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RECENT CASES

Conflict of Laws—False Conflicts—Federal Court Sitting in Diversity Action May Find "False Conflict" and Ignore Forum State's Choice of Law Rule When One State Has Clearly Predominant Interest

Appellee, a domiciliary of Louisiana, brought a diversity action in a Louisiana federal district court seeking to recover the proceeds of a life insurance policy issued to his father in Wisconsin.[1] The appellant-insuranee company, a Connecticut domiciliary,[2] refused to honor the claim on the ground that the policy had lapsed for nonpayment of premiums.[3] Appellee claimed that the policy was still in force at the time of the insured's death because the insurer had failed to comply with a Louisiana statute requiring written notice prior to the termination of a life policy.[4] Appellant contended that since federal courts must apply the choice of law rule of the forum state in diversity actions, and since the Louisiana Supreme Court had traditionally applied the doctrine of *lex loci contractus* in insurance cases,[5] the appellee's claim should be governed by Wisconsin law. Wisconsin had no requirement that notice be given prior to termination of a life insurance policy for nonpayment of premiums. The district court rejected the appellant's assertion that

1. In 1952, appellee's father had contracted in Wisconsin with the appellant, Aetna Life Insurance Company, for the issuance of a life policy in the face amount of $50,000. In 1957, with the insurer's full knowledge, the insured moved to Louisiana, where he resided until his death in 1963. In 1961, the insured exercised his option under the policy to change beneficiaries, naming the appellee as sole beneficiary.

2. Appellant was a Connecticut corporation licensed to do business in the states of Louisiana and Wisconsin.

3. The insured paid the annual premiums as they became due until 1962. In 1961, he had received a policy loan, which, coupled with the attendant interest, exceeded the cash surrender value of the policy. This transaction prevented the automatic loan feature of the policy from becoming operative so as to cover the insurer's default on his 1962 premium. At the appropriate time, Aetna notified the insured that the defaulted premium was due but failed to inform him that the automatic loan provision was inoperative. On July 2, 1962, Aetna notified the insured that the policy had lapsed without value other than the right of reinstatement. In order to reinstate the policy Aetna required that the insured submit a physician's statement. Prior to the submission of the statement the insured died.

4. LA. STAT. ANN. § 22:177 (1959).

5. LA. CIV. CODE ANN. art. 10 (West 1952) provides: "The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed." Appellant asserted that this section taken with state supreme court decisions (*e.g.*, Theye y Ajuria v. Pan American Life Ins. Co., 245 La. 755, 161 So. 2d 70 (1964)), established the proposition that the choice of law rule for insurance conflicts was *lex loci contractus*.

Wisconsin law was applicable, finding the recent decisions of the Louisiana Court of Appeals[6] indicated that the state supreme court was prepared to abandon the doctrine of *lex loci contractus* and adopt the grouping of contacts approach to choice of law problems. Applying the contacts theory, the district court found that the clear nexus of interest was in Louisiana and sustained the appellee's claim.[7] Pending appeal, the Louisiana Supreme Court decisively rejected the contacts approach and reaffirmed the doctrine of *lex loci contractus.*[8] On appeal, the Court of Appeals for the Fifth Circuit found that there was no "true" conflict presented, and, applying Louisiana law, *held,* affirmed. A federal court sitting in a diversity action, upon determining that one state has a clearly predominant interest in having its law applied, may find that there is a "false conflict" and thereby ignore the forum state's choice of law rule. *Lester v. Aetna Life Insurance Co.,* 433 F.2d 884 (5th Cir. 1970).

The use of the concept of "false conflicts"[9] to characterize and dispose of choice of law problems has been widely accepted by scholars, although it is a relatively recent addition to the wealth of conflict of law principles. Its popularity as an analytical device is due largely to its protean capacity to function within the matrix of various approaches to solving choiee of law problems.[10] Professor Brainerd Currie is credited[11] with the initial articulation of the theory as a part of the governmental interest analysis approach to the resolution of conflicts questions.[12] Currie broadly divided choice of law problems into true conflicts and

6. The district court based its holding on recent opinions written by Judge Tate of the Louisiana Court of Appeals for the Third Circuit advocating the utilization of the grouping of contacts approach to choice of law problems. *See* Universal C.I.T. Credit Corp. v. Hulett, 151 So. 2d 705 (La. Ct. App. 1963). *See also* Doty v. Central Mut. Ins. Co., 186 So. 2d 328 (La. Ct. App.) (Tate, J., concurring), *cert. denied,* 249 La. 486, 187 So. 2d 451 (1966); Blanchard v. Blanchard, 180 So. 2d 564 (La. Ct. App. 1965) (Tate, J., concurring).

7. Lester v. Aetna Life Ins. Co., 295 F. Supp. 1208 (W.D. La. 1968).

8. Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 236 So. 2d 216 (La. 1970).

9. The concept has been variously termed "false problems," "superficial conflicts," "spurious conflicts," "apparent conflicts," "avoidable conflicts," "illusory conflicts," or "pseudo conflicts." J. CASTEL, CONFLICT OF LAWS 54 (2d ed. 1968).

10. *See* Note, *False Conflicts,* 55 CALIF. L. REV. 74, 78 (1967).

11. *See, e.g.,* D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965); M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum,* 49 CALIF. L. REV. 845 (1961); R. Traynor, *Is This Conflict Really Necessary?,* 37 TEX. L. REV. 655 (1959); Weintraub, *Choice of Law in Contract,* 54 IOWA L. REV. 399 (1968); Note, *supra* note 10.

12. Professor Currie developed the governmental interest analysis approach in a series of law review articles, several of which are compiled in B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). *See also* Currie, *The Disinterested Third State,* 28 LAW & CONTEMP. PROB. 754 (1963); Currie, *Ehrenzweig and the Statute of Frauds: An Inquiry into the "Rule of Validation,"* 18 OKLA. L. REV. 243 (1965).

false problems.[13] He deemed false problems to encompass two types of cases: (1) when two or more states with conflicting local laws have some connection with the transaction in issue, but only one state has a viable interest in having its law applied; and (2) when the local laws of all interested jurisdictions are compatible.[14] While scholars have uniformly accepted the latter category of cases as representative of a pure false conflict,[15] there is considerable disharmony regarding Currie's interest analysis false conflict approach.[16] Professor Ehrenzweig, for example, has described this approach as a "deviant conflicts theory" suffering from an "incurable circularity" of reasoning.[17] Specifically, Ehrenzweig contends that courts adopting Currie's theory engage in the very choice of law process that the false conflicts doctrine is designed to avoid by determining whether one jurisdiction has an overwhelming interest and the other has only a slight interest in having its law applied.[18] Ehrenzweig would limit the use of the false conflict doctrine.to those cases in which the laws of the states involved are identical.[19] Professor Leflar has pointed out that those who accept the Currie approach often confuse the "easy" choice of law problem with the "false" problem.[20] Like Professor Ehrenzweig, Leflar maintains that whenever a choice must be made between the differing laws of two or more states, a true conflict exists even though the determination of which law is to be chosen is evident.[21] On the other hand, Leflar asserts that the false conflicts analysis is a valuable device for minimizing choice of law problems,

13. *See* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L. J. 171, 177.

14. *See* Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Methods*, 25 U. CHI. L. REV. 227, 251-63 (1958).

15. *See, e.g.*, J. CASTEL, *supra* note 9, at 54-55; D. CAVERS, *supra* note 11, at 63-64, 89-90; Note, *supra* note 10, at 76-78.

16. *Compare* Ehrenzweig, *"False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law*, 53 VA. L. REV. 847 (1967), *and* Leflar, *True "False Conflicts," Et Alia*, 48 B.U.L. REV. 164 (1968), *with* Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845 (1961), *and* Weintraub, *Choice of Law in Contract*, 54 IOWA L. REV. 399 (1968).

17. Ehrenzweig, *supra* note 16, at 848, 851.

18. *Id.* at 851. "That [a state] is the 'legitimately interested' state whose law is applicable without a conflict, or that she has the 'most significant relationship' with the case can be determined only through that very choice of law which the false-conflicts doctrine is designed to avoid." *Id. See generally* A. EHRENZWEIG, CONFLICT OF LAWS § 175, at 465-66 (1962).

19. *See* A. EHRENZWEIG, *supra* note 18, § 175, at 466; Ehrenzweig, *supra* note 16, at 851.

20. *See* Leflar, *supra* note 16, at 169.

21. "When an event or transaction has contacts with two or more states whose laws are different, and each state's contacts are sufficient under the Federal Constitution to permit its laws to be applied a real (not a false) choice-of-law problem is presented." R. LEFLAR, AMERICAN CONFLICTS LAW § 103, at 238 (1968).

provided its application is limited to cases in which either the laws of the jurisdictions involved are identical or the application of either law would yield consistent results.[22] Few courts have overtly employed the concept of "false conflict" as an analytical device for resolving choice of law questions,[23] although the use of the concept is implicit in the reasoning of numerous conflicts cases.[24] The Court of Appeals for the District of Columbia Circuit has disposed of two recent cases that presented an apparent choice of law problem by characterizing the putative controversy as a false conflict.[25] In each case the court utilized the Currie false conflict methodology and found that only one state had a legitimate interest in having its law applied to the facts at issue.[26] To date the false conflicts analysis has been dispositive only of torts cases that have presented apparent choice of law problems.[27]

The instant court initially acknowledged the inveterate proposition that a federal court in a diversity action involving a conflict of laws problem must resolve the conflict in accordance with the choice of law rule of the forum state.[28] In attempting to decipher the Louisiana choice of law rule, the court noted that there had been recent indications by a Louisiana appellate court that the state supreme court was prepared to reject the rule of *lex loci contractus,*[29] thus furnishing a "persuasive"

22. *Id.* at 239; Leflar, *supra* note 16, at 164.

23. *E.g.,* Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965); Kuchinic v. McCrory, 422 Pa. 620, 222 A.2d 897 (1966).

24. *E.g.,* Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964); Lauritzen v. Larsen, 345 U.S. 571 (1953); Fleet Messenger Serv. v. Life Ins. Co. of North America, 315 F.2d 593 (2d Cir. 1963); Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); Booth v. Milliken, 194 N.Y. 553, 87 N.E. 1115 (1909); Peterson v. Warren, 31 Wis. 2d 547, 143 N.W.2d 560 (1966).

25. Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965).

26. "The fact that two states have different rules where all the factors are oriented to one state does not necessarily mean that there is a 'conflict' in which one state demands and the other rejects the application of its rule to a situation where the pertinent factors arise in two or more states. Where there is no such conflict of interest in a multi-state situation, as this court and others have noted, there is a 'false conflict' situation." 404 F.2d at 224. "In sum this case presents a classic 'false conflicts' situation . . . . As a false conflicts case, our decision becomes simple: we apply the estoppel rule of New York, the only jurisdiction with an interest in having its law applied to the issue . . . ." 357 F.2d at 586.

27. *See* notes 22-25 *supra* and accompanying text.

28. *See* Klaxton Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). As a general rule the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), requires that the federal courts in a diversity action must apply the choice of law rule of the forum state. *See also* Fleet Messenger Serv. v. Life Ins. Co. of North America, 315 F.2d 593 (2d Cir. 1963); Shanahan v. George B. Landers Const. Co., 266 F.2d 400 (1st Cir. 1959); Davis v. Insurance Co. of North America, 268 F. Supp. 496 (E.D. La. 1967).

29. *See* note 6 *supra.*

basis[30] for the district court's application of the contacts theory in the instant case.[31] Nevertheless, since the Louisiana Supreme Court "emphatically denounced the . . . 'grouping of contacts'" doctrine immediately after the district court's decision,[32] the instant court concluded that the rule of *lex loci contractus* should govern, provided that a true conflict existed. Upon considering whether the facts at hand presented a true conflict, the court determined that although the laws of Wisconsin and Louisiana differed materially on the notice requirement, Louisiana's interest in having its law applied clearly predominated over that of Wisconsin. More specifically, the court reasoned that while Louisiana had a legitimate interest in protecting its citizens from forfeiture of life insurance coverage because of mere neglect to pay premiums, Wisconsin had virtually no interest in relieving a nondomiciliary insurer of the burden of giving notice to a Louisiana citizen that his policy had lapsed. The court, therefore, concluded that a false conflict existed, rendering the appellant bound by the Louisiana notice statute.

The instant case is the most recent addition to the growing body of decisional law[33] that consciously utilizes a false conflict analysis to classify and dispose of apparent choice of law problems. In reaching its decision, the Fifth Circuit has implicitly adopted a Currie false conflict approach[34] by analyzing each state's respective interests and concluding that no true conflict existed because Louisiana's interest was considerable and Wisconsin's only slight. It is logically indisputable, however, as Professors Ehrenzweig and Leflar have pointed out,[35] that Currie's theory in reality involves nothing more than a direct application of the governmental interest analysis or contacts approach to choice of law problems. Thus, the instant court's use of the Currie theory, in the wake of the Louisiana Supreme Court's unequivocal rejection of the contacts approach, raises a serious question concerning whether the *Erie*

30. Mason v. American Emery Wheel Works, 241 F.2d 906 (1st Cir. 1957). A federal court may conclude that a state supreme court is prepared to overrule a previous decision or rule and so hold. *See* Necaise v. Chrysler Corp., 335 F.2d 562 (5th Cir. 1964); Grey v. Hayes-Sammons Chem. Co., 310 F.2d 291 (5th Cir. 1962).

31. 433 F.2d at 888, *citing* Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 236 So. 2d 216 (1970). The instant court noted that although *Johnson* was a tort action in which the rule of *lex loci delicti* was applied to solve the choice of law problem, the broad validation of the *lex loci* doctrine found therein left no doubt that the Louisiana Supreme Court would apply the rule of *lex loci contractus* when confronted with a contract conflicts case.

32. 433 F.2d at 888.

33. *See* notes 23-26 *supra* and accompanying text.

34. *See* notes 10-14 *supra* and accompanying text.

