version at CONN. GEN STAT. § 52-555 (1983)).

[83] 136 A.2d at 925.

[84] *Id.*

[85] *Id. See also supra* note 31.

[86] 136 A.2d at 925.

[87] *Id.*

In 1960, the Second Circuit Court of Appeals, the circuit which decided *Stokes*, again addressed the evidentiary issue in *McWeeney v. New York, New Haven & Hartford Railroad*,[88] a personal injury action arising under FELA.[89] McWeeney, a railroad employee, was injured when he was struck by a freight car while he was standing on the side ladder of another freight car.[90] Despite the compensatory measure of damages defined in cases arising under FELA,[91] the court applied the rule in *Stokes*, holding that the tax evidence was too speculative for the jury to consider.[92] The court qualified its holding by noting that when earnings are beyond the "middle reach of the income scale," consideration of projected tax liability may be necessary to avoid an "improper result."[93] Thus, the flexible *McWeeney* rule was created.[94] Some courts have applied *McWeeney* to bar tax evidence,[95] while others have ap-

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[88] 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S 870 (1960).

[89] 282 F.2d at 35.

[90] *Id.*

[91] FELA itself does not state the measure of damages. 45 U.S.C. §§ 51-60. *See also* Michigan Central R.R. v. Vreeland, 227 U.S. 59, 68 (1913).

[92] 282 F.2d at 37-39. Although the Second Circuit Court of Appeals in *Stokes* did not explain why it found the tax evidence to be conjectural, the Second Circuit Court of Appeals in *McWeeney* gave its own explanation. The *McWeeney* court stated that because the plaintiff was a bachelor, there was no way to predict whether he would marry or have children. *Id.* at 36. The decision to marry or procreate, said the Second Circuit Court of Appeals, would greatly affect the plaintiff's tax burden by increasing the number of exemptions he could take, thus lowering his tax liability. *Id.* Therefore, the Second Circuit affirmed the lower court which had refused to allow the jury to consider only the plaintiff's net income in reaching its verdict. *Id.* at 35.

[93] *Id.* at 38-39. The Second Circuit Court of Appeals stated:

> For example, if a plaintiff or a plaintiff's decedent, had potential earnings of $100,000 a year, more than half of which would have been consumed by income taxes, an award of damages based on gross earnings would be plainly excessive even after taking full account of [marriage, procreation and inflation].

Id. at 38. In McWeeney's case, his potential yearly earnings were estimated at only $4,800. *Id.* at 35. Therefore, any tax effect was *de minimis*. *Id.* at 38.

[94] Comment, *supra* note 24 at 183.

[95] *See, e.g.*, *In re* Marina Mercante Nicaraguense, S.A., 364 F.2d 118, 125-26 (2d Cir. 1966) (wrongful death action under both state law and Jones Act, 46 U.S.C. § 688), *cert. denied sub. nom.* Marina Mercante Nicaraguense v. McAllister Bros., Inc., 365 U.S. 1005 (1967); Montellier v. United States, 315 F.2d 180, 186 (2d Cir. 1963) (wrongful death action under Federal Tort Claims Act (FTCA)); *accord*, *In re* United States Steel Corp., 436 F.2d 1256, 1273-74 (6th Cir. 1980) (personal injury action under Jones Act), *cert. denied*, 402 U.S. 987 (1971); Draisma v. United States, 492 F. Supp. 1317 (W.D. Mich. 1980) (personal injury action under FTCA).

plied *McWeeney* to admit the evidence where plaintiff or plaintiff's decedent had substantial earning power.[96]

The court in *McWeeney*, however, recognized that the cautionary jury instruction issue was completely separate from the tax evidence issue.[97] The court reasoned that a cautionary jury instruction does not call for a parade of tax experts or tables which might confuse the jury.[98] Stating that a cautionary instruction on the non-taxability of the award would be permissible, the court noted that "it imposes no new burdens on the jury and there is nothing speculative about it." [99] A cautionary instruction to the jury requires no additional calculations and would seem to effectively prevent the jury from over-compensating a plaintiff by an amount the jury mistakenly believes he would have to pay to the federal government in taxes.[100]

In 1977, an Illinois appellate court addressed the tax evidence issue in *Peluso v. Singer General Precision, Inc.,* [101] a wrongful death action brought under Illinois law[102] in which it was noted that *Hall* was not controlling.[103] In *Peluso*, plaintiff's decedent was killed when a mixing machine exploded.[104] On appeal, defendant's claim of error was that the trial court had improperly refused to allow cross-examination of plaintiff's expert economist regarding federal income tax liability.[105] The Illinois appellate court, however, held that the claim of error was not preserved for appeal.[106] A concurring opinion

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[96] Cox v. Northwest Airlines, 379 F.2d 893, 896 (7th Cir. 1967) (wrongful death action arising under state law), *cert.* denied, 389 U.S. 1044 (1968); LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266, 267 (2d Cir.) (wrongful death action arising under state law), *cert denied*, 382 U.S. 878 (1965).

[97] 282 F.2d at 39.

[98] *Id.*

[99] *Id.* In *McWeeney*, plaintiff's future earning potential had been estimated, then discounted to a present value of $100,000. *Id.* at 40. Because the jury's verdict was $87,000, the court refused to order a new trial although it stated that it would have been proper for the trial court to have given the cautionary instruction. *Id.*

[100] *Id.*

[101] 47 Ill. App. 3d 842, 365 N.E.2d 390 (1977).

[102] 365 N.E. 2d at 399.

[103] *Id.*

[104] *Id.* at 397-98.

[105] *Id.* at 399.

[106] *Id.*

in *Peluso* by Presiding Judge Sullivan, on the other hand, found that the tax evidence issue had been properly preserved.[107] He cited much of the same authority[108] which was later cited by the United States Supreme Court in *Norfolk & Western Railway v. Liepelt*[109] in 1980. Sullivan stated that the defendant should have been allowed "to develop the fact that pecuniary loss was a net amount to be determined after deductions for taxes and personal expenses."[110]

In 1980, the Supreme Court of the United States addressed the issues of evidence and cautionary instructions on the non-taxability of a jury award in the context of a wrongful death action arising under FELA.[111] In *Norfolk & Western Railway v. Liepelt*,[112] the Court held that an Illinois appellate court improperly applied state law when it denied both the admission of tax evidence and the cautionary instruction.[113] *Liepelt* effectively overruled *Hall*, at least in the context of an action under FELA.[114] In *Liepelt*, plaintiff's decedent, a fireman employed by Norfolk, was killed in a collision between a locomotive and a loaded hopper car.[115] At trial, an economic expert estimated gross damages, discounted to present value, to be $302,000.[116] The jury, however, returned a verdict of $775,000,[117] more than twice the figure calculated by the expert.[118] The Illinois appellate court upheld the propriety of trial court's refusal to admit evidence on the non-taxability of

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[107] *Id.* at 402.

[108] *Id.* at 401-04.

[109] 444 U.S. 490 (1980) (wrongful death action under FELA).

[110] 365 N.E.2d at 402.

[111] 45 U.S.C. §§ 51-60. *See supra* note 61.

[112] 444 U.S. 490 (1980).

[113] *Id.* at 492-93.

[114] *Liepelt* seems to adopt *McWeeney's* reasoning regarding the exclusion of tax evidence as proper where the projected tax effect is *de minimis* and introduction of the evidence would be more confusing than its worth. 444 U.S. at 494, n.7 (comparing FED. R. EVID. 403 exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time).

[115] 444 U.S. at 490.

[116] *Id.* at 492. The figure was computed by estimating the decedent's gross potential earnings plus the value of his potential services to his family, less the decedent's personal expenses, discounted to present value. *Id.*

[117] *Id.*

[118] *Id.*

the award or to give a cautionary instruction on the issue.[119]

On certiorari, the Supreme Court of the United States found the tax evidence admissible [120] and the cautionary instruction proper.[121] The Court reasoned that the measure of damages interpreted by cases arising under FELA was federal in character[122] and strictly pecuniary in nature.[123] In a footnote, the Supreme Court noted that "[o]ne of the purposes of FELA was to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees."[124] Under FELA, the measure of damages in a wrongful death action is the pecuniary loss to the survivors[125] and is not dependent upon the individual state's measure of damages, even if the FELA case is brought in a state court.[126] Therefore, the evidence on the tax exempt status of the award was found to be relevant and admissible under the Federal Rules of Evidence[127] because the proper measure of damages was the amount of support by which the survivor was deprived due to the wrongful death of the decedent.[128] The Court stated that the survivor would not have had use of the amount the decedent would have paid in taxes, had decedent continued to live.[129] The Court found nothing in the legislative history of the applicable tax code that would "suggest that . . . [Sec. 104 of the I.R.C.] has any

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[119] *Id.* at 491.

[120] *Id.* at 494.

[121] *Id.* at 498.

[122] *Id.* at 493.

[123] *Id.*

[124] *Id.* at 493 n.5 (citing H.R. REP. NO. 1386, 60th Cong., 1st Sess. 3 (1908)).

[125] 444 U.S. at 493.

[126] *Id.*

[127] The Court cited rules 401 and 402 of the Federal Rules of Evidence in support of its determination that tax evidence was admissible. Rule 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

FED. R. EVID. 402.Rules 401 provides that " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the actions more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

[128] 444 U.S. at 493.

[129] *Id.*

impact whatsoever on the proper *measure* of damages in a wrongful death action."[130] The United States Supreme Court's interpretation of the I.R.C. in *Liepelt* effectively overruled the Illinois Supreme Court's interpretation expressed in *Hall*,[131] at least in the context of FELA actions.

In addressing the cautionary instruction issue, the Court in *Liepelt* observed that the verdict was double that of the figure computed by the expert[132] and stated, "It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes, and that therefore it improperly inflated the recovery."[133] In holding that it was error to refuse the cautionary instruction, the Court stated that it was not a complicated instruction and would eliminate any doubt which the jury might transform into an improper inflation of damages.[134] The Court recognized an important federal interest in uniformity[135] and held that a state court hearing an action brought under FELA, where the measure of damages is always federal in character, must apply federal law regarding the tax evidence and cautionary instruction issues.[136] Hence, the Court held that both the tax evidence and cautionary instruction should have been allowed.[137]

In his dissenting opinion, Justice Blackmun stated that he would have held proper both the refusal to admit the evidence and the refusal to give the cautionary instruction.[138] Regarding the evidentiary issue, Blackmun stated that although Congress had not articulated any intent to confer a windfall to the survivor by not taxing the award,[139] neither

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[130] *Id. (emphasis added)*. The Court also reasoned that subtracting taxes from the award "does not confer a benefit on the tortfeasor any more than netting out the decedent's personal expenditures. Both subtractions are required" to determine the pecuniary damages due the survivors. *Id.* at 496 n.10.

[131] See *supra* text accompanying notes 60-77 for a discussion of *Hall*.

[132] 444 U.S. at 497. *See supra* text accompanying notes 116-117.

[133] 444 U.S. at 497.

[134] *Id.* at 498.

[135] *See supra* text accompanying note 126.

[136] 444 U.S. at 492-93.

[137] *See supra* notes 120-121.

[138] 444 U.S. at 498.

[139] *Id.* at 501.

could it be supposed that Congress had intended to transfer such benefit to the tortfeasor.[140] In his treatment of the cautionary instruction issue, Blackmun argued that state law governs the giving of cautionary instructions in cases brought in state court under FELA.[141] While he agreed that state rules should not interfere with federal policy,[142] he found no federal policy that required giving the cautionary instruction contrary to Illinois law.[143]

The issues in *Liepelt* related to actions arising under FELA, a federal law, and heard in a state court.[144] As such, the Court left open the question of whether *Liepelt* is to be extended to actions arising under state law and brought in federal court because of diversity of citizenship.[145] Some guidance on this question seems to have been offered by the Court in *Gulf Offshore Co. v. Mobil Oil Corp.* [146] a case decided a year after *Liepelt*.

Gulf was a personal injury action arising under federal law[147] and tried in a state court.[148] The Court was faced with the propriety of a Texas court's refusal to allow a cautionary

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[140] *Id.* at 500-01. Blackmun quoted the following:

> 'The court can divine no societal purpose that would be furthered by awarding wrongdoing defendants with the benefit of this Congressional largesse. A societal purpose would be served by benefitting innocent victims of tortious conduct. Indeed, since the victims' chances of needing public relief are thereby disminished, this concern would be greater, not less, in the case of death, where the loss of earning capacity is total. This court therefore concludes that Congress, as with all exemptions under Section 104, "intended to relieve a taxpayer who has the misfortune to become ill or injured . . . ."'

Id. at 501 (quoting Huddell v. Levin, 395 F. Supp. 64, 87 (N.J.), *vacated on other grounds*, 537 F.2d 726 (3rd Cir. 1976), which quoted Epmeier v. United States, 199 F.2d 508, 511 (7th Cir. 1952)).

[141] 444 U.S. at 503. Blackmun noted that the Supreme Court has asserted the right to control certain elements of what might appear to be state procedure, apparently in the interests of "protecting the rights of FELA plaintiffs." *Id.*

[142] *Id.* at 504.

[143] *Id.*

[144] *See supra* text accompanying notes 111-113.

[145] Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 487-88 (1981) (reserving the question of whether *Liepelt* controls when action arising under federal law incorporates state law).

[146] 453 U.S. 473 (1981).

[147] *See infra* text accompanying note 152.

[148] 453 U.S. at 476.

instruction regarding the non-taxability of the award.[149] Plaintiff was injured during a storm while being evacuated from an oil drilling platform located off the Louisiana shore over an area known as the Outer Continental Shelf.[150] Plaintiff brought suit in a Texas state court.[151] Under the Outer Continental Shelf Lands Act (OCSLA),[152] the content of the federal law is borrowed from the law of the adjacent state,[153] (in this case, Louisiana), in recognition of the "special relationship between the men working on these [platforms] and the adjacent shore to which they commute to visit their families."[154] The "borrowed" state law is applicable as the substantive law of the case, but only "[t]o the extent [it is] not inconsistent" with federal law.[155] The Court found that the Texas court had not determined whether Louisiana law was inconsistent with federal law as articulated in *Liepelt*.[156] The Court remanded the case to the Texas Court of Civil Appeals to determine whether the cautionary instruction was required under Louisiana law,[157] and if it was not, whether *Liepelt* was applicable.[158]

Notably, the Court did not make a blanket statement that *Liepelt* would require the cautionary instruction if Louisiana law did not.[159] The Court stated that if OCSLA had not contained a choice of law provision, *Liepelt* would control.[160] The Court reasoned that the choice of law provision in OCSLA[161] revealed Congress' intent to reject specifically " 'na-

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[149] *Id.*

[150] *Id.* at 475-76.

[151] *Id.* at 476.

[152] 43 U.S.C. §§ 1331-1356 (1976 & Supp. V. 1981).

[153] *Id.* State laws apply as federal law "[t]o the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws." 43 U.S.C. § 1333(a)(2).

[154] 453 U.S. at 484 (quoting Rodrigue v. Aetna Casualty Co., 395 U.S. 352, 365 (1969)).

[155] *Id.* at 487 (quoting OCSLA, 43 U.S.C. § 1333(a)(2)).

[156] *Id.* at 488.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.* at 487.

[161] *See supra* note 153.

tional uniformity' as a paramount goal."[162] In support of that proposition the Court cited *Chevron Oil v. Huson*, [163] a personal injury case also decided under OCSLA.[164] In *Chevron*, there was inconsistency between the state's statute of limitations and the federal common law statute of limitations.[165] The Court in *Chevron* found that the state's statute was applicable.[166] In *Gulf*, the court stated:

> In *Chevron*, we held that Louisiana rather than federal common law provided the federal statute of limitations for personal injury damages actions under OCSLA. We recognized that 'Congress made clear provision for filling the 'gaps' in federal law; it did not intend that federal courts fill those 'gaps' themselves by creating new federal common law' . . . . In this case, we face an analogous question: does the incorporation of state law [through the OCSLA choice of law provision] preclude a court from finding that state law is 'inconsistent' with a federal common-law rule generally applicable to federal damages actions?[167]

The Court in *Gulf* determined that this question need be answered only if the Texas court found that Louisiana law would not require the cautionary instruction.[168] Therefore, the case was remanded to the Texas Court of Civil Appeals to make that determination.[169]

The Court, by its action in remanding the case to the Texas Court of Civil Appeals to determine whether *Louisiana* law would require a cautionary instruction,[170] seemed to regard the giving of such an instruction as *substantive* rather than procedural.[171] If the Court had considered the giving of the cautionary instruction as procedural, the law of the forum

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[162] 453 U.S. at 487.
[163] 404 U.S. 97 (1971).
[164] *Id.* at 98.
[165] *Id.* at 101.
[166] *Id.* at 105.
[167] 453 U.S. at 487-88.
[168] *Id.* at 488.
[169] *Id.*
[170] *Id.*
[171] *See supra* note 11 and *infra* note 243.

would control.[172] Consequently, if the law of the forum were to control, the court would have remanded to the Texas Court of Civil Appeals to determine whether *Texas* law required a cautionary instruction.[173]

The Supreme Court's guidance in *Gulf* seems to clarify the Court's position on the application of *Liepelt* to cases applying not federal, but state law.[174] The Court recognized that *Liepelt* applies when the cause of action arises under and applies federal law.[175] However, the Court also recognized that *Liepelt* does not automatically control in actions heard in a state court which applies state law as incorporated into federal law.[176] Essentially, the Court's guidance seems to indicate that the giving of a cautionary instruction regarding the non-taxability of the award is substantive and not procedural.[177] State substantive law is binding upon a federal court sitting in diversity under the principles of *Erie*.[178] Therefore, it would seem to follow that if the Supreme Court considered a cautionary instruction as substantive, and not procedural,[179] then a federal court sitting in diversity and deciding a non-federal cause of action should be bound by the law of the state[180] and not by federally-created common law as enunciated in *Liepelt*.[181] The Supreme Court, however, has still not ruled on whether *Liepelt* controls the admissibility of tax evidence or the giving of a cautionary instruction on the non-taxability of the award in state-created causes of action tried in federal courts.[182]

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[172] Monarch Ins. Co. v. Spach, 281 F.2d 401, 405 (5th Cir. 1960). *But see Liepelt*, *supra* notes 141-143 and accompanying text (in certain instances where there are strong federal concerns for uniformity, state courts may be required to follow federal procedure in deciding cases which arise under federal law).

[173] *See supra* note 171.

[174] *See supra* text accompanying notes 152-169.

[175] 453 U.S. at 486.

[176] *See supra* text accompanying notes 159-162.

[177] 453 U.S. at 488. *See supra* text accompanying notes 170-173.

[178] *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938), *discussed supra* at note 11 and *infra* at note 243.

[179] *Id.*

[180] *Id.*

[181] *Id. See supra* text accompanying notes 170-173.

[182] *In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 701 F.2d at 1192.

At the time Plaintiff Haider sought to preclude the tax evidence and a cautionary instruction on the non-taxability of a wrongful death award in *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*,[183] the majority of courts still did not allow the introduction of tax evidence or the giving of a cautionary instruction to the jury,[184] despite the Supreme Court's ruling in *Leipelt*. Subsequent to the Supreme Court's decision in *Liepelt*, and prior to Plaintiff Haider's motion *in limine*,[185] the state of the law was: 1) several state courts had expressly chosen to follow the reasoning in *Liepelt* to admit tax evidence or to give a cautionary instruction in state-created causes of action[186] and in those arising under federal law;[187] 2) several state courts had expressly rejected *Liepelt's* application to actions not arising under federal law;[188] 3) some state and federal courts had likewise declined to follow *Liepelt* in

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[183] 526 F. Supp. 226.

[184] *See generally* Annot., 63 A.L.R.2d 1394 (1959) & A.L.R.2d Later Case Services. *See supra* note 29.

[185] See *supra* note 9 for the definition of motion *in limine*.

[186] Blanchfield v. Dennis, 292 Md. 319, 438 A.2d 1330, 1332-34 (1982) (cautionary instruction must be given upon request in personal injury case applying state law); Curtis v. Finneran, 83 N.J. 563, 569, 417 A.2d 15, 18 (1980) (evidence admissible in wrongful death case arising under state law).

[187] Fanetti v. Hellenic Lines Ltd., 678 F.2d 424 (2d Cir. 1982) (extends *Liepelt* to permit evidence and instruction in all claims arising under federal law); Austin v. Loftsgaarden, 675 F.2d 168 (8th Cir. 1982) (evidence of tax deductions which plaintiffs realized during period they held securities in dispute is admissible to determine proper compensation in action arising under federal securities law); Crabtree v. St. Louis-San Francisco Ry., 89 Ill. App. 3d 35, 411 N.E.2d 19 (1980) (applying *Liepelt* regarding instruction to personal injury action arising under FELA); Oltersdorf v. Chesapeake & Ohio Ry., 83 Ill. App. 3d 457, 404 N.E.2d 320 (1980) (personal injury action arising under FELA), *cert. denied*, 450 U.S. 920 (1981).

[188] Irwin v. Pacific Southwest Airlines, 133 Cal. App. 3d 709, 184 Cal. Rptr. 288 (1982) (trial court did not err in failing to give cautionary instruction in wrongful death action). Illinois cases confirming vitality of *Hall* and *Raines* in non-FELA suits holding trial court's refusal to give cautionary instruction as proper: Newlin v. Foresman, 103 Ill. App. 3d 1038, 432 N.E.2d 319 (1982) (wrongful death); Christou v. Arlington Park-Washington Park Race Tracks Corp., 104 Ill. App. 3d 257, 432 N.E.2d 920 (1982) (personal injury). *See also*, Tennis v. General Motors Corp., 625 S.W.2d 218, (Mo. Ct. App. 1981) (declines to follow *Liepelt* regarding instruction, relying instead on exclusivity of Missouri Approved Instructions in personal injury action); South v. National R.R. Passenger Corp., 290 N.W.2d 819 (N.D. 1980) (trial court did not err when it refused cautionary instruction in personal injury action arising under state law) (quoting *Hall* with approval); Dehn v. Prouty, 321 N.W.2d 534 (S.D. 1982) (income tax liability is extraneous matter; thus refusing cautionary instruction in personal injury action was proper); Barnette v. Doyle, 622 P.2d 1349 (Wyo. 1981) (cau-

cases which arise under federal law, but which apply a state-defined measure of damages,[189] such as cases arising under OCSLA;[190] and 4) other federal courts, sitting in diversity and applying *Erie* principles,[191] had expressly declined to follow *Liepelt* in non-federal actions, choosing instead to apply the law of the state.[192]

II. IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

In *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*,[193] the Seventh Circuit Court of Appeals was faced with two issues: 1) whether, in a diversity action applying the Illinois wrongful death statute, [194] evidence could be introduced regarding decedent's hypothetical tax liability on projected earnings;[195] and 2) whether a proposed cautionary jury instruction that any award would be non-taxable to the recipient was properly excluded.[196] Regarding the evidentiary issue, the Seventh Circuit Court of Appeals found that nor-

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tionary instruction not required as it is not relevant to the proper computation of damages) (quoting *Hall* with approval).

[189] Personal injury actions arising under FTCA, which applies state law regarding measure of damages, where evidence held inadmissible: Erickson v. United States, 504 F. Supp. 646 (D.S.D. 1980); Draisma v. United States, 492 F. Supp. 1317 (W.D. Mich. 1980); *see also*, Louissaint v. Hudson Waterways Corp., 111 Misc. 2d 122, 443 N.Y.S.2d 678 (N.Y. Sup. Ct. 1981) (evidence not admissible in personal injury case arising under 1972 Longshoremens and Harbor Workers Act which applies state law regarding measure of damages).

[190] *E.g.*, Gulf Offshore Co. v. Mobil Corp., 453 U.S. 473 (1981), *discussed supra* in text accompanying notes 146-173.

[191] *See supra* note 11 and *infra* note 243.

[192] Fenasci v. Travelers Ins. Co., 642 F.2d 986 (5th Cir. 1981) (district court applying Louisiana law did not abuse its discretion in refusing tax evidence in wrongful death action), *cert. denied*, 454 U.S. 1123 (1982); Croce v. Bromley Corp., 623 F.2d 1084 (5th Cir. 1980) (looks to Louisiana law to determine that district court's refusal to give cautionary instruction in state wrongful death action arising from plane crash was not error), *cert. denied*, 450 U.S. 981 (1981). *See also* Spinosa v. International Harvester Co., 621 F.2d 1154 (1st Cir. 1980) (although there was no state law regarding admission of evidence of taxation in wrongful death action, district court did not err in applying majority rule when it refused the evidence, particularly since this was non-federal action).

[193] 701 F.2d 1189 (7th Cir.), *cert. denied*, 104 S. Ct. 204 (1983).

[194] 701 F.2d at 1191 n.1.

[195] *Id.* at 1193.

[196] *Id.* at 1191.

mally the Federal Rules of Evidence apply in diversity cases.[197] The Seventh Circuit found, however, that to the extent a state evidentiary rule defines what is sought to be proven, which in this case was the measure of damages, the state evidentiary rule may be binding under *Erie* principles.[198] The Seventh Circuit, however, determined that Illinois had no settled law on point regarding the admissibility of tax evidence in the context of wrongful death actions arising under state law.[199] In predicting how the Supreme Court of Illinois would rule if presented with the tax evidence issue,[200] the Seventh Circuit determined that the Illinois court would no longer find its reasoning in *Hall* determinative because the holding in *Hall* was based on a misinterpretation of the I.R.C.[201] The Seventh Circuit stated that, in view of the United States Supreme Court's interpretation of the I.R.C. in *Liepelt*, section 104[202] merely "makes the recipient no worse

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[197] *Id.* at 1193. The court reiterated that the Federal Rules of Evidence, a statutory enactment, when combined with the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, and the Rules of Decision Act, 28 U.S.C. § 1652 (1976) demands "that the rules apply in federal court, unless Congress exceeded its powers to regulate federal courts in enacting them. The parties have not urged us to find, and we are not prepared to hold, that the rules are unconstitutional." 701 F.2d at 1193. *See also* FED. R. EVID. 101, 1101(b).

[198] 701 F.2d at 1193. The court pointed out that if Illinois did in fact exclude such evidence in cases arising under state law, as do the majority of states, this "*Erie* problem would be quite difficult." *Id.* See Erie R.R. v. Tompkins, 304 U.S. 64 (1938), *discussed supra* at note 11 and *infra* at note 243. *See also* Monarch Ins. Co. v. Spach, 281 F.2d 401, 408 (5th Cir. 1960) (although rules of evidence are normally thought of as procedural, they can also be substantive and hence binding upon a federal court sitting in diversity).

[199] 701 F.2d at 1195. The only cases the Illinois courts had decided regarding the evidentiary issue had been in the context of personal injury actions arising under FELA — *Hall* and *Raines*. *Id.* The court also found the decision of the District Court for the Northern District of Illinois, *In re Air Crash Disaster*, 526 F. Supp. 226 (N.D. Ill. 1981), although ordinarily entitled to great weight, reviewable as a question of law. 701 F.2d at 1195.

[200] 701 F.2d at 1197. In a diversity action, where there is no controlling state law, courts of appeal must construe state law as would the Supreme Court of the State if it were faced with similar facts and issues. *Id.* Thus, the Court of Appeals may consider all data including Illinois law, the laws of other states, federal court decisions, "and the general weight and trend of authority." Hartford v. Gibbons & Reed Co., 617 F.2d 567 (10th Cir. 1980); Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977).

[201] 701 F.2d at 1196.

[202] *See supra* notes 43 and 131 and accompanying text. *But see supra* note 141 and accompanying text.

off (in terms of taxes at any rate) than he would have been had the injury not occurred, by excusing the payment of tax on awards from which potential taxes have already been deducted."[203] Thus, the Seventh Circuit found that section 104 does not have anything to do with the *measure* of damages.[204] Rather, it deals with the non-taxability of the damages *after* they have been calculated and awarded to the survivor.[205]

The Seventh Circuit found that although *Hall* was overruled by *Liepelt* in the context of FELA actions,[206] *Hall* was decided on the basis of general Illinois jurisprudence, and not on the basis of FELA.[207] Thus, the Seventh Circuit determined that the Illinois Supreme Court, if faced with the case at bar, would still look to *Hall* for guidance.[208] The Seventh Circuit, however, found that *Hall's* approval of the majority rule,[209] without having articulated any policy reasons of its own, was mere casual dicta to which no great deference must be given.[210]

The Seventh Circuit also analyzed *Peluso v. Singer General Precision, Inc.*,[211] a wrongful death action brought under Illinois law in which it was noted that *Hall* was not controlling.[212] Although the Illinois appellate court held that the evidentiary question was not preserved for appeal,[213] the Seventh Circuit looked to the concurring opinion in *Peluso*.[214] The concurring opinion in *Peluso* stated that the issue had been properly preserved for appeal[215] and that the defendant should have been allowed to cross-examine plaintiff's expert witness regarding federal income taxes.[216] Additionally, the

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[203] 701 F.2d at 1196 (citing *Liepelt*, 444 U.S. at 496 n.10).
[204] *Id.*
[205] *Id.*
[206] *See supra* text accompanying notes 60-77, 111-137.
[207] 701 F.2d at 1195.
[208] *Id.*
[209] *See supra* text accompanying note 73.
[210] 701 F. 2d at 1196.
[211] 47 Ill. App. 3d 842, 365 N.E.2d 390 (1977).
[212] *Id.* at 399.
[213] *Id.*
[214] 701 F.2d at 1197.
[215] 365 N.E. 2d at 402.
[216] *Id.*

Seventh Circuit noted that *Peluso's* concurring opinion cited much of the same authority which was to be later cited in *Liepelt*.[217] Thus, the Seventh Circuit found *Peluso's* concurring opinion to be compelling evidence of the manner in which the Illinois Supreme Court would view the evidentiary issue.[218]

Additionally, the Seventh Circuit found that Illinois courts had a history of "scrupulously adjust[ing] its damage awards to make them compensatory."[219] For example, Illinois courts had permitted the introduction of mortality tables,[220] had permitted evidence enabling juries to reduce awards to present value,[221] had allowed the deduction of hypothetical personal expenses from decedent's lost future earnings in a wrongful death action,[222] and had allowed income tax adjustments in the context of a wrongful death action under FELA brought twenty-four years before *Liepelt* was decided.[223] The Seventh Circuit, therefore, found that an Illi-

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[217] 701 F.2d at 1197.

[218] *Id.*

[219] *Id.* at 1198.

[220] *Id.* at 1198 (citing Avance v. Thompson, 387 Ill. 77, 83-84, 55 N.E.2d 57, 60 (FELA action), *cert. denied*, 323 U.S. 753 (1944)).

[221] 701 F.2d at 1198 (citing Allendorf v. Elgin, J. & E. Ry., 8 Ill.2d 164, 178, 133 N.E. 2d 288, 296 (FELA action), *cert. denied*, 352 U.S. 833 (1956).

[222] 701 F.2d at 1198 (citing Scully v. Otis Elevator Co., 2 Ill. App. 3d 185, 200, 275 N.E.2d 905, 915 (1971) (wrongful death action arising under state law).

[223] 701 F.2d at 1198 (citing Allendorf v. Elgin, J. & E. Ry., 8 Ill. 2d 164, 181, 133 N.E.2d 288, 296, *cert. denied*, 352 U.S. 833 (1956). Although the Seventh Circuit in *In re Air Crash* cites *Allendorf* in support of its statement that Illinois courts in practice may make income tax adjustments, the Seventh Circuit's reliance on *Allendorf* may be misfounded. In *Allendorf*, plaintiff's husband was killed while working as a switch foreman for defendant railroad. 133 N.E.2d at 289. The trial court required the actuary to compute the present value of decedent's future contributions after deduction of income tax. *Id.* at 296. The resulting estimate was $10,000 less than it would have been without the deduction for income tax. *Id.* Plaintiff's attorney "acquiesced" in this ruling as well as in the giving of a cautionary instruction regarding the non-taxability of a wrongful death award. *Id.* The jury returned a verdict which was almost $15,000 in excess of the figure calculated by the actuary. *Id.* at 289, 292. On appeal, defendant contended the trial court committed reversible error by allowing the actuary to use specific figures based upon what the decedent had been earning at the time of his death and by allowing the actuary to deduct $50 per month as representative of decedent's personal expenses merely because decedent regularly turned over all but $50 of his paycheck to his wife. *Id.* at 295. Defendant argued that "neutral" figures should have been used and that the jury was thereby misled by the use of specific numbers. *Id.* at 292. Defendant contended that the actuary's use of the amount decedent had

nois court would not be opposed to having juries incorporate evidence as abstract as the decedent's hypothetical tax liability into the determination of their awards. [224] Consequently, the Seventh Circuit held that because Illinois' measure of damages under its wrongful death statute was pecuniary in nature and hence identical to that interpreted by *Liepelt* and other cases arising under FELA,[225] the disputed evidence was

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been earning at the time of his death misled the jury into believing that the decedent would continue to earn the same amount. *Id.* at 293. Defendant argued that the jury failed to consider that decedent might have become unemployed and thus might not have continued to earn the same amount. *Id.* at 294. Defendant also urged that the actuary's deduction of $50 per month for decedent's personal expenses was an arbitrary figure not truly representative of decedent's personal expenses. *Id.* at 292.

The Illinois Supreme Court found that the defendant was afforded a fair trial with no reversible error. *Id.* at 297. The Illinois Supreme Court found that if there had been disadvantages to the defendant in the actuary's testimony based on specific figures instead of "neutral" figures, they were counterbalanced by other advantages favoring the defendant: the jury could have used age 68.21 as decedent's age expectancy as reflected on the mortality tables introduced into evidence instead of the railroad's average retirement age of 65; and the actuary's computation based on the amount decedent had been earning at the time of his death did not take into consideration that decedent was a young, healthy man with prospects of earning much more than reflected by his last annual earnings. *Id.* at 296. Additionally, the court found that defendant had the opportunity, but failed, to produce evidence during the trial that would have proven that decedent's personal expenses were more than the $50 per month used in the computation by the actuary. *Id.* at 295. Therefore, the verdict for the plaintiff was affirmed.

