UNIVERSITY OF HAWAII LAW REVIEW

VOLUME 9

1987

University of Hawaii Law Review

Volume 9 / Number 1 / Summer 1987

Subscriptions

THE UNIVERSITY OF HAWAII LAW REVIEW is published semi-annually. Subscriptions are given for the entire year only and are payable in advance. Subscriptions in the United States are $16 for two issues in 1984 if remitted before March 31, 1984 (elsewhere, $17 per year). Remit payment only for the current year. Subscriptions are renewed automatically unless timely notice of termination is received.

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The William S. Richardson School of Law was honored this past January to host Justice John Paul Stevens of the United States Supreme Court and Senior Judge Myron H. Bright of the United States Court of Appeals for the Eighth Circuit in our first Jurists-in-Residence program. This was also an occasion for us to assist Chief Justice Herman T. F. Lum of the Supreme Court of Hawaii and the State Commission he has appointed under the chairmanship of Mr. Vernon Char, to focus upon Hawaii's celebration of the bicentennial of the Constitution of the United States.

Justice Stevens delivered this public speech under the auspices of Mr. Char and his State Bicentennial Commission in our Moot Courtroom on Monday, January 26, 1987. We are pleased to publish Justice Stevens' remarks in our University of Hawaii Law Review.

Justice John Paul Stevens

It is a real honor for a *malihini* to be invited to speak to you at the beginning of your celebration of the bicentennial of our Constitution. Commentary on the events that led up to the convention in Philadelphia, the ratification of the Constitution by the several states, and its interpretation during the years since the reign of King Kamehameha I, could fill an entire library. But since one of the great virtues of the Constitution is brevity, I shall take only a few minutes of your time to make three simple points about that great document.

A celebration of our Constitution should begin at the beginning. Let me read it to you:

> *We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*

The first purpose of our Constitution was—and is—to form a "more perfect Union." Note that the Framers did not set for themselves the unattainable goal of a perfect union. They recognized that some degree of imperfection is an attribute of every human institution. We can insist that our leaders strive for perfection but we must be tolerant of the occasional honest mistake that is an inevitable part of the process of government. The term "more perfect Union" is

intriguing. Some strict grammarians might suggest that a thing is either perfect or it is not perfect—that perfection is an absolute, not a matter of "more or less." Yet the learned men that wrote the Preamble used that arguably ungrammatical term, possibly because it does more than explain the immediate object of their work, but also indicates that it was part of an ongoing and perhaps never-ending process.

In order to form "a more perfect Union," it was of course, essential that there be a Union. The completion of the task of drafting a written Constitution in 1787 did not end the work of the Framers, because the draft had no legal effect until it was ratified by the ninth state, New Hampshire, on June 21, 1788, and perhaps even then it might not have succeeded if Virginia and New York had not followed suit promptly thereafter. Indeed, the original conception of a more perfect union of thirteen states was not achieved until 1790, when Rhode Island ratified the Constitution. But then, less than a year later, Vermont was admitted to the Union as the fourteenth state. That even is of particular interest to us today because it suggests that a union of fourteen states was even more perfect that one of just thirteen. It should follow, I submit, that a Union of fifty states is still even more perfect.

You will recall that the formation of a more perfect union is merely one of the several purposes stated in the Preamble. The fact that there are multiple purposes is itself a matter of some significance, for just as imperfection is a characteristic of human affairs, so is the danger of conflict when large groups of men and women seek to achieve different ends—even when there is no necessary incompatibility between the interest in domestic tranquility, for example, and the interest in establishing justice. But the Framers were fully aware of the inevitability of conflict and dispute in a thriving, dynamic society. That awareness explains the variety of different protections against the abuse of authority, either by an all-powerful executive or by an uncontrollable majority, that permeate our Constitutional scheme. Power is shared not only between the several states on the one hand and the central government on the other, but also among the three branches of the federal government. Moreover, although ultimate power rests with the people who are wise enough to vote, the strength of the transient majority is tempered by the provision of different terms of office for Representatives, for the President, for Senators and for judges—and the power of each of the three branches is further tempered by respect for the others and by the realization that self-restraint is the best preservative of legitimate power.

Admittedly our machinery of government is somewhat cumbersome. It may or may not be operating exactly as the Framers planned. But this much is clear. It works—and over the years has worked—far better than most. Whether measured by material standards that economists use or by the spiritual values that every free citizen recognizes and appreciates, we can surely take pride in the way in which the vision of the Framers had affected our lives.

Finally, let me say a few words about the final purpose identified in the Preamble—to "secure the Blessings of Liberty to ourselves and our Posterity." Like so many clauses in the Constitution, those words can be read in different ways by different persons. I shall illustrate the point by referring to two profound questions of Constitutional Law for which the text of the Constitution provided no certain answer.

As the Nation expanded to the West, the addition of new states with differing territorial histories and dramatically different geographies gave rise to a variety of legal questions concerning matters such as sovereignty over, and title to, property under navigable waters. In resolving such questions, the Supreme Court was required to decide whether there was any difference in the legal status of the original thirteen states and that of a newly admitted state. Arguably, if the authors of the Constitution had been concerned only with securing the blessings of liberty of "ourselves" in the narrowest sense, they might have considered it appropriate to attach special conditions to the acceptance of subsequently created states. But that view was firmly and unequivocally rejected by the Court's adoption of the Equal Footing Doctrine. The concept of equality applies to states as well as individuals. Thus, when Hawaii was admitted to the Union as the fiftieth state, its status was precisely the same as that of the other forty-nine.

And its commitment was irrevocable. Until the Civil War there was uncertainty as to whether a state had the legal right to withdraw from the Union, either because it had never made a commitment to remain in the Union forever and therefore retained the sovereign right to secede at will, or because it regarded the actions of the Federal Government as material breaches of contract that justified a termination of the state's commitment. President Lincoln, of course, disagreed. Relying in part of the unequivocal intent of the Framers to secure the blessing of liberty for their posterity, he concluded that the Union was indeed permanent. His view prevailed. It is unquestionably the right answer to the Constitutional question, but it was provided not by a Court's scholarly examination of the text of the Constitution, but by the blood, courage and faith of thousands upon thousands of free citizens who were prepared to fight and die for a more perfect union.

Thus as we begin the celebration of the Bicentennial, I submit these three thoughts for your consideration. First, that although the drafting and signing of the Constitution 200 years ago marked the beginning of the formation of a central government "of the people" of the United States, it was just one step in a continuous process of striving for a more perfect Union; second, that one reason the process of governing "for the people" had been successful is that it has respected and tried to accommodate the interests of all the people rather than just those in power at any particular time; and finally, that Lincoln's vision that government "by the people" shall not perish from this earth reflects the

perception of the Framers that our trusteeship of the blessings of liberty includes an obligation to posterity.

The General Maritime Law Survival Action: What are the Elements of Recoverable Damages?

By Casey A. Nagy*

I. INTRODUCTION

In 1970, the United States Supreme Court decided *Moragne v. States Marine Lines*,[1] in which the Court recognized an action for wrongful death[2] to exist under the general maritime law for deaths occurring within the admiralty jurisdiction, and resulting from a violation of maritime duties.[3] An increasing num-

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[1] 398 U.S. 375 (1970).

[2] *See infra* note 4 regarding the substance of a wrongful death action.

[3] The general maritime law is "comprised of the ancient codes and customs of seafaring nations . . .," inclusive of their evolution over time. M. NORRIS, THE LAW OF SEAMEN § 3, at 3 (3d ed. 1970). Conceptually, the terms "maritime law" and "admiralty" are nearly synonymous, although the former historically relates more to modern jurisprudence, and the latter in a generalized sense to matters associated with the navigable waters of the world. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 1-1, at 1-2 (2d ed. 1975) [hereinafter G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY]. Jurisdiction over admiralty matters in the United States is primarily vested in the federal courts. Judiciary Act of 1789, § 9, 1 Stat. 76. *See* 28 U.S.C. § 1333 (1976). The later code version of the Act embodies minor amendments made in 1948 and 1949; these amendments effected no substantive changes. Madruga v. Superior Court, 346 U.S. 556, 560 (1954).

The Judiciary Act represented Congress' effort to implement the constitutional grant of admiralty and maritime jurisdiction given to the "judicial power of the United States." U.S. CONST. art. III, § 2. Under the Act, the federal district courts have nearly "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . ." Judiciary Act of 1789, § 9, 1 Stat. 76-77. One exception exists to the federal courts' exclusive jurisdiction in this context; state tribunals may exercise jurisdiction over *in personam* actions grounded in the common law. *Id.* Consequently, where common law rights of action that may be enforced *in personam* arise in an

ber of the lower federal courts have determined, in accord with their somewhat varied perceptions of the principles outlined in *Moragne*, that a survival action also exists under the general maritime law, or, alternatively, that survival damages may be recovered under the general maritime law in conjunction with a maritime law death action.[4]

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admiralty context, state tribunals may exercise jurisdiction concurrently with the federal courts. *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 1-13, at 37-40. Concerning the types of causes which may arise within the admiralty jurisdiction, see *id.*, § 1-10, at 22-31.

When state tribunals do properly exercise jurisdiction over admiralty matters, they may apply state substantive laws to those matters only to the extent those laws afford *in personam* remedies and are not in conflict with existing principles of the substantive maritime law. *Id.*, § 1-13, at 37-40; Chelentis v. Luchenbach S.S. Co., 247 U.S. 372 (1918). *See also* Offshore Logistics, Inc. v. Tallentire, 106 S. Ct. 2485, 2489-90 & 2495-99 (1986). The *Tallentire* Court expounded on this point, observing that state courts could "entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." *Id.* at 2495. The maritime law, to the extent it supersedes conflicting state laws applicable to maritime causes under the Judiciary Act, is comprised of both congressional legislation and judicial decisions that have developed "common law" rights of action under the general maritime law. *See, e.g., Tallentire*, 106 S. Ct. 2485 (1986) (construing the Death on the High Seas Act, 45 U.S.C. §§ 761-68 (1982)); Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) (construing The Merchant Marine Act of 1920, § 33 (the Jones Act), 46 U.S.C. § 688 (1982)); Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980); *In re* S.S. Helena, 529 F.2d 744, 753 (5th Cir. 1976) (both cases considering the general maritime law wrongful death action recognized to exist by the United States Supreme Court in *Moragne*).

[4] In regard to both policy and intent, a survival action is distinguishable from a wrongful death action. A survival action is designed to protect the interests of the decedent in regard to compensable claims he or she might have made prior to death against those persons whose tortious conduct culminated in the death. A wrongful death action, alternatively, exists to protect the interests of the decedent's family and other surviving dependents; consequently, the type of claims presentable through an action for wrongful death are measured by the nature of the losses sustained by the decedent's surviving family and dependents as a result of the death. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-30, at 360. *See also* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 575 n.2 (1974).

The substantive differences between the actions are identified by Stuart M. Speiser in his authoritative text on wrongful death:

> Conceptually, the survival statute is quite different from the wrongful death act, as each provides a remedy for a different kind of loss. Wrongful death acts compensate either the survivors, or the estate of the deceased, for losses they have sustained. Survival statutes, on the other hand, permit recovery by the decedent's estate—subject to certain exceptions where the recovery is on behalf of spouses, children, parents, dependent next of kin, etc.—for damages which the *decedent* could have recovered had he lived. The prime difference between the theories underlying the two types of statutes . . . is that the survival statute merely *continues* in existence the injured person's claim after death as an asset of his estate, while the usual wrongful death statute creates a new cause of action, i.e., based upon the death itself.

At present there appears to be growing support for the concept of an independent survival action; correspondingly, contemporary courts appear less inclined simply to award survival damages as part of a greater recovery of wrongful death damages that are obtained under the guise of the general maritime law.[5] In view of this apparent trend, the object of this article is to examine the

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2 S. SPEISER, RECOVERY FOR WRONGFUL DEATH, § 14:1, at 408 (2d 1975) [hereinafter 2 S. SPEISER]. As the foregoing passage clearly represents, the most visible distinction between survival and wrongful death actions is found in the items of damages they respectively afford, because the character of those damages is so integrally related to the respective purposes of the two actions. Some authorities have suggested, however, that the distinction is nominal. *See, e.g.*, Law v. Sea Drilling Corp., 523 F.2d 793, 795 n.4 (5th Cir. 1975) (suggesting that any differences between survival and death actions are "arcane," and of little significance—if any—in the maritime law).

Among the decisions in which a maritime law survival action has been expressly recognized are the following: Evich v. Connelly, 759 F.2d 1432 (9th Cir. 1985); Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890 (5th Cir. 1984); Law v. Sea Drilling Corp., 523 F.2d 793 (5th Cir. 1975); Chute v. United States, 466 F. Supp. 61 (D. Mass. 1978); McKeithen v. M/T Frosta, 435 F. Supp. 584 (E.D. La. 1977); Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974); Muirhead v. Pacific Inland Navigation, 379 F. Supp. 361 (W.D. Wash. 1974).

Decisions in which survival damages have simply been awarded under the general maritime law include the following: Spiller v. Lowe & Assoc., 466 F.2d 903 (8th Cir. 1972); Greene v. Vantage S.S. Co., 466 F. 2d 159 (4th Cir. 1972); Dennis v. Central Gulf S.S. Corp., 453 F.2d 137 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972); Marsh v. Buckeye S.S. Co., 330 F. Supp. 972 (N.D. Ohio, E.D. 1971). *See also* Smith, *A Maritime Survival Remedy: Is There Life After* Higginbotham, 6 MAR. LAW. 185 (1981) [hereinafter Smith, *Maritime Survival Remedy*]; George & Moore, *Wrongful Death and Survival Actions Under the General Maritime Law: Pre-*Harrisburg *Through Post-*Moragne, 4 J. MAR. L. & COM. 1 (1972) [hereinafter George & Moore, *Wrongful Death and Survival Actions*].

[5] Most of the recent decisions concerning the issue of maritime law survival damages have uniformly endorsed the concept of a maritime law survival action. *See supra* note 4. Significantly, the Fifth Circuit Court of Appeals was one of the first tribunals to simply award survival damages as a part of a maritime law wrongful death recovery, and has subsequently proceeded to champion the independent existence of a maritime law survival action. *See, e.g.*, Law v. Sea Drilling Corp., 510 F.2d 242, 246, *on reh'g*, 523 F.2d 793, 794 (5th Cir. 1975); Dennis v. Central Gulf S.S. Corp., 453 F.2d 137 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972) (awarding survival damages only). The transition in the Fifth Circuit's view is manifest in the opinion following the rehearing in *Sea Drilling*, where the court recognized a maritime law survival action to exist, as opposed to its initial reliance on the *Dennis* practice of simply awarding survival damages. The *Sea Drilling* endorsement of a maritime law survival action appears to possess lasting contemporary significance in the Fifth Circuit. *Cf.* Evich v. Connelly, 759 F.2d 1432 (9th Cir. 1985) (citing to a post-*Sea Drilling* decision of the Fifth Circuit in support of the existence of a maritime law survival action). *See also* Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890 (5th Cir. 1984); George & Moore, *Wrongful Death and Survival Actions*, *supra* note 4, at 15-16 (intimating that *Dennis* would have questionable contemporary significance in the event that a maritime law survival action was recognized to exist). The Fifth Circuit is by no means alone in its recognition of the maritime law survival action, but is joined by a number of other circuits. *See supra* note 4. *Cf.* Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890, 893 (5th Cir. 1985) (referencing a number of decisions consistent with this view). But see *infra* notes 91, 309-

character and scope of the items of damages that should be associated with a survival action commenced under the general maritime law. This examination may be conducted irrespective of the subsidiary question of whether or not the survival action is brought in conjunction with, or independent of, any corollary maritime law wrongful death action.

Despite the apparent popular emergence of an independent maritime law survival action, the question of what damages it affords has received little attention either from the courts involved in its development, or from legal scholars that have given it their endorsement.[6] In a related sense, little discussion has attended the more antiquated practice of simply awarding survival damages as part of an overall damage award realizable through a maritime law wrongful death action.[7] The lack of attention accorded these concerns is a recognizable product of the manner in which the maritime law survival action has come into existence. The action is conceptually based on *Moragne*, and therefore represents

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11 and accompanying text, regarding resolution of survival claims in the admiralty jurisdiction in the post-*Moragne* period without the avail of the general maritime law. Finally, it is important to note that the Supreme Court has not given its imprimatur to the maritime law survival action. *See infra* notes 11 and 92. But see *infra* notes 92-103 and accompanying text for the Supreme Court's indirect endorsements of survival awards in admiralty causes.

[6] This observation is not meant to suggest that the absence of attention results from oversight, neglect, or disinterest. Instead, the manner in which the maritime law survival action substantively devolved from *Moragne* has only recently generated information in a quantity sufficient to support analysis of the character and scope of the damages that should be recoverable under this new form of survival action. *See infra* notes 8-12 and accompanying text. *See also infra* note 39.

[7] Throughout this article, frequent reference is made to the practice of some courts in awarding survival damages under the general maritime law without benefit of the additional endorsement of an independent maritime law survival action. *See supra* note 4. This reference is critical to the discussion of damages recoverable under the maritime law survival action for several reasons. First, the practice of simply awarding survival damages under the maritime law preceded any recognition of a survival action existing independently under the maritime law; the practice helped establish, however, the essential nexus between *Moragne* and the concept of survival remedies in admiralty that was prefatory to recognition of a maritime law survival action. Second, while there are theoretical and practical distinctions between merely awarding survival damages under the maritime law and taking the further step of doing so through recognition of a distinct survival action, the character and scope of the damages should logically remain consistent between the two practices. *See infra* note 328. Therefore, while this article focuses on damages recoverable through the emergent use of an independent maritime law survival action, material pertinent to this purpose can and should be derived from decisions involving its precursor, the practice of awarding survival damages as part of a larger recovery in a maritime law wrongful death action.

a substantive devolution from a decision that was not only revolutionary,[8] but which was also inapposite in purpose and effect to a survival action.[9]

Apart from the revolutionary character of *Moragne* and the relative youth of maritime law actions in general, the patent incongruity between the subject and content of the *Moragne* decision and efforts to develop a maritime law survival action have, perhaps inevitably, produced a natural tension that has adversely impacted those efforts. The nature of the tension is obvious when it is remembered that damages represent the principal distinction between wrongful death and survival actions;[10] in trying to refine the measure of damages recoverable under a survival action, not much help can be expected to follow from reference to a decision wholly devoted to a type of action that is distinct from a survival action in purpose, effect, and damages. Additionally, the tension produced in this fashion has been compounded by the absence of any contemporary Supreme Court address of the maritime law survival action. The one time the Court considered the issue, it declined to endorse the action.[11]

Each of the foregoing factors has helped to produce an undesirable—if predictable—situation: most affirmative applications of the maritime law survival action have been attended by little discussion of its scope and elements, particu-

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[8] Up to the time of the *Moragne* decision, no action for wrongful death existed under the general maritime law. The Harrisburg, 119 U.S. 199 (1886). Recognition of such an action in *Moragne* involved overruling long established precedent, a matter recognized by the *Moragne* Court to be attended with "very weighty considerations." 398 U.S. at 403. Primary among these considerations was the uncertain future of established precedent, which held that courts presiding over admiralty causes would apply state and federal death statutes in the absence of a maritime death action. *See, e.g.*, W. Fuel Co. v. Garcia, 257 U.S. 233 (1921); The Hamilton (Old Dominion S.S. Co. v. Gilmore), 207 U.S. 398 (1907); The Harrisburg, 119 U.S. 199 (1886); *See also infra* notes 29-30 & 63-130 and accompanying text. This uncertainty was grounded not only in the overruling of *The Harrisburg*, but also in the *Moragne* Court's reliance upon existing state and federal death statutes to support recognition of a maritime law wrongful death action, and to assist in the definition of its subsidiary elements. *See infra* notes 138-40, 157-61, 220-21, 224, & 306 and accompanying text. In essence, *Moragne* accomplished the following: (1) modified the need to use state death statutes in admiralty causes, particularly as to seamen; (2) abridged the authority of existing federal wrongful death legislation applicable to admiralty causes, while (3) advising the lower courts to refer nonetheless to both bodies of law in their efforts to refine substantively the maritime law death action. Given this somewhat self-contradicting introduction, it is not surprising that the maritime law death action has been plagued with uncertainty regarding its substance and application—perhaps as an inevitable consequence of the necessary but revolutionary character of its origin. The nature of the reference mandated by the Supreme Court, and its resultant unsettling effect upon the maritime law, is explored at length later in this article.

