The Assignment and Discounting of Consumer Installment Contracts: Transactions Within the Periphery of the Truth-in-Lending Act and Regulation Z

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Plaintiff Glaire purchased a health club membership from defendant LaLanne-Paris Health Spa, Inc. Defendant's practice was to offer unitary price contracts, i.e., contracts in which the price is the same whether the customer pays cash or in installments. Plaintiff chose to pay in installments, as did most of defendant's customers. LaLanne then assigned the membership contract to defendant Universal Guardian Acceptance Corporation, an interlocking corporation with common ownership and control. Universal bought the contract at a discount of 37.5 percent, and plaintiff then became obligated to pay Universal the full contract price in installments over two years. These transactions represented the regular course of business between LaLanne and Universal. Plaintiff sued LaLanne and Universal in the Superior Court, Los Angeles County, contending that both defendants violated portions of the Truth-in-Lending Act, which is part of the Consumer Credit Protection Act, by failing to disclose a finance charge. The Superior Court sustained defendants' general demurrers and plaintiff appealed to the Supreme Court of California. Held, reversed: The amount of the standard discount is a finance charge payable by the consumer, and it must be disclosed as such. Furthermore, where the merchant and finance company have a close and continuing relationship involving the discounting of consumer installment contracts, both parties must make the disclosures required by the Act. Glaire v. LaLanne-Paris Health Spa, Inc., 12 Cal. 3d 915, 528 P.2d 357, 117 Cal. Rptr. 541 (1974).

I. THE TRUTH-IN-LENDING ACT

The Truth-in-Lending Act is a disclosure statute which does not regulate the cost of credit or interest rates. By its own terms, the purpose is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." Thus, the Act covers transactions involving the extension of credit to consumers. This statute has been acknowledged by the United States Supreme Court as being reflective of "a transition in

1. Universal prepared the form contracts for LaLanne, provided most of the cash receipts of each LaLanne gym, and bought each membership contract from LaLanne shortly after the sale.
3. Id. §§ 1601-13, 1631-44, 1661-65, 1671-77, 1681.
4. Id. § 1638(a).
7. Id. § 1631(a).
congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.'

A. Regulation Z and the "Four Installment Rule"

The Truth-in-Lending Act requires all merchants who regularly extend credit to disclose certain information so that their customers may understand the cost of buying on credit. Facts which a merchant must disclose include the cash price, the total amount of deferred payments, the finance charge and other charges, and the annual percentage rate of interest. Failure to make these disclosures subjects the lender to civil liability to the consumer for twice the amount of the finance charge, with a minimum of $100 and a maximum of $1000, plus costs of litigation including reasonable attorney's fees. Protected by the Act are natural persons obtaining credit for personal, family, household, or agricultural purposes. Organizations, persons obtaining credit for business purposes, and the business of buying and selling commercial paper are not protected by the Act. Transactions in excess of $25,000 are excluded except for real property transactions, but consumer credit advertising is covered.

On its face, the Truth-in-Lending Act covers only transactions for which a finance charge is required. As a result, many businesses attempted to circumvent the Act by "burying" the finance charge in the price of goods when they knew that most people would buy on credit. To deter this practice, the Federal Reserve Board issued the "Four Installment Rule" as part of regulation Z. This rule extends the coverage of the Act to all credit transactions "for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments." The rule does not create a conclusive presumption that all credit payments made in more than four installments include a finance charge; instead, it imposes a disclosure requirement on these creditors so that consumers will have all facts necessary for the informed use of credit.

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10. Id. § 1638(a).
11. Id. § 1640(a).
12. Id. § 1602(h).
13. Id. § 1603(1).
14. Id. § 1603(3).
19. 12 C.F.R. § 226.2(k) (1975). One court noted that merely because the so-called "cash" price is the same as for an installment payment plan does not mean that the "cash" price does not include what are essentially finance charges. Strompolos v. Premium Readers Serv., 326 F. Supp. 1100, 1103 (N.D. Ill. 1971).
20. Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 377 (1973). Facts which must be disclosed include the number, dates, and amounts of payments, insurance costs, balloon payments, and default provisions. The advertising safeguards of the Truth-
B. Who Is a Creditor and What Is Consumer Credit?

The Truth-in-Lending Act applies only to credit transactions; disclosures are required only of those who satisfy the statutory definition of "creditor." The Act defines "credit" as the right granted to the debtor by his creditor to defer payment of the debt. The term "creditor" refers to those who either extend or arrange for the extension of credit on a regular basis, thus categorizing two types of creditors: "arrangers" and "extenders." An arranger is a seller who arranges for his customers to obtain credit from a financier, who is the extender. In a three-party transaction involving a buyer, an arranger of credit, and an extender of credit, both the arranger and the extender must make the required disclosures. A federal district court recently held that although assignees of consumer installment sales contracts (usually finance companies) do not deal directly with the consumer, they may themselves be considered creditors if they regularly extend or arrange for the extension of credit to consumers through the assignors of such transactions.
contracts. In other words, lenders may not use sales companies as "front men" in order to escape the Truth-in-Lending Act. In a similar case, another district court held that a health club was just a "conduit" for the extension of credit from the finance company to the customer. William Warren and Thomas Larmore, former members of the Truth-in-Lending Staff of the Federal Reserve Board, state: "Clearly, when a reasonable case can be made that credit has been extended, exemptions from the Act's coverage should be granted with caution." Indeed, the trend among courts across the nation is to apply broadly the Truth-in-Lending Act and regulation Z to any case which can reasonably be shown to involve consumer credit.

II. Glaire v. LaLanne-Paris Health Spa, Inc.: A Broad Reading of the Truth-in-Lending Act

The Glaire decision contains two principle holdings. First, when a merchant offers his customers a unitary price contract and then as a matter of course sells it to a finance company at a discount, the amount of the discount must be disclosed as a finance charge under the Truth-in-Lending Act. Second, when a merchant and a finance company maintain a close and continuing relationship centering around the routine discounting of consumer installment contracts, both parties are subject to the disclosure requirements of the Truth-in-Lending Act.

The Supreme Court of California relied heavily on two federal district court decisions to support its first holding. In Joseph v. Norman's Health Club, Inc. the defendant in a motion for summary judgment asked the court to hold that, as a matter of law, unitary price contracts contain no finance charges. The court refused to grant the motion and held that whether the systematic practice of discounting installment contracts operated to conceal a finance charge was a question of fact to be determined at trial. In Kriger v. European Health Spa, Inc. the court went even further, holding that the amount of the discount between the spa and the bank was actually a finance charge, denying defense motions for summary judgment, denoting defense motions for summary judgment,
and granting summary judgment for the plaintiff consumers. Glaire follows the lead of Kriger in holding that the amount of the discount represents a finance charge. The California court indicated that since the “Four Installment Rule” is intended to deter the practice of burying finance charges, the rule should be applied strictly in any case in which it appears that the merchant is attempting to bury a finance charge in the price of the product.

The second holding of the court in Glaire may provide a strong precedent for extending the coverage of the Truth-in-Lending Act. The court examined the relationship between the finance company and the health spa and concluded that the finance company was a creditor as defined by the Act. Due to the continual dealings between the spa (seller) and the finance company, the finance company was considered to be the extender of consumer credit which the seller had merely arranged. Thus, the finance company could not evade the provisions of the Act. It might be argued that Glaire and similar cases have extended the Act too far by bringing in parties whose coverage was not contemplated by Congress. In dealing with this issue, one federal district court stated that the “Four Installment Rule” may regulate some activities which do not fall under the specific language of the Act but are only within its “penumbra.” The court held that this was consistent with the authority given to the Federal Reserve Board to prevent circumvention of the Act.

37. Id. at 336. For a case reaching a similar result see Killings v. Jeff’s Motors, Inc., 490 F.2d 865 (5th Cir. 1974).
38. 12 Cal. 3d at 926, 528 P.2d at 364, 117 Cal. Rptr. at 548. Kriger and Glaire also held that it was unnecessary for plaintiff to allege that the spa charged a cash price lower than the credit price in order to establish the existence of a finance charge subject to disclosure. 363 F. Supp. at 336-37; 12 Cal. 3d at 926, 528 P.2d at 364, 117 Cal. Rptr. at 548.
39. At least one court is not willing to go this far. See Alpert v. United States Indus., Inc., 59 F.R.D. 491 (C.D. Cal. 1973). In Alpert the facts were almost identical to Glaire, but the court held that the plaintiff health spa member was not damaged by the nondisclosure of the amount at which his installment membership contract was subsequently discounted to a finance company. Plaintiff could not have used this information to his advantage because the spa charged the same price for memberships, whether the member paid cash or paid in installments. The only choice that the prospective member had was whether or not to join at that price. Id. at 498.
40. 12 Cal. 3d at 925, 528 P.2d at 363, 117 Cal. Rptr. at 547.
41. Many analogous cases outside of the Truth-in-Lending area have held that a finance company which accepts the assignment of contracts from a seller with which it is intimately connected still has the duties and responsibilities of a lender; the assignees were not considered holders in due course. See, e.g., Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); Morgan v. Reasor Corp., 69 Cal. 2d 881, 447 P.2d 638, 73 Cal. Rptr. 398 (1968); Lee v. Household Fin. Corp., 263 A.2d 635 (D.C. App. 1970); Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967). Other cases have held a merchant to be the agent of his regular financier. See, e.g., Daniel v. First Nat’l Bank, 227 F.2d 353 (5th Cir. 1975); Schuck v. Murdock Acceptance Corp., 220 Ark. 56, 247 S.W.2d 1 (1952); Thompson v. Commercial Credit Equip. Corp., 169 Neb. 377, 99 N.W.2d 761 (1959); Nat’l Bank of Commerce v. Thomsen, 80 Wash. 2d 406, 495 P.2d 332 (1972). And at least one court has held that an assignee who takes the contract without any knowledge of any violation of the Truth-in-Lending Act is still liable if the violation is apparent on the face of the paper. Austin v. Ohio Furniture Co., [1969-1973 Transfer Binder] CCH CON. CRED. GUIDE ¶ 99,610, at 89,584 (N.D. Ohio 1970).
42. For other authority supporting this proposition see notes 28-29 supra and accompanying text.
The *Glaire* decision leaves unanswered the question of whether a finance company which buys a few installment sales contracts at a discount but has no intimate or continuous relationship with the merchant is an "extender" under the Truth-in-Lending Act. This is important because if the Act is held to cover these casual and isolated transactions, the responsibilities and liabilities of finance companies would be greatly increased.\(^44\)

This issue has not yet been settled because most cases in this area have involved finance companies with a close relationship to the merchant involved. Warren and Larmore, two authorities in this field, shed some light on this question in their discussion of the analogous issue of what constitutes the minimum requirements for holding a person to be an arranger of credit under the Truth-in-Lending Act. They first note the language of regulation 226.2(f),\(^45\) which defines "arranger" as one who provides consumer credit to be extended by another person "under a business or other relationship" by which the arranger receives a fee or has knowledge of the credit terms and helps prepare the necessary contract documents for the extension of credit. Interpreting this regulation, Warren and Larmore conclude that one who provides for credit to be extended by another is an arranger even if his fee comes from the debtor without the knowledge or participation of the extender. They state that neither policy nor the language of the regulation compels a more restrictive interpretation.\(^46\)

It might be argued that a similar broad interpretation should be applied to extenders of credit, thus making the finance company which is not closely connected with the merchant from whom it purchases an installment sales contract come within the definition of "extender" of consumer credit. This argument is not persuasive, however. A finance company which is not closely connected with the merchant would not prepare the contract documents, would not pay a fee to the arranger (who is actually the extender), and would have no contact with the consumer. Thus, its transaction with the merchant should be regarded as separate from the merchant's dealings with the consumer. The Act would be stretched very far indeed if such a finance company was regarded as an extender of consumer credit.

As stated earlier, the extension of business or commercial credit is specifically excluded from the coverage of the Act.\(^47\) The Federal Reserve Board has defined this exemption to include "[e]xtensions of credit to organi-
izations, including governments, or for business or commercial purposes, other than agricultural purposes." 48 None of the cases dealing with this exemption is helpful in determining the liability of a finance company which buys installment contracts at a discount because each deals with direct loans from the financier to the consumer, with the consumer using the proceeds for business purposes. 49 But the Supreme Court of California indicated its position in this area in the Glaire case, stating, "In so holding, we do not . . . extend the coverage of the act to commercial credit, which is explicitly exempted from Truth-in-Lending." 50 In connection with this statement, the court indicated that it was concerned that the merchant and finance company were using this method of operation to channel credit directly from the finance company to the consumer. 51 But this would not be the case when the finance company is not closely connected with the merchant. The court seems to imply that if the finance company does not use the merchant as a "conduit" to channel credit directly from the finance company to the consumer, then the transaction will come within the exemption given to commercial credit by the Act.

III. CONCLUSION

The Glaire decision is representative of a general trend toward broadening the coverage of the Truth-in-Lending Act and regulation Z. The decision goes further than many courts by holding that where a merchant offers its customers a unitary price contract and then as a matter of course sells it to a finance company at a discount, the amount of the discount must be disclosed as a finance charge. Also, where the finance company has a close and continuous relationship with the merchant, both parties must meet the disclosure requirements of the Act.

However, this case should not be read as supporting the proposition that whenever a merchant sells a consumer installment sales contract to a finance company, the finance company then becomes a creditor under the Truth-in-Lending Act. Such a finance company will come under one of three categories: an extender of consumer credit, an extender of commercial credit to the merchant, or not a creditor at all. The company will not fall under the first category unless it has a close connection with the merchant and is using him as a conduit to channel consumer credit to itself. And if it comes under the second or third categories, it is outside the scope of the Act. Therefore, a finance company which sometimes buys consumer installment contracts from a merchant but has no close connection with him should not be considered a creditor under the Truth-in-Lending Act.

Bruce R. Coleman

50. 12 Cal. 3d at 925, 528 P.2d at 363, 117 Cal. Rptr. at 547.
51. Id.
Copper Liquor, Inc. v. Adolph Coors Co.: Should We Return to a Rule of Reason?

The plaintiff, a retail liquor store, periodically sold Coors beer below cost in an effort to attract customers. Upon learning of this pricing policy, the local Coors distributor advised the retailer that his supply of beer would be terminated unless this practice ceased.¹ The retailer refused and his supply was discontinued. The retailer attempted to obtain the product directly from the brewery but was informed by the brewer that the item could only be obtained through the local distributor. Further, the retailer was told that the distributor could not be compelled to sell to anyone, since he was wholly independent. A treble damage action was brought by the retailer against the brewer for violation of section 1 of the Sherman Act,² contending that the defendant combined or conspired with its distributors to fix the retail price of its product and to create and enforce exclusive territories, making it impossible for a retailer to obtain the item once the local distributor refused to supply him. The district court entered a judgment in plaintiff’s favor and the defendant appealed. Held, affirmed: A vertical territorial restriction³ used to facilitate a price fixing scheme is a per se violation of section 1 of the Sherman Act. A product’s uniqueness and susceptibility to damage if not properly distributed does not justify practices restraining distribution. Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975).⁴

I. THE SHERMAN ACT: RULE OF REASON AND PER SE CONCEPTS

In establishing the framework for a system of regulating business and ensuring competition in this country, the Sherman Act has been hailed as “the Magna Carta of free enterprise.”⁵ The principal objective of the Act is to promote and facilitate competition by invoking the court’s power to police unlawful business combinations.⁶ The Sherman Act, read literally, seems to

¹. The reason for the distributor’s threatened refusal to sell to the plaintiff was disputed, but there was sufficient evidence for the court to find that it was based partly on his fear that if he continued to sell to cut rate retailers, the brewer would enforce its right to terminate his distributorship. The court noted that the brewer did use this power of termination to induce distributors to refrain from selling the beer to any retailer who refused to sell it at the “right price.” Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 940 n.4 (5th Cir. 1975). For information on price fixing, see Adolph Coors Co. v. FTC, 497 F.2d 1178, 1183-84 (10th Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

². 15 U.S.C. § 1 (1970) provides in part: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal . . . .”