35. *See* notes 16-21 *supra* and accompanying text.

doctrine has been violated. Certainly under the Leflar-Ehrenzweig view, the Fifth Circuit's characterization of the facts at hand as a false conflict would amount to a *sub silentio* application of the weighing of governmental interests or contacts approach in circumvention of its obligation under *Erie* to apply the Louisiana rule of *lex loci contractus*. Moreover, this apparent misapplication of the false conflict theory has precipitated a result contrary to the one that would have been reached if the Louisiana Supreme Court had been confronted with the facts at issue.[36]

Despite its improper application in the instant case, the false conflict doctrine possesses substantial utility as a means of analyzing choice of law problems. By weeding out[37] apparent conflicts before the necessity for selecting or applying choice of law rules arises, the doctrine often serves to avoid the convoluted reasoning and sophistry that so frequently mar conflicts opinions.[38] However, in situations in which the laws of the jurisdictions concerned are different but only one has a legitimate interest in having its law applied, the doctrine possesses the danger of becoming a mere rubric designed to buttress preconceived conclusions rather than to facilitate incisive analysis of choice of law questions. Courts that are insensitive to the necessity of a thorough analysis in conflicts problems can conveniently employ the term "false conflict" to perfunctorily dispose of choice of law questions that properly merit penetrating examination. It is submitted, however, that so long as courts do not employ the false conflicts label as a substitute for orderly analysis, the doctrine should continue to play a significant role in diminishing the vast uncertainty and confusion that pervade the choice of law field by eliminating at the outset those problems that in essence present no real conflict.

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36. The Louisiana Supreme Court, under the *lex loci* rationale of Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 236 So. 2d 216 (1970), would have looked to Wisconsin law to determine whether notice should have been given to the insured prior to the lapse of his policy. Wisconsin had no statutory requirement that notice be given, hence the Louisiana Supreme Court would have denied recovery to the insured. 433 F.2d at 889.

37. R. LEFLAR, *supra* note 21, § 103, at 257 (1968).

38. *E.g.*, Marie v. Garrison, 13 Abb. N. Cas. 210 (N.Y. Super. Ct. 1883).

Constitntional Law—Creditors' Rights—Civil Arrest Statutes that Promote Valid State Ohjectives and Provide Procedural Fairness Do Not Violate the Due Process Requirements of the Fourteeuth Amendment

Pursuant to the South Carolina civil arrest statute,[1] the judgment creditor[2] petitioned the United States District Court for the District of South Carolina for an arrest order against the defendant-debtor. At a hearing before the district judge, defendant was ordered into the custody of the federal marshall until he could convince the district court that he was not fraudulently concealing his property.[3] At a second hearing before the district judge, defendant asserted that he was neither fraudulently concealing property nor falsifying his schedule of assets and should therefore be released from custody.[4] The judge found defendant's arguments without merit and refused to issue a release order. On appeal, the defendant contended that the civil arrest statute violated the due process clause of the fourteenth amendment because it placed upon him the burden of proving that he had not fraudulently conveyed his property and failed to provide him with ordinary procedural safeguards.[5] The Fourth Circuit Court of Appeals, *held,* affirmed. Civil arrest statutes that foster the enforcement of state court judgments and afford procedural fairness violate neither the substantive nor procedural due process requirements of the fourteenth amendment. *Carter v. Lynch,* 429 F.2d 154 (4th Cir. 1970).

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1. "Arrest in civil actions permitted in certain cases.—The defendant may be arrested . . . in the following cases: . . . (6) In an action for . . . an injury to the person or character or for injury to or for wrongfully taking, detaining or converting property." S.C. CODE ANN. § 10-802 (1962). "Execution against the person.—If the action be one in which the defendant might have been arrested, as provided in § 10-802 and execution against the person of the judgment debtor may be issued . . . after the return of an execution against his property unsatisfied in whole or in part." *Id.* § 10-1705.

2. The judgment creditor's action was for an assault and battery in which he suffered bone fractures and severe lacerations and abrasions. The court reduced the jury's award from $15,000 compensatory and $35,000 punitive damages to $27,500.

3. The judgment creditor's execution was returned unsatisfied because prior to the filing of his tort action the defendant had conveyed all his real property to his mother and sold his personalty. The defendant was actually ordered into the custody of the marshall before the hearing, but was allowed to remain at his home until a hearing could be held.

4. The defendant was seeking release under the state's insolvency statutes. S.C. CODE ANN. §§ 10-841, -859 (1962). In order to be released he had to convince the judge that he was neither falsifying his schedule of assets nor concealing his property from his creditors. The judge disbelieved the debtor, found him in contempt of court, and refused to release him from custody.

5. The appellant contended that the civil arrest statute also violated South Carolina's constitutional provisions against imprisonment for debt. S.C. CONST. art. I, § 24.

The origin of civil arrest statutes can be traced to fifteenth century England. During this period, Parliament and the common law courts developed the legal writ of *capias ad satisfaciendum,* which required the local sheriff, at the plaintiff's request, to arrest a judgment debtor to satisfy an outstanding judgment.[6] Concurrent with this development, the equity courts created another form of civil arrest based on their equitable power to imprison for nonpayment of money judgments.[7] Initially, American law followed the English practice, but during the early 1800's many states passed constitutional prohibitions against imprisonment for debt.[8] Although a majority of state constitutions still forbid this practice, the prescription generally has been limited to contract debts.[9] A number of states have statutes authorizing civil arrest for fraud in the inducement,[10] breach of promise,[11] breach of fiduciary relationship,[12] tortious conduct,[13] and concealment of property from creditors or absconding debtors.[14] Presently, only nine states absolutely prohibit imprisonment of debtors.[15] In all states, nevertheless, a judgment debtor

6. *See* Fox, *Process of Imprisonment at Common Law,* 39 L.Q. REV. 46 (1923).

7. V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 76-77 (1964); W. WALSH, EQUITY 47-48 (1930). "Certainly, imprisonment for debt as practiced in England from the thirteenth to the nineteenth centuries had little to commend it to those who did not regard vengeance as a virtue." V. COUNTRYMAN, *supra* at 76-77.

8. *E.g.,* ALA. CONST. art. 1, § 20; CAL. CONST. art. 1, § 15; ILL. CONST. art. 2, § 12; IND. CONST. art. 1, § 22; N.J. CONST. art. 1, ¶ 13; N.M. CONST. art. 11, § 21; OHIO CONST. art. 1, § 15; PA. CONST. art. 1, § 16; S.C. CONST. art. 1 § 24. In *Ex parte* Trembley, 31 Cal. 2d 801, 193 P.2d 734 (1948), the court held that the California constitutional provision was designed to protect the poor but honest debtor but not to shield a dishonest man.

9. *See* V. COUNTRYMAN, *supra* note 7, at 78; Note, *Present Status of Execution Against the Body of the Judgment Debtor,* 42 IOWA L. REV. 306 (1957).

10. *E.g.,* ARK. STAT. ANN. § 34-602 (1962); CAL. CIV. PRO. CODE § 479 (1954); OHIO REV. CODE ANN. § 2331.02 (Baldwin 1964); ORE. REV. STAT. § 29.520 (1961); R.I. GEN. LAWS ANN. § 9-25-15 (1969).

11. *E.g.,* ORE. REV. STAT. § 29.520 (1961); PA. STAT. ANN. tit. 12, § 257 (1953); S.D. COMPILED LAWS ANN. § 15-22-2 (1967).

12. *E.g.,* CAL. CIV. PRO. CODE § 479 (1954); CONN. GEN. STAT. REV. § 52-355 (1968); ORE. REV. STAT. § 29.520 (1961); S.C. CODE ANN. § 10-802 (1962); S.D. COMPILED LAWS ANN. § 15-22-2 (1967).

13. *E.g.,* COLO. REV. STAT. ANN. § 77-9-3 (1963); ILL. ANN. STAT. ch. 77, § 5 (Smith-Hurd 1966); KY. REV. STAT. ANN. § 426.390 (Baldwin 1969); MICH. STAT. ANN. § 27A.6075 (1962); N.J. REV. STAT. § 2A.17-79 (1951); N.Y. CIV. PRAC. LAW § 764 (McKinney 1963); N.C. GEN. STAT. § 1-140 (1969).

14. *E.g.,* ARK. STAT. ANN. § 34-602 (1962); CAL. CIV. PRO. CODE § 479 (1954); DEL. CODE ANN. tit. 10, § 5051 (1953); MASS. GEN. LAWS ANN. ch. 224, § 2 (1955); MICH. STAT. ANN. § 27A.6075 (1962); MINN. STAT. ANN. § 575.03 (1947); N.Y. CIV. PRO. LAW § 6101 (McKinney 1963); N.C. GEN. STAT. § 1-140 (1969); S.C. CODE ANN. § 10-802 (1962).

15. ALA. CONST. art. 1, § 20; GA. CONST. § 2-121; MD. CONST. art. III, § 38; MISS. CONST. art. 3, § 30; MO. CONST. art. 1, § 11; N.M. CONST. art. II, § 21; OKLA. CONST. art. 2, § 13; TENN. CONST. art. 1, § 18; TEX. CONST. art 1, § 18.

may be imprisoned for civil or criminal contempt of court if he refuses to satisfy a judgment.[16] The purpose of civil arrest is similar to the purposes of both civil and criminal contempt. Civil arrest statutes are designed to coerce satisfaction of the judgment from a recalcitrant debtor and to punish the debtor for his "wrongful" acts.[17] Similarly, civil contempt proceedings can be utilized as a coercive device against a debtor,[18] while criminal contempt punishes an affront to the dignity of the court.[19] Thus the distinction between civil arrest and civil and criminal contempt is a narrow one.[20] The recalcitrant debtor can be imprisoned regardless of the procedure used. The procedures utilized in civil contempt proceedings are essentially equivalent to procedures under civil arrest statutes.[21] Civil

16. *See* Watkins v. Rives, 125 F.2d 33 (D.C. Cir. 1941); Lewis v. Grovas, 62 Ga. App. 625, 9 S.E.2d 282 (1940); Trotcky v. Van Sickle, 227 Ind. 441, 85 N.E.2d 638 (1949). Courts have held that the power to enforce obedience to a judgment, order, or decree for the payment of money will not lie if execution can be enforced. Burton v. Wayne Cir. Judge, 325 Mich. 159, 37 N.W.2d 899 (1949). This rule, however, does not apply unless there is an express statutory provision permitting it. Fingerhut v. Hirsch, 182 Misc. 429, 44 N.Y.S.2d 393 (Sup. Ct. 1943).

17. *See* Note, *supra* note 9, at 316-17.

18. In general, civil contempt punishes any "misconduct in the form of disobedience to an order or direction of the court by one party to a judicial proceeding to the prejudice of the other litigant." R. PERKINS, CRIMINAL LAW 532 (2d ed. 1969). The penalty imposed is "purely coercive in purpose" and "can be avoided by compliance with the court's order." *Id.*

19. Bloom v. Illinois, 391 U.S. 194, 201 (1968). "Indeed the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of government and enforcement of their mandates." *Id.* Most courts have held that willful violation of a court's order is punishable as criminal contempt. *E.g., In re* Debs, 158 U.S. 564 (1895); United States v. Schine, 125 F. Supp. 734 (W.D.N.Y. 1954). *See also* Beale, *Contempt of Court, Criminal and Civil,* 21 HARV. L. REV. 161 (1908).

20. "There is no essential dichotomy between 'civil' and 'criminal' contempt." Yates v. United States, 227 F.2d 844, 845 (9th Cir. 1955). "Fewer legal distinctions are emptier than the classification of contempts as 'civil' and 'criminal.' " Nelles, *Summary Power to Punish for Contempt,* 31 COLUM. L. REV. 956, 960 (1931). *See also* R. GOLDFARB, THE CONTEMPT POWER 46-47 (1963).

21. Compare the following civil contempt procedures with the civil arrest procedures discussed in notes 22-23 *infra* and accompanying text. A judgment creditor must request a decree of civil contempt since a court cannot issue the decree on its own initiative. Parker v. United States, 153 F.2d 66, 70 (1st Cir. 1946). The burden of proof is on the plaintiff by clear and convincing evidence. NLRB v. Tupelo Garment Co., 122 F.2d 603 (5th Cir. 1941). Moreover, even when a prison sentence may be imposed, the defendant cannot, as a matter of right, demand a jury trial. *Cf.* Bloom v. Illinois, 391 U.S. 194 (1968). He may, however, plead and prove impossibility of performance as an affirmative defense. *Cf.* Maggie v. Zeitz, 333 U.S. 56, 76 (1948); Mery v. Superior Court, 9 Cal. 2d 379, 70 P.2d 932 (1937). In order to incarcerate a defendant when impossibility has been pleaded, the court must find that the defendant was able to comply with the court's order. *See* Parker v. United States, *supra* note 21, at 70. One court held that indefinite commitment for civil contempt when the defendant is willing to satisfy the judgment violates specific constitutional prohibitions against involuntary servitude. *See* Wohlfort v. Wohlfort, 116 Kan. 154, 225 P. 746 (1924).

arrest must be initiated by a judgment creditor.[22] After notice is given to the debtor, a "show cause" hearing is held,[23] in which the judgment creditor must prove by a preponderance of the evidence that he has a valid judgment and that execution was returned unsatisfied.[24] The debtor is entitled to a jury trial only when authorized by statute[25] and any affirmative defense, such as insolvency, must be pleaded and proved by the debtor.[26] The procedures required in criminal contempt proceedings, however, are substantially different. In *Bloom v. Illinois*,[27] the Supreme Court stated that "serious" criminal contempt requires the application of the procedural safeguards of a criminal trial, such as proof beyond a reasonable doubt and jury trial before an impartial judge.[28] Moreover, the Court has recently extended criminal procedural requirements to defendants in noncriminal proceedings that may result in incarceration.[29] The Court, however, has never ruled on the constitutionality of civil arrest statutes.[30]

22. For a general discussion of civil arrest procedures see Note, *supra* note 9, at 312-15. *See also* S.C. CODE ANN. § 10-805 (1962).

23. *See* ARK. STAT. ANN. § 34-618 (1962); IND. ANN. STAT. §§ 2-4304 to 4305 (1968); S.C. CODE ANN. § 10-847 (1962).

24. *See, e.g.*, Thompson v. Thompson, 10 N.D. 564, 88 N.W. 565 (1901); IND. ANN. STAT. § 2-4307 (1968). If the debtor does not appear at the "show cause" hearing, the court will determine the question of commitment solely on the basis of the affidavits. *E.g.*, IND. ANN. STAT. § 2-4306 (1968); *cf.* S.C. CODE ANN. § 10-843, -847 (1962). *See generally* Note, *supra* note 9, at 312-13.

25. *E.g.*, IND. ANN. STAT. § 2-4307 (1968); S.C. CODE ANN. § 10-849 (1962); *see* Note, *supra* note 9, at 313.

26. In civil arrest proceedings, the debtor seeks relief under the state's insolvency statute. When the court is satisfied that the debtor is insolvent, a "poor debtors" oath is administered, and the debtor is released from custody. *See, e.g.*, CAL. CODE CIV. PRO. § 1148 (West 1948); IND. ANN. STAT. § 2-4317 (1968); MASS. ANN. LAWS ch. 224, § 29 (1955); S.C. CODE ANN. § 10-844 (1962).