The reason the Seventh Circuit's reliance upon *Allendorf* in *In re Air Crash Disaster Near Chicago* may be misplaced is because the tax evidence issue and the cautionary instruction issue were not preserved for appeal due to the acquiescence of plaintiff's attorney regarding these two matters in the trial court. *Id.* at 296. Thus, even if plaintiff's attorney had raised the tax evidence and cautionary instruction issues for the first time in the Illinois Supreme Court, the court would not have been able to decide the two issues because they were not preserved for appeal. *See* Peluso v. Singer General Precision, Inc., 47 Ill. App. 3d 842, 365 N.E.2d 390 (1977) *discussed supra* notes 101-110. In fact, the Illinois Supreme Court in *Allendorf* stated that "the incident of taxation is not a proper factor for a jury's consideration. . . . It introduces an extraneous subject, giving rise to conjecture and speculation." 133 N.E.2d at 296 *(quoting* Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E. 2d 77 (1955)). Because the Illinois Supreme Court in *Allendorf* had not addressed the evidentiary and cautionary instruction issues (they were not preserved for appeal) and in dicta had approved *Hall*, the Seventh Circuit's use of *Allendorf* to support the proposition that Illinois courts may in practice already take tax consequences into consideration in fixing wrongful death awards seems misplaced.

[224] 701 F.2d at 1198.

[225] 701 F. 2d at 1195. *See supra* note 91 and accompanying text. The court also found that under both FELA and the Illinois Wrongful Death Act, an award was limited to pecuniary damages with punitive damages being unavailable. *See, e.g.*, cases arising under FELA, defining measure of damages as pecuniary: Michigan Central

admissible.[226]

Regarding the propriety of a cautionary jury instruction that any award would not be taxable to the recipient,[227] the Seventh Circuit noted that it was proper to refuse the instruction under current Illinois law.[228] Nevertheless, the Seventh Circuit determined that the underlying substantive law to which the instruction related was the I.R.C.[229] which was not state but federal law. Therefore, the cautionary instruction on the non-taxability of the award was held permissible.[230] Ordinarily in diversity cases, while federal law governs the

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R.R. v. Vreeland, 227 U.S. 59, 68 (1913); Burlington N. v. Boxberger, 529 F.2d 284 (9th Cir. 1975) (amount beneficiary reasonably could have expected to have been applied to her support but for the wrongful death). *See also, In re* Air Crash Disaster, 644 F.2d 594, 605 (7th Cir. 1981) (Illinois as place of injury does not allow punitive damages in wrongful death action) (citing Mattyasovzky v. West Towns Bus Co., 21 Ill. App. 3d 46, 313 N.E.2d 496 (1974), *aff'd*, 61 Ill. 2d 31, 330 N.E.2d 509 (1975)); Elliott v. Willis, 92 Ill. 2d 530, 442 N.E.2d 163 (1982) (purpose of the Illinois Wrongful Death Statute is to compensate survivors for pecuniary loss due to wrongful death, and the measurement of damages is the pecuniary value decedent might have contributed had he lived); Graul v. Adrian, 32 Ill. 2d 345, 205 N.E.2d 444 (1965) (damages under wrongful death act limited to loss of support); Scully v. Otis Elevator Co., 2 Ill. App. 3d 185, 275 N.E.2d 905 (1971) (measure of pecuniary damages in wrongful death action is the value of monetary support and personal services decedent would have contributed had he lived).

[226] 701 F.2d at 1195, 1198. The court also quoted the Illinois Supreme Court Committee on Jury Instructions, ILLINOIS PATTERN JURY INSTRUCTIONS: CIVIL § 31.04 (1971), which recommends that the following instruction be given in a wrongful death action:

> [I]n determining pecuniary loss . . . you may consider what benefits of pecuniary value, including money, goods and services the decedent might reasonably have been expected to contribute to the [survivor] had the decedent lived, bearing in mind the following factors concerning the decedent:
>
> 3. What he spent for customary personal expenses [and other deductions] . . . .

701 F.2d at 1198 n.6 and accompanying text of opinion. The Seventh Circuit reasoned that the pattern jury instructions quoted above further indicate that Illinois courts would allow tax evidence and deduct income taxes as a "personal expense" or "other deduction" in order to make the award compensatory. *Id.* at 1198.

[227] *Id.* at 1199.

[228] *Id.* The court cites *Hall* and *Raines*. *Id.* See also the following decisions confirming the vitality of *Hall* in non-FELA suits, holding trial court's refusal to give cautionary instruction as proper: Newlin v. Foresman, 103 Ill. App. 3d 1038, 432 N.E.2d 319 (1982) (wrongful death); Christou v. Arlington Park-Washington Park Race Tracks Corp., 104 Ill. App. 3d 257, 432 N.E.2d 920 (1982) (personal injury).

[229] 701 F.2d at 1199. *See supra* text accompanying note 43.

[230] 701 F.2d at 1200.

procedure of requesting and giving jury instructions, state law controls the content of those instructions.[231] The Seventh Circuit determined that despite several cases on point,[232] Illinois, in refusing to give the instruction altogether instead of defining it, had failed to articulate an intent to allow what the Seventh Circuit perceived as a possible "bonus beyond compensatory damages."[233] The Seventh Circuit noted that its decision might have been different had Illinois interpreted its own substantive law to include a "right to receive an award beyond compensation."[234] Thus, instead of adhering to Illinois law which did not allow a cautionary instruction,[235] the Seventh Circuit required more of the Illinois courts. The Seventh Circuit seemed to say that the Illinois court's refusal to allow a cautionary instruction is not enough and that such a refusal should be accompanied by an articulated intent to allow a bonus beyond compensation.[236] Because the Seventh Circuit found no such articulated intent in Illinois case law, it looked instead to federal common law as pronounced in *Liepelt*.[237] The Seventh Circuit's rationale was that the cautionary instruction related to the I.R.C. which is federal law.[238]

The Seventh Circuit analyzed *Hall* and determined that whatever substantive interest Illinois seemed to have in denying the instruction was either procedural,[239] and thus not

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[231] *Id.* at 1199. *See also* Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir.), *cert denied*, 419 U.S. 1096 (1974). *Accord* Vasina v. Grumman Corp., 644 F.2d 112 (2d Cir. 1981) (cautionary instruction not permissible under New York Wrongful Death Act, although act precribes a pecuniary measure of damages and does not allow punitive damages; and federal court sitting in diversity must look to law of state to determine whether the instruction is permissible); Croce v. Bromley Corp., 623 F.2d 1084 (5th Cir. 1980) (federal court sitting in diversity is bound to apply state law regarding whether cautionary instruction is permissible in wrongful death action), *cert. denied*, 450 U.S. 981 (1981).

[232] *See supra* note 228.

[233] 701 F.2d at 1200. *See also id.* at 1200 n.7.

[234] 701 F.2d at 1200 n.7.

[235] 701 F.2d at 1199.

[236] *Id.* The Seventh Circuit stated that "[u]nless Illinois has a substantive interest in refusing the instruction, therefore, perhaps federal law should control." *Id.*

[237] *Id.* at 1199-1200.

[238] *Id.* at 1199.

[239] *Id.* at 1200.

binding on a federal court sitting in diversity,[240] or based on a misinterpretation of the federal tax code.[241] In finding that the award in wrongful death actions predicated on Illinois law was limited to pecuniary damages,[242] the Seventh Circuit held that the application of the outcome-determinative test was inappropriate.[243] Giving the instruction might cause a significant difference in the amount of the verdict rendered

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[240] *See supra* note 11.

[241] 701 F.2d at 1196. *See supra* text accompanying notes 201-205.

[242] 701 F.2d at 1196. *See supra* note 225.

[243] 701 F.2d at 1200. Three concerns led to the formulation of the outcome-determinative test in Guaranty Trust Co. v. York, 326 U.S. 99 (1945): 1) the desirability of uniform application of substantive law within a state in both state and federal courts, *id.* at 108-09; 2) that an out-of-state plaintiff should not be able to "forum shop" between the state and federal courts in same jurisdiction for the more favorable law, *id.* at 111; 3) that it is fundamentally unfair to allow the result in a suit to differ between the state court and the federal court merely because of the diversity of the parties to the suit, and because the suit was litigated in a federal court instead of a state court, *id.* at 112. Consequently, the *York* outcome-determinative test dictated that state law must apply if the outcome in a federal court would materially differ from the outcome reached if the case had been litigated in a state court. *Id.* at 108-09. After several years of fear that the *York* outcome determinative test was destroying the independence of the federal court system, the Supreme Court formulated the balancing approach in Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525 (1958). In *Byrd*, the federal court submitted to the jury an issue that would have been decided by the judge if the case had been tried in a state tribunal. *Id.* at 531-32. The Supreme Court balanced competing state and federal policies regarding jury trials to determine that state laws "cannot alter the essential character or function of a federal court." *Id.* at 539. The *Byrd* balancing test was difficult to apply since the competing considerations of federal and state courts were difficult to weigh in determining which entity had the stongest considerations and, hence, the ultimately applicable rule. Boggs v. Blue Diamond Coal Co., 497 F. Supp. 1105, 1116 (E.D. Ky. 1980). Finally, in Hanna v. Plumer, 380 U.S. 460 (1965), the Supreme Court recognized that, although it could be argued that the application of a Federal Rule of Civil Procedure was outcome-determinative, the outcome-determinative test should only be applied in reference to the twin aims of *Erie*. *Id.* at 468 n.9. Thus the balancing test was abandoned. The twin-aims of *Erie* are: (1) discouragement of forum-shopping and (2) avoidance of inequitable administration of laws. *Id.* The Court emphasized that there must be a substantial deviation in the enforcement of the state-created rights under issue before a federal rule will yield to a state rule. *Id.* at 469. The Court stated that,

> *Erie* and its progeny make clear that when a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.

in a federal court, as opposed to that rendered a block away in an Illinois state court where such an instruction is improper.[244] The Seventh Circuit, however, held that the possibility of a larger award than what would be compensatory was an improper outcome in light of Illinois' strictly compensatory scheme for wrongful death actions.[245] The Seventh Circuit also reasoned that in view of *Liepelt*, the Illinois court's interpretation of the federal tax code in *Hall* to include an intent on the part of Congress to confer a positive benefit in the form of an award "beyond the stated measure of damages" was without basis.[246] Thus, the Seventh Circuit held that the possibility of such a windfall in the absence of the cautionary instruction was an improper outcome under both Illinois and federal laws.[247]

The court also briefly considered *Hall's* other reasons for refusing to instruct the jury on the non-taxability of the award—the presumption of integrity of the jury's decision-making processes and the possibility of a profusion of cautionary instructions.[248] Finding these concerns to be "matters of court administration"[249] and not in themselves outcome-determinative so as to be so intertwined with the substantive law as to bind a federal court sitting in diversity,[250] the Seventh Circuit held these concerns to be merely procedural and hence subject to federal practice.[251] Consequently, the Seventh Circuit found permissible the cautionary instruction on

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380 U.S. at 468 n.9. For a good discussion on the historical background of *Erie* and its progeny, see Boggs v. Blue Diamond Coal Co., 497 F. Supp. 1105 (E.D. Ky. 1980).

[244] *See Hall,* 5 Ill. 2d 135, 125 N.E.2d 77 (1955); *Raines*, 51 Ill. 2d 428, 283 N.E.2d 230, *cert. denied*, 409 U.S. 983 (1972); *Newlin*, 103 Ill. App. 3d 1038, 432 N.E.2d 319 (1982); *Christou*, 104 Ill. App. 3d 257, 432 N.E.2d 920 (1982).

[245] 701 F.2d at 1200.

[246] *Id.* at 1199.

[247] *Id.*

[248] *Id. See supra* text accompanying notes 71-72.

[249] 701 F.2d at 1200.

[250] *Id.* (citing Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525, 535-36 (1958)) (state law cannot alter the essential character or functions of a federal court).

[251] 701 F.2d at 1200. *See also* Herron v. Southern Pac. Co., 283 U.S. 91, 94 (1931) (state statutes which would interfere with the appropriate performance of functions of a federal court are not binding upon federal court); Wright v. Farmers Co-Op of Ark. & Okla., 620 F.2d 694, 696 (8th Cir. 1980) (in diversity actions, Federal Rules of Civil Procedure govern grant or denial of jury instruction which is a procedural matter).

the non-taxability of the award.[252]

III. CONCLUSION

Congress has specifically declined to enact a federal aviation disaster law which would create uniformity within the United States regarding liability and damages.[253] Despite this, the Seventh Circuit Court of Appeals in *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, has in effect insured uniformity of practice and results concerning tax evidence and the cautionary instruction within the federal courts of the Seventh Circuit.[254] The Seventh Circuit's ruling would seem to control the evidentiary issue in wrongful death actions brought under state law in federal courts within the Seventh Circuit,[255] at least where the state's measure of damages is identical to that of FELA.[256] Similarly, the court's ruling regarding the cautionary instruction would seem to control where the state has not articulated an intent to allow a recovery beyond compensation.[257]

The Seventh Circuit, however, may have overstepped its powers under *Erie* principles.[258] *Erie* and its progeny taught that federal courts sitting in diversity must apply state substantive law when there is no applicable federal law.[259] Although perhaps properly interpreting Illinois case law to determine that no Illinois precedent exists for the admissibility of evidence of a decedent's hypothetical tax liability,[260] the Seventh Circuit's analysis of the items the Illinois court would take into consideration in making a decision, were it faced with the same issue, seems a bit strained. *In re Air Crash Disaster Near Chicago* was a wrongful death action brought under not federal, but state law.[261] Because a proposed "fed-

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[252] 701 F.2d at 1200.
[253] *See supra* note 23 and accompanying text.
[254] *See supra* text accompanying notes 193-252.
[255] *See supra* text accompanying notes 197-226.
[256] *See supra* text accompanying note 226.
[257] *See supra* text accompanying notes 227-236.
[258] *See supra* notes 11, 243.
[259] *See supra* notes 11, 243.
[260] *See supra* text accompanying note 199.
[261] *See supra* note 8 and accompanying text.

eral aviation disaster law" was allowed to die in committee,[262] there was no federal law applicable here as opposed to cases like *Liepelt* and those arising under other federal laws.[263] Therefore, Congress had not expressed an intent to provide for uniformity of treatment of cases arising in the context of aviation disasters as it had in the context of FELA actions.[264] Had such a federal aviation disaster law been enacted, it would seem reasonable that the Seventh Circuit could have properly relied upon *Liepelt*. Here, the Seventh Circuit's reliance upon analogies between *Liepelt* and other cases arising under FELA and the present case seems totally misplaced due to the lack of any federal interest in uniformity of treatment of aviation disaster cases.[265]

Although federal rules exist for the admissibility of evidence,[266] the Seventh Circuit recognized that to the extent a state evidentiary rule defines what is sought to be proven, which in this case was the measure of damages, the state evidentiary rule may be binding under *Erie* principles.[267] Although the Illinois courts perhaps have never directly ruled on the question of the admissibility of tax evidence,[268] there exists a line of Illinois cases evidencing a strong disposition against admitting tax evidence.[269] Despite this evidence regarding how the Illinois court would respond to the issue, the Seventh Circuit chose to rely upon a concurring opinion in *Peluso*[270] and dicta in *Allendorf*.[271] The Seventh Circuit's reliance upon these two cases seems tenuous at best in view of the fact that in both *Peluso* and *Allendorf* the question of the

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[262] *See supra* note 23.

[263] *See supra* notes 56, 60, 88 and accompanying text.

[264] *See supra* text accompanying note 23.

[265] *See supra* text accompanying note 23.

[266] *See supra* note 127 and accompanying text.

[267] *See supra* text accompanying notes 197-198.

[268] *See supra* note 199 and accompanying text.

[269] *Raines*, 51 Ill. 2d 428, 283 N.E.2d 230 (1972); *Hall*, 5 Ill. 2d 135, 125 N.E.2d 77 (1955); *See also Peluso*, 47 Ill. App. 3d 842, 365 N.E.2d 390 (1977); *Allendorf*, 8 Ill. 2d 164, 133 N.E. 2d. 288 (1956).

[270] 47 Ill. App. 842, 365 N.E.2d 390 (1977), *discussed supra* at text accompanying notes 101-110.

[271] 8 Ill. 2d 164, 133 N.E. 2d 288, *cert. denied*, 352 U.S. 833 (1956), *discussed supra* at note 223.

admissibility of tax evidence was not preserved for appeal and was therefore not properly before the court.[272]

Consequently, the Seventh Circuit's analysis in reaching its decision that the tax evidence was admissible because Illinois' measure of damages was identical to that defined by cases arising under FELA[273] seems ill-reasoned. Instead of conforming to *Erie* principles[274] and applying the law of the state even when the law has to be predicted where there is no existing state precedent,[275] the Seventh Circuit seems to have substituted federal common law as enuciated in *Liepelt*.

Similarly, the Seventh Circuit's reasoning regarding the propriety of a cautionary instruction on the non-taxability of a wrongful death award seems just as ill-reasoned. Although the Seventh Circuit cited *Gulf*,[276] it failed to note the import of the case: 1) that although *Gulf* arose under federal law, the United States Supreme Court did not automatically apply federal common law as enunciated in *Liepelt* to sanction the giving of a cautionary instruction;[277] and 2) that by remanding to the Texas court to determine whether Louisiana law, which was the law of the case according to OCSLA, would require such an instruction it was tantamount to saying that the question of such an instruction is one of substance and not of procedure.[278] Had the Supreme Court considered the question of a cautionary instruction to be procedural and thus controlled by the law of the forum,[279] the Supreme Court would have remanded to the Texas court to determine whether *Texas* law required such an instruction. Had the Seventh Circuit properly analyzed *Gulf*, it would have found that the Supreme Court of the United States did not consider

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[272] *Peluso*, 365 N.E.2d at 399; *Allendorf*, 133 N.E.2d at 296.

[273] 701 F.2d at 1195.

[274] *See supra* notes 11, 243.

[275] *See supra* note 200.

[276] 701 F.2d at 1192 (citing Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981), *discussed supra* at text accompanying notes 147-173.

[277] *Gulf*, 453 U.S. at 488, *discussed supra* at text accompanying notes 157-158.

[278] *Id.*

[279] *Id.*

a cautionary instruction a procedural matter solely within the province of the forum.

Furthermore, in reaching its decision regarding the cautionary instruction, the Seventh Circuit may have disregarded the twin aims of *Erie*, which are the discouragement of forum shopping and the avoidance of inequitable administration of laws between citizens and non-citizens of a state.[280] Despite the fact that significant case law exists in Illinois on the impropriety of such a cautionary instruction,[281] the Seventh Circuit chose to disregard such precedent and chose instead to provide an alternative forum in which the cautionary instruction may be given.[282] Consequently, it is evident that plaintiffs in those states barring evidence of taxation or the giving of a cautionary instruction regarding the non-taxability of an award will seek to bring their actions, and will endeavor to remain, in state court where they are assured of a significantly larger verdict (at least in states where evidence of taxation is improper). Consequently, forum shopping has been encouraged rather than discouraged. Additionally, as between a citizen and a non-citizen of a state, the Seventh Circuit's decision has opened the doors to the inequitable administration of the law. Should a non-citizen of a state decide to bring his suit in a federal court of the Seventh Circuit on the basis of diversity of citizenship, his recovery will be limited (at least where evidence of taxation is improper in that state), while the successful plaintiff who is a citizen and who is able to remain in state court will receive a larger award.

The cumulative effect of the Seventh Circuit's decision in *In re Air Crash Disaster Near Chicago* is that in state-created causes of action where state law differs from the federal common law as pronounced in *Liepelt*, there will be two distinct interpretations and applications of each state's measure of

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[280] *See supra* notes 11, 243.

[281] For significant cases see *supra* note 228.

[282] 701 F.2d at 1200. While Illinois courts refuse to give a cautionary instruction regarding the non-taxibility of jury awards, such an instruction may now be given in a federal court sitting in diversity in Illinois. *Id.*

damages within that state. The state courts will continue to apply their own laws regarding the admissibility of tax evidence and the giving of a cautionary instruction, while the federal district courts of the Seventh Circuit will apply federal common law as enunciated in *Liepelt* to admit tax evidence and a cautionary instruction. Another probable effect of the Seventh Circuit Court of Appeal's decision is that there will be a proliferation of removal cases from state courts[283] due to the motivating factor that an unsuccessful defendant will be assured of paying a lower damage award as between federal and state courts. It is clear that no defendant will be content to stay in a state court where tax evidence is not admissible when through removal he can be assured of the admissibility of tax evidence in order to lower the damage award. Similarly, when the state in which the federal court sits does not allow a cautionary instruction, defendants will be sure to remove to federal court in order to be assured of the propriety of such an instruction, which may protect the defendant from paying an excess amount the jury mistakenly believes the plaintiff will have to pay in taxes.

Still another possible effect will be that as defendants gear up to present evidence of decedent's hypothetical tax liability, plaintiffs will also gear up in their presentation of evidence showing that their decedent was an exceptionally shrewd tax planner and would have paid the least tax possible. Analogous evidence is presented when plaintiffs attempt to prove that their decedent would have earned progressively larger incomes in future years and defendants attempt to prove the opposite.[284] Therefore, plaintiff's and defendant's conflicting evidence may not unduly complicate the jury's considerations as the jury is already required to sift through abstract approximations.[285]

There is logic and even desirability in admitting tax evi-

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[283] Removal of actions from state court to federal court is governed by 28 U.S.C. §§ 1441-1450 (1976).

[284] *See, e.g., Allendorf*, 8 Ill 2d 164, 133 N.E. 2d 288, *cert. denied*, 352 U.S. 833 (1956), *discussed supra* at note 223.

[285] *Id. See also supra* text accompanying notes 220-223.

dence and allowing the cautionary instruction when the measure of damages is pecuniary in nature. Considered in a vacuum, it makes sense that defendants should not have to pay amounts that the survivors would never have received from the decedent in the first place. However, *In re Aircrash Near Chicago* cannot be considered in a vacuum. It must be considered in the context of Illinois law which was the law of the case.[286] It would seem that without the benefit of a federal aviation disaster law[287] and at the expense of the twin-aims of *Erie*,[288] uniformity regarding tax evidence and cautionary instructions on the non-taxability of a wrongful death award has been achieved within the federal courts of the Seventh Circuit.

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[286] *See supra* note 8 and accompanying text.
[287] *See supra* notes 22-23 and accompanying text.
[288] *See supra* notes 11, 243 and accompanying text.

CIVIL PROCEDURE—PERSONAL JURISDICTION IN OREGON—The Oregon Supreme Court Construes a New Long Arm Statute, Adopts a Substantively Relevant Contact Test, and Extends Jurisdiction to a Remote Aircraft Component Manufacturer which Has No Direct Contacts with the Forum. *State ex rel. Hydraulic Servocontrols v. Dale*, 294 Or. 381, 657 P.2d 211 (1982).

State ex rel. Hydraulic Servocontrols v. Dale,[1] a mandamus proceeding,[2] is a case of first impression for Oregon.[3] The case

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[1] 294 Or. 381, 657 P.2d 211 (1982).

[2] 657 P.2d at 211. The trial court refused a motion to dismiss for lack of personal jurisdiction, and Hydraulic sought a writ of mandamus to compel the trial court to dismiss the complaint for lack of personal jurisdicition. *Id.* Mandamus proceedings are brought against an inferior court to compel the performance of an act which the law specially enjoins. OR. REV. STAT. § 34.110 (1981). Alternative (temporary) writs are issued while the higher court decides on whether to issue a peremptory (permanent) writ, and to allow the inferior court to show cause why a peremptory writ should not be granted. *Id.* at § 34.150.

[3] 657 P.2d at 212. On the same day that the court decided *Hydraulic Servocontrols*, it also decided State *ex rel.* Michelin v. Wells, 294 Or. 296, 657 P.2d 208 (1982). *Michelin*, a mandamus proceeding, is also a case of first impression construing the constitutional limits of Oregon's new long arm statute. 657 P.2d at 208. Joint examination of the cases is necessary to properly understand the rationale and decision of each.

In *Michelin*, Lamb-Weston, an Oregon corporation, brought suit against Michelin USA, the American distributor of Michelin tires, and Michelin France, the French manufacturer, for damage to its truck and lost profit resulting from an alleged explosion of a Michelin tire. 657 P.2d at 208. The complaint alleged that Michelin France engaged in substantial activities in Oregon. *Id.* The complaint alleged that the tire was installed on Lamb-Weston's truck and that the tire was unreasonably dangerous and defective at the time of manufacture. *Id.* While the accident occurred in Washington, the places of purchase and installation were not alleged in the complaint. *Id.*

The court pointed out that Michelin France had carefully structured its activities to avoid corporate contacts in the United States in an attempt to avoid the exercise of *in personam* jurisdiction over it. *Id.* at 208. Michelin France had no registered agent in any state and sold its product only to two United States purchasers with whom it had no corporate ties. *Id.* It had no direct marketing efforts in the United States. *Id.* In other words, Michelin France had no direct contacts with Oregon or, for that matter, with any other state. *Id.* The court stated the issue as "whether Michelin France, which seeks through others to serve a nationwide market, can be called into account in an Oregon court on the sole basis that one of its products injures an Oregon resident." *Id.* at 209. The court granted the peremptory writ and held that personal jurisdiction

construes the Constitutional limits of Oregon's new long arm statute, rule 4 of the Oregon Rules of Civil Procedure [4] (ORCP), in light of *World-Wide Volkswagen v. Woodson*.[5] Hydraulic Servocontrols Corporation, a New York corporation,[6] manufactured a servo actuator,[7] and delivered the servo actuator to AiResearch Manufacturing Company with knowledge it would eventually be used in an aircraft.[8] AiResearch is a division of the Garret Corporation, a California corporation.[9] Garret incorporated the servo actuator into an airplane engine[10] and sold it to Cessna Aircraft Company, a

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cannot be upheld under the Constitution of the United States if based only on the general sales or use of Michelin's products in the state. *Id.* at 210-11. Further, the court held that to satisfy due process there must be a substantively relevant contact with the state, a contact relevant to the substance of the claim for relief such as sale, use, accident or injury. *Id.*

[4] OR. R. CIV. PROC. 4. Subsections B through K of rule 4 of the ORCP are specific provisions that allow jurisdiction on facts that the United States Supreme Court has deemed adequate. 657 P.2d at 213. The apparent rationale stems from Kulko v. California Supreme Court, 436 U.S. 84 (1978), in which the Supreme Court found it significant that the state asserting jurisdiction had not expressed a particular jurisdictional interest in the kind of case in which it was attempting to exercise jurisdiction. *Id.* at 213 n.3. Hence Oregon is attempting to claim as much particularized interest as possible to ensure that its courts have jurisdiction in close cases. *Id.* Sections B through K also aid judicial efficiency. *Id.* at 213. If the jurisdictional facts fit within a provision, then the court is aided in determining personal jurisdiction without having to litigate the facts through a general due process clause. *Id.* None of the subsections, however, fit the *Hydraulic Servocontrols'* facts. *Id.* at 212-13. Rule 4 of the ORCP has a catchall provision allowing personal jurisdiction to the outer limits of due process. Rule 4(L) provides: "Notwithstanding a failure to satisfy the requirement of sections B. through K. of this rule, in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States." *Id.*

[5] World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980), construed in Hydraulic Servocontrols, 657 P.2d at 212, 214-16. In *World-Wide Volkswagen* the United States Supreme Court emphasized that the contacts that are relevant are those that would enable the defendant to anticipate being haled into court in the forum state. 444 U.S. at 297. *See infra* notes 76-93 and accompanying text.

[6] 657 P.2d at 212. The opinion does not specify the function of a servo actuator. *Id.* at 211-16. It would appear to be a motor or other form of device which transforms fluid pressure into mechanical force and which receives a small signal from the control device and exerts a large force to accomplish the desired work. J. FOYE & D. CRANE, AIRCRAFT TECHNICAL DICTIONARY 3, 153 (1978) (combined definitions of servo and actuator).

[7] 657 P.2d at 212.

[8] *Id.*

[9] *Id.*

[10] *Id.*

Kansas corporation.[11] Cessna incorporated the engine into one of its Cessna aircraft[12] and sold it to a regional dealer, Western Skyways, Inc., a Delaware corporation.[13] Western Skyways, the regional dealer in Oregon sold the aircraft to Cascade Steel Rolling Mills, an Oregon corporation.[14] Two weeks later the aircraft crashed in California.[15]

Cascade brought suit in Oregon against all four corporations.[16] The complaint alleged that Hydraulic was liable under theories of strict liability and negligence for the design and manufacture of the actuator.[17] Hydraulic contested personal jurisdiction.[18] Hydraulic did no business in Oregon,[19] nor did it have any offices[20] or presence[21] or status in Oregon.[22] Its only place of business was in New York.[23] Even though the product was removed from Oregon through the chain of manufacturing[24] and the component manufacturer had no direct contacts with Oregon,[25] due process is not offended if the product's use in Oregon was foreseeable and there was a substantively relevant contact with the forum.[26] *Held, the alternative writ of mandamus is dismissed.* The Oregon Supreme Court construes a new long arm statute, adopts a substantively relevant contact test, and extends jurisdiction to a remote aircraft component manufacturer which has no direct contacts with the forum. *State ex rel. Hydraulic Servocontrols v. Dale,* 294 Or. 381, 657 P.2d 211 (1982).

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[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id. See supra* note 2.
[19] 657 P.2d at 212.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 215-16.

I. CONSTITUTIONAL ANALYSIS

A. *Oregon Precedent*

In *Hydraulic Servocontrols*, the defendant did not contend that the exercise of jurisdiction would violate the Oregon Constitution.[27] Rule 4(L) of the Oregon Rules of Civil Procedure[28] purports to extend to the limits of United States Constitutional due process as limited by the fourteenth amendment of the United States Constitution.[29] Even prior to the enactment of rule 4(L), the Supreme Court of Oregon had judicially extended the previous long arm statute, section 14.035 of the Oregon Revised Statutes[30] to the outer limits of constitutional due process.[31] Rule 4(L) merely codifies this decision.[32] Therefore, the inquiry by the Supreme Court of Oregon was into the limits set by the United States Supreme Court under the due process clause of the fourteenth amendment to the United States Constitution with regard to the

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[27] *Id.* at 212 n.1.

[28] See *supra* note 4 for the text of rule 4(L) ORCP.

[29] See *supra* note 4. Not all state statutes purport to extend jurisdiction to the limits of due process. While no state may properly extend jurisdiction beyond the limits of the due process clause as construed by the United States Supreme Court, a state is free to impose further restrictions on its own long arm statute. For example, article 2031b of the Texas Revised Civil Statutes previously required a nexus between the defendant's contacts with the state and the cause of action. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964 & Supp. 1982). Note, *Civil Procedure — In Personam Jurisdiction In Texas,* 47 J. AIR L. & COM. 360 (1982). Hall v. Helicol, 638 S.W.2d 870 (Tex. 1982) judicially relaxed the rigid nexus requirement for Texas.

[30] OR. REV. STAT. § 14.035 (1981) provides that:

> (1) Any person, firm or corporation whether or not a citizen or a resident of this state, who, in person or through an agent, does any of the actions enumerated in this subsection thereby submits such person and, if an individual, his personal representative to the jurisdiction of the courts of this state, as to any cause of action or suit or proceeding arising from any of the following: [enumerated list omitted].

Id.

[31] State *ex. rel.* Academy Press v. Beckett, 282 Or. 701, 708, 581 P.2d 496, 500 (1978). In *Beckett* an Oregon author brought suit in his home state against an Illinois publisher. 581 P.2d at 496. The publisher contested jurisdiction claiming that the contract was negotiated and executed in Illinois and that he had no other contacts with Oregon. *Id.* at 497. The trial court sustained the exercise of jurisdiction. *Id.* at 504. The supreme court affirmed, holding that the publisher's requirement of a substantial revision, and the publisher's alleged misrepresentations were sufficient to state a cause of action in Oregon that satisfied due process. *Id.* at 504.

[32] 657 P.2d at 213 n.2.

fact situation in *Hydraulic Servocontrols.*[33]

B. *United States Supreme Court Precedent*

Traditionally, jurisdiction was based upon at least one of four concepts: physical presence within the state, consent, domicile, or an action *in rem*.[34] An action *in rem* was either against the property directly or *quasi in rem*, through the property to reach the defendant.[35] Any modern jurisdictional inquiry, however, must begin with the minimum contacts theory as first elucidated in *International Shoe Co. v. Washington*.[36] *International Shoe* established the new test in place of the

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[33] *Id.* at 213, 657 P.2d at 209.

[34] Pennoyer v. Neff, 95 U.S. 714 (1878). *Pennoyer* involved a collateral attack by Neff on a default judgment entered against him and a suit in ejectment to regain his property that had been sold pursuant to the default judgment. Neff had not been served with process in Oregon, nor had his property been attached before the default judgment. *Id.* at 719-20. The Supreme Court ruled that *in personam* jurisdiction had never been attained on Neff because he had not been served within the state. *Id.* at 727. *In rem* jurisdiction had not been attained because the property was not attached before suit. *Id.* at 728. For an explanation of *in rem* jurisdiction, see *infra* note 35. The Court reasoned "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"; and further, "that no State can exercise direct jurisdiction and authority over persons or property without its territory." 95 U.S. at 722. *Pennoyer* did make exceptions for a person's status within the state, e.g., in divorce proceedings; and it deemed a foreign corporation doing business within the state as having consented to suit. *Id.* at 735-36. See Milliken v. Meyer, 311 U.S. 457, 462 (1940) for a discussion of domicile as a basis for jurisdiction.

