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LEGISLATION

Budget Planners–Regulation To Protect Debtors

In the past few years, many state legislatures have been concerned with the activities of budget planners.[1] The budget planner[2] advertises that he will consolidate the debts of an impoverished debtor and work out a plan by which a certain amount is periodically deposited with him. The money thus deposited is then distributed to the creditors, supposedly on a pro-rata basis, but more generally on any terms the budget planner is able to get the creditor to accept.[3] For his services, the budget planner charges a fee, usually a certain percentage of the debtor's total indebtedness. The advice given by the budget planner is often extremely helpful in aiding the financially depressed to free themselves from pressing creditors. However, the budget planner is active in an area where it is easy to take advantage of a debtor's unfortunate circumstances, and this is precisely the argument that has prompted state legislative action in an attempt to protect the public from the unscrupulous budget planner.

The Need for Legislation

There have been two principle arguments made against the budget planner. The first argument concerns his business activity and the injustices he has perpetrated on the persons he has offered to protect. The most frequent complaint centers around the fee charged for the services. After the total indebtedness of the debtor is ascertained, he must sign a contract or note for the budget planner's fee. The fee may run as high as thirty per cent of the total indebtedness,[4] and is customarily collected before any payments are made to the creditors.[5] Consequently, the debtor may make several deposits with

1. As of now there are sixteen states that prohibit the business, while seven states have placed regulations on it.

2. The budget planner may advertise under a variety of names, such as debt adjuster, debt pooler, or pro-rater.

3. Strong or secured creditors will have more bargaining power than unsecured creditors and may be able to get a larger share of the money deposited with the budget planner than the unsecured creditors. See Home Budget Serv., Inc. v. Boston Bar Ass'n, 335 Mass. 228, 139 N.E.2d 387 (1957).

4. To this fee is likely to be added a bookkeeping and insurance charge. See Note, 10 Kan. L. Rev. 447 (1962).

5. The budget planner is thus assured of his fee before any of the debts are paid. He also gets his fee whether the plan is completed or not. The significance of this can be illustrated by the results of two surveys made. In a survey of local businessmen by the St. Louis Better Business Bureau 87½ per cent reported that budget planners did not pay promptly and 100 per cent said that they did not complete the payments. Backman, *Debt Adjustment Abuses Cause Many Complaints to Better Business Bureau*, 9 Per. Fin. L.Q. 44 (1955). In a survey by the Kansas City Better Business Bureau,

the budget planner before his debts even begin to be liquidated. Also, the size of the fee charged seems out of proportion to the value of the services rendered. The debtor, if he stopped to think, could do the same budget planning for himself, or he could get expert legal help—probably for a smaller fee.

It has been contended that injustice stems from the fact that the debtor must sign his contract with the budget planner before any of the creditors agree to receive payments under the plan.[6] It should be axiomatic that the success of the budget plan depends directly on the willingness of the creditors to accept it. If the creditors do not agree,[7] the debtor has no recourse to force their compliance.[8] In this circumstance, the debtor must continue his payments to the budget planner and must also pay each nonagreeing creditor separately. The planning fee is not reduced, and the debtor finds himself saddled with a new creditor in the person of his friendly protector—the budget planner.

Another charge is that the advertising of the budget planner is misleading because it gives the debtor a false sense of security.[9] The advertisements hold out promises of consolidation of the debts into one easy weekly or monthly payment. However, the budget planner has no power to consolidate a person's debts into one periodic payment. The debtor is liable to each individual creditor and each debt is individually owed. The budget planner promises freedom from harassing and threatening creditors, and to relieve and protect the debtor from garnishments. In reality, the budget planner has no power to prevent suits and threats of suits and no power to force a creditor to accept the plan of payment. Even if a creditor initially agrees to the plan, "what is to prevent him from changing his mind and withdrawing, in the absence of an iron-bound agreement among all creditors involving mutual consents, etc., as a consideration?"[10]

Another complaint is that, while the debtor must pay the full amount of the indebtedness to the budget planner in accordance with

70 per cent of the businessmen reported that the budget planners did not pay promptly, and 98 per cent said they did not complete payments. Birkhead, *Debtors Misled and Deceived by Pro-Raters, Kansas City Better Business Bureau Finds,* 16 PER. FIN. L.Q. 116, 117 (1962).

6. See Note, 10 KAN. L. REV. 447 (1962).

7. In the survey by the St. Louis Better Business Bureau, 70% of the businessmen reported that they did not accept agreements with budget planners. Backman, *supra* note 5. 96% of those answering the Kansas City Better Business Bureau's questionnaire said that they did not accept agreements proposed by the budget planners. Birkhead, *supra* note 5.

8. See Kennedy, *Debt Pooling Arrangements vs. Chapter XIII Proceedings,* 46 ILL. B.J. 816, 823 (1958).

9. Birkhead, *supra* note 5, at 118.

10. Kennedy, *supra* note 8, at 823.

the contract, the budget planner often fails to fully pay off the indebtedness to the creditor.[11] One of the first acts the budget planner generally undertakes is to attempt to negotiate and compromise the debt with the creditors. His ability to succeed will depend on the amount and kind of security the creditors are holding. A secured creditor is not likely to be in any mood for compromise, while an unsecured creditor may frequently be glad to get what he can and forget the remainder.[12] The remainder written off by the unsecured creditor may go to fill the purses of the budget planner and not to reduce the other claims of the debtor.