27. 391 U.S. 194 (1968).

28. *Id.* at 207. In *Bloom*, the Court held that the due process clause requires proof of the defendant's guilt beyond a reasonable doubt, advisement of the charges against him, a reasonable opportunity to present a defense, presentation of witnesses, a public trial before an unbiased judge, and the privilege against self-incrimination. Furthermore, the Court held that the defendant was entitled to a jury trial for "serious" criminal contempt.

29. *In re* Winship, 397 U.S. 358 (1970) (in a juvenile proceeding, guilt must be established beyond a reasonable doubt); *In re* Gault, 387 U.S. 1 (1967) (notification of charges, right to counsel, confrontation of witnesses, privilege against self-incrimination, and the right of cross-examination are required in juvenile proceedings); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1969) (due process requires substantial compliance with criminal procedures in a custody proceeding).

30. In Gotthilf v. Sills, 375 U.S. 79, 80 (1963), the Supreme Court had the opportunity to rule on the constitutionality of civil arrest procedures, but refused to hear the case because certiorari had been "improvidently granted." The lower courts in this case had sustained, without opinion, the constitutionality of the civil arrest statute. Sills v. Charge-It Systems, Inc., 12 N.Y.2d 792, 186 N.E.2d 811, 235 N.Y.S.2d 379 (1962). *See* Rogge, *A Technique for Change*, 11 U.C.L.A.L. REV. 481 (1964).

The instant court initially held that the civil arrest statute, which it characterized as civil in nature, does not violate South Carolina's constitution since the state courts have interpreted the prohibition against imprisonment for debt to apply only to contract debts. Reasoning by analogy to habeas corpus proceedings, the court concluded that the statute's requirement that a defendant prove his inability to comply with the court's order was a constitutionally permissible placement of the burden of proof. Furthermore, the court rejected the defendant's contention that continued incarceration, despite the absence of ordinary criminal proceedings, was an unconstitutional deprivation of liberty. The court held instead that the procedures prescribed by the statute satisfied federal due process requirements because they afforded procedural fairness during the proceedings. The court also found that the civil arrest statute was a reasonable exercise of the state's police power to enforce state court judgments and therefore did not violate substantive due process requirements.[31]

By affirming the constitutionality of South Carolina's civil arrest statute, the instant case would appear to be persuasive precedent for upholding similar state statutes. Upon closer analysis of the constitutional issues, however, the soundness of this decision can be questioned. The court initially erred in ignoring the penal consequences of civil arrest by perfunctorily labeling the proceedings as civil in nature. One of the purposes of civil arrest is to punish the defendant for his "wrongful" acts, and frequently the defendant is imprisoned.[32] The exercise of this power by the court is essentially a utilization of its power to punish for criminal contempt, and under the *Bloom* standard, criminal safeguards should be required. The court failed to recognize that the labels "civil" and "criminal" should have no bearing on a defendant's right to criminal procedures in a proceeding that may result

31. The court returned the defendant to the custody of the marshal. It concluded that if the defendant's imprisonment had been for perjury—falsification of his schedule of assets—full constitutional safeguards of a criminal trial would have been applicable.

32. Before the instant court could incarcerate the debtor, it had to find that he could comply with the court's order. *See* note 18 *supra*. In the instant case, the court concluded that the defendant had "practical" control of his property. The title to the property, however, was vested in the defendant's mother. The court, therefore, must have found that the defendant could have caused his mother to voluntarily return the property as a gift. This assumption is tenuous at best because the mother may have had neither the desire nor the ability to do so, since she held the property as trustee for the defendant's minor children. Furthermore, the defendant could not force reconveyance of the property by legal action since a court will not rescind a conveyance for a person who claims that his own acts were fraudulent. Furthermore, S.C. CODE ANN. § 57-303 (1962) provides 6 months imprisonment "upon lawful conviction" for a fraudulent conveyance.

in his incarceration.[33] When the civil arrest statute in the instant case is tested by this standard, its unconstitutionality is apparent. The statute's requirement that the defendant establish the bona fide nature of his acts in order to be released from custody is manifestly unfair and violates procedural due process. It is unfortunate that the court summarily dismissed the defendant's argument on this point. Furthermore, the court's reliance on an analogy to habeas corpus proceedings appears misplaced. Before habeas corpus may be sought, the petitioner generally has had a full criminal trial with the constitutional safeguards in effect. His guilt has been established by the state to the satisfaction of a jury beyond a reasonable doubt. In the instant case, however, the civil arrest statute requires that the defendant prove his "innocence" at the initial fact finding proceeding. Moreover, the court's holding that the South Carolina statute is a reasonable exercise of the state's police power also is subject to criticism. In the instant case, the judgment creditor could have brought suit to set aside the defendant's conveyance as fraudulent.[34] The successful utilization of this procedure would have satisfied the judgment creditor's claim from the defendant's property. As long as this remedy remains available, the deprivation of the defendant's liberty is unjustifiable. The South Carolina civil arrest statute, therefore, violates the fourteenth amendment's substantive due process requirements by not requiring exhaustion of all other available remedies before incarceration.[35] In conclusion, the court in the instant case has regressed in the judicial movement to protect individual freedom from arbitrary

33. *See* Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968). "It matters not whether the proceedings be labeled 'civil' or 'criminal'. . . . It is the likelihood of involuntary incarceration . . . which commands the observance of the constitutional safeguards of due process." *Id.* at 396. *See also In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. I (1967).

34. It is not clear why the judgment creditor did not attempt to have the conveyance set aside as fraudulent. *See* S.C. CODE ANN. § 57-301 (1962); UNIFORM FRAUDULENT CONVEYANCE ACT §§ 4, 6, 7, 9. Two reasons seem possible: (1) he may have been unable to prove that the conveyance was fraudulent; and (2) he may have sought to punish the defendant for his actions without the necessity of a criminal trial. If the conveyance was not fraudulent, then the civil arrest procedures have imprisoned an innocent man. If the judgment creditor sought punishment, his proper remedy should have been in a criminal proceeding.

35. *Cf.* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964); Shelton v. Tucker, 364 U.S. 479 (1960); Barenblatt v. United States, 360 U.S. 109 (1959); Sweezy v. New Hampshire, 354 U.S. 234 (1957). "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted). This principle was expressly recognized by the Supreme Court in Tate v. Short, 39 U.S.L.W. 4301 (U.S. Mar. 2, 1971) (unconstitutional to imprison indigents for failure to pay traffic fines).

processes that result in the deprivation of liberty without due process of law. Hopefully, future courts will recognize the constitutional deficiencies of civil arrest statutes and will declare them unconstitutional.

Constitutional Law—Supremacy Clause—State Supreme Court Not Bound To Follow Federal District Court Decision on Constitutionality of Municipal Ordinance

Petitioner was convicted in an Illinois circuit court of violating a municipal ordinance that prohibited interference with a police officer in the discharge of his duties.[1] While petitioner's appeal was pending before the Illinois Supreme Court, the United States District Court for the Northern District of Illinois, in an unrelated declaratory judgment action, held the ordinance unconstitutional.[2] Thereafter, the Illinois Supreme Court affirmed petitioner's conviction without mentioning the district court's prior invalidation of the ordinance.[3] Petitioner was subsequently placed in confinement[4] and promptly filed a habeas corpus petition in the District Court for the Northern District of Illinois. As a basis for the issuance of a writ, petitioner contended that under the supremacy clause of the Constitution, the Illinois Supreme Court was bound to follow the federal district court's prior determination of the ordinance's unconstitutionality and that the state court, in failing to do so, had improperly affirmed his conviction. The district court rejected this contention and denied the petition. On appeal to the Court of Appeals for the Seventh Circuit,[5] *held,* affirmed. The decision of a

1. CHICAGO, ILL., CODE ch. 11, § 33 (1908).

2. Landry v. Daley, 280 F. Supp. 968 (N.D. Ill. 1968).

3. City of Chicago v. Lawrence, 42 Ill. 2d 461, 248 N.E.2d 71 (1969). A subsequent appeal to the United States Supreme Court was dismissed for lack of jurisdiction. The Court also treated the jurisdictional statement as a petition for certiorari and denied certiorari, remanding the case to the trial court. Lawrence v. City of Chicago, 396 U.S. 39 (1969).

4. After finding the petitioner guilty, the trial court fined him $100. Petitioner refused to pay and was placed in the custody of the county sheriff and confined in the House of Correction to serve off the fine at a rate of $5 per day.

5. While the appeal was pending before the Seventh Circuit, petitioner, having served the requisite time in jail, was discharged from custody. Accordingly, respondents maintained that this discharge rendered the instant appeal moot. Respondents distinguished Carafas v. LaVallee, 391 U.S. 234 (1968), which involved an application for habeas corpus following a felony conviction, on the ground that the petitioner had violated a municipal penal ordinance. The instant court ruled that

federal district court that a municipal ordinance is unconstitutional is not binding in unrelated litigation pending before a state supreme court. *United States ex rel. Lawrence v. Woods,* 432 F.2d 1072 (7th Cir. 1970).

The United States Supreme Court, in the landmark decision of *Erie R.R. v. Tompkins,*[6] held that federal courts sitting in diversity actions must apply the substantive law of the forum state. Prior to the instant decision, however, no federal court had specifically determined whether decisions of lower federal courts on federal questions are binding on state tribunals. Although a number of state courts have considered the issue,[7] an analysis of the relevant case law reveals a sharp split of authority. The majority of the state courts addressing the question have held that they are obliged to follow only the decisions[8] of the United States Supreme Court and not those of the lower federal courts.[9] These courts have generally pointed to the parallelism of the two court systems, emphasizing that both are subject to the reviewing authority of the Supreme Court[10] whenever a federal law question is involved. Courts

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Carafas and Siborn v. New York, 392 U.S. 40 (1968), both holding that a criminal case is moot only if it is shown that there is no possibility of the imposition of collateral legal consequences upon conviction, were controlling. United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1074 (7th Cir. 1970). Respondents further contended that the possible legal consequences flowing from a conviction under a municipal ordinance were nonexistent. The court, however, held that petitioner clearly had an interest in voiding his conviction in light of ILL. REV. STAT. ch. 38, § 206-5 (Smith-Hurd Supp. 1970), permitting anyone who has been charged with an ordinance violation and who is subsequently acquitted or released without conviction to have the record of his arrest expunged, provided he had never previously been convicted of any criminal offense or ordinance violation. 432 F.2d at 1075.

6. 304 U.S. 64 (1938).

7. Some courts have carefully avoided deciding whether they have a duty to follow lower federal court decisions in cases involving federal questions. *E.g.,* Pennsylvania R.R. v. Midstate Horticultural Co., 124 P.2d 902 (Cal. Ct. App.), *aff'd,* 21 Cal. 2d 243, 131 P.2d 544 (1942); Auslender v. Boettcher, 78 Colo. 427, 242 P. 672 (1925).

8. It should be noted that a denial of certiorari is not considered to be a final determination by the Supreme Court. Brown v. Allen, 344 U.S. 443, 491-92 (1953).

9. *E.g.,* People *ex rel.* Ray v. Martin, 294 N.Y. 61, 73, 60 N.E.2d 541, 547 (1945); Bruce v. Evertson, 180 Okla. 111, 68 P.2d 95 (1937). In *Bruce* the court found that a circuit court of appeals decision on the meaning of a federal statute was not controlling. It yielded to the circuit court's judgment, however, "in the interest of a harmonious administration of the law." *Id.* at 113, 68 P.2d at 97. The Pennsylvania Supreme Court is an example of a state court that only recently has aligned itself with the majority view. *Compare* Thomas v. Hempt Bros., 371 Pa. 383, 392, 89 A.2d 776, 780 (1952), *rev'd,* 345 U.S. 19 (1953), *with* Breckline v. Metropolitan Life Ins. Co., 406 Pa. 573, 578, 178 A.2d 748, 751 (1962). In the *Thomas* case, the Pennsylvania court found a conflict between the Third and Tenth Circuits on the point in question and chose the Tenth Circuit decision as being more consistent with the federal policy involved. The Third Circuit decision was later affirmed by the Supreme Court in Alstate Constr. Co. v. Durkin, 345 U.S. 13 (1953), necessitating a reversal of the Pennsylvania court's decision.

10. *E.g.,* Iowa Nat'l Bank v. Stewart, 214 Iowa 1229, 1246, 232 N.W. 445, 454 (1930), *rev'd on other grounds,* Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931); State v. Coleman, 46 N.J. 16, 36, 214 A.2d 393, 403 (1965).

following the majority view have accorded varying degrees of weight to decisions of lower federal courts, ranging from "persuasive"[11] to "highly persuasive"[12] to "respectful consideration to the circuit courts."[13] A minority of state courts have held that they are bound by lower federal court determinations, though generally the rationale for their expansive interpretation of the supremacy clause has not been fully divulged.[14] Most of the minority-view decisions have involved the construction[15] or constitutionality[16] of federal statutes. Although many of these courts have limited their deference to the courts of appeals for the particular circuits in which they lie,[17] some have considered themselves bound by appellate decisions outside their respective circuits[18] and others by all lower federal court decisions.[19]

In the instant case, the court initially recognized the two distinct lines of authority on the conclusiveness of lower federal court decisions on state tribunals. Analyzing the rationale underlying the majority view, the court cursorily stated that it was "persuaded that [this] view . . . is the correct one."[20] Noting that the lower federal courts, unlike the Supreme Court, exercise no appellate jurisdiction over state tribunals in cases involving federal questions, the court concluded that lower federal court decisions[21] are not encompassed by the supremacy clause and therefore should not be binding on state courts.[22]

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11. Staley v. Illinois Cent. R.R., 268 Ill. 356, 374, 109 N.E. 342, 348 (1915); Harrison v. Barngrover, 72 S.W.2d 971, 974 (Tex. Civ. App. 1934), *cert. denied*, 294 U.S. 731 (1935).

12. State v. Cissna, 168 Ark. 565, 569, 270 S.W. 963, 964 (1925).

13. *See* Lewis v. Braun, 356 Ill. 467, 475, 191 N.E. 56, 59 (1934); Brown v. Palmer Clay Prods. Co., 290 Mass. 108, 110, 195 N.E. 122, 123 (1935).

14. *E.g.*, Handy v. Goodyear Tire & Rubber Co., 230 Ala. 211, 160 So. 530 (1935); Kuchenmeister v. Los Angeles & S.L.R.R., 52 Utah 116, 172 P. 725 (1918). Some of the courts nominally ascribing to the minority view have stated their deference wholly in dicta, while actually relying on Supreme Court precedent to reach their decisions. *E.g.*, Krouse v. Lowden, 153 Kan. 181, 188, 109 P.2d 138, 143, *cert. denied*, 314 U.S. 633 (1941). Others are ambiguous with respect to whether the federal decisions are controlling or merely agreeable. *E.g.*, Breeding v. TVA, 243 Ala. 240, 9 So. 2d 6 (1942); Stella Cheese Co. v. Chicago, St. P., M. & O. Ry., 248 Wis. 196, 21 N.W.2d 655 (1946).