[35] The Supreme Court has explained the *in rem* exercises of jurisdiction as follows:

> A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.

Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1957).

[36] 326 U.S. 310 (1945). The State of Washington brought suit against International Shoe for state employment insurance premiums. *Id.* at 310-11. International Shoe had employed several salesmen in the state and had shipped orders to Washington. *Id.* at 313. International Shoe, a Missouri based Delaware corporation contested jurisdiction because it had made no actual contracts in Washington, and it had no offices there. *Id.* at 312. The Supreme Court of Washington sustained jurisdiction, and the Supreme Court of the United States affirmed. *Id.* at 322. The Supreme Court held that the contacts through the salesmen and orders were of such a quality and nature so as not to offend due process. *Id.* at 320.

traditional bases of jurisdiction[37] and the legal fictions that had built upon them.[38] The minimum contacts test requires that for due process to be satisfied, the defendant must have such minimum contacts within the forum state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[39] The Court in announcing the test also emphasized that the quality and nature of the activity was an essential measure of whether due process had been satisfied.[40] Basing their rationale on *International Shoe*, state courts, unchecked between 1945 and 1977, expanded their exercise of *in personam* jurisdiction, with many state courts exercising jurisdiction in tenuous cases.[41] During this period there was only one case in which the Supreme Court limited state court personal jurisdiction.[42]

Perkins v. Benquet Consolidated Mining Co., [43] the next major personal jurisdiction case, decided by the Supreme Court after *International Shoe*,[44] allowed jurisdiction where the cause of

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[37] *See supra* text accompanying note 34.

[38] 326 U.S. at 316. *International Shoe* dealt specifically with the fiction of presence, but it is clear that the court meant to establish a new jurisdictional paradigm. *Id.*

[39] *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The important, recent jurisdictional case of World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), reaffirmed the minimum contacts test, stating: "As has long been settled, and we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exists 'minimum contacts' between the defendant and the forum State." *Id.* at 291. For a discussion of *World-Wide Volkswagen*, see *infra* text accompanying notes 76-92.

[40] 326 U.S. at 319. In *International Shoe* the previous sales of shoes and the employment of several salesmen constituted contacts of a quality and nature that jurisdiction could properly be asserted. *Id.*

[41] *See* Note, *Long-Arm Jurisdiction and Products Liability: Beyond World-Wide Volkswagen*, 11 MEM. ST. U.L. REV. 351, 353 n.19 (1981).

[42] *Id.* at 353. The case which limited personal jurisdiction is Hanson v. Denkla, 357 U.S. 235 (1958), *discussed infra in* text accompanying notes 56-58. Even though state long arm jurisdiction has generally expanded, no Supreme Court case has actually sustained *in personam* jurisdiction since 1957. 657 P.2d at 213.

[43] 342 U.S. 437 (1952). In *Perkins*, a non-resident plaintiff brought suit against a Philippine corporation in Ohio with a cause of action not related to Ohio. The corporation was temporarily carrying on limited corporate business in Ohio during the Japanese occupation of the Philippines. *Id.* at 438-39. The state court refused to maintain jurisdiction over the corporation on what appeared to be due process grounds. *Id.* at 448-49. The Supreme Court vacated and remanded, holding that the corporation's activities within the state were of such a continuous and systematic nature that due process would not be offended by maintenance of the suit. *Id.*

[44] Note, *supra* note 29, at 263.

action was not related to the forum state.[45] Nor was the plaintiff a citizen of the forum state.[46] The Court held that jurisdiction could properly be maintained where the corporation's activities within the forum were continuous and systematic.[47] The Supreme Court has termed the relationship among the defendant, the forum and the litigation as the "central concern of the inquiry into personal jurisdiction."[48] One author, however, has aptly stated, "The Supreme Court has never required that a nexus exist between the cause of action and the defendant's forum contact. To the contrary, the *Perkins* decision disavows such a requirement by allowing the exercise of personal jurisdiction over the non-resident on a cause of action unrelated to the forum contact."[49]

McGee v. International Life Insurance Co.[50] is the most expansive jurisdictional case decided by the Court.[51] In *McGee* jurisdiction was upheld in California by the single contact of an insurer's offer to reinsure the plaintiff being sent to the plaintiff in California.[52] All the insurance policy premiums were mailed by the California insured to the insurance company in Texas.[53] The Texas company had no other contacts whatsoever with California.[54] Nevertheless, emphazing the quality and nature of the single contact, the Court upheld jurisdiction.[55]

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[45] 342 U.S. at 445.

[46] *Id.*

[47] *Id.*

[48] Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

[49] Note, *supra* note 29, at 366.

[50] 355 U.S. 220 (1957). In *McGee*, a Texas insurance company had assumed a California resident's life insurance policy from an Arizona corporation. The Texas company mailed an offer to the resident offering to insure him under the terms of the original policy. *Id.* After acceptance, and continued payment of premiums, the resident-insured died. The company refused to pay on the policy contending the insured had committed suicide. *Id.* The beneficiaries sought relief and obtained judgment in the California courts, but the Texas courts refused to enforce the judgment ruling that it was obtained without proper jurisdiction. *Id.* at 221.

[51] *Id.* at 222.

[52] *Id.* at 221.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 223.

Only a year later in *Hanson v. Denckla*[56] the Supreme Court began restricting the expansion of state long arm jurisdiction.[57] In *Hanson*, the Supreme Court established the *purposeful availment* measure for minimum contacts by holding that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[58] The Supreme Court did not decide another personal jurisdiction case for almost twenty years, while state courts discounted *Hanson*, for example, as a mere majority decision and continued to increase their long arm grasp.[59] *Shaffer v. Heitner*,[60] the first case

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[56] 357 U.S. 235 (1958). The facts of *Hanson* are as follows: A Pennsylvania resident set up a trust in Delaware. *Id.* at 238. The grantor subsequently moved to Florida where payments were made to her and where she exercised her power of appointment over the assets of the trust. *Id.* Both Delaware and Florida attempted to exercise jurisdiction over the trust assets and the trustee, a Delaware corporation, which assets would go to different individuals depending on which state law was applied. *Id.* at 238-40. The Supreme Court held that Florida's exercise of jurisdiction was improper and that jurisdiction could not be sustained merely by the trust's relations and contacts with the grantor. *Id.* at 251. The Court reasoned that the contacts amounted to unilateral activity by a nondefendant and that the "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Id.* at 253.

[57] Note, *supra* note 41, at 353. State courts continued to expand their *in personam* long arm jurisdiction despite the warnings given in *Hanson*. *Id.* In *Hanson* the Court stated:

> But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

Hanson, 357 U.S. at 251.

[58] *Id.* at 253.

[59] Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen v. Woodson Corp. and Rush v. Savchuk*, 58 N.C.L. REV. 407, 412 (1980).

[60] 433 U.S. 186 (1977). Heitner, a holder of one share of the Greyhound Corporation, a Delaware corporation, brought a shareholder's derivative suit in Delaware against the corporation and 28 of its individual directors. *Id.* at 189-90. The same day the suit was filed a motion was signed sequestering the individual director's Delaware property (stocks, warrants, options). The seizure was accomplished by placing a stop transfer on the corporate books; none of the certificates were actually present in Delaware. *Id.* at 191-92. The directors contested jurisdiction, but the Delaware courts re-

decided after the long silence, ruled that all state assertions of jurisdiction, including *in rem*, must satisfy the minimum contacts standard.[61]

The Supreme Court again decided an *in personam* case in 1978, and again, they rejected the assertion of jurisdiction.[62] In *Kulko v. California Superior Court*,[63] a California court was attempting to maintain *in personam* jurisdiction over a New York resident to establish a Haitian divorce as a California judgment and to modify the judgment concerning custody and child support. The defendant appeared specially and moved to quash the service of the summons.[64] The defendant's only contacts with the forum were two short military stopovers several years earlier, his acquiescence in allowing his daughter to move to California, and the purchase of a ticket for her to do so.[65] The Supreme Court of California reasoned that Kulko's allowing his daughter to move to California to live with her mother and buying the ticket had made an "effect" in California.[66] The court held that by this action Kulko had purposely availed himself of the benefits and protections of the laws of California.[67]

The United States Supreme Court rejected the California rationale for several reasons.[68] First, the Court held that by simply acquiesing to his child's wishes, the father could "hardly be said to have 'purposely availed himself' of the 'benefits and protections' of California laws."[69] Second, the

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jected their minimum contacts analysis because it was a *quasi in rem* proceeding. *Id.* at 195-96.

[61] *Id.* at 212. The *Shaffer* court would not allow an *in rem* exercise of jurisdiction independent of the minimum contacts standard. *Id.* at 212. The Court stated: "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally unfair to the defendant." *Id.*

[62] Kulko v. California Superior Court, 436 U.S. 84 (1978).

[63] *Id.*

[64] *Id.* at 88.

[65] *Id.* at 93-94.

[66] *Id.* at 96.

[67] *Id.* at 94.

[68] *Id.*

[69] *Id.* at 94 (citing Shaffer v. Heitner, 433 U.S. 186, 216 (1977)).

Court held that an "effect" in the forum, if properly understood, should mean a type of wrongful activity outside of the state that causes personal injury or a commercial effect within the state, and not a mere effect in domestic relations.[70] The third reason the rationale was rejected was because the state had not expressed a particularized interest in this type of matter.[71] Finally, the California rationale was rejected because general fairness dictated that the jurisdiction not be sustained.[72] Kulko had no purposeful contacts with California; he had merely assented to the desire of his child.[73] The plaintiff had moved to California and not the defendant;[74] thus the "effect" had been caused by the unilateral activity of the plaintiff.[75]

The most recent *in personam* case which is germane to the analysis is *World-Wide Volkswagen v. Woodson*.[76] The Supreme Court again reversed an exercise of state personal jurisdiction.[77] The decision is so strongly defendant-oriented[78] that

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[70] *Id.* at 96-97. This test is derived from section 37 of the American Law Institute's *Restatement of the Law Second, Conflict of Laws* and has been incorporated into California law. It provides:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971).

[71] 436 U.S. at 98. California had not enacted a special provision in its jurisdictional statute to cover this factual situation, and thus, it has not claimed a special interest in keeping a case of this kind in California. *Id.* The Supreme Court had previously emphasized the importance of a special jurisdictional statute in *McGee*. *Id. See also McGee*, 355 U.S. 220, 221, 224 (1975). See *supra* note 50 for discussion of *McGee*.

[72] 436 U.S. at 97.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] 444 U.S. 286 (1980).

[77] *Id.* at 299.

[78] The *World-Wide Volkswagen* court even defined the functions of the minimum contacts test in defendant protective terms:

> The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

some commentators have considered it at least a limited return to *Pennoyer v. Neff*.[79]

In *World-Wide Volkswagen* the plaintiff sued a local New York automobile dealer, the regional distributor, the national distributor, and the manufacturer of the automobile.[80] The automobile was purchased in New York and was involved in a crash in Oklahoma as the plaintiffs were moving from New York to Arizona.[81] The New York dealer and regional distributor had no contacts with Oklahoma and had neither advertised nor soliticited business there.[82]

The Supreme Court of Oklahoma concluded that the assertion of jurisdiction was proper because an automobile is an intrinsically mobile product and its use is foreseeable in Oklahoma.[83] While acknowledging that limits had properly become more relaxed with modern interstate commerce, the United States Supreme Court in *World-Wide Volkswagen* returned to an emphasis on interstate federalism and the constitutional limits of state *in personam* jurisdiction.[84] The Court repeated the caveat from *Hanson* that it is a mistake to think all restrictions on *in personam* jurisdiction will be eliminated.[85] The Court held that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due

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Id. at 291-92.

[79] 95 U.S. 714 (1878), *discussed supra* note 34. *See* Jay, *Minimum Contacts as a Unified Theory of Personal Jurisdiction*, 59 N.C.L. REV. 429, 475 (1981); *see also* Comment, *Civil Procedure — Personal Jurisidiction*, 46 J. AIR L. & COM. 541, 547-58 (1981).

[80] 444 U.S. at 288. Only the local dealer and regional distributor, however, made special appearances and continued their appeal to the Supreme Court. *Id.*

[81] *Id.*

[82] *Id.* at 289.

[83] World-Wide Volkswagen v. Woodson, 585 P.2d 351 (Okla. 1978).

[84] 444 U.S. at 293-94. The priority of federalism was strongly emphasized. The Court stated:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Id. at 294.

[85] *Id.* See *supra* note 56 for the facts of *Hanson*.

Process Clause."[86] The Court further stated that foreseeability could not be the proper criterion because "[e]very seller of chattel would in effect appoint the chattel his agent for service of process."[87] As a result, the seller's "amenability to suit would travel with the chattel."[88] The Court reasoned that the real test of foreseeability is not foreseeing a product's use in another state but "that [the defendant] should reasonably anticipate being haled into court [in the forum state]."[89] This test, as well as the purposeful availment test, is *subjective*.[90] A third aspect of foreseeability was pointed out by the Court.[91] The Court stated that if a manufacturer or distributor seeks to serve a market directly or indirectly, for example, to deliver its product into a state's stream of commerce, and that product causes injury there, then jurisdiction can be maintained against it.[92]

II. THE OREGON DECISION

In *Hydraulic Servocontrols*,[93] the Oregon court faced a difficult factual situation on the edge of *in personam* jurisdictional law.[94] The court acknowledged that *World-Wide Volkswagen* was the major controlling precedent.[95] Besides following *World-Wide Volkswagen* the court also filtered the facts in *Hy-*

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[86] 444 U.S. at 295. The court later qualifies itself. It states:

> This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he could reasonably anticipate being haled into court there.

Id. at 297.

[87] *Id.* at 296.

[88] *Id.*

[89] *Id.* at 297.

[90] Comment, *supra* note 79, at 560. According to one commentator even the dissent in *World-Wide Volkswagen* acknowledged that the test is subjective. *Id.*

[91] 444 U.S. at 297-98.

[92] *Id.* at 298-99. The Court muddied the water somewhat by its vague reference to *Gray v. American Radiator & Standard Sanitary Corp.*, 222 Ill. 2d 432, 176 N.E.2d 761 (1961). *See* Jay, *supra* note 79, at 442-44.

[93] State *ex. rel.* Hydraulic Servocontrols v. Dale, 657 P.2d 211 (1982).

[94] *Hydraulic Servocontrols*, 657 P.2d at 214.

[95] *Id.*

draulic Servocontrols through the United States Supreme Court's *in personam* precedent.[96]

After construing that rule 4(L) of ORCP extended to the outer limits of due process,[97] the Supreme Court of Oregon in *Hydraulic Servocontrols* analyzed Hydraulic's contacts with Oregon.[98] In its analysis the court summarized the holdings of *International Shoe*,[99] *Perkins*,[100] *McGee*,[101] *Hanson*,[102] *Kulko*,[103]and *World-Wide Volkswagen*[104] and stated that "[t]he Supreme Court's cases since *McGee* tell us what minimum contacts are not rather than what they are."[105] The court also considered itself as going into virgin territory, stating that "[n]one of the cases following *International Shoe* have considered whether a manufacturer is subject to an action on a products liability theory in a state where it has no direct contacts."[106] In analyzing the factual situation in light of *World-Wide Volkswagen*, the court summarized its position in terms of the reasonableness of asserting jurisdiction in light of the defendant's contacts with the forum state and stated that "[o]ne way to judge that reasonableness is by the foreseeability of suit in the forum state."[107]

The *Hydraulic Servocontrols* decision emphasizes and quotes extensively from the analysis concerning foreseeability and the stream of commerce in *World-Wide Volkswagen*.[108] The

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[96] *Id.* at 212, 214. The court construes the facts in regard to the principles set out in *International Shoe*, 326 U.S. 310 (1945), *Hanson*, 357 U.S. 235 (1958), and other precedent. *Id.*

[97] 657 P.2d at 212.

[98] *Id.* at 213-16.

[99] 326 U.S. 310 (1945), *discussed supra* in text accompanying notes 36-40.

[100] 342 U.S. 437 (1952), *discussed supra* in text accompanying notes 43-47.

[101] 355 U.S. 220 (1957), *discussed supra* in text accompanying notes 50-55.

[102] 357 U.S. 235 (1958), *discussed supra* in text accompanying notes 56-58.

[103] 436 U.S. 235 (1958), *discussed supra* in text accompanying notes 62-75.

[104] 444 U.S. 286 (1980), *discussed supra* in text accompanying notes 76-92.

[105] 657 P.2d at 213.

[106] *Id.* at 214.

[107] *Id.*

[108] *Id.* at 215. *See supra* notes 86-92 and accompanying text. The same analysis was used in State *ex rel.* Michelin v. Wells, 294 Or. 296, 657 P.2d 207 (1981), *discussed supra* at note 3. The plaintiff in *Michelin* failed to allege any relation between the cause of action and Oregon, and further failed to properly establish substantial Michelin France commercial activity in Oregon. 657 P.2d at 210. Nevertheless, the Supreme

court reasoned that, by selling its product to a national manufacturer of airplanes, Hydraulic was releasing its product into a national stream of commerce, and it could foresee its use within the forum state and hence was purposely availing itself of that national market, including Oregon.[109] The court distinguished its exercise of jurisdiction from *World-Wide Volkswagen's* refusal to recognize jurisdiction by pointing out the difference in distribution and manufacturing.[110] The court held that by selling servo actuators to Garret, Hydraulic was seeking to serve a national market[111] and therefore should expect to be haled into an Oregon court.[112] Further, the court ruled that Hydraulic was benefiting indirectly from the protection of Oregon's laws and that it was benefiting because it "sold a product with the intention of deriving economic benefit from a national market, including Oregon ."[113] The court held, finally, that there was a substantively relevant contact because the servo actuator [airplane] was sold in Oregon.[114] Thus, the Oregon court upheld jurisidiction over Hydraulic.[115]

III. IMPLICATIONS

The Oregon decision is important to other state jurisdic-

Court of Oregon construed the pleadings liberally in its jurisdictional analysis by assuming that Michelin France had "sought indirectly to serve the Oregon market through a system of distribution by others which covers the Unitd States." *Id.* Although the court found this to be a substantial indirect relationship with the forum, it was still unwilling to sustain jurisdiction. *Id.* at 211. The court construed the reference in Shaffer v. Heitner, 433 U.S. 186, 204 (1977), concerning a "relationship among the defendant, the forum, and the litigation," as a requisite to maintaining jurisdiction. 657 P.2d at 211. It termed this nexus relationship as a "substantively relevant contact," and gave examples such as sale or use of the product within the forum, or accident or injury within the forum resulting from the product. *Id.* Hence, because the cause of action arose in Washington, and no other such contact was established, the court refused to maintain jurisdiction, reasoning that plaintiff's residence in Oregon and the existence of general sales or use of Michelin France's products in Oregon is not enough for Oregon jurisdiction. *Id.* at 208-11.

[109] 657 P.2d at 215.

[110] *Id.* at 215 n.4.

[111] *Id.* at 215.

[112] *Id.*

[113] *Id.*

[114] *Id.* at 216.

[115] *Id.*

tional law for two reasons. The first reason involves the substantively relevant contact test employed by the court.[116] Other states use an equivalent test.[117] The Oregon decision may act to give more credibility and weight to a trend not absolutely required by due process as construed by the United States Supreme Court.[118] The second and potentially more important reason is the Oregon court's construction of the *World-Wide Volkswagen* foreseeability of suit test when it concerns remote component manufacturers.[119] *Hydraulic Servocontrols* acts to extend the scope of *in personam* jurisdiction for remote component manufacturers. As long as a court finds a substantively relevant contact such as sale, use, accident or injury occurring in Oregon, the *Hydraulic Servocontrols*

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[116] *Id.* at 210-11.

[117] Note, *supra* note 29.

[118] The discussion of Perkins v. Benquet Consol. Mining Co. 342 U.S. 437 (1952), *discussed supra* in text accompanying notes 43-47, has shown that a nexus between *the cause of action* and *the forum* is not an absolute prerequisite to sustaining *in personam* jurisdiction. The Oregon court in applying the "substantively relevant contact" test in *State ex rel* Michelin v. Wells, 294 Or. 296, 657 P.2d 208 (1982), *discussed supra* in note 3, appears to defeat the very purpose of Oregon's new long arm statute, rule 4(L) of ORCP. The only contacts required are those necessary to satisfy the "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Michelin France, as the Oregon court concedes, met the basic criteria of Constitutional *in personam* jurisdiction. It obtained economic benefit from the marketing of its product in Oregon, and therefore, it could expect to be haled into an Oregon court. 657 P.2d at 210. Thus, the key test of *World-Wide Volkswagen* was satisfied. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980). Nor were these marketing contacts the result of the unilateral activity of the plaintiff. *See supra* notes 56-57. Further, its products, through a distributor, received the benefits and protections of Oregon's laws. 657 P.2d at 210. The court admits that Oregon would be as fair as any other forum except for the lack of a substantively relevant contact, and it appears to suggest that jurisdiction would have been proper if a substantively relevant contact had existed. The court, however, refuses, stating that "the general distribution of Michelin France's products nationally and in Oregon has no relevance to the substance of this claim for relief." *Id.* at 211. If, as the court admits, Michelin France's tires are generally distributed in Oregon, then why should an Oregon plaintiff be precluded from suing Michelin France in Oregon? Although the nexus relationship is an important analytical tool, the United States Supreme Court has never limited *in personam* jurisdiction to only those cases where there are substantively relevant contacts. See *supra* note 29 for the discussion concerning the nexus requirement. The cases may be few, but there will no doubt be situations in which a defendant's activities within Oregon are continuous and systematic, and yet an Oregon plaintiff will not be able to sustain *in personam* jurisdiction because the cause of action relates to an out of state activity. *Id.*

[119] *See supra* note 86 for the foreseeability of suit test.

decision should act to sustain jurisdiction over *all* component manufacturers putting their products into a nationally marketed product.[120] In *Hydraulic Servocontrols* the component manufacturer was thrice removed in privity from the actual seller;[121] however, the same rationale should apply to the *nth* manufacturer who makes any component part for a nationally marketed product.[122] If other states are persuaded by this analysis, any component manufacturer, no matter how remote, may some day find itself subject to suit anywhere in the country.[123] If other states adopt Oregon's position, a manufacturer of any aircraft part should be prepared to litigate anywhere because of an aircraft's inherently mobile and national nature.[124] The only way a component manufacturer could limit its amenability to jurisdiction in a forum is simply not to manufacture at all.[125]

IV. CONCLUSION

The Oregon court faced a difficult factual situation. By adopting the substantively relevant contact test, the court acted to restrict future permissible exercises of jurisdiction.[126] The *Hydraulic Servocontrols* rationale concerning remote manufacturers, however, extends the permissible scope of *in personam* jurisdiction. Finding that a court has jurisdiction over a national manufacturer or a national distributor is not unu-

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[120] *See* 657 P.2d at 215 for an explanation of the logic extending jurisdiction to Hydraulic Servocontrols, a removed component manufacturer.

[121] 657 P.2d at 212.

[122] *See supra* note 119.

[123] *Id.*

[124] *Id.*

[125] World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980) seeks to add predictability to the system so that potential defendants can structure their primary human conduct and their basic business relationships to have a minimum assurance of where they will be liable for suit. *Id.* A manufacturer cannot legally limit the disbursement of its product to a state or group of states. A purchaser cannot be forbidden to take a product across state lines. Note, *supra* note 41, at 369. Oregon's rationale leaves a component manufacturer no viable alternative; either he will be completely vulnerable to suit, or he must cease making his product. Oregon has left him no way to structure his primary human conduct to avoid suit.

[126] *See* Note, *supra* note 29, at 382 for a discussion of how the past Texas nexus requirement restricted jurisdiction.

sual nor would it be argued improper.[127] But the case for a remote component manufacturer is not as clear.[128] *World-Wide Volkswagen* did not simply repeat earlier foreseeability criteria.[129] First, it emphasized that foreseeability of use of a product in another state alone was *not sufficient* to sustain personal jurisdiction.[130] Second, the Court set forth its *subjective* test of whether the defendant could "reasonably anticipate being haled into court."[131] This test is the foreseeability test "that is critical to due process."[132] After emphasizing the first two aspects of the analysis, the Court then dealt with manufacturers and distributors and the stream of commerce.[133] Unfortunately, the passage concerning manufacturers and distributors and its reference to the stream of commerce is unclear.[134]

The *World-Wide Volkswagen* passage concerning the stream of commerce did not expressly mention foreseeability.[135] The Court uses a subjective term: *expectation*.[136] The opinion states that if a corporation purposely avails itself of conducting activities within the forum, then it has clear notice that it is subject to suit there.[137] In the passage the Court used a hypothetical in explanation of the stream of commerce theory.[138] The hypothetical uses the examples of a national distributor, Volkswagen, and the final manufacturer, Audi.[139] The Court simply stated in conclusory terms that due process would not be offended by asserting "jurisdiction over a corporation that delivers its product into the stream of commerce with the expectation that they will be purchased by consumers in the

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[127] *See* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980).
[128] Note, *supra* note 41, at 368.
[129] 444 U.S. at 295.
[130] *Id.*
[131] *Id.* at 297.
[132] *Id.*
[133] *Id.* Audi, the manufacturer, and Volkswagen, the distributor, were the examples. *Id.*
[134] Note, *supra* note 41, at 368.
[135] 444 U.S. at 297-98.
[136] *Id.* at 298.
[137] *Id.* at 297.
[138] *Id.*
[139] *Id.* at 298.

forum State."[140]

There are several potential problems with the *Hydraulic Servocontrols* decision. The first problem involves the emphasis by the court on Hydraulic's serving a national market.[141] The court holds that because the airplane's ultimate sale in Oregon was an expected result, Hydraulic had effectively delivered its product into a stream of commerce involving Oregon.[142] This conclusion, however, may be begging the question. Under a subjective test, it seems questionable to impute Hydraulic with expectation of suit nationally when its product was twice removed from the final manufacturer. It appears that the Oregon court is applying a mere foreseeability test although the court purports to be evaluating expectation. According to *World-Wide Volkswagen*, it is foreseeability of suit that is critical, not mere foreseeability.[143] Second, the state court considers Hydraulic to have purposely availed itself of the benefits of the laws of the forum through the sale of the airplane in Oregon.[144] This second conclusion is tenuous; Hydraulic was thrice removed from the actual sale to the plaintiff in Oregon.[145] A distributor and a final, or possibly even a secondary, manufacturer[146] could theoretically be tied together as acting in concert or partnership with the distributor and therefore availing themselves of the benefits of the laws of Oregon. But there must come a point when this fiction becomes ludicrous. For example, it would be absurd to sustain jurisdiction over a local New York manufacturer of an allegedly defective screw sold to Hydraulic to make the servo actuator if it knew the screws would eventually be used in an airplane.

For a national manufacturer or distributor, the subjective "reasonably anticipate being haled into court" test can al-

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[140] *Id.*

[141] 657 P.2d at 215.

[142] *Id.*

[143] 444 U.S. at 296-97.

[144] 657 P.2d at 215.

[145] *Id.* at 212.

[146] *See* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) for a case in which a secondary manufacturer was held liable.

most be assumed as automatically met.[147] This assumption is not so clear for a thrice-removed component manufacturer. By selling a servo actuator to an engine manufacturer, Hydraulic did not subjectively anticipate being haled into an Oregon court. Being so far removed from Oregon through the chain of manufacturing makes it highly questionable whether Hydraulic was on clear notice that it was subject to suit in Oregon.[148] A reasonable expectation might be that Hydraulic could expect to be answerable to the engine maker or the airplane manufacturer for indemnity in one of their respective states.

Justice Blackmun said in *World-Wide Volkswagen* that he was not sure why the plaintiff wanted to sue the dealer and regional distributor when he had access to the manufacturer and national distributor.[149] Also, Hydraulic might reasonably expect litigation with Garret or Cessna, as mentioned above, but not with an individual in Oregon, and Hydraulic might reasonably expect that the individual buyer would have its recourse against Cessna or the distributor. The final problem involves the scope of the stream of commerce passage in *World-Wide Volkswagen*.[150] That it covers a component manufacturer is not clear; that it covers a thrice-removed component manufacturer is certainly not clear.

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[147] 444 U.S. at 297.

[148] *Id.* The Court in *World-Wide Volkswagen* held that a corporation that purposely avails itself of the privilege of conducting activities *within* the forum state has clear notice that it is subject to suit there. *Id.* (emphasis added).

[149] *Id.* at 317-18 (Blackmun, J., dissenting).

[150] *Id.* at 297-98.

FEDERAL LAW—WORKERS' COMPENSATION—The Exclusive Liability Provision of the Federal Employees' Compensation Act Does Not Bar Third-Party Indemnity Actions against the United States. *Lockheed Aircraft Corp. v. United States*, 103 S. Ct. 1033 (1983).

On April 4, 1975 a Lockheed manufactured C5A aircraft left Saigon Airport as a part of "Operation Babylift,"[1] an evacuation program for Vietnamese orphans. Some fifteen minutes after take-off, the aft ramp and pressure and cargo doors fell off due to a failure in the aft ramp locking system.[2] The pilot attempted to return to the airport, but ultimately crash-landed in a rice paddy. Approximately 150 persons died in the crash.[3]

Among those killed was Ann Nash Bottorff, a civilian employee of the United States Navy.[4] The government paid death benefits to the Bottorff estate as required by the Federal Employees' Compensation Act (FECA).[5] The administrator of the estate then filed a wrongful death claim against

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[1] Schneider v. Lockheed Aircraft Corp., 658 F.2d 835, 838 (D.C. Cir. 1981). The orphans were being flown to the United States for adoption by American families. *Id.*

[2] *Id.* at 838-39. The failure was primarily due to improper maintenance of the door by the Air Force. Joint Appendix at 62-65, Lockheed Aircraft Corp. v United States, 103 S. Ct. 1033 (1983). Despite contrary regulations, the Air Force maintenance personnel would customarily remove parts from various C5A aircraft at their air base and use them on others which were being readied for flight. *Id.* This "robbing of Peter to pay Paul" was necessitated by a shortage of spare parts. *Id.* As a result, maintenance personnel used "borrowed" tie rods and other cannabalized parts in rigging the cargo door of the C5A involved in this case. *Id.*

[3] Schneider v. Lockheed Aircraft Corp., 658 F.2d 835, 838 (D.C. Cir. 1981). For other descriptions of this accident and actions arising therefrom, see Schneider v. Lockheed Aircraft Corp., 658 F.2d 835 (D.C. Cir. 1981); Friends for All Children, Inc. v. Lockheed Aircraft Corp., 497 F. Supp. 313 (D.D.C. 1980); *In re* Air Crash Disaster Near Saigon, South Vietnam on April 4, 1975, 476 F. Supp. 521 (D.D.C. 1979).

[4] Thomas v. Lockheed Aircraft Corp., 665 F.2d 1330, 1331 (D.C. Cir. 1981).

[5] 5 U.S.C. §§ 8101-8193 (1976). The Act provides in pertinent part that the "United States shall pay compensation . . . for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. . . ." 5 U.S.C. § 8102(a) (1976).

Lockheed, seeking damages under a products liability theory.[6] Lockheed impleaded the United States for indemnity under the Federal Tort Claims Act (FTCA),[7] alleging that the government was primarily responsible for the crash and subsequent deaths.[8]

After settling the claim with Bottorff's administrator, Lockheed moved for summary judgment against the United States, which had never disputed its primary responsibility for the disaster.[9] In defense, the government argued that such a third-party indemnity claim was barred by the FECA's exclusive liability provision.[10] The district court disagreed and granted Lockheed's motion.[11] The District of Columbia Circuit Court of Appeals concluded on appeal that the language of the FECA did indeed bar the claim.[12] It reversed the district court and remanded Lockheed's action against the government.[13] The United States Supreme Court granted certiorari to resolve the conflict.[14] *HELD*: The Federal Employees' Compensation Act does not bar third-party indemnity actions against the United States.[15]

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[6] Thomas v. Lockheed Aircraft Corp., 665 F.2d 1330, 1331 (D.C. Cir. 1981). For a discussion of third-party claims in a product liability context, see O'Connell, *Bargaining for Waivers of Third Party Tort Claims: An Answer to Product Liability Woes for Employers and Their Employees and Suppliers*, 1976 U. ILL. L.F. 435; Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85 (1974).

[7] Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 (1976) (hereinafter FTCA). The Act provides that:

> [The United States is] liable for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope or office of his employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occured. 28 U.S.C. § 1346(b) (1976).

[8] Thomas v. Lockheed Aircraft Corp., 665 F.2d 1330, 1331 (D.C. Cir. 1981).

[9] Lockheed Aircraft Corp. v. United States, 103 S. Ct. 1033, 1035 (1983).

[10] *Id.* For the text of the exclusive liability provision, 5 U.S.C. § 8116(c)(1976), see *infra* text accompanying note 17.

[11] Thomas v. Lockheed Aircraft Corp., 665 F.2d 1330, 1331 (D.C. Cir. 1981).

[12] *Id.*

[13] *Id.* at 1333-34.

[14] 103 S. Ct. 1766 (1982).

[15] Lockheed Aircraft Corp. v United States, 103 S. Ct. 1033, 1038 (1983).

