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RECENT CASES

Constitutional Law—Dne Process—Replevin Statntes Allowing Seizure of Property Without Notice and Opportunity for Hearing Violate Due Process Clause of Fonrteenth Amendmeut

Appellant-debtors[1] purchased household items[2] from respondent-creditors under conditional sales contracts that permitted creditor repossession upon default.[3] When appellants allegedly defaulted, respondents summarily replevied the goods pursuant to the Florida and Pennsylvania statutes[4] that authorize prejudgment replevin of property without prior notice and opportunity for hearing. Appellants brought suit

1. The present action consolidates 2 independent suits. The first suit was brought in federal district court in Florida by a plaintiff who had refused to pay a final installment under a conditional sales contract because of seller's alleged refusal to service the goods as required by the contract. When seller replevied the goods, plaintiff brought suit for declaratory and injunctive relief against continued enforcement of the procedural provisions of the Florida replevin statute. Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970). The second suit was brought by 4 Pennsylvania plaintiffs who sought a permanent injunction against continued enforcement of the Pennsylvania replevin statute. Three of the 4, like the Florida appellant, had had their possessions seized under writs of replevin when they failed to complete their installment payments. The fourth plaintiff had a more bizarre experience—her son's clothes, furniture, and toys were replevied by her former husband after a child custody dispute. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971).

2. The Florida appellant had purchased a stove and a phonograph. The Pennsylvania appellants had purchased a bed, a table, stools, a stereo set, rings, a diamond watch, and a television roof antenna.

3. The contracts signed by the Florida appellant provided "in the event of default of any payment or payments, Seller at its option may take back the merchandise." Fuentes v. Faircloth, 317 F. Supp. 954, 956 (S.D. Fla. 1970). The contracts signed by the Pennsylvania appellants provided "[I]f I default in any payment . . . you or assigns may retake the merchancise . . . ." Epps v. Cortese, 326 F. Supp. 127, 130 (E.D. Pa. 1971).

4. FLA. STAT. ANN. §§ 78.01, 78.07, 78.08, 78.10, 78.13 (Supp. 1972-73); PA. STAT. tit. 12, § 1821 (1967); PA. R. CIV. P. 1073, 1076-77. In essence, these sections provide that any person whose chattels are wrongfully detained may ohtain a writ of replevin to recover them. The applicant must assert to the clerk that he is entitled to the writ and must file a security bond for double the value of the property. (Under Florida law, but not Pennsylvania law, the applicant must also file a complaint.) If the creditor fails to maintain his right to possession (under Florida law, if he fails to prosecute or loses the accompanying lawsuit), he has to pay the party entitled to the property the value of the property plus costs sustained by reason of the issuance of the writ. After the property has been seized, the debtor has 3 days in which to reclaim possession by posting his own security bond equal in amount to that posted by the creditor. If the debtor does not post bond, after the 3-day period the property is turned over to the creditor (pending final judgment in the repossession suit in Florida). Since under Pennsylvania law the creditor is not required to file a complaint, the Pennsylvania debtor must initiate a lawsuit himself if he is to get a post-seizure hearing.

challenging the constitutionality of these statutes on the ground that by authorizing the state's agents to repossess property without first providing the possessor with notice and an opportunity to be heard, the statutes allow deprivation of property without due process of law and thus violate the fourteenth amendment.[5] Respondents asserted that the due process clause requires a preseizure hearing only for takings of "necessary" property, not household goods; the ex parte repossessions were only temporary and therefore not "deprivations" within the meaning of the fourteenth amendment; and that appellants had waived any right to preseizure hearings by signing eontracts that expressly granted repossession rights to the creditors. The United States District Courts for the Districts of Florida and Eastern Pennsylvania adopted respondents' position.[6] On direct appeal to the United States Supreme Court, *held,* vacated and remanded. Absent compelling state or creditor interests or contractual waiver, state statutes authorizing replevin of property without prior notice and an opportunity for a hearing violate the due process clause of the fourteenth amendment.[7] *Fuentes v. Shevin,* 407 U.S. 67 (1972).

Replevin is an ancient form of action[8] that continues to have modern statutory vitality as a creditor's remedy to recover goods from a defaulting debtor,[9] because its summary repossession procedures protect the chattels from destruction, misuse, or concealment and conserve the state's financial resources and administrative time.[10] Modern replevin is initiated by plaintiff's posting bond and claiming that specified goods belonging to him are in defendant's unlawful possession. A writ of replevin is then issued commanding the sheriff to seize the goods from the defendant, to keep them in custody for a fixed time, and, if defendant does not post a counterbond in that time, to turn the goods over

5. Appellants further contended that the prejudgment replevin procedures violated the search and seizure provision of the fourth amendment. The Court, however, did not reach this issue.

6. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).

7. Relying upon this decision, a federal district court has declared Tennessee's replevin provisions unconstitutional. *See* Mitchell v. State, Civil No. 72-241 (W.D. Tenn., Sept. 28, 1972).

8. Replevin is a possessory action that arose at the end of the twelfth or the beginning of the thirteenth century. The procedure evolved to combat the harshness of distraint, a process whereby landowners were empowered to seize summarily the personal goods of their tenants until the landowner's claim was satisfied. J. COBBEY, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN 1 (1890). *See generally* J. WILKINSON, THE PRACTICE IN THE ACTION OF REPLEVIN (1834).

9. The modern action of replevin is a hybrid of common-law replevin and common-law detinue, the latter heing a remedy for an unlawful detention of chattels. Comment, *Laprease and Fuentes: Replevin Reconsidered,* 71 COLUM. L. REV. 886, 888 (1971).

10. *See, e.g.,* Epps v. Cortese, 326 F. Supp. 127, 135 (E.D. Pa. 1971).

to the plaintiff.[11] As in other prejudgment creditor remedies,[12] plaintiff's claim is heard ex parte and thus defendant cannot contest the action until after the goods have been repossessed.[13] This kind of prejudgment seizure provision was found constitutional by the Supreme Court in *McKay v. McInnes.*[14] In *McInnes,* the Court in a per curiam opinion upheld the validity of a prejudgment attachment effected without prior notice or opportunity to be heard, apparently on the rationale of the lower court that, since the attachment was immediately followed by a judicial proceeding in which notice was given and the parties were allowed to be heard, the procedure does not constitute a sufficient "deprivation" to violate the due process clause. The *McInnes* decision remained undisturbed for 40 years until the landmark case of *Sniadach v. Family Finance Corp.*[15] impliedly overruled *McInnes*[16] by holding that the due process clause of the fourteenth amendment requires notice and an opportunity for hearing prior to prejudgment wage garnishment. The *Sniadach* Court emphasized that wages were a "specialized type of property," the garnishment of which would impose tremendous hardship on the debtor.[17] This emphasis, however, produced conflicting decisions on the question whether property other than wages should be accorded the due process safeguards enunciated in *Sniadach.* On one side, several courts applied *Sniadach* to strike down summary prejudgment procedures.[18] For example, in *Laprease v. Raymours Furniture Co.*[19] the creditor, pursuant to New York law, replevied a bed, chest, highchair, and other household goods without giving the debtor an opportunity for a hearing. The court declared that these items were as "specialized" as the wages in *Sniadach,* since they were necessary for day-to-day living and were property the "taking of which on the unilateral command of an adverse party 'may impose tremendous hardships' on the purchaser . . . ."[20] The court therefore concluded that replevy

11. *See, e.g.,* note 4 *supra.*

12. Other creditor remedies, for example, are garnishment and attachment. These remedies, like replevin, involve involuntary dispossession of the defendant—attachment seizes property in the debtor's possession, but garnishment seizes the debtor's funds, effects, or credits in the possession of a third party. *See* 22 VAND. L. REV. 1400, 1401 (1969).

13. *See, e.g.,* note 4 *supra.*

14. 279 U.S. 820, *aff'g per curiam* 127 Me. 110, 141 A. 699 (1928).

15. 395 U.S. 337 (1969), *noted in* 22 VAND. L. REV. 1400 (1969).

16. *See* 1969 DUKE L.J. 1285, 1290.

17. 395 U.S. at 340.

18. *E.g.,* Aaron v. Clark, 40 U.S.L.W. 2756 (N.D. Ga., May 4, 1972) (garnishment statute held unconstitutional); Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972) (repossession statute held unconstitutional). Goldberg v. Kelly, 397 U.S. 254 (1970), in which an administrative regulation terminating welfare benefits was held unconstitutional, did little to resolve the conflict.

19. 315 F. Supp. 716 (N.D.N.Y. 1970).

20. *Id.* at 722.

of the goods without notice and an opportunity for hearing denied the debtor due process of law. On the other side, a few courts restricted the scope of *Sniadach* to prejudgment garnishment of wages.[21] In *Brunswick Corp. v. J & P Inc.*[22] Brunswick replevied bowling equipment sold to J & P under a conditional sales contract when J & P failed to make a payment. The *Brunswick* Court distinguished *Sniadach* as a "unique case involving a specialized type of property" and inapplicable to an action to enforce a security interest.[23] In light of decisions like *Laprease,* in which the property involved was held "necessary" to one's existence, and *Brunswick,* in which the property was held "unnecessary," several commentators felt that *Sniadach* and its progeny had employed a test of balancing the interests of the state and creditor against those of the debtor to determine, in each factual context, whether due process required notice and an opportunity for hearing.[24] If the state or creditor interest outweighed the interest of the debtor, the summary prejudgment procedure would not be violative of due process.[25] Even in situations in which the debtor interest seems certain to prevail, however, the courts may confront the additional problem of the creditor's attempting to secure the debtor's waiver of due process rights.[26] Although the Supreme Court has stated that due process rights may be waived by contract,[27] most courts have declined to find a waiver when there is a standard form contract and a great disparity of bargain-

21. *See, e.g.,* Wheeler v. Adams, 322 F. Supp. 645 (D. Md. 1971) (replevin statute upheld); Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970) (foreclosure statute upheld).

22. 424 F.2d 100 (10th Cir. 1970).

23. *Id.* at 105.

24. *See* Comment, *Provisional Remedies in New York Reappraised Under Sniadach v. Family Finance Corp.: A Constitutional Fly in the Creditor's Ointment,* 34 ALBANY L. REV. 426 (1970); Note, 49 N.C.L. REV. 763 (1971); Note, *Forcible Prejudgment Seizures,* 25 SW. L.J. 331 (1971); Comment, *Replevin: A Due Process Prescription for an Ancient Writ,* 45 TEMP. L.Q. 259 (1972). One author suggested that there were no cogent reasons for limiting *Sniadach* to wage garnishment so long as the following factors were present: "(1) a prejudgment seizure without notice and an opportunity to be heard; (2) a 'strong' (i.e., corporate or institutional) creditor versus a 'weak' consumer-debtor; (3) an absence of 'special' creditor interest; (4) an absence of 'special' state interest (i.e., where the property involved is not dangerous to health and does not otherwise affect the public interest); and (5) a type of property intrinsically valuable to the debtor but only extrinsically valuable to the creditor (e.g., where the nature of the property is relevant to the creditor only to the extent that it is convertible into money or its equivalent, but where the debtor does find its inherent qualities important)." Comment, *Provisional Remedies in New York Reappraised Under Sniadach v. Family Finance Corp: A Constitutional Fly in the Creditor's Ointment, supra,* at 431.

25. *See* note 24 *supra.*

26. *See, e.g.,* Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

27. National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964).

ing power.[28] Furthermore, for an attempted waiver to be effective, it must be clear that the party asserted to have contractually relinquished his rights did so with full knowledge of those rights and the consequences of his action;[29] in situations involving low-income consumers, the likelihood is greatly increased that courts will find that a full understanding of the waiver provisions did not exist.[30] A few courts,[31] however, disregarded this pro-consumer view of waiver and suggested that the mere signing of a standard form contract that expressly authorizes repossession effectively waives a debtor's rights to notice and a hearing, whether or not the debtor is a low-income consumer.[32] In the absence of an authoritative Supreme Court ruling, however, post-*Sniadach* decisions have left effectively unresolved the questions whether a preseizure notice and opportunity for a hearing are constitutionally required for any or all types of property, and whether the due process safeguards can be readily waived.

In the instant case the Court first examined the history of procedural due process and found that a fair system of adjudication cannot be achieved unless the disputing parties are afforded the opportunity to be heard at a meaningful time and in a meaningful manner. In creditor's action cases, according to the Court, the right to be heard serves to protect an individual from substantively unfair or mistaken deprivations of property and, in order to fully effectuate this purpose, the right must be granted before the deprivation occurs. The Court found that no other safeguard for the debtor—such as posting bond prior to repossessing the

28. *See, e.g.*, Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Comment, *The Growth of Procedural Due Process Into a New Substance: An Expanding Protection for Personal Liberty and a "Specialized Type of Property . . . In Our Economic System,"* 66 NW. U.L. REV. 502, 550 & n.218.

29. *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) (contractual waiver effective because parties had equality of bargaining power and knowledge of consequences); *cf.* Brookhart v. Janis, 384 U.S. 1 (1966) (alleged waiver of right to cross-examine witnesses held ineffective); Johnson v. Zerbst, 304 U.S. 458 (1938)(no waiver of right to counsel); Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937)(no waiver of right to have property valued upon evidence).

30. *See, e.g.*, Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), *aff'd*, 405 U.S. 191 (1972). *See also* Comment, *Abolition of the Confession of Judgment Note in Retail Installment Contracts in Pennsylvania*, 73 DICK. L. REV. 115, 116 (1968).

31. *See, e.g.*, McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971); Lawson v. Mantell, 306 N.Y.S.2d 317 (Sup. Ct. 1969).