There have been other complaints made, such as that invalid or nonexistent claims may be paid because the budget planner does not question their validity.[13] Also, the debtor may not be permitted to withdraw from the plan without forfeiting the money he has deposited with the budget planner.[14] And lastly, there have been instances where the budget planner went bankrupt while holding large sums of money that belonged to his clients.[15]

The second argument made in favor of curbing the activities of the budget planner is a charge that he is engaged in an unauthorized practice of law.[16] This charge stems primarily from the budget planner's activities in adjusting and compromising claims, negotiating for time extensions and lower payments, and compromising threats made against the debtor by unsatisfied creditors.[17] It is felt that the proper performance of the budget planner's services will inevitably

11. See note 5 *supra.*

12. Home Budget Serv., Inc. v. Boston Bar Ass'n, *supra* note 3.

13. *Ibid.*

14. This penalty may be made even harsher if the debtor has been required to build up a reserve deposit with the budget planner, and his withdrawal means a forfeiture of this sum also.

15. *Regulation of Debt Adjusters Fails To Protect Debtors in Illinois and Oregon,* 16 PER. FIN. L.Q. 119 (1961-62).

16. Bar associations have been very active in pressing this argument, and it has been frequently accepted as fourteen of the sixteen states prohibiting the business have excluded licensed attorneys from the operation of the statute. Two of the statutes, those of Massachusetts and Virginia, have expressly called the business an unlawful practice of law. However, no court, without legislative authority to the contrary, has branded budget planning as the practice of law per se. The court in *In re* Pilini, 122 Vt. 385, 390, 173 A.2d 828, 830 (1962), was very careful to refrain from doing just that when they said: "We prefer to pass on the facts in each case rather than to unqualifiedly label debt pooling as unauthorized practice of law."

17. After considering these circumstances, the court in Home Budget Serv., Inc. v. Boston Bar Ass'n, *supra* note 3, at 232, 139 N.E.2d at 390, stated: "The conduct of the [budget planners] presents features of the practice of law, and viewed as a whole amounts substantially to that." The Massachusetts court was being asked to determine the constitutionality of a statute which labeled all budget planning as the unlawful practice of law. See note 26 *infra.* See also American Budget Corp. v. Furman, 67 N.J. Super. 134, 140, 170 A.2d 63, 68, *aff'd per curiam,* 36 N.J. 129, 175 A.2d 622 (1961); *In re* Pilini, *supra* note 15 at 391, 173 A.2d at 831; Briggs, *Unauthorized Practice of the Law in Minnesota,* 20 MINN. L. REV. 451 (1936); Note, *supra* note 6.

call for a judgment based on the skill and training possessed only by a licensed attorney.[18] It has also been charged that the budget planner holds himself out as being competent to advise the debtor in regard to his debts, much as a licensed attorney does, and that this is a function that should be rendered only by a licensed attorney.[19] Another aspect of the budget planner's business that has bothered at least one court is the fact that the same basic relationship of trust and confidence exists between a budget planner and the debtor-client as exists between an attorney and his client.[20] The nature of the business is such that the debtor generally makes a complete disclosure of his financial standing to the budget planner. However, it is clear that the budget planner is not subject to the same ethical standards as are attorneys, and that the communications do not enjoy the same privilege against disclosure as do communications made to an attorney.

REGULATION OR PROHIBITION?

The solutions adopted by the various state legislatures to meet the problem brought on by the business of budget planning have taken two forms—regulatory legislation and prohibitory legislation. Seven states have sought to rid the public of the injustices practiced by many budget planners by regulating their activities.[21] These statutes generally require the payment of a licensing fee plus a public bond. There is evidence that these regulatory statutes have not sufficiently protected the debtors from the unscrupulous budget planners.[22] After the license fee is paid and the bond made, there has been an obvious lack of supervision, with some budget planners remaining just as unscrupulous. Also, these regulatory statutes completely evade the argument that the business of budget planning is an unauthorized practice of law.

The second solution, and the one adopted by most states, has been the enactment of prohibitory legislation. At the time of this article

18. See Briggs, *supra* note 17.

19. Note, *supra* note 6.

20. Home Budget Serv., Inc. v. Boston Bar Ass'n, *supra* note 3.

21. CAL. FIN. CODE ANN. §§ 12200-12331; ILL. ANN. STAT. ch. 16½, §§ 251-272 (1963); MICH. STAT. ANN. §§ 23.630(1) to -23.630(18) (Supp. 1963); MINN. STAT. ANN. §§ 332.04 -332.11 (Supp. 1963); ORE. REV. STAT. §§ 697.010-697-992 (1963); R.I. GEN. LAWS ANN. §§ 5-42-1 to 5-42-9 (Supp. 1963); WIS. STAT. ANN. § 218.02 (1957).

22. "Regulation does not by any means solve the problem. Most regulatory acts do not provide a license fee sufficient to pay the expense of periodic examinations of the licensed debt pooler. Moreover, the requirements of financial responsibility are usually insufficient." Northrup, *Indiana's Governor Welsh Vetoes Debt Pooling Act as Sanctioning Unauthorized Practice of Law*, 17 PER. FIN. L.Q. 85-86 (1963). See also *Regulation of Debt Adjusters Fails To Protect Debtors in Illinois and Oregon*, *supra* note 14.

there are sixteen such statutes.[23] All of these acts prohibit the deposit of funds with the budget planner and its distribution by him to the debtor's creditors.[24] It has been the depositing of a debtor's money in the hands of another where he has no control over its distribution that has allowed the budget planner to take advantage of the debtor.