I. "THE MOST EVENLY BALANCED CONTROVERSY"

Section 8116(c) of the FECA limits the government's liability for the injury or death of its employees to those benefits established under the Act.[16] The section provides, in pertinent part:

> The liability of the United States . . . with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States . . . to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States . . . because of the injury or death . . . .[17]

Although the language of this provision appears to preclude any suit which might arise from an injury to a government employee, sharply conflicting interpretations of the provision have arisen since the FECA's enactment in 1949.[18] The issue presented to the courts has been whether the provision should preclude third-party plaintiffs from actions for indemnity or contribution against the government for damages paid to federal employees.[19]

This issue has been referred to by Professor Larson as perhaps "the most evenly balanced controversy in all of workmen's compensation law" because of the irreconcilable conflict between the interests of the employer and those of the

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[16] For a discussion of the benefits under the Federal Employees Compensation Act (hereinafter FECA), see *infra* text accompanying notes 28-33.

[17] 5 U.S.C. § 8116(c) (1976). The 1949 enactment, *see infra* note 33, differed only slightly in wording. It read, in pertinent part:

> The liability of the United States . . . with respect to the injury or death of an employee shall be exclusive, and in place of all other liability of the United States . . . to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States on account of such injury or death . . . .

Federal Employees' Compensation Act, § 7(b), 5 U.S.C. § 757(b) (1949). References in the text to the "exclusive liability provision" will refer to either version unless otherwise noted. Substantively, the two versions are the same. Lockheed Aircraft Corp. v. United States, 103 S. Ct. 1033, 1036 (1983).

[18] This paper will address the various interpretations of this provision in a generally chronological order as they were developed prior to the principal case.

[19] Lockheed Aircraft Corp. v. United States, 103 S. Ct. 1033, 1036 (1983). *See also* Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 227-28, 283-84 (1975) [hereinafter cited as Commission on Revision].

third-party claimant.[20] The employer is primarily interested in limiting its liability for injuries to its employees to a predictable amount against which it can insure.[21] In return for this scheduled compensation, the employer accepts strict liability for injuries to its employees and thus gives up the right to defend itself against claims for injury for which the employer is not actually at fault.[22] Third-party claims for contribution and indemnity,[23] if they are allowed, will expand the employer's liability beyond the limitations guaranteed by the compensation act and defeat the employer's expectations of fixed liability.[24] At the same time, a third party who is only partially or secondarily at fault in causing the employee's injury expects to obtain contribution or indemnity from the other tortfeasor, and does not expect to be charged with the entire loss due merely to the fortuitous circumstance that the other parties involved are under a compensation act.[25] If suit is precluded, the third party's otherwise valid claim will be vitiated, and a loss which should be borne by two will fall to only one.[26] This casenote will examine the

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[20] Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 DUKE L.J. 483, 484.

[21] *Id.*; 2A LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.10 (1976); Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 NW. U.L. REV. 351 (1970) [hereinafter Larson, *Workmen's Compensation*]; Note, *Contribution and Indemnity Under the Federal Employees' Compensation Act*, 6 U. TOL. L. REV. 273 (1974).

[22] Note, *supra* note 21, at 277-78.

[23] Contribution and indemnity are distinct theories in the law of torts, though they are at times confused. Both are founded on equitable principles which seek to protect a party from bearing more than its deserved share of a loss. PROSSER, LAW OF TORTS §§ 50-51 (4th ed. 1971). Contribution is a statutory creation which splits damage awards proportionately between joint tortfeasors, each of whom is independently liable in tort to the plaintiff. Indemnity is a judicial creation which shifts the entire responsibility for a loss from one party to another. This shift is made because of the relationship between the defendant parties (such as respondeat superior), the difference in the comparative duty owed by each defendant to the injured plaintiff, or the difference in kind and degree of fault attributable to each tortfeasor. *Id.* For discussions comparing and explaining indemnity and contribution, see *id.*; Larson, *Workmen's Compensation*, *supra* note 21, at 351; Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932); Weisgall, *Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilites of Third Parties*, 1955 WIS. L. REV. 1035; Note, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 COLUM. L. REV. 123 (1965).

[24] Larson, *supra* note 20, at 485.

[25] *Id.*

[26] *Id.*

various federal judicial approaches to this controversy and its recent resolution by the Supreme Court.

A. *The Balance Defined—Early Historical Background*

In 1916, Congress passed the FECA and thereby provided federal employees with statutory compensation for accidental injuries suffered while working.[27] The FECA was the only legal remedy available to injured employees at the time of its enactment, for the government was immune from suit in tort.[28] In 1946, however, Congress created a general waiver of sovereign immunity in tort when it passed the Federal Tort Claims Act (FTCA).[29] As a result, injured federal employees had an alternative when seeking a remedy: they could collect their benefits under the FECA, or they could sue for damages under the FTCA.[30] The FECA benefits had become inade-

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[27] The Federal Employees' Compensation Act, ch. 458, 39 Stat. 742 (1916) (current version at 5 U.S.C. § 8116(c)(1976)). The Act provided for disability and death benefits based on a percentage of the injured employee's regular earnings prior to the injury or death. For example, a widow without dependent children would receive 35% of her husband's wages for a specified period, and a totally disabled employee could receive up to 66% of his or her prior earnings. *Id.*, 39 Stat. 743-44, §§ 6-10.

[28] H.R. REP. NO. 729, 81st Cong., 1st. Sess. 14 (1949) [hereinafter H.R. REP. NO. 729]; *see also* PROSSER, *supra* note 23, at 970-72.

[29] The Federal Tort Claims Act, Pub. L. No. 79-601, §§ 401-424, 60 Stat. 842 (1949)(codified as amended at 28 U.S.C §§1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1976)). *See also* PROSSER, *supra* note 23, at 970-72. *See generally* WRIGHT, THE FEDERAL TORT CLAIMS ACT (1957); Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. REV. 1325 (1954); Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534 (1947); Note, *Joinder of the Government Under the Federal Tort Claims Act*, 59 YALE L.J. 1515 (1950).

Prior to enacting the FTCA, Congress had authorized other general waivers of immunity through such acts as the Suits in Admiralty Act, 46 U.S.C. §§741-752 (1920)(allowing *in personam* libel against the United States) and the Public Vessels Act, 46 U.S.C. §§ 781-790 (1925)(allowing libel or impleader in admiralty of the United States). *See generally*, Borchard, *Governmental Immunity in Tort*, 34 YALE L.J. 1 (1924); Borchard, *Governmental Responsibility in Tort, VI*, 36 YALE L.J. 1 (1926); Borchard, *Governmental Responsibility in Tort, VII*, 28 COLUM. L. REV. 577 (1928).

[30] H.R. REP. NO. 729, *supra* note 28, at 14; H.R. 3191, 81st Cong., 1st Sess. § 201 (1949), *reprinted in Hearings on H.R. 3191 Before a Special Subcommittee on Education and Labor*, 81st Cong., 1st Sess. 25 (1949).

The House Report explained the existence of the dual remedies as a historical accident. The FECA was enacted in 1916 when the government was immune from suit in tort. There was no need for an exclusive liability provision because the Act was the exclusive remedy of the employees, who could not sue the United States for damages. According to the report, the 1916 Congress did not anticipate that the employee would

quate by 1946,[31] so employees often chose to forego their assured but meager compensation in favor of litigating for a better recovery.[32] Naturally, this produced a greater cost to the government than was allowed under the FECA alone.

Congress responded to this situation in two ways. First, it increased the benefits awarded under the FECA.[33] Second, it made those increased benefits the exclusive remedy for injured employees and their beneficiaries or dependents.[34] The reasoning behind this exclusion, as expressed in the legislative history of section 8116(c),[35] focused on the benefits both to the government and the injured workers.[36] The amendments would assure the employees and their dependents "a planned and substantial protection" as a substitute for their right to a costly and time-consuming action at law for damages.[37] At the same time, the government could realize significant savings by limiting its liability while avoiding litigation.[38] According to the legislative reports, section 8116(c) was enacted as a *quid pro quo* exchange for the mutual benefit of the government and of its employees and their dependents.[39] As be-

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have an alternative remedy against the government when it fashioned the Act. H.R. REP. NO. 729, *supra* note 28, at 14-15.

[31] H.R. REP. NO. 729, *supra* note 28, at 15. The original Act of 1916 provided for a maximum benefit of only $66.67 per month for total disability or death. This schedule was not amended until 1949. *See infra* note 33.

[32] H.R. REP. NO. 729, *supra* note 28, at 15. Under the FECA, the government became strictly liable to its employees. The injured worker could thus collect benefits without the requirement or expense of proving the government's fault through litigation. *See* PROSSER, *supra* note 23, at 530-31.

[33] Federal Employees' Compensation Act Amendments of 1949, Pub. L. No. 357, 63 Stat. 860 [hereinafter 1949 Amendments]. In the 1949 Amendments, Congress raised the maximum benefit available from 66.67% of an employee's normal compensation to 75% with no upper dollar limit such as that ($66.67) found in the 1916 Act. Instead, the 1949 Amendments linked the percentages to the general government pay schedule based on the employee's classification. *See* 1949 Amendments, §§ 750-759, 63 Stat. 860 (now codified at 5 U.S.C. §§ 8102-8113 (1976)).

[34] H.R. REP. NO. 729, *supra* note 28; S. REP. NO. 836, 81st Cong., 1st Sess. 23 (1949), *reprinted in* U.S. CODE CONG. SERV. 2125 (1949).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* The reports make no mention whatsoever of unrelated third parties in the reasons for creating the exclusive liability provision. There are frequent references to the dependents and beneficiaries of employees, and even one mention of "persons pro-

tween those two groups, the remedy under the FECA became exclusive.[40]

Two years after the 1949 Amendments were enacted, the Supreme Court decided a tort claim which did not involve the FECA, but which established the general right to make third-party claims against the government under the FTCA.[41] In *United States v. Yellow Cab Co.*,[42] several private citizens were injured when the taxi in which they were riding collided with a United States mail truck. The combined negligence of the two drivers caused the accident.[43] The passengers sued Yellow Cab, which in turn impleaded the United States for contribution.[44] The trial court allowed the claim, and the court of appeals affirmed.[45] The government appealed the allowance of this third-party action, arguing that the Federal Tort Claims Act allowed only direct actions against the government, not derivative tort claims such as contribution.[46] The United States Supreme Court disagreed, holding instead that the government had consented through the FTCA to be sued both in third-party and separate actions.[47] Looking to the language of the Act, the Court held that the United States was liable in third-party actions to whatever extent the law of the place of injury imposed liability on a similarly-situated private person.[48]

In 1956, the Supreme Court reviewed an exclusive liability provision nearly identical[49] to that of the FECA in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*,[50] and held that it did not preclude third-party claims for contractual indemnity.[51] The

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tected" under the Act. *Id.* There is thus no record of Congress' intent, if any, regarding the rights of third parties.

[40] *See* Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 601 (1963).

[41] Note, *supra* note 21, at 277.

[42] 340 U.S. 543 (1951).

[43] *Id.* at 544.

[44] *Id.*

[45] *Id.* at 545.

[46] *Id.* at 544-45.

[47] *Id.* at 556-57.

[48] *Id.* For the relevant language of the Act, see *supra* note 5.

[49] *See infra* note 58.

[50] 350 U.S. 124 (1956).

[51] *Id.* at 128-32.

case arose when Ryan's improper loading of materials onto the defendant's ship resulted in injury to one of Ryan's own employees.[52] Rather than accept his benefits under the Longshoreman's and Harbor Worker's Act (LHWCA),[53] the employee sued the shipowner who then impleaded Ryan for indemnity.[54] The trial court denied the claim for lack of an express contract of indemnity between the parties,[55] but the appellate court reversed on the basis of an implied contract of indemnity between the primarily negligent party (Ryan) and the indemnitor.[56] Neither court discussed the effect of the LHWCA on the claim.[57] The question presented was whether the LHWCA's exclusive liability provision precluded the shipowner from asserting such an indemnity claim.[58] The Supreme Court concluded that the exclusive liability provision did not preclude the claim when the claim was founded on an independent contractual or implied contractual duty of the employer to the third party.[59]

In its analysis, the Court noted that the LHWCA would not have precluded claims based on an express indemnity contract between Ryan and Pan-Atlantic.[60] Although there was no actual contract, the Court reasoned that the nature of the relationship between the two parties implied one.[61] In other words, Ryan impliedly warranted its stowage work against any damage which improper stowage might cause.[62]

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[52] *Id.* at 126-27.

[53] The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976). An injured employee covered under the Act has the option of receiving compensation or suing a liable third party for damages. *Id.* § 933.

[54] *Ryan*, 350 U.S. at 127.

[55] Palazzolo v. Pan Atl. S.S. Corp., 111 F. Supp. 505, 506 (E.D.N.Y. 1954).

[56] Palazzolo v. Pan Atl. S.S. Corp., 211 F.2d 277, 279 (2d Cir. 1954).

[57] *Ryan*, 350 U.S. at 128.

[58] *Id.* The exclusive liability provision of the LHWCA is contained in 33 U.S.C § 905 (1976), which provides in pertinent part that the "liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages . . . on account of . . . injury or death . . . ." 33 U.S.C. § 905 (1976).

[59] *Ryan*, 350 U.S. at 131-32.

[60] *Id.* at 130.

[61] *Id.* at 133-34.

[62] *Id.* at 130.

The independent contractual right in Pan-Atlantic which devolved from this work relationship was not "on account of" any injury to Ryan's employees, and thus this contractual claim was not precluded by the exclusive liability provision of the LHWCA.[63] The Court, however, made no finding regarding non-contractual indemnity claims because the case involved none.[64]

In 1963, the United States Supreme Court examined the scope of the FECA's exclusive liability provision in *Weyerhaeuser S.S. Co. v. United States*.[65] In *Weyerhaeuser*, a United States Army dredge collided with the *F.E. Weyerhaeuser* off the coast of Oregon.[66] Weyerhaeuser Steamship Company subsequently brought an action against the United States under the Public Vessels Act.[67] Finding both vessels at fault in the collision, the district court applied the admiralty rule of divided damages[68] and split the aggregate losses between the two parties.[69] Weyerhaeuser included among its provable damages a $16,000 award to a federal employee who had successfully sued Weyerhaeuser for injuries sustained in the collision.[70] Although the government agreed that such an award would normally be included in the aggregate total, it contended that the FECA's exclusive liability provision qualified the divided damages rule as to that item when a federal em-

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[63] *Id.*

[64] *Id.* at 133.

[65] 372 U.S. 597 (1963).

[66] *Id.* at 597-98.

[67] *Id.* at 598; Public Vessels Act, 46 U.S.C §§ 781-790 (1927). The Act provides in pertinent part that a "libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States . . . ." 46 U.S.C. § 781.

[68] Under established admiralty law of that time, when a collision occurred in open waters between two vessels, and both vessels were at fault, all provable damages and reasonable court costs for each vessel were aggregated and the loss divided evenly between the vessels. *See* United States v. Reliable Transfer Co., 421 U.S. 397 (1975) (in which Court examines history of the divided damages rule). In 1975, however, the Supreme Court replaced this rule with the comparative negligence standard. *Id. See also* Owen, *The Origins and Development of Marine Collision Law*, 51 TUL. L. REV. 759 (1977).

[69] Weyerhaeuser S.S. Co. v. United States, 174 F. Supp. 663 (N.D. Cal. 1959), *supplemented at* 178 F. Supp. 496 (N.D. Cal. 1961).

[70] *Weyerhaeuser*, 372 U.S. at 599.

ployee was involved.[71] The government argued that its liability to the employee under the FECA was exclusive of all other liability "to *anyone* otherwise entitled to recover,"[72] and that therefore recovery of the $8,000 by Weyerhaeuser was precluded.[73] The court of appeals agreed and reversed the trial court on that point.[74] Upon review, the Supreme Court addressed the narrow question of whether the exclusive liability provision of the FECA modified the admiralty rule of divided damages in mutual fault collisions.[75] The Court analyzed the provision from three perspectives,[76] but found no basis for such a modification of the divided damages rule.[77]

The Court first examined the statutory construction of the provision by applying the rule of *ejusdem generis*.[78] Under this rule, the specific language of a statute qualifies the general, limiting the general to the same class of matters as those specifically mentioned.[79] In the exclusive liability provision of the FECA, the general language "anyone otherwise entitled to recover damages" follows the explicitly enumerated categories of employees, their dependents, and their representatives.[80] In light of that construction, the Court held that the language did not clearly include unrelated third parties such as Weyerhaeuser.[81]

Turning to the Act's legislative history, the Supreme Court concluded that Congress' purpose in adding section 8116(c) to the FECA was to establish an exclusive statutory remedy between the United States and its employees and their repre-

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[71] *Id.*

[72] 5 U.S.C. § 757(b) (1949) (emphasis added).

[73] *Weyerhaeuser*, 372 U.S. at 599.

[74] *Id.*

[75] *Id.* at 600-01.

[76] *See infra* notes 78-92 and accompanying text.

[77] *Weyerhaeuser*, 372 U.S. at 600-03.

[78] In Gooch v. United States, 297 U.S. 124, 128 (1936), the Court defined *ejusdem generis* as a firmly established rule "for ascertaining the correct meaning of words when there is uncertainty . . . . [I]t limits general terms which follow specific ones to matters similar to those specified . . . ."

[79] *Id.*

[80] *Weyerhaeuser*, 372 U.S. at 600-01.

[81] *Id.*

sentatives or dependents.[82] Moreover, the Court stated that "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases."[83] Weyerhaeuser Steamship Company was thus not within the intended purview of the provision, according to the Court.[84]

Finally, the Court analogized the FECA's exclusive liability provision to the nearly identical provision of the LHWCA[85] on which section 8116(c) was partially based.[86] The Court noted that in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*,[87] it had held that the LHWCA provision did not preclude indemnity claims sounding in contract.[88] Moreover, the Court pointed out that the same result (of allowing third-party claims) had been reached in a series of cases subsequent to *Ryan*[89] even though "the contractual relationship was con-

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[82] *Id.* at 601.

[83] *Id.*

[84] *Id.*

[85] 33 U.S.C. § 905 (1976). For the actual language of the provision, see *supra* note 58. Compare the language of 5 U.S.C. § 757(b) (1949), *supra* note 17, with the language of 5 U.S.C. § 8116(c) (1976), *supra* text accompanying note 17.

[86] H.R. 3191, § 201, 81st Cong., 1st Sess. (1949), *reprinted in Hearings on H.R. 3191 Before a Special Subcommittee of the House Committee on Education and Labor*, 81st Cong., 1st Sess. 25 (1949). The report stated that the provision (5 U.S.C. § 757(b) (1949)) was based on the LHWCA, 33 U.S.C. § 905 (1927), and on N.Y. WORK. COMP. LAW § 11 (McKinney 1938)("The liability of an employer . . . shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages . . . ."). Significantly, by the time the FECA was amended in 1949, the New York statute had been held not to preclude third-party recovery actions against employers. *See* Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E.2d 567 (1938)(allowing third-party claim against employer for damages paid on account of injuries to employee); Larson, *Workmen's Compensation*, *supra* note 21, at 409-11.

[87] 350 U.S. 124 (1956). *See supra* notes 50-62 and accompanying text.

[88] *Weyerhaeuser*, 372 U.S. at 602.

[89] *Id.* at 603. The Supreme Court allowed third-party claims based on implied contract in the following cases (all involving the exclusive liability provision of the LHWCA): Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958); Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959); Waterman S.S. Corp v. Dugan & McNamara, Inc., 364 U.S. 421 (1960).

siderably more attenuated" than that in *Ryan.*[90] Although the *Weyerhaeuser* case presented no contractual claim, it did involve a well-established rule of admiralty law[91] which the Court held to be equally clear in defining the rights and duties of the parties involved.[92] The Court concluded that the FECA's exclusive liability provision did not modify a shipowner's right to split losses with the government under the admiralty rule of divided damages.[93]

B. *The Controversy Addressed—Treadwell to Thomas*

In 1962, just prior to the Supreme Court's decision in *Weyerhaeuser*, the Third Circuit Court of Appeals held in *Drake v. Treadwell Construction Co.*[94] that the exclusive liability provision of the FECA precludes a third-party claim against the United States for contribution resulting from injuries to a federal employee.[95] The case arose when a steel expansion tank exploded and injured Joseph Drake, a federal employee. The accident was due to negligent construction of the tank by Treadwell and negligent maintenance by the United States.[96] Treadwell sought contribution from the government for damages paid to Drake.[97] The trial court entered judgment for Treadwell,[98] but the Third Circuit dismissed the claim, holding that it was precluded by the FECA's exclusive liability provision.[99] The court reasoned that civil liability can be imposed upon a sovereign only to the extent that the sovereign

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[90] *Weyerhaeuser*, 372 U.S. at 602-03.

[91] *Id.* at 603. For a discussion of the divided damages rule which the court held to govern this situation, see *supra* note 68.

[92] *Weyerhaeuser*, 372 U.S. at 603.

[93] *Id.* at 604

[94] 299 F.2d 789 (3d Cir. 1962).

[95] *Id.* at 790.

[96] *Id.* at 790-91.

[97] *Id.* Treadwell also had based its third party claim on a contractual theory, but the court refused to hear it for lack of jurisdiction. Under the Tucker Act, 28 U.S.C. § 1491 (1964), the Court of Claims had primary jurisdiction over contractual claims against the government in excess of $10,000, which Treadwell's claim exceeded. *Treadwell*, 299 F.2d at 791-92.

[98] *Id.* at 790.

[99] *Id.* at 791-92.

consents.[100] Although the United States had consented to be impleaded for third-party claims through the Federal Tort Claims Act,[101] the court concluded that the language of section 8116(c) of the FECA[102] withdrew that consent when the claims were for damages awarded to a federal employee.[103]

The Third Circuit dismissed the contribution claim, and Treadwell sought *certiorari*.[104] The Supreme Court vacated the decision without opinion and remanded it to the trial court for reconsideration in light of *Weyerhaeuser*.[105] Upon remand, the court concluded that the FECA's exclusive liability provision did not preclude third-party contribution claims, and entered judgment for Treadwell.[106] The United States maintained its position to the contrary, but ultimately settled without appealing this adverse decision.[107]

In 1964, the Ninth Circuit Court of Appeals decided the issue of whether third-party claims were available against the United States for awards paid to persons covered by the FECA in *United Air Lines v. Weiner*.[108] The case involved a mid-air collision between a commercial airliner and a United States Air Force jet fighter that resulted in the deaths of forty-nine persons, including seven civilian government employees.[109] The trial court found that United and the government were both at fault in causing the crash and dismissed all claims for indemnity by United.[110] The Ninth Circuit, however, allowed indemnity[111] against the government for all

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[100] *Id.*

[101] *See supra* notes 42-48.

[102] See *supra* text accompanying note 17 for the language of section 8116(c).

[103] *Treadwell*, 299 F.2d at 790-91.

[104] Treadwell Constr. Co. v. United States, 372 U.S. 772 (1963).

[105] *Id.*

[106] Hart v. Simons, 223 F. Supp. 109, 111 n.1 (E.D. Pa. 1963).

[107] *Id.* The government originally filed an appeal, but later moved for dismissal of the appeal when the United States Solicitor General recommended against it for reasons not known. *Id.*

[108] 335 F.2d 379 (9th Cir. 1964).

[109] *Id.* at 384-85.

[110] *Id.*

[111] *Id.* The trial and appellate courts both found United and the United States negligent. The appellate court, however, overturned the lower court's finding that the parties were *in pari delicto*, holding instead that the character of the government's fault warranted indemnity rather than mere contribution. *Id.* at 398-402.

damages incurred by United in the deaths of non-government workers, but affirmed the trial court in disallowing indemnity in the cases of the government employees.[112] The court held that under the controlling law, indemnity can only be had where the indemnitor is liable in tort to the injured party.[113] The government, however, has no such tort liability to its employees, according to the court, because the FECA replaced the government's common law tort liability with a strict liability which operates regardless of fault on the part of the United States.[114] The holdings in *Weyerhaeuser* and *Ryan* offered no support, the court concluded, because the former applies only when a rule of law (such as the divided damages rule in admiralty)[115] creates a duty in the government to the third party, and the latter applies only when an actual or implied contract supplies the duty.[116] The court held that United's claim for indemnity was not based on a duty running between it and the government, but on tort liability.[117] As the government had no liability in tort to its employees,[118] the court held that United's claim for indemnity must fail.[119] The exclusive liability provision of the FECA, said the court,

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[112] *Id.* at 402-04, 409.

[113] *Id.* The FTCA requires application of the law of the place where the injury occured. 28 U.S.C. § 1346(b) (1946). The court found that Nevada (the situs of the accident) had no statutes regarding indemnity, but that Nevada courts would apply American common law instead. *Weiner*, 335 F.2d at 398. The court then reviewed the common law, and found that indemnity was available when there was an extreme difference in the character of the fault of the parties, as the court found in this case. *Id.* at 398-401. The court awarded indemnity in favor of United Air Lines, the original defendant, and against the United States, the third-party defendant, in all non-government employee suits. *Id.* at 398-402. *See also* Note, *Contribution and Indemnity in California*, 57 CALIF L. REV. 490, 496-99 (1969).

[114] *Weiner*, 335 F.2d at 402-04.

[115] *Id.* at 404. The court held that indemnity was not an established rule comparable to the divided damages rule, and thus it created no actionable duty under the FECA. *Id.*

[116] *Id.* at 403-04.

[117] *Id.* at 402-04.

[118] *Id.* at 402.

[119] *Id.* at 403. The Ninth Circuit rejected United's contention that the Supreme Court's remand of *Treadwell*, 372 U.S. 772 (1969), *discussed supra in* text accompanying notes 94-104, indicated a broader interpretation of *Weyerhaeuser* and *Ryan*. The court, however, did not develop its rationale for this decision, but merely noted how well-settled the workers' compensation exclusive liability principles were which United wished to overturn. *Id.*

precluded third-party claims for tort indemnity.[120]

In 1968, the District of Columbia Circuit Court of Appeals confronted a third-party contribution claim in *Murray v. United States*.[121] The suit arose when a federal employee was injured when an elevator fell in a building which Murray leased to the government.[122] The employee received her FECA benefits and sued Murray for negligence.[123] Murray, alleging that the United States was primarily at fault, sought contribution, but the trial court dismissed the claim upon a motion for summary judgment by the United States.[124] The Second Circuit was thus presented with the question of whether contribution could be awarded against the government in the face of the exclusive liability provision of the FECA.[125] The court held that although both parties were at fault in the accident, the FECA's exclusive liability provision precluded Murray's third-party claim against the government as a matter of local law.[126] The court noted that the FTCA subjected the government to third-party suits to the same extent that a private party could be sued under District of Columbia law.[127] The court reasoned that under the applicable law, contribution was available only between joint tortfeasors.[128] Since workers' compensation laws replaced the

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[120] *Id.* The Ninth Circuit affirmed its holding in *Weiner* on two other occasions: Wein Alaska Airlines v. United States, 375 F.2d 736 (9th Cir.), *cert. denied*, 389 U.S. 940 (1967)(affirming its holding in *Weiner*); Adams v. General Dynamics Corp., 535 F.2d 489 (9th Cir. 1976)(rejecting the contention that the Ninth Circuit's earlier reasoning was overruled by the Fourth Circuit's opinion in Wallenius Bremen G.m.b.H. v. United States, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970), *discussed infra in* text accompanying notes 165-191).

[121] 405 F.2d 1361 (D.C. Cir. 1968).

[122] *Id.* at 1363.

[123] *Id.*

[124] *Id.* Murray also added claims for indemnity, but these were dismissed for two reasons: the court had no jurisdiction over the contractual claim, *see supra* note 97, and the non-contractual claim was too poorly developed to merit review. *Id.* at 1363, 1367-68.

[125] *Id.* at 1363.

[126] *Id.*

[127] *Id.* The FTCA requires that the law of the state in which the claim arises be used to try the case. 28 U.S.C § 1346(b) (1949).

[128] *Murray*, 405 F.2d at 1364; George's Radio v. Capital Transit Co., 126 F.2d 219 (D.C. Cir. 1945)(establishing the common law rights of contribution between joint tortfeasors).

employer's common law tort liability with strict liability, the court held that the employer could not be liable to its employees in tort, and thus could not be a joint tortfeasor.[129] Accordingly, the court affirmed the trial court's dismissal of Murray's contribution claim.[130]

The court rejected Murray's contention that the Supreme Court holding in *Weyerhaeuser S.S. Co. v. United States*[131] allowed a contribution claim against the government despite the exclusive liability provision of the FECA.[132] In *Weyerhaeuser*, the Supreme Court held that FECA section 8116(c) did not bar a third-party claim against the government for one half of the damages paid by the third party to a federal employee.[133] The District of Columbia Circuit Court limited the application of this holding to those situations involving the admiralty rule of divided damages such as in the *Weyerhaeuser* case.[134] The court thus held that the exclusive liability provision of the FECA did bar a third-party contribution claim against the government for damages awarded to a federal employee.[135]

In 1969, the First Circuit expanded on the concept of underlying tort liability as a basis for third-party claims in *Newport Air Park, Inc. v. United States*.[136] The case arose when the combined negligence of the United States and Newport Air Park caused an aircraft collision which resulted in the death of a civilian federal employee and others.[137] Newport sought

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[129] *Murray*, 405 F.2d at 1364.

[130] *Id.*

[131] 372 U.S. 597 (1963), *discussed supra in* text accompanying notes 65-67.

[132] *Weyerhaeuser*, 372 U.S. at 597.

[133] *Id.*

[134] *Murray*, 405 F.2d at 1364.

[135] *Id.* Although contribution was disallowed, the court reduced the award against Murray by half. *Id.* at 1365-66. The court stated that contribution was equitable in nature, and any inequity arising from the decision was mitigated by a District of Columbia rule which provided that where one joint tortfeasor compromised a claim, the other tortfeasor was protected from added injury by having his tort judgment reduced by one-half. *Id.* The court, however, did not note that this might contradict its overall reasoning in that it had earlier stated that the government could not be considered a joint tortfeasor for purposes of contribution. *Id.* at 1364-66.

[136] 419 F.2d 342 (1st Cir. 1969).

[137] *Id.* at 343.

contribution for damages assessed against it for the death of the civilian employee, and the trial court allowed the claim, finding that the FECA's exclusive liability provision did not bar a third-party claim against the government.[138] On appeal, the First Circuit agreed that the provision did not bar the claim, but redefined the issue of whether section 8116(c) of the FECA affected Newport's right to sue as a third-party plaintiff by rephrasing it as the question of whether the third party had an enforceable right at all.[139] The court held as a matter of federal law that Newport had no enforceable right because the government was under no tort liability to its employees.[140]

The court analyzed the FECA's exclusive liability provision as a federally created immunity, and held that the extent of that immunity is a matter of federal law.[141] Relying on the Ninth Circuit Court of Appeals' holding in *United Air Lines v. Weiner*[142] that the United States has no tort liability to its employees,[143] the First Circuit concluded that a third party has no right of contribution from another party which is statutorily immune from tort liability.[144] The court acknowledged that the FECA provision does not bar a third party's direct, independent claims against the government.[145] The court reasoned, however, that contribution is an indirect right which arises when one of several joint tortfeasors satisfies a judgment levied against all.[146] Since section 8116(c) of

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[138] Newport Air Park v. United States, 293 F. Supp. 809, 811-12 (D.R.I. 1968).

[139] *Newport Air Park*, 419 F.2d at 344.

[140] *Id.* at 347.

[141] *Id.* at 344, 346-47. The court noted that under the applicable Rhode Island law as established in Farrella v. Miller, 100 R.I. 545, 217 A.2d 673 (1966), the United States might have been liable to third-party suit despite its exclusive liability under the FECA. The court, however, held that the government's immunity was a federal, not a state, creation so that the otherwise applicable law was inapposite. *Newport Air Park*, 419 F.2d at 346-47.

[142] 335 F.2d 379 (9th Cir. 1964).

[143] *Id.* at 404.

[144] *Newport Air Park*, 419 F.2d at 347.

[145] *Id.* at 344-45. The court held that *Weyerhaeuser*, 372 U.S. 597 (1963), *discussed supra in* text accompanying notes 65-67, involved an independent, personal right of the third party against the government. *Newport Air Park*, 419 F.2d at 345.

[146] *Id.* at 346.

the FECA removes the government's liability in tort to its employees, the court concluded that the government cannot be a joint tortfeasor with the contribution claimant.[147] The court thus held that a third party has no right to contribution against the United States for damages awarded to an injured federal employee who is covered under the FECA.[148]

In 1975, the Second Circuit addressed this same issue in *Galimi v. Jetco, Inc.*[149] The initial suit was brought by Galimi, a civilian Coast Guard employee who was injured while loading a truck leased by Jetco.[150] Galimi received disability and medical benefits under the FECA and sued Jetco for damages.[151] Jetco interpleaded the government for contribution,[152] charging negligence, but the trial court dismissed the action as barred by the FECA.[153]

On appeal, the Second Circuit agreed with the trial court and held as a matter of federal law that the FECA precluded a third-party claim for contribution for damages paid to an injured federal employee who had been injured through the combined negligence of Jetco and the United States.[154] The court recognized the irreconcilable conflict in this "most evenly balanced controversy"[155] between the employer's interest in fixed liability and the third party's interest in the equitable distribution of loss,[156] but held that the employer's interests prevailed in a federal context.[157] The court's reasoning was simple: Congress had waived sovereign immunity through the FTCA, but never gave up its power to modify

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[147] *Id.* at 345-47.

[148] *Id.* at 347.

[149] 514 F.2d 949 (2d Cir. 1975).

[150] *Id.* at 951.

[151] *Id.*

[152] *Id.* Jetco also sought indemnity on a contractual theory, but the trial court dismissed the claim for lack of jurisdiction under the Tucker Act. *Id.* See *supra* note 97 for an explanation of the Tucker Act regarding jurisdiction of contractual claims against the government.

[153] *Galimi*, 514 F.2d at 951.

[154] *Id.* at 956.

[155] *Id.* at 952 (citing Larson, *Workmen's Compensation*, *supra* note 21).