32. The Court in Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970), *vacated and remanded sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972), declared that whether the 2 contracting parties were both commercial or whether one was a commercial party and the other a private individual was a "distinction without a difference as far as Due Process is concerned." *Id.* at 957. In Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971), *vacated and remanded*, 407 U.S. 67 (1972), dealing with an alleged waiver of fourth amendment rights, the court suggested in dictum that the signing of the conditional sales contract by the vendee probably constituted a valid waiver. *Id.* at 137.

chattels—is as effective as a hearing in preventing the arbitrary deprivation of property and that a temporary repossession pending final adjudication nonetheless constitutes a "deprivation" within the ambit of the due process clause. Therefore, the Court concluded that due process requires notice and an opportunity for a hearing before any property may be seized. The Court, however, did recognize that the repossession of property may constitutionally precede a hearing when an important governmental or public interest is at stake, when a special need exists for prompt action, or when a government official, pursuant to specific statutory authority, determines that summary seizure is necessary. In applying these principles to the instant case, the Court found that the Florida and Pennsylvania replevin provisions did not provide for a preseizure opportunity to be heard or confine their application to specified extraordinary situations. Furthermore, although the appellants did not have complete title to the goods in question, they did have a sufficient interest, in the Court's view, to warrant the protection of the due process clause. The Court stated that *Sniadach's* emphasis on the "necessity" of wages to one's livelihood as a basis for requiring a hearing prior to garnishment of wages did not mean that "unnecessary" property should receive less protection under the fourteenth amendment, because the due process clause, in both letter and spirit, encompasses all significant property interests. Turning to the waiver issue, the Court stated that due process rights may be contractually waived if the language of the contract amounts to a waiver on its face and the waiver is voluntarily, intelligently, and knowingly made. In the instant case, however, the Court found that the waiver provisions of appellants' conditional sales contracts constituted merely a statement of the sellers' rights to repossession and that appellants thus had not waived their constitutional rights to a preseizure hearing.[33] Therefore, since all significant property interests, including those of appellants, are protected by the fourteenth amendment, and since appellants had not waived their procedural due process rights, the Court concluded that the state provisions allowing the prejudgment replevy of chattels without prior hearing and an opportunity to be heard deprived appellants of their property without due process of law.[34]

33. The Court recognized that there had been no bargaining over the contractual terms between the parties who, in any event, were far from equal in bargaining power. The Court also noted that the purported waiver provisions in the standard form contracts had been in relatively fine print and that appellees had made no showing that appellants were aware of the significance of the provisions. 407 U.S. at 95-96.

34. In his dissenting opinion, joined by Chief Justice Burger and Justice Blackmun, Justice White expressed his feeling that the invalidated provisions protected the interests of both creditor and debtor. He declared that if there is a default, it is essential that the creditor be allowed to

The *Fuentes* decision is significant for its holding that the fourteenth amendment protects every significant property interest and not just the "specialized" property enunciated in *Sniadach*; at least two unresolved problems, however, leave the ultimate impact of the case unclear. First, the decision's effect upon the constitutionality of the creditor "self-help" provisions of the Uniform Commercial Code remains to be seen. Section 9-503 provides: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action." This provision thus permits a creditor either to reclaim property without providing the possessor *any* procedural rights if the state's agents are not used to obtain the goods, or to institute judicial proceedings for repossession, in which case *Fuentes* now requires a preseizure opportunity for hearing. This disparity in the availability of procedural due process safeguards might be justified on the ground that personal repossession or self-help provisions lack sufficient nexus with the state to constitute state action, which is required for a violation of the fourteenth amendment.[35] However, since the state creates the contractual rights involved, and since the state statute condones the self-help procedure, there would appear to be sufficient state action to invoke the protection of the fourteenth amendment.[36] If a court were to allow a creditor to deny the debtor procedural safeguards through self-help, the scope of the *Fuentes* holding would be severely limited.[37] Even if state action is not found, the prophylactic purpose of the *Fuentes* rationale nevertheless could be advanced by construing "default" a pre-

repossess; and if there is no default, then the debtor has an opportunity for a full hearing and may recover damages if he prevails. 407 U.S. at 99.

35. U.S. CONST. amend, XIV, § 1. "[N]or shall any State deprive any person of life, liberty, or property . . . ." *Id.*

36. Comment, *supra* note 28, at 513-14. "Since private activities serving a public function have been held to implicate the state in conduct proscribed by the fourteenth amendment . . . and to have invaded first amendment rights . . . it would only constitute one further step to hold that private activity avoiding any public agency's involvement, but aimed at disserving public interests in the protection of constitutional rights, is imbued with sufficient state action." *Id.* at 512 n.42. *See* Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), in which the court declared §§ 9-503 and 9-504 unconstitutional. The court reasoned that, since the statutes embodied the policy of the state and since the statutes had an impact on the provisions of the conditional sales contracts involved, there was sufficient state action to invoke the protection of the due process clause. *Cf.* Hall v. Garson, 430 F.2d 430 (5th Cir. 1970). In *Hall*, plaintiffs challenged a Texas statute that gave a landlord a lien on personal property of a tenant and allowed seizure without opportunity for a hearing. In deciding upon jurisdiction, the court found "state action" under Shelley v. Kraemer, 334 U.S. 1 (1948). *But cf.* Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970).

37. *Cf.* Smith, *Sniadach and Summary Procedures: The Constitution Comes to the Marketplace*, 5 IND. LEGAL F. 300, 327 (1972).

requisite for any repossession, as necessitating a judicial determination, rather than a creditor determination.[38] In addition, any agreement providing that the creditor should determine what constitutes default would be subject to attack on the grounds of disparity of bargaining power[39] or unconscionability.[40] Under this approach, section 9-503 could be held to meet the dictates of *Fuentes*, and the necessity of drafting a new statute could be avoided.[41] Therefore, whether the UCC self-help provisions are declared unconstitutional as violative of the due process clause, or whether they are construed to require judicial scrutiny before any seizure takes place, the result is the same—the debtor must be given an opportunity for a hearing before his property may be seized.

Given that the *Fuentes* rationale will reach the UCC's self-help provisions, however, a second problem remains: the Court seems to have disregarded several pragmatic implications of its decision that tend to impose unreasonable burdens on creditors. Although the Court intimated that notice and a hearing are not necessary prior to repossession if a creditor can show the immediate danger of a debtor destroying or concealing the disputed goods,[42] it failed to give any guidelines on what would constitute a sufficient showing of this danger. Since the proceeding would be ex parte, would anything short of a notarized letter from the debtor declaring his obstructive intentions be sufficient proof? Although it has been suggested that the danger of concealment or damage should not be a valid creditor contention,[43] this view overlooks what

38. *See* Comment, *Replevin: A Due Process Prescription For an Ancient Writ*, 45 TEMP. L.Q. 259, 276 (1972). The creditors in *Fuentes* could not have circumvented this requirement, even though some of the debtors *admitted* default, because those admissions came after the summary seizures. Consequently, the unconstitutional seizures occurred *prior* to an impartial determination on whether there had been a default.

39. *See* Santiago v. McElroy, 319 F. Supp. 284 (E. D. Pa. 1970) (lease providing for statutory distress procedure held not waiver); *cf.* Swarb v. Lennox, 314 F. Supp 1091 (E.D. Pa. 1970), *aff'd*, 405 U.S. 191 (1972) (clause providing for confession of judgment held not waiver). *See generally* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

40. UNIFORM COMMERCIAL CODE § 2-302(1) provides: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may limit the application of any conscionable clause as to avoid any unconscionable result." *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); *cf.* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.* at 449.

41. *See* note 38 *supra*.

42. 407 U.S. at 93.

43. *See* Comment, *supra* note 38, at 265. Proponents of this view reason that, since the creditor constantly is seeking payment of the debt prior to repossession, the debtor has already

seems to be a realistic appraisal of the situation: when a defaulting debtor receives notice of an action in which he will lose the goods, he no longer has any incentive to protect them. Creditors, being unable to protect their interests in the chattels prior to a hearing, may increase the cost of credit to offset losses from missing or damaged goods and expenses from the required judicial hearings.[44] As a result, low-income consumers, who utilize installment credit more than high-income consumers[45] and are marginal credit risks, may be unable to secure any credit.[46] Absent new legislation designed to prevent either a significant increase in credit costs or reduction in credit extension, it would thus appear that the practical results of *Fuentes* may negate its beneficial consumer protection aspects.[47] Furthermore, a creditor may attempt to avoid the increased costs that *Fuentes* entails by securing the debtor's waiver of due process rights in the contract. The Court did suggest that if the contractual language is clear and amounts to a waiver on its face, the waiver would be effective. Nevertheless, since the "courts indulge every reasonable presumption against waiver,"[48] and since the clause would always be subject to the arguments of unconscionability and disparity of bargaining power,[49] it seems unlikely that creditors would be able validly to incorporate such a provision into standard form contracts. Ultimately, the loss of state replevin statutes and the UCC self-help provisions, coupled with the practical difficulties in validly providing for contractual waiver, may impair significantly a creditor's ability to protect his security interest in goods prior to the judicial hearing required by *Fuentes*.

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had ample opportunity to conceal or damage the property if he so intends.

44. Adams v. Egley, 338 F. Supp. 614, 622 (S.D. Cal. 1972).

45. FEDERAL TRADE COMM'N, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS IX (MARCH 1968).

46. *Cf.* Comment, *Laprease and Fuentes: Replevin Reconsidered*, 71 COLUM. L. REV. 886, 904 (1971); Special Project, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, 772-73 (1968). *But see* Comment, *supra* note 38, at 268.

47. For a general discussion concerning the low-income consumer see D. CAPLOVITZ, THE POOR PAY MORE (1967).

48. Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937).

49. *See* notes 39-40 *supra*.

Constitutional Law—Right to Counsel—Absent Waiver, No Defendant May Be Imprisoned Unless Represented By Counsel At Trial

Without representation by counsel, petitioner, an indigent, was convicted of a misdemeanor[1] punishable by imprisonment up to six months and was sentenced to serve 90 days in jail. He subsequently sought habeas corpus relief from the state supreme court alleging that the state's failure to provide a court-appointed attorney contravened his sixth amendment right to counsel.[2] In denying relief, that court adopted the state's contention that petitioner had no right to counsel because the sixth amendment's reach against the states was limited by the Supreme Court's holding in *Duncan v. Louisiana*[3] that the sixth amendment right to trial by jury does not extend to persons accused of offenses punishable by less than six months imprisonment.[4] On writ of certiorari to the United States Supreme Court, *held,* reversed. Absent a knowing and intelligent waiver, no defendant may be imprisoned unless he was represented by counsel at his trial. *Argersinger v. Hamlin,* 407 U.S. 25 (1972).

Judicial recognition of an indigent's right to counsel has emerged in two separate lines of historical development—one federal, and the other state. This right was first recognized to exist within the federal system in 1938 with the Supreme Court's decision in *Johnson v. Zerbst.*[5] The Court in *Johnson* held that, absent an intelligent waiver, an indigent who is accused of a felony has an absolute right to counsel. Four years later, the District of Columbia Circuit in *Evans v. Rives*[6] declared that an indigent misdemeanant was entitled to court-appointed counsel, since

1. Petitioner was charged in Florida with carrying a concealed weapon, an offense punishable by imprisonment up to 6 months and a $1,000 fine.

2. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Many state constitutions also guarantee this right. *E.g.,* GA. CONST. § 2-105. *But cf.* FLA. CONST. art. 1, § 16 (an accused "[s]hall have the right to . . . be heard in person, by counsel or both . . . ."). There was no evidence presented to show that petitioner had waived his right to counsel. Since a waiver must be an intentional relinquishment of a known right, Johnson v. Zerbst, 304 U.S. 458 (1938), and since every reasonable presumption is made against a waiver, Walker v. Johnston, 312 U.S. 275 (1941), waiver could not have been implied.

3. 391 U.S. 145 (1968) (crime punishable by imprisonment up to 2 years made trial by jury mandatory).

4. 236 So. 2d 442 (Fla. 1970) (4-3 decision).

5. 304 U.S. 458 (1938) (accused convicted of counterfeiting Federal Reserve notes and sentenced to 4½ years in the penitentiary).

6. 126 F.2d 633 (D.C. Cir. 1942) (accused convicted of nonsupport of his minor child and sentenced to one year in jail).

the Constitution makes no distinction between loss of liberty for long and short periods of time.[7] Soon thereafter, the Federal Rules of Criminal Procedure were promulgated; Rule 44[8] guaranteed representation to the indigent regardless of the alleged offense. The Federal Criminal Justice Act of 1964, however, modified Rule 44 to deprive petty offenders of their prior statutory right to counsel.[9] In contrast to the relatively simple federal development, recognition of an indigent's right to appointed counsel in state courts has been characterized by conflict and inconsistency. In 1932, the Supreme Court, in *Powell v. Alabama,*[10] held that when the defendant in a case involving capital punishment is unable to employ counsel and is incapable of presenting his own defense, the court must appoint counsel to meet the due process requirements of the fourteenth amendment.[11] Ten years later, the Court in *Betts v. Brady,*[12] a noncapital felony case, established the "special circumstances" test. The Court reasoned that, although due process might require appointed counsel in some criminal proceedings, representation is not always necessary to ensure a fair trial. Therefore, the Court concluded that the necessity of appointing counsel should be determined on an ad hoc basis.[13] The *Betts* test was expressly overruled in 1963 by the landmark decision of *Gideon v. Wainwright,*[14] in which petitioner, who was not represented by counsel at trial, had been convicted of a felony.[15] The *Gideon* Court, holding for the first time that the sixth amendment was applicable to the states,[16] proclaimed the right to counsel to be funda-

7. *Id.* at 638.

8. Rule 44 was amended in 1966 as Rule 44(a), but the right to counsel provision was not altered. FED. R. CRIM. P. 4, comment 1.

9. 18 U.S.C. § 3006A(b) (1970). A petty offense is "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both . . . ." 18 U.S.C. § 1 (1970). The legislative history shows Congress recognized that indigents should have the right to counsel in all misdemeanor cases, but because of limited resources reserved the right to the more serious charges. H.R. REP. No. 1209, 88th Cong., 2d Sess. (1964).

10. 287 U.S. 45 (1932).

11. The fourteenth amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." By relying solely on the fourteenth amendment, the Court by-passed any discussion of the sixth amendment and its applicability to the states.

12. 316 U.S. 455 (1942).

13. The Court reasoned that the fourteenth amendment demands "fundamental fairness." The trial court must weigh the "totality of facts" in order to determine if that right will be denied when the accused is brought to trial without counsel. The Court believed that any "hard and fast rules" would overlook the uniqueness of every criminal proceeding. *Id.* at 462.

14. 372 U.S. 335 (1963) (conviction without the aid of counsel in noncapital felony case).

15. The Court stated that Betts v. Brady, 316 U.S. 455 (1942), failed to follow the well-considered reasoning of Powell v. Alabama, 287 U.S. 45 (1932), which recognized the need for counsel even for the intelligent and educated layman. *Id.* at 345.