[9] *See supra* note 4.

[10] *See supra* note 4.

[11] Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932). *Cf. Moragne*, 398 U.S. at 390. *But cf. Tallentire*, 106 S. Ct. at 2491 n.1 (1986) (the Court noting that it was *not* discussing the question of survival actions cognizable in admiralty, but in announcing this reservation, referencing only survival actions existing under authority of state law).

larly with respect to a proper measure of damages.[12] More attention is merited,

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[12] Aside from the issue of damages, refinement of most of the subsidiary elements of the maritime law survival action is not likely to be a difficult process, and therefore the courts have possibly felt no compelling need to discuss the other elements at any length. Suggestion of this relative absence of difficulty stems from the fact that survival actions in general are associated fairly readily with a definite purpose and beneficiary. *See supra* note 4. *But cf.* the Merchant Marine Act of 1920, § 33 (Jones Act), 46 U.S.C. § 688 (1982), incorporating by reference all provisions of the Federal Employers' Liability Act of 1908 (FELA), 45 U.S.C. §§ 51-59 (1982). The Jones Act affords to seamen, or their beneficiaries, actions for personal injury, wrongful death, and survival, where liability sounds in negligence. Through § 59 of FELA, the Jones Act provides a survival action designed not to benefit the decedent's estate, but his or her "widow or husband and children . . . and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee." 45 U.S.C. § 59 (1982). The beneficiary schedule for a Jones Act survival action is in apparent conflict with the prevailing practice of making the remedy available to the benefit of a decedent's estate. *See supra* note 4. The somewhat anomalous provision of the Jones Act is potentially important to the identification of beneficiaries of the maritime law survival action, as *Moragne* is the philosophical root of the action, and advised looking in part to federal statutes when refining substantive elements of the maritime law wrongful death action. *See infra* note 341. The Jones Act beneficiary schedule might be explained, however, in a manner which makes it less anomalous. As a federal enactment, the Jones Act necessarily must provide for a schedule of beneficiaries, a function generally left by state survival statutes to other state laws regarding testate and intestate distribution. The Jones Act could be construed simply to provide a beneficiary schedule for its survival action that most closely approximates the eventual distribution of damages recoverable under most state survival statutes.

Apart from the elements of damages and a beneficiary schedule for the maritime law survival action, and resolution of the action's primary purpose, the principal remaining element to consider is a period of limitation regarding the time in which the action would have to be commenced. Again, *Moragne* helps to resolve this issue, as the Supreme Court inferred that the maritime law doctrine of laches should control in regard to causes existing under the general maritime law. 398 U.S. at 406. Laches entails a bar against any action that has not been timely brought because of undue delay. In determining what constitutes "undue delay," courts look to analogous statutory periods of limitation. *See generally* Comment, *Admiralty: The Doctrine of Laches*, 37 TUL. L. REV. 811 (1963). In *Moragne*, the Supreme Court suggested that the proper analogous statute of limitations for the maritime death action was that of the Death On the High Seas Act, (DOHSA) 46 U.S.C. §§ 761-768 (1982). While DOHSA affords an action for wrongful death only, and appears not to deal with the issue of survival, its use for resolution of a limitations period for the maritime law survival action would appear feasible. See *infra* notes 83-91 and accompanying text regarding the perceived relationship of DOHSA to survival actions. Laches is a procedural doctrine, and not one related to the substantive rights and duties of parties protected by the maritime law; consequently, DOHSA's limitations period could be used without any dramatic impairment of the integrity of the maritime law survival action. *But see infra* note 295, concerning the contemporary congruence between the respective limitations periods of DOHSA and the Jones Act; this congruence could lead to use of the Jones Act limitation period as a referent where seamen bring a maritime law death—or survival—claim.

Because significant discord exists with regard to damages typically associated with survival actions, less predictability can be exercised in identifying a measure of damages for the maritime law survival action. Therefore, the general failure of the courts and commentators to address this issue at length looms as the most significant consequence of the courts' general tendency to adopt

to the benefit of both litigators and the courts, as they mutually strive to refine the action and to give it a predictable character. This article represents one effort to supply this attention, and demonstrates that the action should afford damages to a decedent's estate for (1) the decedent's antemortem pain and suffering, (2) the decedent's wage loss, measured from the time of injury to the time of death, (3) the decedent's medical expenses insofar as they were incurred between the time of injury and the time of death, and (4) possibly funeral expenses, particularly where the decedent's estate has borne the cost thereof.

Discussion in this article proceeds in four substantive sections. First, the origin and character of survival actions is introduced, including identification of the elements of damages commonly associated with them. Where helpful, illustration is provided through reference to existing survival statutes, and to their respective judicial constructions. This illustration provides insight into the elements of contemporary survival actions, as these elements bear almost singular importance to the task of refining the new, national survival action that an increasing number of courts have recognized to exist under the general maritime law.[18]

Second, the historic availability and character of survival actions is reviewed. This review focuses on survival actions as they were available in the admiralty jurisdiction prior to *Moragne*. From this foundation, discussion turns to a substantive evaluation of the *Moragne* opinion. Initially, this evaluation is elemental in content, identifying the various points and findings made by the *Moragne* Court. Once these elements are identified, consideration turns to the *ratio decidendi* of *Moragne*, which is significant both to the conceptual origin of the maritime law survival action, and to the further refinement of its proper measure of damages.

Finally, a detailed examination is made of the *logical* constitution of the damages component of the maritime law survival action. This examination is supported by references to authorities who have considered the issue of the

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or apply the action, while at the same time leaving it in a relatively inchoate state. *See supra* notes 8-12 and *infra* notes 297-301, 312-17, and 335-36 and accompanying text. The parsimonious approach of the courts can be explained, in whole or in part, by their commitment to discuss only points in issue or controversy, and not to discuss rhetorically elemental aspects of particular actions. *Cf. infra* note 39.

[18] The *Moragne* Court advised that the elements of the maritime law wrongful death action should be refined through reference to existing state and federal wrongful death statutes, and to the law of personal injury. 398 U.S. at 406-08. *See supra* note 8 and *infra* notes 125-29, 138-40, 156-61, 220-21, 224, & 306 and accompanying text. As the maritime law survival action is based on *Moragne*, it is logical to presume that state and federal survival statutes may be referenced to similar ends, as well as to litigation associated with survival claims. *See supra* notes 3-8 and accompanying text. Further support for this premise is found in the statutory authority representing the only basis of survival actions other than the variant now cognizable under the general maritime law. *See infra* note 27.

action's cognizable damages.[14] An effort is also made to identify or clarify the rationales adopted by these authorities as bases for their conclusions. The object of this last point of discussion is to show that virtually all court decisions recognizing or implementing the maritime law survival action have made damage awards consistent with the measure of damages most logically associated with that action. Despite the consistency of these decisions, they do raise an important concern; the "logical" scope of their damage awards are never explained in detail, and as a result, these decisions have consequently laid the foundation for an illogical development of the damages component of the maritime law survival action. Without explanation of why certain items of damages are awarded, no predictability exists concerning what items of damages *could* be awarded, if properly plead by an interested party.

An illustration of the resulting dichotomous character of decisions considering the maritime law survival action is critical to properly understanding their import to the damages issue. The critical character of this illustration results from the failure of these decisions to yield much information about how certain items of damages have been awarded, and others have not been awarded.[15] As the maritime law survival action is founded on common law principles,[16] its continued refinement is inextricably related to the substance of decisions that have already recognized the action, or that have applied it to certain factual instances.

Unless these decisions are put into perspective, and their findings with regard to damages are explained, tremendous potential exists for future decisions to depart from logical constraints upon the character of the damages recoverable through the maritime law survival action. If this departure occurs, it will inevitably produce discordant results of the same nature that were, in substance, an anathema to wrongful death law in the admiralty prior to *Moragne*.[17] If the future course of the maritime law survival action is to be so affected, no purpose is served by recognizing the action to exist. The action's ostensible purpose—in keeping with *Moragne*—is to avoid uncertainty and conflict in the law of admiralty.[18] If the action is to meet this objective and avoid an anathematic

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[14] Reference is also made, where helpful, to decisions in which survival damages have been awarded under the general maritime law, albeit in conjunction with a wrongful death action based on *Moragne*, and not the separate recognition of a maritime law survival action. *See supra* notes 4 & 7.

[15] *See supra* text accompanying notes 6 and 8-12.

[16] *See, e.g.*, Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890, 893 (5th Cir. 1984) (a maritime law survival action has been established by "cases," i.e., decisional law); Barbe v. Drummond, 507 F.2d 794, 799 (1st Cir. 1974) (a maritime law survival action exists and has its origin in "decisional law").

[17] See *infra* text accompanying notes 189-213 regarding wrongful death law prior to *Moragne*, and the influence of that law on the Supreme Court's reasoning in *Moragne*.

[18] These goals were the avowed object of the *Moragne* Court. *See infra* notes 154 and 223. As the maritime law survival action is conceptually based on *Moragne*, the same objects ought to be

fate, its contours must be more fully explored, again with principal emphasis on its proper measure of damages. To the extent this exploration is not accomplished, the stability and integrity of the maritime law is at risk.

II. SURVIVAL ACTIONS: CONCEPTUAL ORIGIN, CHARACTER, AND COMMON ITEMS OF DAMAGES

No survival action existed under the common law, as dictated by the principle of *actio personalis moritur cum persona*, a personal action dies with the person.[19] This principle was conceptually strengthened by the English felony-merger rule, which held that where an act constituted both a tort and a felony, the legal consequences of the tort were merged into those of the felony.[20] Under English law contemporaneous with the period of the rule's application, felons were put to death and their property was forfeited to the crown.[21] Consequently, neither felons or their property remained to satisfy any judgment for survival damages based on the underlying tort. As the felony-merger rule obviated any real object of a survival action, and the principle of *actio personalis moritur cum persona* in any event proscribed such a proceeding, survival actions never gained acceptance at common law.

With marked pragmatism, the common law carried even further its disposition against survival actions by including a bar against any tort action sought to be brought against the personal representative of the felon's estate.[22] This rule was in turn expanded to embody a bar even against tort actions in favor of the wronged party, should he or she be deceased. In essence, all rights of action sounding in tort were considered under the common law to end with the death of either of the parties involved in the incident resulting in death, the

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philosophically associated with it. *See supra* text accompanying notes 3-8. *See generally infra* notes 133-305 and accompanying text.

[19] 2 S. SPEISER, *supra* note 4, § 14:1, at 407 n.1; M. MINZER, DAMAGES IN TORT ACTIONS § 20.01(2) at 20-11 & 20-12 (1986) [hereinafter M. MINZER, DAMAGES IN TORT ACTIONS]; George & Moore, *Wrongful Death and Survival Actions*, *supra* note 4, at 8-9 (1972).

[20] Comment, *Wrongful Death on State Waters*, 44 TEMP. L.Q. 292, 301 n.92 (1971). Regarding the relationship between the principle *actio personalis moritur cum persona* and the felony-merger rule, see generally 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH §§ 1:2-4 (2d 1975) [hereinafter 1 S. SPEISER]; M. MINZER, DAMAGES IN TORT ACTIONS, *supra* note 19, § 20.01(1), at 5-10.

[21] M. MINZER, DAMAGES IN TORT ACTIONS, *supra* note 19, § 20.01(1), at 20-5 to 20-7. *See generally* W. PROSSER, D.DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 120 (3d ed. 1964) [hereinafter PROSSER AND KEETON ON TORTS]; J. DOOLEY, MODERN TORT LAW, § 27.29, at 45 (1983 ed.) [hereinafter J. DOOLEY, MODERN TORT LAW].

[22] F. HARPER, LAW OF TORTS 673-74 (1931), *quoted in* 2 F. HARPER & F. JAMES, LAW OF TORTS § 24.1 n.2 (1956) [hereinafter HARPER & JAMES, LAW OF TORTS].

tortfeasor-felon or the victim.[23] In a much similar fashion, and also as a product of the felony-merger rule, the common law proscribed actions for wrongful death.[24]

The felony-merger rule was only nominally important to the common law precepts transferred to the American colonies, and subsequently into the law of the United States.[25] Similarly, the proscription against survival actions was recognized to be of limited justification, and of marginal utility.[26] The importance of both proscriptive influences was further minimized by the practice of the various states in enacting wrongful death and/or survival statutes.[27] The general maritime law did not follow this trend, however, and embodied no cognizable action for wrongful death or survival.[28] Courts presiding over admiralty causes then tried to nullify the impact of these omissions by applying state death and survival statutes to admiralty causes.[29] These statutes represented one principal means by which damages for wrongful death and survival could be recovered in

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[23] *Id.*

[24] Recent Decisions, *Admiralty—Wrongful Death-General Maritime Law Provides Remedy for Pain and Suffering of Decedent Incurred in Wrongful Death on High Seas but not for Funeral Expenses*, 8 VAND. J. TRANSNAT'L L. 889, 890 n.7 (1975) [hereinafter Recent Decisions, *Maritime Law Remedy*]; PROSSER AND KEETON ON TORTS, *supra* note 21, § 121. The *Moragne* Court addressed the common law proscription of wrongful death actions, observing the felony-merger rule to be outdated and of minimal importance to American jurisprudence. 398 U.S. at 382-90. *See infra* text accompanying notes 216-21. Presumably, the *Moragne* Court's discussion can be analogized to the proscription on survival actions because of the similar histories of the two actions' proscription under the common law. This analogy holds obvious significance to the post-*Moragne* recognition of a maritime law survival action. See *supra* text accompanying notes 3-8 regarding the relationship between *Moragne* and the maritime law survival action.

[25] *Moragne*, 398 U.S. at 382-90.

[26] *See, e.g.*, M. MINZER, DAMAGES IN TORT ACTIONS, *supra* note 19, § 20.01(2), at 20-12.

[27] 2 S. SPEISER, *supra* note 4, § 14:1, at 407. At the time *Moragne* was decided, every state had adopted a wrongful death statute. Additionally, several federal wrongful death statutes had been enacted. 298 U.S. at 390. At approximately the same time, more than one-half of the states had adopted survival statutes. Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 575 n.2 (1974). These statutes, or their precursors, represented the only bases upon which actions for wrongful death or survival could be maintained prior to *Moragne*. 2 HARPER & JAMES, LAW OF TORTS, *supra* note 22, § 24.1 n.2. *See also* GILMORE & BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-33, at 369 (discussing the historic statutory basis of actions for wrongful death). *Cf.* 59 CONG. REC. 4,482 (1920) (statement of Rep. Volstead).

[28] Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932) (no survival action); The Harrisburg, 119 U.S. 199 (1886) (no wrongful death action). This situation only persisted up to the time *Moragne* was decided. *See, e.g.*, McKeithen v. M/T Frosta, 435 F. Supp. 584 (E.D. La. 1977); Recent Decisions, *Maritime Law Remedy*, *supra* note 24, at 890 n.7 (1975). *But cf.* Kernan v. American Dredging Co., 355 U.S. 426, 429 n.2 (1958) (prior to *The Harrisburg*, several lower courts had recognized a maritime law wrongful death action).

[29] *See infra* notes 63-70, 127-28, 196-200 and accompanying text. For a discussion concerning the character of "admiralty," and its relationship to the maritime law, see *supra* note 3.

the admiralty jurisdiction prior to *Moragne*.[30]

Survival actions have historically existed only by statute[31] and have come to be associated with certain identifiable elements of damages.[32] This association has resulted from the basis upon which survival damages have traditionally been awarded. Survival damages are awarded consistent with the purpose of a survival action, which is to compensate a decedent, through his or her estate, for personal losses incurred by the decedent as a result of their tortiously-caused death.[33] The apparent and logical corollary to the concept of a decedent's "personal losses" is that these losses have been incurred prior to death.[34] Speiser has elaborated on this point:

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[30] Federal legislation constituted the other significant means of obtaining wrongful death and survival damages in the admiralty prior to *Moragne*. The principal legislation involved was the Jones Act, 46 U.S.C. § 688 (1982), and the Death on the High Seas Act, 46 U.S.C. §§ 761-68 (1982). *See infra* text accompanying notes 79-99 regarding the role of this and other federal legislation in the admiralty law, in the pre-*Moragne* absence of wrongful death and survival remedies cognizable under the general maritime law.

[31] *See supra* note 27.

[32] The degree of certainty available through statutory reference or construction likely exceeds that which can be expected to follow solely from the gradual development of common law precedent. Where statutory authority exists, courts bound to apply that authority not only have at their disposal the combined judgment of the legislative branch of government—as opposed to the more situation-specific nature of judicial precedent—but also have a more immediate sense of feedback on occasions where the courts might unwittingly err in their perception of legislative intentions. *Cf. Moragne*, 398 U.S. at 390-93 (observing the guidance typically found in legislation, and the manner in which legislation embodies public sentiment). In the absence of legislative authority, common law precedent is subject to the inherent problem of each court being faced with peculiar facts and arguments, which eventually coalesce into an equally unique, albeit reasoned, opinion. More room exists in the judicial forum than in its legislative counterpart for departures from prior judgments, however minute the departure may be, and over time a greater disparity of law may evolve than where it may be measured against the standard provided by a legislative enactment. One clear example of the flexibility inhering to the common law is found in the treatment accorded by the United States Supreme Court to the maritime law wrongful death action first recognized by the Court in *Moragne*. *See generally infra* notes 133-305 and accompanying text.

[33] *See supra* note 4. *Cf. In re* S.S. Helena, 529 F.2d 793, 795 (5th Cir. 1975); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-30 at 361; Recent Decisions, *Maritime Law Remedy*, *supra* note 24, at 899 n.30. But see *infra* notes 45-50 and 321-26 and accompanying text regarding certain instances where survival damages may not be awarded to the decedent's estate.

[34] *See, e.g.*, Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890, 893 (5th Cir. 1984) (considering the maritime law survival action to permit recovery "[o]f a decedent's pre-death damages"). The United States Supreme Court has evidenced an attitude similar to the Fifth Circuit's in this regard, although in the context of the survival action existing under the Federal Employer's Liability Act, 45 U.S.C. §§ 51-59 (1982), incorporated into the Jones Act, 46 U.S.C. § 688 (1982):

> [The survival provision] means that the right existing in the injured person at his

> Since an action under a state survival statute represents the same action a decedent would have had had he lived, the usual elements of damages in personal injury actions form the basis of recovery. Generally, the administrator or executor prosecutes the action for the benefit of the estate of the deceased and may recover only those damages which accrued between the time of injury and the time of death.[35]

As Speiser observed, survival statutes generally contemplate an antemortem restriction on the character of recoverable damages. Some differences do exist among survival statutes, however, concerning what may conceptually qualify as an antemortem loss. Most statutes exclude recovery for losses the decedent presumably sustained as a result of a shortened life.[36] A number of state statutes do not exempt this genre of damages from a survival recovery, however, but award them as apparent compensation for the fact of an untimely death.[37] These contrasting views have introduced a malleable quality to the concept of "personal losses." This quality has been accented by a wide divergence among state statutes concerning damages recoverable either as antemortem losses or as losses occasioned by the fact of an untimely death.