[156] *Galimi*, 514 F. 2d at 952.

[157] *Id.* at 952, 956. The court declined to address interpretations of controlling state law once it determined that federal law prevailed. *Id.*

that waiver.[158] The court reasoned that when Congress added the exclusive liability provision of the FECA, it did so as a modification of that waiver out of concern for "limiting the costs to government of litigating suits and paying substantial damages to its injured employees."[159] The court recognized that Congress may not have clearly expressed its intent to bar third-party contribution and indemnity suits.[160] Even so, the court noted, a literal reading of the provision would produce that result since the section denies recovery to "*any* other person otherwise entitled to recover."[161] Moreover, the section removed the government's underlying tort liability which is necessary to maintain such claims.[162] The court further observed that the majority of circuits which had addressed the issue had found section 8116(c) of the FECA a bar to third-party claims against the government.[163] The Second Circuit suggested that the Supreme Court would agree if faced with a similar third-party claim.[164]

Despite the supposed "even balance" in this workers' compensation controversy, the only circuit court of appeals to allow a third party recovery was the Fourth Circuit. In the

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[158] *Id.* at 952.

[159] *Id.* at 953.

[160] *Id.*

[161] *Id.*; 5 U.S.C § 8116(c) (1976) (emphasis added).

[162] *Galimi*, 514 F.2d at 953.

[163] *Id.* The court here cited the decisions of the First, Ninth and District of Columbia Circuits discussed above, *supra* notes 136-147, 108-120, 121-107, respectively, plus a Third Circuit case, Traveler's Insurance Co. v. United States, 493 F.2d 881 (3d Cir. 1974)(denying indemnity and contribution as a matter of federal law on the rationale of *Weiner*). One year after *Galimi*, the Seventh Circuit joined the majority in Kudelka v. American Hoist & Derrick Co., 541 F.2d 651 (7th Cir. 1976) (denying indemnity and contribution as a matter of federal law). The *Kudelka* court incorporated the *Galimi* opinion by reference, without extending the rationale. *Id.* at 659.

[164] *Id.* at 956. The *Galimi* court concluded that it was in accord with the Supreme Court on the basis of two observations. First, the Second Circuit noted that the Supreme Court had never squarely faced the issue before it. *Galimi*, 514 F.2d at 955. (*Weyerhaeuser* and *Ryan* were dismissed by the court as involving admiralty law and contractual claims, respectively, not third-party tort claims.) Second, the court observed that in Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co., 406 U.S. 340 (1972), certain dicta by the Supreme Court suggested that the LHWCA exclusive liability provision precluded such third-party claims. *Galimi*, 514 F.2d at 955. The *Galimi* court felt that this dicta replaced the dicta in Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 601 (1963), that Congress was not concerned with the rights of unrelated third parties when it enacted FECA section 8116(c). *Galimi*, 514 F.2d at 955.

1969 case of *Wallenius Bremen G.m.b.H v. United States*,[165] a government employee settled with Bremen for injuries sustained while inspecting a ship owned by that corporation.[166] Bremen then sought indemnity from the United States on a negligence theory,[167] but the trial court dismissed the claim upon a motion by the government for summary judgment.[168] Bremen appealed and thus presented the Fourth Circuit Court of Appeals with the question of "whether the exclusive remedy provision of the Federal Employees' Compensation Act bars the claim of a third party for indemnity against the federal government for damages paid an injured government employee."[169]

The Fourth Circuit employed a three-pronged analysis in rejecting the reasoning of the other circuits which had denied such claims.[170] First, the court concluded that language of the exclusive liability clause specifically excluded from bringing suit only those who derived their claims from a personal relationship to the injured federal employee.[171] The words "anyone otherwise entitled" were, according to the court, a "catch-all" phrase designed by a cautious Congress to avoid missing other related groups such as adopted children.[172] In the court's view, Congress did not intend to include strangers to the FECA in this list.[173] This lack of Congressional desire to include strangers was further evidenced by the *quid pro quo* basis of the Act,[174] which excluded the employees' benefi-

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[165] 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970).

[166] *Id.* at 995.

[167] *Id.* Bremen contended that the United States was primarily negligent in allowing the employee to work because the employee's physical condition was so poor that he could not work safely. *Id.* at 995. The court, however, did not address the merits of this claim. *Id.*

[168] *Id.*

[169] *Id.* at 994-95.

[170] *Id.* at 995, 998. The court specifically addressed only the Ninth Circuit's opinion in United Air Lines v. Wiener, 335 F.2d 379 (9th Cir. 1964), *discussed supra in* text accompanying notes 108-120.

[171] *Bremen*, 409 F.2d at 995. The exclusive liability provision of the FECA specifically mentioned "the employee, his legal representative, spouse, dependents [and] next of kin." 5 U.S.C § 757(b) (1949) (codified as amended at 5 U.S.C. § 8116(c)(1980)).

[172] *Bremen*, 409 F.2d at 995.

[173] *Id.*

[174] *Id.*

ciaries under the scheme because they benefitted from it.[175] The court thus reasoned that Congress could not have intended that an unrelated third party lose its otherwise valid rights without any reciprocal benefit being derived from the legislation.[176]

Next, the Fourth Circuit noted that the Supreme Court had already permitted indemnity in other situations.[177] In *Ryan*, the Supreme Court had held that a theory of contractual indemnity defeated a similar exclusive liability provision.[178] The Court in *Weyerhaeuser* had permitted indemnity to a third party who had satisfied the claim of an injured federal employee, even though the employee himself was excluded from maintaining suit against the government.[179] Although this indemnification was framed in principles of admiralty law, the Fourth Circuit held that the Supreme Court's conclusion that Congress had not intended to affect the rights of unrelated third parties[180] was of controlling importance.[181] Finally, the Supreme Court vacated a lower court's denial of an indemnity claim in *Treadwell* and remanded the case for reconsideration in light of *Weyerhaeuser*.[182] According to the Fourth Circuit, this remand was evidence that "the Court may have thought that other types of obligations, as well as the divided damages rule, were intended to be undisturbed by the Federal Employees' Compensation Act."[183]

In the third prong of its analysis, the *Bremen* court redefined the liability issue as established by the Ninth Circuit in

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[175] *Id.* The beneficiaries were entitled by the FECA to receive swift and sure compensation, without having to prove negligence on the government's part. *See generally*, 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 76.10 (1982).

[176] *Bremen*, 409 F.2d at 995.

[177] *Id.* at 996.

[178] 350 U.S. 124 (1956), *discussed supra in* text accompanying notes 88-90.

[179] Weyerhauser S.S. Co. v. United States, 372 U.S. 597 (1963), *cited in Bremen*, 409 F.2d at 996.

[180] *Weyerhaeuser*, 372 U.S. at 601. The Court stated that "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties." *Id.*

[181] *Bremen*, 409 F.2d at 997.

[182] *Id.*

[183] *Id.*

Wiener.[184] According to the Ninth Circuit, the FECA's exclusive liability provision precludes indemnity actions because it erases the underlying governmental liability necessary to support the claim.[185] The Fourth Circuit rejected this approach and held that tort indemnity[186] shifted the burden of loss according to primary and secondary liability.[187] The party with the primary or active fault can be required to indemnify another whose fault is merely passive or secondary.[188] Concluding that the determination of the relative degree of fault rests on the breach of a duty of care,[189] the court reasoned that indemnity could be sought only where the indemnitor (the government here) "owed a *duty* of his own to the injured person."[190] The court held that the right of indemnity rests not merely upon liability, but upon "violation of a duty of care to the injured person" which had nothing to do with whether that injured person could directly sue the one who caused the injury.[191]

In 1977, the Supreme Court addressed a similar third-party indemnity claim in *Stencel Aero Engineering Corp. v. United States.*[192] *Stencel* arose when the ejection system in a fighter aircraft malfunctioned during flight and injured a military pilot.[193] The pilot, who was awarded a lifetime pension

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[184] *Id.* (discussing United Air Lines v. Weiner, 335 F.2d 379 (9th Cir. 1964)).

[185] United Air Lines v. Wiener, 335 F.2d 379 (9th Cir. 1964).

[186] *Bremen*, 409 F.2d at 998-99. The court recognized three possible theories of indemnity: contractual, strict tort, and independent tort based on an independent duty of care owed by the government to the third party, not to the plaintiff. *Id.* It established the validity of all three approaches, then remanded to the trial court to determine whether the facts would support any of the indemnity claims. *Id.* The trial court had granted summary judgment in favor of the United States on the sole ground that the FECA barred suit by the original plaintiff (the injured federal employee) against the government. *Id.* at 995, 998-99.

[187] *Id.* at 998.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.* In 1981, this decision was vehemently criticized from inside the Fourth Circuit itself in Glover v. Johns-Manville Corp., 662 F.2d 225, 233 (4th Cir. 1981). Judge Hall (concurring in result) flatly stated that *Bremen* was wrong and was based upon faulty analysis. *Id.*

[192] 431 U.S. 666 (1977).

[193] *Id.* at 667.

under the Veterans' Benefits Act,[194] sued the United States and Stencel, the manufacturer of the ejection system, for their individual and joint negligence in designing the defective system.[195] Stencel cross-claimed against the government for indemnity.[196] The trial court dismissed both claims against the government on the authority of *Feres v. United States*,[197] and the Eighth Circuit Court of Appeals affirmed.[198] Stencel appealed the decision and thereby presented the Supreme Court with the issue of whether the *Feres* doctrine limited the right of a third party to recover in an indemnity action against the United States. The Court held that *Feres* did limit the right.[199]

In deciding this third-party claim, the *Stencel* Court enumerated the three factors from *Feres* which justified dismissal of the pilot's direct claim against the government and then applied those principles to Stencel's indirect claim.[200] First, the Court determined that the relationship of the government

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[194] 38 U.S.C. § 321 (1976).

[195] *Stencel*, 431 U.S. at 668.

[196] *Id.*.

[197] 340 U.S. 135 (1950). The *Feres* doctrine, which formed the basis for the Court's holding in *Stencel*, arose from a suit in which a serviceman who was injured on duty sued the government for negligence under the Federal Tort Claims Act. *Id.* The Supreme Court held that the unique nature of the military relationship was distinctly federal in character, thus precluding application of local law as required by the FTCA, 28 U.S.C. § 1346(b) (1946). *Id.* at 141-42. The *Feres* Court noted that the Veterans' Benefits Act, 38 U.S.C. § 135 (1959) provided for limited benefits to injured servicemen. *Id.* at 144. Although the Veterans' Benefits Act had no exclusive liability provision, the Court held that the unique nature of the military relationship and the Congressionally defined limited benefits under the Veterans' Benefit Act combined to limit a serviceman's otherwise valid tort claims against the government. *Id.* at 141-42. Further, the Court held that allowing suit by a serviceman against his superiors would have a potentially disruptive effect on military discipline, because it would require courts to second-guess military decisions in order to establish or dismiss allegations of negligent military orders. *Id.* at 138-46. *See also* United States v. Brown, 348 U.S. 110 (1954) (in which the Court examined "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given . . . in the course of military duty"). For a discussion of the *Feres* doctrine, see Comment, *The Feres Doctrine: Should It Continue To Bar FTCA Actions By Servicemen Who Are Injured While Involved In Activities Incident To Their Service?* 49 J. AIR L. & COMM. 177 (1983).

[198] *Stencel*, 431 U.S. at 669.

[199] *Id.* at 674.

[200] *Id.* at 671.

to its military suppliers is no less "distinctively federal in character" than that between the government and its soldiers. Because of that federal character, local law which might allow this claim under the FTCA was inapposite.[201] Second, the Court established that a compensation scheme such as the Veterans' Benefits Act was not enacted only as a *quid pro quo* agreement between the government and its military employees; it was also enacted as "an upper limit of liability for the government as to service-connected injuries."[202] In light of this intentional limitation of liability, the Court reasoned that permitting the third-party claim would "admit at the back door that which has been legislatively turned away at the front door."[203] Third, the Court concluded that allowing the third-party tort suit would be just as disruptive to military discipline as would a negligence suit against the government by military personnel.[204] Either would require second-guessing military orders at the trial and might necessitate calling on military personnel to testify against each other concerning the propriety of the military orders which led to the injury.[205] The Supreme Court held that the Federal Tort Claims Act did not give a third party the right to indemnity from the United States for damages arising from injuries to military personnel.[206]

The weight of opinion was balanced heavily against allowing third-party indemnity claims[207] when *Thomas v. Lock-*

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[201] *Id.* at 672.

[202] *Id.* at 672-73.

[203] *Id.* at 673.

[204] *Id.*

[205] *Id.*

[206] *Id.* The same result was reached in United Air Lines v. Wiener, 335 F.2d 379 (9th Cir. 1964), *discussed supra in* text accompanying notes 80-120, in regard to two servicemen killed in the collision of a commercial airliner and a military fighter aircraft. The court held that "United's claim for indemnity must fall for the reason that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen when the injuries arise out of or in the course of activity related to service . . . . *Feres*." *Id.* at 404. The *Wiener* case is noteworthy in that it addresses indemnity claims against the government for awards paid by a third party to private citizens, civilian federal employees, and military federal employees. The only claim allowed was one based on losses arising from the injuries to private citizens. *Id.*

[207] Seven circuit courts of appeal have disagreed with *Bremen*. *See* Kudelka v. American Hoist & Derrick Co., 541 F.2d 651 (7th Cir. 1976)(indemnity barred as a matter of

heed Aircraft Corp.[208] came to bar in 1981. In *Thomas*, the estate of a deceased civilian federal employee sought a judgment for damages against Lockheed for Lockheed's part in the C5A crash which caused the employee's death.[209] Lockheed argued that the government was primarily responsible for the crash and moved for summary judgment for indemnity.[210] The trial court granted Lockheed's motion.[211] On the government's apppeal, the District of Columbia Circuit Court of Appeals held that the exclusive liability provision of the FECA barred any third-party claim against the government arising from injury to a federal employee which is not based on an independent duty owed by the government to the purported indemnitee.[212] Finding that Lockheed had alleged only derivative tort claims which arose from the government's duty to its employees, the court dismissed the claim as barred by FECA's exclusive liability provision.[213]

II. THE CONTROVERSY RESOLVED—*LOCKHEED AIRCRAFT CORP. V. UNITED STATES*

Lockheed appealed the circuit court's adverse decision, thus presenting the Supreme Court in *Lockheed Aircraft Corp. v. United States*[214] the issue of whether the exclusive liability provision of the FECA, 5 U.S.C. § 8116(c) directly bars a third-

federal law); Galimi v. Jetco, Inc., 514 F.2d 949 (2d Cir. 1975)(contribution barred as a matter of federal law); Travelers Ins. Co. v. United States, 493 F.2d 881 (3d Cir. 1974)(indemnity and contribution barred as a matter of federal law); Newport Air Park v. United States, 419 F.2d 342 (1st Cir. 1969)(contribution barred as a matter of federal law); Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968)(contribution barred as a matter of local law); Maddux v. Cox, 382 F.2d 119 (8th Cir. 1967)(contribution barred as a matter of federal law); United Airlines v. Wiener, 335 F.2d 379 (9th Cir. 1964)(indemnity barred as a matter of local law) (the Ninth Circuit expressly affirmed this holding in two later cases, Wien Alaska Airlines v. United States, 375 F.2d 736 (9th Cir. 1967), *cert. denied*, 389 U.S. 940 (1968), and in Adams v. General Dynamics Corp., 535 F.2d 489 (9th Cir. 1976), *cert. denied*, 432 U.S. 905 (1977)).

[208] 665 F.2d 1330 (D.C. Cir. 1981).

[209] *Thomas*, 665 F.2d at 1331.

[210] *Id.*

[211] *Id.*

[212] *Id.* at 1331.

[213] *Id.*

[214] 103 S. Ct. 1033 (1983).

party action for indemnity against the United States.[215] The Court began its analysis by noting that the language of the provision is specific and detailed as to the parties excluded from recovery.[216] Finding that Lockheed was not a federal "employee, his legal representative, spouse, dependent, [or] next of kin," the Court held that Lockheed could only be excluded under the Act as an "other person otherwise entitled to recover."[217] That, in turn, depended on whether Congress intended that the scope of the provision should include a party such as Lockheed.[218]

In concluding that Congress did not intend to affect the rights of third parties such as Lockheed, the Supreme Court placed much emphasis on the "*quid pro quo*" nature of workers' compensation agreements: employees give up their rights to sue the employer in return for fixed, immediate benefits which are given whether the employer was at fault in the injury or not.[219] The Court also noted that section 8116(c) was based on a New York Workers' Compensation scheme which allowed contribution.[220] The Court then confirmed its conclusion in *Weyerhaeuser* that Congress did not intend to affect the rights of unrelated third parties when it enacted the FECA's exclusive liability provision.[221]

The Supreme Court explained its 1963 holding in *Weyerhaeuser* as one that had implications outside of admiralty law.[222] The Court noted that *Weyerhaeuser* went beyond the *Ryan* holding that allowed contractual indemnity in the face of an exclusive liability provision.[223] It reasoned that whereas indemnity claims after *Ryan* may have been allowed under increasingly attenuated implied contracts, *Weyerhaeuser* al-

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[215] *Id.* at 1034-35.

[216] *Id.* at 1035-36.

[217] *Id.* The quoted languge is drawn from FECA, 5 U.S.C. § 8116(c) (1980).

[218] *Lockheed*, 103 S. Ct. at 1036.

[219] *Id.* at 1036, 1038. ("[E]mployees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the government.").

[220] *Id.* at 1036 n.4. For the text of the relevant New York law, see *supra* note 86.

[221] *Lockheed*, 103 S. Ct. at 1036-37.

[222] *Id.* at 1037.

[223] *Id.*

lowed payment where there was no contract at all.[224] The Court concluded that the exclusive liability provision of the FECA did not affect the rights of unrelated third parties, regardless of the basis for the underlying cause of action.[225]

Justice Rehnquist disagreed. Writing for the dissent,[226] Rehnquist contended that a principal purpose of workers' compensation exclusive liability provisions is to limit the amount that an employer will have to pay on account of injuries to its employees.[227] The proper test for allowing recovery, according to Rehnquist, is whether "the plaintiff's right to recover outweigh[s] the limitation of liability provision of the [FECA]."[228] In *Weyerhaeuser*, the "ancient" rule of divided damages[229] created a direct right of recovery against the government which necessarily prevailed over the limitation.[230] Rehnquist likewise concluded that an independent contractual right such as that in *Ryan* should produce the same result.[231] On the other hand, he concluded that the limitation of liability provision overcomes an indirect claim based merely on the difference in degree of the parties' individual fault, such as the tort indemnity claim in *Stencel Aero Engineering Corp. v. United States*.[232] The result of the Court's decision, according to Rehnquist, is to expand greatly the government's liability stemming from injuries to its employees by

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[224] *Id.* (discussing Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963)).

[225] *Lockheed*, 103 S. Ct. at 1038. The Court decided the case with only one reference to substantive tort law (and then only to mark it as irrelevant to the holding), despite the mass of legal literature produced in lower court litigation. *See supra* note 208. The Court declared that "[t]o the extent that the basis for the underlying cause of action *could make any difference*, the indemnity theories on which Lockheed relies are as well-established as the divided damages rule was in *Weyerhaeuser*." *Lockheed*, 103 S. Ct. at 1038 (emphasis added).

[226] *Lockheed*, 103 S. Ct. at 1038-41 (Rehnquist, J. and Burger, C.J., dissenting).

[227] *Id.* at 1039.

[228] *Id.*

[229] Justice Rehnquist emphasized the importance of the divided damages rule by noting that it dates back to the 12th Century. *Id.* at 1039 n.1. *See* The North Star, 106 U.S. 17 (1882) (tracing the history of the rule); *see also* Owen, *The Origins and Development of Marine Collision Law*, 51 TUL. L. REV. 759 (1977).

[230] *Lockheed*, 103 S. Ct. at 1039-40.

[231] *Id.* at 1040.

[232] *Id.* The majority distinguished the decision in *Stencel* as standing only for the proposition that the government had not waived its sovereign immunity in military matters and found the case to be inapposite to the FECA. *Id.* at 1037 n.8.

allowing "inappropriate kind[s] of claim[s]"[233] to defeat the provision by which Congress had clearly intended to limit the liability of the United States.[234] Despite this vigorous dissent, the Court held that the exclusive liability provision of the FECA does not bar a third-party indemnity action against the United States.

III CONCLUSION

The immediate effect of the *Lockheed* decision is to settle the controversy between the circuits,[235] and in so doing halt any tendency toward forum shopping which may have been inspired by the variety of holdings.[236] Although the holding is explicitly framed only in terms of indemnity, the underlying reasoning of the Court suggests that contribution should also be allowed. Indeed, the federal courts should no longer dismiss any third-party claims for awards against the government unless the claims fail on their own merits. Any continuing controversy at the judicial level arising from section 8116(c) of the FECA should center only on whether the third party is truly "unrelated" to the employee.[237]

The rift between the majority and dissent is due to a difference in focus; the majority is concerned more with the equitable allocation of loss and the dissent with limitation of liability.[238] In terms of honoring the interests of third parties,

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[233] *Id.* at 1040. Justice Rehnquist never explicitly identified which actions he considered to be "inappropriate." His other statements indicate, however, that he considers any "indirect" or "derivative" action (such as contribution or indemnity) inappropriate to defeat an "established" right (such as exclusive liability in workers' compensation or divided damages in admiralty). *Id.* at 1039-41.

[234] *Id.* at 1041.

[235] In light of the fact that only one circuit has held for allowing the third party's claim, "controversy" may be a misnomer. The Court's decision has dramatically shifted the "balance." See *supra* note 207 for those circuits which disagree with *Bremen*.

[236] *See* Commission on Revision, *supra* note 19 (suggesting that resolution of the inter-circuit conflict would halt forum-shopping).

[237] It would not be surprising to see arguments being presented and accepted which allege either an implied employment or beneficiary relationship between the third party and the injured employee, or to see the *"quid pro quo"* analysis artfully stretched to include the third party.

[238] See Larson, *supra* note 20, 1982 DUKE L.J. at 535-40 for an elaboration of this division and possible solutions according to interests and values to be served.

the Court's decision appears to be quite equitable. Contribution and indemnity were developed in tort law to keep a party from having to shoulder more of a loss than it deserved.[239] Prior to this decision, the government could cause an injury through its active negligence and pay little, while a third party would have to bear the greater loss though it had less fault.[240]

The problem with this "equitable" solution is that it gives no regard to the interests of the United States as an employer under the workers' compensation program. As Justice Rehnquist pointed out,[241] this decision greatly expands the government's liability for injuries to its employees, despite the very compelling interest of the government in limiting that liability. With the purported FECA bar now clearly removed, the ever persistent plaintiff's pursuit of the deep pocket will undoubtedly produce more lawsuits involving third-party liability for injuries to government workers. Plaintiffs will bring suit against potentially liable third parties who can interplead the government for contribution or indemnity. This liability will be compounded to the extent that the government foregoes subrogation of its employees' claims lest the suit to recover from the third party becomes a suit against itself.[242]

Congress has been asked without result on more than one occasion to legislate a balance of the conflicting interests involved here.[243] Perhaps this newly expanded governmental liability will serve as the catalyst for change. If so, Congress has ample precedent in the state courts from which to draw as they seek to reach a workable compromise between the three interested groups.[244] Hopefully Congress will respond

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[239] *See supra* note 23.

[240] PROSSER, THE LAW OF TORTS at 310.

[241] *Lockheed*, 103 S. Ct. at 1040.

[242] Larson suggests that the subrogation interest of the workers' compensation insurer is actually relatively minor. Larson, *supra* note 20. Even so, inability to subrogate will increase liabilities.

[243] *See, e.g.,* Galimi v. Jetco, Inc., 514 F.2d 949, 953 (2d Cir. 1975)(noting Congress' failure to address this conflict); Commission on Revision, *supra* note 19 (specifically suggesting legislative action).

[244] The three groups and their interests are: 1.) the government which, as employer,

to this judicial interpretation of the FECA by producing such a compromise.

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wishes to limit its liabilites; 2.) the third parties who wish an equitable allocation of loss; and 3.) the injured employees who desire full compensation for their injuries. Larson, *supra* note 20, at 535-38.

For a comprehensive review of state approaches to this problem, see Larson, *supra* note 20 (suggesting how the revisions in this field should be fashioned). *See also* Weisgall, *Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilities of Third Parties*, 1977 WIS. L. REV. 1035 (recommending various approaches to balancing the interests of employers and third parties).

LABOR—APPORTIONMENT OF DAMAGES FOR EMPLOYEE'S WRONGFUL DISCHARGE — Apportionment of Damages is Required Where Damages Sustained by the Employee Are Caused Initially by the Employer's Unlawful Discharge and Are Increased by a Union's Breach of Its Duty of Fair Representation. *Bowen v. United States Postal Service*, 103 S. Ct. 588 (1983).

Charles Bowen, an employee of the United States Postal Service (Postal Service) and a member of the American Postal Worker's Union, American Federation of Labor — Congress of Industrial Organizations (AFL-CIO), was harassed by his supervisors and fellow employees.[1] On February 21, 1976, Bowen asked to go home early after a particular employee had badgered him.[2] As he was leaving, Bowen met the employee on the stairs and scuffled with him briefly.[3] Although neither employee thought the matter was important enough to report, Bowen was suspended from his job without pay when the Postmaster indirectly learned of the incident.[4] Bowen was formally discharged on March 30, 1976,[5] and thereafter filed a grievance with the AFL-CIO pursuant to the collective bargaining agreement.[6] The local AFL-CIO president personally investigated the discharge and at each step of the grievance procedure recommended the case for further pursuit.[7] A national AFL-CIO official, however, de-

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[1] Brief for Petitioner at 4, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983). Co-workers and supervisors joked that Bowen was a homosexual and was mentally retarded. *Id.*

[2] *Id.*

[3] *Id.*

[4] *Id.* at 4-5.

[5] *Id.* at 5.

[6] Bowen v. United States Postal Serv., 642 F.2d 79, 80 (4th Cir. 1981).

[7] Brief for Petitioner on Petition for Writ of Certiorari at 4, Bowen v. United States Postal Serv., 103 S.Ct. 588 (1983). The AFL-CIO's investigation revealed unnecessarily harsh treatment of Bowen by co-workers and supervisors and that Bowen's principal supervisor had often commented that he was going to "get rid of" Bowen. *Id.*

clined to recommend Bowen's case for arbitration and the claim was not arbitrated.[8]

In December of 1976, Bowen filed suit in United States District Court, pursuant to section 301 of the Labor Management Relations Act (LMRA)[9] and section 9 of the National Labor Relations Act (NLRA).[10] The complaint alleged that

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[8] *Id.* at 4-5. The AFL-CIO official faced a backlog of cases at the time Bowen's case came before him for review. After spending fifteen to thirty minutes reviewing Bowen's file and ignoring tape recorded interviews of witnesses, the official refused to recommend the case for arbitration. Brief for Petitioner at 6, *Bowen*.

[9] Labor Management Relations Act, ch. 120, § 301(a), Pub. L. No. 80-101, 61 Stat. 136, 156 (1947) (codified at 29 U.S.C. § 185(a) (1976)). Section 301(a) provides:

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

[10] *Id.* National Labor Relations Act, ch. 372, § 9(a), Pub. L. No. 74-198, 49 Stat. 449, 453 (1935) (codified at 29 U.S.C. § 159(a) (1976)). Section 9(a) provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given the opportunity to be present at such an adjustment.

Id. Although no party contested the jurisdictional basis, both the Postal Service and the AFL-CIO pointed out in their briefs that jurisdiction should have been founded on analogous provisions in the Postal Reorganization Act, 39 U.S.C. §§ 101-5605 (1976). *See* Brief for Federal Respondent at 3, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983), Brief for Respondent Union at 1-2, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983).

39 U.S.C. § 1203(a) (1976) is analogous to § 9(a) of the NLRA and provides in its pertinent part:

> The Postal Service shall accord exclusive recognition to a labor organization when the organization has been selected by a majority of the employees in an appropriate unit as their representative. . . .

Id. 39 U.S.C.§ 1208(b) (1976) is analogous to § 301 of the LMRA and provides:

> Suits for violation of contracts between the Postal Service and a labor organization representing Postal Employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy.

Id.

the Postal Service discharged Bowen, without just cause, in breach of the collective bargaining agreement[11] and that the Union breached its duty of fair representation (DFR).[12] The district court submitted interrogatories to a jury sitting as an advisory panel.[13] The trial judge instructed the jury to apportion damages between both defendants if the jury found that the AFL-CIO breached its DFR and that the Postal Service wrongfully discharged Bowen.[14] The court suggested that the jury might apportion backpay based on the date on which Bowen would have been reinstated had the AFL-CIO not breached its DFR.[15] The jury found for Bowen, assessing damages for lost wages and benefits in the amount of $47,000.[16] Determining that the AFL-CIO was responsible for approximately two-thirds of the period Bowen was unemployed up to the time of trial, the court found the AFL-CIO liable for $30,000 compensatory damages and the Postal Service liable for $17,000.[17]

On appeal, the Fourth Circuit Court of Appeals reversed the award of damages against the AFL-CIO.[18] The court held that because the Postal Service, as the employer, is solely re-

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[11] The Postal Service was a party to a collective bargaining agreement with the American Postal Worker's Union which required that an employee could be discharged only for just cause. Bowen v. United States Postal Serv., 470 F. Supp. 1127, 1129 (W.D. Va. 1979).

[12] Bowen v. United States Postal Serv., 642 F.2d 79, 80-81 (4th Cir. 1981).

[13] *Id.* The jury could only act as an advisory panel on Bowen's claims against the Postal Service. 28 U.S.C. § 2402 (1976) provides: "Any action against the United States under section 1346 shall be tried by the court without a jury." *See generally*, C. WRIGHT, LAW OF FEDERAL COURTS § 92 (3d ed. 1976).

[14] Bowen v. United States Postal Serv., 103 S. Ct. 588, 591 n.2 (1983).

[15] *Id.* at 591. The District Court found that the grievance would have been arbitrated by August, 1977. Bowen v. United States Postal Serv., 470 F. Supp. at 1127, 1129 (W.D. Va. 1979).

[16] Bowen v. United States Postal Serv., 470 F. Supp. 1127, 1129 (W.D. Va. 1979).

[17] *Id.* at 1130-32. The trial judge added $5,954.12 for losses incurred between the date of trial and the hearing on post-trial motions, assessing the full amount to the Postal Service because it refused to reinstate Bowen. The court also awarded the plaintiff $20,000 in attorney's fees, $15,000 to be paid by the Postal Service and $5000 by the AFL-CIO. *Id.* at 1130. The court gave no reason for apportioning attorneys' fees differently than backpay damages. For a brief discussion pertaining to the apportionment of attorney's fees, see Comment, *Apportionment of Damages in DFR/Contract Suits*, 1981 WIS. L. REV. 155, 173 n.128.

[18] Bowen v. United States Postal Serv., 642 F.2d 79, 83 (4th Cir. 1981).

sponsible for the payment of Bowen's compensation, it is liable for all backpay.[19] The original opinion was issued on February 23, 1981, but the court issued a "rewritten" opinion on July 7, 1981,[20] adding only a single footnote.[21] The effect of this footnote was to reduce Bowen's original judgment from $52,954, the amount assessed against both the Union and the Service, to $22,954, the amount assessed against the Postal Service alone.[22]

The United States Supreme Court granted certiorari in order to determine whether a union may be assessed a share of backpay damages awarded to a wrongfully discharged employee when the union has breached its DFR.[23] *Held, reversed and remanded*: Apportionment of damages is required where damages sustained by the employee are caused initially by the employer's unlawful discharge and are increased by a union's breach of its duty of fair representation. *Bowen v. United States Postal Service*, 103 S. Ct. 588 (1983).

I. LEGAL BACKGROUND

A. *Origins of the Duty of Fair Representation*

Prior to the 1920's, employees organizing to demand higher wages or better working conditions faced either criminal prosecution as conspirators or court-ordered civil injunctions.[24] In the late 1920's and 1930's, Congress enacted a series of federal labor laws designed to promote industrial

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[19] *Id.* at 82.

[20] Brief for Petitioner on Petition for Writ of Certiorari at 2, Bowen v. United States Postal Serv., 103 S.Ct. 588 (1983).

[21] Bowen v. United States Postal Serv., 642 F.2d 79, 82 n.6 (4th Cir. 1981). Note 6 states, "We make no revision in the judgment of $22,954.12 against the Postal Service. In this connection we note that no appeal was entered by the plaintiff from the judgment against the Service in the amount of $22,954.12." The Supreme Court pointed out that the court's view that the judgment could not be increased because of Bowen's failure to appeal was erroneous. Bowen v. United States Postal Serv., 103 S. Ct. 588, 592 n.7. (1983).

[22] Bowen v. United States Postal Serv., 103 S. Ct. 588, 592 (1983).

[23] Bowen v. United States Postal Serv., 454 U.S. 1097 (1981). Certiorari was granted because a conflict existed between the Fourth Circuit and the other circuit courts of appeals. *See infra* text accompanying notes 107-110.

[24] Martucci, *Employer Liability for Union Unfair Representation*, 46 MO. L. REV. 78, 79-80 (1981).

peace through a system of employee organization and collective bargaining.[25] In 1926, the Railway Labor Act (RLA), the first of the federal labor laws,[26] proposed to avoid interruption of commerce or the operation of carriers[27] by providing administrative methods of settling disputes before service was interrupted by strikes.[28] In 1932, Congress, by enacting the Norris-La Guardia Act, another of the federal labor laws, ensured workers the freedom to organize and bargain collectively by declaring such freedoms to fall within the public policy of the United States.[29]

In 1935, Congress expanded the scope of the federal labor law by passing the NLRA.[30] The NLRA expressly established the principle of representation by the majority and endorsed the practice of collective bargaining.[31] Inherent in these principles and practices was the concept of subjugation of the individual employee's preference to that of the majority.[32] Exclusivity and majority rule led to conflicts with the

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[25] Vaca v. Sipes, 386 U.S. 171, 182 (1967).