16. The Court concluded that fundamental guarantees incorporated in the Bill of Rights

mental and therefore applicable to "any person haled into court." On the same day, the Court in *Patterson v. Warden*[17] vacated an indigent's misdemeanor conviction and remanded the case to the state court for further consideration in light of *Gideon*. However, Mr. Justice Harlan, in a concurring opinion, indicated that the *Gideon* rationale should be confined to its factual context—trials of accused felons.[18] In attempting to implement the ambiguous *Gideon* holding, the states adopted a variety of standards for providing counsel to indigent misdemeanants.[19] Each jurisdiction, however, was able to justify its own standard under a defensible interpretation of *Gideon*. First, California was the only state to guarantee counsel in all criminal proceedings.[20] Secondly, a minority of states withheld counsel in all misdemeanor cases by restricting *Gideon* to its facts.[21] Thirdly, the majority of states took various intermediate positions based on three basic rationales. Some states used a discretionary test similar to that employed in *Betts*.[22] Other states granted court-appointed counsel only to indigents eligible for jury trial.[23] The remaining states held that no convicted indigent could be imprisoned unless he had been represented by counsel at trial. To comply with this rule, these jurisdictions adopted either of the following standards: providing counsel whenever incarceration is authorized for the offense charged;[24] or assigning counsel when imprisonment is not

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apply not only to federal forums, but also to state proceedings through the due process clause of the fourteenth amendment. The Court used the same rationale employed in making the first, fourth, fifth, and eighth amendments applicable to the states. *Id.* at 339-44.

17. 372 U.S. 776 (1963).

18. "Whether the rule should be applied to *all* criminal cases need not now be decided." 372 U.S. at 351.

19. *See generally* Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 719-22 (1968).

20. CAL. CONST. art. 1, § 13; *see In re* Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965); CAL. PEN. CODE § 859 (West Supp. 1972) ("If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him.").

21. *E.g.*, Watkins v. Morris, 179 So. 2d 348 (Fla. 1965) (accused not entitled to counsel for traffic violation, a misdemeanor); Fish v. State, 159 So. 2d 866 (Fla. 1964) (accused misdemeanant not entitled to counsel). The Florida Supreme Court in the instant case refused to grant petitioner counsel under the *Fish* doctrine. *Contra*, Brinson v. Florida, 273 F. Supp. 840 (S.D. Fla. 1967). The Florida Supreme Court in *Watkins v. Morris*, a post-*Gideon* case, expressly refused to grant misdemeanants counsel until the necessity should have been "authoritatively determined" by the Supreme Court of the United States. 179 So. 2d at 349.

22. *See, e.g.*, COLO. REV. STAT. ANN. § 39-21-3 (1963); CONN. GEN. STAT. ANN. § 54-81(a) (1958). The criteria to be used for granting right to counsel have not been clearly enunciated by either statute or court opinion. Junker, *supra* note 19, at 727.

23. This test is also called the "6-month rule" and is equivalent to the criteria of the Federal Criminal Justice Act of 1964. In the instant case, the Florida Supreme Court analogized to Duncan v. Louisiana, 391 U.S. 145 (1968), in picking a 6-month cut-off. 236 So. 2d at 443. *But cf.* Junker, *supra* note 19, at 707.

24. *E.g.*, State v. Borst, 228 Minn. 388, 154 N.W.2d 888 (1967); *In re* Stevenson, 254 Ore.

only authorized but is likely to be imposed.[25] Therefore, prior to the instant decision, lack of uniformity characterized the states' recognition of an indigent's sixth amendment right to counsel; depending on the state, indigent misdemeanants, charged with the same offense, might be guaranteed court appointed counsel or no counsel at all.[26]

In the instant case, the Court first reviewed previous sixth amendment cases[27] and concluded that conditioning the availability of rights upon the seriousness of the offense has a valid historical basis only for the right to trial by jury.[28] Turning to an examination of the previous right to counsel cases, the Court noted that *Powell v. Alabama* emphasized the extreme disadvantages an accused often faces when taken to trial without counsel.[29] Moreover, the Court noted that *Gideon* emphasized that representation is necessary to ensure a fair trial.[30] The Court explained that, although *Powell* and *Gideon* involved felons, their reasoning was equally applicable to lesser offenders. The Court also asserted that the trials of petty offenders often "bristle" with complex legal issues, that plea decisions can be critically important in criminal cases,[31] and that the enormous volume of misdemeanor cases can reduce due process safeguards to "assembly-line justice." Relying on the

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94, 458 P.2d 414 (1969); 19 CASE W. RES. L. REV. 367 (1968).

25. *Accord,* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *Standards Relating to Providing Defense Services* § 4.1 (1968). "Counsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors or otherwise." *Id.* Two methods based on the likelihood of incarceration have been used for deciding if counsel should be assigned: an analysis of the particular case, a *Betts* approach, or an analysis and elimination of those classes of cases that rarely carry jail sentences, although such sentences are authorized by statute. Junker, *supra* note 19, at 709. With the exception of California, all states have attempted to limit the assignment of counsel in some manner in order to avoid the great expense of providing every indigent accused with free legal services. *E.g.,* City of Toledo v. Frazier, 10 Ohio App. 2d 51, 59, 226 N.E.2d 777, 782 (1967).

26. In spite of this confusion, the Supreme Court declined to clarify the scope of its *Gideon* holding. Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364 (1965), *cert. denied,* 385 U.S. 907 (1966); DeJoseph v. Connecticut, 3 Conn. Cir. 624, 222 A.2d 752, *cert. denied,* 385 U.S. 982 (1966).

27. The specific rights dealt with in the cases reviewed by the Court include the right to a public trial, to be informed of the charge, to confront witnesses, and to compulsory process for obtaining witnesses.

28. The right to jury trial is for historical reasons limited to offenses punishable by more than 6 months imprisonment. Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

29. 287 U.S. at 68-69. Disadvantages cited by the Court include ignorance of the science of law, inability to determine the validity of an indictment, and unfamiliarity with the rules of evidence.

30. 372 U.S. at 344.

31. The Court believed that counsel should be present when an accused pleads guilty in order to ensure that he understands the significance and consequences which may result from the plea and that he is treated fairly by the prosecution.

sixth amendment, the Court then concluded that, absent a valid waiver,[32] no person may be imprisoned unless represented by counsel at his trial.[33]

In a concurring opinion, Mr. Justice Powell[34] challenged the majority opinion on both constitutional and practical grounds. He rejected the no-counsel, no-prison mandate, arguing that it fails to consider criminal sanctions such as fines[35] or other nonimprisonment penalties[36] that involve deprivation of property rights and could produce consequences as serious as imprisonment. As an alternative, Mr. Justice Powell recommended a three-fold test to determine the need for counsel.[37] By weighing the complexity of the offense, the probable sentence to be imposed, and the individual factors of the specific case, Justice Powell suggested that a court could determine whether or not counsel should be appointed; he explained that this methodology would avoid the pitfalls that he believed to be inherent in the majority opinion—the need for a time-consuming pretrial investigation to determine whether imprisonment may be ordered, the subsequent limitation on sentencing if counsel is not appointed, the burdens on state resources by increasing the use of court-appointed counsel, and the resulting delays which will tax an already overburdened court system. Mr. Justice Powell reasoned that this standard fulfills constitutional due process requirements and guarantees fairness at trial.[38]

Although the instant decision promises to guarantee greater fairness at trial and to foster long-range reform of the criminal system, it initially presents serious constitutional and practical questions. First, the sixth amendment does not condition the right to counsel upon distinctions between penalties that entail deprivation of liberty and penalties that entail deprivation of property; further, the due process clause, through which the sixth amendment is made applicable to the states,[39] includes protection of property rights as well as life and liberty. The

32. Although the Court did not discuss the criteria for a valid waiver, these requirements have been outlined in other Supreme Court cases. *See* note 2 *supra.*

33. Chief Justice Burger in his concurring opinion briefly explained how the new rule might be applied. He recommended that the trial judge make a pretrial "predictive evaluation" based on the special circumstances to determine whether counsel should be appointed. *See* note 25 *supra.*

34. Mr. Justice Rehnquist joined in the concurring opinion.

35. The due process clause of the fourteenth amendment applies to life, liberty, and property but makes no distinctions among them.

36. For example, loss of one's drivers license.

37. Although Mr. Justice Powell did not mention *Betts v. Brady,* his test is similar in approach to the *Betts* rationale.

38. "Due Process . . . embodies principles of fairness rather than immutable line drawing . . . ." 407 U.S. at 49.

39. Gideon v. Wainwright, 372 U.S. 335 (1963); *see* note 16 *supra.*

majority, however, fails to discuss any rationale that would justify requiring counsel for those accused facing imprisonment while denying counsel to those facing fines.[40] In *Fuentes v. Shevin*,[41] decided on the same day as the instant case, the Court held that any deprivation of a significant property interest requires due process of law under the fourteenth amendment. The two cases might be distinguishable on their facts and their reliance on different amendments, but their common emphasis on fairness and procedural due process would seem to make the divergent holdings significantly inconsistent. Secondly, the Court's decision raises a constitutional question of equal protection for the solvent accused. If an indigent is convicted without counsel and has not waived representation, the court must limit the sentence to a fine. A solvent accused, however, will be subjected to the full range of criminal sanctions whether he has legal assistance or not. Apparently the Court equates the solvent accused's failure to retain counsel with a valid waiver.[42] Hence the range of possible sanctions is predicated upon the questionable distinction of wealth. Moreover, since indigents have the right to court-appointed counsel during interrogation under *Miranda v. Arizona*,[43] does *Argersinger* imply that a failure to provide representation to an indigent at this stage of the criminal proceeding precludes a subsequent prison sentence? In addition, the *Argersinger* holding raises the question of its applicability to the military court-martial.[44] Aside from these constitutional questions, the instant holding promises to present serious problems in its practical implementation. Since present resources are inadequate to provide all misdemeanants with counsel,[45] courts will be forced to select the misdemeanants who are to receive counsel. This process will involve additional pretrial investigation, and will force a judge to decide if counsel should be appointed before he has heard all the relevant facts and testimony.[46] Since many indigent misdemeanants will not face jail sentences simply because no counsel will be available, the legislative design and deterrent effect of imprisonment will

40. Justice Douglas dismissed the issue when he stated, "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here, petitioner was in fact sentenced to jail." 407 U.S. at 37.

41. 407 U.S. 67 (1972).

42. This conclusion is implicit in the instant decision, since an accused who fails to qualify as an indigent has 2 choices: hire private counsel or proceed to trial without a lawyer.

43. 384 U.S. 436 (1966).

44. The district court of Hawaii held that *Argersinger* is binding in court-martial proceedings. Daigle v. Warner, 41 U.S.L.W. 2161 (D. Hawaii Aug. 31, 1972) (serviceman entitled to counsel in summary court-martial where sentenced to one month incarceration).

45. *See* Comment, 23 U. FLA. L. REV. 428 (1971).

46. Junker, *supra* note 19, at 709.

be greatly reduced. In addition, under the Court's recent decision in *Tate v. Short*,[47] which invalidated "dollar-a-day" statutes, fines may also lose their punitive effect, since an accused who qualifies as an indigent under state law will probably be too impecunious to pay a fine.[48] Consequently, if the court fails to appoint counsel for an indigent, the judge may have no effective sanction to impose. The instant decision thus will require significant increases in the availability of defense counsel if the prison sentence is to function as an effective sanction.[49] Studies have shown, however, that providing counsel for all accused indigents will be feasible only if the number of law school graduates is increased, more paraprofessionals are used, and funding for legal aid and public defender programs is expanded.[50] But, in spite of these short-term problems, *Argersinger* should produce long-range benefits to the judicial system. To provide counsel on such an increased scale, more efficient and innovative methods for handling criminal cases will be required.[51] The instant decision should encourage courts to experiment with new judicial techniques for treating misdemeanants and should spur legislatures to appropriate more funds.[52] Finally, requiring counsel for misdemeanants may precipitate new reforms similar to those which the public defender and legal aid programs initiated in the aftermath of *Gideon*.[53] Should the burden on state financial and human resources become overwhelming, the instant decision could produce a major restructuring of the criminal system. One authority[54] has suggested that certain crimes now classified as misdemeanors or petty offenses should be completely abolished[55]—thus freeing state courts and law enforcement agencies to concentrate on more serious criminal offenses.[56] Although extreme, this

47. 401 U.S. 395 (1971) (indigent may not be incarcerated for inability to pay fine).

48. This conclusion, of course, depends on the state's definition of "indigent."

49. *See Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389 (1966).

50. Allison & Phelps, *Can We Afford to Provide Trial Counsel for the Indigent in Misdemeanor Cases?*, 13 WM. & MARY L. REV. 75, 83-94 (1971). For a discussion of costs see Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1259-64 (1970).

51. *See* Note, *supra* note 50, at 1266-67.

52. *Id.* at 1267.

53. *See* Allison & Phelps, *supra* note 50, at 84-85; Silverstein, *The Continuing Impact of Gideon v. Wainwright on the States*, 51 A.B.A.J. 1023 (1965); Graham, *A Lawyer Now For All Who Risk Jail*, N.Y. Times, June 18, 1972, § 4, at 6.

54. N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL (1970).

55. Included in this category might be drunkenness, drug abuse, gambling, disorderly conduct and vagrancy, abortion, deviant sexual behavior, and some forms of juvenile delinquency. *Id.* at 3.

56. *Id.* at 2. The authors contend that the criminal law is poorly designed to enforce private morality by labeling victimless acts "criminal" and recommend no imposition of criminal sanctions for these offenses.

suggestion illustrates the crisis regarding the treatment of lesser offenses that the states will experience subsequent to *Argersinger* unless their legislatures provide significant and innovative reforms.

Federal Rules of Civil Procedure—Class Actions—Class Action Alleging Similar Injury by Separate Defendants Who Acted Similarly but Independently Allowed Under Rule 23(b)(3)

Plaintiff brought a class action in federal district court on behalf of all persons who had borrowed from several Oregon pawnbrokers during a six-month period, alleging that each defendant had committed similar[1] violations of the Truth in Lending Act.[2] Plaintiff, who had dealt with only one of the defendants, claimed that questions common to the class predominated over questions that affected only individual class members, that a class action was superior to other available methods of adjudicating the controversy, and, consequently, that the action should be allowed as a class suit under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Defendants contended that the group plaintiff claimed to represent did not constitute a single class, but rather was composed of several classes, each comprising those persons who had borrowed from each defendant, and that plaintiff therefore could not represent those persons who had borrowed from other defendants. On defendants' motion to dismiss, the United States District Court for the District of Oregon, *held*, motion denied. In a class action under Rule 23(b)(3), a representative plaintiff may sue multiple defendants on behalf of a class all of whose members allege similar injury as the result of independent acts by separate defendants. *LaMar v. H & B Novelty & Loan Co.*, 55 F.R.D. 22 (D. Ore. 1972).