³. A vertical territorial restriction has been defined as an “arrangement by one manufacturer restricting the territory of his distributors or dealers.” White Motor Co. v. United States, 372 U.S. 253, 261 (1963).

⁴. The court reversed and remanded the trial court’s award of $303,033 in damages and $75,000 in attorneys’ fees, as the record did not reveal injury in fact attributable to Coors’ policy of pricing and territorial restrictions. 506 F.2d at 953. This point was affirmed by the court when the plaintiff’s petition for rehearing and rehearing en banc was denied. Cooper Liquor, Inc. v. Adolph Coors Co., 509 F.2d 758 (5th Cir. 1975).


⁶. 21 CONG. REC. 2457 (1890) (remarks of Senator Sherman). The Senator noted the Act’s purpose when he said:
preclude any restraint on trade; however, since 1910, following *Standard Oil v. United States*, the courts have ruled that only unreasonable restraints of trade are illegal. The Supreme Court illustrated this rule of reason in *Chicago Board of Trade v. United States*, calling for a detailed and exhaustive study of the business and economic justifications, ramifications, and consequences of any restraint. This type of inquiry is often expensive and time consuming; however, it provides a party with the opportunity to fully defend its conduct and affords the court the occasion to analyze the practical effects of any restraint on trade.

In an effort to promote judicial economy and certainty, the courts have eliminated the need for an extensive examination of the reasonableness of certain types of commercial conduct by classifying certain activities as illegal per se. The rationale for such a classification was stated in *Northern Pacific Railway Co. v. United States*, in which the Court recognized that certain restraining trade practices evidence sufficient pernicious effects on competition and lack any redeeming virtue so as to preclude the necessity for examining the reasonableness of such activities. Accordingly, per se rules have been applied to various practices including tying arrangements, boycotts, and horizontal territorial restrictions. Additionally, per se

This bill, as I would have it, has for its single object to invoke the aid of the courts of the United States to deal with the combinations described in the first section when they affect injuriously our foreign and interstate commerce and our revenue laws, and in this way to supplement the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these states.

See also 1 H. TOULMIN, A TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES §§ 1.7, 4.7 (1949).

1. 221 U.S. 1 (1910).
3. 246 U.S. 231 (1917). The Court explained:

   Every agreement concerning trade, every regulation of trade, restrains . . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its conditions before and after the restraint was imposed; the nature of the restraint, and its effects, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts.

   *Id.* at 238.

12. *Id.* at 5.
13. *Id.* "[A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Id.* at 5-6.
14. United States v. General Motors Corp., 384 U.S. 127 (1966). A boycott has been defined as "[a] combined refusal to deal with anyone as a means of preventing him from dealing with a third person, against whom the combined action is directed . . . ." Fashion Originators Guild of America v. FTC, 114 F.2d 80, 84 (2d Cir. 1940), aff'd, 312 U.S. 457 (1941).
15. United States v. Sealy, Inc., 388 U.S. 350 (1967). A horizontal territorial restriction involves a dividing up of territories by parties on an equal marketing level. In *Sealy*, all licensees selling Sealy products agreed among themselves to divide up selling territories. The Court held this to be an unlawful restraint of trade. *Id.* at 382-54.
categorizations have been established prohibiting agreements to facilitate price fixing, and vertical territorial restrictions. These last two per se categories, which have followed divergent paths in their respective developments and applications, were of particular importance in Copper Liquor.

Price fixing agreements have long been held to be per se violations of the Sherman Act, subject to one narrow exception: the seller has the right to select the person to whom he will sell and the conditions under which sales will be made. Beyond this exception, however, the per se rule against price fixing has been steadfastly maintained.

In contrast, the per se categorization of vertical territorial restrictions has not been so precisely defined or as rapidly accepted. The Supreme Court was first faced with the question of whether such restrictions were in violation of the Sherman Act in White Motor Co. v. United States. In ordering a trial to determine whether the vertical restrictions constituted unreasonable restraints of trade under a rule of reason analysis, the Court stated that it did not know enough of the competitive effects of such arrangements to hold them illegal per se. Four years later, however, in United States v. Arnold, Schwinn & Co., the Court held a similar system of vertical territorial restrictions unlawful per se. Schwinn, a family-owned bicycle manufacturer, had assigned specific territories to wholesale distributors and had instructed them to sell only to franchised Schwinn accounts within those territories. The Government sought to prove that this practice resulted in an illegal vertical territorial restriction, based on a rule of reason analysis. The Court went beyond the Government's urgings, however, and held that, with respect to bicycle sales, vertical territorial restrictions imposed by the manufacturer constituted per se violations of the Sherman Act.

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19. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). For an indication of how far the courts will go to find the necessary price fixing agreement see United States v. Parke, Davis & Co., 362 U.S. 29 (1960). The Court found the necessary agreement when "the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." Id. at 43. See, e.g., Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711 (S.D.N.Y. 1969).
22. Id. at 263.
24. Id. at 374.
25. Id. at 373.
26. The Court stated:

We are here concerned with a truly vertical arrangement . . . . We conclude that the proper application of § 1 of the Sherman Act to this problem requires differentiation between the situation where the manufacturer parts with title, dominion, or risk with respect to the article, and where he completely retains ownership and risk of loss . . . . Where a manufacturer sells products to his distributor subject to territorial restrictions upon resale, a per se violation of the Sherman Act results.

Id. at 378-79.
II. Copper Liquor, Inc. v. Adolph Coors Co.

The Fifth Circuit in Copper Liquor\textsuperscript{27} was confronted with a situation in which the manufacturer of a high quality product was attempting to direct its distribution by establishing a system of exclusive territories, each with a sole independent distributor.\textsuperscript{28} The court reasoned that Schwinn mandated a finding of a per se violation of the Sherman Act since Coors was attempting to control the flow of its product after it had given up dominion over and risk of loss for the product.\textsuperscript{29} The court further interpreted the Supreme Court’s decision in United States v. Topco Associates, Inc.,\textsuperscript{30} in which a system of horizontal territorial restrictions was struck down as violative of the Sherman Act, as intensifying the per se rule regarding territorial restrictions.\textsuperscript{31} Although the court recognized judicial exceptions to the Schwinn per se rule based on a finding that a product required special safeguards in its distribution,\textsuperscript{32} the court refused to extend these exceptions to Coors’ system because “[t]he exceptions might engulf the rule itself.”\textsuperscript{33} The court found further support for its refusal to except Coors’ system from a per se categorization in the evidence relating to price fixing.\textsuperscript{34} This added per se proscription caused the court to bypass the question of whether an exception to the Schwinn rule should be allowed.

III. Per Se Violation or Rule of Reason Analysis?

The Fifth Circuit was able to hold Coors in violation of the Sherman Act without application of a rule of reason, since Coors’ price fixing and vertical territorial restrictions both fitted within previously determined per se categorizations. If, however, a price fixing scheme had not been involved, the peculiar aspects of Coors’ situation might have led to an exception to the Schwinn per se rule, thereby allowing a court to test the Coors’ vertical territorial restriction system under a rule of reason.

In postulating a rationale for an exception to any per se rule, some attention must be given to the basis of the per se concept. Per se rules are

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\item \textsuperscript{27} 506 F.2d 934 (5th Cir. 1975).
\item \textsuperscript{28} Coors’ rationale for its centralized direction of the distribution of its product was based on its fear that its beer would be damaged if special safeguards in shipping and marketing were not adhered to. Id. at 937. For information on the fragile quality of Coors beer see note 44 infra and accompanying text.
\item \textsuperscript{29} 506 F.2d at 947; see note 26 supra and accompanying text. The court found that the situation presented by Coors’ distribution scheme did not fit into either of the exceptions to the per se rule applying to vertical territorial restrictions which the Schwinn Court had stated. The court ruled, “Topco and Schwinn, read together, suggest that at this point we must accept the fact that the Court has set its face against both horizontal and vertical territorial restrictions, with the possible exception of vertically imposed restrictions by ‘new entrants’ and ‘failing companies’ briefly mentioned in Schwinn.” 506 F.2d at 943.
\item \textsuperscript{30} 405 U.S. 596 (1972).
\item \textsuperscript{31} 506 F.2d at 942-43.
\item \textsuperscript{33} 506 F.2d at 947.
\item \textsuperscript{34} See note 1 supra and accompanying text. Although the court recognized that Coors’ restrictive distribution system was an integral part in the maintenance of quality control, it also felt such a scheme played a vital role in the control of wholesale and retail prices, a practice per se violative of the Sherman Act. 506 F.2d at 944.
\end{itemize}
valuable, but there should not be an expansion of their scope without careful
analysis; nor should the courts utilize such a rule as a substitute for the
necessary detailed study of a deserving case. As Mr. Chief Justice Burger
said, dissenting in United States v. Topco Associates, Inc.: 5

Nor do I believe that a new per se rule should be established in dis-
posing of this case, for the judicial convenience and ready predictability
that are made possible by per se rules are not such overriding consider-
ations in antitrust law as to justify their promulgation without careful prior
consideration of the relevant economic realities in the light of the basic
policy and goals of the Sherman Act. 3

The principle that per se rules should not be dogmatically followed in every
case seems particularly appropriate in light of the holding in Schwinn. That
decision has been roundly criticized by the commentators as unreasoned
from a business and economic standpoint, as exalting form over substance, as
failing to expound any new evidence of the “pernicious effect” of the
business and economic “stuff” of vertical restrictions discovered since White
Motor Co., and as relying on a common law rule against restrictions on
alienation that never really existed to the extent supposed. 37 For these
reasons, the Schwinn rule should be narrowly applied by the courts. 38

Some lower courts have recognized the necessity of not expanding
Schwinn too far and have established limitations to its scope. 39 The Schwinn
opinion itself postulated several permissible exclusions from its coverage,

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35. 405 U.S. 596 (1972).
36. Id. at 614-15. For further discussion of the proper judicial use of per se rules, see
(1967); See also The Twentieth Annual Antitrust Review, 53 VA. L. REV. 1667, 1680-89
(1967); Note, Antitrust—Franchising—Vertical Customer and Territorial Restrictions on Goods
Sold by Manufacturer are Illegal Per Se, 13 VILL. L. REV. 192 (1967). A further
criticism of Schwinn can be made concerning the process of adoption of a per se rule in
that particular circumstance. The traditional procedure for establishing per se rules has
been that there must have been a number of cases before a court evidencing the same
practice so that the court might eventually take judicial notice of the necessary “perni-
cious effect.” The Schwinn Court strayed from this procedure. See Van Cise, The Future
of Per Se in Antitrust Law, 50 VA. L. REV. 1165 (1964). The Schwinn decision also runs
counter to the observation made several years before that “[a] review of prior writings
discloses that virtually every writer on the subject of exclusive territorial arrangements
believes that such distribution arrangements are valid if they do not constitute an attempt
to monopolize or do not unreasonably lessen competition.” Day, Exclusive Territorial
Arrangements Under the Antitrust Laws—A Reappraisal, 40 N.C.L. REV. 223, 223 n.2
(1962) (emphasis added).
38. One commentator recognized situations in which vertical territorial restrictions
would not present unreasonable restraints on trade when he said:

There is a host of reasons why in particular circumstances vertical terri-
tory or customer restrictions would be entirely reasonable as restraints of
trade, particularly where their net effect is to promote competition. Ex-
amples include the need of nondominant firms to attract effective dis-
tributors, particularly where substantial capital commitment at the dis-
tributor level is required, the situation where service is a major or crucial
element of marketing and interbrand competition and requires some ele-
ment of control by the manufacturer . . . the need to keep the product
out of the hands of distributors or dealers who handle it in such a way as
to hurt the public . . .

Pogue, Vertical Restrictions on Price, Territory, and Customers—The Certainty of
39. See notes 41 and 42 infra and accompanying text.
such as vertical restrictions imposed by new or failing companies, or situations where the manufacturer has proved an absence of any "firm and resolute" plan in enforcing the territorial restrictions. The Schwinn Court also intimated that there might be other cases calling for an exception to the per se rule, saying "[u]nder the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." Although the circumstances which would be sufficient to create an exception to the Schwinn rule have not been precisely defined, this phrase certainly seems an invitation to exceptions to the rule. For example, in Tripoli Co. v. Wella Corp., the Third Circuit found the additional facts necessary to bypass the Schwinn rule where the manufacturer's product was dangerous to users or consumers if not properly distributed. In utilizing a rule of reason analysis, the court found that if there were a sufficient lawful main purpose for the restrictions, they might not be unreasonable. The Third Circuit's exception to the per se rule might be expanded from situations in which the public may be injured if the product is not properly distributed to situations in which the product itself is likely to be damaged if its distribution is not controlled. Evidence of the uniqueness and fragility of Coors beer was apparently accepted by the court in Copper Liquor, but the Fifth Circuit refused to acknowledge this as sufficient justification to except the distribution scheme from the Schwinn rule. The court may have been too doctrinaire in this decision, particularly since it might just have easily found against Coors on the sole basis of the more widely accepted per se rule relating to price fixing. In light of Mr. Chief Justice Burger's warnings in Topco, the Fifth Circuit should not espouse a per se rule unless it is clearly called for by the particular circumstances. Copper Liquor may tend to

41. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372 (1966); see Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398 (2d Cir), cert. denied, 393 U.S. 938 (1968). "In United States v. Arnold Schwinn & Co. . . . the Supreme Court premised its finding of a per se violation on the fact that Schwinn had been 'firm and resolute' in insisting on compliance. Here the evidence was conflicting on that issue." Id. at 406; see e.g., Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637 (10th Cir), cert. denied, 411 U.S. 987 (1973).
42. 388 U.S. at 379 (emphasis added).
43. 425 F.2d 932 (3d Cir.), cert. denied, 400 U.S. 831 (1970). Wella was the manufacturer of a line of cosmetic products which it sold to wholesale distributors for resale. Most of the products were sold subject to the restriction that they only be sold to professionals and not to the general public since the products could prove dangerous if not properly administered. Tripoli sold some of the restricted products directly to consumers and upon Wella's termination of its distributorship, Tripoli sued, alleging a violation of the Sherman Act. The court refused to apply the Schwinn per se proscription due to the lawful main purpose for the restrictions, either to protect the public or to shield the manufacturer from product liability suits. 425 F.2d at 938.
44. 506 F.2d at 937. The court discussed the uniqueness of Coors beer, including the fact that Coors' use of rare ingredients made it the most expensive beer to manufacture because of its raw materials and processing, that it was brewed in an aseptic, as contrasted with a pasteurization, process, requiring refrigeration and rotation of stock to ensure that the beer was not damaged, and the fact that Coors required its product to be removed from stock after it had been on the marketplace a prescribed length of time. Id.
45. Id. at 944.
expand and solidify the widely criticized Schwinn rule, and since it was not necessary to use the Schwinn rule to reach the court's decision, it was not appropriate for the court to promulgate such an expansion.