[26] 45 U.S.C. §§ 151-164 (1976).

[27] 45 U.S.C. § 151(a)(1976).

[28] Slocum v. Delaware, L. & W. Ry., 339 U.S. 239, 242 (1950). The plan was to prevent interruption of railway service by strikes. This goal was to be implemented through the creation of various Adjustment Boards created by voluntary agreements. *Id.* When the results were unsatisfactory, Congress amended the RLA in 1934 in order to create a National Adjustment Board (Adjustment Board) composed of representatives of railroads and unions. *Id.* at 242-43. The Adjustment Board is empowered to hold hearings, make findings, and grant awards in disputes between carriers and their employees. *Id.* at 240.

45 U.S.C. § 181 (1976 & Supp. II 1978) expanded most of the provisions of the RLA to include the airline industry.

[29] 29 U.S.C. §§ 101-115 (1976) (originally Norris-La Guardia Act, ch. 90, §§ 1-15, 47 Stat. 70-73 (1932)). Section 101 now severely limits the issuance of injunctions in labor disputes.

[30] 29 U.S.C. §§ 151-169 (1976 & Supp. II 1978) (original version at 45 Stat. 449 (1935)).

[31] 29 U.S.C. § 159(a) (1976). See *supra* note 10 for text of section 159(a). Exclusivity of representation is also established under the RLA at 45 U.S.C. §§ 151-152 (1976 & Supp. II 1978).

[32] Martucci, *supra* note 24, at 81-82. The policy of encouraging collective bargaining is predicated on the belief that majority representation is the most efficient and effective means to improve employee benefits and achieve industrial stability. *Id.* at 81. If majority representation is to function, the individual must allow his interests to be expressed collectively through a majority representative. *Id.* at 81-82.

competing interests of the minority and majority.[33] Specifically, the courts were faced with the necessity of dealing with racial discrimination by both management and unions.[34] In dealing with the issue of racial discrimination, the Supreme Court first propounded a duty on the part of the unions to represent all employees fairly.[35]

On December 18, 1944, the Supreme Court handed down three decisions that heralded the birth of the DFR.[36] In *Steele v. Louisville & Nashville R.R.* [37] and its companion case, *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*,[38] the Court invalidated a seniority clause which placed blacks at the bottom of the seniority list.[39] In *Steele*, the Court introduced the standard of the DFR when it held that the RLA imposed on the bargaining representative of a class or craft

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[33] *Id.* at 83.

[34] Jones, *The Origins of the Concept of the Duty of Fair Representation*, in THE DUTY OF FAIR REPRESENTION 25 (J. McKelvey ed. 1977).

[35] *Id.*

[36] The DFR is not specifically mentioned in the NLRA or the RLA; it is derived from section 9(a) of the NLRA (quoted *supra* note 9) and section 2 of the RLA, 45 U.S.C. § 152, Fourth, (1976), which provides in part: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Chapter." *See* Aaron, *The Duty of Fair Representation: An Overview*, in THE DUTY OF FAIR REPRESENTATION (J. McKelvey ed. 1977).

[37] 323 U.S. 192 (1944).

[38] 323 U.S. 210 (1944).

[39] According to one commentator, the economic and political climate of the country in 1944 made it desirable for the Court to strike down racial discrimination. Jones, *supra* note 34, at 26. Having the will to decide the issue, the Court sought a rationale. While citing such cases as Yick Wo v. Hopkins, 118 U.S. 356 (1886) (prohibiting the enforcement of an ordinance in a discriminatory manner against Chinese laundry owners) and Hill v. Texas, 316 U.S. 400 (1942) (holding that a county court could not summarily exclude all blacks from serving on the grand jury), the Court invoked more general concepts when it stated:

> It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.

323 U.S. 192 at 202.

Some commentators perceive the DFR as stemming from the status of the individual under collective bargaining agreements. *See supra* notes 32-33 and accompanying text. Others find support in trust law and agency. Jones, *supra* note 34, at 27-29; Summers, *The Individual Employee's Rights under the Collective Agreement* in THE DUTY OF FAIR REPRESENTATION 61 (J. McKelvey ed. 1977).

the duty to represent all employees "without hostile discrimination, fairly, impartially, and in good faith."[40] In *Wallace Corp. v. NLRB*,[41] the Court applied the DFR in a non-racial context to a union falling under the NLRA.[42]

Although *Steele* stated the basic DFR standard, *Ford Motor Co. v. Huffman*[43] made clear that unions would not be held to rigid requirements. In *Ford Motor Co. v. Huffman*, the Court upheld the validity of an agreement between the union and the employer which gave seniority credit to veterans.[44] Regarding the competing interests of veteran and non-veteran employees, the Court explained that "[a] wide range of reasonableness" must be allowed a bargaining representative, subject to complete good faith and honesty of purpose in the exercise of discretion.[45] The Court further defined the scope of the DFR in *Conley v. Gibson*[46] which involved black employees who were discharged and replaced by whites.[47] The Court held that the exclusive collective bargaining agent must fairly represent all employees in the administration of the collective bargaining agreement.[48] Furthermore, the Court held that breach of the DFR presents a cause of action within the subject matter jurisdiction of federal courts, even absent diversity of citizenship.[49]

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[40] 323 U.S. at 204.

[41] 323 U.S. 248 (1944).

[42] *Id.* In *Wallace*, the union brought about the discharge of employees who had supported the union's rival. In disapproving the union's conduct, the Court emphasized that "[b]y its selection as bargaining representative, [the union] has become the agent of all the employees charged with the responsibility of representing their interests fairly and impartially." *Id.* at 255.

[43] 345 U.S. 330 (1953).

[44] *Id.* at 343.

[45] *Id.* at 338.

[46] 355 U.S. 41 (1957).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 44. The lower courts dismissed the employee's complaint for lack of jurisdiction based on the belief that the RLA conferred exclusive jurisdiction on the Adjustment Board. *Id.* at 43-44. The Supreme Court dismissed the lower courts' view as erroneous because the suit did not involve a dispute between employee and employer but rather a controversy between employees and the bargaining agent. *Id.* at 44. Under the provisions of the RLA, the Adjustment Board had no power to protect the employees from discrimination. *Id.* at 44-45.

B. *Origins of Section 301 Actions*

Paralleling the DFR suits were cases involving employee and employer controversies arising under collective bargaining contracts. In *Smith v. Evening News Association*,[50] for example, members of one union went on strike and employees who were members of another union were not permitted to report to work.[51] Smith, a maintenance employee, alleged violation of a clause in the collective bargaining contract.[52] Although the lower courts dismissed on the ground that the subject matter was within the exclusive jurisdiction of the National Labor Relations Board (NLRB),[53] the Supreme Court recognized the right of individual employees to bring suit under section 301 of the LMRA for breach of the collective bargaining agreement in the federal courts.[54]

In *Republic Steel Corp. v. Maddox*,[55] the Court limited the scope of section 301 actions. An employee seeking severance pay declined to utilize the collective bargaining agreement's grievance procedure, instead suing for breach of contract.[56] The Supreme Court held that before an employee may bring such a suit against his employer, he must attempt to exhaust grievance and arbitration procedures established by the collective bargaining agreement.[57] In so holding, the Court emphasized that Congress, through the LMRA, has expressly endorsed grievance procedures as a preferred method of set-

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[50] 371 U.S. 195 (1962).

[51] *Id.* at 196.

[52] *Id.* The collective bargaining contract prohibited discrimination on the basis of union membership or activity. *Id.*

[53] *Id.*

[54] *Id.* at 197-201. Under section 301, 29 U.S.C. § 185(a) (1976), courts have jurisdiction over suits to enforce collective bargaining agreements even though the employer's conduct may also be an unfair labor practice within the jurisdiction of the NLRB. *See* 371 U.S. at 197. See *supra* note 9 for the text of Section 301.

In International Ass'n of Machinists v. Central Airlines, 372 U.S. 682, 692 (1963), the Court emphasized that an agreement under section 204 of the RLA is parallel to a section 301 contract under the LMRA - a federal contract governed and enforceable by federal law in federal courts. *See* 45 U.S.C. § 184 (1976).

[55] 379 U.S. 650 (1965).

[56] *Id.* at 650-51.

[57] *Id.* at 658-59.

tling disputes.[58] If a grievance procedure can be avoided, the procedure loses its appeal to the employer and union as a method of settlement.[59]

C. *The Section 301/DFR Suit*

While the Supreme Court endorsed an employee's right to sue his employer for breach of the collective bargaining agreement[60] and his union for breach of the DFR,[61] the Court first recognized in *Humphrey v. Moore*[62] that an employee could bring both suits in the same action. It was not until *Vaca v. Sipes*,[63] however, that the Court firmly established the hybrid section 301/DFR suit. In *Vaca*, an employee was discharged on the ground of poor health. When, during the grievance procedure, the employee received an unfavorable physician's report, the union decided not to take the grievance to arbitration.[64]

The employer's defense to the employee's section 301 suit was that the employee, through his union, had failed to exhaust the contractual grievance procedures.[65] The Court held that a wrongfully discharged employee may bring an action against his employer, even though he has not exhausted all remedies, as long as the employee can prove that the union breached its DFR in handling the grievance.[66] Although the Court held on the merits that the union had not breached its DFR,[67] it stressed that a breach of the DFR "occurs only when a union's conduct toward a member of the

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[58] *Id.* at 653.

[59] *Id.*

[60] *See supra* notes 50-54 and accompanying text.

[61] *See supra* notes 36-42 and accompanying text.

[62] 375 U.S. 335 (1964). In *Humphrey* a joint employer-employee committee decided to dovetail the seniority lists of two companies. *Id.* at 337. Moore brought a class action suit, alleging that the decision of the committee was obtained by dishonest conduct in breach of the union's DFR. *Id.* at 340. Moore also alleged that by implementing the decision, the employer breached the collective bargaining agreement. *Id.* at 336-44.

[63] 386 U.S. 171 (1967).

[64] *Id.* at 174-75.

[65] *Id.* at 186.

[66] *Id.*

[67] *Id.* at 194-95.

collective bargaining unit is arbitrary, discriminatory, or in bad faith"[68] and that a "union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."[69]

The Court then addressed a number of other topics,[70] including the appropriate apportionment of damages when both union and employer actions have injured an employee.[71] The Court stressed that an award against a union may not include damages solely attributable to the employer's breach of contract.[72] The Court explained that

> [t]he governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should

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[68] *Id.* at 190-91.

[69] *Id.* at 191. A continuing source of confusion among litigants and discussion among commentators is the question of the exact standard of representation required of the union. *See* Aaron, *supra* note 36, at 18-22; Clark, *The Duty of Fair Representation*, 51 TEX. L. REV. 1119 (1973); Jones, *supra* note 34, at 37-42; Rabin, *The Duty of Fair Representation in Arbitration*, in THE DUTY OF FAIR REPRESENTATION 84, 86-89 (J. McKelvey ed. 1977).

Although both the Supreme Court and the Fourth Circuit in *Bowen* state only that the Union had in fact breached its DFR, the District Court found as fact that the Union handled Bowen's "apparently meritorious grievance . . . in an arbitrary and perfunctory manner and in so doing acted in reckless and callous disregard of plaintiff's rights." 470 F. Supp. at 1129.

[70] As Clyde W. Summers, author of *The Individual Employee's Rights under the Collective Agreement*, stated:

> The Supreme Court's decision in *Vaca v. Sipes* is like a giant squid. It has a number of procedural tentacles, any one of which may be more than we can master, but with all of which we must ultimately contend. There is always the danger that we shall be so preoccupied with avoiding the entwining arms that we shall never see the head from which the tentacles grow, and the whole problem will escape in a cloud of ink.

Summers, *supra* note 39, at 60.

Besides propounding the standard of fair representation, noting remedies available to a damaged employee and combining section 301 and DFR suits, the Court held that an employee had no absolute right to have a grievance taken to arbitration, dealt with the exercise of concurrent judicial and administrative remedies, federal labor policy, and examined the competing interests among the employer, the employee, the union, and society. 386 U.S. 171 (1967).

[71] 346 U.S. at 196-98.

[72] *Id.* at 197.

not be charged to the employer.[73]

This language constituted the Court's mandate that damages be apportioned between the union and the employer. Although the Court did not specifically prescribe the manner of apportionment until the *Bowen* decision, several cases following *Vaca* shed light on the apportionment issue.

D. *Apportionment of Damages After Vaca v. Sipes*

The Supreme Court addressed the next suit involving an alleged breach of the DFR in 1970. In *Czosek v. O'Mara*,[74] employees discharged after furlough brought suit in federal district court, seeking compensatory damages against the employer, the union, or both.[75] The district court dismissed for failure to exhaust remedies prescribed by the RLA.[76] The Second Circuit Court of Appeals reversed the dismissal as to the union[77] but affirmed as to the employer.[78] The court gave leave on remand for the employees to amend their complaint to allege employer involvement in the union misconduct in order to retain the previously dismissed employer as a defendant.[79]

The Supreme Court affirmed, holding that a suit against a union for breach of the DFR is not within the jurisdiction of the Adjustment Board or subject to the ordinary exhaustion rule under the RLA.[80] The Court assured the union that although it may be sued alone, it would not have to pay damages for which the employer is responsible.[81] Citing *Vaca*, the Court emphasized that damages may be assessed against a

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[73] *Id.* at 197-98.

[74] 397 U.S. 25 (1970).

[75] *Id.*

[76] *Id.* at 27.

[77] O'Mara v. Erie Lackawanna R.R., 407 F.2d 674, 678 (2d Cir. 1969). The Second Circuit pointed out that a charge against a union for breach of DFR does not fall within the jurisdiction of the Adjustment Board. The charge may therefore be the basis of a suit in federal district court. *Id.*

[78] *Id.* at 677. The contract dispute between the railroad and its employees fell within the primary jurisdiction of the Adjustment Board. *Id.*

[79] *Id.* at 679.

[80] 397 U.S. at 27-28.

[81] *Id.* at 29.

union for only those losses flowing from its own conduct and that backpay "damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer."[82]

In *Hines v. Anchor Motor Freight, Inc.*,[83] employees were charged by their employer with dishonesty and discharged.[84] Although the union submitted the allegations to an arbitration committee which upheld the discharge, the employees sued the employer and the union, claiming that the charges of dishonesty were false and that the error in the charges could have been discovered with a minimum of investigation by the union.[85] The district court granted the union's and the employer's motion for summary judgment,[86] and the Court of Appeals affirmed, holding that employees cannot relitigate charges already taken to arbitration.[87]

The Supreme Court reversed, concluding that an arbitrator's decision is reviewable in the courts if tainted by a union's breach of DFR.[88] The Court mentioned apportionment in dictum, stating that if the employees prove wrongful discharge and breach of DFR, they are "entitled to an appropriate remedy against the employer *as well as the Union*."[89] Justice Stewart, however, filed a separate concurrence which emphasized that if the employer relies in good faith on a final decision by the arbitration committee, liability for the wages lost after arbitration should be charged to the union.[90]

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[82] *Id.*

[83] 424 U.S. 554 (1976).

[84] *Id.* at 556. The employer claimed that the employees attempted to be reimbursed for motel expenses in excess of what was actually paid by them. *Id.*

[85] *Id.* at 557-58.

[86] *Id.* at 559. The district court found that the decision of the arbitration committee was binding on the employees and that the employees failed "to show facts comprising bad faith, arbitrariness or perfunctoriness on the part of the Unions." *Id.*

[87] *Id.* at 559-60.

[88] *Id.* at 567.

[89] *Id.* at 572 (emphasis added).

[90] *Id.* at 572-73 (Stewart, J., concurring). Justice Stewart stressed that:

> [i]f an employer relies in good faith on a favorable arbitral decision, then his failure to reinstate discharged employees cannot be anything but rightful, until there is a contrary determination. Liability for the inter-

The DFR also arose in *International Brotherhood of Electrical Workers v. Foust*[91] in which a railroad employee was discharged and the union filed the employee's grievance after the deadline for submission of the claim to the employer had passed.[92] Although the employee settled his dispute with his employer out of court,[93] he filed suit against the union for breach of DFR.[94] The jury found for the employee, assessing $40,000 actual damages and $75,000 punitive damages against the union.[95] The Tenth Circuit Court of Appeals affirmed the district court in most respects, but remanded for determination of whether the punitive damage award was excessive.[96]

The sole issue before the Supreme Court was whether the RLA permits an employee to recover punitive damages for a union's breach of the DFR.[97] While the Court disallowed the punitive damage award,[98] it specifically permitted the award of compensatory damages against the union.[99] Discussing apportionment, the Court recalled that under *Vaca* "all or almost all" of the employee's damages were attribrutable to the discharge.[100] Justice Blackmun concurred in the result, but

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> vening wage loss must fall not on the employer but on the union. Such an apportionment of damages is mandated by *Vaca's* holding. . . . To hold an employer liable for back wages for the period during which he rightfully refuses to rehire discharged employees would be to charge him with a contractual violation on the basis of conduct precisely in accord with the dictates of the collective-bargaining agreement.

Id. at 573.

[91] 442 U.S. 42 (1979).

[92] *Id.* at 43-44.

[93] *Id.* at 45 n.3.

[94] *Id.* at 44-45.

[95] *Id.* at 45.

[96] *Id.*

[97] *Id.* at 46.

[98] *Id.* at 48-52. The Court reasoned that national labor policy disfavors punishment. Additionally, the Court reasoned that the economic consequence of having to pay large awards would present a substantial burden to a union, impairing its effectiveness as a collective bargaining agent. *Id.* at 50-51.

[99] *Id.* at 45 n.4. The Court explained that its grant of certiorari was limited to the punitive damages question. For purposes of its analysis, the Court took as correct the findings that the union breached its duty of fair representation and that the $40,000 compensatory damages award was proper. *Id.*

[100] *Id.* at 50 (quoting Vaca v. Sipes, 386 U.S. 171, 198 (1967)). The *Foust* court stated

disagreed with the majority's blanket rule that unions should never have to pay punitive damages, reasoning "the damages a union will be forced to pay in a typical unfair representation suit are minimal. . . . Union treasuries . . . will emerge unscathed [in most cases.]"[101]

In *Clayton v. International Union, United Auto Workers*[102] the Court held that an employee need not exhaust internal union appeals procedures prior to filing a section 301/DFR action.[103] In reaffirming that damages may be assessed against both the employer and the union,[104] the Court examined union procedures in similar actions decided by the union's Public Review Board.[105] The Court indicated that the Review Board is empowered to award backpay damages against a union in an appropriate case.[106]

Although *Vaca* and subsequent Supreme Court cases made clear that courts were to apportion damages between breaching employer and union, lower courts' application of *Vaca's*

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that although such apportionment might immunize a clearly breaching union, that risk was insufficient to justify endangering the financial stability of unions. *Id.*

[101] *Id.* at 57 (Blackmun, J., concurring). Justice Blackmun commented that "under *Vaca*'s apportionment formula, the bulk of the award will be paid by the employer, the perpetrator of the wrongful discharge, in a parallel § 301 action." *Id.*

Justice Stevens voiced a different opinion in his dissenting and concurring opinion in United Parcel Serv. v. Mitchell, 451 U.S. 56 (1981), a hybrid section 301/DFR suit. Although the Court had no occasion to discuss damages, Justice Stevens revealed his view that a union may bear liability for backpay damages due to its breach. *Id.* at 73 n.2, 73-74 n.4.

[102] 451 U.S. 679 (1981).

[103] *Id.* at 685.

[104] *Id.* at 690 n.15.

[105] *Id.* at 692-94.

[106] *Id.* at 690-92. The Public Review Board was presumably following NLRB precedent in assessing backpay relief against the union. The NLRB has mandated such awards when the union's unfair representation is found to be an unfair labor practice in violation of the NLRA. *See, e.g.*, Steelworkers (InterRoyal Corp.), 223 N.L.R.B. 1184, 92 L.R.R.M. 1108 (1976) (union liable for all backpay because it refused to process employee's grievance); IBEW, Local 2088 (Fed. Elec. Corp.), 218 N.L.R.B. 396, 89 L.R.R.M. 1590 (1975) (because the union violated the NLRA by failing to process a non-member's grievance the union was ordered to compensate the employee for all loss of earnings); Port Drum Co., 180 N.L.R.B. 590, 73 L.R.R.M. 1068 (1970) (because the union failed to take steps to fulfill its obligation of fair representation, the union was ordered to make the estate of the employee whole). *See generally* Comment, *Unfair Representation and the National Labor Relations Board*, 37 J. AIR L. & COM. 89 (1971); Brief for Petitioner at 35-40, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983).

"governing principle" varied. While some courts held that only the employer may be liable for lost wages,[107] others asserted that the measure of damages assessed against a union may include liability for backpay.[108] Some courts apportioned damages according to the fault of each,[109] while one declared the union and the employer jointly and severally lia-

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[107] Milstead v. International Bhd. of Teamsters, 649 F.2d 395 (6th Cir. 1981) (*per curiam*) (employee not entitled to recover lost wages from his union); Wyatt v. Interstate Ocean and Transp. Co., 623 F.2d 888 (4th Cir. 1980) (backpay cannot be recovered against a union unless it has contributed to the discharge or exacerbated the employee's loss); Self v. Drivers, 620 F.2d 439 (4th Cir. 1980) (union not liable for backpay - only for expenses employees incurred in pursuing their claim); De Arroyo v. Sindicato de Trabajodores Packinghouse, 425 F.2d 281 (1st Cir.), *cert. denied sub nom.* De Arroyo v. Puerto Rico Tel. Co., 400 U.S. 877 (1970) (entire backpay award charged to the company; union is not liable unless it participated in the discharge, or but for the union's conduct the employees would have been reinstated at an earlier date); Crawford v. Pittsburgh-Des Moines Steel Co., 386 F. Supp. 290 (D. Wyo. 1974) ("the backpay due, if any, is not attributable to actions of the union"); Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974), *rev'd on other grounds*, 514 F.2d 285 (2d Cir.) (2d Cir. expressly affirmed backpay award), *cert. denied*, 423 U.S. 892 (1975) ("[s]ince essentially all the loss suffered here was due to [the employer's] improper discharge of the plaintiff, it must be held liable for the plaintiff's backpay").

[108] Seymour v. Olin Corp., 666 F.2d 202 (5th Cir. 1982) (the employer should not be relieved of the natural consequences flowing from his discharge merely because the union has breached a separate duty); Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291 (1st Cir. 1978) (union liable for a portion of backpay if but for the union's conduct, the employee would have been reinstated earlier); Smart v. Ellis Trucking Co., 580 F.2d 215 (6th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979) (employer's liability may be limited if he justifiably relied on the finality of the arbitration decision); Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976) (union liable for backpay when its breach of duty extinguished employee's right to pursue his own grievance); Thompson v. Brotherhood of Sleeping Car Porters, 367 F.2d 489 (4th Cir. 1966) (lost wages charged to union and not challenged on appeal); Atwood v. Pacific Maritime Ass'n, 432 F. Supp. 491 (D. Or. 1977) (employer should not be denied the presence of the union as a party should the case reach the apportionment stage).

[109] Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977) (damages recoverable from the union and the employer are distinct and attributable to the fault of each); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972) (damage may be apportioned to the union to the extent that it shares responsibility for the whole harm); St. Clair v. Local 515, Int'l Bhd. of Teamsters, 422 F.2d 128 (6th Cir. 1969) ("the increment of damages caused by the union's breach of duty is virtually de minimis" because the union did not procure the employee's discharge); Ruzicka v. General Motors Corp., 96 L.R.R.M. 2822 (E.D. Mich. 1977) (a proper apportionment of damages must consider not only the chronology of the employer and union's conduct but also the gravity and nature of their wrongdoing), *vacated on other grounds and remanded*, 649 F.2d 1207 (6th Cir.) (union relieved from liability if it can show its delay in filing grievance was due to reliance on company policy), *dismissed*, 519 F. Supp. 893 (E.D. Mich. 1981).

ble.[110] Because this controversy existed, the Supreme Court granted certiorari in the case of *Bowen v. United States Postal Service*.[111]

II. BOWEN V. UNITED STATES POSTAL SERVICE

Justice Powell began his opinion for the Court by quoting the "governing principle" of *Vaca*[112] but acknowledged that application of the principle has not been an easy task for the lower courts.[113] The AFL-CIO argued that because its breach of the DFR was unrelated to the Postal Service's breach of the collective bargaining contract, the breach itself should not give rise to any backpay liability.[114] The Court agreed with the AFL-CIO's claim that its default merely lifted the bar to the employee's suit on the contract against the employer, stressing that *Vaca* permits an employee to forego exhaustion of contractual grievance procedures if he can prove that the union has breached its DFR, and that *Hines* removed the bar of finality from an arbitral decision when the union has breached its DFR.[115] The Court emphasized, however, that a union's breach of DFR does more than merely lift the exhaustion bar.[116] A collective bargaining agreement creates relationships among the union, employer, and employee not present in a traditional common law employment contract;[117] the collective bargaining agreement

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[110] Freeman v. O'Neal Steel, Inc., 436 F. Supp. 607 (N.D. Ala. 1977), *rev'd.*, 609 F.2d 1123 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980) (because the union and the employer were equally culpable, the court held them jointly and severally liable for any damages awarded).

[111] 454 U.S. 1097 (1981).

[112] 386 U.S. 171, 197-98 (1967). See *supra* text accompanying note 73 for explanation of the term "governing principle."

[113] 103 S. Ct. 588, 593 (1983). *See supra* notes 107-110 and accompanying text.

[114] 103 S. Ct. at 593-94. The AFL-CIO maintained that because the Postal Service had the sole duty to pay wages and the sole power to reinstate Bowen, all backpay should be charged to the Service. The AFL-CIO contended that an award of attorney's fees and other litigation expenses would provide sufficient deterrence to misconduct. *See* Brief for Respondent Union at 219-29, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983).

[115] 103 S. Ct. at 595.

[116] *Id.* at 594.

[117] *Id.*

may not be treated as an employment contract terminable at will without ignoring the dictates of the federal common law of labor policy.[118]

Although the Court placed great emphasis on the federal labor policy,[119] it affirmed that the greatest concern is the injured employee's right to be made whole.[120] Justice Powell noted that an employer should not be shielded from the "natural consequences" of its wrongful conduct,[121] but indicated that *Vaca* mandates an allocation according to responsibility.[122] The Court held that the union is responsible for the increase in damages caused by its breach of the DFR.[123]

The Supreme Court declared that an employer is entitled to rely on a union's decision not to pursue a grievance because by acquiring the exclusive power to speak for the employees the union assumes a corresponding duty to fulfill its obligations faithfully.[124] Justice Powell pointed out that if the employer could not rely on the union's decision, the grievance procedure would not provide "the uniform and exclusive method for [the] orderly settlement of employee grievances" which is essential to national labor policy.[125] The Court reasoned that incentives to comply with the grievance procedure would be diminished and employers might be reluctant to agree to the customary arbitration clauses if damages were not apportioned.[126] The Court added that requiring the union to pay compensatory damages would not impose the great burden about which it was concerned in *Foust* because an award of backpay would be finite and lim-

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[118] *Id.* See Steele v. Louisville & Nashville R.R., 323 U.S. 192, 204 (1944) and cases cited therein regarding the federal labor policy.

[119] 103 S. Ct. at 594-95.

[120] *Id.* at 595.

[121] *Id.* at 595 (quoting Vaca v. Sipes, 386 U.S. 171, 186 (1967)).

[122] *Id.* at 595.

[123] *Id.* The Court ruled that if the employee cannot collect the damages apportioned against the union, the employer remains secondarily liable for the full loss of backpay. *Id.* at 595 n.12.

[124] *Id.* at 597.

[125] 103 S.Ct. (quoting Clayton v. International Union, United Auto Workers, 451 U.S. 679, 686-87 (1981)).

[126] 103 S.Ct. at 597.

ited.[127] The Court asserted that the potential liability for a breach of the DFR would provide an incentive for the union to carefully scrutinize its members' claims.[128]

Although the AFL-CIO contended that *Czosek* made clear that a union could not be held liable for backpay damages,[129] the Court limited *Czosek* to the RLA context.[130] The RLA provides alternate procedures which an individual employee can pursue if the the union refuses to process his grievance, and a breach by the union does not deprive the employee of access to a remedy.[131] Because the employee had such access, the union in *Czosek* did not increase the employer's liability and the union was liable only for the employee's added litigation expenses.[132] The Court pointed out that *Czosek* was consistent with *Vaca's* mandate that damages be apportioned according to fault.[133]

The Court dealt with its other precedents summarily, stressing that it had consistently applied *Vaca's* "governing principle" in its various remarks on remedies provided to injured employees.[134] The Court remanded for allocation of damages against both the Postal Service and the AFL-CIO.[135] Justice Powell commented that the Court was not required to decide whether the district court's instructions on apportionment were proper because the AFL-CIO had not

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[127] *Id.* at 597 n.16.

[128] *Id.* at 597-98.

[129] Brief for Respondent Union at 23, Bowen v. United Postal Serv., 103 S. Ct. 588 (1983).

[130] 103 S. Ct. at 599. Although the Court distinguished cases arising under the RLA from those arising under the NLRA, the dissent insisted that the distinction was irrelevant because *Czosek* applied *Vaca*'s apportionment rule. *Id.* at 602 n.5.

Because the Court did point to one of the major differences between the labor acts, it is possible that the *Bowen* rule will apply only to cases falling under the NLRA in which the employee has no alternate remedy. Under such strict construction, *Bowen*'s apportionment rule would not be applied to the railroad or airline industries falling under the RLA. At the least, the *Bowen* decision reflects the Court's disposition toward apportionment of damages and provides an insight into how the Court might decide a section 301/DFR suit in the future under the RLA.

[131] 103 S. Ct. at 602.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 598 n.17.

[135] *Id.* at 599.

objected to the manner of apportionment, if such damages were to be assessed.[136] The Court concluded that apportionment of backpay damages between a breaching employer and a union is required by *Vaca*.[137]

Justice White dissented, joined by Justices Marshall, Blackmun, and Rehnquist.[138] He asserted that the employer who discharges an employee in breach of the collective bargaining agreement should be primarily liable for all backpay.[139] In support of his position Justice White quoted *Vaca's* explicit statement that the union's violation of its DFR in no way "exempt[ed] the employer from contractual damages which he would otherwise have to pay."[140] The dissent further noted that the Court's decision in *Hines* reiterated that a union's breach of duty does not shield an employer from damages it would otherwise owe.[141] Justice White stated that prior to the *Bowen* decision, under the Court's previous holdings,[142] the union's breach did not affect the employer's potential liability where the employee prevails against the employer in a section 301 suit.[143]

The dissent looked also to *Czosek*'s assurance to the union of minimal liability[144] to provide support for its view that a union is not primarily liable for backpay.[145] In addition, the

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[136] *Id.* at 599 n.19. See *supra* notes 15-16 and accompanying text for discussion of the method of apportionment employed by the trial court.

[137] 103 S.Ct. at 599.

[138] *Id.* Although the Justices concurred in part and dissented in part, their opinion will be referred to as the dissent because the dissenting portion concerned the apportionment issue. *Id.* at 607. The concurring portion (Part IV), to which Rehnquist filed a separate dissent, concerned the Court of Appeal's ruling that the Service was only liable for the amount originally apportioned because Bowen failed to appeal the manner in which the district court apportioned the award in his favor. *Id.* at 606-08.

[139] *Id.* at 600.

[140] *Id.* at 601 (quoting Vaca v. Sipes, 386 U.S. 171, 196 (1967)).

[141] 103 S.Ct. at 601.

[142] *Id.* Justice White did not cite case names in his reference to the Court's "previous holdings."

[143] *Id.*

[144] *Id.* at 602.

[145] *Id.* at 601-02. In Vaca v. Sipes, 386 U.S. 171 (1967), the employee was discharged in 1960, the union refused to arbitrate in 1961, the employee filed suit in 1962, the trial began in 1964 and was finally adjudicated by the Supreme Court in 1967. The *Bowen* Court reasoned that, because an arbitration award would have been made less than one year after the grievance was filed, well over half of the wage loss would have been

dissent considered *Czosek* to be the guide to the proper measure of damages in a hybrid section 301/DFR suit.[146] Justice White also pointed to the concurrence in *Foust* in which Justice Blackmun speculated that the damages a union would have to pay in a DFR case would be minimal.[147] The dissent asserted that the majority had abandoned the *Vaca* rationale of apportionment in light of the apportionment language in *Czosek*, *Hines*, and *Foust*.[148] The dissent accused the majority of having effectively insulated the employer from most liability although the employer alone has the ability to stop the accretion of damages by reinstating the employee.[149] Justice White reasoned that the "bulk of the award" will be borne by the union and not by the employer; although the hypothetical arbitration date[150] will usually fall less than a year after the discharge,[151] such cases take from three to ten years to run their course in the judicial system.[152] The dissent claimed that the employer is the actual cause of the damage because but for the employer's breach of the collective bargaining contract, no one would have to reimburse the employee.[153]

Justice White also disagreed with the Court's distinction between the collective bargaining agreement and traditional contract law.[154] The dissent asserted that the matter should be governed by the general rule in contract law that a breaching defendant must pay damages equivalent to the total harm suffered even though there were other contributing

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attributable to the union's refusal to arbitrate. 103 S. Ct. at 601 n.4. The *Bowen* dissent, however, agreed with *Vaca*'s dictum that "all or almost all" of the employee's damage would be attributable to the employer. 103 S.Ct. at 601.