The Federal Rules of Civil Procedure, as amended in 1966, grant the federal courts broad power to settle multiparty claims in a single action. The rules that control class actions[3] and joinder of parties[4] de-

1. Defendants were charged with failure to disclose the total amount to be financed and the amount of the finance charge expressed in an annual percentage rate. LaMar v. H & B Novelty & Loan Co., 55 F.R.D. 22 (D. Ore. 1972).

2. 15 U.S.C. §§ 1601-13, 1631-44, 1661-65 (1970). The purpose of the Act is to protect consumers against unfair billing practices by requiring full disclosure of finance charges. The Act imposes a statutory penalty of not less than $100 per violation.

3. FED. R. CIV. P. 23.

4. FED. R. CIV. P. 19-20.

emphasize formal procedural requirements[5] but provide general guidelines, allowing courts to examine the practical considerations of individual cases[6] to determine whether the amalgamation of disputes will promote judicial economy and avoid prejudice to the parties.[7] Rule 23(a) establishes four requirements for any class action: the class must be so numerous that joinder is impracticable; there must be common questions of law or fact; the claims or defenses of the representative party must be typical of those held by the rest of the class; and the representative party must fairly and adequately protect the interests of the class. Rule 23(b)(3), which was intended to facilitate damages actions for which class treatment is desirable and convenient but not essential,[8] imposes two further conditions: the common questions must predominate, and the class action must be superior to other methods of adjudication. The decisions reflect a judicial view that the class action requirements possess considerable flexibility. A class action involving a class numbering as few as thirteen members has been upheld;[9] and although the class must be defined with some precision,[10] exact numbers need not be specified.[11] Courts have held that representative plaintiffs who claim

5. Former Rule 23, which took effect in 1938, made a tripartite division of the situations in which class actions were allowed. The 3 categories, "true," "hybrid," and "spurious," became obscure and uncertain. The restrictions prevented a suit that could not be pigeonholed but that was otherwise amenable to class treatment from being maintained as a class action. Z. CHAFFEE, SOME PROBLEMS OF EQUITY 244-49 (1950); 3B J. MOORE, FEDERAL PRACTICE ¶ 23.01 [8], at 23-22 (2d ed. 1969).

6. "[T]he district judge, unhampered by traditional classifications, is given a large measure of discretion in balancing conflicting interests." Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1214 (1966).

7. Cohn, *supra* note 6, at 1204; Advisory Committee's Note to Rule 23(b)(3), 39 F.R.D. 98, 102-03 (1966).

8. The Advisory Committee described the circumstances in which a class action under Rule 23(b)(3) is appropriate as follows: "In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above [cases under Rule 23(b)(1)-(2)], but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Advisory Committee Note, *supra* note 7.

9. Dale Electronics, Inc. v. R.C.L. Electronics, Inc., 53 F.R.D. 531 (D.N.H. 1971) (patent infringement case in which class of 13 defendants was permitted because their locations in different parts of the country made joinder not only impractical, but impossible). A class action in which class members numbered no more than 5 was not allowed. Bonner v. Texas City Independent School Dist., 305 F. Supp. 600 (S.D. Tex. 1969). "For the class to be large enough to permit a class suit, impossibility of joinder is not required. . . . [I]t is clear that no numerical test is possible." C. WRIGHT, LAW OF FEDERAL COURTS 308 (2d ed. 1970).

10. Classes designated "Indo-Hispano, also called Mexican-American and Spanish-American" and "poor" held too vague to define the class properly. Lopez Tijerina v. Henry, 48 F.R.D. 274 (D.N.M. 1969), *appeal dismissed*, 398 U.S. 922 (1970).

11. Fischer v. Kletz, 41 F.R.D. 377, 384 (S.D.N.Y. 1966) (stock fraud case; held, "[T]he

damages different from those of other class members,[12] or allege reliance on a prospectus different from those relied on by other class members,[13] satisfy the requirement of typical claims.[14] Although the adequate representation requirement prohibits a class action when the interests of class members are adverse,[15] inadequate representation alone does not compel dismissal; courts may realign a class to avoid adversity[16] or permit representation to be strengthened by the addition of supplemental parties.[17] Courts have held that the requirement that a class action be superior to other methods of adjudication is satistifed in cases for which class treatment is useful only in preliminary stages of the litigation.[18] The flexibility of Rules 23(a) and 23(b)(3) is best manifested by the manner in which the courts have resolved the issue whether common questions of law or fact exist and predominate. To determine whether common questions predominate, courts often must undertake to assess considerations of judicial economy.[19] When, for example, separate proofs by each class member are necessary to assure adequate representation of his interests, and substantial judicial diseconomies therefore result, courts have denied class action treatment, reasoning that individual questions predominate over common ones.[20] Upon a

failure to state the exact number in the class does not preclude the maintenance of a class action.")

12. Minnesota v. United States Steel Corp., 44 F.R.D. 559, 566-67 (D. Minn. 1968) (antitrust class action; plaintiff's claims held "typical" despite "substantially different damages" sustained by members of plaintiff class).

13. In a securities fraud case the court construed Rule 23 very broadly, holding representative plaintiff's claims "typical" although he had relied entirely on the third prospectus issued by defendant and other members of plaintiff class had relied on defendant's first and second prospectuses. Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

14. Professor Moore criticizes this requirement, concluding, "[T]here is no need for this clause, since all meanings attributable to it duplicate requirements prescribed by other provisions in Rule 23." 3B J. MOORE, *supra* note 5, ¶ 23.06-2, 23-325.

15. City of Chicago v. General Motors Corp., 332 F. Supp. 285, 288 (N.D. Ill. 1971) (action on behalf of Chicago residents to enjoin sale of defendants' automobiles unless equipped with pollution control devices not allowed; plaintiff could not adequately represent the class because some members would be adversely affected by the relief sought).

16. Sol S. Turnoff Drug Distrib., Inc. v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 51 F.R.D. 227, 233 (E.D. Pa. 1970) (power of court under Rule 23(c)(4)(B) to divide class into subclasses justified maintenance of class action; class may be subdivided at later stage of proceedings if interests become adverse).

17. The Advisory Committee stated, "[T]he court may rule . . . that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type." Advisory Committee Note, *supra* note 7, at 104.

18. Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968).

19. *See* Note, *Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendment*, 52 MINN. L. REV. 509, 530 (1967). "[T]here seems to be a continuum upon which the courts will draw a line at some point when the disunity of the class exceeds these factors which unify it." *Id.* at 514.

20. Purdes v. Carvel Hall, Inc., 301 F. Supp. 1256, 1259 (S.D. Iowa 1969) (predominance of common questions doubtful because proof required extensive evidence from each class member).

determination that the adjudication of common questions would save time and expense,[21] common questions are deemed predominant, even if individual questions must be resolved later in separate trials.[22] In class actions against multiple defendants, an allegation that a conspiracy or a common course of action by defendants injured each member of the plaintiff class has been held to satisfy the common question requirement.[23] The necessity of an allegation that defendants' concerted action injured each plaintiff, although not a requirement of Rule 23, is apparent from the requirements for joinder of parties under the Federal Rules. For proper joinder of multiple defendants, Rule 20(a) requires not only that a common question exist, but also that any right to relief arise from the same transaction, occurrence, or series of transactions or occurrences.[24] Paralleling their approach to the Rule 23 requirements, the courts have afforded the Rule 20(a) series of transactions requirement a liberal construction. In *United States v. Mississippi*,[25] defendant voting registrars contended that joinder of defendants was improper because their alleged offenses were separate torts against separate members of plaintiff class. The Supreme Court allowed the class action, holding that plaintiffs' allegation that defendants had acted as part of a state-wide system of discriminatory voter registration was sufficient to meet the requirement of a series of transactions.[26] In a proper case, plaintiffs may avoid the difficulty of meeting Rule 20 joinder conditions by bringing suit against defendants as a class.[27] Although this device has proved useful in patent infringement cases under Rule 23(b)(1)[28] and actions for declaratory and injunctive relief under Rule 23(b)(2),[29] the device is impractical for Rule 23(b)(3) actions because defendants may voluntarily remove themselves from the class.[30] Rule 23(c)(2)-(3) pro-

21. Rogers v. Coburn Fin. Corp., 53 F.R.D. 182, 183 (N.D. Ga. 1971) (class treatment in Truth in Lending Act case not permitted because "[c]learly no economy whatever would be gained . . . since the court would still be required to physically examine several thousand disclosure statements . . . .").

22. *E.g.*, Weiss v. Tenney Corp., 47 F.R.D. 283 (S.D.N.Y. 1969) (securities fraud); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967) (antitrust).

23. *E.g.*, Morris v. Burchard, 51 F.R.D. 530, 532 (S.D.N.Y. 1971) (securities fraud); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967) (antitrust).

24. FED. R. CIV. P. 20(a).

25. 380 U.S. 128 (1965).

26. *Id.* at 142-43.

27. FED. R. CIV. P. 23(a): "One or more members of a class may sue *or be sued* as representative parties on behalf of all . . . ." (emphasis added).

28. Dale Electronics, Inc. v. R.C.L. Electronics, Inc., 53 F.R.D. 531 (D.N.H. 1971); Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714 (N.D. Ill. 1968).

29. Jehovah's Witnesses v. King County Hospital Unit 1, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd mem.*, 390 U.S. 598 (1968).

30. Benzoni v. Greve, 54 F.R.D. 450, 455 (S.D.N.Y. 1972) (securities fraud case; one reason

vides that a judgment in an action under subdivision (b)(1) or (b)(2) binds all whom the court finds to be members of the class; in a (b)(3) action, prospective members may request exclusion from the class and thereby avoid the effect of a judgment. The maximum reach of a permissible class action against multiple defendants under Rule 23(b)(3) is illustrated by *Contract Buyers League v. F & F Investment*.[31] In that case, plaintiffs, a class of black home buyers, brought suit against defendant sellers, alleging numerous illegalities in connection with the sale of used residential property. Denying defendants' contention that the suit was not a proper class action because it consisted of "separate claims by separate plaintiffs against separate defendants and requiring separate proofs,"[32] the court allowed the class action to stand. The court found that, although individual questions would remain, the allegation of concerted action by defendants in similarly unconscionable circumstances constituted a predominant common question. On the basis of its finding that each unfair contract was the result of a greater scheme of exploitation created by the other unfair contracts and the system of "blockbusting" in which all the defendants participated, the court concluded that defendants had acted in concert.[33] Courts consistently have held that an allegation of defendants' concerted action is necessary for plaintiff class to maintain an action against multiple defendants.[34]

In the instant case, the court indicated two reasons for its reluctance to dismiss the action. First, it emphasized that Rule 23 should be construed broadly to afford effective relief for small claimants, especially the poor and the ignorant, and to prevent windfall immunities for law violators. Secondly, the court noted that many borrowers would be barred from relief by the statute of limitations if the instant class action

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for court's refusal to order the establishment of two defendant subclasses was that "many [of the defendants] would probably opt out of the class if it were established").

31. 48 F.R.D. 7 (N.D. Ill. 1969) (decision on issue whether suit could be maintained as a class action). For decision on defendants' motions to dismiss for insufficiency of the claims see 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd sub nom.* Baker v. F & F Investment, 420 F.2d 1191 (7th Cir. 1970).

32. 48 F.R.D. at 10.

33. *Id.* at 10-12.

34. In a case decided the month before the instant case, a Missouri district court allowed plaintiff class, composed of persons who had bought "lifetime memberships" in a health club, to maintain a class action under the Truth in Lending Act against the 4 finance companies that had bought the notes executed by plaintiffs to the health club. The facts are similar to the instant case, in that separate members of plaintiff class alleged injury from separate defendants. Although no allegation of concerted action by defendants was mentioned in the opinion, the fact that all defendants used the same forms and extended credit through the health club as a conduit makes a common course of conduct among defendants apparent. Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307 (E.D. Mo. 1971).

were dismissed.[35] The court first considered whether the requirements of Rule 23(a) had been met. After listing the requirements, the court found that each had been satisfied. Without discussing reasons for its findings, the court stated the following conclusions: first, 33,000 borrowers represented a class too numerous to join; secondly, the issue whether the Truth in Lending Act applies to pawnbrokers was a common question; thirdly, despite plaintiff's failure to allege personal injury by each defendant, the similarity of the injuries made his claims typical of the class; and, finally, plaintiff, as a member of the class, would adequately represent its interests. Turning to the additional requirements of Rule 23(b)(3), the court concluded, again without explanation, that the size of the class rendered a class action the superior means of adjudicating the controversy. Although recognizing that other courts had allowed class actions only against multiple defendants acting in concert, the court found nothing in Rule 23 or prior case law[36] to indicate that the common question requirement cannot be satisfied when multiple defendants act independently. It reasoned that defendants' alleged violation of the same law in the same way, giving rise to the same statutory relief, created a common question of law predominating over questions affecting individual members. Holding that all the requirements of Rule 23(a) and 23(b)(3) therefore had been satisfied, and without mentioning the joinder provisions of Rule 20(a), the court denied defendants' motion to dismiss the suit as a class action.

The instant decision may have a beneficial impact in some situations, but the court's analysis is questionable. The decision, as applied to the Truth in Lending Act and other federal consumer protection legislation,[37] undeniably could have far-reaching consequences.[38] By allowing one plaintiff, as a private attorney general, to maintain an action against numerous members of an industry when a common pattern of wrongful conduct can be shown, the instant decision strengthens

35. It is not clear under what circumstances the statute of limitations is tolled for class actions that are dismissed. *See* J. MOORE, *supra* note 5, ¶ 23.9[3] at 23-1651 to -1654. *See generally* Comment, *Class Actions Under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationale,* 13 VILL. L. REV. 370 (1968).