15. *E.g.*, Kuchenmeister v. Los Angeles & S.L.R.R., 52 Utah 116, 172 P. 725 (1918).

16. *E.g.*, Waller v. Eanes' Adm'r, 156 Va. 389, 157 S.E. 721 (1931).

17. *E.g.*, Handy v. Goodyear Tire & Rubber Co., 230 Ala. 211, 160 So. 530 (1935).

18. *E.g.*, Massey v. War Emergency Cooperative Ass'n, 209 S.C. 292, 39 S.E.2d 907 (1946); Kuchenmeister v. Los Angeles & S.L.R.R., 52 Utah 116, 172 P. 725 (1918).

19. *E.g.*, Brenen v. Dalhstrom Metallic Door Co., 189 App. Div. 685, 178 N.Y.S. 846 (1919).

20. 432 F.2d at 1075.

21. Although the precise issue before the instant court concerned the effect of a federal district court decision, the language of the opinion refers to lower federal courts in general.

22. 432 F.2d at 1076. The court was careful to distinguish the res judicata effect of a lower federal court decision when the court had jurisdiction over the subject matter and parties from the instant case, in which the determination of unconstitutionality was made in an unrelated action involving a different defendant.

The instant decision presents an opportunity to consider the desirability of decisional uniformity in cases involving federal rights. Uniformity in this respect would produce essentially the converse of the *Erie*[23] doctrine by requiring state courts to follow the lower federal courts in the adjudication of federal questions. The landmark decisions of *Clearfield Trust Co. v. United States*[24] and *Textile Workers of America v. Lincoln Mills,*[25] which directed lower federal courts to formulate federal common law to govern federal question cases, illustrate the Supreme Court's high regard for the uniform administration of federal statutes and policies.[26] There is clearly an even more pervasive national interest in the uniform interpretation of the Constitution as the fountainhead of federally created rights.[27] Balanced against the interest in decisional uniformity is an ostensible element of pride and dignity that state appellate courts rightly accord themselves in considering cases involving the interrelationship of courts within the judicial hierarchy.[28] The present absence of decisional uniformity, of course, permits state courts to substitute their independent conceptions of important federal rights for the prior determinations of lower federal courts on identical issues. This incongruity becomes particularly acute in actions instituted under federal civil statutes that provide a choice of state or federal courts for litigation.[29] Moreover, the proposition that any temporary disharmony betwcen state and federal decisions on a given issue will

23. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

24. 318 U.S. 363 (1943).

25. 353 U.S. 448 (1957).

26. For a discussion of the development of federal common law since the *Erie* decision see Friendly, *In Praise of Erie—And of the New Federal Common Law,* 39 N.Y.U.L. REV. 383, 405-22 (1964).

27. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 343 (1816).

28. This element is exemplified by the Illinois Supreme Court's earlier decision of the conflict presented in the instant case. City of Chicago v. Lawrence, 42 Ill. 2d 461, 248 N.E.2d 71 (1969). Since the Illinois court made no mention of the prior district court decision on the unconstitutionality of the ordinance, one can readily hypothesize that such an omission, coupled with its decision, is indicative of this attitude among state appellate tribunals.

29. The Fair Labor Standards Act is an example of a federal statute that provides claimants with the opportunity to maintain actions in either a state or federal court of competent jurisdiction. 29 U.S.C. § 216 (b) (1965). In Connell v. Vermilya-Brown Co., 73 F. Supp. 860 (S.D.N.Y. 1946), the court declared that whether a defense base was a "possession" of the United States within the meaning of the FLSA is a political question not to be determined by the courts. A New York trial court subsequently noted the federal district court decision in *Connell* but nevertheless concluded, after examining the purpose behind the FLSA, that territory leased by the United States for a defense base was a "possession" within the meaning of the act. Crowe v. Elmhurst Contracting Co., 191 Misc. 585, 74 N.Y.S.2d 445 (Sup. Ct. 1947), *aff'd,* 273 App. Div. 999, 79 N.Y.S.2d 876 (1948). The *Connell* case was subsequently reversed in 164 F.2d 924 (2d Cir. 1947), *aff'd,* 335 U.S. 377 (1948).

ultimately be reconciled by the Supreme Court[30] overlooks the obvious physical incapacity of the high Court to render a final decision in all cases. There is in fact a much greater likelihood of the Supreme Court's reconciling differences between federal decisions on particular issues, especially at the circuit level,[31] than of its resolving conflicts between state and federal courts. The lower federal courts thus might be an administratively feasible alternative for obtaining uniform decisional law on federal questions. By the very nature of the judicial system, these courts are more experienced than the state tribunals in adjudicating federal rights and administering Supreme Court determinations. Assuming that the expertise of the lower federal courts should be utilized to achieve decisional uniformity, there is the further problem of which federal courts should be given deference. Although the lower federal courts exercise no appellate jurisdiction over state courts,[32] a strong argument can be made for requiring a state court to follow at least the decisions of the federal court of appeals for its respective circuit. In the first place, such decisions are strictly binding on federal district courts within the state. Moreover, the prestige of the circuit court within the federal system, coupled with the fact that three judges generally hear cases at that level, commands respect. On the other hand, it would seem less reasonable to require a state supreme court to be bound by the decision of a single federal judge. While it is unlikely that the Supreme Court will ever formally require state courts to follow lower federal court decisions, the problems discussed herein point out the need to reexamine and define precisely the role of the lower federal courts in the judicial system.

Damages—Punitive Damages Are Recoverable in Suits Brought Under the Federal Employers' Liability Act

Plaintiff, administratrix of her deceased husband's estate,[1] sued defendant railroad under the Federal Employers' Liability Act (FELA),[2]

30. *See* State v. Coleman, 46 N.J. 16, 34, 214 A.2d 393, 403 (1965); 48 COLUM. L. REV. 943, 948 (1948).

31. Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1357-58 (1970).

32. *See* cases cited note 10 *supra* and accompanying text.

1. The deceased was crushed to death when a suspended boxcar fell from a crane lift. The plaintiff alleged that the crane's defective brake system had failed in the past and that the railroad, although knowing of the defect, made no attempt to correct the dangerous situation.

2. 45 U.S.C. §§ 51-60 (1964). Section 1 of the Act gives a cause of action for negligence

alleging that the defendant's negligence caused her husband's death and that punitive as well as compensatory damages should be awarded. Defendant maintained that since the FELA does not expressly provide for punitive damages, the remedy is precluded in an action brought under the Act. Plaintiff contended, however, that Congress, in enacting the FELA, did not intend to abrogate existing common law regarding punitive damages. The District Court of the United States for the Western District of Michigan, *held*, judgment for plaintiff.[3] Punitive damages may be awarded under the Federal Employers' Liability Act in any action in which they could be recovered at common law. *Kozar v. Chesapeake & Ohio Railway*, 320 F. Supp. 335 (W.D. Mich. 1970).

The original purpose of the FELA was to facilitate recovery by railroad workers for injuries caused by their employers' negligence.[4] Enacted in 1908, the Act differed from the common law in two fundamental ways. First, it excluded the common law defenses of fellow-servant, contributory negligence, and assumption of the risk, which usually had barred injured employees from recovery.[5] Secondly, the Act provided a right of action to named beneficiaries of a deceased employee. The latter provision created an exception to the traditional rule that a

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against a railroad "to any person suffering injury while he is employed . . . or, in case of death of such employee, to his or her personal representative, for the benefit of [named beneficiaries, family, or next of kin]." *Id.* § 51. A 1910 amendment added § 9, which provides that "any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of [named beneficiaries, family, or next of kin] . . . but in such cases there shall be only one recovery for the same injury." *Id.* § 59. The constitutionality of the Act was upheld in Mondou v. New York, N.H. & H.R.R., 223 U.S. 1 (1912).

The purpose of the Act was to reduce the hazardous working conditions of railroad employees and shift the burden of loss sustained by railroad employees and their families to the employer. In the year 1908 alone, there were 281,615 injuries and deaths suffered by employees of railroads. SENATE JUDICIARY COMM. REPORT ON THE 1910 AMENDMENTS TO FELA, S. REP. NO. 432, 61st Cong., 2d Sess. 2 (1910) [hereinafter cited as REPORT ON 1910 AMENDMENTS]. *See also* Johnson v. Southern Pac. Co., 196 U.S. 1, 19 (1904) (reflecting concern for the plight of railroad employees). For a comprehensive survey of the history of the FELA see Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 LAW & CONTEMP. PROB. 160 (1953). *See also* E. CHEIT, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT 10-11, 21-23 (1961); W. PROSSER, TORTS § 82 (3d ed. 1964); Richter & Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L.Q. 203 (1951).

3. The jury awarded $70,000 punitive damages and $120,045.40 compensatory damages.

4. 42 CONG. REC. 4434 (1908) (majority report of the House Judiciary Committee recommending passage of FELA). When the FELA is applicable, it is the exclusive remedy. Bowen v. New York Cent. R.R., 179 F. Supp. 225 (D. Mass. 1959); McCabe v. Boston Terminal Co., 303 Mass. 450, 22 N.E.2d 33 (1939), *rev'd on other grounds*, 309 U.S. 624 (1940).

5. *See* Mondou v. New York, N.H. & H.R.R., 223 U.S. 1, 49-51 (1951) (contributory negligence, however, is retained for the purpose of reducing damages to the extent of the employee's negligence); 42 CONG. REC. 4527 (1908) (remarks of Senator Dolliver).

right of action terminated with the victim's death.[6] The beneficiary's right of action under the FELA, like the typical American wrongful death statute, is patterned after Lord Campbell's Act.[7] Since this early statute did not expressly allow recovery of punitive damages, the English courts assumed that a beneficiary could recover only compensatory damages for the loss of the deceased's support and services.[8] Although punitive damages traditionally had been awarded at a jury's discretion in common law tort actions,[9] American courts have followed the English rule that punitive damages may not be awarded in wrongful death actions unless the statute expressly or by clear implication provides for recovery.[10] No reference to punitive damages appears in either the FELA, as originally enacted, or its later amendments. When the Supreme Court, in *Michigan Central Railroad v. Vreeland*,[11] first interpreted the 1908 provisions of the FELA, it held that a beneficiary's

6. At common law there was no cause of action for the wrongful death of another. *See, e.g.*, Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 67 (1913); Florida E. Coast Ry. v. McRoberts, 111 Fla. 278, 282, 149 So. 631, 632 (1933).

7. Lord Campbell's Act is the Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93. *See* Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 69 (1913); Petition of Den Norske Amerikalinje A/S, 276 F. Supp. 163, 174 (N.D. Ohio 1967).

8. *See, e.g.*, Blake v. Midland Ry., 118 Eng. Rep. 35, 40 (Q.B. 1852). *See generally* Annot., 94 A.L.R. 384 (1935).

9. Punitive damages, which are given at a jury's discretion, are viewed as a windfall to the plaintiff and not as a "right of recovery." *E.g.*, Harrison v. Ely, 120 Ill. 83, 11 N.E. 334 (1887); Louisville & N.R.R. v. Logan's Adm'x, 178 Ky. 29, 198 S.W. 537 (1917); Van Deventer v. Gulf Prod. Co., 41 S.W.2d 1029 (Tex. Civ. App. 1931). The first American case to allow punitive damages in an action at law was Day v. Woodworth, 54 U.S. 362 (1851). "It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff." *Id.* at 370. In Milwaukee & St. P. Ry. v. Arms, 91 U.S. 489 (1875), the Court stated that punitive damages are "applicable to suits for personal injuries received through the negligence of others." *Id.* at 493. Punitive damages continued to be awarded in certain cases, but varied terminology was used to describe the conduct that justified their recovery. Courts, for example, have spoken in terms of conduct that is willful or wanton, malicious, grossly negligent, recklessly indifferent to rights of others, and equivalent to intentional conduct. *See, e.g.*, Winters v. Cowen, 90 F. 99 (C.C.N.D. Ohio 1898), *aff'd*, 96 F. 929 (6th Cir. 1899) (state law allowed punitive damages); Denver & R.G. Ry. v. Harris, 122 U.S. 597 (1887) (assault on plaintiff by servants of railroad); Barry v. Edmunds, 116 U.S. 550 (1886) (trespass accompanied with malice); Missouri Pac. Ry. v. Humes, 115 U.S. 512 (1885) (statute setting damages for failure of a railroad to maintain fences); Philadelphia, W., & B.R.R. v. Quigley, 62 U.S. (21 How.) 202 (1858) (libel action); Gallena v. Hot Springs R.R., 13 F. 116 (C.C.E.D. Ark. 1882) (wanton and malicious ejectment of a railroad passenger); Brown v. Memphis & C.R.R., 7 F. 51 (C.C.W.D. Tenn. 1881) (wrongful passenger ejectment).

10. *See, e.g.*, Swift & Co. v. Johnson, 138 F. 867 (8th Cir. 1905); Meehan v. Cent. R.R., 181 F. Supp. 594 (S.D.N.Y. 1960); Thompson v. Louisville & N.R.R., 91 Ala. 496, 8 So. 406 (1890); Burk v. Arcata & M.R.R., 125 Cal. 364, 57 P. 1065 (1899); Florida E. Coast Ry. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933); Annot., 94 A.L.R. 384 (1935).

11. 227 U.S. 59 (1913).

recovery was limited to compensation for the loss of the deceased's support and services.[12] The Court, however, did not consider the question of punitive damages. The deeision of a lower federal court in *Cain v. Southern Railway*[13] is the only case specifically holding that punitive damages could not be recovered in a wrongful death action under the 1908 Act. The 1910 amendment to the FELA expanded the rights of beneficiaries by permitting the deceased's right of action to survive for their benefit. Thus, in addition to the right to recover for loss of support and services, the beneficiary could recover damages that the deceased might have recovered in his own right.[14] Following the 1910 amendment, some courts held that a beneficiary's recovery in a wrongful death action also included compensation for the deceased's pain and suffering prior to death.[15] Many FELA decisions, however, continued to follow *Vreeland*, limiting recovery to loss of the deceased's support and services.[16] Of the five FELA cases that have even mentioned punitive damages,[17] none is adequate authority either for or against allowing recovery. In the recent case of *Petition of Den Norske Amerikalinje A/S*,[18] however, a federal district court held that an injured seaman or his beneficiary could

12. *Id.* at 70.