Another feature commonly found is the exclusion of certain groups of persons from the scope of the prohibition.[25] Thus, exemplifying a belief that advice concerning one's debts and their ultimate liquidation is socially beneficial, these state legislatures have excluded certain persons from the act and have authorized the business only when conducted by those persons they deem competent to perform it. Consequently, a debtor in need of help is not deprived of this valuable aid. Two states, Massachusetts and Virginia,[26] have gone further than most and have labeled the business of budget planning an unauthorized practice of law; therefore, prohibiting it except when conducted by a member of the legal profession.[27]

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23. FLA. STAT. ANN. §§ 559.10-559.13 (1962); GA. CODE ANN. §§ 84-3601 to -3603 (Supp. 1963); KAN. GEN. STAT. ANN. § 21-2464 (Supp. 1961); ME. REV. STAT. ANN. ch. 137, §§ 51-53 (Supp. 1963); MASS. GEN. LAWS ANN. ch. 221, § 46c (Supp. 1963); MO. ANN. STAT. §§ 425.010-425.040 (Supp. 1963); N.J. STAT. ANN. 2A:99A-1 to -99-4 (Supp. 1960); N.Y. PEN. LAW §§ 410-412 (Supp. 1963); N.C. GEN. STAT. §§ 14-423 to -426 (Supp. 1963); OHIO REV. CODE ANN. §§ 4710.01-4710.99 (Supp. 1963); OKLA. STAT. ANN. tit. 24, §§ 15-18 (Supp. 1963); PA. STAT. ANN. tit. 18, § 4899 (1963); S.C. CODE § 56-147 (Supp. 1964); VA. CODE ANN. § 54-44.1 (1958); W. VA. CODE ANN. § 6112(4) (1961); WYO. STAT. ANN. §§ 33-190 to -192 (1957).

The prohibitory type of legislation promises to grow in popularity as a result of the Supreme Court decision of Ferguson v. Skrupa, 372 U.S. 726 (1963), holding the Kansas statute constitutional. The Court stated that the act did not violate the due process clause of the fourteenth amendment. "Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government aud wholly beyond the protection which the general clause of thc Fourteenth Amendment was intended to secure.'" 372 U.S. at 730. Three of the above listed sixteen statutes were enacted after the decision in the *Ferguson* case, and they may signal a growing trend among states.

24. With the exception of Maine and Massachusetts which prohibit the business whether done for a fee or not, all of thc remaining fourteen states prohibit the business ouly when the planner receives consideration for his services.

25. By far the largest single group of persons excluded from the operation of the statutes has been licensed attorneys. Only Ohio and Oklahoma do not sanction the business of budget planning when conducted as incident to the authorized practice of law. See Note, 15 OKLA. L. REV. 459 (1962), where the author criticizes this omission in the Oklahoma statutc. Other minor groups have been excluded from individual statutes, but there has been no uniformity as to these groups.

26. MASS. GEN. LAWS ANN. ch. 221, § 46c (Supp. 1963); VA. CODE ANN. § 54-44.1 (1958).

27. The court in Homc Budget Serv., Inc. v. Boston Bar Ass'n, *supra* note 3, at 233, 139 N.E.2d at 391, said that the Massachusetts statute was not unconstitutional because it infringed on the constitutionally delegated power of the Massachusetts Supreme Court to determine what was an unlawful practice of law; the legislature could aid the court in making this determination.

It is submitted that the best solution to the problem is to prohibit budget planning for a fee. The evil in this business arises because the budget planner has placed in his possession money in which he has a financial interest and over which its real owner, the debtor, has little or no control. Consequently, the budget planner finds it too easy to yield to the temptation of financial gain and betray the confidence and trust that has been bestowed in him. A statute which prohibits the deposit of money with a budget planner and its distribution for a fee by him to the creditors would prevent a budget planner from obtaining a financial interest in any planning arrangement, and thus would discourage the unscrupulous planner from engaging in this activity. However, a statute of this character would not prohibit free budget planning by someone without a financial interest in the plan.

A statute of this nature should also be aimed at steering the impoverished debtor from the budget planner to those who are best qualified to give him advice about the settlement of his debts. A statute which exempts attorneys from its prohibition would tend to accomplish this end. By seeking help from an attorney the debtor can get a legal opinion as to the validity of the claims against him, and also obtain help in defending suits and threats of garnishments. The budget planner has too long stood between the debtor and the persons who could give him competent advice. The statute should also exempt any person appointed by a court to aid the debtor plan his budget. Such an exemption would hopefully encourage persons in need of advice and help to seek it from the state courts. This avenue of assistance would be of great aid to the person attempting to avoid bankruptcy while trying to clear himself with his creditors.[28]

It is further submitted that a statute should not label budget planning as the practice of law per se.[29] As long as the budget planner refrains from giving opinions that are legal in nature and does not participate in the preparation of documents that require legal skill, it can be argued that his activities do not involve the practice of law.[30]

28. Of course, the appointment by a court would in no way authorize the planner to engage in activities that would constitute the practice of law by a person not a licensed attorney.

29. This was the view expressed by the court in *In re* Pilini, *supra* note 15, and seems to be much the sounder view.

30. This situation is analogous to companies that search titles to real property. As long as they limit their activities to searching the record, and do not render an opinion as to the validity of the title, the courts have said that they are not engaged in the practice of law. See *In re* Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935).

PROPOSED STATUTE

The following statute is proposed:

1. DEFINITIONS:

   (a) The term "person" as used in this act means an individual, partnership, corporation and association.