> death—a right recovering his loss and suffering while he lived, but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life—shall survive to his personal representative to the end that it may be enforced.

St. Louis Iron Mt. & So. Ry. Co. v. Craft, 237 U.S. 648, 658 (1915). See *supra* note 12 for the relationship existing between FELA and the Jones Act. It should be noted that the survival provision discussed in *Craft* contains no reference to specific items of damages, but instead states only that "[a]ny right of action given by this chapter to a person suffering injury shall survive to his or her personal representative . . . ." 45 U.S.C. § 59 (1982). This language is consistent with that of most state survival statutes, and regarding which some consensus exists regarding the "personal losses" character of survival damages. But see *infra* text accompanying notes 45-50, 58-60 and 321-27 for the divergent views held by some states concerning the elements of damages that properly comprise a "personal loss."

[35] 2 S. SPEISER, *supra* note 4, § 14:6 at 423-24.

[36] *See, e.g.*, Chute v. United States, 466 F. Supp. 61, 62-63 n.2 (D. Mass. 1978) (survival damages ordinarily consist of "[w]ages, medical expenses, and the pain and suffering of a decedent between the time of injury and death . . . ."); McKeithen v. M/T Frosta, 435 F. Supp. 584, 586 (E.D. La. 1977) (In a survival action, "the decedent's representative recovers for such items as pain and suffering before death, medical expenses and lost wages."); Abbott v. United States, 207 F. Supp. 468, 472 (S.D.N.Y. 1962) (the Death on the High Seas Act was not designed as a survival action, and therefore would tolerate a collateral survival action entailing "[c]laims for physical injury, pain and suffering, and loss of wages arising prior to death which existed in favor of the injured person"). *See also* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-30, at 360. *But see infra* notes 45-50, 58-60, 321-27 and accompanying text.

[37] *See infra* notes 46-50, 58-60, 321-27 and accompanying text. In some instances, the concept of post mortem losses may not even be associated with the question of an untimely death, as the statute in question, or court constructions thereof, may not have included recognition of an antemortem restriction on survival damages. *See generally* 2 S. SPEISER, *supra* note 4, §§ 14:1-13.

These variations portend significant consequences for continued development of the maritime law survival action, as the action must inevitably derive some portion of its substance from these statutes.[38] Therefore, to ascertain the items of damages that are logically recoverable, it is necessary to understand both the past and probable future influences of these variations. This understanding may only be accomplished by first recognizing the damage recoveries contemplated by state and federal survival statutes—the items of damages they share in common, and those that are not commonly adopted.[39] This understanding then

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[38] First, the maritime law survival action is theoretically predicated on *Moragne*, wherein the Supreme Court suggested that state and federal wrongful death statutes be used in defining the various substantive elements of the maritime law death action. *See supra* notes 4-8 and 13. The *Moragne* Court's suggested use of state and federal death statutes should, by analogy, support a similar use of state and federal survival statutes in reference to the maritime law survival action. *See supra* note 18.

Second, state and federal survival statutes represent the only guidance available in regard to the refinement of the maritime law survival action, as no survival action existed under the common law. *See supra* text accompanying notes 19-22 and 27-30. Court constructions of existing state and federal survival statutes are, of course, additionally suited to this purpose.

[39] Given the logical role of state and federal survival statutes in the identification of damages recoverable under the maritime law survival action, the importance of the items of damages associated with these various statutes can be readily illustrated. Several of the federal courts of appeal have recognized a maritime law survival action to exist, or have awarded survival damages under the guise of the maritime law. *See supra* note 4 and accompanying text. Among the decisions of these courts in this regard, virtually no discussion has been raised concerning any item of damages other than that designed to compensate the decedent for his or her antemortem pain and suffering—a scope of damages that is on its face far different from that embodied in most survival statutes. *See infra* text accompanying notes 347-57. In one sense, the uniformity observable among the courts on this point suggests their intention to restrict to pain and suffering any survival recovery effected under the maritime law. Far more likely, however, the subject decisions were made absent any presentation of a further claim colorable as an item of recovery in a survival action. The most visible example of the latter possibility exists where the decedent died soon after occurrence of the tort that served as a basis for the survival action; in the short period intervening between injury and death, no loss of earnings would be likely, and no medical expenses would likely be incurred, and pain and suffering would be the sole item of survival damages remaining for consideration—at least in a majority of jurisdictions. *See infra* note 349 and accompanying text. This scenario is apparently common to the circuit court decisions in which survival damages have been awarded under the maritime law, whether or not the award included recognition of a survival action existing thereunder. *See, e.g.*, Barbe v. Drummond, 507 F.2d 794, 800 n.7 (1st Cir. 1974); Spiller v. Lowe & Assoc., Inc., 466 F.2d 903 (8th Cir. 1972). *See generally supra* note 4. *But cf.* Greene v. Vantage S.S. Corp., 466 F.2d 159 (4th Cir. 1972) (decedent died thirty-six hours after injury). Most district courts appear to conform to the views held by the circuit courts, although one federal district court has manifested an intent to treat the maritime law survival action as more than recovery for the decedent's pain and suffering. Muirhead v. Pacific Inland Navigation Co., 378 F. Supp. 361 (W.D. Wash. 1974) (awarding damages consistent with the state survival statute of the State of Washington). See *infra* notes 328 and 351 and accompanying text regarding the import of this district court decision for the maritime law survival action.

facilitates analysis of the relative impact of existing forms of survival recovery on recovery realizable through the maritime law survival action.[40]

Most states have today adopted some form of survival statute.[41] Where federal statutes are made applicable to admiralty causes, they generally allow incorporation into the law of the case the survival statute of that state which is most interested in the proceeding.[42] The principal exception to this federal practice is

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The apparent singular orientation of the federal circuit and district courts on the issue of maritime law survival damages, and the relative absence of any more expansive authority on the subject, underscores the need for an outline of the identity of damages available through existing state and federal survival statutes. The maritime law survival action is based on decisional law. *See supra* note 16. Consequently, the action continues to evolve, but on the basis of its own precedent—which has historically been less than illustrative on substantive issues such as damages. *See supra* notes 6-12 and accompanying text. The action must today be considered, therefore, to exist in a relatively amorphous state in regard to its constituent items of damages. This condition in turn creates a paradox of significant proportion, which may be illustrated through reference to the decision of the Eighth Circuit Court of Appeals in *Spiller*. There, the court acceded to the use of state survival statutes in the absence of any clear opposing precedent to the contrary, for the purpose of either providing an independent survival remedy, or for helping to ascertain the identity of survival damages available under the general maritime law. At the present date, however, a number of years have passed since *Spiller* was decided, and the number of decisions affording survival damages under the general maritime law—whether or not by recognition of a maritime law survival action—could be considered to represent precedent contrary to the use of state survival statutes where they afford damages other than for pain and suffering. Alternatively, state survival statutes embodying additional items of damages could be considered "inimical" to the maritime law that has evolved over the fifteen years since the *Spiller* decision was announced, and their use would be similarly proscribed. *Cf.* Romero v. International Terminal Operating Co., 358 U.S. 354, 391 n.3 (1959) (Brennan, J., concurring). Paradoxically, then, courts considering the issue of damages recoverable under the maritime law would look to *Moragne* as the source of their ability to even address such a topic, and yet find themselves bound to refrain from referring to state and federal survival statutes in their efforts to devise a measure of damages recoverable under the action, although that type of reference is expressly counseled in *Moragne*, due to the advent of "precedent" contrary to ordinary statutorily-derived items of damages. The true scope of this precedent must therefore be established in order to relieve the paradoxical tension inhering to existing decisions affecting the maritime law survival action, and the first step in this task is identification of the common and uncommon items of survival damages as they exist through statutory authority. Notably, the paradox raised by *Spiller* is present as a result of certain of the other decisions among the federal courts of appeal regarding maritime law survival damages. *See also* Greene v. Vantage S.S. Corp., 466 F.2d 159 (4th Cir. 1972); Dennis v. Central Gulf S.S. Corp., 453 F.2d 137 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972).

[40] This analysis is contained *infra* in notes 306-57 and accompanying text.

[41] 1 S. SPEISER, *supra* note 20, § 1:23, at 56.

[42] *Id.*, §§ 1:18-20. Some representative statutes in this regard are the following: Federal Tort Claims Act, 28 U.S.C. § 1346 (b) (1982) (authorizing actions against the federal government for negligent acts or omissions of government employees acting within the scope of their employment, with liability and damages ordinarily to be determined in reference to state law); Civil Rights Act, 42 U.S.C. § 1988 (1982) (allowing the borrowing of state death and survival statutes to provide remedies not existing under the Act, to the extent such remedies are not inconsistent

found in Jones Act litigation, because the Jones Act indirectly provides for a survival action.[43] As both state survival statutes and the Jones Act share a common purpose, they evidence numerous similarities in their respective measures of recoverable damages.[44] State statutes and the Jones Act also evidence significant variations in this regard. The most consequential variation is the practice in several states of merging elements of a survival action with those more appropriately associated with an action for wrongful death, creating a survival remedy markedly different from ordinary varieties.[45]

Among the states employing this type of merger, the typical practice is to assess all recoverable damages against a standard of calculable loss to the decedent's estate. Calculation of loss is accomplished in several ways.[46] This calculation, once made, is also used in various ways.[47] The scope of these variations is compounded in several states where "true" wrongful death statutes measure the

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with the Act). *See also Moragne*, 398 U.S. at 390 n.8 (discussing similar provisions of the National Parks Act, 16 U.S.C. § 457 (1982) and the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 to 1343 (1982)). The principal exceptions to this tendency are the Jones Act, 46 U.S.C. § 688 (1982) and the Death on the High Seas Act, 46 U.S.C. §§ 761-68 (1982), both of which are not simply applied to admiralty cases, but which exclusively concern admiralty matters. *See supra* note 30. The Jones Act does contain a survival provision, but the United States Supreme Court has intimated that state survival provisions may nevertheless provide a remedy supplemental to it. *See infra* text accompanying notes 92-101. DOHSA is generally considered to lack any survival provision, although the point is debated. *See infra* text accompanying notes 83-91.

[43] *See supra* note 12. *See also infra* note 88 and accompanying text.

[44] *See supra* notes 4, 33 and 35 and *infra* notes 337-38 and accompanying text.

[45] 1 S. SPEISER, *supra* note 20, § 3:2, at 116-26.

[46] Three basic theories are used in evaluating damages under a loss-to-estate standard. The most prominent of these holds that the damages should reflect the present value of the decedent's net future earnings, or earnings after subtraction of projected living expenses. A second theory suggests that damages should reflect the present value of the decedent's probable post mortem accumulated assets; recovery under this theory is intended to reflect what estate the decedent might actually have left—reduced to present value—if he or she had lived a full life. The last of the three basic theories awards damages based on the projected present value of the decedent's probable gross future earnings; no deduction is made for the decedent's living expenses. 1 S. SPEISER, *supra* note 20, § 3:2, at 122-26. Then, too, there are states that employ survival-death statutes but measure recovery by the loss to the survivors, and not to the estate. Maine and Louisiana provide examples of the latter practice. *Id.* at 119. These methods are ordinarily used whenever lost future earnings are awarded, whether or not by merged statutes.

[47] In Connecticut, Iowa, New Hampshire, and Tennessee, wrongful death damages must be recovered through the enlarged survival statute, and are measured by a loss-to-estate standard. In Delaware and Pennsylvania, wrongful death damages must be recovered through the enlarged survival-death statute only where the decedent commenced an action for personal injury prior to his or her death; damages in these instances are also determined in accord with a loss-to-estate standard. 1 S. SPEISER, *supra* note 20, § 3:2, at 117-19. Both these varieties of loss-to-estate statutes can then be contrasted with the similar requirements of statutes in Maine and Louisiana regarding merger of death and survival actions, which incorporate a loss-to-survivors measure of damages. *See supra* note 46.

loss to survivors through a loss-to-estate standard,[48] or alternatively measure wrongful death damages in the usual sense as a loss to the decedent's survivors, but yield recovery to the decedent's estate in the event no statutory death beneficiaries exist.[49] One final point accentuates the important means by which "merged" survival statutes depart from the norm: most ordinary survival statutes do not contemplate a recovery to the estate of the decedent based upon hypothesized post-mortem activities, and therefore afford damages which may be quite distinct from those available under "merged" statutes.[50]

Mergers of wrongful death and survival actions into one form do not represent the only instances in which the two actions interrelate. In some states, a different practice is in effect, where statutes provide separately for actions of wrongful death and survival, but caution that only one may be pursued on account of the same death.[51] A similar restriction present in several other states provides that a wrongful death action must be pursued exclusively where the facts do not warrant pursuit of both a death and a survival action, as where death occurs simultaneously with the circumstances of injury.[52] Most states, however, eschew conditioning the pursuit of one action in favor of the other, and allow unrestricted prosecution of both actions on account of the same death.[53]

Apart from statutory differences regarding the separability and/or conjunctive relationship of wrongful death and survival actions, significant variation exists concerning the items that conceptually qualify as "survival" damages. The item

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[48] 1 S. SPEISER, *supra* note 20, § 3:2, at 119-20. "True" death statutes are those not adopting any merger with a survival action. Death statutes are specifically designed to compensate a decedent's survivors. *See supra* note 4.

[49] 1 S. SPEISER, *supra* note 20, § 3:2, at 121.

[50] *See supra* notes 4 & 33-36 and *infra* notes 317-38 and accompanying text. "Merged" statutes, by incorporating a wrongful death recovery into a survival award, introduce post mortem damages generally considered antithetical to the purpose or scope of a survival action. *See supra* notes 32-37 and accompanying text.

[51] 1 S. SPEISER, *supra* note 20, § 1:23, at 56.

[52] *Id.* The effect of such a provision is naturally conditioned by the items of survival damages recognized by the particular survival statute, as instantaneous death would not in all instances be dispositive of the decedent's losses. *See supra* note 37 and *infra* notes 317-28 and accompanying text. There is some suggestion that the Jones Act, 46 U.S.C. § 688 (1982), is subject to this restriction. *Cf.* St. Louis, Iron Mt. & So. Ry. v. Craft, 237 U.S. 648 (1915) (construing the survival provision of the Federal Employers' Liability Act (FELA), 5 U.S.C. § 58 (1982)). See *supra* note 12 regarding the relationship between the Jones Act and FELA.

[53] 1 S. SPEISER, *supra* note 20, § 1:23, at 56-58. This allowance is provided either expressly by statute, or by the courts' efforts to ascertain the legislative intent underlying statutes which do not speak to the issue. Even where access to both death and survival actions is allowed, there exist varying rules regarding joinder of the two causes of action. *Id.* In this regard, the Jones Act also allows the pleading of wrongful death claims and a survival claim in a single action. *Id.*, § 1:19, at 52-53.

best illustrating this variation is antemortem pain and suffering, which is the most identifiable of survival damages in that it is ordinarily an inseparable accompaniment to the circumstances which result in an individual's death.[54] Consistent with this intrinsic quality of pain and suffering, most states and the Jones Act afford damages.[55] Significantly, however, some states have expressly declined to award damages for a decedent's pain and suffering, and certain other states have not yet resolved their position on the issue.[56] Even in regard to this most pervasive and sensible item of survival damages, there is a lack of uniform endorsement.

Apart from pain and suffering, important differences exist among the states concerning the availability of many other common statutory items of damages, or regarding items that have historically experienced significant judicial support, although not always necessarily as a result of statutory guidance. These differences, in turn, often represent deviations from the identity of the survival damages recoverable under the Jones Act. Damages subject to differential availability include medical expenses incurred by the decedent prior to death, funeral expenses, damages for mental anguish, damages for outrage, and punitive damages.[57] Additionally, while damages are commonly awarded for a decedent's lost

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[54] Damages for antemortem pain and suffering are widely available by statute, or by judicial construction of legislative intent. *See supra* notes 4, 34 & 36. Where available, a showing must be made that the decedent was not conscious in the moments directly preceding his or her death before the damages will be disallowed. Deal v. Bell Fish Co., 728 F.2d 717 (5th Cir. 1984); Cook v. Ross Island Sand & Gravel Co., 626 F.2d 746 (9th Cir. 1980). Eyewitness testimony of the decedent's conscious state is unnecessary, so long as sufficient evidence can be produced to substantiate a reasonable inference of consciousness. *In re* United States Steel Corp., 436 F.2d 1256, 1275-76 (6th Cir.), *cert. denied*, 402 U.S. 987, *reh'g. denied*, 403 U.S. 924 (1971). Most courts have reflected a disposition favoring the necessary inferences whenever a modicum of evidence exists to support them. *See generally* 2 S. SPEISER, *supra* note 4, § 14:10.

[55] *See supra* notes 4, 34 and 36 and *infra* text accompanying notes 337-38.

[56] 2 S. SPEISER, *supra* note 4, § 14:4, at 413. The presence of discord on this issue is significant concerning the items of damages recoverable under the maritime law survival action, not only because of the differing views, but because damages for pain and suffering represent the most identifiable item of damages recoverable under the action. *See supra* note 39 and *infra* notes 347-57 and accompanying text. See also *supra* notes 12 & 38-39 and *infra* notes 138-40, 160, 306, 335-43 and accompanying text regarding the importance to the maritime law survival action of disparate items of damages recoverable under state survival statutes. But see *infra* notes 285 & 316 concerning some authorities who view this disparity to be inconsequential.

[57] Most states afford survival damages for "conscious pain and suffering; medical expenses; funeral and burial expenses; and loss of earnings, usually from the time of injury to the time of death." 2 S. SPEISER, *supra* note 4, § 14:6, at 423-24; M. MINZER, DAMAGES IN TORT ACTIONS, *supra* note 19, § 21.00; Abbott v. United States, 207 F. Supp. 466, 472 (S.D.N.Y. 1962). *See also infra* note 337, and accompanying text. Additionally, several states variously allow recovery for mental anguish and outrage, and sometimes provide an award of punitive damages. 2 S. SPEISER, *supra* note 4, § 14:5, at 424-25. Other states, however, expressly preclude recovery for such items. *Id.*

earnings,[58] and are generally restricted to earnings lost between the time of injury and the time of death,[59] some states allow the recovery to encompass the hypothetical post mortem earnings of the decedent.[60]

In summarizing the character and scope of survival damages recoverable under statutes historically applicable to admiralty causes, several points may be clearly stated. First, significant disparity exists among state survival statutes—and the Jones Act—concerning the type of relationship existing between survival actions and coterminous actions for wrongful death. Second, among these same statutes, a great deal of variation exists in regard to the items of damages that may be recovered through a survival action; this variation is aggravated by conflicts-of-law problems associated with interstate and state-federal conflicts of interest.[61] Third, as an implicit consequence of the preceding two points, there is a patent lack of uniformity present among survival statutes historically applicable to admiralty causes in regard to the character and scope of the damages they embody.[62] Finally, despite this variance concerning damages, there exist several items of damages for which broad support exists under both state statutes and the Jones Act.

III. The Availability and Character of Survival Actions in the Admiralty Jurisdiction Prior to *Moragne*

Given the historical absence of a survival action under the general maritime law,[63] courts presiding over actions involving a death within the admiralty jurisdiction developed the practice of applying state and federal survival statutes to the extent they were pertinent to the matters in issue.[64] When a state sur-

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[58] *See supra* notes 46-51 and accompanying text.