13. 199 F. 211 (E.D. Tenn. 1911).

14. *See* 45 U.S.C. § 59 (1964). *See also* Cain v. Southern Ry., 199 F. 211 (E.D. Tenn. 1911) (survival of the injured employee's right of action was expressly provided for by the amendment); 45 CONG. REC. 4045 (1910) (Senator Borah commenting on the change proposed by the 1910 survivorship clause amendment—the legal representative of a deceased railroad employee shall have a right to recover damages for whatever injury the deceased suffered between the time of the injury and the time of his death).

15. *E.g.*, St. Louis, I.M. & S. Ry. v. Craft, 237 U.S. 648, 658 (1918) (an excellent discussion of the effect of the 1910 amendment); Southern Pac. Co. v. Heavingham, 236 F.2d 406 (9th Cir. 1956); Chicago, R.I. & P. Ry. v. Brooks, 155 Okla. 53, 11 P.2d 142 (1931). *See also* Grantham v. Fishing Boat Redwing, 234 F. Supp. 89 (E.D.S.C. 1964) (Jones Act).

16. A reason that some of these decisions do not mention damages for pain and suffering may be that the decedent died instantaneously. *See* Forgarty v. Northern Pac. Ry., 85 Wash. 90, 147 P. 652 (1915). *See also* Chesapeake & O. Ry. v. Gainey, 241 U.S. 494 (1916); Atlantic Coast Line R.R. v. Daugherty, 116 Ga. App. 438, 157 S.E.2d 880 (1967); Nashville, C. & St. L. Ry. v. Hines, 20 Tenn. App. 1, 94 S.W.2d 397 (1935); Chafin v. Norfolk & W. Ry., 80 W. Va. 703, 93 S.E. 822 (1917).

17. Missouri-K.-T. R.R. v. Ridgway, 191 F.2d 363 (8th Cir. 1951); Gunnip v. Warner Co., 43 F.R.D. 365 (E.D. Penn. 1968); Helsel v. Pennsylvania R.R., 84 F. Supp. 296 (E.D.N.Y. 1949); Cain v. Southern Ry., 199 F. 211 (E.D. Tenn. 1911); Ennis v. Yazoo & M.V.R.R., 118 Miss. 509, 79 So. 73 (1918) (discussed note 21 *infra*).

18. 276 F. Supp. 163 (N.D. Ohio 1967), *rev'd sub nom.* United States Steel Corp. v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970). The award of punitive damages was reversed because of plaintiff's failure to prove either that the employer authorized or ratified the negligent acts of the ship's master or that the employer was reckless in hiring an unfit master. 407 F.2d at 1148. As authority for this standard of proof the court cited Lake Shore & M.S. Ry. v. Prentice, 147 U.S. 101 (1893); The Amiable Nancy, 16 U.S. (3 Wheat.) 546 (1818); and Pacific Packing & Navigation Co. v. Fielding, 136 F. 577 (9th Cir. 1905).

recover punitive damages under the Jones Act.[19] Since the Jones Act liability provisions are identical to those of the FELA, and courts have accorded the two statutes a similar construction, the decision has precedential value for FELA cases.[20] The reasoning of the *Den Norske* court, however, has been criticized,[21] and the issue of punitive damages under the FELA has remained an unsettled question.

The instant court reviewed the legislative history of the FELA and found that the clear purpose of the Act was to expand rather than limit the previously existing remedies of railroad employees in cases of injury or death.[22] Observing that punitive damages traditionally were recoverable at common law, the court reasoned that Congress had not intended that this remedy be abrogated by the FELA. Moreover, since the FELA's liability provisions were intended to discourage negligent conduct by railroads, the court reasoned that Congress could not have intended to eliminate the deterrent affect of punitive damages. Examining earlier cases, the court concluded that *Den Norske* was the sole authority on the issue of punitive damages and was correctly decided. Noting that the defendant's conduct would have justified recovery of punitive damages in a common law negligence action, the court held that an award of punitive damages was proper in the instant case.

Two principal reasons explain the past failure of courts to award punitive damages in FELA cases. First, the remedy has never been favored,[23] and its use has been restricted to relatively uncommon

19. 46 U.S.C. § 688 (1964).

20. For the proposition that the Jones Act incorporates FELA liability provisions see Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Kernan v. American Dredging Co., 355 U.S. 426 (1958); and De Zon v. American President Lines, Ltd., 318 U.S. 660 (1943).

21. It has been suggested that *Den Norske* relied upon dubious authorities. King, *Punitive Damages in Admiralty—Analysis and Impact of Cedarville*, 20 CASE W. RES. L. REV. 570, 578 nn.47 & 48 (1969). The author notes that the *Den Norske* court interpreted *Cain* to imply that punitive damages were made available by the 1910 amendment, although it is apparent that this early decision was limited to a consideration of the 1908 provisions of the FELA. *Id.* Similarly, the court purported to follow Ennis v. Yazoo & M.V.R.R., 118 Miss. 509, 79 So. 73 (1918). It is unclear, however, whether that case was brought under the FELA or was a common-law negligence action.

22. The court noted in particular REPORT ON 1910 AMENDMENTS, *supra* note 2, at 12, which stated that "the purpose of the statute was to extend and enlarge the remedy provided by law to employees engaged in interstate commerce in cases of death or injury to such employees while engaged in such service. No purpose or intent on the part of Congress can be found to limit or to take away from such an employee any right theretofore existing by which such employees were entitled to a more extended remedy than that conferred upon them by the act."

23. *See* Brown v. Coates, 253 F.2d 36, 39 (D.C. Cir. 1958); Post v. Buck's Stove & Range Co., 200 F. 918, 920 (8th Cir. 1912); Annot., 67 A.L.R.2d 973 (1959). *See also* Crowell-Collier Publishing Co. v. Caldwell, 170 F.2d 941 (5th Cir. 1948); Gombos v. Ashe, 158 Cal. App. 2d 517, 322 P.2d 933 (1958).

situations. Prior to the FELA, for example, the recovery of punitive damages against railroads generally was confined to cases in which either an express statutory right existed[24] or the common law imposed a higher duty of care upon the defendant.[25] Secondly, courts have followed the general rule that punitive damages will not be awarded in wrongful death actions unless the statute expressly or by clear implication provides for recovery.[26] Neither of these reasons, however, is persuasive when contrasted with the rationale of the instant decision. Courts uniformly allowed recovery of punitive damages in common law negligence cases when a defendant's conduct evinced a reckless disregard for the rights of others.[27] Furthermore, the legislative history of the FELA clearly demonstrates that Congress did not intend to nullify previously existing remedies.[28] That punitive damages were not mentioned specifically in the FELA debates or in the Act itself is not surprising since the remedy has limited application and is solely a matter of jury discretion.[29] It seems logical, therefore, that Congress intended that the remedy remain intact. It is clear, moreover, that the right to recover punitive damages should accrue not only to injured railroad employees but to statutory beneficiaries as well. It is only reasonable to assume that the 1910 amendment, which gave to the beneficiary the deceased's right of action, intended the recovery of punitive damages in proper circumstanees. In light of the congressional purpose underlying the Act, no logical basis can be found for distinguishing between the injured employee's and the beneficiary's right to punitive damages. In either case, the remedy deters conduct that produces extra-hazardous working conditions for railroad employees. Since punitive damages are not awarded to compensate the injured party, but rather as a jury sanction for aggravated conduct, it is clear that the remedy also should be available to statutory beneficiaries. It would be anomalous, to say the least, for a defendant to incur less liability for wrongful death than wrongful injury. For these reasons, the instant decision should be viewed

24. *See* Missouri Pac. Ry. v. Humes, 115 U.S. 512 (1885) (statute setting damages for the failure of a railroad to maintain fences); Fell v. Northern Pac. R.R., 44 F. 248 (C.C.D.N.D. 1890) (statute allowing punitive damages for breach of an obligation involving oppression, fraud, or malice).

25. A higher duty of care is imposed upon railroads in handling passengers. *See, e.g.*, Denver & R.G. Ry. v. Harris, 122 U.S. 597 (1887); Gallena v. Hot Springs R.R., 13 F. 116 (C.C.E.D. Ark. 1882); Brown v. Memphis & C.R.R., 7 F. 51 (C.C.W.D. Tenn. 1881).

26. *See* cases cited note 10 *supra*.

27. *See* cases cited note 9 *supra*.

28. REPORT ON 1910 AMENDMENTS, *supra* note 2.

29. *See* cases cited note 9 *supra*.

as an accurate interpretation of both the scope and intent of the FELA remedial provisions. Because the issue of punitive damages arises only when a defendant is chargeable with culpable negligence, the impact of the decision on future FELA cases is limited. Nevertheless, the case is significant as another step in the gradual but persistent liberalization of the FELA.[30] Similarly, it further enhances the desirability of an FELA recovery over workmen's compensation remedies.[31] The decision also is important as another example of the growing judicial acceptance of the doctrine of punitive damages.[32] The court's discussion of punitive damages in light of congressional intent and public policy may be a useful precedent for related areas of the law. Future decisions on the availability of punitive damages under the Jones Act, for example, undoubtedly will be influenced by the instant court's holding. In addition, a similar evaluation of wrongful death and survival acts could lead to decisions permitting recovery of punitive damages in proper circumstances. This result will be even more likely if future decisions recognize, as did the instant court, that an award of punitive damages is not simply a windfall for plaintiffs, but, more importantly, is a highly effective deterrent against reprehensible conduct.

30. *See* Rogers v. Missouri Pac. Ry., 352 U.S. 500 (1957) (a plaintiff's burden of proof is satisfied by a showing that the employer's negligence played even the slightest part in producing the employee's injury or death). It is arguable that since the proof required to establish an employer's liability is slight, an additional grant of punitive damages cannot be justified. It is clear, however, that punitive damages will be awarded only in cases of proven culpable negligence.

31. E. CHEIT, *supra* note 2, at 216. Until recent years it often was suggested that the FELA should be replaced with a workmen's compensation system. *See id.* at 186-216. *See also* Miller, *The Quest for a Federal Workmen's Compensation Law for Railroad Employees*, 18 LAW & CONTEMP. PROB. 188 (1953); Parker, *Federal Employers' Liability Act or Uniform Compensation for All Workers?*, 18 LAW & CONTEMP. PROB. 208 (1953); Schoene & Watson, *Workmen's Compensation on Interstate Railways*, 47 HARV. L. REV. 389 (1934).

32. The oft-cited article by Clarence Morris marked the turning point of judicial acceptance of the doctrine of punitive damages. Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931). The doctrine recently has been applied in air pollution nuisance cases. *E.g.*, Davis v. Georgia-Pacific Corp., 251 Ore. 239, 445 P.2d 481 (1968); McElwain v. Georgia-Pacific Corp., 245 Ore. 247, 421 P.2d 957 (1966). *See also* Lampert v. Reynolds Metals Co., 372 F.2d 245 (9th Cir. 1967) (emissions of floride gas from defendant's aluminum plant injured plaintiff's crops).

Securities Regulation—Franchises—Franchise Agreement that Permits Active Participation by the Franchisee in the Operation of the Business and Does Not Provide the Franchisor with Risk Capital Is Not a Security Under the Securities Act of 1933

Mr. Steak, Inc.[1] brought suit against defendant-franchisee[2] for defaulting on certain obligations under their franchise agreement.[3] Defendant counterclaimed, alleging that Mr. Steak had violated the Securities Act of 1933 by failing to register its franchise agreement as a security.[4] Plaintiff moved for dismissal of the counterclaim, contending that the Act was not applicable because the franchise agreement was not a security within the ambit of section 2(1).[5] Defendant argued that the agreements were securities since certain clauses, relating to the selection of a manager[6] and control over financial affairs,[7] virtually eliminated its

1. Mr. Steak, Inc. is a national restaurant franchisor with more than 200 franchises operating throughout the country.

2. The defendant-franchisor, River City Steak, Inc., was organized for the purpose of operating one of the plaintiff's franchises. The original plans called for the restaurant to be located in Mason City, Iowa, but the location was later changed to Sharon, Pennsylvania. The plaintiff's statements about the market potential of the latter city led to the defendant's charges of violation of the antifraud provisions of the Securities Act of 1933.

3. The franchise agreement provided for the payment by the franchisee of a certain portion of the weekly receipts of the restaurant to the franchisor, in addition to a lump sum payment at the inception of the agreement. After a period of losing operations, defendant defaulted on rental, insurance, and weekly franchise payments.

4. Defendant claimed that Mr. Steak had violated §§ 5, 6 of the Securities Act of 1933, 15 U.S.C. §§ 77(e), (f) (1964), and the Colorado Licensing and Practice Act, COLO. REV. STAT. ANN. § 125-1-1 (1963), which provide for registration of securities that are not exempted under the acts. Defendant also alleged that plaintiff had made fraudulent and misleading statements within the antifraud provisions of §§ 12(2), 17 of the Securities Act of 1933, 15 U.S.C. §§ 77(q)(a)(1), (2) (1964); § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j) (1964) and regulation 10b-5 thereunder, 17 C.F.R. § 240.10b-5 (1970); and § 125-1-1 of the Colorado Licensing and Practice Act, COLO. REV. STAT. ANN. § 125-1-1 (1963).

5. 15 U.S.C. § 77(b)(7) (1964). *See* note 14 *infra* and accompanying text. The Act provides that for the registration requirements to apply there must first be a security within this definition. Thus, the crucial issue in the instant case was whether there was a security.

6. The crucial clause in the franchise agreement concerning the management of the restaurant read, "the ASSOCIATE [River City Steak] hereby irrevocably grants to MR. STEAK the power to supervise, instruct and direct the activities, duties and functions of the Investor-Manager and in the event that the Investor-Manager does not comply with any directive or recommendation by MR. STEAK, then . . . MR. STEAK can, at its absolute discretion, remove [the manager] and replace him . . . ." Mr. Steak, Inc. v. River City Steak, Inc., CCH FED. SEC. L. REP. ¶ 92,838, at 90,143 (D. Colo. Sept. 30, 1970). This control was reduced, however, by the language of the contract between the franchisee and the manager, which read in part: "The INVESTOR-MANAGER agrees to continually maintain a general reputation in his business community for honesty, integrity, good credit and conduct a Mr. Steak restaurant in an honest and upright manner and to operate the restaurant *according to all standards set up by the ASSOCIATE* [franchisee] and MR.

role in the active management of the enterprise. The District Court of Colorado, *held*, motion granted. When a franchise agreement permits some control by the franchisee over his business and does not provide the franchisor with risk capital, it is not a security under the Securities Act of 1933. *Mr. Steak, Inc. v. River City Steak, Inc.*, CCH FED. SEC. L. REP. ¶ 92,838 (D. Colo. Sept. 30, 1970).