   (b) The term "budget planning" as used in this act shall mean the act of entering into a contraet by any person with a particular debtor by the terms of which contract the debtor agrees to deposit periodically with such person a specified sum of money and said person agrees to distribute said sum of money among specified creditors of the debtor in accordance with an agreed plan for which service the debtor agrees to pay a valuable consideration.[31]

2. BUDGET PLANNING PROHIBITED:

   No person shall henceforth be engaged in the business of budget planning; provided, the provisions of this act shall not affect any contract heretofore made.[32]

3. PERSONS EXCLUDED:

   This act shall not apply to the following persons, and their activities shall not be deemed to be the practice of budget planning as above prohibited:

   (a) any person who is actively engaged in the practice of law in (name of state) and who is a member of the (name of state) bar;

   (b) any person acting pursuant to any order or judgment of court, or pursuant to authority conferred by any law of (name of state) or of the United States.[33]

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31. This section is modeled after FLA. STAT. ANN. § 559.10 (1962).

32. This proviso should be ineluded so as not to raise any confusion about contracts with budget planners which are in force at the time of the passage of the statute.

33. This seetion dealing with the persons excluded from the statute is modeled after N.J. STAT. ANN. 2A:99A-4 (Supp. 1960).

Criminal Law—Taxation of Court Costs

At common law no costs were recoverable in any criminal court action.[1] Therefore, in England and in all American jurisdictions liability for costs is based entirely upon statutory enactment.[2] Taxing the costs of trial to the losing defendant in a criminal action is based upon the premise that such costs should be borne by the person whose actions brought about the expense.

THE PROBLEM

In a majority of jurisdictions a convicted defendant is taxed all of the costs of his prosecution.[3] If the convicted defendant is unable or refuses to pay these costs, many states imprison him until the costs are paid, or until he is released through compliance with some other statutory procedure. The usual statutory procedure for such release consists of crediting the prisoner's cost account with an allowance of from one to three dollars[4] for each day the prisoner serves in prison. Thus, an indigent who is convicted of a crime must serve time to pay his costs in addition to spending time in jail to fulfill his sentence or to work out his fine.

Such incarceration for costs might seem unconstitutional under many state constitutions which have provisions prohibiting imprisonment for debt.[5] However, courts have upheld such imprisonment for nonpayment of costs under the rationale that the constitutional mandates against such imprisonment are meant to apply only to contract debts.[6] The courts generally feel that the framers of the constitutions intended only to prevent the imprisonment of unfortunate debtors unable to perform their pecuniary obligations and not persons who

1. Lowe v. Kansas, 163 U.S. 81, 85 (1896); Antoni v. Greenhow, 107 U.S. 769, 781 (1882); Eastman v. Sherry, 37 Fed. 844 (C.C.E.D. Wis. 1899); Saunders v. People, 63 Colo. 241, 165 Pac. 781 (1917); Jenkins v. State, 22 Wyo. 34, 134 Pac. 260 (1913).

2. In Eastman v. Sherry, *supra* note 1, at 845, it was said: "It must be borne in mind that at common law costs were unknown. They are the creature of statute. It rests with legislative authority to grant or deny them, and to determine in what cases, and under what circumstances, they should be allowed."

3. Those jurisdictions not taxing the costs to a convicted defendant in a criminal action are: California, Counecticut, Massachusetts, Michigan, New Hampshire, New York.

4. A typical statute is that of Ohio which provides for a credit of three dollars a day. OHIO REV. CODE ANN. § 2947.20 (Baldwin 1958).

5. A typical constitutional provision is that of Oklahoma. "Imprisonment for debt is prohibited, except for the nonpayment of fines and penalties imposed for the violation of law." OKLA. CONST. art. 2, § 13.

6. Lee v. State, 75 Ala. 29 (1883); *Ex parte* Hardy, 68 Ala. 303 (1880); State v. Montroy, 37 Idaho 684, 217 Pac. 611 (1923); McCool v. State, 23 Ind. 127 (1864); *In re* Wheeler, 34 Kan. 96, 8 Pac. 277 (1885); *Ex parte* Small, 92 Okla. Crim. 101, 221 P.2d 669 (1950); Colby v. Backus, 19 Wash. 347, 53 Pac. 367 (1898).

by their own conduct exposed themselves to the punitive powers of the law.[7] Even though a convicted defendant in a criminal action may incur monetary liability for his prosecution and conviction, it is held that these are not debts arising out of a contract to which the constitutional protection applies.[8]

Although it is arguable that a defendant should bear the cost required to secure his conviction, it is still unfortunate that many indigent persons must pay these costs with the surrender of their liberty. Imprisonment of indigents for such nonpayment is subject to several objections. One is that it deprives a family of its breadwinner. Another is that it discourages an insolvent defendant from pleading not guilty since such a plea necessitates a trial with higher costs being imposed if the defendant is subsequently convicted. Also, imprisonment should only be required as punishment for a crime. In some instances the extra time served for the costs may be far greater than the original sentence levied. An illustration of this is found in a recent Wyoming case.[9] There the court imposed upon the defendant a sentence of less than six months, and a fine of one hundred dollars. Because of a lengthy trial the costs taxed to the defendant amounted to more than nine hundred dollars.[10] If the defendant had been unable to pay these costs he would have had to serve an additional two and one-half years in confinement. Of course it can be argued that no costs should be imposed as, in theory, every citizen pays taxes to support the judicial system and thus should be entitled to have a day in court without bearing any additional expense. However, the general public should not have to bear the court expense of a person whose own breach of the law necessitates prosecution and its attendant costs.