[59] 2 S. Speiser, *supra* note 4, § 14:7, at 426; M. Minzer, Damages in Tort Actions, *supra* note 19, §§ 21.21, 21.29 to 2.31. This restriction also applies to the Jones Act. *See supra* note 34.

[60] 2 S. Speiser, *supra* note 4, § 14:7, at 426-29. *See also supra* notes 46-50.

[61] *See infra* notes 63-132 and accompanying text.

[62] Variation in the relationships existing between survival and wrongful death actions does not appear to impact seriously the availability of traditional items of survival damages. This variation does, however, impact the predictability of these damages. See generally *infra* notes 179, 263-83, 322-24 and accompanying text regarding confusion resulting from lessening of the separability of survival and death remedies. *See also infra* text accompanying notes 260-69.

[63] *See supra* notes 19-24 and accompanying text. *See also* Cortes v. Baltimore Insular Lines, 386 U.S. 376 (1932) (concluding that maritime remedies available to compensate an individual for injuries tortiously received terminate with the death of the injured party absent statutory authority to the contrary).

[64] *See supra* text accompanying notes 27-31. The only truly applicable federal statute was the Jones Act, 46 U.S.C. § 688 (1982), which was only available after 1920. *See supra* note 12. Even after passage of the Jones Act, however, state survival statutes fulfilled the need of affording a survival remedy to non-seamen, and in time even to seamen. *See, e.g.*, Gillespie v. United States

vival statute was selected for application, its use was conditioned upon a preliminary finding that the state legislature had, in drafting the statute, contemplated that it would be used—at least in part—to provide a remedy for tortious death occurring within the admiralty jurisdiction.[65] Where a federal survival statute was sought to be applied, less inspection of congressional intent was necessary. Congress has only once spoken to the issue of a survival action applicable to admiralty matters, through enactment of the Jones Act.[66] The Jones Act expressly applies to seamen; seamen are by definition associated with navigable waters, and consequently with the admiralty jurisdiction.[67]Historically, state survival statutes generally have been considered applicable in admiralty only where tortious death occurs within state territorial waters, and not on the high seas.[68] This restriction is consistent with a general perception of the utility of state statutes in admiralty proceedings. Typically, state statutes are applied only to situations arising in territorial waters. This limited application is attributable to concerns that further extension of state law into maritime matters exceeds the proper scope of state legislative interest, and impairs uniformity of the maritime law by interjecting regional values into an area primarily subject to national

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Steel Corp., 379 U.S. 148, 157 (1974); Kernan v. American Dredging Co., 366 U.S. 426, 430 n.4 (1958). *See also infra* text accompanying notes 92-103. Regarding the competence of state survival statutes to fill this need, see *infra* notes 60-112 and accompanying text. Some commentators have observed that where a seaman was entitled to survival damages both under the Jones Act and a state survival statute, potentially damages could be recovered under both, as the Jones Act provides for survival damages to go to certain enumerated beneficiaries other than the decedent's estate, which is the ordinary beneficiary of a survival action. *See e.g.*, H. BAER, THE ADMIRALTY LAW OF THE SUPREME COURT § 1-12, at 87-88 (3d ed. 1979) [hereinafter H. BAER, THE ADMIRALTY LAW OF THE SUPREME COURT]. *See supra* note 12 and *infra* note 341. See also *infra* notes 92-97 and accompanying text regarding the historic interaction of state survival statutes with the Jones Act in regard to affording survival remedies to seamen.

[65] *Cf.* Greene v. Vantage S.S. Corp., 466 F.2d 159, 163-64 n.5 (4th Cir. 1972) (discussing the use of state wrongful death statutes in admiralty, which use had origins similar to the identical practice involving state survival statutes; this point is clarified *supra* notes 19-30 and accompanying text).

[66] See *supra* notes 12 & 64, particularly concerning the relationship between the Jones Act and § 58 of FELA. *Cf.* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-30 at 361 (suggesting that the text of the Jones Act was not so clear in regard to its provision of a survival action, although no dispute can attach to the fact the statute applies to seamen alone). See *supra* note 42 for non-remedial federal survival provisions.

[67] *See supra* note 3 and *infra* note 142.

[68] Comment, *The Application of State Survival Statutes in Maritime Causes*, 60 COLUM. L. REV. 534, 541 (1960) [hereinafter Comment, *Application of State Survival Statutes*]. State territorial waters have historically been considered to extend one marine league, or three miles, from the physical shoreline of the subject state. The high seas constitute all waters beyond that limit, excluding inland lakes. *See* The Death on the High Seas Act, 46 U.S.C. §§ 761-68 (1982). *See also* H.R. REP. NO. 674, 66th Cong., 2d Sess. (1920); 59 CONG. REC. 4,482-87 (1920).

policy interests.[69] Reflecting this concern, the United States Supreme Court has followed a policy of tolerance regarding the use of state laws in admiralty proceedings whenever the proceedings appertained to a "maritime but local" issue. The high seas are distinct from state territorial waters and generally have not been considered an area of local or state suzerainty. Consequently, state laws have only been sporadically applied to matters affecting the high seas.[70]

The most evident source of the restricted use of state statutes is the decision of the United States Supreme Court in *Southern Pacific Co. v. Jensen*.[71] In *Jensen*, the Court expansively declared that state statutes could not interfere with the "essential uniformity" of the maritime law. This declaration soon evolved into a "maritime but local" test; if an incident occurred within the "local" marine jurisdiction of a state, for example, its territorial waters,[72] or concerned a legitimate state interest existing outside the bounds of territorial waters,[73] application of pertinent state law was tolerated. If an incident occurred that did not meet either of these criteria, application of state law was ordinarily not tolerated.[74] Traditionally, these criteria have been commensurate with the application of state law to incidents arising in state territorial waters. Where incidents occur beyond territorial waters, the utility of state statutes remains an inconsistent proposition.[75]

The inconsistent utility of state statutes to high seas incidents is based on a variety of factors relating both to *Jensen* and later court constructions of the "maritime but local" test. First, *Jensen* was itself equivocal in that it announced the locality test even while approving prior decisions allowing application of state wrongful death statutes to incidents occurring on the high seas.[76] Second, the *Jensen* Court evidenced its own discomfort with the locality test, observing that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied."[77] The

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[69] *See infra* notes 70, 110-24, 197 and accompanying text.

[70] Concerning survival statutes particularly, see Comment, *Application of State Survival Statutes*, *supra* note 68, at 541.

[71] 244 U.S. 205 (1917). *Jensen* has long been considered a "landmark" decision concerning state legislative influence on admiralty matters. *Cf.* Offshore Logistics, Inc. v. Tallentire, 106 S. Ct. 2485 (1986).

[72] *See supra* note 68.

[73] *See infra* notes 110-24 & 197.

[74] W. Fuel Co. v. Garcia, 257 U.S. 233 (1921).

[75] *See generally infra* text accompanying notes 110-21.

[76] 244 U.S. at 216 (citing The Hamilton, 207 U.S. 398 (1907) (involving the similar use of a state survival statute)).

[77] *Jensen*, 244 U.S. at 216. Not surprisingly, *Jensen* has been criticized for being oblique on the question of the locality test and its role in the maritime law. *See, e.g.*, Kossick v. United Fruit Co., 365 U.S. 731, 742-43 (1961) (Frankfurter, J., dissenting).

discomfort of the *Jensen* Court has been characteristic of later efforts of the Supreme Court to apply the locality test, and no clear parameters exist for proper exercise of the test.[78]

In 1920, Congress further suggested that the high seas were beyond the legislative ken of the states by adopting into law the Death on the High Seas Act (DOHSA).[79] By express provision, DOHSA allowed the continued application of state wrongful death statutes to incidents of death occurring inside territorial waters.[80] By providing a federal death remedy applicable to the high seas, however, DOHSA generally was considered to vitiate whatever need there had been for state wrongful death statutes to provide remedies for tortious deaths occurring on the high seas.[81] By adopting DOHSA, Congress also impliedly

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[78] One leading commentator on admiralty law has commented, upon reviewing the results of these efforts, that "only a soothsayer with a crystal ball could tell which claimants were on the state side of the line ('maritime but local') and which were on the federal side ('maritime and national') . . . ." G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-49, at 419-20. *See infra* notes 81-91, 110-24, 235-42 and accompanying text.

[79] 46 U.S.C. §§ 761-68 (DOHSA).

[80] 46 U.S.C. § 767. The following language is found in § 767:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

This language generally has been construed to contemplate an admiralty application of state death statutes only to the outward bounds of territorial waters. *See infra* note 81. Some courts have not found the language of § 767 so restrictive, however, and have considered that state death statutes could be applied to high seas deaths irrespective of DOHSA. *See, e.g.*, Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274 (5th Cir. 1985), *rev'd*, 106 S. Ct. 2485 (1986). The United States Supreme Court has recently resolved the issue, holding that § 767 precludes use of state death statutes to provide redress for deaths occurring on the high seas, and least where DOHSA speaks directly to issues raised by the circumstances of death. Offshore Logistics, Inc. v. Tallentire, 106 S. Ct. 2485 (1986). In particular, the Court construed § 767 to be a jurisdictional savings clause similar to that contained in the Judiciary Act of 1789. *See supra* note 3. Under this interpretation, the Court advised that DOHSA actions could be brought in state fora as well as federal; the law applied in DOHSA actions, however, would derive exclusively from DOHSA. The *Tallentire* Court considered that the first sentence of § 767 meant that state death laws would not be abridged by DOHSA only to the extent state laws could be applied in admiralty at the time DOHSA was enacted. 106 S. Ct. at 2498-99. The Court then noted that following *Jensen*, state laws could not generally be applied to high seas incidents. *Tallentire* 106 S. Ct. at 2495-99. See *supra* notes 71-77 and accompanying text concerning the pertinence of *Jensen*. Since *Jensen* preceded enactment of DOHSA by three years, the *Tallentire* Court felt that § 767 had no state death statutes to apply to the high seas, even if the section was construed to allow that application. *Id.* at 2498-99.

[81] G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-31, at 364. *See also Moragne*, 398 U.S. 397-98 (purpose of DOHSA was to supply a wrongful death remedy where none had previously been available, implying that the states had not been competent to satisfactorily fulfill this function). *Accord*, King v. Pan American World Airways, 166 F. Supp. 136 (D.C.

suggested that state wrongful death statutes constituted an ineffectual source of remedy beyond the limits of state territorial waters.[82]

The enactment of DOHSA did not, however, resolve all problems associated with the application of state statutes to high seas incidents of death.[83] DOHSA contained no survival provision. Consequently, a widely-perceived need arose either to make such a remedy available on the high seas, or to continue in effect the practice of using state statutes—particularly several statutes—in admiralty causes involving high seas deaths.[84] The courts have not responded uniformly either in their perception of this need, or in their manner of dealing with it.

A number of courts have concluded that DOHSA not only effaces all vestiges of the applicability of state wrongful death statutes to the high seas, but also that of state survival statutes.[85] These courts have generally construed DOHSA not only in view of its express creation of a remedy for wrongful death, but also in regard to the context of its nearly contemporaneous passage with the Jones

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Cal. 1958), *aff'd*, 270 F.2d 355 (9th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960). What use had been made of state death statutes to provide remedies for deaths occurring on the high seas was generally attributed to The Hamilton, 207 U.S. 398 (1907). *See infra* note 114. *But cf.* Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274 (5th Cir. 1985), *rev'd*, 106 S. Ct. 2485 (1986) (suggesting that *The Hamilton* accorded the states broad legislative freedom in regard to matters transpiring on the high seas, and that DOHSA did not preclude the exercise of state wrongful death statutes in regard to deaths occurring on the high seas). DOHSA was typically considered to abrogate use of state death statutes on the high seas, but it did clearly require this reading. *See supra* note 80.

[82] *See* H.R. REP. NO. 674, 66th Cong., 2d Sess. (1920); 59 CONG. REC. 4,482-87 (1920). The implication derived from the somewhat confused nature of the congressional debates attending the enactment of DOHSA. *See generally*, *Tallentire*, 106 S. Ct. at 2494-99. See also *supra* notes 80 & 81 concerning the lack of a definitive congressional statement on this point, creating an environment susceptible to inference and speculation concerning congressional attitudes regarding use of state death statutes on the high seas.

[83] As a matter of historical import, DOHSA also did not resolve the question of how state statutes could be applied to incidents of death occurring on the high seas, or the propriety of such applications. *See, e.g.*, *Tallentire*, 754 F.2d 1280-81 n.12. The decision of the Supreme Court in *Tallentire* appears to have finally resolved this issue consistent with the view that state death statutes have no apparent application to high seas incidents of death. *See also infra* notes 85-91, 110-21 & 267-69, and accompanying text.

[84] This practice had originated with the similar use of state death statutes prior to enactment of DOHSA. *See supra* notes 76 & 81. *See also infra* note 114. As seamen had the benefit of a survival action under the Jones Act, 46 U.S.C. § 688 (1982), this perceived need appertained most directly to non-seamen. It was of additional interest to seamen, however, where liability under the state survival statute included unseaworthiness as a basis of liability. *See infra* notes 92-101 and accompanying text.

[85] *Cf.* Dugas v. National Aircraft Corp. 438 F.2d 1386, 1388-90 (3d Cir. 1971). That DOHSA has this effect on state death statutes is clear from the recent *Tallentire* decision. The *Tallentire* court expressly declined to consider the impact of DOHSA on state survival statutes. 106 S. Ct. at 2491, n.1.

Act.[86] DOHSA contains no survival provision, and yet the Jones Act does contain one.[87] These courts have deduced that if Congress had intended a federal survival remedy to be available to non-seamen on the high seas, it demonstrated by the Jones Act that it knew how to draft such a provision. Consequently, these courts reason that the absence of a survival provision in DOHSA should not be read as a congressional omission, but as an indication of Congress' resolve to forebear from providing a survival action applicable to the high seas.[88]

Most courts that have considered the issue of DOHSA's preclusive effect on state survival statutes, however, have rejected such an affirmative interpretation of congressional intent.[89] The majority view is that DOHSA singularly concerns an action for wrongful death, and a survival action is a matter not addressed in either the statute or its legislative history.[90] Consistent with the majority view, state survival statutes were frequently applied to high seas incidents in the years following enactment of DOHSA and preceding *Moragne*,[91] as well as to territorial waters, where DOHSA expressly lacked applicability.

Support for the majority viewpoint is drawn from various decisions of the United States Supreme Court, particularly where the Court has discussed the interaction of federal and state laws.[92] Among the more influential of the

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[86] 46 U.S.C. § 688 (1982). *Dugas*, 438 F.2d at 1388-90.

[87] *See supra* notes 12, 67-75 and accompanying text.

[88] *See, e.g., Dugas*, 438 F.2d at 1390 (the "weight of opinion" agreeing on this point); Brown v. Anderson-Nichols & Co., 203 F. Supp. 489 (D. Mass. 1962). One troublesome factor affecting this theory is the possibility that the survival provision available through the Jones Act was present only because the Act wholly incorporated the provisions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-59 (1982), and Congress in adopting the Jones Act possibly did not even consider the question of the survival provision. *See, e.g., Dugas*, 438 F.2d at 1390; GILMORE & BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-30, at 361. *See supra* note 12 on the relationship of the Jones Act to FELA. See also text *infra* accompanying notes 90-99 for a discussion of views opposed to this theory.

[89] *See Dugas*, 438 F.2d at 1388-90.

[90] *See, e.g.*, Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890, 893 (5th Cir. 1984); Comment, *Application of State Survival Statutes*, *supra* note 68, at 5367. *Cf.* Evich v. Connelly, 759 F.2d 1432, 1434 (9th Cir. 1985) (DOHSA does not preclude survival actions, particularly as *Higginbotham* did not discuss DOHSA as proscribing a survival action).

[91] Some courts have suggested that state death statutes retain applicability to the high seas even after *Moragne*. *Cf.* Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274 (5th Cir. 1985), *rev'd*, 106 S. Ct. 2485 (1986). The Supreme Court has rejected this suggestion. But see *supra* note 85 concerning the import of the Court's ruling on use of state survival statutes.

[92] Inference is necessary because the Supreme Court has never expressly considered the issue of the applicability of state survival statutes on the high seas. *See Dugas*, 438 F.2d at 1389; Comment, *Application of State Survival Statutes*, *supra* note 68, at 535. *See also supra* note 85. The inferential approach of the majority is represented in the following passage:

> There has been no determination by the Supreme Court as to whether a state statute may be applied . . . when the injuries resulting in death are sustained on the high seas. However, several lower courts have held that such an incorporation by admiralty is proper.

Court's decisions in this regard are *Kernan v. American Dredging Co.*,[93] *Gillespie v. United States Steel Corp.*,[94] and *Kossick v. United Fruit Co.*[95] In *Kernan* and *Gillespie*, the Court commented directly on the use of state survival statutes in admiralty causes. In *Kossick*, the Court addressed the more fundamental question of when state or federal law should control in an admiralty proceeding involving both state and federal interests. All three decisions, particularly in view of their different approaches to the use of state laws in admiralty proceedings, are germane not only to the majority view regarding DOHSA's preclusive effect on state survival statutes, but also to the more contemporary question of the utility of state survival statutes in admiralty causes given the advent of a maritime law survival action.

The Court in *Kernan* was, in pertinent part, concerned with the bases of liability contemplated by the Jones Act. Following analysis of this concern, the Court observed that the Act provided to seamen and their beneficiaries a wrongful death action with exclusive applicability in territorial waters, and that the beneficiaries of a decedent seaman could therefore not avail themselves of any other wrongful death action existing under state law where the basis of liability might be unseaworthiness.[96] As a corollary observation, however, the

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> There is dictum in a . . . decision of the [Supreme] Court that, as to accidents occurring on the high seas, "presumably any claims, based on unseaworthiness, for damages accrued prior to the decedent's death would survive, at least if a pertinent state statute is effective to bring about a survival of the seaman's right."

Abbott v. United States, 207 F. Supp. 468, 473 (S.D.N.Y. 1962) (quoting Kernan v. American Dredging Co., 355 U.S. 426, 430 n.4 (1958) (citations omitted)). The last portion of the quoted text from *Kernan*, regarding the availability of a "pertinent state statute," refers to the related questions of whether a state having an interest in the subject death has a survival statute, and if it does, did the state's legislature intend that the statute have a maritime application. *See supra* text accompanying notes 63-65. *See also Dugas*, 438 F.2d at 1390-92. But see *infra* text accompanying notes 93-99 & 105-30 regarding indirect consideration by the Court concerning high seas applications of state survival statutes.

[93] 355 U.S. 426 (1958).

[94] 379 U.S. 148 (1964).

[95] 365 U.S. 731 (1961), *reh'g denied*, 366 U.S. 941 (1961).

[96] This proposition was originally announced in Lindgren v. United States, 281 U.S. 38 (1930). The *Kernan* Court did not resolve a question raised by the petitioner as to whether the representative of a decedent seamen could elect between a wrongful death action based on negligence under the Jones Act and one based on unseaworthiness under the general maritime law. This question has subsequently been resolved by case law following *Moragne*. *Cf.* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-37, at 379-83. Regarding the utility of state laws regarding wrongful death remedies based on unseaworthiness, see *infra* notes 97-99 and accompanying text. The *Kernan* Court did go on to note that where death occurred on the high seas, DOHSA afforded a wrongful death action. 355 U.S. at 430 n.4. DOHSA does contemplate liability based on unseaworthiness, and may be brought in conjunction with a Jones Act wrongful death action. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-31, at 363-64.