36. *See* cases cited notes 23 & 31 *supra.*

37. For a discussion of 3 consumer protection bills now pending in Congress and the beneficial effects of enforcement by class actions see Newberg, *Federal Consumer Class Action Legislation: Making the System Work,* 9 HARV. J. LEGIS. 217 (1972). For another point of view see Millstein, *Federal Consumer Protection—Are Class Suits an Answer?,* 26 RECORD OF N.Y.C.B.A. 664 (1971).

38. The need for improved protection of consumers is demonstrated by the Kerner Commission Report, which shows unfair credit practices and consumer sales as one of the 12 major sources of discontent in ghettos. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 139-40 (1968).

the enforcement power of consumer protection legislation. Additionally, the decision meets the objections of large companies that consumer protection legislation is enforced only against major, affluent members of an industry.[39] The decision makes practical consumer actions against groups of small companies that, separately, are effectively judgment-proof. The court's failure, however, to question whether defendants were properly before the court under the joinder provisions of Rule 20(a)[40] is the primary defect of the decision. Plaintiffs' complaint, by alleging independent wrongful acts by defendants that injured members of plaintiff class separately, fails to state a right to relief arising from the same series of transactions. That the Rule 20(a) restriction is not simply formalistic but is necessary to the orderly process of judicial administration may be illustrated by examples of actions that are clearly prohibited by the series of transactions requirement but might be brought if it were abandoned. A logical application of the rationale of the instant decision would permit a class action by shareholders of many different corporations if the plaintiffs allege that each corporation, acting independently, violated the same securities laws in the same way by issuing misleading prospectuses. The rationale of the decision also might allow a class suit by all whiplash victims against the negligent drivers who hit the cars plaintiffs were driving. The development of a rationale that ignores Rule 20 and supports anomalous consequences, however, does not seem necessary to reach salutary effects on the enforcement of consumer protection legislation. If plaintiffs can establish that substantially all Oregon pawnbrokers use forms that violate the Truth in Lending Act by failing to disclose the cost of credit, he can show that industry-wide use of the same form prevented any member of the class from turning to a competitor to obtain a fairer bargain.[41] Plaintiff could then invoke the rationale of the court in *Contract Buyers League*[42] that each particular unfair credit contract depended upon a series of discriminatory transactions—the execution of unfair credit contracts by other defendants—to support his contention that defendants' actions pursuant to an industry-wide practice constituted concerted action that resulted in injury to each member of the plaintiff class. The allegation of such concerted action should meet the series of transactions requirement of Rule 20(a) as construed by the Supreme Court in *United States v. Mississippi*.[43]

39. Newberg, *supra* note 37, at 225; Note, *Class Actions Under the Truth-in-Lending Act*, 47 NOTRE DAME LAWYER 1305, 1316 (1972).

40. The point is not raised in defendants' appeal brief. Brief for Appellants, LaMar v. H & W Novelty & Loan Co., Civil No. 72-1485 (9th Cir. 1972).

41. This argument is forcefully made by the court in the landmark case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

42. 48 F.R.D. 7 (N.D. Ill. 1969).

43. 380 U.S. 128 (1965).

Securities Regulation—Securities Act of 1933—Access Of All Offerees To Additional Desired Information Required For Section 4(2) Private Offering Exemption

Pursuant to section 20(b) of the Securities Act of 1933,[1] the Securities and Exchange Commission sought a permanent injunction to halt the sale of unregistered securities by defendant Continental Tobacco Company in violation of sections 5(a) and 5(c) of the Act.[2] Defendant argued that its common stock offering to 38 persons, including 35 ultimate purchasers, most of whom signed investment letters acknowledging receipt of defendant's prospectus, personal contact with its counsel and officers, and access to all requested company records, was a private offering entitled to the section 4(2) nonpublic offering exemption[3] from the Act's registration requirements.[4] In denying injunctive relief, the

1. Securities Act of 1933, § 20(b), 15 U.S.C. § 77t(b) (1970). Failure to comply with the registration provisions of § 5 of the Securities Act of 1933 may result in civil liability under § 12(1), 15 U.S.C. § 77*l*(1) (1970); criminal liability under § 24, 15 U.S.C. § 77x (1970); or an injunctive action under § 20(b).

2. Securities Act of 1933, §§ 5(a), (c), 15 U.S.C. §§ 77e(a), (c) (1970), provides:

"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

. . . .

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title."

A preliminary injunction issued against Continental in 1967 for the violation of §§ 5(a) and 5(c) had led to the dissolution and subsequent reorganization of the company's management. The instant proceeding concerned the efforts of the new directors to refinance the company in 1969 and 1970.

3. Securities Act of 1933, § 4(2), 15 U.S.C. § 77d(2) (1970), provides: "The provisions of section 77e [§ 5] of this title shall not apply to—. . . (2) transactions by an issuer not involving any public offering."

4. The offerings were made at several presentations in private homes and in hotels in Fort Lauderdale, Florida, and Baltimore, Maryland. The offerees included the family, friends, and business associates of holders of the illegal 1967 Continental offering. At least one purchaser was told that although the company was a speculative venture and offered no firm promises of profit, stock was available to anyone who wanted to purchase it. Another purchaser, a dentist, openly displayed the prospectus in his office and solicited as additional offerees his secretary, colleagues

federal district court adopted defendant's contention as a matter of law.[5] On appeal to the United States Court of Appeals for the Fifth Circuit, *held*, reversed and remanded. An issuer claiming the section 4(2) nonpublic offering exemption from the Act's registration requirements must explicitly prove that every offeree held a personal relationship with the issuer through which the offeree had actual access to all information concerning the company that he requested or required for making an informed investment decision. *SEC v. Continental Tobacco Co.*, 463 F.2d 137 (5th Cir. 1972).

Congress enacted the Securities Act of 1933 to protect investors by requiring the disclosure of information necessary for informed investment decisions.[6] Accordingly, section 5 of the Act requires the filing of a registration statement detailing this necessary information for every security offered or sold by an issuer, underwriter, or dealer through the facilities of interstate commerce or the mails.[7] Reflecting the congres-

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and patients. At least 2 purchasers never had access to a prospectus, and 2 were given no opportunity to meet with officers of the company prior to purchase. SEC v. Continental Tobacco Co., 326 F. Supp. 588 (S.D. Fla. 1971), *rev'd*, 463 F.2d 137 (5th Cir. 1972).

5. SEC v. Continental Tobacco Co., 326 F. Supp. 588 (S.D. Fla. 1971).

6. SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953); A.C. Frost & Co. v. Coeur D'Alene Mines Corp., 312 U.S. 38, 40 (1941); United States v. Custer Channel Wing Corp., 376 F.2d 675, 678 (4th Cir.), *cert. denied*, 389 U.S. 850, *rehearing denied*, 389 U.S. 998 (1967); Gilligan, Will & Co. v. SEC, 267 F.2d 461, 463 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959). The preamble to the Act sets forth this congressional intent: "An Act To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." 48 Stat. 74 (1933). President Roosevelt intended to impose *caveat vendor* responsibility in the securities field, but with the "least possible interference with honest business." Sargent, *Private Offering Exemption*, 21 BUS. LAW. 118 (1965).

7. 15 U.S.C. § 77e (1970). Securities Act of 1933, § 4(1), 15 U.S.C. § 77d(1) (1970), further exempts from the provisions of § 77e "transactions by any person other than an issuer, underwriter, or dealer." Section 3 of the Act, 15 U.S.C. § 77c (1970), offers additional exemptions for certain classes of securities.

The registration statement, Securities Act of 1933, § 7, 15 U.S.C. § 77g (1970), and attending prospectus, Securities Act of 1933, § 10, 15 U.S.C. § 77j (1970), require the following information as specified in Securities Act of 1933, Schedule A, 15 U.S.C. § 77aa (1970): the nature and character of the issuer's business; its capital structure; the remuneration to be paid to the issuer's directors and to its officers and other employees, and the nature and extent of their interest in any property acquired; an estimate of the net proceeds to be derived from the security offered; the amounts, itemized in "reasonable" detail, of expenses incurred in connection with the sale of the security; a detailed balance sheet of the assets and liabilities of the issuer certified by an independent public or certified accountant; the profit and loss statement of the issuer, showing earnings and income; the names and addresses and a copy of the opinions of counsel who have passed on the legality of the issue; and a copy of the issuer's articles of incorporation and of its by-laws. United States v. Custer Channel Wing Corp., 376 F.2d 675, 678 n.2 (4th Cir. 1967); Sargent, *Pledges and Foreclosure Rights Under the Securities Act of 1933*, 45 VA. L. REV. 885, 886 (1959). Pursuant to Securities Act of 1933, §§ 3(b), 19, 15 U.S.C. §§ 77c(b), 77s (1970), the SEC has developed the Regulation A registration format which generally provides a simplified registration procedure if the aggregate issue is less than $500,000. 17 C.F.R. § 230.254(a) (1972), *as amended*, 37 Fed. Reg. 599 (effective Apr. 15, 1972).

sional determination that not all transactions demand this protection,[8] section 4(2) provides that "transactions by an issuer not involving any public offering"[9] need not be registered. Although the private offering exemption originally may have been intended to cover isolated sales of securities to particular individuals,[10] or to facilitate the promotion of small business ventures by a few closely related persons,[11] the exemption's attractiveness to issuers quickly led to its widespread use—and to some abuse.[12] Consequently, a need arose to define its parameters more sharply. Early guidelines released by the Securities and Exchange Commission suggested merely that an offering might be classified as public or private by examining the particular characteristics of the offering itself, such as the number of offerees, their relationship to each other and to the issuer, the number of units offered, the size of the offering, and the manner in which the offering was made.[13] A second and equally

8. The Securities Act of 1933 "carefully exempts from its application certain types of securities and securities transactions where there is no practical need for its application or where the public benefits are too remote." H.R. REP. No. 85, 73d Cong., 1st Sess. 5 (1933). *See* 1 L. LOSS, SECURITIES REGULATION 653 (2d ed. 1961) [hereinafter cited as Loss]; Orrick, *Non-Public Offerings of Corporate Securities—Limitations on the Exemption Under the Federal Securities Act*, 21 U. PITT. L. REV. 1 (1959).

9. 15 U.S.C. § 77d(2) (1970).

10. SEC Securities Act Release No. 285 (Jan. 24, 1935); 1 Loss, *supra* note 8, at 653; Israels, *Some Commercial Overtones of Private Placement*, 45 VA. L. REV. 851 (1959).

11. SEC Securities Act Release No. 4552 (Nov. 6, 1962); Steffen, *The Private Placement Exemption: What To Do About A Fortuitous Combination in Restraint of Trade*, 30 U. CHI. L. REV. 211 (1963); 1971 DUKE L.J. 1017, 1018.

12. Since the adoption of the 1933 Act, both the volume and value of private offerings have skyrocketed. Although only 3% of all securities sales were privately placed between 1900 and 1933, this volume increased to 42% between 1934 and 1963. The annual value of sales increased during the same period from approximately $92,000,000 in 1934 to $6,400,000,000 in 1963. *See* Note, *The Investment-Intent Dilemma in Secondary Transactions*, 39 N.Y.U.L. REV. 1043, 1044-45 (1964). *See also* 1 Loss, *supra* note 8, at 689; 4 *id.* at 2662 (Supp. 1969); Cohan, *Should Direct Placements Be Registered?*, 43 N.C.L. REV. 298, 300 (1965). The lower costs, the greater speed, flexibility, and privacy; the fear that the filing might later be used against a registrant trying to establish that the Act is inapplicable; and the desire to avoid the individual liability imposed by §§ 11, 12(2), and 17 of the Act for false or fraudulent registration statements, prospectuses, or communications all explain the increased reliance on the private exemption. *See generally* 1 Loss, *supra* note 8, at 693-94; Victor & Bedrick, *Private Offering: Hazards for the Unwary*, 45 VA. L. REV. 869 (1959); Note, *supra* at 1045. However, "[a]dmitted abuses in what were patently artificial claims of the availability of the exemption to financings of extensive scope frequently have resulted in both Commission and court decisions of a sweeping nature, furnishing language quotable in subsequent cases where the claim to the exemption was bona fide." Meer, *The Private Offering Exemption Under the Federal Securities Act—A Study in Administrative and Judicial Contraction*, 20 SW. L.J. 503, 514 (1966). For examples of such abuse see Sargent, *supra* note 7, at 892; 1971 DUKE L.J. 1017, 1018.

13. SEC Securities Act Release No. 285 (Jan. 24, 1935). Under the early tests, an issue to 25 or fewer offerees was generally considered safe. 1 Loss, *supra* note 8, at 662; Sargent, *supra* note 6, at 119.

imprecise approach looked to the particular class of offerees and held an offer private when the issuer could prove some sensible relation between the means used to selcct the members of the class and the purpose for which the selection was made.[14] These tests, however, ignored the policies underlying the Act and proved unsatisfactory when a transaction demanding the protection of registration could nevertheless qualify as private.[15] Recognizing the need to establish a more workable standard, the Supreme Court in *SEC v. Ralston Purina Co.*[16] noted that the Act's registration provisions are designed to protect an uninformed investing public by disclosing necessary and otherwise unavailable information.[17] Accordingly, the Court held that transactions may qualify for the exemption only when they involve offerees whose knowledge of and access to information obviate the necessity for public registration.[18] Under this test the private offering classification turns on the needs of the particular offerees for the protection of the Act, and the surrounding circumstances are relevant only to the degree that they reflect the knowledge or access of the offerees.[19] Drawing on the *Ralston* doctrine that knowledge and access justify waiving the registration requirements by identifying a class of offerees who can fend for themselves,[20] the courts have concludcd that these criteria may cstablish a legitimate private placement only if the offerees possess sufficient investment experience and sophistication to evaluate independently the proposed purchase.[21] Since, however, sophisticated investors may exert considerable leverage to extract from an issuer all the information they need to make informed investment decisions,[22] some courts have distinguished between the small investor and the large institutional one, implying that,

14. *See* SEC v. Sunbeam Gold Mines, 95 F.2d 699 (9tb Cir. 1938); Orrick, *supra* note 8, at 7; Note, *supra* note 12, at 1048.

15. Note, *supra* note 12, at 1049; *cf.* SEC v. Ralston Purina Co., 102 F. Supp. 964 (E.D. Mo.), *aff'd*, 200 F.2d 85 (8th Cir. 1952), *rev'd*, 346 U.S. 119 (1953).

16. 346 U.S. 119 (1953).