Legislative Provisions

At the present time fourteen states unqualifiedly require convicted criminal defendants to completely work out their costs if they are unable to pay them.[11] Several states have recognized the inequity of requiring imprisonment for nonpayment of costs and either have

7. Lee v. State, *supra* note 6, at 30.

8. *Ibid.*

9. Arnold v. State, 76 Wyo. 445, 306 P.2d 368 (1957).

10. See Note, 13 Wyo. L.J. 178, 181 (1959).

11. Alaska Stat. Ann. § 11.05.120 (1962); Ark. Stat. Ann. § 43-2316 (1947): Idaho Code Ann. § 19-2517 (1948); Ind. Ann. Stat. § 9-2227a (Supp. 1964); Ky. Rev. Stat. § 453.020 (1963); La. Rev. Stat. § 15:571.2 (1951); Minn. Stat. Ann. § 631.48 (1947); Miss. Code Ann. § 7906 (1942); Mont. Rev. Codes Ann. § 94-7817 (1947); Neb. Rev. Stat. § 29-2412 (1943); N.D. Cent. Code § 29-26-21 (1960); Ohio Rev. Code Ann. § 2947.20 (Baldwin 1958); Tex. Code Crim. Proc. art. 10, § 794 (1950); Wash. Rev. Code Ann. § 10.82.040 (1961).

no provision for taxation of costs[12] or by statute exempt all criminal defendants from the payment of such costs.[13] In still other states, statutes specifically exempt persons who cannot pay from taxation of costs or from imprisonment for nonpayment.[14] Eleven states have statutes which vest the trial judge with power to release criminal defendants from liability for costs.[15] The question arises as to whether these statutes are used. The county court clerk of Davidson County, Tennessee has informed the author that to his knowledge the Tennessee "good cause" statute has never been used.

POSSIBLE SOLUTIONS

If one accepts the argument that a person is entitled to come before the courts without costs being imposed because he has paid for this right through taxation, then "no imposition of costs" would be the proper solution. While statutes relieving defendants from paying costs are, indeed, humanistically inspired, they perhaps go too far in removing the expenses of the prosecution from the convicted defendant and placing it upon the society whose laws he has transgressed. After all it was the defendant who by his conduct made such costs necessary. Therefore, it would seem that a solution in the nature of an equitable method of payment should be advanced.

One such method of handling the problem (which has not proved entirely satisfactory) is in effect in eight states[16] and the federal system.[17] These jurisdictions mandatorily set a relatively short period for which an indigent may be imprisoned for nonpayment of costs. At the expiration of such time the prisoner is released, sometimes after taking an oath of poverty.[18] This procedure is subject to the same objection, as mentioned earlier, that of placing the burden of the costs on the taxpayer. Also, any period of incarceration for the

12. Arizona, California, Iowa, New York.

13. CONN. GEN. STAT. REV. § 54-143 (1958); MASS. ANN. LAWS ch. C.280, § 6 (1956); MICH. STAT. ANN. § 28.1258 (1954); N.H. REV. STAT. ANN. § 618.44 (1955).

14. COLO. REV. STAT. ANN. § 33-2-1 (1953); ILL. ANN. STAT. ch. 38, § 766 (Smith-Hurd 1935); KAN. GEN. STAT. ANN. § 62-1901 (Supp. 1961); N.J. STAT. ANN. § 2A:166-7 (1951); S.C. CODE § 17-574 (1962); W. VA. CODE ANN. § 5852 (1) (1961).

15. DEL. CODE ANN. tit. 11, § 4103(b) (1953); FLA. STAT. ANN. § 939.05 (1944); GA. CODE ANN. § 27-2804 (1953); MO. ANN. STAT. § 550.010 (1949); PA. STAT. ANN. tit. 39, § 14 (1954); R.I. GEN. LAWS ANN. § 13-2-36 (1956); S.D. CODE § 34-3709 (Supp. 1960); TENN. CODE ANN. § 40-3201 (1956); VT. STAT. ANN. tit. 28, § 1010 (1959); VA. CODE ANN. § 19.1-332 (1950); WYO. STAT. ANN. § 6-8 (1957).

16. ALA. CODE tit. 80, § 83 (1958); HAWAII REV. LAWS § 259-3 (1955); ME. REV. STAT. ANN. ch. C.149, § 42 (1954); MD. CODE art. 38, § 4 (1957); N.C. GEN. STAT. § 153-194 (1952); OKLA. STAT. ANN. tit. 57, § 15 (1941); ORE. REV. STAT. § 169.160 (1955); WIS. STAT. ANN. § 959.055 (1) (1958).

17. 18 U.S.C. § 3569 (1958).

18. Those states requiring an oath of poverty are Hawaii and Oregon. The federal statute also calls for such an oath. 18 U.S.C. § 3569 (1958).

nonpayment of a monetary sum has the connotation and basic evils of imprisonment for debt whether the statute is constitutionally assailable upon such grounds or not.

Two other procedures offer a more satisfactory solution to the problem. Three states treat the costs taxed on criminal defendants as civil judgments for which, of course, there can be no imprisonment for failure to pay.[19] In the case of an indigent, who by definition has no property upon which to levy, the problem arises that the judgment might curtail his incentive for employment as he knows any accumulation of wealth will be taken by the state to pay the judgment. The possibility of his leaving the jurisdiction also looms as an objection to treating costs as civil judgments. These statutes, however, do offer some hope of actually receiving these taxed costs from an indigent defendant.