Court suggested that a survival action sounding in unseaworthiness might nevertheless exist independently of the Jones Act and the Act's restriction to negligence as a basis of liability.[97] The Court appeared to place no areal limitations on a survival action afforded by this suggested collateral means, and conceivably state survival statutes that incorporated unseaworthiness as a basis of liability could be applied in the *Kernan* sense either to incidents occurring in territorial waters or on the high seas.

In *Gillespie*, the Court went further than *Kernan* in endorsing the use of state survival statutes in admiralty causes, to the extent these statutes contemplated unseaworthiness as a basis of liability.[98] Like the Court in *Kernan*, the *Gillespie* Court was concerned at one point with the concept of the exclusivity of the death action provided by the Jones Act. The *Gillespie* Court affirmed the exclusivity of the death action, but in noting that the Jones Act also contained a survival provision, opined that "[a] state survival statute can preserve the cause of action for unseaworthiness, which would not survive under the general maritime law."[99] Consequently, the *Gillespie* Court considered that a seaman could bring a survival action under either the Jones Act or a state survival statute having unseaworthiness as a basis of liability.

On this point, the *Gillespie* Court in essence applied the *Kernan* statement concerning state survival statutes *directly* to the Jones Act survival provision.

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[97] The Court opined that "[p]resumably any claims, based on unseaworthiness, for damages accrued prior to the decedent's death would survive, at least if a pertinent state statute is effective to bring about a survival of the seaman's right." 355 U.S. at 430 n.4. The Court did not address, however, the fact that the Jones Act contains a survival provision that contemplates liability based on negligence—analogous to the basis of liability found exclusive by the Court in regard to the Jones Act wrongful death provision. *See supra* note 12. The Court therefore did not elucidate why it felt the Jones Act survival provision could be supplemented by a state survival action sounding in unseaworthiness, when the death provision of the Act was exclusive. Some clue of the Court's reasoning in this respect may be found, however, in the fact the petitioner was arguing in favor of an election between the Jones Act and unseaworthiness as a basis of liability in regard to wrongful death, and while the Court was confronted with *Lindgren* concerning that argument, it was not similarly constrained in regard to a survival action. Additionally supporting the Court's disparate treatment of the Jones Act survival provision was the fact the majority was, in the estimation of some commentators, taking a major step toward equating Jones Act liability with liability based on unseaworthiness. *Cf.* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-37, at 380-83. *See also infra* note 125.

[98] State survival statutes were available in admiralty causes only to the extent they incorporated unseaworthiness as a basis of liability. Apparently, this requirement originated with the Court's determination that the Jones Act, because it contemplated liability for negligence only, precluded application of state laws having the same basis of liability. *See supra* note 97. Also, it should be noted that this restriction logically applied just to seamen, as the Jones Act applied only to seamen, and could not be considered exclusive as a remedy to non-seamen. Also, unseaworthiness as a basis of liability is unavailable to non-seamen. *See infra* notes 141 & 142.

[99] 379 U.S. at 157. For concern over the logical import of this conclusion, as well as the similar suggestion contained in *Kernan*, see *supra* note 64.

This direct application corrected some of the vagueness of the *Kernan* discussion in this regard, which resulted from the failure of the *Kernan* Court to address particularly state survival remedies as they might exist concurrently with the Jones Act.[100] *Gillespie*, like *Kernan*, advised no areal limitations on the remedial use of state survival statutes in admiralty causes where those statutes contemplated liability based on unseaworthiness.

In addition to the similarities between *Kernan* and *Gillespie*, and the manner in which they appear to support use of state survival statutes on the high seas[101]—as well as on territorial waters—there is a less visible, but equally important facet to these decisions. However uncomfortably the Court conceptually distinguished the exclusivity of the Jones Act regarding wrongful death and survival actions, the Court indicated in these decisions that it would allow state law to supplement federal remedies where those remedies did not proscribe supplementation.[102] Therefore, state laws might have application on the high seas despite substantial overlap with federal laws. Simply stated, it would be nonsensical to suggest that state statutes could apply concurrently with federal legislation, but could not apply on the high seas simply because that was an area of federal interest.

The Court's tolerance on this point may help to explain the tendency of courts in the post-*Moragne* period to perceive "gaps" in the remedies afforded by the maritime law death and survival actions.[103] Upon perceiving such gaps to exist, a number of courts have embarked upon a haphazard use of state statutes to afford supplemental recoveries of damages. This practice has had a dramatic impact on the maritime law death and survival actions.[104] The Su-

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[100] *See supra* notes 96-97 and accompanying text.

[101] Although both *Kernan* and *Gillespie* discussed the availability of state survival actions to seamen, their discussion on this point should be considered applicable to non-seamen as well as to the extent the statutes afforded bases of liability other than unseaworthiness. If unseaworthiness constituted the only basis of liability, only seamen could avail themselves of the action thus provided. *See infra* notes 141 & 146. *See also supra* note 98.

No state in the union would have occasion to draft a survival statute singularly applicable to seamen, and state statutes should be presumed to contemplate bases of liability other than unseaworthiness; negligence is undoubtedly the most common of these alternatives. *See infra* text accompanying notes 209-11.

[102] The Court most recently discussed this tolerance in *Tallentire*, 106 S. Ct. 2485 (1986) (construing DOHSA to preclude application of state death statutes on the high seas). See *supra* notes 63-78 and accompanying text regarding factors affecting the propriety of supplementing federal admiralty remedies with remedies available under state law.

[103] *See, e.g.*, Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890, 893-94 (5th Cir. 1984); Spiller v. Lowe & Assoc., Inc., 466 F.2d 903 (8th Cir. 1972). *Cf.* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-61, at 468.

[104] *See infra* text accompanying notes 227-305. In particular, this practice has encouraged a renascent use of state laws as they were used prior to *Moragne*, often resulting in a confusing blend of pre- and post-*Moragne* influences.

preme Court itself has not been reluctant to engage in efforts of this nature,[105] resulting in an even more telling impact on these actions.

In contrast to *Kernan* and *Gillespie* and their opportune efforts at statutory construction, *Kossick* involved an effort by the Supreme Court generally to discuss the substantive relationship existing between state and federal law in the context of admiralty litigation. At issue were the somewhat disparate rules of the maritime law and the law of New York on the requisites of a valid contract. In this context, the Court was required to address the finer points of conflicts-of-law principles to be applied to admiralty causes, without benefit of any applicable congressional directive. Therefore, *Kossick* represents one of the Court's most informative pre-*Moragne* discussions on admiralty conflicts principles. As such, it illustrates the culmination of almost fifty years of decisions involving the "maritime but local" test announced in *Jensen* and *Garcia*.[106] The contemporary status of this test, as embodied in *Kossick*, in turn harbors lasting significance for the maritime law death and survival actions and the relationships they should bear to corresponding state actions.[107]

The petitioner in *Kossick* was a seaman who had been taken ill with a thyroid ailment while employed on a vessel owned by his employer, the respondent. The seaman was reluctant to accept medical treatment available to him at no charge through a United States Public Health Services Hospital,[108] and only agreed to accept treatment at the facility after the respondent employer orally agreed to be responsible for the consequences of any negligent or incompetent treatment received by him while there. Eventually, the seaman sued his employer on the oral contract, alleging that he had received improper treatment that aggravated his thyroid condition.

The *Kossick* Court first resolved that the statute of frauds existing by New York state statute did not nullify the oral contract. According to the Court, the contract appertained to a maritime concern and not a "local" one subject to the laws of the State of New York. Under maritime law, oral contracts were consid-

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[105] *See Moragne*, 398 U.S. at 397-400; Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-26 (1978).

[106] *See supra* note 70 and accompanying text. *See also infra* text accompanying notes 162-74 & 243-62. *See also* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955). *Cf.* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 1-17 at 48-50.

[107] *See generally infra* notes 110-31 and accompanying text.

[108] As one aspect of an injured seaman's right to receive maintenance and cure until the time he or she has achieved a satisfactory recovery, a seaman injured prior to 1981 was able to receive free or low cost medical care at marine hospitals maintained by the United States Public Health Service. GILMORE & BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-11, at 301-02. This service was discontinued in 1981. M. NORRIS, THE LAW OF SEAMEN § 26:53 (4th ed. 1985) [hereinafter M. NORRIS, THE LAW OF SEAMEN]. Regarding an injured seaman's right to maintenance and cure, and the substance of that entitlement, see *id.*, §§ 26:1-74.

ered to be enforceable.[109] Consequently, the Court considered the oral contract binding on the seaman's employer. In making this determination, the Court discussed the proper relationship between state and federal laws within the admiralty jurisdiction. The Court's discussion of this relationship was principally illustrated through reference to wrongful death and survival remedies:

> In allowing state wrongful-death statutes, and state survival of actions statutes, respectively, to grant and to preserve a cause of action based ultimately on a wrong committed within the admiralty jurisdiction and defined by admiralty law, this Court has attempted an accommodation between a liability dependent primarily upon the breach of a maritime duty and state rules governing the extent of recovery for such breach. Since the chance of death foreclosing recovery is necessarily a fortuitous matter, and since the recovery afforded the disabled victim of an accident need be no less than that afforded to his family should he die, the intrusion of these state remedial systems need not bring with it any undesirable disuniformity in the scheme of the maritime law.[110]

The key point in the preceding passage is the Court's reference to its historic policy of accommodating maritime principles of liability and state forms of redress. Prior to *Moragne*, when neither a wrongful death nor a survival action existed under the general maritime law, state laws afforded the principal means of redress for a breach of maritime duties that resulted in death. After 1920, state statutes were assisted or modified in this function by the Jones Act and DOHSA.[111] For reasons explained at length in *Moragne*, these two federal enactments were insufficient to supply all forms of desired redress for deaths occurring within the admiralty jurisdiction.[112] This insufficiency was, as acknowledged by the *Kossick* Court, corrected to the extent possible by continued use of state death and survival statutes.[113]

One unfortunate consequence of *Kossick* has been the tendency of some courts

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[109] 365 U.S. at 734; *see also* Union Fish Co. v. Erickson, 248 U.S. 308 (1919).

[110] *Kossick*, 365 U.S. at 739 (citing The Tungus v. Skovgaard, 358 U.S. 588 (1959)); The Hamilton, 207 U.S. 398 (1907); Just v. Chambers, 312 U.S. 383 (1940). The primary example of a maritime basis of liability is unseaworthiness. *See infra* notes 141, 146 and accompanying text.

[111] *See supra* notes 29-30, 63-99 and accompanying text.

[112] 398 U.S. at 393-400. *See also infra* notes 196-212 and accompanying text.

[113] Once *Moragne* was decided, the pattern of accommodation specifically described by the *Kossick* Court became largely obsolete. *But see infra* notes 224-305 and accompanying text. Despite this general obsolescence, however, the *Kossick* decision retains contemporary relevance simply because the Court discussed at length the principles associated with allowing state laws to interface with the maritime law, a consideration still material to the manner in which state survival statutes—and state wrongful death statutes—may continue to impact the maritime law survival and death actions based on *Moragne*. *See infra* notes 224-305, 309-16 & 335-46 and accompanying text.

to view it as authorizing the use of state death and survival statutes to provide remedies for incidents of tortious death occurring on the high seas.[114] While the decision may appear to support this view, it does not actually work to this effect. In citing earlier decisions sanctioning the use of state survival and death statutes in admiralty causes, the *Kossick* Court did not explain that the decisions cited typically involved deaths that occurred inside territorial waters[115]—the area traditionally receptive to the use of state survival and death statutes.[116] *Kossick* does not sanction a broader use of these statutes.

Although the *Kossick* Court did not expressly identify an areal limitation affecting the use of state statutes in admiralty death causes, the restriction is implicit in the decisions cited by the Court, and should in any event be logically confirmed. Without such confirmation, *Kossick* remains problematic because of its endorsement of the historic policy of accommodation accorded to state and federal interests in admiralty death causes. To the extent state laws are allowed to reach beyond the proper scope of state legislative authority, they can—and do—impact adversely upon the very uniformity of the maritime law that the *Kossick* Court concluded to be desirable.[117] As the uniformity of the

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[114] *See, e.g., Dugas*, 438 F.2d at 1391. This view of *Kossick* may be attributable in whole or part to two considerations. First, and perhaps the most logical, is the fact the *Kossick* Court indicated no areal restrictions affected the historic use of state death and survival statutes in the admiralty's process of state and federal interest-accommodation. *See supra* text accompanying notes 110-17. Second, the *Kossick* Court referenced in its discussion of this process its earlier decision in The Hamilton, 207 U.S. 398 (1907). In *The Hamilton*, the Court had acquiesced to the use of a state wrongful death statute in litigation following a vessel collision on the high seas. By referencing *The Hamilton*, the *Kossick* Court impliedly suggested that state statutes could be legitimately applied to afford redress for deaths occurring on the high seas. *See supra* note 81. The *Kossick* Court did not discuss, however, the particularized manner of *The Hamilton* holding, which some courts have found to be less than a ringing endorsement the application of state statutes to incidents of death occurring on the high seas. *See Moragne*, 398 U.S. at 393 n.10 (observing that *The Hamilton* holding was intended to apply only to actions involving plaintiffs and defendants holding citizenship in the same state, where that state intended its law to apply to the high seas—not likely to be a usual occurrence). *See also Tallentire*, 106 S. Ct. at 2489-90. (discussing both the pertinent holding in *The Hamilton* and questionable interpretations of that holding in later decisions).

[115] *See, e.g.*, Just v. Chambers, 312 U.S. 383, 384 (1941) (the vessel was located within the territorial waters of the state of Florida; state survival statute was applied); The Tungus v. Skovgaard, 358 U.S. 588, 589 (1959) (the vessel was located within the territorial waters of the state of New Jersey; state wrongful death statute was applied); Kernan v. American Dredging Co., 355 U.S. 426, 477 (1958) (the vessel was located within the territorial waters of the state of Philadelphia; state survival statute was applied). *See also* Barbe v. Drummond, 507 F.2d 794, 798 n.2 (1st Cir. 1974). *But see supra* note 113.

[116] *See supra* notes 68-82 and accompanying text.

[117] Regarding the proper scope of state legislation in admiralty, see *infra* note 197. Regarding the non-uniform consequences of applying state statutes to admiralty death causes, see generally *infra* text accompanying notes 32-62, 125-30, 335-36 & 341-46. Concerning uniformity of the

maritime law is of paramount importance, *Kossick* should not be read to sanction any amended form of accommodation between state and federal laws that would impair the preservation of that uniformity.[118] State laws regarding actions for survival and wrongful death should therefore, on the strength of *Kossick*, be applied in admiralty causes only when the manner of their application is compatible with principles of uniformity.

Because *Kossick* has been suggested to sanction the use of state death and survival statutes in regard to deaths occurring outside territorial waters,[119] and that use is incompatible with efforts to promote uniformity in the maritime law,[120] some further illustration is necessary as to why *Kossick* should be construed not only to proscribe that use, but additionally to represent a principled discussion of why such a proscription must exist. A discussion of this character has material significance to current efforts at developing the substantive elements of the maritime law survival action, as those efforts are directly associated with the necessary balancing of federal and state law interests.[121]

Long before *Kossick* was decided, the Supreme Court recognized a constitutional mandate to preserve the uniformity of the maritime law.[122] While this mandate has not always received uniform treatment,[123] it has realized fairly constant endorsement. The *Kossick* Court clearly rejected any suggestion that the principle was being abandoned, and in fact affirmatively restated the traditional conception of uniformity in the maritime law, identifying it as a derivative function of accommodations reached between the admiralty interests embodied in state and federal laws.[124] The character of these accommodations illustrates

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maritime law as a principle of constitutional magnitude, see *Moragne*, 398 U.S. at 401.

[118] *But see infra* notes 285 & 316 and accompanying text (considering that the principle of uniformity does not pertain to damages, or remedies in the context of the *Kossick* Court's discussion of accommodation, and therefore implying that the non-uniformity of state measures of damages should not be material to the processes of accommodation historically in practice).

[119] *See supra* note 114.

[120] See *supra* note 117 for references concerning the non-uniformity associated with application of state death statutes in admiralty causes.

[121] *See infra* notes 125-31, 306-08, 335-46 and accompanying text. In this sense, *Kossick* promotes use of state laws as exhibited in both the pre- and post-*Moragne* periods. *See supra* note 104.

[122] *See, e.g., Moragne*, 98 U.S. at 401.

[123] *See infra* notes 285 & 316. *See also Tallentire*, 106 S. Ct. at 2495-99.

[124] The *Kossick* Court made the following observation on this point:

> Perhaps the most often heard criticism of the . . . doctrine is this: the fact that maritime law is—in a special sense at least . . .—federal law and therefore supreme by virtue of Article VI of the Constitution, carries with it the implication that wherever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant. But the process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert

the general utility of state survival and death statutes in admiralty causes in the pre-*Moragne* era. With reference to the maritime law survival action, the utility thus envisioned for state statutes holds lasting importance because of the clearly chaotic consequences that have resulted from application of state death statutes to admiralty death causes, and from the infusion of that chaos into the fabric of the maritime law wrongful death action—what happened to the one, if not corrected, may well happen to the other.

Despite manifold differences in the items of damages recoverable among the survival statutes of the various states in the pre-*Moragne* era,[125] and between state statutes and the Jones Act,[126] courts presiding over admiralty death causes

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divergent interests in a transaction as to which both have some concern. Surely the claim of federal supremacy is adequately served by the availability of a federal forum in the first instance and of review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight.

365 U.S. at 738-39 (citation omitted). This passage from *Kossick* is similar in content to the general perception of state and federal interest-accommodation. The passage is simply more restrained in regard to its assessment of certain problems that inhere in a case-by-case evaluation of state versus federal interests. The following passage represents a more frank appraisal of these problems:

> The suggestion has been made, and has indeed acquired a certain vogue, that what the Court ought to do (arguably, what the Court has been doing) in solving federal-state conflicts is to adopt a "balancing" approach. That is, when the Court is faced with a situation in which there are conflicting state (or common law) and federal (or maritime) rules (or a state rule but no federal rule) it should weight the competing state and federal interests in the balance. If the federal interest outweighs the state interest, it should apply the federal rule (or "fashion" one if none exists). If the state interest outweighs the federal interest it should apply the state rule. The balancing idea has the merit of recognizing that cases of this sort have been sorted out into two heaps and have not, for the sake of "logical" consistency, all been forced into a single pattern of decision according to some preconceived theory. On the other hand, "balancing" ultimately explains nothing (beyond the fact that there are, and perhaps should be, two heaps of cases). Past cases can be arranged in a sort of formal unity (with cases the writer disapproves of dismissed as failures on the Court's part to have arrived at a proper balance). Future cases cannot be predicted at all since no two lawyers (or judges) would ever agree on which of the intangible "interests" outweighs the other.

G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-61, at 463-64.

It should be noted that *Kossick* represents a culmination of judicial evolution since the time the "maritime but local" test originated in *Jensen* and *Garcia*, and does not necessarily stand for the proposition that the test retains contemporary significance in its original form. BAER, THE ADMIRALTY LAW OF THE SUPREME COURT, *supra* note 64, § 14-1, at 470. See *supra* notes 70, 109-17 and accompanying text regarding the "maritime but local" test. But see *Tallentire*, 106 S. Ct. at 2495-99, referencing *Jensen* and its "landmark" pronouncements concerning the relationship in admiralty between state and federal law. The *Tallentire* Court was only construing DOHSA, however, so it is not clear that *Jensen* retains its original import, or a modified value.

[125] *See supra* notes 35-60 and accompanying text.