An opportunity for the application of the rule of reason to the Coors' system was presented in Adolph Coors Co. v. FTC, in which the Tenth Circuit recognized the possible justification and necessity, due to the uniqueness and fragile quality of the product, for the type of distribution system used by Coors. Although compelled to follow the precedent of Schwinn, the court expressed a desire to find an exception to the Schwinn rule. Although certiorari was not granted by the Supreme Court in that case, the rule of reason should be allowed to reemerge in the exceptional situations such as those presented by Coors' distributional scheme if our legal system intends to adhere to the true purpose of the Sherman Act—the prohibition of only unreasonable restraints of trade.

Even if an exception to the Schwinn rule had been applied, the Fifth Circuit might still have held that the system was an unreasonable restraint of trade. Any attempt by Coors to assert that the restraints were reasonable because they actually promoted competition instead of hindering it would probably have been unavailing. Further, Coors' argument that restrictive distribution was reasonable due to the susceptibility of its product to damage was apparently not considered a sufficient justification by the Fifth Circuit. Nevertheless, a rule of reason analysis would at least allow a court to consider alternatives which are less destructive of competition and not in violation of the Sherman Act. Such a rule of reason analysis would perhaps furnish Coors a blueprint for a lawful distribution scheme which would allow the company to maintain the quality and excellence of its product.

IV. CONCLUSION

Although most courts have chosen to follow the Schwinn per se rule, a few courts, discovering some of the rule's inherent faults, have engrafted exceptions to its coverage. It is submitted that the situation presented by the distribution system of the Adolph Coors Company should also be subject to such an exception. If the Sherman Act is not read as precluding all business restraints, the manufacturer of a quality product, easily susceptible to damage, should be given the opportunity to argue the propriety of its

47. 497 F.2d 1178 (10th Cir. 1974), cert. denied, 419 U.S. 1105 (1975).
48. See note 44 supra and accompanying text.
49. 497 F.2d at 1187.
50. The courts have seemed unamenable to a manufacturer's argument that its restraints on intrabranc competition actually promote interbrand competition. The response to this argument has often been that our system does not favor a private concern deciding whether competition in one sector of the economy is to be sacrificed in order to enhance it in another. Instead, the courts intimate this should be a decision for Congress. See United States v. Topco Associates, Inc., 405 U.S. 596, 610-11 (1972); White Motor Co. v. United States, 372 U.S. 253, 278 (1963).
51. See notes 44 and 45 supra and accompanying text.
52. See Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 945 n.6 (5th Cir. 1975). For an interesting discussion of possible outcomes concerning the question of the necessity of a less restrictive alternative, see White Motor Co. v. United States, 372 U.S. 253, 270-71 (1963) (Brennan, J., concurring).
distribution arrangement in the light of a rule of reason analysis. Per se rules
have their place in antitrust adjudication, but the courts must not accept
them "as unvarying laws of the Medes and Persians." In a case evidencing
a lawful purpose for a particular restriction, an exception to a per se rule
should be allowed. In such a case the rule of reason can surely uphold the
principle and intent of the Sherman Act and provide the necessary protection
against unreasonable impairments of competition.

Lawrence Adams

Federal Intervention in State Court Proceedings:
Expansion of the Younger Doctrine by Huffman v. Pursue, Ltd.

State officials invoked the Ohio public nuisance statute in state court
against appellee's predecessor as operator of a theater exhibiting pornographic
films. The trial court concluded that the operator had shown obscene
movies and rendered a judgment in appellant's favor, ordering the theater
closed for a year and the seizure and sale of the personal property used in its
operation. Pursue, Ltd., successor to the leasehold interest in the theater,
immediately filed suit in the United States District Court for the Northern
District of Ohio, rather than appealing the state court judgment within the
Ohio court system. Seeking injunctive and declaratory relief in a complaint
based on section 1983 of the Civil Rights Act of 1871, Pursue alleged that
Ohio's nuisance statute constituted a deprivation of constitutional rights under
color of state law. A three-judge district court found that the statute was an
overly broad restraint on first amendment rights and permanently enjoined
the execution of that portion of the state court's judgment that closed the
theater to films which had not been adjudged obscene in prior adversary

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1. Ohio Rev. Code Ann. § 3767.01(c) (1971) provides that a place which exhibits
obscene films is a nuisance. Section 3767.06 requires closure for up to a year of any
place determined to be a nuisance and provides for sale of all personal property used
in conducting the nuisance and for release from a closure order upon satisfaction of cer-
tain conditions, including a showing that the nuisance will not be re-established.
2. State ex rel. Huffman v. Dakota, Civil No. 72-0326 (Ct. C.P., Allen City, Ohio,
Nov. 30, 1972).
   Every person who, under color of any statute, ordinance, regulation, cus-
   tom, or usage, of any State or Territory, subjects, or causes to be subjected,
   any citizen of the United States or other person within the jurisdiction
   thereof to the deprivation of any rights, privileges, or immunities secured
   by the Constitution and laws, shall be liable to the party injured in an ac-
   tion at law, suit in equity, or other proper proceeding for redress.
4. Pursue, Ltd. v. Huffman, Civil No. 73-432 (N.D. Ohio, Apr. 20, 1973), dis-
cussed in Huffman v. Pursue, Ltd., 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975). The dis-
   trict court concluded that Pursue had standing to challenge the nuisance statute, as the
   state court judgment was directed primarily against a property interest to which it had
   succeeded. Similarly, Pursue's counsel conceded at oral argument that it could have ap-
   pealed that judgment of the trial court within the Ohio court system.

53. Van Cise, The Future of Per Se in Antitrust Law, 50 Va. L. Rev. 1165, 1169
(1964).
proceedings. Held, judgment vacated and cause remanded: In state civil cases, such as the present, which are in many respects similar to state criminal actions, a federal court should follow the principles set out in Younger v. Harris and refuse to intervene unless the complainant establishes that the state proceeding is conducted in bad faith or with an intent to harass, or the challenged statute is flagrantly and patently unconstitutional. Huffman v. Pursue, Ltd., 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975).

I. THE HISTORY OF FEDERAL INTERVENTION IN STATE COURT PROCEEDINGS

A delicate balancing of competing federal interests is inherent in questions concerning the propriety of federal court intervention by injunctive or declaratory relief in state court proceedings. The protection of basic constitutional rights must be considered on the one hand, and on the other, the interests of judicial efficiency, federalism, and comity so necessary to the smooth operation of a dual form of government.

Although the Constitution, with the exception of article III limitations, makes no restrictions upon federal competence to enjoin a party from participating in state court proceedings, Congress sharply limited this power with the passage of the Anti-Injunction Act of 1793, which later became 28 U.S.C. section 2283. The Supreme Court in Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers concluded that the exceptions to section 2283 should not be enlarged by loose statutory construction, and that proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately the
United States Supreme Court. While there are also discretionary doctrines of equity and federal-state comity limiting the enjoining of state court proceedings, this statute is an absolute restriction with expressly authorized exceptions. In *Mitchum v. Foster*, which concerned a private civil suit brought under section 1983 of the Civil Rights Act of 1871, the Supreme Court held that section 1983 is an Act of Congress falling within one of the exceptions of the Anti-Injunction Act. In so concluding, the Court did not in any way question or qualify the principles of equity, comity, and federalism that come into play as further restraints on federal court intervention after it has been decided that the case does fall within one of the statute's exceptions.

A. Principles of Abstention and Comity

*Ex parte Young*, a case challenging an allegedly unconstitutional state statute concerning sufficiency of railroad rates, originated the doctrine that, when necessary, federal courts may enjoin state officers from instituting criminal proceedings. There the Court distinguished between a stay of threatened or future prosecutions as therein involved and pending prosecutions, to which stays were barred. The Court stated that no injunction ought to be granted unless in a case reasonably free from doubt, and that such would be justified where state officers "threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution . . ."24

The scope of *Young* was narrowed by subsequent cases which established the abstention doctrine and developed the rule that an applicant seeking a federal injunction against a state statute alleged to be unconstitutional normally must exhaust his state legislative or administrative remedies

15. 398 U.S. at 287.
16. *Id.* at 286-87.
19. See note 11 supra.
20. 407 U.S. at 242-43. In his concurring opinion, Mr. Chief Justice Burger noted that these principles allow a federal court to provide injunctive relief in only a narrow class of circumstances, and that the Court had not yet decided how great a restraint is imposed by these principles on a federal court requested to enjoin state civil proceedings. *Id.* at 243-44 (Burger, J., concurring).
22. *Id.* at 163.
23. *Id.* at 166.
24. *Id.* at 155-56.
25. See, e.g., *Porter v. Investors Syndicate*, 286 U.S. 461 (1932) (a federal court is without jurisdiction to enjoin the revocation of a business permit under a state Blue Sky Law where the complainant has failed to exhaust a state administrative remedy); *Gibb v. Interborough Rapid Transit Co.*, 279 U.S. 159 (1929) (a transit company which has applied to a public commission for leave to increase fares as prescribed by statute cannot defeat orderly action by application to the courts under an allegation of an intent by the commission to deny the relief sought). But cf. *McNeese v. Board of Educ.*, 373 U.S. 668 (1963) (prior resort to a state proceeding is not a prerequisite to maintaining a suit to assert rights under the Civil Rights Act of 1871, particularly when it is by no means clear that state law provides an adequate administrative remedy).
The abstention doctrine, whereby a federal court should refrain from granting discretionary federal relief in cases where adequate state relief is available, had its beginnings in 1929. The doctrine rests on two principles: the courts' reluctance to decide federal constitutional issues unless absolutely necessary to the disposition of the case, and deference to state sovereignty. In subsequent years the abstention doctrine lost much of its impact as a bar to federal interference in state proceedings, as it became apparent that its strict application hindered the effective protection of civil rights.

The principle of comity influenced the federal courts long prior to development of the doctrine of abstention. The Court has recognized that federal interference with a state's good-faith administration of its criminal laws is peculiarly inconsistent with a federal framework. It is generally assumed that state courts will adhere to constitutional standards, and the mere possibility of erroneous application of those standards will not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge to the validity of some statute, unless it plainly appears that this course would not afford adequate protection and that an injunction is needed to prevent great and immediate irreparable injury.

**B. Standards for Relief: From Dombrowski to Younger**

The Supreme Court in *Dombrowski v. Pfister* ruled that the abstention

28. See Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929). This doctrine was developed more fully in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), in which a railroad company challenged a regulation by a state commission as unconstitutional and unauthorized by state statutes. The Court concluded that when asked for injunctive relief, federal courts should exercise sound discretion in the public interest to avoid needless friction with state policies. In this case decision of the issue on the merits was withheld, pending proceedings to be taken in the state courts to secure a definitive construction of the state statute.
30. See Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509 (1972), in which the Court, while ruling abstention appropriate in that particular case, maintained that abstention is a judge-made doctrine that sanctions escape from immediate decision only in narrowly limited special circumstances justifying the delay and expense which is caused; England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 417 (1964), in which the Court held that in cases where, but for the application of the abstention doctrine, the primary fact determination would have been made by the district court, a litigant may not be deprived unwillingly of that determination. See also Baggett v. Bullitt, 377 U.S. 360 (1964) (first amendment exception to the doctrine); McNeese v. Board of Educ., 373 U.S. 668 (1963) (affirmation of civil rights exception); Monroe v. Pape, 365 U.S. 167 (1961) (civil rights exception).
34. 380 U.S. 479 (1965). *Dombrowski* held that a lower federal court had erred
doctrine is inappropriate in cases where statutes are justifiably attacked on their face as abridging free expression, or are applied for the purpose of discouraging protected activities.\textsuperscript{35} Dombrowski was heralded as “ushering in an era of federal judicial activism.”\textsuperscript{36} Although the Court did not give adequate guidance concerning the scope of the holding, many questions, left unanswered,\textsuperscript{37} were clarified by subsequent cases.\textsuperscript{38}

In 1971, the Supreme Court in \textit{Younger v. Harris}\textsuperscript{39} and its companion cases\textsuperscript{40} reexamined the issue. The Court in \textit{Younger} held that the Dombrowski decision should not be regarded as having upset the settled doctrines that have always very narrowly confined the availability of injunctive relief against state criminal prosecutions.\textsuperscript{41} Federal courts, the Court ruled, will not enjoin pending state criminal proceedings except under extraordinary circumstances where the danger of irreparable loss is both great and immediate in that there is a threat to the plaintiff’s federally protected rights which cannot be eliminated by his defense against a single prosecution.\textsuperscript{42}

The Court stressed that the existence of a “chilling effect” on an individual’s exercise of constitutional rights, even in the area of first amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action.\textsuperscript{43} Although presented with an opportunity to determine the

when it had refused to grant injunctive relief against a threatened state criminal prosecution that worked a “chilling effect” upon the exercise of first amendment rights. \textit{Id.} at 489-90. Mr. Justice Brennan, speaking for the majority, commented: “So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.” \textit{Id.} at 494.

\textsuperscript{35} \textit{Id.} at 489-90.

\textsuperscript{36} See also \textit{Note, Implications of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution Is Pending}, 72 COLUM. L. REV. 874, 883-84 (1972).


\textsuperscript{38} 401 U.S. 66, 73 (1971). (the same equitable principles relevant to the propriety of injunctive relief must be taken into consideration by district courts in deciding whether to issue a declaratory judgment, and that where an injunction would be impermissible, declaratory relief should ordinarily be denied also).

\textsuperscript{39} 401 U.S. 37 (1971).


\textsuperscript{41} 401 U.S. at 53.

\textsuperscript{42} \textit{Id.} at 37. Mr. Justice Stewart stated in his concurring opinion that a threat of irreparable injury both great and immediate might be shown if the state criminal statute in question was patently and flagrantly unconstitutional on its face or if there has been bad faith and harrassment in a statute’s enforcement. \textit{Id.} at 56 (Stewart, J., concurring).

\textsuperscript{43} 401 U.S. at 51. The Court stated:

Just as the incidental “chilling effect” of such statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the impor-
independent force of the Anti-Injunction Act and decide whether it would be controlling under the circumstances of the case, the Court expressly refrained from deciding that question and instead relied on principles of comity and "Our Federalism." A concurring opinion by Mr. Justice Stewart in Younger, which involved a criminal prosecution, made it clear that the Court was not dealing with the considerations that should govern a federal court when it is asked to intervene in state civil proceedings, "where, for various reasons, the balance might be struck differently.