Recommended Solution

A better solution to the problem is found in the statutes of Rhode Island[20] and Vermont,[21] of which the former appears superior. These states not only recognize the unjustuess of imprisonment for the nonpayment of costs but also recognize that the convicted criminal defendant, whether indigent or not, should bear the expense of his prosecution. These statutes are designed to allow the indigent confined solely for nonpayment of costs to be released to a probation officer who will set terms for payment of the costs. Breach of the terms of release and payment result in the defendant's reimprisonment upon the warrant of the probation officer. One of the attributes of the Rhode Island statute is the sanction imposed upon a breach of the release terms. A prisoner receives five dollars a day credit on his costs if he is not released to a probation officer, but rather works out his costs in prison. However, upon his rearrest and confinement after a breach of his release agreement, this per diem credit is reduced to one dollar a day.[22] The problem with the Rhode Island statute is its administration. It is suggested that after the sentence is served or the fine worked out, release should be almost automatic with only repeated offenders, who would likely flee parole, being held to work out their costs. It is recognized that such a statute would place a tremendous burden of administration upon present probation and parole officials, but the costs actually recovered from the parolee

19. Nev. Rev. Stat. § 169.060 (1961); N.M. Stat. Ann. § 36-19-18 (1953) (statute provides for officer to "attempt to recover costs" from defendants); Utah Code Ann. § 77-36-2 (1953).

20. R.I. Gen. Laws Ann. § 13-2-36 (1956).

21. Vt. Stat. Ann. tit. 28, § 1010 (1955).

22. R.I. Gen. Laws Ann. § 13-2-36 (1956).

would assist in destroying the increased expense of administration. It would also reduce the expense of maintaining the penal system. In many cases the release of the breadwinner would allow his family to be removed from the relief rolls of the state—thus providing another economic impetus for the enactment of such a statute. The Rhode Island statute so nearly approximates a complete solution to the problem of imprisonment for nonpayment of costs that it's provisions are the core of the model statute set out below. Inquiry has revealed, however, that the authority of the statute is seldom invoked in that state, possibly due to the difficulty of administration. For that reason it is suggested that a provision be added to provide for automatic release unless an official shows cause why the indigent should stay in confinement to work out his costs. Thus affirmative action would be required to hold a prisoner for nonpayment of his costs. It is felt that the following statute and its proper administration would correct the inequities inherent in requiring convicted indigent defendants to serve time in confinement to pay the costs of their prosecutions.

PROPOSED STATUTE

Imprisonment for failure to pay fines or costs or give recognizance—

Every person who has been or shall hereafter be committed or detained in the adult correctional institutions for the nonpayment of his fine or costs, or both, or for his failure to give the recognizance in the amount required of him to keep the peace, shall be detained in the adult correctional institutions after he has served his sentence of imprisonment, if any shall have been imposed, one (1) day for each five dollars ($5.00) or any fraction thereof, or the amount of his fine or costs or both, or of the recognizance so required of and not furnished by him,

Provided, however, that unless both the District Attorney of the political district where the conviction occurred and the Assistant Director of Social Welfare show good cause why said person should not be released the Director of Social Welfare shall order the release of any person held in the adult correctional institutions solely for the nonpayment of his costs on such terms as he shall fix for the payment by such person, and[23]

Any such person so released may be caused to be reimprisoned by said director for his failure to observe the terms of his release and his warrant for such imprisonment shall be sufficient authority to all sheriffs, police officers, jailers and the agents of said director to retake and detain such person who shall upon his return to the correctional institutions serve one (1) day for each dollar or any fraction thereof of his costs then unpaid.

23. While the Rhode Island statute places the probationary power in the welfare office, it is recognized that such explicit adherence to the statute would not be necessary as many states might have other offices or agencies which could more readily be adapted to the release procedure.

Statute of Limitations–Professional Negligence–Foreign Objects Left in Patient's Body

The Problem

The application of the statute of limitations to malpractice actions involving a foreign object left in the body of a patient has received extensive treatment in the courts and legal publications.[1] The problem arises when the alleged negligence of a doctor is such that the patient cannot reasonably discover it until after the statute of limitations has run. In a typical case, during an operation, the surgeon negligently leaves a needle or a sponge in the body of a patient that is not discovered until years later. According to many courts,[2] the patient's claim against the surgeon is barred by the statute of limitations on one or more of the following grounds: the plain meaning rule, the obvious intent of the legislature, the authority of former court decisions, and a desire to refrain from judicial legislation.

Statutes of limitation are intended to prevent fraudulent and stale claims with their attending difficulty of securing witnesses and evidence.[3] Additionally, they are based on the belief that a plaintiff would not ordinarily delay pursuit of a meritorious claim.[4] However, most of these considerations are not present in a foreign objects case. First, these cases do not involve a plaintiff delaying pursuit of his rights. On the contrary, the facts of a typical case establish that the cause of action was unknown and unknowable to the plaintiff until after the statute has run.[5] Secondly, the lapse of time does not entail the danger of a false or frivolous claim, nor the danger of a speculative or uncertain claim. Fraud is negated by the existence of the object itself.[6] A longer statute of limitations would not make the claim any more speculative or uncertain, for leaving a foreign object in a patient's body is clearly a result of negligence.[7] Perhaps the

1. Notice, for example, these recent articles: Lillich, *The Malpractice Statute of Limitations in New York's New Civil Practice Law and Rules*, 14 Syracuse L. Rev. 42 (1962); Miller, *The Contractual Liability of Physicians and Surgeons*, 1953 Wash. U.L.Q. 413; Note, 32 Ind. L.J. 528 (1957); Note, 64 W. Va. L. Rev. 412 (1961); 27 Albany L. Rev. 312 (1963); 13 Clev.-Mar. L. Rev. 313 (1964); 31 Fordham L. Rev. 842 (1963); 42 Neb. L. Rev. 180 (1962); 37 St. John's L. Rev. 385 (1963); 29 U. Kan. City L. Rev. 91 (1961). See Annots., 80 A.L.R.2d 368 (1961); 144 A.L.R. 209 (1943); 74 A.L.R. 1317 (1931).