[126] *See supra* notes 12, 35-60 and accompanying text.

often felt compelled to make use of state statutes in order to provide a just remedy.[127] This use of state survival statutes produced chaotic results in the types of survival recoveries available for deaths within the admiralty jurisdiction,[128] much as the use of state death statutes had affected the nature of recoveries realized for maritime wrongful death.[129]

The Supreme Court in *Moragne* was deeply concerned over the distortion created by state statutes when used to afford a remedy for wrongful death, and, in recognizing a maritime law death action, tried to eliminate the source of this distortion:

> The difficulty with [applying state laws] to wrongful deaths occurring on territorial waters was clear. First, since most state courts had not interpreted their wrongful-death statues [sic] in the context of substantive maritime law, the federal courts were often left to "divine" how the state court would interpret its wrongful death statute. Furthermore, the basis of liability differed according to the state in which the death occurred. Finally, in those states in which the wrongful death statutes did not encompass substantive maritime principles, the duty

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[127] *See generally supra* notes 63-132 and accompanying text.

[128] *See* 2 S. SPEISER, *supra* note 4, § 15:1, at 959. These chaotic results resulted principally from four factors. First, not all states had survival statutes, resulting in one source of different survival damages. *See supra* note 27. Second, among states having survival statutes, not all contemplated application of those statutes to maritime deaths, and this internal variability again resulted in differential availability of survival damages. *See supra* notes 65 & 96-99. *See also infra* note 129 and accompanying text. *See also* Barbe v. Drummond, 507 F.2d 794, 798 (1st Cir. 1974). Third, different states with survival statutes contemplating a maritime application sometimes claimed an interest in having their respective survival statutes applied to a given instance of death, requiring a choice by the presiding court; a variant of this situation would occasionally involve the presence of a federal survival statute such as the Jones Act. Finally, the measure of damages recoverable among various state survival statutes—and the Jones Act—differs significantly, producing a wide range of damages potentially recoverable in a survival action depending on the location (or, in the event of the Jones Act, occupation) of the subject death. *See supra* notes 12, 35-60, 124 and accompanying text. Regarding the combined effect of these factors, which have historically affected both recoveries for survival and wrongful death in admiralty causes, Speiser provides the following observations:

> [The Supreme Court] did not mention the *lack* of *uniformity* that exists in the federal, state, territorial and dependency legislative systems embracing recovery for wrongful death and for survival damages. Even though our system of state sovereignties has produced some remarkably good political, social and economic innovations, permitting each state—in the terms of Brandeis, J., to act as a single laboratory—nevertheless the gross disparities in the individual death and survival systems have resulted in some chaotic results in choice-of-laws situations where the interests of more than one jurisdiction and of its residents have truly (not merely nominally) been involved.

2 S. SPEISER, *supra* note 4, § 15:1, at 459 (emphasis added). Other commentators have made similar observations. *See, e.g.*, M. MINZER, DAMAGES IN TORT ACTIONS, *supra* note 19, § 20.11, at 20-14.

[129] *See supra* notes 8 & 29-30. *See also infra* note 130 and accompanying text.

> owed by the ship owner varied depending on whether the injury was fatal or non-fatal. It was within this framework that the Court decided *Moragne*: "Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts."[130]

The concern of the *Moragne* Court, and its attempt to resolve the problem by obviating the need to use state law, should be applied analogously to the maritime law survival action for several reasons. First, the maritime law survival action is philosophically based on *Moragne*.[131] Second, the pre-*Moragne* character of survival actions in the admiralty jurisdiction was quite similar to that evidenced by wrongful death actions; just as *Moragne* dealt with the latter, *Moragne* has logical import for the former. Finally, as a result of the first two considerations, the reasons cited in *Moragne* for recognizing a maritime law death action, and the *Moragne* Court's sentiments concerning how that action should be refined, provide analogous support for recognition and refinements of the maritime law survival action.

If the maritime law survival action is considered to be thus founded on *Moragne*, the action should be considered, among other purposes, to correct the need to apply state survival statutes in admiralty causes. Similarly, the advent of the action must be understood to counsel against any resurgent use of state statutes that would result in a recreation of non-uniformity in the nature of survival recoveries effected in admiralty causes. The Supreme Court provides the necessary support for these related analogies to the circumstances that led the Court to recognize a maritime law death action:

> [W]hatever lack of uniformity there may be in giving effect to the state rule as to survival is equally present when the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation.[132]

IV. SUBSTANTIVE ASPECTS OF *Moragne*, AND THE IMPORT OF ITS *ratio decidendi* FOR THE ORIGIN AND REFINEMENT OF THE MARITIME LAW SURVIVAL ACTION

No confusion attends the essential focus of the *Moragne* decision, which was

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[130] Greene v. Vantage S.S. Corp., 466 F.2d 159, 164 n.5 (4th Cir. 1972) (quoting *Moragne*, 398 U.S. at 401) (citations omitted). *See also supra* note 128.

[131] *See supra* notes 4-8, 24 and accompanying text.

[132] Just v. Chambers, 312 U.S. 383, 392 (1940).

to recognize an action for wrongful death to exist under the general maritime law.[133] A fair amount of uncertainty has been manifest in the years following the decision, however, in regard both to the substantive elements of the action and the policies or purposes the action was intended to effectuate. A proper analysis and understanding of this uncertainty, and of *Moragne* in general, is critical to placing the maritime law survival action into a proper perspective, and to assigning it legitimate elements and goals.[134] With regard to both of these necessary assignments, identification of the action's logical measure of damages constitutes a primary consideration.[135]

To properly understand *Moragne* and its contemporary import, the substance of the *Moragne* decision must first be outlined. This outline is accomplished through reference to *Moragne* and two subsequent Supreme Court decisions which, because they involved application of the maritime law death action to different factual circumstances, offer further illustration of substantive elements of the action only briefly addressed by the *Moragne* Court. These later decisions are *Sea-Land Services, Inc. v. Gaudet*[136] and *Mobil Oil Corp. v. Higginbotham.*[137] Additional reference is made, where helpful, to other Supreme Court and lower court decisions that contain either analyses or applications of the Supreme Court's reasoning in *Moragne*, *Gaudet*, and *Higginbotham.*

A. *The substantive elements of* Moragne, *as represented in* Moragne, Gaudet, *and* Higginbotham.

1. Moragne

One of the remarkable aspects of the *Moragne* opinion, apart from the well-recognized vision of Justice Harlan's discussion of the needs and justifications for a maritime law wrongful death action, was a lack of substantive attention to determination of the constituent elements of the action. While the Court spared little effort in substantiating its recognition of the action, the Court also largely refrained from providing details about the substantive elements of the action. Several factors were cited by the Court in support of this apparently conscious election.

The Court first generally observed that detailed introduction of the maritime law death action was unnecessary, because the action was not "new" in any

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[133] *See supra* notes 1-4 and accompanying text.

[134] The survival action is premised on *Moragne* and its subsequent history. *See supra* note 131.

[135] *See supra* notes 4-5 and accompanying text.

[136] 414 U.S. 573 (1974).

[137] 436 U.S. 618 (1978).

substantive sense. Instead, the action was suggested "merely [to remove] a bar to access to the existing general maritime law."[138] By perceiving the action in this light, the Court considered that most of its substantive elements, and the manner of their application, would follow logically from existing state and federal legislation, and from judicial decisions construing that legislation:[139]

> [T]he courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades. The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill.[140]

Because the *Moragne* Court addressed the elements of the maritime law death action prescriptively, and not substantively, the actual substance of these elements must be considered on two levels. First, attention should focus on elements of the action that were elucidated—if only to a bare extent—in *Moragne*. Second, and inevitably by somewhat more abstruse means, later decisions of the Court may be referenced in which some elements of the action were further refined on the basis of reasoning implicit in *Moragne*.

First, *Moragne* unequivocally envisioned a wrongful death action having seaworthiness as a basis of liability.[141] This foundational aspect of the maritime law death action potentially has a significant bearing on the identity of individ-

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[138] 398 U.S. at 405-06.

[139] Prior to recognition of a maritime law wrongful death action in *Moragne*, wrongful death actions were generally considered to exist only by statutory authority. *See supra* notes 13 & 27. *But cf. Moragne*, 398 U.S. at 379-80 (observing that a number of early lower court decisions had recognized a maritime law wrongful death action to exist, prior to the contrary ruling of the Supreme Court in The Harrisburg, 119 U.S. 199 (1886)).

[140] *Moragne*, 398 U.S. at 408. In referencing these authorities, the Court specifically considered their utility in regard to identification of damages recoverable under the action, and concerning resolution of certain undefined "subsidiary issues" that might arise in future efforts to apply it. Apart from this reference, however, the Court merely advised that the law applied in personal injury litigation would be of assistance in answering questions arising in the context of the death action. *Id.* at 405-06. The Court apparently intended the latter advice to be of lesser effect than that of the former. *Cf. Higginbotham*, 436 U.S. at 624-25 (considering certain of the elements to be defined through reference to varying sources of law, and perceiving that DOHSA had figured most prominently in their discussion in *Moragne*).

[141] 398 U.S. at 401-04. The concept of unseaworthiness represents the negative aspect of a vessel owner's obligation to provide his crew with "[a] vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960). Consistent with the extension of the vessel owner's obligation to members of the crew, only seamen are entitled to the warranty of seaworthiness. *See infra* notes 142-46 and accompanying text. Regarding the relationship between the terms "crew" and "seamen," see *infra* note 142.

uals entitled to avail themselves of it. Because seamen alone are entitled to a vessel owner's warranty of seaworthiness,[142] if unseaworthiness is considered to be the sole basis of liability underlying the maritime law death action, only seamen—or more accurately, certain of their survivors—would have standing to institute the action. A number of courts have considered *Moragne* to contemplate a negligence-based death action,[143] however, with the possible consequence of making the action available to non-seamen.[144] The Supreme Court has not expressly acknowledged this point, and significant dispute persists.[145]

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[142] *See supra* note 141. The most fertile source of discussion regarding the substantive content of the term "seaman" is the Jones Act, which pertains only to employees fitting that designation. *See supra* note 108. In Jones Act litigation, the term "seaman" has come to be associated with three essential qualities on the part of any individual claiming to have rights under the Act: (1) one associated with a vessel that is in navigation; (2) one's connection with that vessel is more or less permanent; and (3) one who is aboard that vessel primarily to aid in its navigation. M. NORRIS, THE LAW OF SEAMEN, *supra* note 108, § 30:7, at 346. Consistent with the vessel-oriented definition of seaman, the term is ordinarily considered synonymous with that of a vessel crewman. *See generally id.*, §§ 2:10-13. In 1946, however, the United States Supreme Court somewhat clouded these three criteria of seaman status by determining that certain harbor workers *not* possessing them would nonetheless be considered seamen *pro hac vice*, and be entitled to remedies based on unseaworthiness. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). The *Sieracki*-type seamen fall into the categories of workers subject to the remedial provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1982). Through amendments made to the act in 1972, unseaworthiness is expressly disclaimed as a basis of an action by a harbor worker or longshoreman against a vessel owner charged with providing a seaworthy vessel; consequently, the *Sieracki* seaman exception to the traditional criteria of seaman status no longer appears relevant to the question of who may be entitled to an action based on unseaworthiness, and therefore has only historical significance in regard to the standing of such workers to bring a maritime law death action based on unseaworthiness—although the right of such workers to bring the action alleging negligence as a basis of liability appears to remain intact. H. BAER, THE ADMIRALTY LAW OF THE SUPREME COURT, *supra* note 64, § 6-17, at 259. *But cf.* American Export Lines v. Alvez, 446 U.S. 274, 280-81 (1980) (stating that the general maritime law does provide remedies to harborworkers, suggesting that *Sieracki* may retain contemporary viability).

[143] *See, e.g.*, Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-32 at 368. *Cf.* Law v. Sea Drilling Corp., 523 F.2d 793, 796 (5th Cir. 1975) (implying the same). *But cf.* Ford v. Wooten, 581 F.2d 712, 714-17 (11th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1982); Hartsfield v. Seafarer's Int'l Union, 427 F. Supp. 264 (S.D. Ala. 1977) (considering that the general maritime law death action provides a remedy only for deaths resulting from an unseaworthy condition).

[144] *See, e.g.*, Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974); *In re* ABC Charters, Inc., 558 F. Supp. 364 (W.D. Wash. 1983); DOOLEY, MODERN TORT LAW, *supra* note 21, §§ 27.35, at 49 and § 27.98, at 126 (1983). *See also* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 1-10, at 23 n.77. For a related discussion of the bases of liability available to non-seamen, see *supra* notes 97-101 and accompanying text.

[145] The Supreme Court has not expressly considered negligence as a basis of liability for the maritime law death action in any of its decisions. *Cf.* American Export Lines v. Alvez, 446 U.S. 274 (1980); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978); Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573 (1974); Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

Summarily, non-seamen may receive the benefit of the maritime law death action—if at all—only when liability is based on principles of negligence, while seamen may benefit by the action whether liability is based on unseaworthiness or negligence, where negligence is an accepted basis of liability.[146]

Another substantive attribute of the maritime law death action apparent from the *Moragne* opinion concerns the area of the action's applicability. As a part of the general maritime law, the action was entitled to a presumption of applicability throughout the admiralty jurisdiction, inclusive of both state territorial waters and the high seas.[147] The *Moragne* Court found it necessary to explain, however, why this comprehensive jurisdictional sway would not impermissibly interfere with the partially concurrent jurisdiction of the Death on the High Seas Act.[148]

The Court first noted that DOHSA expressly reserved to the states their legislative authority over wrongful deaths occurring within state territorial wa-

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[146] The distinction in bases of liability is important, and reflects the different concerns acknowledged by the Supreme Court to exist regarding to the welfare of seamen, who are habitually exposed to the dangers inhering in maritime employment, and of non-seamen, who are by definition less exposed to the vicissitudes of the sea. As the *Moragne* Court observed, courts presiding over admiralty causes have traditionally extended to seamen and their dependents a "special solicitude." 398 U.S. at 387. This principle has guided the Court in its further efforts to develop the maritime law death action. *See Gaudet*, 414 U.S. at 573. *See also* Dennis v. Central Gulf S.S. Corp., 453 F.2d 137 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972); Muirhead v. Pacific Inland Navigation, Inc., 378 F. Supp. 361 (W.D. Wash. 1974); Greene v. Vantage S.S. Co., 466 F.2d 159 (4th Cir. 1972). In keeping with this philosophy, the vessel owner's duty of providing to a seaman a seaworthy vessel, if breached, constitutes a species of liability without fault; whether or not the owner was negligent in allowing an unseaworthy condition to exist, he will be held strictly liable to the seaman or his beneficiaries for the consequences of the unseaworthiness. Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). *See generally* BAER, THE ADMIRALTY LAW OF THE SUPREME COURT, *supra* note 64, § 1-4. Negligence, on the other hand, requires establishment of fault, and has been observed by the Supreme Court to represent the appropriate standard of liability for non-seamen. *Cf.* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).

A deceased seaman's beneficiaries may recover damages for wrongful death under the Jones Act in addition to the general maritime law as pronounced in *Moragne*. *See infra* note 278. While the Jones Act contemplates negligence as the sole basis of liability in litigation initiated under the Act, the courts have visibly exercised their "special solicitude" for seamen in nearly equating liability based on negligence with the liability based on unseaworthiness. *See* GILMORE & BLACK, THE LAW OF ADMIRALTY, *supra* note 3, §§ 6-34 to 6-37. *See also supra* note 97. This policy has not been extended to non-seamen asserting liability based on negligence. *Id.* Seamen may also avail themselves of the unseaworthiness remedy existing under DOHSA. Kernan v. American Dredging Co., 355 U.S. 427, 430 n.4 (1958).

[147] *See infra* notes 3, 68 and accompanying text. *See also infra* text accompanying notes 235-38.

[148] 46 U.S.C. §§ 761-68. No similar need was apparently felt regarding the Jones Act, as it lacked the more explicit language of DOHSA concerning exclusivity. *Cf.* 398 U.S. at 396-400.

ters.[149] State statutes had historically been considered to afford competent remedies in this area.[150] The Court next observed that when DOHSA was enacted in 1920, the doctrine of unseaworthiness was relatively undeveloped, and was not given much consideration by Congress in either the drafting or subsequent passage of the Act.[151] Following the enactment of DOHSA, however, actions based on unseaworthiness were observed greatly to outnumber those based on negligence.[152]

While a DOHSA action could be based not only on negligence but also on unseaworthiness, many state death statutes did not incorporate that maritime law basis of liability. State statutes failing to do so would consequently not provide, within territorial waters, an actionable right available on the high seas. Given this possibility, the Court declined to hold that DOHSA proscribed recognition of a maritime law wrongful death action. The Court instead emphasized that a maritime law death action having unseaworthiness as a basis of liability was necessary, particularly because the laws of the various states, upon which DOHSA had in part relied in regard to territorial waters, were no longer fully competent to provide a death remedy in those waters for reasons not considered by Congress.[153] Because Congress had not considered this particular problem, the Court felt that DOHSA was not preemptive authority.

The Court supported its conclusion by looking to the Jones Act, which was passed contemporaneously with DOHSA. Unlike DOHSA, the Jones Act was applicable throughout the admiralty jurisdiction, albeit only concerning seamen and their dependents:

> [T]he Jones Act was intended to achieve "uniformity in the exercise of admiralty jurisdiction" by giving seamen a federal right to recover . . . regardless of the location of the injury or death. That strong concern for uniformity is scarcely consistent with a conclusion that Congress intended to require the present nonuniformity in the effectuation of the duty to provide a seaworthy ship. Our recognition of a right to recover for wrongful death under [the] general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts.[154]

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[149] 398 U.S. at 397-98. The applicable provision of DOHSA is 46 U.S.C. § 767. Concerning the character of this reservation, see generally Offshore Logistics, Inc. v. Tallentire, 106 S. Ct. 2485 (1986).

[150] 398 U.S. at 397-98. *See also supra* text accompanying notes 68-80 & 110-16.

[151] 398 U.S. at 397-98.

[152] *Id.* at 399.

[153] *Id.* at 400.

[154] *Id.* at 401 (quoting Gillespie v. United States Steel Corp., 379 U.S. 148, 155 (1964)). Concerning the "non-uniformity referenced by the Court," see *infra* notes 202-08 and accompanying text.

Notably, the *Moragne* Court did not anywhere expressly state whether the maritime law death action could be brought in conjunction with, or independently of, an action under DOHSA. Absent a statement on this point, the presumptive association of the maritime law death action with the full range of the admiralty jurisdiction caused most lower courts to consider its availability unaffected by DOHSA.[155]

Another substantive element of the action receiving attention from the *Moragne* Court was a limitation on the time during which suit could be commenced. The Court first recounted arguments of counsel suggesting that either a state statute of limitations be "borrowed," or the maritime doctrine of laches be applied.[156] The Court declined to choose one suggestion over the other, however, as timeliness of the suit was not in issue. The Court merely observed that future resolution of the question should not be difficult in view of maritime law precedence on point.[157] Similar in substance to this abbreviated address was the Court's treatment of another element, a schedule of beneficiaries. After observing that development of such a schedule was necessary, the Court acknowledged—in distinction to the issue of a limitations period—that adequate guidance appropriate to this purpose did not exist under the general maritime law.[158] Still, the Court left the matter to what resolution might follow, at least in the first instance, from the craftsmanship of the lower courts.[159]

While the *Moragne* Court declined to provide much detail concerning the foregoing elements, it did, to at least some degree, discuss them and provide varying insights into their future treatment.[160] One further essential element of the maritime law death action was, however, conspicuously omitted from even this spare introduction—the measure of recoverable damages. Concerning damages, the Court suggested that the lower courts might, when necessary, find guidance through "persuasive analogy" provided by precedent associated with

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[155] *See infra* notes 235-38 & 256 and accompanying text. See *supra* notes 3 & 68 regarding the range of the admiralty jurisdiction.