II. Huffman v. Pursue, Ltd.

In Huffman v. Pursue, Ltd. the Supreme Court, for the first time facing this issue directly, applied the Younger standard for federal intervention in a civil proceeding. The impact of the case, however, is diminished by the Court's cautious circumscription of the rule's applicability to state proceedings which are akin to criminal prosecutions.

Traditionally, courts of equity have shown greater reluctance to intervene in criminal prosecutions than in civil cases. There are several reasons behind this basic policy. A state's decision to classify conduct as criminal indicates the importance it has ascribed to prompt and unimpaired enforcement of its law, evidencing a strong state interest, whereas the state might not even be a party in a civil proceeding, and therefore have less interest.

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Furthermore, while federal relief through habeas corpus is available to the state court criminal defendant after exhaustion of state remedies, that option is not available to the losing litigant in a state civil proceeding which does not result in custodial detention. In his dissenting opinion in *Huffman*, Mr. Justice Brennan noted that in contrast to the safeguards present in criminal proceedings against spurious prosecutions such as arrest, charge, information or indictment, the civil proceeding is begun by the mere filing of a complaint by one party, without any of the equivalent safeguards. The majority opinion in *Huffman* adequately circumvented the first argument by applying the new extension of the *Younger* rule only to those civil proceedings, such as *Huffman*, which are in many respects similar to criminal prosecutions. The Court, for example, emphasized the fact that the state was a party in the lower state court proceeding, and that the state's civil nuisance abatement statute upon which the case was based is both in aid of and closely related to criminal statutes which carry out the same state policy of prohibiting the dissemination of obscene materials. An infringement of the state's interest by federal intervention in such a case is likely to be as great as it would be were this a criminal proceeding. In dealing with the second argument against the extension of the *Younger* rule, the majority in *Huffman* emphasized that *Younger* turned on considerations of comity and federalism and that *Huffman* must likewise be controlled by application of those same factors. The Court stated that the issue of whether federal courts should be able to intervene in state proceedings is distinct and separate from the issue of whether litigants are entitled to subsequent federal review of state court dispositions of federal questions. The majority did not deal with the third aforementioned argument concerning the lack of safeguards against unfounded civil proceedings.

The *Huffman* decision, as an extension of the toughened standards for federal intervention in state court proceedings, is a further step in locating the most harmonious balance between the protection of constitutional guarantees and principles of federalism and comity. A party in state court civil or criminal proceedings may still be awarded federal injunctive or declaratory relief in certain extraordinary circumstances where the state proceeding is conducted in bad faith or with an intent to harass, or where the challenged

53. 28 U.S.C. § 2254 (1970). Section 2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."
54. 95 S. Ct. at 1208-09, 43 L. Ed. 2d at 493.
55. Id. at 1212, 43 L. Ed. 2d at 497 (Brennan, J., dissenting).
56. Id. at 1214, 43 L. Ed. 2d at 499.
57. Id. at 1208, 43 L. Ed. 2d at 492.
58. This argument was used in MTM, Inc. v. Baxley, 365 F. Supp. 1182 (N.D. Ala. 1973), *prob. juris. noted*, 415 U.S. 975 (1974), where the court dealt with consolidated actions under the Civil Rights Act of 1871 seeking injunctive and declaratory relief from state court orders enjoining operation of theaters and book stores under nuisance statutes. The three-judge district court held that on principles of equity, comity, and federalism, the cases were dismissed in accordance with *Younger*, where state proceedings complemented or substituted for proceedings under criminal laws of the state.
59. 95 S. Ct. at 1209, 43 L. Ed. 2d at 493-94.
60. Id.
statute is flagrantly and patently unconstitutional. Even when these exceptional factors are not present, a party wronged in a state court civil case, though lacking the possibility of habeas corpus relief available to criminal defendants, still has the option of invoking federal judicial process to protect his constitutional rights after exhaustion of state remedies or the option, in certain circumstances, of removal to federal court before state court proceedings begin. These methods create less friction in the operation of a dual system of government and lend more respect to state judicial systems which, having concurrent power to decide controversies within article III of the United States Constitution, should be as fair and as competent to decide such cases. Premature resort to federal court instead of exhausting state court processes casts a direct aspersion on the competency of state courts and hampers efficiency because of duplicative efforts of the two court systems, disruption of the state proceeding through the issuance of unnecessary stays, and the burdensome necessity for the parties to proceed in two courts simultaneously.

In the present case, Pursue argued that Younger did not apply, as there was no pending action, the nuisance abatement action having already come to completion, except for enforcement of an injunction against the operation of a theater, and no appeal from that judgment having been taken within the state system. The Court's conclusion was that a party in Pursue's position must exhaust his state appellate remedies before seeking relief in the district court unless he can bring himself within one of the exceptions specified in Younger. The Court reasoned that federal intervention at the appellate stage is likely to be even more disruptive and offensive than intervention at or before trial because the state has already won a nisi prius determination that its policies are being violated so as to justify judicial abatement. In requiring exhaustion of state appellate remedies for the purposes of applying Younger, the Court in Huffman distinguished Monroe v. Pape, which held that a party seeking relief for deprivation of federal rights under section

61. 95 S. Ct. at 1200, 43 L. Ed. 2d at 482.
63. 28 U.S.C. § 1257 (1970). This provision, which applies in both civil and criminal cases, specifies when the United States Supreme Court may review, by appeal or by certiorari, a final judgment of the highest court of a state in which a decision could be had. According to 28 U.S.C. § 1257(1), appellee in Huffman v. Pursue, Ltd. was assured of eventual consideration of its claim by the United States Supreme Court, for where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to the Supreme Court lies as a matter of right.
65. See note 9 supra and accompanying text.
68. 95 S. Ct. at 1210, 43 L. Ed. 2d at 494-95. According to the Younger doctrine, these exceptions are when the state proceeding is conducted in bad faith or with an intent to harass, or when the challenged statute is flagrantly and patently unconstitutional. See note 42 supra.
69. 95 S. Ct. at 1210, 43 L. Ed. 2d at 495.
70. 365 U.S. 167 (1961). The complaint in this case was against a city police officer for an allegedly illegal search and seizure.
1983 of the Civil Rights Act does not have to first initiate state proceedings based on related state causes of action. Huffman, in contrast, was concerned with a different issue, namely the deference to be accorded state proceedings which have already been initiated and which offer a competent forum for the determination of federal questions.

III. Conclusion

Huffman v. Pursue, Ltd., in extending the strict Younger rule to certain civil cases which are similar in critical aspects to criminal prosecutions, is significant in that it further limits the instances where a federal court may intervene in state judicial proceedings, while stressing the importance of comity and federalism principles. Because of the Court’s cautious limitation of the Younger rule to such cases rather than holding it applicable to all civil proceedings, the Huffman decision in a sense perpetuates the traditional deference to be accorded the principle that courts of equity should show greater reluctance to intervene in criminal prosecutions than in civil proceedings. As a first step by the Supreme Court in facing the issue of Younger’s applicability in civil cases, however, the Huffman case may have implications for further expansion of the rule to all civil proceedings.

Debra Ann Bacharach

Henderson v. Ford Motor Co.: Defense and Proof of Defect
Limits to Recovery In Product Liability Actions

Irene Henderson was driving her 1968 automobile in city traffic when she discovered that she could not control the speed of her car. Realizing that she was approaching a busy intersection, Mrs. Henderson drove her car into a large light pole and was seriously injured. Both the manufacturer and distributor of the automobile were sued in strict liability for defective manufacture of a carburetor gasket. The jury found that the defective design of the automobile’s air filter was the producing cause of Mrs. Henderson’s damages and judgment was rendered for the plaintiff. The court of civil appeals reversed and remanded, stating that the issue of “contributory negligence” should have been submitted to the jury. Held, reversed: The contributorily negligent conduct of the plaintiff after the discovery of a products defect is not a defense in a strict liability action. Although the

72. 95 S. Ct. at 1211 n.21, 43 L. Ed. 2d at 495 n.21.
2. In applying this defense to the plaintiff’s behavior after the discovery of the alleged defect, the court of civil appeals noted that the jury should consider whether the plaintiff voluntarily and unreasonably encountered a known danger. Id. at 712.
volenti non fit injuria defense can bar recovery, it is based on subjective factors; the objective reasonableness of any voluntary encounter with a known risk is not a concomitant of this defense. However, since the plaintiff failed to introduce any evidence of defective design, recovery of damages is denied. Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974).

I. ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE AS DEFENSES IN PRODUCTS LIABILITY CASES

A. Background

Texas was a pioneer in recognizing the theory of liability without fault. In Jacob E. Decker & Sons v. Capps the supreme court ruled that a manufacturer or processor of food unfit for human consumption was strictly liable to the consumer notwithstanding the absence of privity or negligence. Subsequently, in two companion cases, Texas formally adopted section 402A of the Restatement (Second) of Torts. Based on the policies of loss prevention and justifiable consumer reliance, the Texas Supreme Court yielded to the logic that strict liability in tort is the only practicable vehicle for the protection of the public from defective products. The court did point out, however, that the rule is strict liability rather than absolute liability, and the manufacturer is not an insurer of his product, thereby recognizing that boundaries to the cause of action exist. There are two basic problems in defining these limits to recovery: the available defenses and the requisite burden of proof to establish the existence of a defect.

The task of distinguishing between the defenses of assumption of risk and contributory negligence has been difficult in Texas due to the general esoteric nature of the concepts and the Texas courts' unique subclassification.
tion system. Three separate doctrines have developed: assumption of risk, where the plaintiff voluntarily confronts a known risk based on a contractual relation existing between the plaintiff and the tortfeasor; volenti non fit injuria, a doctrine similar to assumption of risk but applicable even where a contractual relation does not exist; and contributory negligence, a defense based on the plaintiff's failure to use ordinary care.

Confusion between the doctrines of volenti and contributory negligence has been particularly prevalent. In Halepeska v. Callihan Interests, Inc. the Texas Supreme Court limited the scope of volenti due to its harsh restrictions on recovery and distinguished it from contributory negligence on two grounds: justification and proximate cause. When only contributory negligence is at issue a plaintiff may voluntarily expose himself to a known risk and not be barred from recovery if such conduct was reasonably justified under the circumstances. Also, for contributory negligence to be a valid defense, the plaintiff's negligence must have been a proximate cause of his own harm. In contrast, the volenti defense exists without inquiry as to proximate cause or the plaintiff's justification. In relating these two

12. See notes 13-15, 19 infra and accompanying text.
13. Generally, the doctrine of assumption of risk has been limited to cases involving a master-servant relationship. Wood v. Kane Boiler Works, Inc., 150 Tex. 191, 238 S.W.2d 172 (1951). But the court has pointed out that assumption of risk can be used in a non-technical sense in other cases, if the doctrine is used to designate a person's actions rather than a particular doctrine. Scott v. Liebman, 404 S.W.2d 288 (Tex. 1966) (occupier-invitee case).
14. Volenti non fit injuria, literally meaning that that to which a person assents is not deemed in law an injury, is also referred to as incurred risk. The court has ruled that in order for this defense to be valid in negligence cases, the plaintiff's free and intelligent decision to incur the risk must be made with actual knowledge and actual appreciation of the danger. Wood v. Kane Boiler Works, Inc., 150 Tex. 191, 238 S.W.2d 172 (1951). In certain situations the danger might be so open and obvious that the requisite appreciation of the danger is imputed to the plaintiff. Schiller v. Rice, 151 Tex. 116, 246 S.W.2d 607 (1952). As a result of this rationale, the question became whether the plaintiff knew or should have known and appreciated the danger. McKee v. Peterson, 155 Tex. 517, 271 S.W.2d 391 (1954). As such, a type of objective contributory negligence standard, involving due care, has been superimposed to some extent on the supposedly distinct defense of volenti.
15. See, e.g., McFall v. Fletcher, 138 Tex. 93, 157 S.W.2d 131 (1941).
16. Chief Justice Greenhill of the Texas Supreme Court has pointed out that the confusion surrounding assumption of risk in Texas also stems from the fact that there is not a logical sequence in the cases applying the doctrine. He has stated that because of this confusion the court was at one time tempted to abolish the doctrine altogether. Greenhill, Assumption of Risk, 16 BAYLOR L. REV. 111 (1964).
17. 371 S.W.2d 368 (Tex. 1963).
18. Id. at 380. Perhaps motivated by the harshness of this doctrine and Texas' recent adoption of comparative negligence, Tex. Rev. Civ. Stat. Ann. art. 2212a, § 1 (Supp. 1975), the court recently held that volenti was no longer a defense to actions predicated upon negligence. The reasonableness of an actor's conduct in confronting a risk will now be determined under the principles of contributory negligence. It was pointed out, however, that volenti will still apply in cases involving an expressly assumed risk as well as strict liability. See also Farley v. M&M Cattle Co. 18 Tex. Sup. Ct. J. 398, 403 (July 9, 1975); Rosas v. Buddies Foods, Inc., 518 S.W.2d 534, 539 (Tex. 1975).
19. 371 S.W.2d at 379. The court also distinguished the concept of "no duty" from volenti based on the type of action involved and the element of justification, but noted the defenses' basic similarities. Id. at 380. However, by pointing out that "no duty" only applied to invitee cases, the court severely limited the applicability of the reasonable man standard in volenti cases. Id. at 378.
20. See Keeton, Assumption of Products Risks, 19 Sw. L.J. 61 (1965); 371 S.W.2d at 379.
21. 371 S.W.2d at 379.
22. Id. at 380.
defenses to strict liability cases, the Texas courts have been concerned with these distinctions based on the conduct of the plaintiff and the applicability of each defense in an action not based on the concepts of negligence or fault.

The Texas Supreme Court has not only accepted the section 402A theory of strict liability, but has also limited the defenses applicable to this type of action in accord with the Restatement. In 

Shamrock Fuel & Oil Sales Co. v. Tunks\textsuperscript{25} the court held that a minor plaintiff who was contributorily negligent in pouring kerosene over a smoldering stick could still recover. Further, in 

McKisson v. Sales Affiliates, Inc.\textsuperscript{26} a beauty operator who should have known the danger of using a permanent wave treatment on bleached hair was allowed to recover in spite of her lack of due care.\textsuperscript{27} Relying on the principles enunciated in comment \textit{n} of section 402A,\textsuperscript{28} the supreme court held that a plaintiff should not be barred from recovery by reason of his failure to test the product for possible defects.\textsuperscript{29} Although removing the defense of contributory negligence with respect to the plaintiff's conduct prior to the discovery of the defect, the court seemed to indicate that only assumption of risk or volenti would bar recovery in products liability actions.\textsuperscript{30} Since products liability rests on the assumption that the consumer justifiably relied on the integrity of the manufacturer and vendor of the products, recovery should not be limited to the reasonably prudent buyer. On the other hand, if there was a subjective realization of the danger, reliance on the manufacturer's representations of fitness and merchantability was not justifiable.\textsuperscript{31} However, volenti was not clearly defined and its role in product liability cases was not expressly decided. Similarly, the court left open the question of whether the plaintiff's contributorily negligent conduct occurring \textit{after} discovery of the defect would be recognized as a defense.