Although franchising can be traced back to the nineteenth century in the United States,[8] it has experienced its greatest commercial growth during the past twenty years.[9] As a result of the increased investment in this field,[10] a number of proposals that would protect the investor in commercial franchise operations have been advanced.[11] Probably the most frequently advocated means of control have been the antifraud and registration provisions of the Securities Act of 1933.[12] The basic purpose of the Act is to protect the passive and relatively uninformed investing public in its purchase of securities.[13] Section 2(1) defines "security" as "any note, stock, treasury stock, bond, . . . evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, . . . *investment contract*, . . . or, in general, any interest . . . commonly known as a 'security' . . . ."[14] This general wording has been interpreted by the courts in a variety of situations.[15] Most writers

STEAK." *Id.* (emphasis added). This contract was probably a form contract provided by Mr. Steak, and it was referred to in the franchise agreement itself.

7. Contract provisions required the franchisee to give Mr. Steak the power to pay all salaries and accounts payable from Mr. Steak's bank accounts. The franchisee was required to submit weekly franchise fees and a meat count. All invoices, statements and delivery tickets for items purchased, records of cash received and deposited, bank deposit slips, and a complete food inventory were required to be given to the franchisor. Account statements and deposit verification slips also were to be sent to the franchisor. These provisions collectively eliminated much of the financial independence of the franchisee.

8. H. KURSH, THE FRANCHISE BOOM 4 (1968).

9. R ROSENBERG, PROFITS FROM FRANCHISING 13 (1969).

10. It has been estimated that today more than one-fourth of the total retail trade and services in this country is conducted by franchises and that the dollar volume of this trade is $80 billion. *Id.*

11. There have been proposals to control franchising through traditional contract law, antitrust law, trade regulations, and security regulations. *See* Note, *Regulation of the Franchise as a Security*, 19 J. PUB. L. 105 (1970). It has also been proposed, in legislation analagous to the Securities Act, that independent disclosure laws be imposed directly on franchisors. Two such bills, S. 3844, 91st Cong., 2d Sess. (1970), and H.R. 19,022, 91st Cong., 2d Sess. (1970), were introduced in the last session of Congress but neither bill was reported out of committee.

12. *See* note 4 *supra*.

13. *See* Llanos v. United States, 206 F.2d 852 (9th Cir. 1953), *cert. denied*, 346 U.S. 923 (1954); United States v. Monjar, 47 F. Supp. 421 (D. Del. 1942), *aff'd*, 147 F.2d 916 (1943), *cert. denied*, 325 U.S. 859 (1945).

14. 15 U.S.C. § 77(b)(1) (emphasis added).

15. *E.g.*, SEC v. W.J. Howey Co., 328 U.S. 293 (1946) (plan for selling citrus acreage); Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635 (9th Cir. 1969) (sale of paint

agree that a franchise agreement must be construed as an investment contract in order for it to constitute a security within the purview of section 2(1).[16] Although an investment contract is not defined by the statute, the Supreme Court has held that Congress intended to adopt the meaning that had previously existed under state blue-sky laws.[17] In the most widely quoted definition of an investment contract, the Minnesota Supreme Court held that it is a "laying out of money in a way intended to secure income or profit from its employment . . . ."[18] In attempting to define the scope of the Act, the courts have repeatedly held that it should be broadly interpreted because of its remedial nature and general language.[19] Following this approach, the Supreme Court has made two attempts to articulate the limits of the investment contract concept. In *SEC v. C.M. Joiner Leasing Corp.*,[20] leases of undescribed, unlocated acreage were being offered to investors; selling literature represented that a test oil well was being drilled on the leasehold. The Court found that this literature was clearly aimed at creating the impression that the investors would earn profits through the efforts of the promoters.[21] After examining the economic realities of the situation, the majority held that this scheme was an investment contract, pointing out that novel and

distributorships); Continental Mkt. Corp. v. SEC, 387 F.2d 466 (10th Cir. 1967) (beavers were "sold" with recommenation that care be provided by the seller's firm); Los Angeles Trust Deed & Mortgage, Exch. v. SEC, 285 F.2d 162 (9th Cir. 1960) (purchase of notes secured by mortgages); Blackwell v. Bentsen, 203 F.2d 690 (5th Cir. 1953) (sale of citrus groves). For a particularly unique situation under the California state statute see People v. Syde, 37 Cal. 2d 765, 235 P.2d 601 (1951) (child actors' movie contracts).

16. Coleman, *A Franchise Agreement: Not a "Security" Under the Securities Act of 1933*, 22 BUS. LAW. 493 (1967); Note, *Franchise Sales: Are They Sales of Securities?*, 34 ALBANY L. REV. 383 (1970); Note, *Regulation of the Franchise as a Security*, 19 J. PUB. L. 105 (1970); Note, *Franchise Regulation Under the California Corporate Securities Law*, 5 SAN DIEGO L. REV. 140 (1968).

17. *See* SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

18. State v. Gopher Tire & Rubber Co., 146 Minn. 52, 56, 177 N.W. 937, 938 (1920). This case interpreted the Minnesota blue-sky law, which was the first statute to use the phrase investment contract in the definition of a security. MINN. GEN. LAWS ch. 429, § 3 (1917). The inactive purchaser test, which was enunciated in this case, held that a security existed if the purchaser-investor had no active part in the management of the business in which he had an interest. This test was eventually incorporated in the Securities Act of 1933. *See* note 17 *supra* and accompanying text.

19. Llanos v. United States, 206 F.2d 852 (9th Cir. 1953); Newman v. Weinstein, 229 F. Supp. 440 (S.D. Ill. 1964); United States v. Monjar, 47 F. Supp. 421 (D. Del. 1942). An excellent rationale for broadly interpreting securities laws was given by the Minnesota Supreme Court: "In view of the ingenuity of those who seek to induce men and women to put their money into far-off speculative enterprises over which the investor has little or no control, and in view of the paternalistic character of Blue Sky Laws, it should be the policy of the courts to refrain from hampering the state officials in the performance of their duties by placing a narrow construction on such laws." Kerst v. Nelson, 171 Minn. 191, 195, 213 N.W. 904, 905 (1927).

20. 320 U.S. 344 (1943).

21. *Id.* at 349.

irregular devices are covered by the Act if the substance of an investment contract security is involved.[22] Shortly thereafter, in the landmark decision of *SEC v. W.J. Howey Co.*,[23] the Court found that an offering of units of a citrus grove development, coupled with a contract for cultivating, marketing, and remitting the net proceeds to the investor, constituted an investment contract for purposes of section 2(1) of the Act. In reaching this decision, the Court enunciated a broad and flexible definition of the investment contract by establishing a two-step test. First, the contract must be for the promotion of a common enterprise; secondly, the purchaser must be led to expect profits solely from the efforts of the promoter or a third party.[24] The confluence of *Joiner* and *Howey* have established a "substance-over-form" test with two general rules for identifying investment contracts. Although the *Joiner-Howey* rationale is generally the prevailing standard in both federal and state courts today,[25] the requirement that the purchaser's anticipated profits come "solely" from the efforts of others has been troublesome to many courts. Most tribunals have literally applied the test and held that participation in the enterprise by the investor will remove the scheme from the "security" classification[26] on the theory that the active, informed investor does not need the protection of the Act.[27] Other courts have classified agreements as securities even though the purchaser retains some control or right to control the operation of the business.[28] Although most courts have been reluctant to deviate from the strict application of the *Howey* test, the California Supreme Court, in *Silver Hills Country Club v. Sobieski*,[29] has adopted an innovative "risk capital" standard

22. *Id.* at 351.

23. 328 U.S. 293 (1946).

24. It is not necessary for the third party to be the seller or someone under his control. Continental Mkt. Corp. v. SEC, 387 F.2d 466 (10th Cir. 1967); Roe v. United States, 287 F.2d 435, 439 n.5 (5th Cir. 1961).

25. *E.g.*, Romney v. Richard Prows, Inc., 289 F. Supp. 313 (D. Utah 1968); Gallion v. Alabama Mkt. Centers, Inc., 282 Ala. 679, 213 So. 2d 841 (1968); Polikoff v. Levy, 55 Ill. App. 2d 229, 204 N.E.2d 807 (1965). *See also* Emery v. So-Soft, 30 Ohio App. 2d 226, 199 N.E.2d 120 (1964).

26. *See, e.g.*, Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635 (9th Cir. 1969); Georgia Mkt. Centers, Inc. v. Fortson, 225 Ga. 854, 171 S.E.2d 620 (1969).

27. *Cf.* SEC v. Ralston Purina, 346 U.S. 119 (1953). This reasoning was the basis of a recent restatement of the *Howey* test by the Tenth Circuit, which placed new emphasis on the nature of the investor's participation as the determinative factor. "We do not think the element of ownership or control is essential . . . . The more critical factor is the nature of the investor's participation in the enterprise." Continental Mkt. Corp. v. SEC, 387 F.2d 466, 470 (10th Cir. 1967).

28. *See, e.g.*, United States v. Herr, 338 F.2d 607 (7th Cir. 1964); Blackwell v. Bentsen, 203 F.2d 690 (5th Cir. 1953).

29. 55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961), *noted in* 50 CALIF. L. REV. 156 (1962) *and* 14 HASTINGS L.J. 181 (1962). *See also* Note, *Franchise Regulation Under the California Corporate Securities Law*, 5 SAN DIEGO L. REV. 140 (1968).

for determining whether an investment enterprise constitutes a security.[30] Specifically, the court indicated that if risk capital[31] is being invested by a purchaser, the arrangement constitutes a security for state law purposes.[32] In *Silver Hills,* the promoters were builders of a new country club who solicited capital through the sale of memberships. The court found that the "profit" required by the *Howey* test was supplied by the investor's expectation of future use and enjoyment of the club, whereas prior to this finding it was thought that pecuniary profits were necessary.[33] This expansion of the *Howey* test, which has been ignored by the federal courts, was the basis of a subsequent opinion by the California Attorney General concerning the status of franchise agreements as securities.[34] The opinion found that franchise agreements can be securities when there is only nominal franchise participation or when the franchisor receives fees to provide for actual operations.[35] The courts, however, have had little opportunity to consider the status of franchise agreements as securities. The *Howey* test was applied recently by the Ninth Circuit in a case involving a paint distributorship, and the court found there was no security.[36] Although a common enterprise was established, the court indicated that there was no reliance on the efforts

30. It is unclear whether the California Supreme Court intended this approach to replace the traditional *Howey* 2-step test. It is conceivable that because of the unusual facts of this case—a country club seeking capital to begin operations by selling memberships—the court was merely using the broad interpretive mandate to bring the facts into the second part of the *Howey* test.

31. Aside from inserting a new concept into the analysis of securities, the California court neglected to define precisely the phrase risk capital. One writer has described 3 situtations to which the term might apply: (1) initial capital, (2) a scheme that appears to be very risky, or (3) plans in which there is less than a fair chance of success. Note, *supra* note 29. The *Silver Hills* fact situation would fall within all 3 of the possible definitions. A problem would arise, however, when only one or 2 of the definitions would be satisfied by a particular fact situation.

32. Although the court did not label the enterprise an investment contract, it has been generally recognized that the risk capital concept might be used to find investment contract status. The risk capital approach is based on the investment gamble that is being taken by the investor, *regardless* of the type of participation contemplated. *See* authorities cited note 29 *supra.*

33. 361 P.2d at 909.

34. 3 CCH BLUE SKY L. REP. ¶ 70,747 (1967).

35. The Attorney General outlined 3 possible franchise situations: "1) Where the franchisee participates only nominally in the franchised business in exchange for a share of the profits. 2) Where the franchisee participates actively in the franchised business and where the franchisor agrees to provide certain goods and serviees to the franchisee. 3) Where the franchisee participates actively in the franchised business and where the franchisor agrees to provide eertain goods and serviees to the franchisee, but where the franchisor intends to secure a substantial portion of the initial capital that is needed to provide such goods and services for the fees paid by the franchise or franchisees." The Attorney General concluded that a security existed in situations 1 and 3 but not in situation 2. *Id.* at 66,640. The Georgia Attorney General has reportedly accepted and even expanded the viewpoint of this opinion. Note, *supra* note 11, at 121.

36. Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635 (9th Cir. 1969).

of third parties to produce profits. The Seventh Circuit reached the opposite result, holding that an arrangement making investors "inactive distributors" was an investment contract because profits were expected solely from the efforts of third parties.[37] Since the present state of the law dictates a strict application of the *Howey* test, most courts would hold only a small number of franchise agreements to be securities. On the other hand, the California risk capital approach, which disregards the activity of the purchaser, would be satisfied more easily by the standard franchising agreement.[38]

The instant court initially found that the franchise agreement did not vest complete control in the franchisor over the local manager of the franchisee's business. The court predicated this finding on the fact that the franchisee-manager contract made the manager directly responsible to the franchisee.[39] Recognizing that a portion of the franchisee's control over his financial affairs had been delegated to the franchisor, the court reasoned that this delegation had not substantially impaired the franchisee's business judgment. The court further found that the parties had intended that the franchisee control the local business, and, applying the *Howey* test, held that no security existed. Turning to a consideration of the risk capital approach, the court determined that since there was only minimal risk involved in investing in this franchise, there was no security under this approach.[40] The court, therefore, concluded that because of the absence of a security the registration provisions of the 1933 Act were inapposite.[41] Consequently, the plaintiff's motion to dismiss the counterclaim was granted.

Although the instant decision found that the franchise agreement did not constitute a security, the court's application of the risk capital approach may signal a dangerous future pattern if other courts adopt it. It should be noted that while the California courts have continually

37. United States v. Herr, 338 F.2d 607 (7th Cir. 1964); *cf.* Drug Management, Inc. v. Dart Drug Corp. [1961-64 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91, 293 (D.C. Cir. 1963) (very little continuing relationship between franchisor and the franchisee).

38. A standard franchise agreement provides for a basic franchise purchase fee plus a percentage of the gross dollar volume to be paid by the franchisee to the franchisor. For a sample agreement see R. ROSENBERG, *supra* note 9, at 239. *See* note 6 *supra.*

39. The franchisee-manager agreement was apparently a form contract, which was authorized by the franchisor and was referred to in the franchise contract.