[156] 398 U.S. at 406. For the substantive character of the doctrine of laches, see *supra* note 12.

[157] In a subsequent decision concerning the maritime law death action, the Court suggested that DOHSA's statute of limitations would control, although no discussion was given to whether it would be "borrowed" or applied via analogy to the doctrine of laches. *See* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 624 (1978) (advising that apart from the issue of damages, no subsidiary elements of the maritime law death action were likely to differ from the corresponding elements present in an action brought pursuant to DOHSA).

[158] 398 U.S. at 407-08.

[159] *Id.* at 408.

[160] The paucity of detail provided by the Court in regard to most elements of the newly cognizable action was perhaps an effect of the Court's initial perception of it, which was not as a premise for further expansion of the maritime law, but a mechanism by which to apply simply existing law. *See supra* notes 138-40 and accompanying text.

DOHSA and various state wrongful death statutes.[161]

2. Gaudet *and* Higginbotham

The Supreme Court did address the topic of damages in its later decisions in *Gaudet* and *Higginbotham*, and, in the process, made that element of the maritime law death action more comprehensible than any other element.[162] *Gaudet* represented the first of these efforts by the Court, and involved circumstances that required the Court to expound upon its advice in *Moragne* concerning the use of DOHSA and state death statutes as guidelines to identify a measure of damages.[163]

Awtrey Gaudet was a longshoreman injured while working aboard a vessel located on Louisiana navigable waters, and therefore within the admiralty jurisdiction. Mr. Gaudet recovered damages for his injuries in a suit concluded before his death, which occurred, as alleged by his widow, as a natural consequence of those injuries. Based on this allegation, the widow of Mr. Gaudet brought suit against the vessel's owner seeking damages for wrongful death under the general maritime law.

In two principal respects, the Court was required to address divergent rules of recovery as they existed under various state wrongful death statutes and DOHSA. Of primary concern was the prevailing view among the states that once a decedent had recovered damages during his lifetime for the injuries which culminated in his or her death, the recovery would act to bar any subsequent action for wrongful death based on those sea injuries.[164] DOHSA was observed to entail not such a bar.[165] The Court concluded, in the spirit of the admiralty's traditional solicitude for seamen and their dependents,[166] and in view of the distinction between the decedent's antemortem recovery and a

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[161] 398 U.S. at 408. In the Court's subsequent decision in *Higginbotham*, DOHSA was cited as being primary among these two sources of law for purposes of identification of damages recoverable on the high seas, while the Court's decision in *Gaudet* elevated state wrongful death statues to a controlling level in regard to damages recoverable for deaths occurring within state territorial waters. *See infra* text accompanying notes 164-74.

[162] The Court did this by expressly considering the issue of damages recoverable under the action, a degree of consideration not yet given by the Court to any other of the action's subsidiary elements. *See supra* text accompanying notes 141-60.

[163] *See supra* note 161. *See also Gaudet*, 414 U.S. at 581-83 & 583 n.10.

[164] 414 U.S. at 579. Additionally, the Federal Employers' Liability Act had been construed to embody such a limitation, and this construction was transferable to the Jones Act. Mellon v. Goodyear, 277 U.S. 335, 345 (1928). See *supra* note 12 regarding relationship of FELA to the Jones Act.

[165] 414 U.S. at 583 n.10. The Court felt that this construction of DOHSA was "significant." *Id.*

[166] 414 U.S. at 583. *See also supra* note 146.

wrongful death action designed to "insure compensation of the [decedent's] dependents for their losses resulting from the decedent's death,"[167] that the decedent's recovery would not bar the widow's subsequent wrongful death suit under the general maritime law. This question was therefore resolved in accord with precedent generated under DOHSA.

Once the Court found that the widow had a colorable claim under the maritime law, the Court next turned to the question of what damages she might recover. The Court initially noted that it again would resolve the issue by reference to DOHSA and state death legislation, consistent with the provisions of *Moragne*.[168] The majority then concluded that recoverable damages included loss of support, loss of services, loss of society, and funeral expenses—at least in instances where surviving dependents had either paid or assumed the responsibility of paying the expenses.[169] Each of these items of damages were observed to be recoverable under a majority of state statutes and DOHSA,[170] with the exception of loss of society; most states also contemplated recovery for this item, but DOHSA did not.[171] The incongruity between this last item of damages under *Gaudet* and the traditional measure of damages recoverable under DOHSA became the central issue in the Court's next address of the maritime

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[167] 414 U.S. at 583. The majority opinion, drafted by Mr. Justice Brennan, set forth the distinction between a remedy for wrongful death and one of survival:

> Wrongful-death statutes are to be distinguished from survival statutes. The latter have been separately enacted to abrogate the common-law rule that an action for tort abated at the death of either the injured person or the tortfeasor. Survival statutes permit the deceased's estate to prosecute any claims for personal injury the deceased would have had but for his death. They do not permit recovery for harms suffered by the deceased's family as a result of his death.

Id. at 575 n.2. The Court further described the general character of wrongful death recoveries, particularly construing the applicable provision of the Federal Employer's Liability Act, 45 U.S.C. § 51, to contemplate "liability for the loss and damage sustained by relatives dependent upon the decedent." 414 U.S. at 578, n.5 (quoting Michigan R.R. Co. v. Vreeland, 227 U.S. 59, 68 (1913)). The liability thus described was observed to be wholly distinguishable from a decedent's survival rights. *See supra* note 4. *See also* infra notes 317-24 and accompanying text.

[168] 414 U.S. at 584. For *Moragne's* recommendations in this regard, as observed by the *Gaudet* majority, see *supra* note 161 and accompanying text.

[169] 414 U.S. at 584. Justice Powell, joined by three other members of the Court, wrote a strong dissenting opinion. *Id.* at 595. The dissenters were visibly upset with the reasoning used by the majority in determining the measure of recoverable damages, which the dissenters considered to reflect a gross departure from the "settled" state of the law that the majority purported to follow. In particular, the dissent focused on damages for loss of society as being inconsistent with sound precedent. *Id.* at 505-06.

[170] *Id.* at 583-91. *See also infra* notes 248-52 and accompanying text.

[171] DOHSA excludes recovery for loss of society because it is not a pecuniary loss. 414 U.S. at 588 n.22. The Court also noted that authorities were in conflict regarding recovery of burial expenses under DOHSA. 414 U.S. at 591. *See also infra* notes 248-52 and accompanying text.

law wrongful death action, *Mobile Oil Corp. v. Higginbotham*.[172]

In *Higginbotham*, the survivors of several individuals killed in a plane crash on the high seas sought to recover *Gaudet*-prescribed damages instead of those available under DOHSA. Specifically, the survivors sought damages for loss of society as afforded by *Gaudet*. To determine which source of law would control, the Court was required to analyze the relationship between the maritime law death action and its congressional counterpart. The *Higginbotham* majority observed that *Gaudet* involved a death resulting from an accident in territorial waters, similar to the situation in *Moragne*, and that the *Gaudet* allowance for loss of society represented a policy choice unnecessary with respect to a death occurring on the high seas, where DOHSA afforded an existing death remedy.[173] Summarily, the Court held that where DOHSA was applicable, it would provide the controlling measure of damages for wrongful death.[174]

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[172] 436 U.S. 618 (1978). A number of lower courts had previously addressed this same issue with differing results. *Cf.* Law v. Sea Drilling Corp., 510 F.2d 242 (5th Cir.), *aff'd on rehearing*, 523 F.2d 793 (5th Cir. 1975) (concluding that the measure of the damages available through *Gaudet* and the general maritime law would control over DOHSA, irrespective of the location of the subject death); Barbe v. Drummond, 507 F.2d 794, 799-802 (1st Cir. 1974) (concluding that the DOHSA measure of damages would control on the high seas over that provided in *Gaudet*).

[173] 436 U.S. at 622. The *Higginbotham* majority, comprised of six justices, noted that the majority opinion in *Gaudet* had been broadly written, and might support a view, as advocated in *Sea Drilling*, that DOHSA had been rendered obsolete. 436 U.S. at 622-23. The *Higginbotham* majority added, however, that the Court lacked authority to simply supersede Congress's express judgment by declaring a measure of damages applicable to high seas incidents of death that conflicted with DOHSA. *Id.* at 625-26. *Gaudet* was observed to be effective in view of DOHSA's inapplicability to the area of territorial waters, but only with respect *to* the area of territorial waters. Two of the five justices comprising the majority in *Gaudet* dissented in *Higginbotham*, and Justice Brennan, who wrote for the majority in *Gaudet*, took no part in the later decision. But see *supra* notes 81-83 and *infra* notes 67-69 and accompanying text concerning the historic application of state statutes to the high seas irrespective of DOHSA, which practice confused to a certain extent the "policy choice" suggested as the distinguishing factor in *Gaudet*'s majority treatment of the damages issue, and the real scope of DOHSA in its resolution of that issue.

This confusion has recently been partially corrected in Offshore Logistics, Inc. v. Tallentire, 106 S. Ct. 2485 (1986). The *Tallentire* Court concluded that DOHSA precludes application of state death statutes to high seas incidents of death. The *Tallentire* Court does not entirely resolve the confusion, however, as it reached its conclusion by interpreting DOHSA's reservation of state authority on the high seas to be jurisdictional, not substantive. In this sense, no "policy" decision was reached by the Court that would visibly affect the reasoning of the *Gaudet* majority.

[174] But see *infra* text accompanying notes 260-69 regarding uncertainty as to the scope of DOHSA's exclusive measure of damages. The majority did not appear concerned about the different measures of damages that would be associated with the maritime law death action, at least as the difference was constituted by damages for loss of society:

> It remains to be seen whether the difference between awarding loss-of-society damages under *Gaudet* and denying them under DOHSA has a great practical significance. It may

Higginbotham clearly represents an effort by the Supreme Court to delimit the areal and substantive scope of the maritime law death action, most directly in regard to the measure of damages. The Court not only expounded on the relationship of the action to corresponding legislation,[175] but provided express direction regarding efforts to define the non-damages elements of the action. Specifically, the Court noted that apart from damages, neither *Moragne* nor *Gaudet* established legal precedent in conflict with that generated under DOHSA.[176] The Court then advised that such conflicts were unlikely to occur, because DOHSA was to be the primary guide used by the lower courts in their efforts to define other elements of the maritime law death action.[177] The *Higginbotham* Court obviously intended that all elements other than damages, about which

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> be argued that the competing views on awards for loss of society . . . can best be reconciled by allowing an award that is primarily symbolic, rather than a substantial portion of the survivors' recovery. We have not been asked to rule on the propriety of the large sums that the District court would have awarded for loss of society in this case.

436 U.S. at 624-25 n.20. *See also Tallentire*, 106 S. Ct. at 2499-2500.

If, as suggested in later parts of this article, other non-DOHSA items of damages may conceivably be recovered on the high seas under the general maritime law, the Court would presumably become more concerned with the disparate nature of recoveries realizable through the one action. *See infra* text accompanying notes 260-69. *See also* Sistrunk v. Circle Bar Drilling Co., 270 F.2d 455 (5th Cir. 1985). The *Sistrunk* Court declined to award damages for loss of society to the non-dependent parents of a deceased seaman. The court observed this item of damages to be the only colorable claim had by the parents, and therefore of more than nominal significance.

[175] 436 U.S. at 625-26. In particular, the Court stated that where Congress had directly spoken to an issue, the courts could not feel free to substitute their own judgment concerning that issue in place of that already expressed by Congress. *Id.*

[176] *Id.* at 624.

[177] *Id.* In stating that DOHSA should be used in this capacity, the Court supported itself by liberally interpreting the references to DOHSA that were made in *Moragne*. There, the Court had discussed in general detail some of the issues that might arise in future efforts to apply the maritime law death action, particularly a statute of limitations and a beneficiary schedule. DOHSA was one authority referenced in the Court's discussion of these issues, along with the Jones Act, the Longshoremen's and Harbor Workers' Act, 33 U.S.C. §§ 901-50 (1982), and the various laws of the states. DOHSA was mentioned more often than the others, apparently more as a result of the brief filed by the United States as *amicus curiae* than on the strength of the arguments made therein; at no point did the *Moragne* Court advise that one source of law should be considered a primary referent by the lower courts as they endeavored to refine the maritime law death action. The DOHSA and state wrongful death laws were also suggested as a source of guidance on the question of recoverable damages. *See supra* text accompanying notes 161 & 168. Additionally, the *Moragne* Court generally suggested that the body of law generated through past personal injury litigation would be helpful in answering questions about the newly cognizable action. *See supra* note 140. In *Higginbotham*, however, the majority recalled only the *Moragne* Court's discussion of a limitations period and a beneficiary schedule, and with respect to that discussion, observed that "[o]nly DOHSA . . . figured prominently . . . ." 436 U.S. at 624 n.19.

the Court had already resolved existing questions,[178] should conform to elements of the death action existing under DOHSA.[179]

The efforts of the *Higginbotham* Court, however illustrative for future constructions of the maritime law death action,[180] provide questionable counsel with respect to the maritime law survival action. A number of lower courts have construed *Higginbotham* to have effect only on considerations associated with actions for wrongful death, and not survival. Either expressly or implicitly, these courts have considered *Higginbotham* immaterial to issues affecting survival actions.[181] Consequently, while *Higginbotham* may help clarify the areal scope and elemental character of the maritime law wrongful death action, it does not so clearly help resolve those same considerations as they are raised by the maritime law survival action.

While suggestions of *Higginbotham's* limited scope may be less substantive than they first appear,[182] these suggestions necessitate further address of the reasoning involved in *Moragne*, and consequently the elaboration of that reasoning in *Gaudet* and *Higginbotham*. This address is necessary in order to establish the true scope of the relationship perceived by the lower courts to exist between *Moragne* and the maritime law survival action.[183] Only by chronicling the *ratio decidendi* of *Moragne* in this fashion is it possible to define accurately the various elements of the maritime law survival action, the most significant of which is the element of damages. From this foundation, and consistent with the object of this article, analysis in section V will focus on the measure of damages that is most logically associated with the action.

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[178] *See supra* note 174 and accompanying text.

[179] This recommendation, however, may be taken to mean only that where DOHSA by its terms speaks to an issue, the maritime law death action should conform in its treatment of that issue to the substance of DOHSA's analogous terms. If DOHSA is considered to not address a particular topic, reference to alternative sources of law for guidance would presumably be appropriate. *See generally infra* text accompanying notes 263-83. *See also Higginbotham*, 436 U.S. at 625-26.

[180] See *infra* notes 261-86 and accompanying text regarding serious questions about the efficacy of *Higginbotham* as a determinative resolution of matters affecting the elemental refinement of the maritime law death action.

[181] *See, e.g.*, Evich v. Connelly, 759 F.2d 1432, 1434 (9th Cir. 1985); Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890, 893 (5th Cir. 1984).

[182] *See infra* note 284 and accompanying text.

[183] Regarding the general tenor of this relationship, see *supra* note 4. *See also supra* text accompanying notes 5-8, 24 & 131.

B. *The Ratio Decidendi of* Moragne*: Developmental Influence for the Maritime Law Wrongful Death Action, and Guidance for the Maritime Law Survival Action*

Most of the Supreme Court's unanimous *Moragne* opinion[184] was dedicated to explaining why the Court, contrary to long-standing precedent,[185] recognized an action for wrongful death to exist under the general maritime law. While much of the Court's discussion focused on the historic factors that influenced its decision, significant attention was also given to contemporary supporting policy.[186] The Court's discussion of history and policy significantly affects the evolving concept of the maritime law survival action. This discussion materially illustrates the Court's intentions regarding the purpose and character of the maritime law death action, and also helps account for significant debate associated with those intentions. The Court's intentions in this regard, together with the manner in which those intentions have been subject to variable interpretation, are germane to the maritime law survival action because the action is predicated on the reasoning of the *Moragne* Court,[187] and because the *Moragne* Court, although discussing history and policy as to wrongful death, could in most senses have been talking about survival without changing a word.[188] Consequently, the maritime law survival action will be equally impacted by both the positive and negative consequences of the reasoning of the *Moragne* Court.

In view of the important association of *Moragne* to the maritime law survival action, it is necessary to evaluate the *Moragne ratio decidendi* as it reflects the Court's consideration of historic factors and policy. This evaluation is enhanced by topically segregating the text of the Court's opinion. Consequently, discussion of the Court's determinative reasoning will focus first on the historic factors of decision, then on policy matters. Next, an effort is made to illustrate the uncertainty that has been generated by this reasoning.[189] The object of this

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[184] Justice Blackmun took no part in the consideration of the *Moragne* case or the preparation of the opinion; the remaining eight members of the Court joined in the opinion of Justice Harlan.

[185] The *Moragne* Court acknowledged that it was acting principally to overrule The Harrisburg, 119 U.S. 199 (1886), where the Court had held that no wrongful death action existed under the general maritime law. 398 U.S. at 378. See *supra* note 139 regarding contrary views reached by various lower courts prior to *The Harrisburg*. See also *supra* notes 138-39 and *infra* notes 214-23 and accompanying text for the explicative orientation of the *Moragne* opinion.

[186] Both considerations received the attention of the Court in *Gaudet* and *Higginbotham*, and these decisions will therefore be referenced where useful to evaluation of the *ratio decidendi* of *Moragne*.

[187] *See supra* note 4. *See also supra* text accompanying notes 8-12, 24 & 131.

[188] *See supra* text accompanying notes 129-32.

[189] The substance of this confusion appears to be more articulable with the policy pronouncements of the *Moragne* Court, although matters of policy were inextricably related to historic

evaluation is to place *Moragne*, together with later decisions of the Supreme Court concerning the maritime law wrongful death action, into a proper perspective. Once achieved, this perspective affords the necessary basis from which to identify and define the logical measure of damages recoverable under the maritime law survival action.[190] Two observations, as noted earlier, support this application: first, historic factors associated with state death laws were largely common to state survival laws. Second, policy considerations associated with state death laws were largely relevant to state survival statutes.

1. Moragne*: Discussion of Historic Factors*

The Supreme Court in *Moragne* considered the wrongful death remedies available to the widow of a decedent longshoreman, who had been killed while aboard a vessel located within the territorial waters of the State of Florida. The substance of the Court's review of available remedies formed an integral part of the Court's ultimate decision to recognize a wrongful death action to exist under the general maritime law.

The widow had initially sued in Florida state court alleging negligence and unseaworthiness as bases of liability. The action was removed to federal district court on the basis of diversity of citizenship.[191] Following removal, the defendant vessel owner and the third-party defendant employer of the decedent moved to dismiss the unseaworthiness count on two grounds. First, the defendants argued that Florida's wrongful death statute did not contemplate an action based on unseaworthiness. Second, they argued that in the absence of state law, general maritime law would represent the only remaining source of liability based on unseaworthiness, and no action for wrongful death was cognizable under the maritime law.[192]

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factors throughout the course of the *Moragne* opinion.

[190] And other elements, although consideration of these other elements rests largely outside the scope of this article.

[191] Diversity jurisdiction is determined through reference to 28 U.S.C. § 1332 (1982). Removal of a state court proceeding to a federal forum is accomplished as provided in 28 U.S.C. §§ 1441-51 (1982).