The Fifth Circuit has also struggled with the volenti issue in two products liability cases, 

Borel v. Fibreboard Paper Products Corp.\textsuperscript{32} and 

Messick v. General Motors Corp.\textsuperscript{33} According to the Restatement formulation of

\textsuperscript{23} Of course, other possible defenses exist to products liability cases including misuse, adequacy of warning or instructions, and unavoidably unsafe product. \textit{See} Restatement \textsuperscript{\textsection} 402A, comments \textit{h}, \textit{j}, \& \textit{k}. \textit{See also} Procter \& Gamble Mfg. Co. v. Langley, 422 S.W.2d 773 (Tex. Civ. App.---Dallas 1967, writ dism'd) (applying the misuse doctrine as a defense and equating it with volenti rather than contributory negligence). \textit{See generally} Noel, \textit{Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk}, 25 Vand. L. Rev. 93, 95 (1972).

\textsuperscript{24} \textit{See} note 52 \textit{infra} and accompanying text.

\textsuperscript{25} 416 S.W.2d 779 (Tex. 1967).

\textsuperscript{26} 416 S.W.2d 787 (Tex. 1967).

\textsuperscript{27} \textit{Id.} at 793. In both these cases, the court equated this conduct with contributory negligence rather than misuse, thereby possibly limiting the application of the misuse defense to unintended and unforeseeable use.


\textsuperscript{29} Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 786 (Tex. 1967).

\textsuperscript{30} \textit{Id.} at 785.

\textsuperscript{31} \textit{Id.} at 786.

\textsuperscript{32} 493 F.2d 1076 (5th Cir. 1973).

\textsuperscript{33} 460 F.2d 485 (5th Cir. 1972).
volenti or assumption of risk, the question was not only whether the plaintiff voluntarily incurred the risk but also whether this conduct was objectively reasonable.\textsuperscript{34} Since the Texas Supreme Court had already accepted comment \textit{n} as it related to contributory negligence, the federal court reasoned that the hybridization of the \textit{volenti} defense enunciated in this comment had been thereby impliedly accepted by the Texas court.\textsuperscript{35}

B. \textit{Henderson v. Ford Motor Co.}

The supreme court in \textit{Henderson v. Ford Motor Co.}\textsuperscript{36} restated the general rule as to \textit{volenti} in Texas, disregarding the \textit{Restatement}'s definition of defense.\textsuperscript{37} The court felt that the somewhat harsh Texas doctrine had validity in strict liability actions;\textsuperscript{38} thus, plaintiffs who voluntarily encounter a known product danger or risk, even if such conduct was reasonable, should not recover.\textsuperscript{39} However, the court determined that Mrs. Henderson's failure to discover the best possible means of escape was not \textit{volenti}.\textsuperscript{40}

By barring the plaintiff who voluntarily confronts a known product risk without inquiry as to reasonableness, the goal of risk distribution is not promoted.\textsuperscript{41} Indeed, the Texas cases turn on other grounds, including whether the imposition of liability will prevent future occurrences of the same type\textsuperscript{42} and whether the consumer justifiably relied on the manufacturer's reputation and representations as to the quality of the product.\textsuperscript{43} The

\textsuperscript{34} The Fifth Circuit recognized that in order for \textit{volenti} to exist under \textit{Halepeska}, four conditions must be met: (1) the plaintiff must have knowledge of facts constituting a dangerous condition; (2) he must know the condition or activity to be dangerous; (3) he must appreciate the nature or extent of the danger; and (4) he must voluntarily expose himself to this danger. 460 F.2d at 488. Although the Fifth Circuit was cognizant of the subjective standard applied by the Texas courts with respect to \textit{volenti}, the federal court reasoned, an objective standard of reasonableness must be included within the fourth element of \textit{volenti}. That is, the plaintiff must voluntarily and unreasonably expose himself to the danger. The Beaumont court of civil appeals in \textit{Henderson v. Ford Motor Co.}, 500 S.W.2d 709 (Tex. Civ. App.—Beaumont 1973), also interpreted the Texas Supreme Court rulings in this manner. Other state courts have adopted this doctrine as well. See, e.g., \textit{Bachner v. Pearson}, 479 P.2d 319 (Alas. 1970); \textit{Ferraro v. Ford Motor Co.}, 423 Pa. 324, 223 A.2d 746 (1966); \textit{Brown v. Quick Mix Co.}, 75 Wash. 2d 833, 454 P.2d 203 (1969).

\textsuperscript{35} 493 F.2d at 1096; 460 F.2d at 491, Comment \textit{n} states: "On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger . . . is a defense under this Section." \textit{Restatement} § 402A, comment \textit{n}.

\textsuperscript{36} 519 S.W.2d 87 (Tex. 1974).

\textsuperscript{37} \textit{Id.} at 90; see notes 14, 35 supra and accompanying text.

\textsuperscript{38} 519 S.W.2d at 90.

\textsuperscript{39} \textit{Id.} at 91.

\textsuperscript{40} \textit{Id.} at 92.

\textsuperscript{41} The risk distribution policy is the theory that a supplier should be held liable because he can absorb the loss as a cost of doing business, which is then passed on to the general public through higher priced consumer goods. By this means society as a whole pays for the cost of losses suffered by those injured. See \textit{Seely v. White Motor Co.}, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (Traynor, J., concurring).

\textsuperscript{42} The Texas policy of prevention has been set forth in various cases. See \textit{Darryl v. Ford Motor Co.}, 440 S.W.2d 630 (Tex. 1969); \textit{Shamrock Fuel & Oil Sales Co. v. Tunks}, 416 S.W.2d 779 (Tex. 1967); \textit{Jacob E. Decker & Sons v. Capps}, 139 Tex. 609, 164 S.W.2d 828 (1942). Only one civil appeals case has approved the risk distribution policy. \textit{Thermal Supply Inc. v. Asel}, 468 S.W.2d 927 (Tex. Civ. App.—Austin 1971, no writ).

\textsuperscript{43} See, e.g., \textit{Jacob E. Decker & Sons v. Capps}, 139 Tex. 609, 612, 164 S.W.2d 828, 831 (1942).
Texas courts have gradually extended manufacturers’ liability for product defects, in order to protect the defenseless consumer, by basing the action on strict tort liability. The tendency has been, however, to guard against absolute liability through the implementation of these accepted policy goals which, consequently, become the theoretical basis for defining the boundaries to the action. Prevention of loss by imposition of strict liability is questionable when there is a subjective realization of the defect by the plaintiff. Thus, the courts reason, if the consumer knows of the defect and still continues to use the product, the manufacturer should not be held liable for his representations. If the consumer knows, appreciates and understands the danger involved in using the product after discovering a defect, he is not justified in relying on the manufacturers’ advertising, trade name, or implied warranties of merchantability and fitness. In such a case, the goal of loss prevention is not furthered and the basic premise of the action is not met.

The Henderson court not only recognized the Texas rule that the plaintiff’s lack of due care in failing to discover a defect would not bar recovery, but also pointed out that contributory negligence after the discovery of the defect would not preclude recovery. The supreme court based this decision on the precedent set forth in Marshall v. Ranne, a strict liability case which involved injuries sustained in a confrontation with a trespassing vicious hog. In Marshall, the court stated that because the action for damages caused by dangerous trespassing animals was based on strict liability and not negligence, contributory negligence could not be a defense. The plaintiff was still allowed to recover for the damages he sustained, even though the jury found that the plaintiff’s negligent failure to shoot the offending hog was a proximate cause of his injuries. The court ruled that a failure to choose the right alternative after discovering the risk was not a bar to recovery even though it may be contributory negligence.

Under the Henderson court’s approach, the policies of loss prevention and protection of consumers who justifiably rely on products were attained. The manufacturer’s conduct which led to the presence of the defect would be deterred, and the manufacturer would realize that the only way to prevent

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44. See notes 5-8 supra and accompanying text.
45. See notes 42-43 supra and accompanying text.
46. 519 S.W.2d at 89.
47. Id. at 90.
48. 511 S.W.2d 255 (Tex. 1974).
49. Id. at 259.
50. Id. at 257.
51. The court in Marshall also confronted the question of assumption of risk as it related to this question. The plaintiff knew of the vicious nature of the hog prior to the incident and confronted the animal when it came upon his property. Thus, the defendant claimed that the plaintiff voluntarily exposed himself to the danger. The court held that there was no voluntary encounter since there was not a free choice of alternatives available—the plaintiff’s only choices were to face the danger or surrender his rights in regard to the property. Id. at 260. Similarly the defendant in Henderson argued that the plaintiff by intentionally running into the light pole and by not choosing the best means of escape voluntarily confronted the danger. However, the court stressed the point that if the defendant has placed the plaintiff in a dilemma by leaving him no reasonable alternative to encountering the danger, the encounter is not voluntary.
future judgments of this type would be to alter his mode of production. At the same time, the consumer, although careless, still relied on the manufacturer’s integrity and did not subjectively believe that this reliance was unfounded.

Within the context of *Henderson*, the court has firmly established the idea that strict liability, whether involving defective products or trespassing animals, is not based upon negligence. Arguably, however, the unexpressed analysis used by the court in determining the type of conduct which would bar recovery was based on the relative fault of each party to the action.\(^5\) The court may have been merely balancing the relative degrees of negligence—the manufacturer’s conduct by creating the incident was more culpable than was the plaintiff’s later negligent action when forced to react to the situation after discovery of the defect. The same principle applies to the plaintiff’s negligent conduct in failing to inspect the product before use. Justifiable reliance, the basis of the products liability action, although theoretically arising out of basic warranty concepts, is thus a mechanism through which basic negligence factors are considered by the court, even in a strict liability case.

II. PROOF OF DEFECT

In setting guidelines and boundaries for the application of the traditional negligence defenses to product defect cases, the courts have been concerned with the questions of where or why liability should stop and what circumstances will excuse a manufacturer or distributor from liability. These questions, involving basic policy considerations, have also had a considerable influence on the courts’ treatment of proof of defective condition, another issue fundamental to the development of the law of products liability. In accepting the idea that strict liability does not equal absolute liability, the courts have held that the plaintiff in a product defect case must prove more than mere injury in order to recover.\(^5\) Although this principle is clear, questions arise with respect to the nature and extent of the facts the plaintiff must prove and the techniques which can be utilized in meeting this burden.\(^5\)

A. Requirements of Proof

The Texas courts, having adopted the Restatement principles of products liability,\(^5\) require that the plaintiff must prove (1) that a defective condi-

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52. This fact does not coincide with the basis of the action in strict tort liability. See notes 5-8 *supra* and accompanying text.


Courts have been more willing to allow the inference to be drawn if the fact that the incident happened in the first place is some circumstantial evidence is still successfully utilized to prove defective condition. These requirements may be proven directly by means of expert testimony. However, due to the difficulty of procuring direct evidence of a defect, the plaintiff may also rely on circumstantial evidence. Since the courts often caution against jury speculation about the presence or absence of a causative defect, a circumstantial basis often leads to evidentiary problems. In negligence cases, juries are often allowed to infer liability under the doctrine of res ipsa loquitur. In recent cases, though, courts have cautioned against its use since reliance on res ipsa is questionable in products cases. Yet, circumstantial evidence is still successfully utilized to prove defective condition.

Certain established facts properly lead to an inference of defective condition occurring as the result of a deficient manufacturing process. The fact that the incident happened in the first place is some proof. If the product is relatively new the inference is more justifiable. In addition, the courts have been more willing to allow the inference to be drawn if the

57. RESTATEMENT § 402A, comment i, stating: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." California has rejected the idea that the plaintiff must prove that the defect made the product unreasonably dangerous. The court held that the elimination of this requirement provided a clear and simple test for determining whether the plaintiff should recover. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 101 P.2d 1153, 104 Cal. Rptr. 433 (1972). Other authors suggest that this unreasonably dangerous element of proof is merely part of the meaning of defect and thus separate elements of proof should not be required even under the Restatement formulation. See Keeton, supra note 9. One author has suggested that the Texas courts have not clearly delineated the parameters of unreasonably dangerous. See Sales, Strict Tort Liability in Texas, 11 Hous. L. Rev. 1043 (1974).
60. See, e.g., Soso v. Atlas Powder Co., 238 F.2d 388 (8th Cir. 1956).
61. Under this doctrine, negligence can be inferred from the mere fact that the accident happened if the item or instrumentality causing the damage was in the exclusive control of the defendant and the type of accident was one which ordinarily does not occur in the absence of negligence. See W. Prosser, HANDBOOK OF THE LAW OF TORTS §39, at 211 (4th ed. 1971). For a discussion of the doctrine of res ipsa and the proper submission of special issues on res ipsa to the jury, see Mobil Chem. Co. v. Bell, 517 S.W.2d 245 (Tex. 1974). See generally Morris, Res Ipsa Loquitur in Texas, 26 Texas L. Rev. 257 (1948).
62. See Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967).
63. The doctrine of res ipsa loquitur is generally not applicable in products cases because at the time of an accident occurring while the product is in use the defendant does not have exclusive control of the defective product. Keeton, Products Liability—Problems Pertaining to Proof of Negligence, 19 Sw. L.J. 26, 36 (1965).
65. See Keeton, Products Liability—Problems Pertaining To Proof of Negligence, 19 Sw. L.J. 26 (1965).
66. In some cases, if the plaintiff testifies to this fact alone, the requirement of proof has been met. See, e.g., Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 97-98 (1960).
product comes in a sealed container which has not been opened or tampered with.\textsuperscript{68}

Texas courts have recognized that a plaintiff may recover for a design defect as well as a defective condition resulting from a manufacturing error or omission.\textsuperscript{69} The plaintiff must still prove that a defective design existed which rendered the product unreasonably dangerous and can still utilize direct and circumstantial evidence. But due to the nature of a design defect, the plaintiff is forced to rely heavily on technical expert testimony. In testifying, the experts must identify the design flaw or flaws that occasioned the injury, evaluate these features relative to the expected performance standards of the product as well as their effect upon the product's subsequent usefulness and cost, compare the possibly defective product with other similar products and establish the causal link between the design deficiency and the injury.\textsuperscript{70} In order for the plaintiff to recover, the jury must not only make the appropriate inferences from this testimony, but as with other expert witnesses, the witness must also be considered credible. The allowable inferences in both manufacturing and design defect cases are, of course, subject to the "no evidence" or "scintilla of evidence" rules.\textsuperscript{71}

B. Henderson v. Ford Motor Co.

In Henderson the court found that the plaintiff had failed to produce any evidence that a design defect existed.\textsuperscript{72} As noted by the dissent, the majority concluded that on the basis of the evidence presented no reasonable man could find that a design defect existed in spite of the fact that a jury of twelve and four dissenting justices reached this conclusion.\textsuperscript{73} There was witness testimony to support the required inference. Witnesses at trial testified as to the defective and questionable design of the carburetor and the

\textsuperscript{68} Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). The Texas Supreme Court has applied this "sealed container" principle to automobiles but only to prove that the defect existed at the time of sale. McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967).