40. It is unclear whether the court intended the *Silver Hills* approach to be a binding test. It should also be noted that the interpretation of the risk capital approach taken by this court was that of the initial risk capital. *See* note 31 *supra.*

41. There also had been a claim in the instant case under the Securities Exchange Act of 1934 and the Colorado Licensing and Practice Act. Since these statutes define a security similarly to the Securities Act of 1933, the court's holding on the existence of a security precluded their application in this case.

applied the risk capital test, they have never precisely defined it.[42] For this reason, it is unclear how many business plans could be arbitrarily placed in this expanding and nebulous area of newly found securities. Although there may have been some justifiable reason for the original formulation of the test by the California Supreme Court, it would be unwise to extend its application into areas that would be regulated best by means other than securities legislation. Acceptance of this ill-defined judicial construct could lead to a day-by-day evaluation of an enterprise to determine whether enough risk is present to classify the investment agreement as a security. In the franchising context, it is not unreasonable to envision a situation in which the franchisee whose local business venture had been unsuccessful would sue the franchisor for violations of securities law. The courts, therefore, should avoid adopting the risk capital approach and continue to apply the traditional *Howey* test.

Although there is virtually no case law on the question of whether franchise agreements constitute securities, several writers have considered the issue.[43] An economic analysis of franchising arrangements has led two commentators to view the franchisee's investment on two separate levels: (1) the day-to-day business investment, and (2) the investment in the continued good will and success of the franchisor's chain.[44] The goodwill investment would seem to be totally controlled by third parties and would satisfy the *Howey* test for an investment contract security, since the franchisee would derive the benefit of those efforts. However, two weaknesses appear in an economic analysis of franchising agreements: first, no distinction is drawn between different types of franchising businesses and no reference is made to how such a distinction might affect the value of the franchisor's goodwill to the success of the franchisee's business;[45] secondly, the local business investment is included in the same franchise agreement and would not satisfy the *Howey* test, since the franchisee actively participates in the enterprise. These weaknesses demonstrate the difficulties inherent in utilizing the machinery of the Securities Act to regulate franchising. While expanding the coverage of the Act through judicial interpretation may be valuable under certain circumstances, its application to

42. *See, e.g.*, Harvey v. Davis, 69 Cal. 2d 362, 444 P.2d 705, 71 Cal. Rptr.129 (1968); Clejan v. Reisman, 5 Cal. App. 3d 224, 84 Cal. Rptr. 897 (2d Dist. Ct. App. 1970); Sarmento v. Arbax Packing Co., 231 Cal. App. 2d 421, 41 Cal. Rptr. 869 (3d Dist. Ct. App. 1964).

43. *See* note 16 *supra*.

44. Note, *supra* note 11, at 105.

45. Surely, the national reputation of a franchise chain of car washes, for example, would have much less effect on the value of the franchisee's business than the national reputation of a franchise chain of restaurants.

franchises would place an undesirable burden on the franchisor. The extensive delays and expense, which are inevitable parts of the registration process under the Act, would seriously stifle the initiative of franchisors. The public policy in favor of business expansion would not be served by such a result. There are admittedly many evils against which a prospective franchisee needs protection—notably the threat of financially unstable franchisors, and fraudulent and misleading statements that induce the franchisee to enter into the agreement. The public interest, however, would be served better by specific legislation directed at the particular problems of the franchise industry than by a strained construction of the securities laws.[46] Regrettably, at present the only direct regulation of franchising is designed to prevent unreasonable revocation of automobile franchises.[47]

Torts —Strict Liability — Strict Liability in Tort Held Applicable in Suit by Patient Against Hospital for Injuries Received from Transfnsion of Defective Blood

Plaintiff brought a tort action against the defendant hospital for injuries she sustained as a result of a transfusion of blood containing the virus serum hepatitis.[1] Plaintiff alleged that the defendant was strictly liable in tort because the blood was defective and unreasonably dangerous when it left the defendant's control.[2] On a motion for

46. Two bills were proposed in the 91st Congress for full disclosure in the franchise situation. *See* note 11 *supra.*

47. Automobile Dealers' Franchise Act of 1956, 15 U.S.C. §§ 1221-25 (1964).

1. Plaintiff entered the defendant hospital in 1960 for treatment of anemia. While a patient there, she received several pints of blood. A few months later she came down with a severe case of serum hepatitis that required further medical treatment and resulted in permanent disabilities. She sued the defendant for $50,000. *See* TIME, Oct. 19, 1970, at 57.

2. Plaintiff relied on § 402A of the RESTATEMENT (SECOND) OF TORTS (1965), which provides: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

judgment on the pleadings, defendant contended that it was not subject to strict liability because blood is not a product and the transfusion of blood is a service rather than a sale. Defendant further contended that it should not be held strictly liable because medical science has not developed a satisfactory test for detecting the existence of serum hepatitis in whole blood.[3] The trial court entered judgment for the defendant on its motion. The Illinois Appellate Court reversed and remanded the case for trial, holding that blood is a product and that the transfer of blood constitutes a sale.[4] On appeal to the Illinois Supreme Court, *held,* affirmed with modifications. A hospital is strictly liable in tort for injuries caused by defective blood received in a transfusion if the blood was contaminated when it left the hospital's control. *Cunningham v. MacNeal Memorial Hospital,* 266 N.E.2d 897 (Ill. 1970).

Traditionally, courts have imposed strict liability, which is liability without proof of negligence,[5] only on defendants engaged in ultrahazardous or abnormally dangerous activities, such as blasting and crop dusting with dangerous chemicals.[6] In recent years, however, manufacturers have been held strictly liable for injuries caused by their defective products with increasing frequency. At the beginning of this trend, strict liability was imposed only on manufacturers of defective foodstuffs;[7] it was soon applied, however, to articles other than foodstuffs that were intended for intimate bodily use.[8] Strict liability has

3. Defendant also argued that it was immune from liability as a charitable institution, under the doctrine of charitable immunity, and that the application of strict liability would "open the floodgates" to multiple suits that would eventually thwart the hospitals' worthy mission to humanity. The court disposed of both arguments summarily.

4. Cunningham v. MacNeal Memorial Hosp., 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969). The court decided that the question of whether blood can be made safe should be decided after the introduction of evidence at the trial on remand.

5. For a general discussion of the theory of strict liability see Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. REV. 791 (1966); Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099 (1960); Wade, *The Continuing Development of Strict Liability in Tort,* 22 ARK. L. REV. 233 (1968); Wade, *Strict Tort Liability of Manufacturers,* 19 SW. L.J. 5 (1965). These articles document the pronounced judicial trend toward strict liability during the past decade.

6. This doctrine developed from the English case of Rylands v. Fletcher, L.R. 1 Ex. 265 (1866), *aff'd,* L.R. 3 H.L. 330 (1868). For an explanation of the doctrine and its application in American courts see W. PROSSER, THE LAW OF TORTS § 77 (3d ed. 1964).

7. *E.g.,* Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944).

8. *E.g.,* Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954) (hair dye); Krupar v. Procter & Gamble Co., 113 N.E.2d 605 (Ohio Ct. App. 1953), *rev'd on other grounds,* 160 Ohio St. 489, 117 N.E.2d 7 (1954) (soap); Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958) (permanent wave solution).

now been expanded by many courts to cover all types of products.[9] The first cases imposing strict liability for defective products were based on the theory that implied warranties of merchantibility and fitness for a particular purpose had been breached.[10] Leading scholars have criticized the warranty theory as being too closely tied to the rules of contract law.[11] In *Greenman v. Yuba Power Products, Inc.*,[12] the California Supreme Court rejected the warranty approach, recognizing that the liability of the manufacturer was imposed by law for reasons of public policy rather than by virtue of a contractual agreement.[13] The policy underlying the doctrine of strict liability in tort is that the burden of accidental injuries resulting from defective products should be placed upon those who market the products rather than upon the consumers.[14] Manufacturers can treat the burden as a cost of production and obtain liability insurance to protect themselves. Section 402A of the *Restatement (Second) of Torts* adopted the *Greenman* view that the liability is tortious in nature and strict in character.[15] The *Restatement* takes the position that warranty language is superfluous and misleading.[16] Under section 402A, however, the seller's liability is not absolute, because the plaintiff must prove that the defective product was unreasonably dangerous, that the defect was present when the product left the seller's control, and that the injury resulted from the defective

9. *E.g.*, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (automobile); Santor v. A&M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) (carpet); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (airplane). *See* note 5 *supra*. To get some idea of how rapidly the trend has progressed see Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 7 n.17 (1965).

10. The leading case on the implied warranty theory of strict liability is Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

11. *E.g.*, Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 801 (1966); Wade, *supra* note 9, at 9.

12. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

13. As Judge Traynor observed, "[T]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

14. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *c* at 349-50 (1965).

15. *See* note 2 *supra*.

16. RESTATEMENT (SECOND) OF TORTS § 402A, comment *m* at 355-56 (1965) provides: "Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no contract. . . .[I]t should be recognized and understood that the 'warranty' is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales. . . .It is much simpler to regard the liability here stated as merely one of strict liability in tort."

condition.[17] To determine whether the product is unreasonably dangerous, one scholar has suggested that the court must balance the utility of the risk against the magnitude of the risk.[18] The *Restatement* specifically provides that a product is not unreasonably dangerous if it is not capable of being made safe for its intended use by the present state of scientific knowledge.[19] Twenty-three states, including Illinois,[20] have adopted the *Restatement* theory of strict tort liability.[21] Although strict liability has been applied in a wide variety of cases, courts generally have refused to hold hospitals and blood banks strictly liable for supplying blood containing the virus serum hepatitis. In these cases, courts have formulated the issue in terms of whether the hospital or blood bank could be held strictly liable for breach of implied warranty. To resolve this issue, the initial question has always been whether there was a contractual sale from which an implied warranty could arise. In the landmark case of *Perlmutter v. Beth David Hospital,*[22] the New York Court of Appeals found that the blood was supplied to the patient as a part of the hospital's services and thus there was no sale that could involve implied warranties. The court reasoned that the transaction was a service because the patient had bargained only for the trained

17. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *g* (1965).

18. *See* Wade, *supra* note 9, at 17. Dean Wade mentions several factors that must be considered in balancing the utility of the risk against the magnitude of the risk: "(1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive." *Id.; cf.* RESTATEMENT (SECOND) OF TORTS § 402A, comment *i* (1965).

19. RESTATEMENT (SECOND) OF TORTS § 402A, comment *k* at 353 (1965). Many drugs fall under this exception.

20. Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965). In *Suvada,* strict liability was imposed on the manufacturer of a defective brake system. One defendant, Bendix-Westinghouse Automotive Air Brake Co., contended that § 2-318 of the Uniform Commercial Code, codified in Illinois as ILL. ANN. STAT. ch. 26, § 2-318 (Smith-Hurd 1963), required privity in order to prove breach of implied warranty, except as to those persons specifically included in the section. The court did not have to rule on this contention because it found defendant strictly liable in tort. 32 Ill. 2d at 622-23, 210 N.E.2d at 187-88. Although *Suvada* involved a manufacturer, strict liability may be applied to any vendor in the chain of distribution of a product, at least according to the RESTATEMENT definition. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *f* at 350 (1965).

21. States adopting the theory of strict liability in tort are Alaska, Arizona, California, Connecticut, Iowa, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Washington, and Wisconsin. For a list of the cases adopting the doctrine see 1 CCH 1970 PRODS. LIAB. REP. ¶ 4070.

22. 308 N.Y. 100, 123 N.E.2d 792 (1954) (4-3 decision).

personnel and specialized facilities of the hospital.[23] *Perlmutter* has been widely followed in other states.[24] Recently, however, two state supreme courts have impliedly held that a blood transfusion is a sale that will support an allegation of breach of implied warranty.[25] To prevent the application of the implied warranty theory of strict liability, 26 states have passed statutes characterizing the transfer of blood as a service rather than a sale.[26] Although no court has restricted the application of

23. "[T]he main object sought to be accomplished in this case was the care and treatment of the patient. The supplying of blood by the hospital was entirely subordinate to its paramount function of furnishing trained personnel and specialized facilities in an endeavor to restore plaintiff's health. It was not for blood — or iodine or bandages — for which plaintiff bargained, but the wherewithal of the hospital staff and the availability of hospital facilities to provide whatever medical treatment was considered advisable. . . . [I]t is the transaction, regarded in its entirety, which must determine its nature and character." *Id.* at 106, 123 N.E.2d at 795.

24. *E.g.*, Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964); Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965); Fischer v. Wilmington Gen. Hosp., 51 Del. 554, 149 A.2d 749 (1959); White v. Sarasota County Pub. Hosp. Bd., 206 So. 2d 19 (Fla. Dist. Ct. App. 1968); Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967); Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965); Goelz v. J.K. & Susie L. Wadley Research Institute & Blood Bank, 350 S.W.2d 573 (Tex. Civ. App. 1961); Dibblee v. Dr. R.W. Groves Latter Day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085 (1961); Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964). *Perlmutter's* present validity in New York was recently cast into doubt by Carter v. Inter-Faith Hosp., 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969), in which the New York Supreme Court said a patient had a good cause of action against a commercial blood bank for breach of implied warranty. The court distinguished *Perlmutter* by holding that there was clearly a sale by the blood bank in this case.

25. In Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967), the Florida Supreme Court held that the plaintiff had a good cause of action against a blood bank in implied warranty, thus impliedly holding that the transfusion was a sale, not a service. The court refused to decide whether the lack of a valid test for detection of the virus would constitute a valid defense, holding that the question of whether there was a test at all was a question of fact. The rule of this case was overturned in 1969 by the Florida legislature, which passed a statute classifying the transfusion of blood as a service, not a sale. *See* FLA. STAT. ANN. § 672.2-316(5) (Supp. 1970).

In Jackson v. Muhlenberg Hosp., 53 N.J. 138, 249 A.2d 65 (1969), the New Jersey Supreme Court followed the lead of Florida and indicated its willingness to consider finding strict liability on the implied warranty theory. The court remanded the case for trial, where evidence could be introduced about the availability of a test to detect viral hepatitis in blood and about "such economic and other factors as may bear on the question of whether the doctrine of implied warranty or strict liability should apply to deliveries and transfusions of blood." *Id.* at 142-43, 249 A.2d at 68.