2. See, *e.g.*, Vaughn v. Langmack, 390 P.2d 142 (Ore. 1964). See also Annot., 80 A.L.R.2d 368, 374, 396 (1961), and cases cited.

3. 53 C.J.S. *Limitations of Actions* § 1 (1948).

4. *Ibid.*

5. Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961), 15 Vand. L. Rev. 657 (1962).

6. Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964).

7. That leaving a foreign object in the body of the patient during an operation is negligence per se, see Annot., 65 A.L.R. 1023, 1030 (1930).

greater lapse of time would make it harder for the patient to link the negligence to the defendant doctor, but a plaintiff could hardly complain of this hardship. From the physician's point of view, a longer statute of limitation would make him more susceptible to the dangers of lost evidence and dead witnesses. Balancing the equities, it is submitted that the injustice of denying innocently ignorant malpractice victims judicial relief should override the policy of repose and security from stale claims.

Since most statutes measure the period of limitation from the accural of the cause of action,[8] the basic question is: When does the cause of action accrue in cases involving foreign objects? When a plaintiff is assaulted by a defendant, he has notice immediately that a wrong has been committed against him. But in a foreign objeet case, the plaintiff may not be aware that a wrong was committed for several years. Thus, the courts have been confronted with the question of whether a cause of action accrues at the time of the negligent act or when the plaintiff becomes aware of the negligence.

JUDICIAL SOLUTIONS

A majority of courts which have faced the problem have been liberal[9] in allowing a plaintiff to state his claim in this type of case; using four basic theories to provide the plaintiff with some degree of relief from the unjust results of a strict enforcement of the statute. First, in a few jurisdictions a plaintiff may take advantage of the longer period of limitation available for contract actions by couching his complaint in terms of a breach of contract.[10] Most jurisdictions have rejected this device, holding that the gravamen of the action sounds in tort.[11] The contract theory would also be unavailable to

8. ARIZ. REV. STAT. ANN. § 12-542 (1956); CAL. CIV. PROC. CODE § 343; COLO. REV. STAT. ANN. § 87-1-6 (1953); GA. CODE § 3-1004 (1933); ILL. ANN. STAT. ch. 83, § 15 (Smith-Hurd 1956); IOWA CODE ANN. § 614.1 (1946); KAN. GEN. STAT. ANN. § 60-306 (1949); KY. REV. STAT. ANN. § 413.140 (1955); ME. REV. STAT. ANN. ch. 112, § 93 (1954); MD. ANN. CODE art. 57, § 1 (1957); MASS. ANN. LAWS ch. 260, § 4 (1956); MICH. STAT. ANN. § 27A.5805, 27A.5838 (1962); MISS. CODE ANN. § 722 (1956); N.H. REV. STAT. ANN. § 508.4 (1955); N.J. REV. STAT. § 2A: 14-2 (1951); N.D. CENT. CODE § 28-01-18 (1960); OHIO REV. CODE ANN. § 2305.11 (Baldwin 1958); OKLA. STAT. ANN. tit. 12 § 95 (1960); R.I. GEN. LAWS ANN. § 9-1-14 (1956); S.D. CODE § 32.0232 (1939); TENN. CODE ANN. § 28-304 (1956); TEX. REV. CIV. STAT. art. 5526 (1948); VT. STAT. ANN. tit. 12, § 512 (1959); WASH. REV. CODE ANN. §§ 4.16.010, 4.16.080 (1962); W. VA. CODE ANN. § 5404 (1961).

9. "[I]t appears that most jurisdictions, when faced with the set of facts we have presented herein would, on one theory or another, allow appellants to come into court and present their claims." Billings v. Sisters of Mercy, *supra* note 6, at 232.

10. The following states have allowed the plaintiff to take advantage of the longer period allowed for contract actions: Alabama, Arkansas, Minnesota. For cases from these jurisdictions see Annot., 80 A.L.R.2d 320, §§ 5, 6 (1961).

11. The following states have refused to use the contract period of limitations in malpractice actions: California, Colorado, Connecticut, Idaho, Illinois, Kansas, Ken-

the plaintiff who fails to discover his injury within the contract period of limitation. The remaining three theories involve the interpretation of the word "accrual." Second, the "continuing negligence" theory is based upon the premise that a doctor leaving a foreign object in a patient and continuing to treat him thereafter, is not only negligent in his initial action, but also negligent in allowing the object to remain while the patient is still under his care. Thus, the statute does not begin to run until the doctor-patient relationship terminates.[12] This exception is unavailable to the plaintiff who terminated his relationship with the doctor immediately following the operation. Third, some jurisdictions have held the doctor's failure to inform the patient of the object to be fraudulent concealment of a cause of action. Thus, the statute of limitations does not begin to run until the fraud is discovered.[13] Until recently, the courts have required the plaintiff to prove that the doctor, knowing of the existence of the foreign object, actively concealed this fact.[14] However, it is now generally held "that the fiduciary relationship between physican and patient imposes a duty of disclosure, the breach of which constitutes fraudulent concealment."[15] At least two courts have further liberalized this rule and held that the mere fact of the foreign object in the plaintiff's body is enough to constitute "constructive fraud" so that this doctrine will apply even though the doctor did not have actual knowledge of the foreign object.[16] It seems to be stretching the theory of fraud to denominate as fraud an action which is unintentional and of which the actor has no knowledge. Yet, anything short of this would not give the victim of the doctor's malpractice a remedy. Fourth, the "discovery doctrine" is stated as