\textsuperscript{71} Generally, in an instance such as this, the court must consider only that evidence most favorable to the party seeking to prove a fact or condition, disregarding entirely that which is opposed or contradictory in nature. Renfro Drug Co. v. Lewis, 149 Tex. 507, 233 S.W.2d 609 (1950). It must draw all inferences which support the findings, rejecting the evidence and inferences which are contrary to the trial court's findings. Butler v. Hanson, 455 S.W.2d 942 (Tex. 1970). It is not within the appellate court's jurisdiction to weigh the evidence and to determine what happened; to overturn a jury's finding, the evidence must conclusively prove the opposite point as a matter of law. Langlotz v. Citizens Fid. Ins. Co., 505 S.W.2d 249 (Tex. 1974). See Martinez v. Delta Brands, Inc., 515 S.W.2d 263 (Tex. 1974), in which Chief Justice Greenhill suggested that evidence which creates a mere surmise or suspicion is no evidence. See also Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 Texas L. Rev. 361 (1960).

\textsuperscript{72} 519 S.W.2d at 93.

\textsuperscript{73} Id. at 95 n.2 (dissenting opinion).
alternative design used in the newer model of the same vehicle. In addition, there was some circumstantial evidence in the record to support the plaintiff's claim. Thus, as there was some evidence to support the jury's finding that a design defect existed, the supreme court's overturning of the jury's verdict is indeed questionable under the Texas sufficiency of evidence rules.

This decision clearly affects the practicing Texas attorney who attempts to prove design defect. The amount of evidence necessary to prove a design defect or to support a jury's finding that a design defect existed is rendered uncertain by the court's opinion. Most importantly, though, the decision that no design defect was present demonstrates a boundary to products liability recovery set by the Texas court, which can be utilized by courts to limit actions by consumers. If the Texas courts in the future require more evidence and less "speculation" for liability in product defect cases, it is clear that there will be narrower boundaries to the action and thus fewer consumers will recover.

III. Conclusion

The development of strict tort liability for product defects was founded on public policy precepts influenced by a consumer-based orientation of the courts. The Texas courts have recognized that because the action is based on strict tort liability the injured consumer should not be hampered by the affirmative defense of contributory negligence, whether the plaintiff's lack of due care occurred before or after discovery of the defect. At the same time, the Texas courts have not been concerned with the possible total protection of the defenseless consumer. No court has ever stated that absolute liability should be the rule. Even the Restatement formulation of products liability requires certain elements of proof and allows for certain defenses.

However, the Texas courts, in cautioning against a manufacturer or distributor becoming an insurer of his product, have gone too far in limiting the scope and nature of the action. When the policy expressed by a court is risk distribution or merely compensation of those injured, more consumers are allowed to recover, even though certain limits to the action still exist. With the acceptance of a loss-prevention policy, the Texas courts have set narrower boundaries to products liability actions. As such, they have failed to adopt the Restatement's more liberal definition of the assumption of risk defense and instead have applied the harsher Texas doctrine of volenti. At the same time, although not expressing the loss-prevention policy, the Texas courts have expanded the measure of proof required to show a design defect. It is unfortunate that a state which was once considered a pioneer in the products liability field would limit recovery in this manner.

If the fundamental basis of the action is consumer protection, then the risk

74. Id. at 96-99 (dissenting opinion).
75. Mrs. Henderson's vehicle was purchased a mere seven months prior to the incident and only had 9,000 miles on it. Id. at 88. See notes 65-68 supra and accompanying text.
76. See note 71 supra and accompanying text.
distribution or compensation policies more adequately promote this goal as does a more liberal evaluation of the proof requirements. Thus, the narrower boundaries created by the Texas courts in implementing the policy goals of loss prevention and justifiable reliance do not coincide with the basis of the action in strict tort liability and the ultimate goal of consumer protection. The result has been the development of a rather unique type of action in Texas; one which is hampered by policy considerations not reflecting societal needs.

Janice Vyn

Maness v. Myers: Attorney’s Contempt for Advising the Fifth

Petitioner, an attorney, appeared as counsel for Michael McKelva in a civil injunction proceeding. The city of Temple, Texas, sought to enjoin the sale of certain allegedly obscene magazines at the store which McKelva operated. McKelva was served with a subpoena duces tecum ordering him to appear in court with some fifty-two named magazines. McKelva twice declined to produce the magazines, claiming that they might be obscene and that their production would tend to incriminate him. Both times McKelva stated that his refusal was based upon the advice of counsel, and, but for such advice, he would have produced the subpoenaed magazines. The trial judge found McKelva guilty of contempt for failure to obey an order to produce and also found petitioner guilty of contempt for advising McKelva to disobey. After all habeas corpus possibilities in Texas had been exhausted, the United States Supreme Court granted certiorari. Held, reversed: An attorney, acting in good faith, cannot be held in contempt for advising his

1. The injunction was sought under repealed Tex. Penal Code Ann. art. 527, § 13 (1971). Generally, the article set forth criminal penalties for specific acts of distribution of obscene articles. Section 13, however, provided for an injunction to enforce its provisions. The entire article was repealed by ch. 399, § 3(a), [1973] Tex. Laws 991, effective January 1, 1974. The new law has no provisions equivalent to section 13.

2. McKelva had been convicted six days earlier under a Temple city ordinance for selling obscene magazines. Petitioner admitted that the subpoenaed magazines dealt explicitly with acts of a sexual nature, and that they were of the same character as the magazines for which McKelva previously had been convicted and, therefore, there existed a substantial possibility of self-incrimination if McKelva were required to produce the magazines.

3. The trial judge based his decision on the grounds that the fifth amendment plea was not available in a civil proceeding and that a motion to suppress in any subsequent criminal proceeding would afford adequate protection against any self-incriminating evidence obtained by way of the coercive court order.

Pursuant to Texas law, Tex. Rev. Civ. Stat. Ann. art. 1911a, § 2(c) (1960), the contempt against the petitioner, because he was an attorney, was reviewed by another district judge who affirmed the initial contempt judgment and set a $500 fine.

4. Under Texas law “there is no right to an appeal from an order of contempt. The only remedy to review such an order is by writ of habeas corpus, when relator is in custody.” Arnold v. State, 493 S.W.2d 801 (Tex. Crim. App. 1973) (emphasis added). Thus, since petitioner was only fined and was not “in custody,” the judgment was a final judgment to which the Court’s certiorari extends. Judiciary and Judicial Procedure Act, 28 U.S.C. § 1257(3) (1970). Stanford v. Texas, 379 U.S. 476, 480 (1965).
client to risk a contempt charge by asserting the fifth amendment privilege in order to avert the production of subpoenaed material when there is no other avenue to assure appellate review without having to surrender such material. *Maness v. Myers*, 419 U.S. 449 (1975).

I. DISOBEDIENCE AND THE FIFTH AMENDMENT

Ordinarily, disobedience to an unconstitutional or otherwise invalid judicial order may result in criminal contempt. In *United States v. United Mine Workers* the United States Supreme Court stated that orderly and expeditious administration of justice by the courts requires that an order issued by a court with proper jurisdiction must be obeyed until it is reversed by proper proceedings. However, this doctrine is by no means absolute. In situations in which compliance with a judicial order would irreparably jeopardize an irretrievable constitutional right because of the unavailability of pre-compliance review, the doctrine is inapplicable. A fortiori, a refusal to comply with a judicial order to provide potentially self-incriminating testimonial or documentary evidence after a fifth amendment plea has been entered is a classic exception to the doctrine espoused in *United Mine Workers*. The Supreme Court has consistently held that the person to whom such an order is directed has an alternative to involuntary compliance under the *United Mine Workers* doctrine where the fifth amendment privilege is impaired, since a witness who has involuntarily disclosed privileged information cannot thereafter retrieve it, and since subsequent appellate review cannot ordinarily repair the error.

5. The risk of contempt in this sense falls only on the client. If he chooses to avert production under a fifth amendment plea he faces the possibility of a final adjudication of contempt if his claim is rejected on the appeal of the initial contempt citation. See *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *Cobbledick v. United States*, 309 U.S. 323 (1940). The attorney's risk of contempt in giving advice to a client lies in the determination of his good faith in giving such advice. See *In re Watts & Sachs*, 190 U.S. 1, 29 (1903). See also note 20 infra.


8. Id. at 293.

9. See, e.g., *Johnson v. Virginia*, 373 U.S. 61 (1963). The Court summarily reversed a contempt conviction that resulted when a black man disregarded a judge's order to be seated in a section of the courtroom reserved for Negroes. A similar result followed in *Hamilton v. Alabama*, 376 U.S. 650 (1964), rev'd 275 Ala. 574, 156 So. 2d 926 (1963), where the contempt resulted from a black woman's refusal to testify during a criminal trial until the prosecutor accorded her the same courtesy he had previously shown to white witnesses by addressing her as "Miss Hamilton" rather than "Mary." See also *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Hickman v. Taylor*, 329 U.S. 495 (1947).


11. "[O]nce the witness has complied with an order to testify, he cannot thereafter retrieve the information involuntarily revealed, even if it subsequently develops that compelling the testimony violated constitutional rights. In such a predicament, the damage is irreparable. No remedies are available which can effectively cure the constitutional deprivation after the order has been unwillingly obeyed," United States v. Dickinson, 465 F.2d 496, 512 (5th Cir. 1972) (footnote omitted).

12. Id.
In United States v. Ryan the Court set out two alternatives available to one who reasonably believes in good faith that he is privileged from producing ordered evidence. The witness or party subject to the order may comply with the order to produce magazines or documents and still object to the introduction of the subpoenaed material or its fruits against him at a criminal trial. Or he may refuse to comply and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey with the concomitant possibility of a final adjudication of contempt if his claims are rejected on appeal. When a witness chooses noncompliance, relying on his fifth amendment privilege, he cannot be required to demonstrate his entitlement to the privilege, for this would be exactly the type of self-incriminating disclosure which the fifth amendment is designed to prevent. More than a century ago in United States v. Burr, and more recently in Hoffman v. United States, the Court set forth the general rule that once a witness has stated that his answer is self-incriminating, a court can demand no other testimony of the fact. The other alternative, compliance coupled with a motion to suppress at a subsequent criminal proceeding, is simply the exclusionary rule which forbids the use of illegally obtained evidence. But this after-the-fact protection, as compared with pre-compliance review in a contempt hearing, is not absolute, since a state court in a subsequent trial could conclude that the compulsory disclosure was not within the fifth amendment privilege and thus allow the evidence to be used.

13. 402 U.S. 532 (1971). Ryan sought relief from an unappealable interlocutory order directing him to comply with what he contended was an illegal subpoena duces tecum, arguing that substantial burdens associated with compliance justified immediate review of the order. The Court rejected the claim in the following terms:

> Of course, if [Ryan] complies with the subpoena, he will not thereafter be able to undo the substantial effort he has exerted in order to comply. But compliance is not the only course open to [him]. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him . . . . [The law provides] a choice between compliance with a trial court’s order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if [the] claims are rejected on appeal.

14. Id. at 532-33 (footnotes omitted; emphasis added).


17. "[I]f the witness, upon interposing his claim, were required to prove the hazard [of self-incrimination] in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." Hoffman v. United States, 341 U.S. 479, 486 (1951).


19. 341 U.S. 479 (1951); see note 17 supra and accompanying text.

20. This alternative can be used even if the fifth amendment privilege has not been raised. See United States v. Blue, 384 U.S. 251, 255 (1966). In Blue the Court held that even if the Government had acquired incriminating evidence (before the trial) in violation of the witness's fifth amendment privilege he would at most be entitled to suppress evidence and its fruits if they were used against him at a criminal trial. The Court has recognized or developed exclusionary rules where evidence has been obtained in violation of an accused's rights under the Constitution, federal statutes, or federal rules of civil procedure. See Mapp v. Ohio, 367 U.S. 643 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Mallory v. United States, 354 U.S. 449 (1957); Weeks v. United States, 232 U.S. 383 (1914).
These alternatives set out in Ryan are only available to a witness or party and are normally decided upon through the advice of counsel. But the risk of contempt in choosing not to comply is undertaken by the witness or party, not by his attorney. As pointed out in In re Watts & Sachs, it is the good faith of the attorney in giving the advice to his client and not whether he erred in judgment that determines whether the attorney may be held in contempt. It is conceivable that an attorney, as well as his client, could be held in contempt in a situation where the fifth amendment privilege was being used merely to obstruct justice. For example, if a witness at the instigation of his attorney continues to rely on the privilege following a valid grant of use and derivative use immunity, then a trial judge might be justified in concluding that such resistance to his authority amounted to criminal contempt. But in this type of situation, like any other criminal contempt involving an attorney, it is the attorney's good faith that is at issue and not whether he erred in judgment.

II. MANESS v. MYERS

In Maness v. Myers the Supreme Court unanimously reversed the petitioner's contempt conviction. The Court stated that compliance by McKelva could have caused irreparable injury because appellate courts cannot always "unring the bell" once the information has been released, and therefore the noncompliance procedure described in Ryan was a reasonable method for obtaining pre-compliance review. The Court rejected the respondent's argument that if petitioner's client had produced the magazines he would have been amply protected because in any subsequent criminal proceeding he could move to suppress, or object on fifth amendment grounds to the introduction of the magazines into evidence. Chief Justice Burger, writing for the Court, stated that "without something more"
McKelva would have been forced to surrender the very protection which the privilege is designed to guarantee. The Court distinguished the situation in *Maness* from that in *United States v. Blue* because in *Blue* the Government had already acquired the information from the witness who had not even asserted his fifth amendment privilege. In *Maness* the witness had not yet "let the cat out of the bag" and had vigorously asserted his privilege. Answering the respondent's contention that the privilege was not available in a civil proceeding the Court reaffirmed the established principle that the privilege can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.

The Court seemed primarily concerned with the possible chilling effect a threat of contempt might have upon an attorney's willingness to give honest advice concerning his client's fifth amendment privilege. The Court stated that the privilege would be drained of its meaning if counsel could be penalized for advising his client in good faith to assert it. Since a layman may not be aware of the precise scope, nuances and boundaries of his fifth amendment privilege, he is entitled to the good faith advice of his counsel concerning the privilege. If performance of a lawyer's duty to advise a client about the availability of the privilege exposes a lawyer to the threat of contempt for giving honest advice, it is highly conceivable that some advocates might lose their zeal for forthrightness and independence. The Court then restated the good faith test of *In re Watts*, and held that lawyers are not subject to the penalty of contempt for good faith advice to their clients to assert the fifth amendment privilege against self-incrimination in any proceeding embracing the power to compel testimony. Any other holding would deny the fifth amendment privilege against self-incrimination the means of its own implementation.