26. ALA. CODE tit. 7A, § 2-314(4) (Supp. 1969); ALASKA STAT. § 45.05.100(e) (Supp. 1970); ARIZ. REV. STAT. ANN. § 36-1151 (Supp. 1970); ARK. STAT. ANN. § 85-2-316(3)(d) (Supp. 1969); CAL. HEALTH & SAFETY CODE § 1606 (West 1970); DEL. CODE ANN. tit. 5A, § 2-316 (Supp. 1970); KY. REV. STAT. ANN. § 139.125 (1969); LA. CIV. CODE ANN. art. 1764 (West Supp. 1970); ME. REV. STAT. ANN. tit. 11, § 2-108 (Supp. 1970); MASS. GEN. LAWS ANN. ch. 106, § 2-316(5) (Supp. 1969); MICH. STAT. ANN. § 14.528(1) (1969); MISS. CODE ANN. § 7126-71 (Supp. 1970); NEB. REV. STAT. § 71-4001 (Supp. 1967); NEV. REV. STAT. § 460.010 (1967); N.M. STAT. ANN. § 12-12-5 (Supp. 1969); N.D. CENT. CODE § 41-02-33(3)(d) (Supp. 1969); OHIO REV. CODE § 2108.11 (Supp. 1970); OKLA. STAT. ANN. tit. 63, § 2151 (Supp. 1970); S.C. CODE ANN. § 32-559 (Supp.

these statutes, their continued effectiveness is questionable. The Pennsylvania Supreme Court recently suggested in *Hoffman v. Misericordia Hospital*[27] that recovery may be possible under the implied warranty theory irrespective of whether the transfusion is classified as a sale or as a service.[28] Moreover, other courts have recognized the existence of implied warranties in non-sales transactions.[29]

In the instant case, the court initially determined that section 402A of the *Restatement (Second) of Torts* was applicable to the facts at issue. The court found that whole human blood is a "product"[30] within the meaning of section 402A because it is distributed for human consumption. The court next decided that the blood transfusion was a sale, not a service,[31] and that the question of whether the defendant was "engaged in the business of selling" blood within the meaning of section 402A would have to be decided at the trial on remand.[32] Turning to

1970); S.D. COMPILED LAWS ANN. § 57-4-33.1 (Supp. 1970); TENN. CODE ANN. § 47-2-316(5) (Supp. 1970); TEX. CODE BUS. & COMM. ANN. § 2-316(e) (1968); VA. CODE ANN. § 32-364.2 (1969); WIS. STAT. ANN. § 146.31(2) (Supp. 1970); WYO. STAT. ANN. § 34-2-316(3)(d) (Supp. 1969).

27. 439 Pa. 501, 267 A.2d 867 (1970).

28. Although the court merely remanded the case for trial, it opened the door to recovery on the implied warranty theory: "In view of our case law implying warranties in non-sales transactions, it cannot be said with certainty that no recovery is permissible upon the claim here made, even if it should ultimately be determined that the transfer of blood from a hospital for transfusion into a patient is a service. . . ." 267 A.2d at 870. As precedent for its decision, the court cited several cases involving either a bailment for hire, a bailment lease, or a lease of personal property. *Id.* at 870 n.9.

As the court pointed out, such warranties are not at all inconsistent with the Uniform Commercial Code. In fact, comment 2 to UCC § 2-313 provides: "Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. . . .[T]he matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise."

29. *E.g.*, Newmark v. Gimbel's, Inc., 102 N.J. Super. 279, 246 A.2d 11 (1968). For a discussion of implied warranties in non-sales transactions see Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); Note, *A New Principle of Products Liability in Service Transactions*, 30 U. PITT. L. REV. 508 (1969).

30. The court reasoned by analogy from 2 federal cases that found blood to be a "product" within the meaning of 2 federal statutes. *See* United States v. Steinschreiber, 218 F. Supp. 426 (S.D.N.Y. 1962); United States v. Calise, 217 F. Supp. 705 (S.D.N.Y. 1962); *cf.* RESTATEMENT (SECOND) OF TORTS § 402A, comment *e* (1965). The court rejected defendant's argument that it could not be classified as a "product" because it was not manufactured.

31. The court abandoned the *Perlmutter* rationale entirely and adopted the reasoning of the concurring opinion in Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967), which stated: "It seems to us a distortion to take what is, at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision." *Id.* at 118.

32. The court noted that for the purposes of this appeal, the defendant's motion for judgment

policy considerations, the court rejected the defendant's contention that blood falls within the "unavoidably unsafe products" exception to section 402A[33] and found that blood containing serum hepatitis is unreasonably dangerous to the user because of its impurity.[34] The court, moreover, determined that the absence of a reliable means to detect serum hepatitis in blood does not constitute a defense, noting that to permit such a defense would emasculate the doctrine of strict tort liability. After reaching these determinations,[35] the court concluded that the defendant could be held strictly liable in tort if the plaintiff could prove on remand that the defective blood supplied by the defendant caused her injury.[36]

The instant case represents a continuation of the trend to expand the scope of strict tort liability. In addition, it may signal the beginning of the demise of the *Perlmutter* rationale. In conjunction with the *Hoffman* decision, the instant case has shocked the medical world[37] by making doctors, hospitals, and blood banks acutely aware that the imposition of strict liability may eventually encompass a wide variety of medical services. It has been argued, for example, that if blood is considered a product for which strict liability may be imposed, it is certainly conceivable that a court might also impose strict liability for the transplantation of a defective human organ, such as a heart that fails to

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on the pleadings necessarily admitted the truth of plaintiff's allegation that defendant was engaged in the business of selling blood. The court did decide that defendant could not be excluded from the category of those "engaged in the business of selling" blood solely because it is not a hospital's principal function to provide blood to patients, thus disposing of the distinction one court recently drew between hospitals and blood banks. *See* White v. Sarasota County Pub. Hosp. Bd., 206 So. 2d 19 (Fla. Dist. Ct. App. 1968).

33. *See* note 18 *supra* and accompanying text.

34. The court distinguished a product like the vaccine for the Pasteur treatment of rabies, which falls under the exception of comment *k* to the *Restatement*. The Pasteur vaccine, said the court, is not defective or unreasonably dangerous because it is not impure and because it involves substantial risk of injury to the user even if properly prepared.

35. The court also refused to apply the charitable immunity doctrine, which had previously been rejected in a negligence case, Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966). The court rejected defendant's "floodgates" argument on a policy basis, stating: "[W]e do not believe in this present day and age, when the operation of eleemosynary hospitals constitutes one of the biggest businesses in this country, that hospital immunity can be justified on the protection-of-the-funds theory." Cunningham v. MacNeal Memorial Hosp., 266 N.E.2d 897, 904 (Ill. 1970).

36. Proof of causation is not always easy in such cases. Hepatitis may be transmitted to a person in many different ways, according to the latest scientific findings. *See* Wall Street J., Feb. 3, 1971, at 1, col. 3. This decision merely opens the door for a jury to find against the hospital if it chooses to, based on circumstantial evidence. Interview with Robert J. Walker, member of the law firm of Bass, Berry & Sims, in Nashville, Tenn., Jan. 27, 1971.

37. *See* MEDICAL WORLD NEWS, Nov. 6, 1970, at 18.

beat, a cornea that fails to see, or a kidney that fails to function.[38] In reaction to the instant case, the strong hospital association lobby[39] may be expected to persuade state legislatures to follow the 26 states that have already classified the transfer of blood as a service rather than a sale.[40] The effectiveness of such a legislative classification, however, is questionable in light of the *Hoffman* decision, which suggests that a court may allow recovery in strict liability on the implied warranty theory even if the transfer of blood is deemed by statute to be a service.[41] The wisdom of these statutes, moreover, is highly questionable because they fail to recognize that the resolution of this problem should not turn on a semantical distinction. The instant decision is commendable because the court refused to base its conclusion on semantics, focusing instead on the important policy question of whether to impose strict liability on a hospital. The court labeled the transfer a "sale"[42] in order

38. Brief for Blood Services as Amicus Curiae at 17-18, Cunningham v. MacNeal Memorial Hosp., 266 N.E.2d 897 (Ill. 1970).

39. The Illinois State Medical Society and the Illinois Hospital Association are presently seeking to persuade the Illinois Legislature to pass such a statute to emasculate the instant decision. *See* MEDICAL WORLD NEWS, Nov. 6, 1970, at 19.

40. *See* note 21 *supra*. The statutes of Alabama, Arkansas, Delaware, Louisiana, Massachusetts, North Dakota, South Dakota, Texas, and Wyoming also expressly cover "other human tissue or organs," and the statutes of Kentucky, Maine, Nebraska, Ohio, Oklahoma, South Carolina, Virginia, and Wisconsin mention specifically such items as corneas, bones, and organs. Brief for Blood Services as Amicus Curiae at 18, Cunningham v. MacNeal Memorial Hosp., 266 N.E.2d 897 (Ill. 1970).

41. *See* note 27 *supra*. If a state court actually reaches such a result, it would cast the burden on the supplier of blood to attempt to disclaim implied warranties, and the court would then have to decide as a matter of public policy whether to uphold the disclaimer. It would be inconsistent with the *Restatement's* definition of strict liability if courts were bound to uphold such disclaimers. As RESTATEMENT (SECOND) OF TORTS § 402A, comment *m* at 356 (1965) points out: "The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands." Thus, a hospital's disclaimer of implied warranties on a bottle of blood conceivably might not be upheld by a court, if it feels there should be strict liability.

42. "Sale" is probably a more accurate verbal description of the transfer than "service." The transfer of blood to the patient is usually for a consideration, though the hospital will generally hide the cost of the blood within administrative costs. This is done to avoid antagonizing patients with the high cost of blood and to allow their Blue Cross coverage to meet the cost of the blood; Blue Cross insurance will not meet these costs unless it is done in this manner. Interview with Dr. John M. Flexner, assistant professor of hematology at Vanderbilt University Medical School, in Nashville, Tenn., Jan. 27, 1971. If the blood is acquired from the Red Cross, which gets it from volunteer donors, there is a processing charge to the patient of about $10 a unit. But if it comes from a commercial blood bank, the cost is about $30-35 a unit. About half the blood given in transfusions every year comes from the Red Cross. Interview with Dr. Richard O. Cannon, Regional Director of the Red Cross Blood Program in Middle Tennessee, in Nashville, Tenn., Jan. 28, 1971.

to apply the *Restatement* rule, which is applicable only if a sale is involved. Although the use of "sale" gave the court a better conceptual framework in which to examine the policy questions, it failed to analyze these questions thoroughly. One public policy consideration is whether the product is unreasonably dangerous,[43] and its resolution involves the consideration of numerous factors, such as the usefulness of the product, the availability of other products to meet the same need, and the avoidability of injury by care in the preparation of the product. In essence, an analysis of these factors requires a balancing of the utility of the risk against the magnitude of the risk.[44] The instant court, however, failed to analyze these factors; it considered only whether impossibility of detection was a defense against strict liability, concluding that the availability of this defense would emasculate the doctrine of strict liability. This rationale is unfounded. When the social utility of the product is not great, impossibility of detection should be irrelevant because public policy demands that consumers be protected from any defects.[45] When the product serves a clear and significant social utility, however, the defense should be permitted as long as the state of technology has not reached the point where the defect in the product could be detected. This theory finds support in the comments to section 402A, which expressly except from strict liability products that are unavoidably unsafe in the present state of scientific knowledge. The court's conclusion that the blood does not fall under this exception seems completely contrary to the language of comment *k* to section 402A.[46] A thorough analysis of the relevant factors seems to indicate that blood is unavoidably unsafe and therefore not unreasonably dangerous under the *Restatement* provision.[47] Blood is of vital importance in the medical

43. *See* note 17 *supra.*

44. *Id.*

45. Several examples mentioned by the instant court would fall into this category. For example, a tin of canned meat, a candy bar sealed in a paper wrapper, a bottled drink, and a clam containing typhoid bacilli do not have the same utility as blood. Although the instant court placed blood in the same category with all these products, they can easily be distinguished when the balancing test is applied. *See* Cunningham v. MacNeal Memorial Hosp., 266 N.E.2d 897, 902-04 (Ill. 1970).

46. *See* note 18 *supra* and accompanying text. As the comment points out, "The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk." RESTATEMENT (SECOND) OF TORTS § 402A, comment *k* at 354 (1965).

47. If the hospital were to attach some sort of warning to the blood, it would probably not be considered unreasonably dangerous. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *j* (1965). Another method to avoid the problem would be to require the patient to sign a consent form

treatment of injured persons, especially at times when death or other serious complications would result without a blood transfusion. A similar healing result can be achieved with no other product. Furthermore, there presently are no available means to detect the presence of the hepatitis virus in blood in more than a small percentage of cases.[48] Assuming that the risk of injury and the concomitant consequences of defective blood may be great, these factors, when compared with the social utility of blood, seem less significant and no longer demand the imposition of strict liability. An additional policy consideration that the instant court failed to consider is that doctors are having an increasingly difficult time obtaining sufficient malpractice insurance. A similar insurance crisis could arise for blood banks if the albatross of strict liability is hung around their necks.[49] If blood banks have inadequate insurance coverage, the blood supply may run dangerously low,[50] forcing hospitals to use blood transfusions in only the most serious cases. Obviously, such a situation would be highly detrimental to the public. Moreover, inability to obtain adequate liability insurance coverage would remove one of the very bases for imposing strict liability.[51] Future courts, when faced with the problem presented in the instant case, should analyze carefully the policy considerations rather than becoming bogged down in the semantics of sale and service. It is hoped that courts will realize that the public interest will be best served if strict liability is not imposed for the transfer of defective blood.

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before receiving the blood, releasing the hospital from all liability for any injury caused by the blood. It is possible, of course, that the court would refuse to uphold such a consent form on the grounds of public policy.

48. The test used most frequently by hospitals and blood banks is the Australia antigen method, and estimates of its effectiveness vary greatly. Interview with Dr. John M. Flexner, assistant professor of hematology at Vanderbilt University Medical School, in Nashville, Tenn., Jan. 27, 1971. *See also* Kramer, *Scientists Find Weapon to Battle the Spread of Serum Hepatitis*, Wall Street J., Mar. 2, 1971, at 1, col. 1. A recent study indicates that a more effective method of control will be available in 5-9 years. Nashville Tennessean, Mar. 25, 1971, at 37, col. 1.

49. According to one insurance agent, a blood bank in Nashville, Tennessee, has had only one claim against it in about 15 years. A sudden rash of claims would cause an insurance company to seriously reconsider the wisdom of insuring such a blood bank. Hospitals would not face such a serious problem because they already meet a large number of claims every year. Interview with Philip H. Conner, insurance agent for Vanderbilt University, in Nashville, Tenn., Feb. 3, 1971.

50. One lawyer has predicted that the blood banks would either have no insurance at all or insurance that was priced so high that patients could no longer afford to receive blood in large quantities. Address by David E. Willett, memher of the law firm of Hassard, Bonnington, Rogers & Huber, in San Francisco, Calif., American Association of Blood Banks Convention, Oct. 28, 1970.

51. In explaining the rationale of strict liability, RESTATEMENT (SECOND) OF TORTS § 402A, comment *c* (1965) provides in part that "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production *against which liability insurance can be obtained* . . . " (emphasis added). *Id.* at 350.