17. *Id.* at 124.

18. *Id.* at 125; *see* Note, *supra* note 12, at 1049.

19. *See* 346 U.S. at 125; Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680, 687-89 (5th Cir. 1971). Historically, a persuasive surrounding circumstance has been the number of offerees. The recent flood of decisions disavowing any safe numerical test has limited even further the reliability of surrounding circumstances as a guide. 4 Loss, *supra* note 8, at 2644 (Supp. 1969).

20. 346 U.S. at 125.

21. *See, e.g.*, Garfield v. Strain, 320 F.2d 116 (10th Cir. 1963); Woodward v. Wright, 266 F.2d 108 (10th Cir. 1959); Repass v. Rees, 174 F. Supp. 898 (D. Colo. 1959); Patton, *The Private Offering: A Simplified Analysis of the Initial Placement*, 27 BUS. LAW. 1089, 1090-92 (1972). The inference of sophistication that prior investment experience creates, however, "is only as strong as the correlation between the circumstances of the prior and present investments." *Id.* at 1091.

22. Professor Loss observes that "[s]ometimes they seem to elicit even more information than the SEC does." 1 Loss, *supra* note 8, at 663.

at least in the case of institutions, sophistication renders the requirement of access superfluous.[23] Another approach has reasoned, however, that without actual access to all necessary information, an investor's sophistication gives him no protection.[24] In holding that an offering made only to sophisticated businessmen was nevertheless public, the court in *Hill York Corp. v. American Int'l Franchises, Inc.*[25] noted that merely furnishing offerees the same information normally found in a registration statement does not, in and of itself, establish the right to the exemption.[26] Rather, the court stressed as determinative the existence of a privileged relationship between issuer and offeree that would provide information and access sufficient to make registration unnecessary.[27] In *United States v. Custer Channel Wing Corp.*,[28] the issuer argued that an investment letter signed by the purchaser acknowledging access to all desired information was sufficient evidence of the purchaser's need for no further protection. The court held, however, that since such letters were intended primarily to caution the offeree against further distribution of the securities, they could not, absent proof of actual access to the information, establish a private offering.[29] Incorporating

23. Value Line Fund, Inc. v. Marcus, [1964-66 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,523 (S.D.N.Y. 1965); 1971 DUKE L.J. 1017, 1020; *see* BNA SEC. REG. & L. REP. No. 144, B-1, -3 (Mar. 22, 1972).

24. *E.g.*, Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680, 690 (5th Cir. 1971); United States v. Custer Channel Wing Corp., 376 F.2d 675 (4th Cir. 1967); *see* 1 LOSS, *supra* note 8, at 657 n.53. In Henderson v. Hayden, Stone Inc., 461 F.2d 1069 (5th Cir. 1972), a sophisticated individual investor who knew when he bought the securities that they were unregistered was allowed rescission of the sale on the ground that the offering was not private within the meaning of § 4(2). The court held that in absence of proof that the purchaser had knowledge of the business affairs of the company, that he had the same kind of information as would appear in a registration statement, and that he had access to such information, the issuer failed to sustain his burden of proof as required by the *Hill York* decision and could not rely on the investor's sophistication to establish the exemption.

25. 448 F.2d 680 (5th Cir. 1971).

26. *Id.* at 688 n.5; *accord, In re* D.F. Bernheimer & Co., [1961-64 Transfer Binder] CCH FED. SEC. L. REP. ¶ 76,895; SEC Securities Exchange Act Release No. 7000 (Jan. 23, 1963); SEC Securities Act Release No. 4552 (Nov. 6, 1962); 4 LOSS, *supra* note 8, at 2632 (Supp. 1969).

27. 448 F.2d 680, 688 & n.6. Although this relationship has never been precisely defined, the court's language reveals the type of relationship it was contemplating: ". . . [an offering] made to a diverse and unrelated group, i.e. lawyers, grocers, plumbers, etc. . . . would have the appearance of being public; but an offering to a select group of high executive officers of the issuer who know each other and of course have similar interests and knowledge of the offering would more likely be characterized as a private offering." 448 F.2d at 688. Again, a private offering is one "where the public interest is . . . remote and the relationship between the issuer and offeree . . . creates special advantages in the offerees substantially different from the status of members of the public at large to be able to obtain all necessary information about the issuer and its securities." Orrick, *supra* note 8, at 8. Garfield v. Strain, 320 F.2d 116 (10th Cir. 1963), demonstrates some characteristics of a sufficiently close relationship.

28. 376 F.2d 675 (4th Cir. 1967).

29. *Id.* at 679; *cf.* SEC Securities Act Release No. 5121 (Dec. 30, 1970).

the principles announced in *Hill York* and *Custer Channel Wing*, the court in *Lively v. Hirschfeld*[30] concluded that the *Ralston* decision contemplated offerees who both possessed superior business experience and skill and were fully informed as to all relevant data of the particular issuer.[31] Although it has not eliminated the private exemption, this line of decisions has severely restricted its availability and led the securities bar to question its continued viability.[32]

In the instant case, the court found that plaintiff's evidence of Continental's use of interstate facilities to offer or sell unregistered securities established a prima facie case; it then ruled that to prevail on its section 4(2) defense Continental had to demonstrate with explicit, exact proof—rather than its own conclusive statements—that its offerees did not require the protection of the Act. Quoting from its opinion in *Hill York*,[33] the court reaffirmed that the mere disclosure of the same information which would appear in a registration statement will not assure the exemption, and that the offerees' need for protection can be eliminated only when a privileged relationship with the issuer gives the offerees present knowledge and access to such data. The court then looked to the *Custer Channel Wing* decision and observed that an investment letter signed by the offerees asserting that access to any desired information was available cannot by itself establish the requisite privileged relationship. Although it acknowledged that numbers are not determinative, the court noted that the concept of a privileged relationship seems inconsistent with the idea of a large number of offerees, and found that defendant's failure to establish that the instant group of offerees was not larger than the SEC asserted, permitted the inference that more offerees did exist. Drawing on a dictum in the *Lively* opinion that a meaningful application of the *Ralston* test requires the test to be satisfied for all offerees,[34] the court concluded that a successful section 4(2) defense requires the issuer to prove that a privileged relationship with the issuer afforded every offeree actual access to all information con-

30. 440 F.2d 631 (10th Cir. 1971).

31. *Id.* at 633; *see* 1971 DUKE L.J. 1017, 1021-22.

32. *See generally* BNA SEC. REG. & L. REP. No. 144, B-1 (Mar. 22, 1972).

33. "However, mere disclosure of the same information as is required in a registration statement is not the alpha and the omega, as Professor Loss has noted. '. . . this says too much if it implies that the exemption is assured . . . by giving each offeree the same information that would be contained in a registration statement though without the statutory safeguards and sanctions.' " SEC v. Continental Tobacco Co., 463 F.2d 137, 160 (5th Cir. 1972).

34. Although the instant court refers to this conclusion as the holding of *Lively*, 463 F.2d at 160, the *Lively* court merely found that the *Ralston* test was satisfied for *none* of the offerees. Accordingly, that court's statement that the private offering exemption requires that the test be satisfied for all offerees, 440 F.2d 631, 633 (10th Cir. 1971), is at best dictum.

cerning the issuer that he requested or required in making an informed investment decision.[35]

The instant case represents the logical conclusion of a series of cases following the *Ralston* decision that has given the section 4(2) exemption an increasingly narrow construction. If read strictly, the court's holding could require that a transaction may qualify as a private offering only when each offeree stands in such a privileged relationship to the issuer that by virtue of the relationship he has actual access to any information concerning the issuer that he considers relevant to his investment decision.[36] Such a criterion, if vigorously enforced, could limit the class of permissible private offerees to a few highly placed key employees of the issuing company.[37] At the very least, the decision holds that the issuer must prove the financial sophistication of every offeree, issue each prospective investor a thoroughly descriptive offering circular, and then hold a face-to-face conference between the principal officers of the issuer and the offerees, at which all the investors are provided both specific information concerning the company and any other additional information they might want.[38] Although these re-

35. Since defendant could not establish the requisite relationship and access as to all offerees, the court ruled that it was not entitled to the private offering exemption. Having disposed of the case on this basis, the court did not have to consider the second requirement of a private offering—whether the purchasers took for investment (private offering) or for distribution (public offering). *See* 463 F.2d at 159. Turning to the issue of the permanent injunction, the court concluded that Continental's recent violations of § 5 should be read in conjunction with the 1967 violations that led to the issuance of the temporary injunction. On this basis the court held that a permanent injunction was warranted. *Id.* at 162.

36. Although the Fifth Circuit's decision is quite restrictive, the SEC's brief to the court argued for an even narrower application of § 4(2). For instance, the SEC had suggested that each offeree must have a relationship to the company "tantamount to an 'insider' in terms of his ability to know, to understand, and to verify for himself all of the relevant facts about the company and its securities. This type of offeree through his own knowledge, sophistication and unfettered access to the citadels of corporate power and decision-making can protect himself; he does not require the protections of the Act." BNA SEC. REG. & L. REP. No. 155, A-10 (June 7, 1972). Such language does not, however, appear in the court's opinion.

It is not entirely clear just who determines what "desired" information must be available to the investor—the offeree himself, the issuer, the SEC, or the courts. The broad language of the decisions, however, implies that the discretion lies with the offeree.

37. *See* 1971 DUKE L.J. 1017, 1022.

38. Panel Discussion Before the ABA Section of Corporation, Banking and Business Law, BNA SEC. REG. & L. REP. No. 167, A-9, -10 (Aug. 30, 1972) (comments by Herbert S. Wander). Concerning the required proof of sophistication, Wander notes that while proving sophistication may be quite difficult, "I think deep down we all know that doctors aren't sophisticated investors and if anyone need[s] the protection of a prospectus, they [do]." *Id.* at A-10. Referring to the face-to-face meeting and personal relationship requirement, he acknowledges that "perhaps this is a cosmetic approach and it may not work, but I think this is what the courts appear to want, and therefore I would provide it." *Id.*

quirements might not threaten the position of the institutional investor,[39] they seem certain to eliminate almost all private offerings to individual investors. In light of the original intent of Congress to preserve the private offering for certain individual investors, the instant decision seems undesirable. Absent the section 4(2) exemption, the small or medium-sized company seeking to raise new capital from interstate sources — or even the individual wishing to promote a new business venture — must file either a full registration form or the abridged Regulation A statement.[40] The cost of the former may be prohibitive,[41] and the latter, which costs nearly as much as the full statement,[42] is available only for certain issues totaling less than 500,000 dollars.[43] Unable to raise new capital without risking the civil[44] and criminal[45] sanctions of the Securities Act, the small-business sector of the economy would face a difficult and uncertain future.[46] Recognizing this prospect, the SEC — its broad arguments in the instant case notwithstanding — is currently taking steps to ensure the continued availability of the private offering exemption. Recent pronouncements by Commissioner Owens that, at least insofar as institutional investors are concerned,

39. *See generally* BNA SEC. REG. & L. REP. No. 155, A-9 (June 7, 1972); BNA SEC. REG. & L. REP. No. 157, A-10 (June 21, 1972); 1971 DUKE L.J. 1017, 1022. The instant case is easily limited on its facts to apply only to noninstitutional, individual private investors. Moreover, fears that the increasingly restrictive interpretations of the § 4(2) exemption given by the courts would preclude the institutional investor from the private offering exemption have not been realized. That the forthcoming Securities Act Rule 146 will not even consider institutional investors when determining whether an offering is public or private, *see* note 51 *infra* and accompanying text, further supports the inference that the SEC plans no assault on the institutional investor's reliance on § 4(2). *Cf.* BNA SEC. REG. & L. REP. No. 166, A-3 (Aug. 23, 1972) (Fifth Circuit's refusal to grant Continental a review en banc). The court did not permit Continental to offer as evidence an SEC No-Action letter granted to an issuer whose 25 offerees would not satisfy the strict "privileged relation" test of *Continental*, but who all had net worth exceeding $250,000, and who in any one of the last 3 years were in the 50% tax bracket, if depreciation and capital losses were added back. This action by the court reflects judicial concurrence in the SEC's distinction between the unsophisticated individual investor and the sophisticated investor whose bargaining power rivals that of the institutions.

40. *See* note 7 *supra.*

41. Sargent, *supra* note 6, at 123.

42. Meer, *supra* note 12, at 504.

43. 17 C.F.R. § 230.254(a) (1972), *as amended*, 37 Fed. Reg. 599 (effective Apr. 15, 1972).

44. 15 U.S.C. § 77*l*(1) (1970).

45. 15 U.S.C. § 77x (1970).

46. Sargent, *supra* note 6, at 124: "We are faced today . . . with a complete drying up of risk capital which otherwise might be available to young, unseasoned, honest companies . . . whose potential for success is . . . tremendous. Many companies with legitimate aims, a sound business venture and good management cannot produce their product because of a lack of available risk capital at reasonable rates." *See also* Owen, *The Private Offering and Intrastate Exemptions Under the Securities Act of 1933*, in SELECTED ARTICLES ON FEDERAL SECURITIES LAW 165 (1968).

language found in the SEC's brief to the Fifth Circuit may have been "overly restrictive,"[47] indicate that the SEC may be willing to limit its interpretation of the law to the particular facts of the instant case.[48] Moreover, the Commission is currently preparing Securities Act Rule 146 to establish with greater certainty the conditions under which reliance on section 4(2) is warranted.[49] The rule apparently will allow the exemption when there has been no general advertising and when the sale has resulted from a negotiated transaction at which each buyer was represented by an advisor. The number of buyers will be limited to 35,[50] not counting institutional investors.[51] Additionally, the "access of an advisor or representative of a buyer would be imputed to the buyer and . . . there would be a contractual commitment to provide continued access to information about the affairs of the issuer."[52] Finally, the rule will establish a suitability test to determine from the buyer's financial circumstances and his, or his representative's, business sophistication whether the buyer requires the protection afforded by registration.[53] These provisions reflect both current state practices concerning the private offering[54] and the recommendations of the American Law Institute's proposed Federal Securities Code.[55] This effort to establish more objective standards for determining the availability of the private placement may reflect not only a growing dissatisfaction with the impractical sophistication and access criteria, but also a feeling that the rationale

47. BNA SEC. REG. & L. REP. No. 152, A-9 (May 17, 1972).

48. The facts of the instant case may well place it among those cases whose abuses of the private offering exemption have resulted in excessively broad decisions with sweeping dicta. *See* Meer, *supra* note 12, at 514. The Commission's recent efforts to quiet the securities bar's violent reaction to *Continental* implies an awareness on its part that it went further than was necessary to stop Continental.