Though *Maness* was unprecedented in Anglo-American law, the Court did not expand the law surrounding the fifth amendment privilege or that concerned with the advice of counsel and its possible liabilities. In *Maness* the Court reaffirmed established principles set out in *Ryan*, *Kastigar*,

of immunity, *citing Kastigar v. United States*, 406 U.S. 441 (1972). Justice White's concurring opinion goes beyond the majority opinion on this point. Justice White stated that if a state clearly recognized the functional equivalent to a formal grant of immunity as declared in *Kastigar, Lefkowitz, and Garrity* then an attorney would have no business advising his client to disobey the court's order to answer. *See note 22 supra.*

31. 384 U.S. 251 (1966); *see note 20 supra* and accompanying text.
32. 419 U.S. at 462-63.
33. *Id.*
35. 419 U.S. at 465.
36. *Id.* at 466.
37. *Id.*
38. *See notes 5 and 21 supra and accompanying text.*
39. 419 U.S. at 468. Respondent made no contention as to lack of petitioner's good faith or reasonable grounds for assertion of a fifth amendment claim. *See note 13 supra and accompanying text.*
40. *See notes 22 and 34 supra and accompanying text.*
In re Watts. 42

The respondent, probably realizing that the weight of authority was against his assertions that the privilege was unavailable in a civil proceeding and that a motion to suppress in a subsequent criminal proceeding would afford ample protection, contended that the Court should uphold the contempt conviction and allow the trial court to make some inquiry into an assertion of the privilege against self-incrimination such as an in camera inspection. 43 The Court did not mention this in its opinion. Such a proposal, by no means novel, 44 would in effect wipe out over a century of constitutional litigation under the fifth amendment beginning with United States v. Burr 45 and culminating in Hoffman v. United States. 46

Respondent's proposal would, of course, make it easier for a trial judge to rule on a fifth amendment claim and, therefore, expedite the judicial process. But it would also have the effect of virtually nullifying the fifth amendment guarantee, since all individuals asserting the privilege would have to waive it on a demand for inspection by a judge. The Court has never before subjected the privilege to such pragmatic considerations. 47 Unlike other claims of privilege or questions of admissibility of evidence, a trial judge must make a ruling on the privilege against self-incrimination with little illumination as to the validity or efficacy of the claim. In Hoffman the Court laid out its test 48 for determining the validity of a claim of privilege against self-incrimination, stating that the privilege must be recognized when there is a mere possibility of danger and cannot be overruled unless it is perfectly clear that the witness is mistaken and that the answer cannot possibly tend to incriminate. 49

Though the expediency argument is not strong enough to influence the Court to drastically change the means of determining the validity of a fifth amendment claim, it might support an additional alternative to those set out

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42. See note 21 supra and accompanying text.
43. In summary, if subpoenaed documents cannot be examined by a trial court and some testimony be compelled (perhaps, both testimony and documents to be reviewed in camera by the court), frivolous claims of self-incrimination will result in the loss of much relevant evidence to litigants, thus severely damaging the judicial, truth-finding process.
44. Petitioner's contempt conviction should be upheld and this Court is respectfully urged to ground its decision on permitting some inquiry into an assertion of the privilege of self-incrimination by a trial court.

Supplemental Brief for Respondent at 5-6.

45. MODEL CODE OF EVIDENCE rule 204 (1942) provides: "[A] witness in an action is entitled under Rule 203 to refuse to disclose a matter, if he claims a privilege so to refuse on the ground that it will incriminate him, and the judge finds that the matter will incriminate the witness" (emphasis added).
46. 25 F. Cas. 38, 40 (No. 14,692e) (C.C. Va. 1807); see note 18 supra and accompanying text.
47. 341 U.S. 479 (1951); see note 17 supra and accompanying text.
48. 341 U.S. 479 (1951); see notes 17 and 19 supra and accompanying text.
49. Some states adhere to an earlier test which offers a more balanced and expedient approach. A classic statement of that test is: "[T]he court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer." Mason v. United States, 244 U.S. 362, 365 (1917); see C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 129, at 271 (1st ed. 1954).
in *Ryan*, especially when the incriminating evidence consists of documents or records. If a witness's claim of privilege has been overruled by a trial judge, it would seem reasonable to allow the witness to decide whether an *in camera* inspection would be to his benefit. If, for example, a witness is unsure about the validity of his claim, he may not desire to take the drastic course of noncompliance coupled with the possibility of a final adjudication of contempt. Of course, even after an *in camera* inspection by the judge, the other alternatives in *Ryan* should still be available to a witness if the judge still feels that the claim is invalid. Thus, an *in camera* alternative, used before a witness's decision is made as to the two alternatives in *Ryan*, would expedite proceedings to some degree and at the same time keep intact a witness's fifth amendment rights.

III. CONCLUSION

In *Maness*, the Court took no new strides in the development of the law surrounding the fifth amendment privilege or, more specifically, the law concerning an attorney's advice to his client about the privilege. The Court did make clear its position that a lawyer's advice to his client about the privilege is of paramount importance and, therefore, any good faith advice concerning the privilege should not be subject to the possible chilling effect that a threat of contempt can produce.

Though *Maness* was perhaps an inappropriate vehicle, the Court did not discuss any pragmatic considerations involved in the determination of the validity of a claim of the privilege against self-incrimination. The addition of an *in camera* alternative to the present alternatives set out in *Ryan*, without forfeiting those alternatives after the inspection, appears to be consistent with the Court's position concerning the determination of the validity of a fifth amendment claim and should, therefore, be adopted.

*Bruce John Stensrud*

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**Pre-Judgment Seizures and the Due Process Clause:**

**North Georgia Finishing, Inc. v. Di-Chem, Inc.**

After bringing suit against defendant corporation on an alleged indebtedness, plaintiff obtained a writ of garnishment on defendant's bank account. Defendant attacked as unconstitutional the Georgia statutes authorizing the

50. In a situation similar to the instant case an *in camera* inspection of possibly obscene magazines would seem most appropriate and expedient.

51. An example in which a witness might not choose the *in camera* alternative would be in a non-jury case. Also, a witness could decline to choose the *in camera* alternative for the simple reason that he does not trust the judge.

52. 402 U.S. at 531-32. The two alternatives are: (1) compliance with a subsequent motion to suppress at a later criminal trial, and (2) noncompliance with the concomitant possibility of a final adjudication of contempt if the witness's claims are rejected on appeal.

garnishment. Under these statutes a writ of garnishment may be issued in pending actions upon plaintiff's affidavit containing conclusory allegations only without the participation of a judge, provided that plaintiff file a bond for double the amount in controversy. The Georgia garnishment statutes failed to provide for pre-seizure notice to defendant, or for an early hearing at which plaintiff creditor was required to prove facts supporting the grounds upon which the writ was issued. Defendant could dissolve the garnishment only by filing a bond protecting the plaintiff against loss. The Georgia Supreme Court upheld the constitutionality of the statutes, and the United States Supreme Court granted certiorari. Held, reversed and remanded: The Georgia garnishment statutes do not satisfy the due process clause of the fourteenth amendment in that they place garnished property beyond the use of a defendant during litigation on the basis of a writ issued merely on plaintiff's conclusory allegations without judicial participation, and without notice or the opportunity for an early hearing. This procedure denies due process of law even though the garnishment may be dissolved upon the filing of a bond by defendant. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

I. REQUIREMENTS OF PROCEDURAL DUE PROCESS

The due process clause of the fourteenth amendment protects an individual from the taking of his property by a state through its judicial processes without due process of law. The United States Supreme Court has developed two fundamental concepts in the area of procedural due process. In the first of these principles, the Court has recognized that parties whose rights are affected by a state's judicial processes are entitled to a hearing and, in order to effectuate that right, are entitled to notice. The second principle, a corollary of the first, is that the notice and the opportunity for a hearing "must be granted at a meaningful time and in a meaningful manner."

Within these concepts, the Court has not adhered to any rigid formula in determining whether the requirements of procedural due process have been met. The form of the requisite hearing need only be "appropriate to the nature of the case" depending on the nature of the interests involved and

4. U.S. Const. amend. XIV, § 1 ("nor shall any state deprive any person of ... property without due process of law").
7. Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginative situation"); Inland Empire Council v. Millis, 325 U.S. 697, 710 (1945) (The requirements of due process of law "are not technical, nor is any particular form of procedure necessary."); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 351 (1938) (due process of law guarantees "no particular form of procedure; it protects substantial rights").
the availability and nature of subsequent proceedings. The hearing requirement is similarly broad. Traditionally, the states have been limited only by the requirement that the opportunity for a hearing must be given before the property is taken, except in extraordinary situations in which a valid state interest justifies postponing the hearing until after the event.

II. PRE-JUDGMENT SEIZURES AND DUE PROCESS

There are generally three types of statutory pre-judgment seizure provisions: attachment, garnishment, and sequestration. The application of due process considerations to these proceedings is a new development in the law evolving essentially through three cases decided by the Supreme Court since 1969. The Supreme Court first squarely addressed the issue of wheth-

11. Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971). These situations must be truly unusual. The Court has allowed outright seizure without opportunity for a prior hearing only in a few limited situations. First, in each case, the seizure has been necessary to secure an important governmental or public interest. Second, the need for very prompt action has been compelling. Third, the state has exercised strict control over this use of legitimate force: the person initiating the seizure has been a government official who determined under the standards of a narrowly drawn statute that the seizure was necessary in the particular case. Fuentes v. Shevin, 407 U.S. 67, 90-91 (1972). Pre-hearing seizure was upheld in the following cases: Ewing v. Mytinger & Casselberry Inc., 339 U.S. 594 (1950) (seizure of misbranded drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (seizure of assets of a financially troubled savings bank); Phillips v. Commissioner, 283 U.S. 589 (1931) (seizure of back taxes owed the federal government); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure of contaminated food shipments).
12. The effect of an attachment is to place a lien on a defendant's property. Typically, it is used to furnish security for the satisfaction of a judgment which the plaintiff might ultimately obtain. The purpose of such an attachment is to prevent a debtor from disposing of or removing his property from the state for the purpose of defrauding his creditors. Attachment may also be used to obtain quasi in rem jurisdiction over a nonresident defendant who owns property within the state. Harrison v. Morris, 370 F. Supp. 142, 146-47 (D.S.C. 1974). Unlike sequestration, an attachment does not deprive defendant physically of his property, since only defendant's ability to remove, conceal, or dispose of his property is impeded. Technically, the property remains in the hands of the court until judgment. If plaintiff obtains a judgment the property may be sold to satisfy it. Otherwise the lien is removed, and defendant may again freely dispose of his property. 370 F. Supp. at 148-49. A general discussion of attachment may be found in H. Oleck, DEBTOR-CREDITOR LAW 30 (1953).
13. Garnishment is similar to attachment and is often considered a specialized type of attachment. Typically the procedure is to place a lien on the property and credits of a debtor, which are in the possession of, or owed to the debtor by a third party who is called the garnishee. Frank F. Fasi Supply Co. v. Wigwam Inv. Co., 308 F. Supp. 59, 60-61 (D. Hawaii 1969). A good discussion comparing garnishment and attachment can be found in Comment, Constitutional Law—Garnishment—Prejudgment Wage Garnishment, in Absence of Condition Requiring the Special Protection of a State or Creditor Interest Violates the Due Process Clause of the Fourteenth Amendment, 22 Vand. L. Rev. 1400, 1401-02 (1969).
15. Prior to 1969, the United States Supreme Court addressed the issue of prejudgment seizures three times and in each case upheld the validity of state summary
er state laws authorizing pre-judgment seizures denied an individual due process of law in *Sniadach v. Family Finance Co.* Mrs. Sniadach attacked the constitutionality of the Wisconsin procedure by which her wages had been garnished. Justice Douglas, speaking for seven members of the Court, determined that there had been a deprivation of property by state action entitling the wage earner to due process. The question faced was whether the interim seizure of wages without a chance to be heard violated that constitutional requirement. Because of the absence of any extraordinary state or creditor interest which would justify such a summary procedure, the Court declared the Wisconsin statutes unconstitutional. However, the scope of precedent laid in *Sniadach* was unclear since Justice Douglas had emphasized that the nature of the property affected had a distinct influence on the requirements of due process and had noted the particularly odious nature of wage garnishments.

Immediately following the *Sniadach* decision there was substantial doubt as to whether due process demanded the same treatment in other pre-judgment seizures dealing with other types of property. That doubt seemed clearly resolved by *Fuentes v. Shevin*, a case in which consumers in Florida

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18. After bringing suit alleging a $420 debt owed by Mrs. Sniadach, Family Finance brought a wage garnishment action against her employer who promptly turned one-half of the debtor's salary over to the court in accordance with the Wisconsin statutes.
19. 395 U.S. at 342. This deprivation clearly existed even though Mrs. Sniadach was still entitled to a hearing determining the validity of the debt action at the trial of the suit brought against her. *Id.* at 342.
20. *Id.* at 340.
21. *Id.* at 339.
22. *Id.* at 340-41. Mr. Justice Douglas's majority opinion emphasized the socially harmful nature of wage garnishments in denying the existence of a valid state interest which would justify the summary seizure and satisfy due process.
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and Pennsylvania, who had purchased goods under revolving credit plans,25 attacked state statutes26 which authorized the summary seizure of chattels under a writ of replevin.27 The Court refused to draw distinctions between various kinds of property and the differing interests held by the parties in the property subject to seizure.28 Determining that there was no extraordinary situation which would justify the summary seizure,29 the Court held that due process had been denied by the replevin provision insofar as it denied the right to a hearing before the chattels were taken from the possessor.30

The Fuentes decision had an enormous impact as both state and federal courts quickly invalidated a wide range of creditor collection devices.31 Yet, less than two years later, in Mitchell v. W.T. Grant Co.,32 the Court retreated from the strict requirement of notice and a pre-seizure hearing established in the Fuentes decision. In Mitchell the Court was asked to consider the constitutionality of Louisiana statutory sequestration provisions33 which provided for pre-judgment seizure of property without the requirement of a prior hearing.34 Mr. Justice White, speaking for five members of the Court, found Fuentes distinguishable.35 In pre-judgment sequestrations in which consumer goods are seized, often the property is not solely that of the defendant debtor; both creditor and debtor have substantial property interests in the sequestered property. Recognizing that both interests must be protected, the majority concluded that the Louisiana statutory procedure affected "a con-

25. In Fuentes, debtor, a Florida resident, purchased consumer durables. Firestone, the creditor, retained title, but Mrs. Fuentes was entitled to possession. With $200 remaining to be paid, a dispute developed, Mrs. Fuentes stopped payment, and Firestone sought replevin. In the Pennsylvania companion case, three of the four appellants, purchasers of personal property under conditional sales contracts, attacked replevin of the property after defaults in the contract. The fourth, engaged in a dispute with her former husband, fought replevin of their child's personal belongings.
26. FLA. STAT. ANN. §§ 78.01-07, .08, .10, .13 (1964); PA. STAT. ANN. tit. 12, §§ 1821 (1967); PA. R. CIV. P. 1073.
27. See note 14 supra and accompanying text.
28. 407 U.S. at 88. The Court thus rejected the argument based on a very narrow reading of Sniadach and Goldberg v. Kelly, 397 U.S. 254 (1970) (where the Court held there must be a prior hearing before the termination of welfare benefits) that a prior hearing is required only with respect to the deprivation of basically "necessary" items. Id. at 88-90.
29. Id. at 90-93.
30. Id. at 96. The Court emphasized the following factors in its decision: the statutes did not limit the summary seizure to special situations demanding prompt action, e.g., where there was a danger that debtor would destroy or conceal the goods; the absence of effective state control of the proceedings since no state official participated in the decision to seek a writ, no state official evaluated the ground for the writ and there was no requirement that the creditor provide the court any information as to why it sought the writ. Id. at 93.
34. W. T. Grant Co., the creditor, sought the writ alleging an unpaid balance of $574.17 owed to it by Mitchell on the credit purchases of consumer durables. 416 U.S. at 601.
35. Id. at 612-13.
stitutional accommodation of the conflicting interests of the parties and determined that "the mere absence of a prior hearing was not a denial of due process." In particular, the Court examined the procedure established by the Louisiana statutes and found several ways in which the debtor was protected, all of which were absent in Fuentes. In Louisiana the writ of sequestration could issue only when the defendant was in a position to conceal, dispose of, waste, or remove the property, and then only when the nature of the claim and amount as well as the grounds relied upon for the issuance of the writ "clearly appear from specific facts." The Court also noted that the showing of grounds for the writ must be made to a judicial officer, who alone could authorize the writ. Finally, although the writ was obtainable ex parte without notice or hearing prior to seizure, the debtor could immediately seek dissolution of the writ unless the creditor proved the grounds on which the writ issued.