> where a foreign object is negligently left in a patient's body by a surgeon and the patient is in ignorance of the fact, and consequently of his right of action for malpractice, the cause of action does not accrue until the

tucky, Louisiana, Missouri, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Washington, West Virginia. For more cases from these jurisdictions see Annot., 80 A.L.R.2d 320, at § 4 (1961).

12. The following states have adopted the continuing negligence theory: California, Michigan, Minnesota, Missouri, Nebraska, New York, Ohio, Oregon, Utah, Wisconsin. For cases from these jurisdictions see Annot., 80 A.L.R.2d 368 (1961).

13. The following states have applied the fraudulent concealment doctrine to malpractice cases: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, West Virginia. For cases from each of these jurisdictions see Annot., 80 A.L.R.2d 368, 400 (1961).

14. *Id.* at 407.

15. Note, 32 IND. L.J. 528, at 536 (1957).

16. Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590 (1948); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944).

> patient learns of, or in the exercise of reasonable care and diligence should have learned of the presence of such foreign object in his body.[17]

This theory merely interprets the word "accrual" to mean the time when the injury was discovered. While this seems to be the preferable judicial theory, a strong dissent to this view pointed to the fact that the statute of limitations is a creature of the legislature and the clear intent of the legislature should not be cast aside by judicial fiat simply because "it may be considered harsh in its application to malpractice cases."[18]

Because this last theory is so near to judicial legislation, most courts are reluctant to accept it.[19] Therefore a judicial settlement of the problem appears to be impractical because of the necessity to fit each case into one of the other recognized theories. Because it is impossible to fit many meritorious claims into any theory, it is necessary to stretch existing theories in order to prevent injustice. This results in undesirable distortion in the law. Stare decisis presents another block to the courts. However, the legislature is free to enact any policy without regard to either theory or stare decisis.[20]

LEGISLATIVE SOLUTIONS

Legislative action in this field has taken three forms. First, most legislatures by using the word "accrual" in the statute, without definition, have allowed the courts to either define the term so as to postpone the running of the statute of limitations by giving it a broad interpretation or to restrict the time allowable by a strict interpretation.[21] Second, some legislatures have precluded their courts from making a broad interpretation by wording their statute of limitations so that the period of limitations runs from the date of the "act, omission or neglect complained of."[22] Third, other legislatures have prevented the courts from strictly construing the statute against plaintiffs. The Missouri statute is illustrative of this point. Missouri

17. Billings v. Sisters of Mercy, *supra* note 6, at 232. The following jurisdictions have used the discovery doctrine: California, Colorado, Louisiana, Missouri, North Carolina, Pennsylvania, Texas. For cases from each of these jurisdictions see Annot., 80 A.L.R.2d 368, at 388 (1961).

18. Billings v. Sisters of Mercy, *supra* note 6, at 506, 389 P.2d at 238.

19. In the following jurisdictions the courts have specifically refused to apply the discovery doctrine: Alabama, Colorado, Georgia, Indiana, Kansas, Kentucky, Massachusetts, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Washington. For cases from each of these jurisdictions see Annot., 80 A.L.R.2d 368, at 396 (1961).

20. Vaughn v. Langmack, *supra* note 2; see also dissent in Billings v. Sisters of Mercy, *supra* note 6; Lillich, *supra* note 1.

21. *Supra* note 8.

22. See, *e.g.*, DEL. CODE ANN. tit. 10, § 8118 (1953); IND. ANN. STAT. 2-627 (1946); PA. STAT. tit. 12, § 34 (1936).

has a statute providing that "All actions against physicians, surgeons . . . for malpractice . . . shall be brought within two years from the date of the act of neglect complained of . . . ."[23] While this statute appears to prevent the postponement of the running of the statute, another Missouri statute provides: "the cause of action shall not be deemed to accrue when the wrong is done . . . but when the damage resulting therefrom is sustained and is capable of ascertainment . . . ."[24] The Missouri Supreme Court has held that the last cited statute is applicable to malpractice actions.[25]

Conclusion and Proposed Statute

It is submitted that a statutory solution to this problem would be the most satisfactory, for "if criticism [of the status quo] is to be leveled, it should be directed, not at the court, but at the legislature."[26] Thus, the following language is suggested as a reasonable legislative response to the problem of when a cause of action accrues in a medical malpractice case involving a foreign object left in the body of the plaintiff. It would have the effect of giving a deserving plaintiff his day in court, relieving the court of the necessity of twisting the law to prevent an injustice, and insuring that a doctor will know that he is subject to a longer statute of limitations and consequently take precautions accordingly.

> A cause of action for malpractice due to a foreign object left in the body of a patient by a physician or surgeon shall be deemed to accrue when the injury is actually discovered or when in the exercise of reasonable diligence the injury should have been discovered.

23. Mo. Rev. Stat. § 516.140 (1949).
24. Mo. Rev. Stat. § 516.100 (1949).
25. Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943), 9 Mo. L. Rev. 102 (1944).
26. 1953 Wash. U.L.Q. 336, at 339.