[146] 103 S.Ct. at 602. *See supra* text accompanying notes 81-82.

[147] 103 S.Ct. at 602. *See supra* note 101 and accompanying text. Justices Burger, Rehnquist, and Stevens joined the *Foust* concurrence.

[148] *See supra* notes 140-147 and accompanying text.

[149] 103 S. Ct. at 602-03.

[150] The dissent assumed that the hypothetical arbitration date was endorsed by the Court as the proper dividing line for apportionment. *Id.* at 603. *See supra* text accompanying note 136.

[151] *Id.* at 603. The dissent observed that the average time between the filing of a grievance and the rendering of a final arbitral award ranged from 223.5 to 268.3 days. *Id.* at 601 n.4.

[152] *Id.* *See* Comment, *supra* note 17, at 171 n.110.

[153] 103 S. Ct. at 603.

[154] *Id.* *See supra* text accompanying notes 117-118.

factors.[155] Following general contract law, the employer would be liable for the total backpay amount, even though the union contributed to the harm through its breach of the DFR.[156]

Although the Court found that the nature of the collective bargaining agreement entitles the employer to rely on the union's decisions, the dissent emphasized that a union's duty is to fairly represent the *employees*.[157] Justice White accused the majority of reading an indemnification provision into the agreement which would require the union to somehow protect the employer.[158] The enactment of such a provision, the dissent claimed, would amount to modification of the terms of a collective bargaining agreement without the authority to do so.[159]

Justice White conceded that where the union has affirmatively induced the employer to commit a breach of collective bargaining contract, the union and the employer should be jointly and severally liable for the backpay damages.[160] In situations involving a union which has not participated in the discharge, the dissent opined that the union should be secondarily liable.[161] The dissent speculated, however, that unions knowledgable of the Court's method of apportionment will take many unmeritorious grievances to arbitration, simply to avoid the prospect of liability for the major portion of the backpay award.[162]

III. PRACTICAL IMPLICATIONS AND CONCLUSION

By affirming the district court's manner of apportionment, the Supreme Court has held in effect that, in a hybrid section 301/breach of DFR suit, where the employee can prove that

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[155] *Id.* (quoting 5A CORBIN, CORBIN ON CONTRACTS § 999 (1964)).

[156] 103 S. Ct. at 603.

[157] *Id.* at 604.

[158] *Id.*

[159] *Id.* at 605.

[160] *Id.*

[161] *Id.* See *supra* text accompanying note 117 where the Court took the opposite approach.

[162] 103 S.Ct. at 605.

the employer has discharged him in breach of the collective bargaining agreement and that the union has breached its DFR, the employer will be liable for only those lost wages which accrue prior to the date at which arbitration would have taken place had the union processed the grievance.[163] The union will be liable for all backpay damages which accrue from the hypothetical arbitration date to the date of final adjudication.[164] As the dissent pointed out, a union breaching its DFR will consistently be liable for the greater portion of the backpay award.[165] The possibility of being held liable for such damages may force unions to more carefully scrutinize their members' grievances,[166] strengthening the bargaining process by forcing the union to adhere to its duty to represent all employees fairly.[167]

The Court's decision, however, may have the opposite effect, that of discouraging the settlement of grievances[168] and encouraging the furtherance of many unmeritorious claims.[169] Courts should stem the flow of grievances taken to arbitration by clearly defining exactly what quality of performance is required to fulfill the DFR.[170] Additionally, there are two possible effects of allowing employers to rely on the union's arbitration decisions. First, employer reliance may protect the parties' expectations by allowing the system to operate as designed.[171] On the other hand, such an "in-

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[163] *Id.* at 599 n.19.

[164] *See supra* text accompanying notes 151-152.

[165] 103 S. Ct. at 603. If, for example, a case would have gone to arbitration in one year but would not be finally adjudicated in the courts for three years, the employer would be liable for 25% of the damages (one year out of four) and the union would be liable for 75%. If the case remained unsettled in the courts for nine years, see Comment, *supra* note 17, at 171 n.110, the employer would be liable for only 10% of the award and the union would be forced to pay 90%. For an illustration of the *Bowen* approach, see Comment, *supra* note 17, at 171.

[166] 103 S. Ct. at 597-98.

[167] Brief for Petitioner at 25, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983). *See also*, Comment, *supra* note 17, at 180.

[168] Brief for Respondent Union at 45, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983).

[169] 103 S. Ct. at 605.

[170] *See supra* note 69.

[171] Brief for Petitioner at 25, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983).

demnification" provision may create reliance on *implied* agreements, defeating the expectations of the parties.[172] Furthermore, employers may perceive an incentive not to settle cases because their potential backpay liability will already be fixed as of a date past.[173]

Although the *Bowen* decision may provide comfort to employers who have breached their collective bargaining agreements and incentive for unions to make grievance decisions more cautiously, the Court may have misconstrued the intention of the *Vaca* decision. Given the reality of the slow judicial system, choosing to apportion damages according to the hypothetical arbitration date implies that the union is primarily responsible for the entire situation although the union has no authority to stop the accretion of damages by reinstating the employee. Such apportionment seems inconsistent with *Vaca*'s mandate that each party pay damages attributable to its fault.

Beth Pace Baker

[172] Brief for Respondent Union at 48, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983).

[173] *Id.* at 43.

ANTITRUST—HORIZONTAL MARKET ALLOCATION-MILITARY AIRCRAFT INDUSTRY—The Actions of Two Contractors under a Military Arms Contract and Teaming Agreement Are Not *Per Se* Violations of the Antitrust Laws but Are To Be Governed by the "Rule of Reason" Analysis Despite the Existence of Heavy Governmental Regulation in the Industry. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir.), *cert. denied*, 104 S. Ct. 156 (1983).

In 1974, the United States Navy announced the Navy Air Combat Fighter (NACF) competition to develop a lightweight fighter suitable for aircraft carriers.[1] Proposals were limited to use of technology developed in General Dynamic's YF-16 and Northrop Corporation's (Northrop) YF-17 land-based air combat fighter programs.[2] As a result the competition was effectively limited to General Dynamics and Northrop.[3] Neither, however, possessed the necessary experience in producing carrier-suitable aircraft.[4]

The solution as suggested by the Defense Department and the Navy was to "team"[5] the manufacturer winning the con-

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[1] Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1036 (9th Cir.), *cert. denied*, 104 S. Ct. 156 (1983).

[2] *Id.* By limiting the proposals to this particular technology, the Navy would satisfy the congressional goal to cut costs. Northrop Corp. v. McDonnell Douglas Corp., 498 F. Supp. 1112, 1114 (C.D. Cal. 1980). In 1972, the United States Air Force had announced a similar program for lightweight, land-based, air combat fighters in which Northrop and General Dynamics were awarded contracts to develop the YF-17 and YF-16, respectively. McDonnell did not compete because it concentrated on continued research and development on the F-4 and F-15. *Id.*

[3] 705 F.2d at 1037.

[4] *Id.* Both had concentrated their efforts in the past on land based aircraft. *See supra* note 2.

[5] Armed Services Procurement Regulation, 32 C.F.R. § 4-117 (1982). Section 4-117 provides in full:

> (a) *Definition*. A contractor team arrangement is one whereby two or more companies form a partnership or joint venture to act as a potential prime contractor or whereby a potential prime contractor agrees with one or more other companies to act as his subcontractor(s) under a specified Government procurement or program.

tract with other companies having the requisite experience in Naval aircraft development.[6] McDonnell Douglas Corporation (McDonnell) had the requisite naval experience.[7] On October 2, 1974, Northrop and McDonnell executed a "Teaming Agreement"[8] to develop and propose variants of the YF-17 to the Air Force and Navy.[9]

(b) *Policy*. There are times when it may be desirable, both from the Government and Industry standpoints, for companies to enter into a team arrangement prior to a Government contract award or thereafter. Team arrangements may be particularly appropriate for engineering and operational system developments, but may be used in other appropriate situations, including production procurement. Team arrangements allow a prime contractor and subcontractor to complement the unique capabilities of each and to offer the Government the best combination of capabilities to achieve the system performance, cost, and delivery desired for the system being produced. The Government will recognize the integrity and validity of contractor team arrangements, *provided* they are identifed and company relationships are stated in a proposal. Under a contractor team arrangement, the prime contractor is fully responsible for the performance of the contract. The Government normally will not require or encourage dissolution of contractor team arrangements. These policies do not authorize arrangements in violation of anti-trust statutes and do not limit the Government's rights to:

(i) approve subcontracts in accordance with ASPR requirements;
(ii) determine the responsibility of a prime contractor on the basis of the stated contractor team arrangement;
(iii) provide the selected prime contractor with data rights owned or controlled by the Government; and
(iv) pursue its policies on competitive procurement, subcontracting and component breakout, after initial production procurement or at any other time.

Id.

In teaming arrangements, often used in large military projects, two or more private contractors pool their financial and technological resources to work on a project they would be unable to handle alone. Experimental Eng'g v. United Technologies Corp., 614 F.2d 1244, 1245 (9th Cir. 1980); American Standard, Inc. v. Laird, 326 F. Supp. 492, 501-02 (D.D.C. 1971).

[6] 705 F.2d at 1037. The Navy was forced to encourage teaming because they were faced with "a crap game in which the two potential participants did not know how to play." *Northrop*, 498 F. Supp. at 1115.

[7] 705 F.2d at 1037. It should be noted that it was unclear who was the pursuer and the pursuee; however, both were in desperate need of each other if they were to be successful in taking advantage of the opportunity represented by the Navy's need for a new carrier-suitable aircraft to meet the military needs of the nation. *Northrop*, 498 F. Supp. at 1115.

[8] This "Teaming Agreement" would be the first of three agreements between the two contractors. 705 F.2d at 1037.

[9] *Id.* The USAF version would be a land-based, light-weight fighter from the YF-17 prototype, while the USN version would be carrier-suitable. *Id.* The Teaming Agree-

On January 14, 1975, Northrop lost the Air Force competition to General Dynamic's YF-16,[10] while on May 2, 1975, McDonnell won the NACF competition based on its design.[11] Two months later McDonnell and Northrop executed the second agreement between themselves.[12] This "Basic Agreement" paralleled the Teaming Agreement for the most part,[13] although the Contract Responsibilities Clause of this new

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ment stated that Northrop would concentrate on the Air Force's ACF competition while McDonnell would center its efforts on the Navy's NACF competition. *Id.* The central idea behind the joint effort was to combine the knowledge and skills of both companies to successfully design fighter aircraft for both competitions based on the groundwork laid down by Northrop. *Northrop*, 498 F. Supp. at 1115. Northrop had spent a large amount of time and energy in the development of the lightweight fighters. *Id.* at 1114. In 1965, Northrop began development of a new lightweight supersonic fighter from which emerged its prototypes P-530 and P-630. *Id.* The P-530 was the design on which the Air Force awarded the 1972 contract to Northrop. *Id.* The agreement was intended to be the foundation for future agreements. 705 F.2d at 1037. By its own terms the Teaming Agreement was to terminate on June 30, 1975, unless mutually extended. *Northrop*, 498 F. Supp at 1115.

[10] 705 F.2d at 1037.

[11] *Id.* The Navy designated the new aircraft to be the "F-18." *Id.*

[12] *Id.* The Government was not a party to this agreement. *Id.* at 1037 n.3.

[13] *Id.* The key provisions of the Basic Agreement are the Definitions Clause which defines the F-18 as a "carrier-based derivative of [the] YF-17 aircraft . . . ;" the Objective Clause in which:

> [the parties expressed their commitment to] work together (without in any manner intending to create a joint venture or otherwise incur or imply joint or several liability) for the purpose of obtaining and performing contracts for the development and production of derivatives of [the] YF-17 aircraft that are responsive to the requirements of the U.S. Navy and foreign customers;

and the Contract Responsibilities Clause which provides:

> [McDonnell] will be prime contractor in connection with contracts with the U.S. Navy for the development of the F-18 and for the production of those F-18 aircraft purchased by the U.S. Navy for its own use. Futhermore, in the event a foreign customer desires to procure from [McDonnell] . . . *F-18 aircraft of basically the same configuration . . . [McDonnell] will be prime contractor. [Northrop] may elect to be prime contractor on any or all contracts for the development and production of aircraft derived from the YF-17 other than those referred to in paragraph . . . above.*

Id. at 1037-38 (emphasis added). The court also examined the Data Exchange Clause and the Division of Effort Clause. *Id.* at 1038. The Data Exchange Clause mutually obligated both parties to exchange available information on the F-18 and YF-17 technology. *Id.* The exchanged technology could only be used by the receiving party in furtherance of the contracts referred to in the Contract Responsibilities Clause, and the Division of Effort Clause provided that absent a contrary Navy directive, all F-18 production was to be performed according to the distribution of labor specified by the parties in the agreement. *Id.*

Agreement failed to clearly define the limitations imposed on McDonnell with respect to the development of F-18 carrier-suitable derivatives.[14] Thereafter, the Government awarded McDonnell the prime contract on the production of the F-18,[15] and McDonnell awarded Northrop the principal subcontract on the project.[16]

In late 1975 and early 1976, Iran commenced negotiations with Northrop to become the first customer of a YF-17 derivative land-based fighter.[17] The Navy was concerned that the sales of Northrop's F-18L to Iran would dilute and undermine its F-18A program.[18] In response, the Navy persuaded McDonnell and Northrop to enter into a new agreement on August 26, 1976.[19]

Northrop initiated suit against McDonnell on October 29, 1979,[20] alleging that McDonnell waged a deliberate campaign to monopolize the market for YF-17 derivative aircraft by crippling Northrop as a viable competitor.[21] Particularly,

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[14] *Id.* at 1038.

[15] *Id.*

[16] *Id.* Northrop was required to provide "personnel, materials, services, facilities, logistics support, data and management required to design and develop, fabricate, qualify, test, document and deliver the . . . F-18 major assemblies/equipment in accordance with MACAIR Statement of Work (SOW) No. WS-F-18-27." *Northrop*, 498 F. Supp. at 1115.

[17] *Id.* The Northrop land-based derivative was designated the F-18L, and McDonnell's Navy design was known as the F-18A. *Id.*

[18] *Id.* at 1115-16.

[19] 705 F.2d at 1038. This new agreement essentially reaffirmed the Basic Agreement. *Id.* McDonnell's rights under the contract were expressly unchanged. *Id.* at 1038 n.5. The fighter that Northrop could develop was more specifically defined under the new agreement. *Id.* at 1038. Northrop was exclusively to design, develop and produce for sale land-based designed fighters derived from the YF-17 to the United States and to foreign governments. *Id.* This assured the Navy that Northrop's agreements concerning the F-18L would not interfere with development of the F-18A. *Id.* The parties satisfied the Navy's demand that they agree on a Foreign Military Sales Master Plan pursuant to the Military Assistance and Sales Manual, Defense Department Directive 5105.38M. *Id.*

[20] *Id.* The initiation of suit was in response to McDonnell's aggressive marketing of the completed design of the production-ready F-18. *Northrop*, 498 F. Supp. at 1116. At that time, McDonnell was in active negotiations with Canada, Israel, Spain and Australia. *Id.*

[21] 705 F.2d at 1038. Generally, Northrop's claims were based on the theories that McDonnell delayed production of all F-18 derivatives, including Northrop's F-18L, in order to promote sales of its own land-based F-15 in the interim, that McDonnell attempted to restrict Northrop's F-18L to a specialized class of limited-use fighters

Northrop alleged that McDonnell breached the Contract Responsibilities Clause[22] of the Basic Agreement by representing to foreign customers[23] that McDonnell could serve as prime contractor on any version of the F-18, including a land-based version.[24]

McDonnell counterclaimed, moving to dismiss the complaint of Northrop on the grounds that Northrop's claim contained nonjusticiable political and foreign policy questions and did not state grounds for relief under section 2[25] of the

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known as "day fighters" so that McDonnell's F-15 and F-18A fighters would be more attractive to customers desiring multi-mission aircraft, and that McDonnell breached its obligations under the Basic Agreement to exchange F-18 technology and to subcontract the specified share of work to Northrop on F-18A aircraft sold in foreign countries. *Id.* at 1039.

Specifically, the relief sought by Northrop can be summarized as follows:

1. Injunctive relief to prevent McDonnell from misappropriating Northrop's property by breaching the Agreements.
2. Injunctive relief to prevent McDonnell from misappropriating Northrop's property by exceeding the "license" of technology granted under the Agreements.
3. A declaration of the parties' rights under the Agreements.
4. Damages for fraud by McDonnell in the inducement to enter the Agreements.
5. An accounting for profits earned by McDonnell as a result of its breaches of the Agreements.
6. Injunctive relief and damages for McDonnell's alleged attempt to monopolize the domestic and foreign markets for F-18s in violation of Section 2 of the Sherman Act.
7. Injunctive relief and damages for McDonnell's act of unfair competition.
8. Recovery in quantum meruit for contributions to the joint business relationship for which Northrop has not been compensated.

Id. at 1039 n.6.

[22] See *supra* note 13 for relevant text of Contract Responsibilities Clause.

[23] Many of the acts involved negotiations with Israel. *Northrop*, 498 F. Supp. at 1116.

[24] 705 F.2d at 1039.

[25] 15 U.S.C. § 2 (1976). Section 2 of the Sherman Act reads in full:

> 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 one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id.

Sherman Act.[26] McDonnell also asked for summary judgment on the grounds that the relief requested by Northrop[27] would constitute an illegal restraint of trade in violation of sections 1[28] and 2[29] of the Sherman Act.[30]

The district court dismissed Northrop's complaint in its entirety and additionally granted McDonnell summary judgment as to five[31] of the eight counts.[32] The district court found the case nonjusticiable under the political question doctrine based upon the separation of powers doctrine and the delegation of the care of the military to the executive branch.[33] The court also found that the facts clearly brought the case within the *per se* rule[34] and not the "rule of reason"

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[26] *Northrop*, 498 F. Supp. at 1116. McDonnell also moved on two other grounds—that there was a failure to join a necessary and indispensible party, the United States, as required by Federal Rule of Civil Procedure 19, and that the court lacked subject matter jurisdiction. 498 F.Supp. at 1116. The district court found that the United States was an indispensible party and granted dismissal on the basis that the Government would be prejudiced and inadequately represented. *Id.* at 1117-19. The district court determined that it lacked subject matter jurisdiction because Northrop's remedy was not wholly against the United States. *Id.* But only in an action against the Government could its agency relationship be determined. *Id.* Consequently, the court lacked jurisdiction. *Id.* at 1119-20.

[27] *See supra* note 21, counts one, two, three, six and seven.

[28] 15 U.S.C. § 1 (1976). Section 1 states in full:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in the restraint of trade or commerce among the several States, or with foreign nations, is 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 one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id.

[29] See *supra* note 25 for text of section 2 of the Sherman Act.

[30] *Northrop*, 498 F. Supp. at 1116. McDonnell also alleged that Northrop could not establish injury in fact in its allegations. *Id.* *See supra* note 21, counts four, five, six, seven and eight.

[31] *Northrop*, 498 F. Supp. at 1124. *See supra* note 21, counts one, two, three, six, and seven.

[32] 705 F.2d at 1036.

[33] *Northrop*, 498 F. Supp. at 1120.

[34] See *infra* notes 46-51 and 59-69 and accompanying text for discussion of the *per se* rule.

analysis[35] for restraints of trade.[36] The district court also dismissed the counterclaim of McDonnell.[37] The district court found that McDonnell's counterclaim was a mirror image of Northrop's complaint and should be denied on the same grounds.[38]

Both parties appealed and cross-appealed.[39] *Held, reversed and remanded for further proceedings*: The actions of two contractors under a military arms contract and teaming agreement are not *per se* violations of the antitrust laws but are to be governed by the "rule of reason" analysis despite the existence of heavy governmental regulation in the industry. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir.), *cert. denied*, 104 S. Ct. 156 (1983).

I. LEGAL BACKGROUND

A. *Restraint of Trade Test*

To curb the unchecked restraints of trade created by trusts and monopolies and the imposition of those restraints by them on the free enterprise system, Congress passed the Sherman Antitrust Act ("Act") in 1890.[40] Sections 1[41] and 2[42] of the Act were written in broad sweeping language leaving to the courts the job of defining the boundaries.[43] The purpose of the Act was to "prevent undue restraints of interstate commerce, to maintain [interstate commerce's] appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor."[44]

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[35] See *infra* notes 52-58 and accompanying text for discussion of the "rule of reason" analysis.

[36] *Northrup*, 498 F. Supp. at 1122.

[37] 705 F.2d at 1036. In the alternative the district court granted Northrop summary judgment on McDonnell's counterclaim. *Id.*

[38] *Id.*

[39] *Id.* at 1030.

[40] Note, *The Facial Unreasonableness Theory: Filling the Void Between Per Se and Rule of Reason*, 55 ST. JOHN'S L. REV. 729, 729 (1981). *See generally*, 1 E. KINTNER, FEDERAL ANTITRUST LAW § 4 (1980).

[41] See *supra* note 28 for text of section 1 of the Sherman Act.

[42] See *supra* note 25 for text of section 2 of the Sherman Act.

[43] Note, *supra* note 40, at 729-31.

[44] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933) (holding that

By making the language broad, Congress insured that the purpose of the Act would be met and a standard of reasonableness would be achieved.[45]

In first construing the Act, the Supreme Court made the sweeping determination that the Act embraced every restraint of trade without exception.[46] This determination was too broad, and the Court was forced to retreat and concede that not all restraints of trade were in violation of the Act.[47] The Sixth Circuit quickly recognized that there were different types of restraints of trade and made the distinction between "naked" restraints[48] and ancillary[49] restraints.[50] Naked restraints were condemned by common law, but ancillary restraints were exempted.[51] Thirteen years after the initial rec-

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there was insufficient evidence to prove a violation of the Sherman Act where 137 bituminous coal producers formed an exclusive selling agency to market their coal).

[45] *Id.* at 359-60. The Supreme Court equated the generality and adaptability of the Act with that found in constitutional provisions. *Id.* For an example of generality and adaptability in constitutional provisions, see the cases judicially developing the due process clause, U. S. CONST. amend. XIV, § 1. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Lochner v. New York, 198 U.S. 45 (1905).

[46] *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 328 (1897) (an organization of eighteen railroad companies, which had agreed to adhere to certain rates, rules and regulations for the carriage of freight, held unreasonable restraint under the Sherman Act).

[47] *See* United States v. Joint Traffic Ass'n, 171 U.S. 505, 568 (1898) (a restrictive agreement collateral to a sales contract held unlawful ancillary restraint).

[48] Naked restraints are contracts which have no other purpose or consideration on either side other than the mutual restraint of the parties. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do Sealy and Topco Logically Survive Sylvania and Broadcast Music?*, 66 VA. L. REV. 879, 882 (1980).

[49] Ancillary restraints are "those merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." Louis, *supra* note 48, at 882 (quoting United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)).

[50] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898) (an agreement between six companies to refrain from competing against each other in the iron pipe market in order to raise the price of iron pipe held unreasonable), *aff'd*, 175 U.S. 211 (1899).

[51] *Id.* at 282. The traditional approach of determining whether an ancillary restraint is illegal places the burden of justification on the user of the restraints once its existence and objectionable nature are established. Thus, the restraint must be essential—not merely helpful or useful—to the implementation of the underlying transaction. Moreover, it cannot be more restrictive than necessary to meet the parties' needs. Louis, *supra* note 48, at 883.

ognition of restraints of trade, the Supreme Court in *Standard Oil Co. v. United States*[52] announced the rule of reason test which established those restraints which were in violation of the Act.[53] The rule departed from the *per se* unreasonableness test of all naked restraints found in *United States v. Trans-Missouri Freight Association*.[54] Effectively this new test recognized that some transactions were inherently restrictive or required explicit restraints to make them either efficient or feasible.[55] Therefore, only those restraints that unduly inhibited interstate commerce were prohibited by the Act.[56] Unreasonableness was to be based either on the nature or character of the contracts, or on surrounding circumstances giving rise to the inference or presumption that the contracts were intended to restrain trade.[57] The nature of the inquiry, however, was confined to the consideration of the impact on competitive conditions.[58]

But the near *per se* analysis of *Trans-Missouri* reemerged in subsequent cases decided by the Supreme Court.[59] In *United States v. Socony-Vacuum Oil Co.*,[60] the Supreme Court ruled that horizontal price-fixing[61] was *per se* unreasonable.[62] The ma-

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[52] 221 U.S. 1 (1911). Forty competing corporations had entered the Standard Oil Trust Agreement. *Id.* at 33-35. The corporations exchanged stock for trust certificates. *Id.* at 36-37. By 1890, the trust controlled most of the oil refining industry. *Id.* at 33, 40.

[53] *Id.* The test from *Standard Oil* virtually absorbed the ancillary restraint exception of *Addyston Steel*. Louis, *supra* note 48, at 882. *See infra* text accompanying notes 55-58 for the rule of reason test.

[54] 166 U.S. 290 (1897). Louis, *supra* note 48, at 882 n.23. *See supra* note 46 and accompanying text.

[55] Louis, *supra* note 48, at 882.

[56] *Standard Oil*, 221 U.S. at 60.

[57] National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 690 (1978) (an association's canon of ethics prohibiting competitive bidding held to be a violation of the Sherman Act); *Standard Oil*, 221 U.S. at 58.

[58] *National Soc'y of Professional Eng'rs*, 435 U.S. at 690; *Standard Oil*, 221 U.S. at 55.

[59] United States v. Trenton Potteries Co., 273 U.S. 392 (1927). This was the first case to explicitly propose the *per se* rule. The rule, however, was not definitely established as viable until United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (holding that the efforts of oil companies to stabilize market prices through purchasing gas on the market at high prices was *per se* illegal).

[60] *Socony-Vacuum*, 310 U.S. 150 (1940).

[61] Horizontal price-fixing refers to an agreement to fix prices between or among independent entities which compete on the same levels of product or service distribution. 2 E. KINTNER, *supra* note 40, § 10.3, at 74.

jor oil companies had attempted to stabilize the midwest gasoline markets by purchasing distress gasoline[63] at higher prevailing market prices.[64] In disapproving of this practice, the Court stated that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."[65]

While the *per se* rule in *Socony-Vacuum* was relatively explicit, the Court further defined the rule in *Northern Pacific Railway Co. v. United States*.[66] The Court specifically rejected the rule of reason analysis because the railroad had "sufficient economic power with respect to the tying product [the use of the railroad] to appreciably restrain free competition in the market for the tied product."[67] Therefore, in clarifying the *per se* rule, the Court stated that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[68] The purpose in advocating the *per se* rule was to make specific types of unreasonable restraints more certain and predictable, and also to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when

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[62] 310 U.S. at 223.

[63] Distress gasoline is a term for large quantities of gasoline sold by small refiners at low prices on the spot market because of lack of storage capacity. The result would depress the price of gasoline as a whole on the market. Note, *supra* note 40, at 740.

[64] *Socony-Vacuum*, 310 U.S. at 179-80.

[65] *Id.* at 223.

[66] 356 U.S. 1 (1958).

[67] *Id.* at 6-8. A tying arrangement is formed where the seller conditions the sale of one product (the tying product) upon the purchase of another (the tied product), or where the buyer agrees to refrain from buying the tied product from any other supplier. 2 E. KINTNER, *supra* note 40, § 10.52, at 223. Here the tying arrangement was more akin to the former method. The railroad conditioned the sale of land upon the purchaser's agreement to use only the railroad when shipping goods. 356 U.S. at 3.

[68] 356 U.S. at 5.

undertaken."[69]

After *Northern Pacific*, the Court continued the process of defining the *per se* rule and expanded its boundaries by creating the "aggregation of trade restraints doctrine."[70] In *Timken Roller Bearing Co. v. United States*,[71] Timken, a manufacturer, licensed a British company to use its patents and trademarks in the production of tapered roller bearings.[72] The license agreement divided up the world markets and fixed prices.[73] The Court rejected the ancillary restraint doctrine developed in *United States v. Addyston Pipe & Steel Co.*[74] and held that restraint of trade was the primary purpose of the arrangement.[75] In holding the restraints *per se* unreasonable, the Court stated its prior decisions plainly established that the agreements providing for an aggregation of trade restraints such as those existing in *Timken* were illegal under the Act.[76] The Court based its decision on the connected price-fixing which had been held *per se* unreasonable in *Socony-Vacuum*.[77] By ruling on the price-fixing issue, the Court avoided deciding the horizontal market division issue.[78] The aggregation of trade restraints doctrine was further reinforced in *United States v. Sealy, Inc.*[79] and *Citizens Publishing Co. v. United States*.[80] The Court, however, had never explained what it meant by the

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[69] *Id.*

[70] Louis, *supra* note 48, at 884-89.

[71] 341 U.S. 593 (1951).

[72] *Id.* at 595.

[73] *Id.* at 595-96.

[74] *See supra* notes 48-52 and accompanying text.

[75] 341 U.S. at 597-98.

[76] *Id.* at 598. The Court in dicta stated that it could not find authority to justify the restraints on the basis that the licensing agreement was labeled a joint venture or otherwise. *Id.* All agreements could be thus labeled, and hence be beyond the reach of the Sherman Act. *Id.*

[77] *Id.* *See supra* notes 54-60 and accompanying text.

[78] Louis, *supra* note 48, at 887. It is noteworthy that the Court, in United States v. Topco Ass'n, 405 U.S. 596, 609 n.9 (1972), stated in dicta that the territorial restraints in United States v. Sealy, Inc., 388 U.S. 350 (1967) would have been unlawful *per se*.

[79] 388 U.S. 350 (1967) (expressly relying upon *Timken* and holding that the restraints were horizontal and connected with price-fixing, making them *per se* unlawful).

[80] 394 U.S. 131 (1969) (joint venture between two newspapers held *per se* unreasonable because it combined advertising and circulation departments and agreed to price-fixing and profit-sharing arrangements).

doctrine.[81]

The Court finally confronted the issue of horizontal market division in *United States v. Topco Associates*.[82] Topco was a cooperative serving as a joint purchasing association for approximately twenty-five medium to small regional supermarket chains.[83] Topco would order a thousand different items from independent packers and manufacturers, place its label on the foodstuffs, and ship them to the member markets.[84] In return, Topco granted each member an exclusive retail territory where no other member or prospective member could operate a store carrying Topco products.[85] The Supreme Court held these territorial restraints to be naked and horizontal, and therefore *per se* unlawful.[86] At least one commentator, however, has said that the restraints at issue were actually ancillary in nature and not naked, thus casting doubt on the ancillary restraint doctrine which employed the rule of reason analysis.[87]

Even as the *per se* rule reached its pinnacle in *Topco*, the Court had begun to reevaluate the absoluteness of the *per se* rule and the need for a return to the rule of reason analysis.[88] As a result of its decision in *United States v. Arnold, Schwinn & Co.*,[89] the Court was forced to explicitly reevaluate the *per se* rule.[90] In *Schwinn*, the manufacturer held control and author-

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[81] Louis, *supra* note 48, at 887.

[82] 405 U.S. 596 (1972).

[83] *Id.* at 598.

[84] *Id.* at 598-99.

[85] *Id.* at 601-02.

[86] *Id.* at 608.

[87] Louis, *supra* note 48, at 890, 892. *But see National Soc'y of Professional Eng'rs*, 435 U.S. 679, 689, 696 n.22 (1922) (referring favorably to the common-law uses of the doctrine).

[88] *See, e.g.*, White Motor Co. v. United States, 372 U.S. 253 (1963). The Court rejected the *per se* illegality of nonprice vertical restrictions until an adverse economic and business impact of the practice could be demonstrated, but it did not adopt the "rule of reason" test. *Id.* at 263. The Court simply did not adopt any standard at all. Stewart & Roberts, *Viability of the Antitrust Per Se Illegality Rule: Schwinn Down, How Many to Go?*, 58 WASH. U.L.Q. 727, 730-31 (1980). *But see* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (the Court unexpectedly found a nonprice-fixing vertical arrangement as *per se* illegal).

[89] 388 U.S. 365 (1967).

[90] Stewart & Roberts, *supra* note 88, at 729.

ity over its product even after it was sold.[91] The Court held that this practice was a *per se* violation of the antitrust laws.[92] The main problem was the Court's reliance upon the *per se* analysis when the government did not even pursue that particular analysis.[93]

The Supreme Court made its first clear attempt to limit the application of the *per se* rule in *Continental T.V., Inc. v. GTE Sylvania, Inc.*[94] The Court recognized that this area of law was in need of clarification,[95] and focused its decision on *Schwinn*.[96] In a painstakingly detailed decision, *Schwinn* was overruled, and the rule of reason analysis was held to apply to nonprice-fixing vertical restraints.[97] In overruling *Schwinn*, the Court created uncertainty as to the viability of *Topco* which had held a questionably naked territorial restraint as *per se* unreasonable.[98] After *Sylvania*, the courts, undaunted by the legal commentators, continued to apply the *per se* rule of *Topco* to horizontal market allocations.[99]

The Supreme Court finally reevaluated its approach to the *per se* rule in the horizontal market setting in its recent decision in *Broadcast Music, Inc. v. Columbia Broadcasting System (BMI)*.[100] The case involved a challenge to the blanket li-

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[91] 388 U.S. at 379.

[92] *Id.*

[93] Stewart & Roberts, *supra* note 88, at 730.

[94] 433 U.S. 36 (1977). The manufacturer had a distribution system whereby it sold its product to uncontrolled and company controlled middlemen, who in turn sold the products to independent retailers. *Id.* at 38. After a decline in market share, the manufacturer attempted to limit its authorized retailers to sell only its products at their approved and franchised locations. *Id.* The manufacturer also reserved the right to limit the number of franchises in an area. *Id. See also* Note, *supra* note 40, at 747.

[95] 433 U.S. at 47.