The Commission is maintaining its stand on the instant case, however. For a report on the Fifth Circuit's denial of Continental's request for a review en banc see BNA SEC. REG. & L. REP. No. 166, A-3 (Aug. 23, 1972).

49. Speech by Chairman Casey Before the ABA Section of Corporation, Banking and Business Law, BNA SEC. REG. & L. Rep. No. 165, F-1 (Aug. 16, 1972).

50. It is noteworthy that the numerical standard will be applied to purchasers, rather than offerees. This application recognizes that an offeree who does not buy is not hurt. *See* ALI FEDERAL SECURITIES CODE § 227, Comment (Tent. Draft No. 1, 1972). The fact that an offering to 100 prospective purchasers often yields fewer than 25 ultimate investors provides additional support for a number-of-buyers test. *See* Sargent, *supra* note 6, at 124.

51. The rule apparently will define institutional investors as "those who purchase for cash in a substantial amount, which might be $50,000 or $100,000." Speech by Chairman Casey Before the ABA Section of Corporation, Banking and Business Law, BNA SEC. REG. & L. REP. No. 165, F-1 (Aug. 16, 1972).

52. *Id.*

53. *Id.*

54. For an extensive catalogue of current (1969) state procedures see 4 LOSS, *supra* note 8, at 2634-41 (Supp. 1969).

55. ALI FEDERAL SECURITIES CODE § 227 (Tent. Draft No. I, 1972).

underlying the private offering exemption is not that sophisticated and knowledgeable investors do not require the Act's protection, but that the benefits to investors derived from registration do not always justify the attending burdens upon the offeror.[56] Noting that "small offerings are simply not worth the time, trouble, and money required for registration,"[57] this view weighs the burdens of registration against the protection it affords and concludes that a numbers test, or other objective standard, may appropriately be applied to this determination.[58] Since an effective registration system can exist only where enforcement and potential liability are predictable,[59] attempts to render the private/public offering distinction more objective are both desirable and necessary. Nevertheless, the continued utility of such subjective criteria as knowledge, sophistication, and access must not be overlooked. If untempered reliance on a prescribed investor profile precludes all but the very wealthy from the class of legitimate private placement offerees, then the lot of the small-business sector currently threatened by the judicial limitations on the section 4(2) exemption will hardly be improved. Furthermore, if a single dispute over contractual access provisions at some indefinite future time could void an otherwise qualified private offering and subject the issuer to numerous personal liability and rescission suits, the registration exemption still might not offer a feasible alternative to the burdens of section 5 compliance. While the proposed rule does not appear to eliminate all subjectivity, the extent to which it offers a dangerously mechanical evaluation of an offering's private nature will be determined only by the construction the courts, the Commission, and the securities bar will give it. The SEC is clearly acting to preclude further decisions like the instant one — decisions that are intellectually

56. Panel Discussion Before the ABA Section on Corporation, Banking and Business Law, BNA SEC. REG. & L. REP. No. 167, A-9, -13 (Aug. 30, 1972) (comments by Richard M. Phillips).

57. *Id.* at A-13.

58. *Id.* The movement toward objective standards in an effort to find some workable solution to the private placement dilemma is evident throughout the investment field. In a memorandum to the Real Estate Advisory Committee, which is evaluating for the SEC what real estate interests qualify as securities under the 1933 Act, the Securities Industry Association has noted the dependency of the small or medium-sized investor on the private offering exemption and has recommended that the burden of proving customer suitability for real estate investment be placed with the customer instead of with the broker or underwriter; the Association would require the investor to be in the 50% tax bracket with a net worth of at least $50,000, and with commitments to tax shelter investments bearing "a reasonable relationship to his net worth." BNA SEC REG. & L. REP. No. 167, A-18, -20 (Aug. 30, 1972). Similarly, amendments to the regulations controlling real estate syndications proposed by the California Commission of Corporations establish a suitability profile for offerees based on annual income, liquid net worth, and amount invested. BNA SEC. REG. & L. REP. No. 162, A-6 (July 26, 1972).

59. *See* Speech by Chairman Casey Before the ABA Section of Corporation, Banking and Business Law, BNA SEC. REG. & L. REP. No. 165, F-1, -3 (Aug. 16, 1972).

and logically sound, but have unreasonable or undesirable practical impact. Although the continued strength of the small-business sector of the economy demands that the approach of the instant case toward the private offering exemption be substantially modified, the Commission must take care to ensure that its remedial efforts do not unwittingly further the attack on section 4(2).

Torts—Joint Tort-feasors—Apportionment of Damages Among Negligent Joint Tort-feasors Based npon Relative Responsibility of Parties

Plaintiff brought an action for damages against defendant manufacturer, alleging that defendant had negligently caused the death of her husband.[1] Plaintiff contended that defendant had been negligent in failing to label properly a poisonous insecticide to warn users of potential dangers and in providing no instructions for the proper use of the poison. Defendant filed a third-party complaint[2] against decedent's employer,[3] demanding judgment for any recovery that plaintiff might be awarded in the original action.[4] Defendant contended that if decedent's death was the result of negligence by any party, it was the " 'active and primary negligence' " of the employer rather than defendant's own negligence, if any, which was " 'merely passive and secondary.' "[5] Main-

1. Plaintiff's husband, an employee of George Urban Milling Company, died while cleaning his employer's grain storage bin. The bin had been fumigated with methyl bromide, a poisonous and highly volatile chemical produced by defendant manufacturer, Dow Chemical Company, for use in controlling storage insects and mites.

2. Defendant served a third-party summons and complaint pursuant to N.Y. CIV. PRAC. LAW § 1007 (McKinney 1963). For a general discussion of third-party practice (impleader) see F. JAMES, CIVIL PROCEDURE 505-10 (1965).

3. Defendant also brought a third-party complaint against the fumigating company, McLeod Industrial Fumigators & City Exterminators, Inc., but that action was not involved in the appeal.

4. Plaintiff could not have brought an action for negligence against the employer, because New York's workmen's compensation statute abrogated the employer's common-law tort liability. N.Y. WORKMEN'S COMP. LAW § 11 (McKinney 1965) provides in part: "The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death . . . ." N.Y. WORKMEN'S COMP. LAW § 29 (McKinney 1965) allows the dependents of a deceased employee to bring an action against an allegedly negligent third-party tort-feasor without losing the compensation provided by statute. *Cf.* Taylor v. New York Cent. R.R., 294 N.Y. 397, 62 N.E.2d 777 (1945).

5. Dole v. Dow Chem. Co., 282 N.E.2d 288, 290, 331 N.Y.S.2d 382, 385 (1972). Defendant alleged that the employer was negligent in failing to take proper precautions in fumigating with

taining that defendant's own active negligence barred the impleader action under New York law, the employer moved to dismiss the third-party complaint. The Supreme Court at Special Term, Erie County, entered an order denying the motion to dismiss. The Supreme Court, Appellate Division, reversed and dismissed the third-party complaint.[6] On appeal to the Court of Appeals, *held,* reversed. A defendant in an action for negligence may bring a third-party action against other negligent joint tort-feasors to obtain apportionment of damages based upon the relative responsibility of the parties. *Dole v. Dow Chemical Company,* 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

The contemporary principles of law that govern apportionment of damages among joint tort-feasors[7] can be traced to the English case of *Merryweather v. Nixan,*[8] in which the court denied contribution between tort-feasors against whom a joint judgment for conversion had been rendered. The court in *Merryweather* apparently grounded its decision on the belief that the tort-feasors who had acted intentionally and in concert should not benefit from their own deliberate wrongdoing.[9] A later English decision sought to confine the "no contribution" rule to cases in which the party seeking redress could be presumed to have known that he was committing an unlawful act.[10] Although a few courts applied the rule against contribution to cases of mere negligence, accident, or mistake,[11] the more accepted English view appears to have been that contribution was allowed in cases of vicarious liability, negligence, or other unintentional breaches of the law.[12] The early American cases

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the insecticide, in using untrained personnel to perform the work, in failing to follow instructions on the insecticide container's label and in literature provided by defendant, and in failing to test the fumigated premises before allowing employees to re-enter.

6. Dole v. Dow Chem. Co., 35 App. Div. 2d 149, 316 N.Y.S.2d 348 (1970).

7. In its original sense, the term "joint tort-feasors" referred to an intentional concert of action among 2 or more persons. More recently, it has been expanded to include all who are jointly liable for a particular tort, whether their individual actions were concerted, concurrent, or even successive in time. Under this definition, 2 individuals whose separate acts of negligence combine to produce a single, indivisible injury, as in the instant case, are "joint tort-feasors." Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. PA. L. REV. 130, 131 n.9 (1932). *See* Knell v. Feltman, 174 F.2d 662, 663 n.1 (D.C. Cir. 1949); 1. F. HARPER & F. JAMES, TORTS § 10.1, at 693-94 (1956).

8. 101 Eng. Rep. 1337 (K.B. 1799). For a general discussion of *Merryweather* see Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan,* 12 HARV. L. REV. 176 (1898); Williams, *The Rule in Merryweather v. Nixan,* 17 L.Q. REV. 293 (1901).

9. *See* W. PROSSER, TORTS 305 (4th ed. 1971) [hereinafter cited as PROSSER].

10. Adamson v. Jarvis, 130 Eng. Rep. 693, 696 (C.P. 1827). The case is discussed in Williams, *supra* note 8, at 295-96.

11. *See* J. FLEMING, THE LAW OF TORTS 687 (3d ed. 1965), *citing* The Englishman & The Australia, [1895] P. 212.

12. PROSSER, *supra* note 9, at 306. In Palmer v. Wick & Pulteneytown S.S. Co., [1894] A.C. 318, 324, Lord Chancellor Herschell criticized *Merryweather*: "It is now too late to question that

also applied the *Merryweather* rule to forbid contribution only between intentional wrongdoers,[13] but later American courts neglected to consider the policy supporting the no-contribution rule;[14] the great majority of American jurisdictions applied the rule to refuse contribution in all cases, even when independent acts of negligence had concurred to produce a single, indivisible injury.[15] The no-contribution rule ultimately became an important element of New York tort law.[16] Application of the rule often produced inequitable results. For example, a single negligent joint tort-feasor might be held liable for all damages caused by his negligent co-tort-feasors. For this reason, several commentators suggested that legislative revisions represented the best hope for dislodging the entrenched common-law doctrine and providing contribution among negligent joint tort-feasors.[17] In 1928, the New York legislature modified the common-law bar against contribution by enacting section 211-a of the Civil Practice Act,[18] which allows contribution when a joint judgment is awarded against two or more defendants and one defendant pays more than his pro rata share. By conditioning the right to contribution upon the plaintiff's election to sue more than one defendant, however, the provision failed to remedy all of the inequities inherent in the common-law rule.[19] Persisting difficulties with the rule against contribu-

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decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justified its extension to the jurisprudence of other countries." Great Britain finally abolished the rule against contribution by statute. Law Reform (Married Women and Tortfeasors) Act, 25 & 26 Geo. 5, c. 30, § 6(1) (1935). For a discussion of the English statute see G. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE §§ 28-31 (1951).

13. *See, e.g.*, Bailey v. Bussing, 28 Conn. 453 (1859); Thweatt's Adm'r v. Jones, 22 Va. (1 Rand.) 328 (1823). *See generally* Reath, *supra* note 8.

14. Prosser attributes this result to the greatly increased availability of joinder which allowed tort-feasors who had merely caused the same damage to be joined in one action. These "joint tort-feasors" were mistakenly considered to be the same joint tort-feasors to whom the common-law rule against contribution originally applied. In fact, the original usage of the term "joint tort-feasors" was much narrower, connoting intentional tort-feasors acting in concert. *See* PROSSER, *supra* note 9, at 306.

15. *Id.*

16. For a discussion of the early cases that adopted the *Merryweather* rule in New York see NEW YORK LAW REVISION COMM'N, REPORT 716-17 (1936)[hereinafter cited as 1936 REPORT]. Andrews v. Murray, 33 Barb. S.C. 354 (N.Y. 1861), is an early case often cited to sustain the view that negligent tort-feasors cannot secure contribution from eacb other. 1936 REPORT, *supra*, at 717 n.20.

17. For a discussion of some of these proposed legislative changes see C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 11-45 (1936).

18. Section 211-a is now N.Y. CIV. PRAC. LAW § 1401 (McKinney 1963).

19. 1936 REPORT, *supra* note 16, at 704. Making the right to contribution depend upon plaintiff's choice of defendants provides fertile ground for collusion between the potential defendants and plaintiff. *See* PROSSER, *supra* note 9, at 307, and cases therein cited.

tion, even as modified by statute,[20] motivated the New York courts and others to expand the doctrine of indemnity[21] to apply to the recovery of damages among negligent joint tort-feasors. Although the right to indemnity originally developed in the context of express contractual obligations, the right to indemnity between persons liable for a tort generally was classified as quasi contractual in nature. Between joint tort-feasors, the obligation to indemnify was based on the court's notion—influenced by equitable considerations—of fairness between the parties.[22] When both joint tort-feasors were negligent but there was a considerable disparity between the degrees of their negligence, the New York courts frequently found an indemnity contract "implied by law," imposing upon the more negligent party the obligation to indemnify the less negligent.[23] Although other state courts have formulated many tests[24] for determining whether the difference in degrees of negligence between joint tort-feasors warrants an award of indemnity, the "active-passive" negligence test has been the test most commonly relied upon by New York courts to determine if a right to indemnity exists.[25] Although the evolving indemnity doctrine served to shift the unfair burden of damages in certain instances,[26] the doctrine was applicable only to

20. The statutory right of contribution is limited to cases in which a joint judgment has been awarded, N.Y. CIV. PRAC. LAW § 1401 (McKinney 1963), and has no effect in a situation like that of the instant case, in which a joint tort-feasor has a special defense against the original plaintiff. In the instant case, plaintiff could not sue the grain company for negligence, since the company's common-law tort liability was abrogated by workmen's compensation legislation. As a result, Dow Chemical Company could not sue the grain company for contribution in a third-party action because plaintiff had not obtained a joint judgment against both negligent parties. For a discussion of similar problems see Larson, *A Problem in Contribution: The Tortfeasor With an Individual Defense Against the Injured Party*, 1940 WIS. L. REV. 467; Note, *Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action by the Injured Party*, 52 CORNELL L.Q. 407 (1967).