Mitchell indicated that the Supreme Court had stepped back from the principle stated in Fuentes. As long as the statutory procedure for pre-judgment seizures reflected a "constitutional accommodation" between the interests of the debtor and creditor such that the debtor's possessory interests in the seized property were sufficiently protected by the particular features of the state's procedure, due process could be satisfied without either notice or a hearing prior to the seizure. Though Justice Powell, concurring, expressed the view that Mitchell overruled Fuentes, no such intention was expressed by the majority, and the question of how far the Court had retreated from Fuentes remained the subject of much speculation.

36. Id. at 607.
37. Id.
38. The Court also noted two basic protections which were present in Fuentes. The creditor had to post a bond for double the amount in controversy to enable the debtor to collect damages if his claim on the merits was ultimately disallowed, and the debtor could regain possession by filing his own bond to protect the creditor. LA. CODE CIV. P. arts. 3501, 3507-08, 3574 (1961). See also Johnson, Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure, 38 Tul. L. Rev. 1, 21-22 (1963).
40. Id. art. 3501.
41. Id. arts. 281-83. Article 281 confined the authority to issue writs of sequestration to the judge in Orleans Parish, the parish where this case arose. Articles 282-83 provided that the county clerk also had the authority to issue the writ in every other parish. The Court specifically limited its approval of the Louisiana procedure to that in Orleans Parish. 416 U.S. at 611.
42. LA. CODE CIV. P. art. 3506 (1961).
44. 416 U.S. at 607.
45. Id. at 623 (Powell, J., concurring). This position has been supported by one authoritative commentary, The Supreme Court, 1973 Term, 88 Harv. L. Rev. 13, 71-72 (1974), and by a three-judge federal panel, Ruocco v. Brinker, 380 F. Supp. 432, 436 (S.D. Fla. 1974).
46. See notes 43, 45 supra. A major question seemed to involve the degree of
III. NORTH GEORGIA FINISHING, INC. v. DI-CHEM, INC.

In North Georgia Finishing, Inc. v. Di-Chem, Inc.\(^{41}\) the Supreme Court held that Georgia statutes authorizing garnishment of a debtor's bank account without notice or a prior hearing violated the due process clause of the fourteenth amendment,\(^{48}\) stating that the Georgia statute was vulnerable for the same reasons as the Pennsylvania and Florida statutes declared unconstitutional in Fuentes.\(^{49}\) The Court further recognized that the Georgia procedure possessed none of the "saving characteristics" of the Louisiana sequestration statute examined in Mitchell.\(^{50}\) Specifically, the Georgia garnishment writ was issuable on plaintiff's affidavit containing only conclusory allegations,\(^{51}\) and no judicial participation was required for the writ to issue.\(^{52}\) Moreover, there was no early hearing provision at which time creditor must prove the grounds relied on for issuance of the writ, and the debtor's only means of dissolving the writ was to post a bond protecting creditor.\(^{53}\) Following the Mitchell decision, a number of states were left to wonder whether their pre-judgment statutes were saved by a sufficient "constitutional accommodation"\(^{54}\) short of pre-seizure notice and hearing.\(^{55}\) Though in many ways the Court's decision in North Georgia Finishing was an enigmatic one,\(^{56}\) it helps to establish, together with Fuentes and Mitchell, a basic, if somewhat incomplete, framework within which states may examine their statutes.


47. 419 U.S. 601 (1975).
48. Id. at 606. The same result was also reached in Morrow Elec. Co. v. Cruse, 370 F. Supp. 639 (N.D. Ga. 1974), where subsequent to the ruling by the Georgia Supreme Court, a three-judge federal panel declared the same provisions unconstitutional.
49. 419 U.S. at 606.
50. Id. at 607.
52. GA. CODE ANN. § 46-102 (1974). This provision authorizes even a creditor's attorney, who need have no personal knowledge of the facts, to obtain the required affidavit.
54. See notes 38-42 infra and accompanying text.
55. The Texas sequestration statute was one which came under attack. Garcia v. Krause, 380 F. Supp. 1254 (S.D. Tex. 1974). There, a federal district court declared unconstitutional the Texas provision. TEX. REV. CIV. STAT. ANN. art. 6840 (1960); TEX. R. CIV. P. 696-716. The court found the sequestration statutes lacked the constitutional accommodations present in the Georgia sequestration statutes. In particular, while the Texas provisions required allegations of facts in order for writs to issue, they did not demand the specific allegation that the creditor feared loss, removal, or destruction of the property, or that the writ issue from a judge. Finally, there was no early hearing provision at which time there had to be a showing of probable cause if the writ was to be continued. In response to the Court's decisions in Mitchell and North Georgia Finishing, Texas recently enacted an amended article 6840. Although it stops short of providing a pre-seizure hearing, it does provide the basic accommodations found acceptable by the Court in Mitchell. TEX. REV. CIV. STAT. ANN. art. 6840 (Supp. 1975), amending ch. 44, § 1, [1887] Tex. Laws, 9 H. GAMMEL, LAWS OF TEXAS 828 (1898). The reaction of the courts in other states is discussed supra note 46.
56. See notes 63-69 infra and accompanying text.
If none of the "saving characteristics" of the Louisiana statutes are present, then it seems clear that state statutes authorizing any type of pre-judgment seizure violate due process of law. To this extent, Justice Powell's view, expressed in Mitchell, that Fuentes v. Shevin had been overruled, is refuted. This decision indicated that the Fuentes decision was still viable on the particular facts there involved. While Fuentes and Mitchell expressed the requirement of procedural safeguards in statutory replevin or sequestration procedures, North Georgia Finishing illustrated that such safeguards are also required in pre-judgment garnishment provisions. In addition, North Georgia Finishing also established that the principles of Fuentes and Mitchell are applicable to business corporations as well as "consumers who are victims of contracts of adhesion and who might be irreparably damaged by temporary deprivation of household necessities . . . ." Rejecting plaintiff's argument that those cases were limited to the application of due process to such consumers, the Court held that the possibility of irreparable injury inherent in a pre-judgment seizure is sufficiently great, even in a commercial setting, so that some procedural safeguards are required to prevent the risk of error in the seizure process.

The Supreme Court has left many crucial questions unanswered. Justice Blackmun, dissenting, argued that the "Court now has embarked on a case-by-case analysis . . . of the respective state statutes in this area. That road is a long and unrewarding one, and provides no satisfactory answers to issues of constitutional magnitude." In the meantime, many states are left to ponder the combined effect of Fuentes, Mitchell, and North Georgia Finishing on their statutes. In Mitchell the Court indicated characteristics which distinguished the Louisiana sequestration statutes from those struck down in Fuentes. Yet it was unclear whether the basis of the Mitchell holding was a new recognition of a need to accommodate the conflicting interests of debtor and secured creditor in sequestered property or the presence of procedural safeguards in the Louisiana system. While the Court in North Georgia Finishing did state that the Georgia garnishment statutes had none of the saving characteristics of the Louisiana system, it did not resolve the question. The garnishment process does not involve the conflicting interests of two parties, each claiming an interest in the seized property. Rather, pre-judgment attachment and garnishment allow seizure of a debtor's property by a simple creditor who has no interest in the particular property seized.

57. See notes 38-42 supra and accompanying text.
58. 416 U.S. at 623 (Powell, J., concurring).
59. Mr. Justice Stewart, borrowing a line from Mark Twain, remarks in his concurring opinion: "It is gratifying to note that my report of the demise of Fuentes v. Shevin seems to have been greatly exaggerated." 419 U.S. at 608.
60. 419 U.S. at 608.
62. 419 U.S. at 608.
63. 419 U.S. at 620 (Blackmun, J., dissenting); see note 82 infra.
64. See notes 62-63 supra and 65-69 infra and accompanying text.
65. See notes 38-42 supra and accompanying text.
66. See note 43 supra and accompanying text.
67. 419 U.S. at 607.
68. See notes 12-14 supra and accompanying text.
Though not discussed by the Court in North Georgia Finishing this aspect might be enough to distinguish it from Mitchell. The lack of conflicting property claims and, therefore, the lack of any valid state interest in attachment-garnishment situations might have allowed the Court to decide that a pre-judgment provision violated due process of law, even if the procedural safeguards of Mitchell had been present in the Georgia garnishment statutes. Yet, while the North Georgia Finishing decision provided no indication of the significance of the "constitutional accommodation" of conflicting property interests concept, since the concept had no application, the Court's failure to discuss the matter cannot be read as a rejection of the idea. The Court's failure to answer this question leaves the states in continuing doubt as to the validity of their pre-judgment attachment and garnishment statutes absent pre-seizure notice and hearing.

Furthermore, North Georgia Finishing offered no further definition of the "saving characteristics" concept. Specifically, the constitutionality of a state pre-judgment seizure provision requiring judicial issuance of the writ and a sworn allegation that the creditor fears destruction or loss of property, but none of the other "saving characteristics" discussed in Mitchell, has not been determined. The statutes considered in Mitchell, Fuentes, and North Georgia Finishing represented only the boundaries of a broad area, and while statutory procedures substantially the same as those in Louisiana are clearly acceptable under the principles of the due process clause, there are many potential statutory procedures which may differ somewhat from the approved Louisiana sequestration provisions. The Court gave little hint in Mitchell of the nature of the minimum procedural safeguards which are constitutionally required by the due process clause. In North Georgia Finishing the Court likewise refused to indicate the minimum procedural safeguards required of a pre-judgment seizure statute and did not address itself to any of the potential pre-judgment seizure provisions which may be attacked in the future.

The Court seemed intent on offering as little justification as possible for its decision in North Georgia Finishing. In many ways this reflects a continuing divergence in views existing among the members of the Court, represented on the one hand by a wide reading of Fuentes, and on the other, by pre-Sniadach thought. The Court has still not taken a definitive position on pre-judgment seizures and due process. North Georgia Finishing repre-

69. See notes 38-42 supra and accompanying text.
70. 419 U.S. at 614 (Blackmun, J., dissenting): "The Court, it seems to me, does little more than make very general and very sparse comparisons of the present case with Fuentes v. Shevin on the one hand, and with Mitchell v. W. T. Grant Co. on the other ...." Justices Brennan, Douglas, Marshall, and Stewart have consistently supported the wide reading of Fuentes. Justices Burger, Blackmun, and Rehnquist have consistently voted to narrow Fuentes. Justices Powell and White were the swing votes, siding with the majority in both Mitchell and North Georgia Finishing. For an analysis of the impact of the Nixon appointees see Note, Changing Concepts of Consumer Due Process in the Supreme Court—The New Conservative Majority Bids Farewell to Fuentes, 60 IOWA L. REV. 262 (1974). It should be noted that Fuentes was a 4-3 short-court decision. Justices Rehnquist and Powell had been confirmed but not yet seated. Therefore, the precise impact of Nixon's appointees cannot be determined.
sents a victory for those favoring a Fuentes outlook, but that victory is neither total nor permanent since the decision leaves the Court a wide field of controversy remaining with regard to provisions not as clearly deficient as those in Georgia.

However, it is possible to venture the prediction that judicial issuance of the writ and a prompt post-seizure hearing will be the basis of the minimum constitutional requirements of due process. Without such provisions it seems likely the statute will fail since the Court in Mitchell distinguished the Fuentes case on these points and emphasized that under the applicable Louisiana law there is "judicial control of the process from beginning to end." North Georgia Finishing gives additional support to this view by its focus on these defects in the Georgia garnishment statute.

Such a response should be the beginning of a sensible approach to the procedural problems of pre-judgment seizures and should signal a return to the traditional flexible standards of the due process clause. The Court should recognize that in its efforts to establish an equitable balance between the rights of the creditor and those of the debtor its decision in Fuentes went too far toward creating a rigid impracticable rule not in accordance with traditional notions of due process. Mitchell should be seen as a flexible compromise between the conflicting property interests of parties in sequestered goods, giving rise to the kind of extraordinary situation where a summary seizure is appropriate, while still recognizing and protecting the interests of the debtor.

Finally, North Georgia Finishing should be viewed as a traditional application of due process principles to garnishment and attachment statutes where absent the extraordinary situation present in sequestration there can be no taking without a prior hearing. Within this national framework the pre-judgment seizure provisions and the due process clause can exist in harmony.

IV. CONCLUSION

Although faced with the same general question for the fourth time in five years, the Court refused to make North Georgia Finishing, Inc. v. Di-Chem, Inc. a definitive announcement of its position on the due process requirements applicable to state pre-judgment seizure provisions, reflecting the fact that the Court itself has not yet decided what those requirements should be. In this rapidly changing area of law in which the Court has seemed to establish a rule and implicitly overrule it, and then modify the new rule, the

72. See notes 38-42 supra and accompanying text.
73. 416 U.S. at 616-18.
74. 419 U.S. at 607; see notes 51-53 supra and accompanying text.
75. See notes 4-11 supra and accompanying text.
76. Id.
77. See notes 38-42 supra and accompanying text.
80. See Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). Though the majority was able to distinguish Fuentes, Mr. Justice Powell, concurring, and Mr. Justice Stewart, dissenting, expressed the opinion that Mitchell overruled Fuentes. See note 45 supra and accompanying text.
final outcome remains uncertain. The only certainty is that the Court has indeed embarked on a state-by-state analysis of pre-judgment seizure provisions and that a great deal of controversy among the members of the Court remains to be concluded before a definitive rule is established.

North Georgia Finishing, Inc. v. Di-Chem, Inc. established that a statutory scheme possessing none of the "saving characteristics" of the Louisiana sequestration statute examined in Mitchell is unconstitutional. Although it is possible to predict that at least a prompt post-seizure hearing and judicial issuance of the writ will be required by due process principles, a definitive announcement of the constitutional minimum will have to await a later case.

E. John Justema

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82. Even before the decision in North Georgia Finishing one commentator suggested that the abandonment of the rigid Fuentes standard in Mitchell would require a case-by-case clarification. Phillips, Revolution and Counterrevolution; The Supreme Court on Creditors' Remedies, 3 Fordham Urban L.J. 1, 10-11 (1974).