[96] *Id.* at 42-59.

[97] *Id.* at 47-59. It should be noted that the Court based much of its analysis on *Northern Pacific Railway*, 356 U.S. 1 (1958), a case which it had ignored in *Schwinn*.

[98] Louis, *supra* note 48, at 894. *Topco* was distinguished on the grounds that it involved horizontal restraints. 433 U.S. at 58 n.28.

[99] Stewart & Roberts, *supra* note 88, at 741-42. *See, e.g.*, *In re* Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); United States v. Cadillac Overall Supply Co., 568 F.2d 1078 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978). One author contended that the *Sylvania* rationale demanded the overruling of *Topco*. Weisburg, *Continental T.V. v. GTE Sylvania: Implication for Horizontal, as Well as Vertical, Restraints on Distributors*, 33 BUS. LAW. 1757, 1760-69 (1978).

[100] 441 U.S. 1 (1979).

censing of musical compositions.[101] The blanket license procedures effectively bar price competition among copyright owners because once a license was issued the licensee had unlimited rights to the music libraries for a fixed fee.[102] CBS alleged that the practice amounted to *per se* unlawful price-fixing.[103] In reversing the Second Circuit's condemnation of the licensing agreement, the Court held that the practice of blanket licensing did not constitute a *per se* unreasonable restraint of trade.[104]

At the outset of its opinion, the Court held that price fixing arrangements were *per se* unreasonable;[105] not all arrangements that appeared to be price-fixing, however, fell into this category.[106] The Court stated:

> As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable . . . . [However,] [l]iteralness is overly simplistic and often overbroad. When two partners set the price of their goods and services they are literally "price fixing," but they are not *per se* in violation of the Sherman Act. Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing." That will often, but not always, be a simple matter.[107]

The Court pointed out that considerable judicial experi-

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[101] Under a blanket licensing system, certain organizations operate as clearing houses for the licensing of copyrighted musical compositions. *Id.* at 5. Copyright owners grant to these clearinghouses, on a nonexclusive basis, the right to license their compositions for public performance. *Id.* In return, the organizations perform various functions for the composers, including the collection and distribution of royalties. *Id.* Authorizations from clearinghouses such as Broadcast Music, Inc. almost always take the form of blanket licenses. *Id.* These arrangements permit licensees to use any and all compositions in the library of the organization for a fixed term. *Id.* Almost all television and radio broadcasters hold blanket licenses from clearinghouse organizations which charge them a fixed rate or percentage of total dollar revenues. *Id.*

[102] Note, *CBS v. ASCAP: Performing Rights Societies and the Per Se Rule*, 87 YALE L.J. 783, 793-94 (1978).

[103] *BMI*, 441 U.S. at 6.

[104] *Id.* at 7.

[105] *Id.* at 8.

[106] *Id.* at 8-10.

[107] *Id.* at 9 (citations omitted).

ence with the business relationship involved was required before a restraint could be found *per se* unreasonable.[108] In *BMI*, the necessary business experience was absent.[109] Further, the Court held that the practice was not a naked restraint of trade with no other purpose than to stifle competition, but instead the practice accompanied the integration of sales, marketing, and enforcement against unauthorized copyright use.[110] Therefore, the blanket licensing was not "price-fixing" within the meaning of the *per se* rule.[111]

One point is clear from *BMI* and *Sylvania*: the *per se* rule analysis is appropriate under the right conditions but should not be applied blindly without the proper analysis.[112] *BMI* effectively placed "a small, relatively undefined area beyond the reach of the *per se* rule and, with *Sylvania*, suggests that further limitations on the *per se* rule with respect to practices having some redeeming social virtue may be in order."[113] *BMI*, while not specifically identifying the area, did not expressly overrule or distinguish *Topco* and "did not hold that ancillary restraints should be generally analyzed under the rule of reason."[114]

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[108] *Id.* (quoting United States v. Topco Ass'n, 405 U.S. 596, 607-08 (1972)).

[109] *Id.* at 10. The Court stated, " '[W]e confront conditions both in the copyright law and in antitrust law which are *sui generis*.' " *Id.* (quoting Columbia Broadcasting Sys. v. American Soc'y of Composers, Authors, and Publishers, 562 F.2d 130, 132 (2d Cir. 1977)).

[110] *BMI*, 441 U.S. at 20.

[111] *Id.* at 23. The Court's holding that blanket licensing was not *per se* "price-fixing" could be interpreted to undermine the *per se* rule. Louis, *supra* note 48, at 898 n.127. *But see* Arizona v. Maricopa County Medical Soc'y, 102 S. Ct. 2466 (1982) (reaffirming the validity of the *per se* rule in naked price-fixing arrangements).

[112] Note, *supra* note 40, at 749. The test for the application of the *per se* rule is whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output. *BMI*, 441 U.S. at 19-20. This is tempered, however, by the unclear result in *BMI*. Note, *Price Fixing and the Per Se Rule: A Redefinition—Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 5 DEL. J. CORP. LAW. 73, 92 (1980). The unclear result is possibly an indication of the Court's increased hesistency to employ the *per se* rule without going through an economic analysis to aid in the resolution of the issue. *Id.*

[113] Louis, *supra* note 48, at 898-99.

[114] *Id.* One author states that the present status of both tests is as follows:

> [T]he per se rule can be applied only after scrutiny of the competitive effects of a particular restraint in a given industry. This limited scrutiny can be distinguished from the rule of reason analysis in several major respects. The rule of reason approach entails examination of the precise

B. *Implied Immunity Doctrine*

By passing the Interstate Commerce Act (ICA)[115] in 1887, Congress began what would later prove to be an era of regulation in various industries and markets.[116] When Congress passed the Sherman Act in 1890,[117] however, a direct conflict arose between the purpose of the antitrust laws, which was to encourage competition, and the purpose of regulation, which was to suppress competition.[118] This conflict resulted in

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> facts in the case involved. Indeed, while the competitive consequences of a restraint are scrutinized under both inquiries, it is the rule of reason which looks, *inter alia*, to the relevant product and geographic markets as they existed before and after the challenged practice evolved. Conversely, the per se inquiry seeks only to make broad generalizations, and therefore, does not concern itself with particularities. Moreover, under the per se inquiry, the purposes of a restraint generally are not scrutinized, except when they tend to show competitive effects. A court engaged in the rule of reason analysis, however, will focus upon the particular defendant's purposes for developing a commercial practice and will examine the justifications for and scope of that restraint in detail. Finally, the market power of an antitrust defendant may be considered irrelevant under the per se approach, depending upon the type of restraint involved. Under the rule of reason analysis, this factor is highly significant.

Note, *supra* note 40, at 751-52.

[115] An Act to Regulate Commerce, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.).

[116] *See* Comment, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 TEX. L. REV. 751, 752 n.1 (1979). The rationale behind the institution of regulation in an industry was to control and possibly eliminate competition as a means towards the greater good or public interest. Ashley, *Vanishing Immunity: The Antitrust Assault on Regulated Industries*, 27 LOY. L. REV. 187, 187-88 (1981). According to Ashley, the preference for regulation in an industry has been based on several theories: (1) a natural monopoly existed in the industry, in particular the public utilities where the demand for a given service simply cannot support more than one company, *see, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 369 (1973); (2) businesses like common carriers which involve public convenience or nondiscriminatory provisions of services should be judged by standards other than competitive ones, *see, e.g.*, Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 453, 456-67 (1945); (3) the industry has been important to the foreign commerce of the United States, *see, e.g.*, Far East Conference v. United States, 342 U.S. 570, 573-74 (1952); and (4) there has been special concern for the regulated industry because of historical events, as for example, in the securities market where regulation was prompted by the Great Depression and the belief that that economic calamity was the result of unrestrained competition in the securities field, *see, e.g.*, Gordon v. New York Stock Exchange, 422 U.S. 659 (1975).

[117] Sherman Antitrust Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-7 (1976)). See *supra* notes 25, 28 for the text of sections 1 and 2.

[118] *See* National Gerimedical Hosp. & Gerontology Center v. Blue Cross, 452 U.S.

claims of so-called implied immunity by the regulated industries.[119] This implied immunity doctrine did not receive any substantial judicial development until 1907 in *Texas & Pacific Railway v. Abilene Cotton Oil Co.*[120]

In *Abilene Cotton*, the oil company alleged that the railroad had overcharged for the transportation of cotton in violation of the ICA.[121] The Court held that the ICA granted authority to the Interstate Commerce Commission (ICC) to ensure uniform, nondiscriminatory rates in shipping.[122] Therefore, Abilene's claim that it had the common law right of damages against the railroad because the railroad had unreasonably and unjustly set its rates was barred by Congress' exercise of power to regulate commerce.[123] *Abilene Cotton* was an implied repeal of a common law right; it did not, however, specifically address the conflict between federal regulations and antitrust laws.[124]

378, 387-90 (1981). Regulation was designed to protect infant industries from, the effects of unrestrained competition, according to Congress' judgment. Comment, *supra* note 116, at 753. It should be further noted that in some respects the two Acts do coincide—they both were enacted to achieve the most efficient allocation of resources possible. Northern Natural Gas Co. v. Federal Power Comm'n, 399 F.2d 953, 959 (D.C. Cir. 1968).

[119] National Gerimedical Hosp. & Gerontology Center V. Blue Cross, 452 U.S. 378, 387-90 (1981). The basic argument set forth by these industries relying upon implied immunity was that the very nature of regulation, i.e. suppression of competition, was inherently and fundamentally inconsistent with the application of the antitrust laws; therefore, the antitrust laws were impliedly repealed. Balter & Day, *Implied Antitrust Repeals: Principals for Analysis*, 86 DICK. L. REV. 447, 448 (1982).

[120] 204 U.S. 426 (1907). Prior to *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, the implied immunity issue had been partially addressed by the Supreme Court in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). In *Trans-Missouri*, the defendants argued that the ICA authorized the rate setting controls at issue. 166 U.S. at 314. The Court held that the ICA did not expressly authorize any agreements inconsistent with the antitrust laws; therefore, no conflict existed, and the agreements were subject to the antitrust laws. *Id.* at 335. In Georgia v. Pennsylvania R.R. Co., 324 U.S. at 456, the Court reaffirmed its statement in *Trans-Missouri* stating that "regulated industries are not *per se* exempt from the Sherman Act." A similar argument was rejected in United States v. Joint Traffic Ass'n, 171 U.S. 505, 569 (1898). *Trans-Missouri* is best noted for its development of the test for restraints of trade. *See supra* notes 46, 54 and accompanying text.

[121] *Abilene Cotton*, 204 U.S. at 430.

[122] *Id.* at 441-42.

[123] *Id.* The appropriate means of redress was through the ICC. *Id.* at 448.

[124] *Id.* at 446.

In *Keogh v. Chicago & Northwestern Railway*,[125] the Supreme Court addressed the conflict between regulations and the Sherman Act.[126] In *Keogh*, the shipper, Keogh, alleged that the carrier, the railroad, had illegally overcharged the shipper in violation of the ICA.[127] Keogh also alleged that the railroad was restraining trade in violation of the Sherman Act.[128]

Having avoided the issue in *Trans-Missouri*,[129] the Court was faced with deciding between two conflicting federal statutes.[130] Relying upon its decision in *Abilene Cotton*, the Court held that if Keogh was allowed to recover under the Sherman Act, the damages would be tantamount to a rebate giving Keogh an unfair advantage over its competitors.[131] This was not consistent with the congressional intent behind the ICA.[132]

The most important feature of *Keogh* was the leap the Court made from the implied repeal of common law rights doctrine of *Abilene Cotton* to the *implied repeal of antitrust laws doctrine*.[133] These two cases provided the basis for the development of the implied immunity doctrine.[134] By formulating this doctrine, the Court created certain exceptions to the antitrust laws "on the theory that the public interest would be better served by allowing specific industries to engage in anticompetitive practices in order to assure growth and increased services."[135]

Although the implied immunity doctrine was conceived almost concurrently with the antitrust laws, it has not been

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[125] 260 U.S. 156 (1922).

[126] Comment, *supra* note 116, at 758.

[127] *Keogh*, 260 U.S. at 159-60.

[128] *Id.*

[129] *See supra* note 120.

[130] Comment, *supra* note 116, at 758.

[131] *Keogh*, 260 U.S. at 163.

[132] *Id.*

[133] Comment, *supra* note 116, at 759. Recently, the Supreme Court pointed out that it was a misconception that *Keogh* stood for the implied repeal of antitrust laws. McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 243 (1980). *Keogh* was solely a judicial interpretation of the private injury requirement. Balter & Day, *supra* note 119, at 455.

[134] Ashley, *supra* note 116, at 201.

[135] Ashley, *supra* note 116, at 201.

molded into a simple uncomplicated rule; rather, it has evolved into a mere shell of incoherence and ambiguity.[136] This has been a direct result of the doctrine's application to a specific industry which has its own individual characteristics.[137] There are, however, certain factors that have been consistently examined by the courts to determine whether immunity exists.[138]

The first of these factors is whether there was congressional intent, express or implied, to permit the regulatory scheme to prevail over the antitrust laws.[139] The second factor looked at by the courts has been whether the regulatory agency has sanctioned the particular conduct.[140] Courts have also looked

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[136] Ashley, *supra* note 116, at 202; Comment, *supra* note 116, at 760. *But see* Balter & Day, *supra* note 119, at 447-50.

[137] Phonetele, Inc. v. American Tel. & Tel., 664 F.2d 716, 727 (9th Cir. 1982).

[138] Ashley, *supra* note 116, at 200-07; Comment, *supra* note 116, at 766-82.

[139] *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 374-75 (1973). Certain regulatory schemes or statutes have expressly provided for immunity with respect to certain activities. *See, e.g.*, The Shipping Act, § 15, 46 U.S.C. § 814 (1976) (agreements approved by the Federal Maritime Commission are immune from the antitrust laws). More often, however, the statute in question either required compliance, *see, e.g.*, The Atomic Energy Act of 1954, 42 U.S.C. § 2-135 (1976), or was silent or ambiguous on the matter, *see, e.g.*, Pan Am. World Airways v. United States, 371 U.S. 296 (1963) (Pan Am's activities did not fall within the express immunitites under the Federal Aviation Act; however, the Supreme Court implied immunity). Where the statute has been silent or ambiguous, the arguments have been that subjecting an industry to pervasive regulation was a manifestation of Congress' intent to lift the ban of the Sherman Act from activities under a regulatory agency's direction. *See, e.g.*, United States v. National Ass'n of Sec. Dealers, 422 U.S. 694, 730-33 (1975). The theory most commonly advanced for pervasive regulation is that by enacting a comprehensive regulatory scheme Congress has indicated that competition alone does not sufficiently serve the public interest to permit the competitive standards of the antitrust laws to control the regulated industry. FCC v. RCA Communications, Inc., 346 U.S. 86, 93, 98 (1953).

[140] Ashley, *supra* note 116, at 204. An express statutory approval of the conduct has been persuasive to the courts. *See, e.g.*, United States v. National Ass'n of Sec. Dealers, 422 U.S. 694, 728 (1975) (holding that section 22(f) of the Investment Company Act of 1940, 15 U.S.C. § 80a-22(f) (1976) authorized certain vertical restraints). But the Supreme Court has rarely found express statutory authorization for immunity. *See, e.g.*, *National Ass'n of Sec. Dealers*, 422 U.S. at 713-20, (involving the Investment Company Act of 1940, § 22(d), 15 U.S.C. § 80a-22(d) (1976)); *Trans-Missouri*, 166 U.S. at 315 (involving the Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1976)). If the industry has been constantly under agency supervision, then the industry has lost its freedom to act alone, and immunity may be granted. *See, e.g.*, Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 389 (1973) (holding that the Civil Aeronautics Board's inquiry involved nearly all actions taken by Hughes Tool and since it had approved those

to whether the antitrust litigation interferes with the regulatory scheme and the goals of that scheme.[141] Finally, the courts have focused some attention on whether the particular agency has the authority to enforce the antitrust laws, and whether the agency has the ability to grant relief to the injured party.[142]

These factors, however, are tempered by the courts' disfavor of a finding of implied immunity.[143] Therefore, the courts have not found immunity where it has not been shown that a clear repugnancy or total incompatability existed between the regulation and the antitrust laws.[144] Futhermore,

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actions immunity was granted under the Federal Aviation Act and Pan Am. World Airways v. United States, 371 U.S. 296 (1973)).

[141] *See, e.g.*, Gordon v. New York Stock Exchange, 422 U.S. 659, 685-86 (1975); Silver v. New York Stock Exchange, 373 U.S. 341, 360-61 (1963). If the antitrust litigation does interfere with the regulatory scheme, immunity has been found. *Gordon*, 422 U.S. at 685-86; *Silver*, 373 U.S. at 360-61. In this regard, the courts have focused on whether the questioned activity serves the goals of the regulatory scheme. In *Hughes Tool*, the Supreme Court referred to "mainstream" responsibilities of the agency. 409 U.S. at 382. Chief Justice Burger's dissent in *Hughes Tool* referred to the "core" of statutory responsibility. *Id.* at 412. The nature of the relief sought has also played an important role in this stage of the analysis. Ashley, *supra* note 116, at 205. One author summarized the role the type of action plays by stating that "a successful suit for damages based on past and completed antitrust activity would not constrain the agency's ability to select regulatory options after judgment. A suit for injunctive relief from certain practices, however, might directly conflict with the agency's pursuit of fundamental regulatory goals." Comment, *supra* note 116, at 772.

[142] *See, e.g.*, Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 385-90 (discussing the CAB's control over the actions and situations involved). The Supreme Court has held that where the agency does not have the ability to enforce the antitrust laws, immunity must be refused. Silver v. New York Stock Exchange, 373 U.S. 341, 358 (1963). One author argues that where the statute grants authority, *see, e.g.*, The Clayton Act, 15 U.S.C. § 21(a) (1976), it does not extend any further than what is expressly delineated. Comment, *supra* note 116, at 777-78. *But see*, *Pan Am.*, 371 U.S. 296 (1973) (holding that the CAB has authority over all antitrust actions involving the airline industry). The ability to grant relief, however, has not been considered as important as the other factors. Comment, *supra* note 116, at 781. Consequently, the Supreme Court has manipulated the factor in various cases. *See, e.g.*, *Silver*, 373 U.S. at 357 (refusal to find immunity because the SEC did not have the authority to remedy abusive enforcement of the rules); *Pan Am.*, 371 U.S. at 312 (authority was conferred upon the CAB where one of the participants was arguably outside of the CAB's jurisdiction). One author has pointed out that without analyzing this factor the result may be that the injured party has been left without a remedy because the agency's power to grant relief may be discretionary. Comment, *supra* note 116, at 781.

[143] United States v. National Ass'n of Sec. Dealers, 422 U.S. 694, 719-20 (1975). *But see* Phonetele, Inc., v. American Tel. & Tel., 664 F.2d 716, 728-29 (9th Cir. 1982).

[144] United States v. National Ass'n of Sec. Dealers, 422 U.S. 694, 719-20 (1975).

when this has been shown, the immunity is only granted *to the minimum extent necessary to make the regulatory scheme work*.[145]

Also, each of these factors has not been conclusive in any particular judicial opinion; thus the result has not been the development of a "simplistic and mechanically universal doctrine of implied antitrust immunity."[146] Along with the inconsistency in decisions,[147] the recent trends away from the doctrine and regulation have caused additional confusion.[148] The Ninth Circuit summarized the prevailing judicial attitude by warning that the use of abstact characterizations was an unreliable method of analysis that was more harmful than helpful.[149]

II. *NORTHROP CORPORATION V. MCDONNELL DOUGLAS CORPORATION*

The Ninth Circuit reversed the district court's grant of dismissal and summary judgment in *Northrop Corp. v. McDonnell Douglas Corp.*[150] by first determining that there was subject

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Gordon v. New York Stock Exchange, 422 U.S. 659, 682 (1975). Extensive Congressional regulation does not reflect an intent to repeal the antitrust laws by implication with respect to every action taken by the industry. Otter Tail Power Co. v. United States, 410 U.S. 366, 372-75 (1973); United States v. Radio Corp. of Am., 358 U.S. 334, 346 (1959). If Congress intended to repeal, then that intent must be absolutely clear before it will control. *Gordon*, 422 U.S. at 682. The intent is clear when it is expressly mandated or where the regulatory agency has been empowered to authorize or require the type of conduct under challenge. *National Ass'n of Sec. Dealers*, 422 U.S. at 730-34; *Gordon*, 422 U.S. at 689-90.

[145] Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963).

[146] Phonetele, Inc. v. American Tel. & Tel., 664 F.2d 716, 727 (9th Cir. 1982).

[147] See *supra* note 142 for an example of the inconsistencies in the Supreme Court's opinions.

[148] The courts have begun to limit the application of the doctrine. *See, e.g.*, Phonetele, Inc. v. American Tel. & Tel., 664 F.2d 716, 727 (9th Cir. 1982). Congress, also, has responded by limiting regulation and promoting competition. *See, e.g.*, Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.).

[149] Phonetele, Inc. v. American Tel. & Tel., 664 F.2d 716, 727 (9th Cir. 1982).

[150] 705 F.2d 1030 (9th Cir.), *cert. denied*, 104 S. Ct. 156 (1983). The five issues were: (1) whether the suit against the Government pursuant to 22 U.S.C. § 2356 (1976) (disclosure of propriety data) was the exclusive remedy; (2) whether the Government was a necessary and indispensible party; (3) whether the claims presented non-justiciable political or foreign policy questions; (4) whether certain agreements between the parties were *per se* illegal restraints of trade; and (5) whether the Government so pervaded

matter jurisdiction,[151] that the Government did not have to be joined as a necessary party,[152] and that the issues were justiciable.[153] The court was then able to focus its attention on the critical antitrust issues.[154]

The court had to first determine the appropriate test for the antitrust claim.[155] Northrop challenged the district court's determination that the Contract Responsibility

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the relevant market that no trade or commerce existed for Sherman Act purposes. 705 F.2d at 1035-36.

[151] 705 F.2d at 1039-42. In an extensive analysis, the court concluded that the district court had erred in determining that 22 U.S.C. § 2356 (1976) mandated suit against the Government as exclusive remedy. 705 F.2d at 1039-46. The emphasis of the court's analysis was on § 2356 which waives sovereign immunity for claims within its scope and establishes that the exclusive remedy is against the Government. 705 F.2d at 1040; 22 U.S.C. § 2356(a)(2). The court's decision turned on the lack of expression by the statute itself and by the legislative history that the disclosure by government contractors was to be encompassed by § 2356. 705 F.2d at 1041-42.

[152] 705 F.2d at 1042-46. Under the confines of Federal Rule of Civil Procedure 19, the Government was not a necessary and indispensible party because it was not a party to the agreements; it had never asserted a formal interest in the action; it had a non-party interest, but there was a lack of judicial precedent requiring the joinder as a necessary party; and its rights to the data were not prejudiced. 705 F.2d at 1043-44.

[153] 705 F.2d at 1046-49. The court did not find, as required by Baker v. Carr, 369 U.S. 186, 217 (1962), that there was a textually demonstrable constitutional commitment of the issue to a coordinate political department; a lack of judicially discoverable and manageable standards; the impossibility of deciding without an initial policy determination reserved for non-judicial discretion; the impossibility of deciding without expressing lack of respect for the coordinate branches of government; unusual need for adherence to a political decision already made; and the potentiality for embarrassment from multifarious pronouncements by various departments. *Id.* at 1046-47. Therefore, based on these considerations, the court held that the issues were not political questions, but legal questions which the courts were well equipped to resolve. *Id.*

As for the Act of State doctrine, the court held that it did not shield the issues from judicial inquiry. 705 F.2d at 1047-49. Relying upon Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682, 695 (1976), the court held that the purely commercial activity involved between Northrop and McDonnell did not require judicial forebearance under the Act of State doctrine. 705 F.2d at 1048 n.25. Furthermore, since Northrop could establish its losses by proof of increased costs without reference to lost sales, the court held that the doctrine did not shield all violators of private agreements involving some foreign governmental act. 705 F.2d at 1048 (relying upon Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48, 55 (5th Cir.), *reh. denied*, 599 F.2d 449 (1979), *cert. denied*, 445 U.S. 903 (1980)).

[154] 705 F.2d at 1049.

[155] *Id.* at 1049-50. Before the court focused on the antitrust test issue, it pointed out that summary judgment under Federal Rule of Civil Procedure 56 is generally disfavored in antitrust cases when motive and intent are at issue; however, the court did note that summary judgment did have certain applications in the antitrust area. *Id.* at 1050.

Clause[156] was a *per se* unreasonable market allocation under section 1 of the Sherman Act.[157] The court concluded that the application of the *per se* rule to the horizontal market allocation was inappropriate.[158]

The court noted that in prior decisions it had held horizontal market divisions as *per se* unreasonable.[159] Since *BMI*,[160] however, there have been exceptions where the rule of reason analysis was held applicable to horizontal market allocations.[161] In order for the rule of reason analysis to apply, certain characteristics have to surface—judicial inexperience in the area of teaming agreements, non-harmful effect on competition, and the reasonableness of the limitation clause through its essentiality to the agreements.[162]

With regard to judicial inexperience, the Supreme Court's "established position [is] that a *new per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged."[163] In remonstrating McDonnell for its narrow interpretation of *BMI*, the court reaffirmed the condemnation of literalness as expressed in *BMI*.[164] The key factor here was that neither the district court nor McDonnell could point to a case where similar facts had met judicial scrutiny.[165] In light of this, the court held that imposing the *per se* rule here would be premature.[166]

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[156] *See supra* note 13 and accompanying text.

[157] 705 F.2d at 1050. See *supra* note 28 for text of section 1.

[158] 705 F.2d at 1050.

[159] *Id*. *See* A.H. Cox & Co. v. Star Mach., 653 F.2d 1302, 1305 (9th Cir. 1981); Gough v. Rossmoor Corp., 585 F.2d 381, 386 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979).

[160] 441 U.S. 1 (1979), *discussed supra in* text accompanying notes 100-114.

[161] 705 F.2d at 1050-51. *See also* Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 821-24 (9th Cir.) (as amended) (horizontal market allocations in a lease provision were not *per se* unreasonable), *cert. denied*, 456 U.S. 1011 (1982).

[162] 705 F.2d at 1050-54.

[163] Arizona v. Maricopa County Medical Soc'y, 102 S. Ct. 2466, 2476 n.19 (1982). It is interesting to note that in *Maricopa County*, the Supreme Court held that even in light of its inexperience in the health-care antitrust field, the *per se* rule applied to the horizontal price-fixing agreement. *Id.* at 2476-80.

[164] 705 F.2d at 1051.

[165] *Id*.

[166] *Id*. at 1052.

The effect on competition factor was the "most troubling and conceptually elusive of the three factors."[167] The critical inquiry in determining whether the *per se* rule should be applied without judicial experience is whether the *"practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."*[168] In support of this broad statement from *BMI*, the court, citing *Sylvania*,[169] stated, "[T]hat departure from the rule-of-reason standard must be based upon *demonstrable economic effect* rather than . . . upon formalistic line drawing."[170] With these concepts in mind, the court turned to the contracts and analyzed them for effect.[171] The conclusive factor was that the contracts did not preclude competition amongst the parties, but actually fostered competition by allowing both parties to compete in a market from which they would have otherwise been foreclosed.[172] To label these *per se* would revert to the formalistic line drawing eschewed by *Sylvania*.[173]

The court then stated that where the effect on competition is equivocal, a court is obliged to turn to an examination of the purpose of the restraint.[174] The teaming agreement was at the Government's behest and had specific statutory approval.[175] The restraints were therefore not the type of "naked restraint of trade with no purpose except stifling competition."[176] The court then went one step further and held that "affiliated businesses cannot be held to conspire with each other where they function as essentially a single economic unit," thus raising the spectre of the ancillary restraint doctrine.[177]

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[167] *Id.*

[168] *Id.* (emphasis added).

[169] 433 U.S. 36 (1977), *discussed supra in* text accompanying notes 94-99.

[170] 705 F.2d at 1052 (emphasis added) (citing *Sylvania*, 433 U.S. at 58-59).

[171] 705 F.2d at 1052.

[172] *Id.* at 1052-53.

[173] *Id.* at 1053.

[174] *Id. See also BMI*, 441 U.S. at 19-20.

[175] 705 F.2d at 1053. *See supra* note 5.

[176] 705 F.2d at 1053 (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).

[177] *Id.* at 1053-54. While the court did not specifically use the phrase "ancillary restraint," it was essentially reaffirming the Supreme Court's decision in United States

The third factor—the reasonable use limitation—was the final basis for justification of the rule of reason.[178] The court stated that the limitation upon license technology was not a *per se* violation if the technology was otherwise unavailable creating a reciprocal license agreement.[179] Therefore, the contracts between the parties were reciprocal license agreements and as a result fell within the rule of reason.[180]

After establishing the rule of reason analysis as the appropriate test, the court confronted Northrop's attempt to monopolize claims.[181] McDonnell here alleged implied immunity while it had not specifically done so at the district court level.[182] Because of the lack of decisions regarding the immunity question in the military aircraft industry, the court looked to other regulated industries and those cases involving the implied immunity doctrine for aid.[183] Applying the standards set out by the Supreme Court,[184] the court held the application of blanket immunity was inappropriate.[185] In particular the court quoted from an earlier decision:

> Antitrust immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct. There is no general presumption that Congress intends the antitrust laws to be displaced whenever it gives an agency regulatory authority over an industry . . . . [T]he area of immunity from antitrust laws is not coterminous with areas of agency jurisdiction or agency

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v. Addyston Pipe & Steel Co., 85 F.2d 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). See *supra* notes 49-53 and accompanying text for a discussion of ancillary restraints.

[178] 705 F.2d at 1054.

[179] *Id.* (relying upon A&E Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 715 (9th Cir. 1968)).

[180] 705 F.2d at 1054.

[181] *Id.*

[182] *Id.* The Ninth Circuit also pointed out that the district court did not directly deal with the issue, but rather the lower court reasoned that because of the pervasive governmental control, there was no trade or commerce as defined by the Sherman Act. *Id.* at 1054-55. *See Northrop*, 498 F. Supp. at 1123. The Ninth Circuit held that this was erroneous, and significant government control did not equal no trade or commerce. 705 F.2d at 1055.

[183] 705 F.2d at 1056.

[184] *See supra* note 115-149 and accompanying text.

[185] 705 F.2d at 1056.

expertise.[186]

Thus under the holding of that case and Armed Services Procurement Regulation section 4-117(b)[187] the court held that there was a sufficient basis to subject the actions of the parties to antitrust scrutiny, and hence immunity was improper.[188]

III. CONCLUSION

In *Northrop Corp. v. McDonnell Douglas Corp.*,[189] the Ninth Circuit continued the current trend towards confronting antitrust issues. By holding that the teaming agreements between Northrop and McDonnell did not come within political question or act of state doctrines, the court was able to fully analyze the antitrust issue. The court, however, did not add to the political question analysis or the act of state doctrine. It merely used the established tests and determined that the agreements between Northrop and McDonnell were justiciable.[190]

Futhermore, the court dismissed McDonnell's contention that the agreements and its actions were protected by the implied immunity doctrine. The court did so even though it appeared that McDonnell was correct. The Government does regulate the military aircraft industry so extensively that the contractors must have the executive branch's approval before acting. This is similar to the circumstances that lead

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[186] *Id.* (quoting Phonetele, Inc. v. American Tel. & Tel., 664 F.2d at 729 (9th Cir. 1982)).

[187] Armed Services Procurement Regulation, 32 C.F.R. § 4-117(b) states that teaming agreements cannot violate the antitrust statutes. See *supra* note 5 for the full text of section 4-117.

[188] 705 F.2d at 1057.

[189] 705 F.2d 1030 (9th Cir.), *cert. denied*, 104 S. Ct. 156 (1983).

[190] The use of the political question doctrine has faded in the recent years. *See, e.g.*, Nixon v. United States, 418 U.S. 683 (1974) (holding that the tapes of conversations on matters related to Watergate were not protected by the political question doctrine even though the evidence clearly met the *Baker v. Carr* test). At the same time the Act of State doctrine has been limited by the Supreme Court. *See, e.g.*, Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (holding that the doctrine does not apply to commercial obligations).

the Supreme Court to grant the airline industry immunity.[191] The Ninth Circuit refused to recognize this, probably because of its express disdainment of the implied immunity doctrine.[192] It is noteworthy that the agreements themselves were not in violation of the antitrust laws, but rather the alleged actions of McDonnell were violative of the antitrust laws. This coupled with the fact that the implied immunity defense was raised only on appeal gave the court an opportunity to deny immunity and turn to the restraint of trade analysis.

On the surface, the decision appears to merely apply the analysis delineated in *BMI*. Closer scrutiny, however, reveals that the decision clears some of the confusion left by the Supreme Court after *BMI* and *Topco*.[193] As pointed out, the decision in *BMI* did not state whether the rule of reason should generally apply to ancillary restraints. The Ninth Circuit has given new life to the proposition that the rule of reason should apply to ancillary restraints. The agreements here involved entirely ancillary restraints, and by holding that the rule of reason should apply, the court has provided a foundation for other courts to stand upon. On the other hand, the court's emphasis on judicial experience in the particular industry may cause other courts to cast a wary eye on the decision before relying upon it. Even so, the Ninth Circuit has taken the first step towards a return to the ancillary restraint doctrine of *United States v. Addyston Pipe & Steel Co.*[194] It is now up to the other courts to recognize the importance of the case and continue the process begun by the Ninth Circuit.

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[191] *See* Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973); Pan Am. World Airways v. United States, 371 U.S. 296 (1963).

[192] *See supra* note 186 and accompanying text.

[193] *See supra* text accompanying note 114.

[194] *See supra* notes 48-50 and accompanying text.