21. Indemnity allows one discharging the tort obligation to recover over the whole amount from another joint tort-feasor. Contribution allows a joint tort-feasor discharging the joint obligaton to recover a ratable portion of the total amount from another tort-feasor. *See* Leflar, *supra* note 7, at 130-31. For a more detailed discussion of the development of indemnity in New York see NEW YORK LAW REVISION COMM'N, REPORT 38-55 (1952) [hereinafter cited as 1952 REPORT]; Meriam & Thornton, *Indemnity Between Tort-Feasors: An Evolving Doctrine in the New York Court of Appeals*, 25 N.Y.U.L. REV. 845 (1950); Comment, *Indemnity Among Joint Tort-feasors in New York: Active and Passive Negligenee and Impleader*, 28 FORDHAM L. REV. 782 (1960).

22. Leflar, *supra* note 7, at 146-47.

23. *See* Putvin v. Buffalo Elec. Co., 5 N.Y.2d 447, 158 N.E.2d 691, 186 N.Y.S.2d 15 (1958); McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 107 N.E.2d 463 (1952).

24. For a discussion of these various tests see Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728 (1968).

25. Under the "active-passive" test, the "passive" wrongdoer may obtain indemnity from the "active" wrongdoer. *See, e.g.*, McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 328, 107 N.E.2d 463, 471 (1952). The difficulty lies in distinguishing between "active" and "passive" negligence. *See* 1952 REPORT, *supra* note 21, at 53-55.

26. The secondary, or "passive," wrongdoer had the advantage of being able to implead the

instances in which the difference in degree of negligence between tort-feasors was considerable. "Actively negligent" joint tort-feasors or parties who were substantially *in pari delicto* could not meet the standards required in actions for indemnity. Furthermore, unless the parties both were subject to a joint money judgment, the common-law rule prevented the tort-feasors from obtaining contribution.[27] In short, many negligent joint tort-feasors were unable to obtain apportionment of damages through a statutory action for contribution or by a common-law action for indemnity.

In the instant case, the court initially noted that the common-law bar to apportionment of damages among joint tort-feasors had been altered both by statutory provisions allowing contribution and by the judicial decisions permitting indemnity in certain cases of joint negligence. Examining the "active-passive" negligence test for determining indemnity in New York, the court then found that the remedy afforded by the application of that test to negligent joint tort-feasors was uncertain, unpredictable, and possibly unfair. The court considered the recent New York indemnity cases and the professional commentaries[28] and observed in both a common theme—dissatisfaction with the "active-passive" test that indicated a movement toward a fairness standard for apportionment. Furthermore, the court discussed the unfair control that a plaintiff exercises, through his ability to choose which tort-feasor to sue, over the adjudication of joint tort responsibility. Recognizing that the method for apportioning damages among tort-feasors would require substantial modification, the court held that a defendant in a negligence action may implead a joint tort-feasor to obtain an apportionment of damages that is based on the relative responsibility of the parties.[29]

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primary, or "active," wrongdoer pursuant to § 193(2) of the Civil Practice Act. *See* 1952 REPORT, *supra* note 21, at 38-39 & n.7 and cases therein cited. N.Y. CIV. PRAC. LAW § 1007 (McKinney 1963), the successor to § 193(2), provides in part: "After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to him for all or part of the plaintiff's claim against him . . . ."

27. *See* 1952 REPORT, *supra* note 21, at 38-39. In Price v. Ryan, 255 N.Y. 16, 173 N.E. 907 (1930), the court, construing § 211-a of the Civil Practice Act (now N.Y. CIV. PRAC. LAW § 1401 (McKinney 1963)) in light of the no-contribution rule at common law, held that the remedy of contribution was expressly confined to cases in which a money judgment had been obtained against both joint tort-feasors. Additionally, in Fox v. Western N.Y. Motor Lines, Inc., 257 N.Y. 305, 178 N.E. 289 (1931), the court held that a negligent joint tort-feasor seeking contribution could not, pursuant to § 193(2) of the Civil Practice Act (now N.Y. CIV. PRAC. LAW § 1007 (McKinney (1963)), implead a co-tort-feasor not joined by the plaintiff as required by § 211-a. This had the effect of denying the use of impleader to joint tort-feasors seeking contribution.

28. *See, e.g.*, Leflar, *supra* note 7, at 159.

29. The court viewed the question of the relative responsibility of the parties as a question of fact, to be determined by the jury only if the third-party plaintiff (the original defendant) is found

The instant case has significantly expanded the New York law relating to negligent joint tort-feasors in two significant respects—the substantive recovery rights and statutory procedural rights of joint tort-feasors. First, the decision of the instant court enlarged recovery rights among joint tort-feasors by creating a right to apportionment of damages on the basis of relative culpability. Although it referred to the apportionment formula as one for "partial indemnification,"[30] the court in actuality recognized an unlimited right of contribution among joint tortfeasors.[31] Secondly, the instant decision liberalized the statutory procedural rights of joint tort-feasors by permitting a negligent joint tort-feasor to implead a co-tort-feasor to obtain apportionment of damages. This enlargement of impleader actions will provide, in a single action whenever feasible, a fair apportionment of damages for every negligent joint tort-feasor. The court's action in expanding both the substantive recovery rights and statutory procedural rights, however, is not without precedent in other jurisdictions.[32] Moreover, legal scholars

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negligent. Whether the causes are tried together or separately rests in the court's discretion according to the requirements of fairness. 282 N.E.2d at 294-95, 331 N.Y.S.2d at 391-92.

30. *Id.* at 291, 331 N.Y.S.2d at 386.

31. The term "partial indemnification" is something of a contradiction in terms, because indemnification commonly refers to full recovery over against a third party. *See* note 21 *supra.* The court clearly had in mind a partial recovery over, or contribution, but avoided using the term "contribution," apparently because of problems peculiar to the instant case. Under the law of contribution as formerly interpreted by the New York courts, Dow Chemical Company could not obtain contribution from the grain company. *See* note 20 *supra.* The court thus escaped a direct confrontation with this prior authority by couching its holding in the language of indemnity. The instant court apparently has sought to avoid a radical departure from past New York cases on contribution by expanding the existing doctrine of common-law indemnity. The resulting terminology, including the novel use of the term "indemnity," may confuse courts following *Dole* and cause them to misconstrue the holding of the case. In a more recent case, the court has characterized the *Dole* holding as the "rule of relative contribution," so that perhaps the confusion over terminology will be clarified. Kelly v. Long Island Lighting Co., 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 854 (1972).

32. Before the instant decision, 9 American jurisdictions had rejected the no-contribution rule at common law and allowed contribution without legislation. *See, e.g.,* Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949); Wiener v. United Airlines, 216 F. Supp. 701 (S.D. Cal. 1962)(concluding that Nevada has abrogated the rule); Hawkeye-Security Ins. Co. v. Lowe Const. Co., 251 Iowa 27, 99 N.W.2d 421 (1959); Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Quantray v. Wicker, 178 La. 289, 151 So. 208 (1933); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Underwriters at Lloyds v. Smith, 166 Minn. 288, 208 N.W. 13 (1926); Ankeny v. Moffett, 37 Minn. 109, 33 N.W. 320 (1887); Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 A. 231 (1928); Davis v. Broad St. Garage, 191 Tenn. 320, 232 S.W.2d 355 (1950); Mitchell v. Raymond, 181 Wis. 591, 195 N.W. 855 (1923); Ellis v. Chicago & N.W. Ry., 167 Wis. 392, 167 N.W. 1048 (1918). In addition, 23 states have passed statutes permitting contribution in some form. PROSSER, *supra* note 9, at 307. A more detailed classification of the jurisdictions can be found in Note, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases,* 68 YALE L.J. 964, 981-82 (1959). The UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1939 version) was adopted in 9 jurisdictions but was withdrawn in 1955 by the Commissioners on Uniform State Laws after it was amended

have been virtually unanimous in their condemnation of the common-law rule against contribution.[33] By rejecting the common-law rule against contribution, the New York Court of Appeals has added a prestigious voice to the mounting trend toward fairer apportionment of damages among negligent joint tort-feasors. The significance of the instant case, however, extends beyond its impact on the law of contribution. By adopting as its standard of apportionment the "relative responsibility"[34] of the parties, the court created the equivalent of a comparative negligence action among negligent joint tort-feasors.[35] The instant case marks the first instance in which a court, on its own initiative, explicitly has imposed the relative apportionment standard.[36] This action by the court raises the question whether the court will proceed one step further to adopt a comparative negligence standard in the traditional single plaintiff-single defendant context, thereby abolishing contributory negligence as a bar to recovery.[37] At least two considerations militate in favor of such a judicial undertaking. First, proceeding from proportional contribution to comparative negligence in the traditional plaintiff-defendant setting would be logically consistent.[38] The rule against contribution and the doctrine of contributory negligence are both vestiges of the punitive, all-or-nothing tort principles that prevailed in the early common law.[39] Proportional contribution and comparative negligence represent complementary means of attacking the harshness of common-law apportionment, because both rest upon a single

extensively in several states. A new version of the Act, proposed in 1955, has been adopted in 4 states. PROSSER, *supra* at 307 n.63.

33. *See, e.g.*, Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552 (1936); Leflar, *supra* note 7. For an original defense of the no-contribution rule see James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941). *Contra*, Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941).

34. 282 N.E.2d at 295, 331 N.Y.S.2d at 392.

35. Most jurisdictions that allow contribution apportion damages equally among joint tort-feasors, regardless of their relative degrees of culpability. PROSSER, *supra* note 9, at 310.

36. *See id.* at 310 & n.87; Note, *supra* note 32, App. I(A).

37. For a general discussion of comparative negligence see PROSSER, *supra* note 9, at 433-39; Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953).

38. *Cf.* James, Kalven, Keeton, Leflar, Malone & Wade, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889, 921 (1968) (Comment of Robert A. Leflar)[the entire work is hereinafter cited as *Comments*].

39. Several authorities have noted the close relationship between the no-contribution rule and contributory negligence. Professor Leflar views both as manifestations of the law's unwillingness to aid persons whose conduct does not conform to legal standards. Leflar, *supra* note 7, at 130-31. Dean Wade contends that the principal explanation of both can be traced to the no-compromise, all-or-nothing approach of the common law. *Comments*, *supra* note 38, at 940-42 (Comment of John W. Wade). *See also* K. LLEWELLYN, THE BRAMBLE BUSH 143 (1960).

principle—that fairness requires apportionment of damages on the basis of the relative culpability of the parties.[40] Secondly, the instant court's willingness to overturn an established body of judge-made law, rather than defer to the legislature,[41] suggests the likelihood of further judicial action to reduce reliance upon the doctrine of contributory negligence. This argument, however, must be balanced against the fact that no court to date has been willing to adopt the comparative negligence standard in the absence of legislative action.[42] No compelling reason appears to preclude judicial modifications of the contributory negligence rule, however, for it was the courts themselves—and not the legislatures—that formulated the rule originally.[43] The New York Court of Appeals' concern in the instant case for implementing certain " 'relevant tort goals' "[44]—deterrence, equitable loss sharing by all wrongdoers, effective loss distribution throughout society, and rapid compensation[45]—and its overall concern for fairness to the parties may lead the court to correct the unfairness inherent in contributory negligence, which places upon one party the entire burden of loss for which two are responsible.[46] At the very least, the court in the instant case has laid the

40. For further discussion of the relationship between contribution and comparative negligence see C. GREGORY, *supra* note 17, at 49-55.

41. A bill providing a general right of contribution based on common liability was recommended for passage to the legislature by the New York Law Revision Commission on several occasions, beginning in 1936. The bill was never enacted. 1952 REPORT, *supra* note 21, at 27. Insurance companies have vigorously opposed the passage of contribution statutes in other states, PROSSER, *supra* note 9, at 307, and opposition to comparative negligence legislation has come from the liability insurance companies and from the "habitual defendants." *Id.* at 438. For an explanation of the factors inhibiting legislative approval of legal reform measures generally see *Comments, supra* note 38, at 928-29 (Comment of Robert A. Leflar). For an interesting discussion of the relative roles of the judiciary and the legislature in reforming tort law see Keeton, *Creative Continuity in the Law of Torts,* 75 HARV. L. REV. 463 (1962). Professor Keeton's list of relevant factors that determine whether a given area is appropriate for judicial law reform indicates that the areas of contribution among joint tort-feasors and comparative negligence are highly suitable for creative judicial decisions. *Id.* at 506-08. *See generally Comments, supra* note 38.

42. In 1962 the Illinois Supreme Court asked the Appellate Court for an opinion on whether adoption of comparative negligence was desirable. After receiving an affirmative answer, Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967), the Supreme Court decided that the matter should be left to the legislature. Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968); *accord,* Bissen v. Fujii, 51 Hawaii 636, 466 P.2d 429 (1970); Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513 (1970). For a discussion of *Maki v. Frelk* see PROSSER, *supra* note 9, at 434-35; *Comments, supra* note 38.

43. PROSSER, *supra* note 9, at 434. *See generally Comments, supra* note 38; Keeton, *supra* note 41.

44. 282 N.E.2d at 293, 331 N.Y.S.2d at 389; *see* Comment, *supra* note 24.

45. For a general discussion of modern tort goals and their relation to contribution see Comment, *Contribution and Indemnity in California,* 57 CALIF. L. REV. 490 (1969).

46. *See* PROSSER, *supra* note 9, at 453.

groundwork for further judicial action that will perhaps produce an integrated, modernized body of tort law.[47]

47. Many members of the New York bar think that the *Dole* decision presages a judicially created system of comparative negligence. Interview with Robert A. Leflar, Visiting Professor of Law, Vanderbilt University, and Director of Appellate Judges Seminars, New York University, in Nashville, Tennessee, September 6, 1972. A decision by the Supreme Court, Trial Term, rendered since the instant case, has already broadened the *Dole* rule—apportionment among negligent joint tort-feasors based upon relative responsibility—to apportion liability between an automobile dealer and the manufacturer in an implied warranty case. Walsh v. Ford Motor Co., 335 N.Y.S.2d 110 (Sup. Ct. 1972).