[192] 398 U.S. at 376-77. Prior to *Moragne*, actions for wrongful death were maintained in admiralty courts only to the extent state or federal statutes allowed. *See supra* note 27. If a state statute was involved, the court could not apply it prior to determining if the statute contemplated an action based on unseaworthiness. *See supra* note 128. In *Moragne*, no federal statute was involved (the Jones Act did not apply to the non-seaman decedent, and DOHSA did not apply because the accident occurred in territorial waters), and the defendants argued that the Florida wrongful death statute did not contemplate unseaworthiness as a basis of action. The federal district court had granted the defendants a dismissal of the unseaworthiness count, and the Fifth Circuit Court of Appeals had affirmed after certifying to the Florida Supreme Court the question of whether the statute did in fact contemplate an application based on unseaworthiness, and

The Supreme Court, compelled by these legal contentions to consider the adequacy of the historical practice of using state wrongful death statutes in certain admiralty causes, concluded that the practice engendered too many legal incongruities. The Court attributed these incongruities to differences in the remedies available among state wrongful death statutes, and between state statutes and pertinent federal legislation.[193] The Court therefore sought to alleviate the jurisprudential and equitable problems resulting from these incongruities by recognizing a maritime law death action to exist.[194] The Court felt that the tenor of these problems justified its holding, by satisfying the "very weighty considerations" attending its overruling of established precedent proscribing a maritime law wrongful death action.[195]

It is helpful to outline the incongruities, as noted by the Court, that followed from the historic role of state death statutes in admiralty causes. This outline helps to illustrate why the Court felt a maritime law death action would obviate the need to apply discordant state remedial statutes to maritime issues.[196] Preliminarily, application of state death statutes to admiralty causes was affected by inconsistencies in the availability and character of the remedies provided by those statutes. These inconsistencies resulted from several related attributes of

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receiving a negative response. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-32, at 367. For federal certification of issues to state courts, see generally 5 AM. JUR 2D *Appeal and Error* §§ 1025-28 (1962).

[193] The particular federal enactments material to this consideration were DOHSA and the Jones Act. Regarding specific incongruities generated by the state and federal wrongful death laws, see *infra* text accompanying notes 202-12. For further discussion on related points, see *supra* note 117.

[194] *See supra* text accompanying note 154. *See also infra* notes 210-13.

[195] 398 U.S. at 403. The contrary precedent was largely derived from *The Harrisburg*. *See supra* notes 8 & 185. Regarding the legal consequences of *The Harrisburg*, which prompted the holding in *Moragne*, see generally Nagy, *Non-Dependent Beneficiaries in Wrongful Death Actions Under the General Maritime Law: How Far Has* Moragne *"Sifted"?*, 17 J. MAR. L. & COM. 33, 37-42 (1986) [hereinafter Nagy, *Non-Dependent Beneficiaries*].

[196] The Court's sentiments on this issue in regard to a maritime law survival action may, because of the similar histories of pre-*Moragne* admiralty death and survival remedies, be subject to inference from this outline. *See supra* text accompanying notes 129-32. See *supra* notes 27-31 and accompanying text concerning the initial, necessary application of state death statutes to maritime causes. It should be noted that despite the numerous differences observable among state wrongful death statutes, and among those statutes collectively and similar federal legislation, all such statutes share a common origin and purpose. The first true wrongful death statute was Lord Campbell's Act, 9 & 10 Vict. Ch. 93, which was created to circumvent the consequences of the felony-merger rule present in English common law. *See supra* notes 20-24 and accompanying text. Most wrongful death legislation in the United States, both state and federal, is modeled on the terms and purpose of Lord Campbell's Act. 1 S. SPEISER, *supra* note 20, § 3:34, at 263. This modeling has been encouraged by the perceived need in the United States to circumvent by statute the common law felony-merger rule. *See supra* text accompanying notes 27-31. The result has been a marked identity in major terms and purpose among state and federal death legislation.

state wrongful death legislation.

First, as states may only legislate in regard to their legitimate interests, courts presiding over admiralty death causes would need to determine if a state which was "interested" in the circumstances of the death had a wrongful death statute. If one or more states did have such a statute, a second determination was necessary, concerning the propriety of applying the state statute(s) to litigation involving a maritime tort—a fact not always certain.[197] If two or more "interested" states had statutes with a determined maritime applicability, a choice would have to be made between them as to which would provide the controlling law.[198]

These uncertain attributes of state death laws introduced variability and confusion into the substantive content of wrongful death actions in admiralty, and of the remedies afforded by them. This confusion was much more problematic in regard to deaths occurring on the high seas, because state wrongful death statutes were generally observed to have limited applicability.[199] In addition, the Supreme Court at times offered conflicting advice regarding various factors to be considered by the lower courts in using state legislation for maritime purposes.[200] Finally, federal legislation which was intended to ameliorate some of this uncertainty, specifically involving the Jones Act and DOHSA, was not entirely successful; at times, these enactments either compounded existing problems or created new ones.[201]

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[197] *See supra* note 128. *Moragne* involved just this type of interpretation in regard to construction of the Florida wrongful death statute. *See supra* note 192.

A state's legislative jurisdiction may, with respect to admiralty causes, follow from one of two principal theories. Under the first, a vessel is considered to be a physical extension of the state's territory, so that jurisdiction exists as it would to any part of the state's physical domain. Under the other, a vessel, person, or business entity involved in the circumstances underlying the litigation may be considered a citizen of the state irrespective of their presence outside of its physical boundaries. *See Tallentire*, 106 S. Ct. at 2490-91 (quoting Wilson v. Transocean Airlines, 121 F. Supp. 85, 88 (N.D. Cal. 1954)). While at the time of *Moragne* every state was observed to have a wrongful death statute, this had not always been true. *Cf.* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-29, at 359. Given the universality of such statutes when *Moragne* was decided, however, the usual determination made by admiralty courts in using state death laws must have been to ascertain their maritime applicability. Although *Moragne* purported to correct the need for such applications of state laws, and therefore the necessity of evaluating their maritime applicability, in some jurisdictions both remain present concerns. *See infra* text accompanying notes 263-86.

[198] *See supra* note 128. *See also Tallentire*, 106 S. Ct. at 2490-91.

[199] *See supra* notes 68-79 and accompanying text. *See also* Dugas v. National Aircraft Corp., 438 F.2d 1386, 1389-90 (3d Cir. 1971); Wilson v. Transocean Airlines, 121 F. Supp. 85, 88 (N.D. Cal. 1954). *See also Moragne*, 398 U.S. at 393 n.10; *Tallentire*, 106 S. Ct. at 2489-91.

[200] *See supra* notes 70, 96-121 & 124 and accompanying text.

[201] Regarding the ameliorative purpose of the Jones Act and DOHSA, see *Moragne*, 398 U.S. at 393-94. *See also supra* notes 79-82 & 154 and accompanying text. Regarding uncertainty

Faced with this legal backdrop to the admiralty law of wrongful death, the Supreme Court in *Moragne* focused on three legal incongruities as being the most troubling.[202] The first concerned the fact that an unseaworthy condition could, if it produced injury within state territorial waters, result in liability, while the same condition would not necessarily result in liability if it caused a death.[203] Second, a similar problem was associated with DOHSA. The Act was observed to include unseaworthiness as a basis of liability.[204] Noting this fact, the Court observed that an unseaworthy condition producing death on the high seas could result in liability, while in territorial waters that same condition could result in liability for deaths only if, as was not always true, the applicable state statute included unseaworthiness as an actionable element.[205]

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associated with these enactments, and with the use of state wrongful death laws in admiralty causes, *see supra* notes 83-121 & 128 and accompanying text. See also *supra* notes 117 & 193 for references to related discussions.

[202] The Court referred to these incongruities as "anomalies" in the maritime law. 398 U.S. at 395-96. This reference was apparently adopted from the terminology employed by the United States, participating as *amicus curiae*. However the Court came to use the term, it is significant for the manner in which it portrays the legal incongruities as aberrations in the law that the Court would not tolerate. This observation may, if valid, assist in efforts to refine further the maritime law survival action, where it becomes exposed to similar incongruities. *See infra* notes 306-46 and accompanying text.

[203] This legal peculiarity was attributed in part to the legacy of *The Harrisburg*, apparently in the sense that as no federal death remedy encompassing unseaworthiness as a basis of liability applied in state territorial waters, Jones Act seamen could conceivably recover for injury resulting from a negligently-caused unseaworthy condition, and not for a death resulting from the same condition if it occurred without negligence, and therefore outside the scope of the Jones Act. *Moragne*, 398 U.S. at 393. Additional factors affecting this scenario were the Court's earlier decisions in Lindgren v. United States, 281 U.S. 38 (1930) and Gillespie v. United States Steel Corp., 379 U.S. 148 (1964). *Cf.* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-32, at 368. In *Lindgren*, the Court suggested in dictum that state statutes could not be used to supplement the Jones Act and give to seamen a wrongful death remedy sounding in unseaworthiness. This dictum was affirmatively endorsed in *Gillespie*. *See supra* text accompanying notes 92-105. But see *supra* notes 97 & 146 regarding a possible convergence of negligence and unseaworthiness in the context of Jones Act litigation.

[204] Kernan v. American Dredging Co., 355 U.S. 426, 430 n.4 (1958). *Cf. Moragne*, 398 U.S. at 407.

[205] 398 U.S. at 395. *See also supra* notes 65, 96-99 & 128 and accompanying text. The factors underlying this incongruity have been summarized by this author in a related article:

> This particular circumstance was first postulated in The Tungus v. Skovgaard, 358 U.S. 588, 1959 AMC 813 (1959), and actually presented for decision in *Moragne*. It was hypothetically raised in *The Tungus* as a logical concern for the ramifications of the holding in that case. To understand the concern, however, reference to the decision of the Supreme Court in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), is necessary. In *Sieracki*, the Court held that certain harbor workers should be considered seamen *pro hac vice*, and thus entitled to maintain an action for death or injury resulting from unseaworthiness. In *The Tungus*, a *Sieracki* seaman died as a result of an unseaworthy condition. By a 5-4 majority,

The final incongruity addressed by the Court involved the term "seaman." The Court observed that, in certain instances, longshoremen or harbor workers could be ascribed the status of seamen. As seamen, these workers would be entitled to a warranty of seaworthiness in regard to vessels upon which they were called to work.[206] Consequently, longshoremen or harbor workers possessing this special "seaman" status—or their surviving beneficiaries—might be entitled to a wrongful death action under an applicable state statute contemplating unseaworthiness as a basis of liability,[207] while true (Jones Act) seamen could not receive the same benefit of that statute due to the exclusive nature of the Jones Act.[208]

The legal incongruities specifically addressed by the *Moragne* Court developed principally as a result of a tremendous expansion in the importance of unseaworthiness as a basis of liability. At the time the Jones Act and DOHSA were enacted, negligence constituted the usual basis of liability for wrongful death in admiralty. State wrongful death statutes, to the extent they were expressly applicable to admiralty causes, reflected this understanding by incorporating negligence as the primary basis of an action.[209]

Since enactment of the two Acts, however, unseaworthiness gradually supplanted negligence as the primary source of liability for seamen's injury and/or wrongful death.[210] As most state wrongful death statutes and the Jones Act were ill-equipped to meet this change,[211] and DOHSA was restricted in application to the high seas, incongruities of the nature addressed in *Moragne* sur-

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> the Court determined that a wrongful death action could be maintained only if the applicable state wrongful death statute encompassed an action based upon unseaworthiness. Following the decision in *The Tungus*, then, the representatives of a seaman suffering death due to an unseaworthy condition on the high seas would be entitled to a wrongful death action under DOHSA, but if the same condition caused the death in territorial waters, no action could be maintained unless the state statute so provided.

Nagy, *Non-Dependent Beneficiaries*, *supra* note 195, at 41 n.36 (citations omitted). See *supra* notes 142-43, *infra* notes 206-08 and accompanying text for further discussion of the *Sieracki* holding.

[206] *See supra* note 205.

[207] *See supra* notes 96-97, 205 and accompanying text.

[208] *Moragne*, 398 U.S. at 395-96. See *supra* note 97 and accompanying text regarding the exclusivity of seamen's wrongful death actions under the Jones Act. With respect to *Sieracki* seamen and their incongruous impact on the maritime law, the Court considered that impact only as it might follow from a death occurring in territorial waters; a *Sieracki* seaman suffering tortious death on the high seas could have a remedy based on unseaworthiness under DOHSA, as would a true Jones Act seaman because DOHSA provides a death remedy irrespective of the occupation of the decedent. Negligence is also actionable under DOHSA.

[209] *Moragne*, 398 U.S. at 398.

[210] *Id.* at 399.

[211] Most state statutes and the Jones Act contemplated negligence alone as a basis of liability for wrongful death. *See supra* notes 12, 209 and accompanying text.

faced regarding the availability and character of wrongful death actions in the admiralty.

The *Moragne* Court ultimately traced the origin of these incongruities to *The Harrisburg* and its holding proscribing a maritime law death action.[212] The Court resolved to overrule that decision and establish a maritime law death action, partially in view of the historical factors recounted above. These factors must be correlated with policy matters addressed by the Court, as both are integral to a proper understanding of the maritime law wrongful death action and, by logical extension, to the maritime law survival action.[213]

2. Moragne: *Discussion of Policy Factors*

The Supreme Court in *Moragne*, facing the difficult task of overruling precedent and simultaneously forging a new direction in the maritime law, discussed in detail the policy factors supportive of these efforts. Apart from the ordinary importance associated with the Supreme Court's discussions of policy, in *Moragne* these discussions assumed added significance in view of the Court's reluctance to identify or refine many of the substantive elements of the maritime law death action until a later time, or before other tribunals had first addressed them.[214]

Each point of policy contained in *Moragne* provides unique insight into the Court's intentions concerning the form and character those elements might—or should—ultimately take. Together with historic factors recounted by the Court, policy considerations helped to substantiate the Court's recognition of a maritime law death action. Alone, policy considerations served the additional explicative function of revealing, at least in an introductory sense, the foundational criteria the Court considered to be essential to the successful implementation of the action.[215]

The threshold policy consideration addressed in *Moragne* was the historic absence of a maritime law wrongful death action, and the relationship of that absence to the common law.[216] The Court outlined the nominal justification for that tradition in American jurisprudence, both generally and in regard to mari-

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[212] *See supra* note 143 and accompanying text.

[213] *See supra* text accompanying notes 3-8, 15-18 & 38 and *infra* text accompanying notes 303-04 & 329-34.

[214] *See supra* notes 6-9, 138-61 and accompanying text.

[215] These criteria may be analogized to the purpose of refining the maritime law survival action. See *supra* note 213 for references to discussions supportive of this suggested analogy. The Court embellished its address of both historic factors and policy considerations in its later decisions in *Gaudet* and *Higginbotham*, though these embellishments are necessarily predicated on the substance of the *Moragne* opinion.

[216] For a background discussion of these matters, see *supra* text accompanying notes 19-30.

time law, and, as a point of contrast, noted the prevailing sentiment in American and international law favoring a remedy for wrongful death.[217] Observing this sentiment and its general legislative embodiment in American state and federal legislation, the Court found it representative of contemporary social mores that merited expression in the maritime law:

> These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.[218]

This passage illustrates a critical transition made by the Court, from its introduction of the need for a wrongful death action in the maritime law by acknowledgment of its illogical absence, to reliance on public sentiment—as evidenced by legislation—for revelation of matters that should receive expression in decisional law.[219] The Court expounded on this thesis by cautioning that it was not creating a "new" form of action, but merely affording access to existing means of redress for wrongful death occurring within the admiralty jurisdiction.[220] In stating this caution, the Court was apparently suggesting that existing wrongful death legislation represented matters that should—and would—be introduced into the maritime law.[221]

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[217] 398 U.S. at 384-93. Perhaps most significantly, the Court observed that every state in the United States had enacted wrongful death legislation, as had Congress in a number of instances. *Id.* at 390. The federal acts mentioned by the Court were DOHSA, 46 U.S.C. §§ 761-68; the Jones Act, 46 U.S.C. § 688; the Federal Employers' Liability Act, 45 U.S.C. §§ 51-59; and the Federal Tort Claims Act, 28 U.S.C. § 1346(b). *Id.* Internationally, the Court observed that England had abandoned the common law proscription against wrongful death actions by enacting wrongful death legislation. *Id.* at 389. See also *supra* notes 27-30 and accompanying text regarding use of the rule in American jurisprudence.

[218] 398 U.S. at 390-91.

[219] The importance of this reliance on legislation is easily demonstrated by the fact the maritime law death and survival actions, evolving in a common law tradition, must incorporate legislative sentiments in order to retain a contemporary perspective. *See supra* note 32. The Court has, in its later efforts at refining the maritime law death action, continued to look to legislation for guidance. *See infra* text accompanying notes 243-61.

[220] 398 U.S. at 405-06. *See also supra* notes 138-40 & 160-61 and accompanying text.

[221] *See supra* note 219 and accompanying text. The lower courts have followed *Moragne's* lead with respect to consulting wrongful death legislation in the course of refining the maritime law death action, as evidenced by the following discussion of the Fifth Circuit Court of Appeals:

> The Methodology for the 'further sifting' contemplated by *Moragne* has thus been firmly established in this circuit. In shaping the new remedy we look first to existing maritime

By framing the substance of the maritime law death action through reference to legislation, the Court surmised that all historic incongruity associated with the absence of such an action would be corrected. Most importantly, the action would encourage uniformity in the maritime law and would alleviate the tensions associated with the historic practice of applying state laws to admiralty death causes, a practice which had, in conjunction with similar applications of federal legislation, created a substantial lack of uniformity.[222] The Court's sentiment on this point, concerning the stabilizing influence of the maritime law death action, was encapsulated by Justice Harlan as he wrote of the factors underlying the need for the action:

> [T]he desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighted against these factors.[223]

Despite the *Moragne* Court's desire that the maritime law death action promote uniformity in the law of admiralty wrongful death, and the Court's visible conviction that this result would attend its recognition of the action, the initial promise of *Moragne* has not been entirely realized. Instead, two critical policy determinations of the Court have, in conjunction with the incongruities existing among state and federal wrongful death statutes, created uncertainty regarding elements of the maritime law death action. This uncertainty has impelled the

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> law, to which *Moragne* has allowed access in a death action. We next examine the remedial policies indicated by Congress in the federal maritime statutes. Heed to these statutes will assist in ensuring that "uniform vindication of policies" mandated by the *Moragne* Court. Finally we look for "persuasive analogies" in the state wrongful death acts. The importance of the role of these state acts is accented by their long and successful contribution to the growth of federal maritime law, and in their assistance in influencing the direction of admiralty law toward solution of contemporary maritime problems. To the extent that policies developed under state death remedies are applicable in a maritime context, then, those policies should influence the content of the new maritime death remedy.

In re M/V Elaine Jones, 480 F.2d 11, 31 (5th Cir. 1973), *on reh'g*, 513 F.2d 911 (5th Cir.), *cert. denied*, 423 U.S. 840 (1975) (citations omitted). While the *Moragne* Court contemplated a "further sifting" only with respect to the question of a beneficiary schedule for the maritime law death action, *infra* note 287, the Fifth Circuit appears to have extended that approach to the entire fabric of the action—not without justification, in view of the *Moragne* Court's parsimonious introduction of most substantive elements of the action. *See supra* notes 6-9, 138-61 and accompanying text.

[222] 398 U.S. at 401-02. *See supra* note 154 and accompanying text.

[223] 398 U.S. at 403.

lower courts to inconsistent efforts in both defining these elements and giving them effect.

The first of the Court's policy determinations pertinent to this uncertainty was its reliance on existing law to satisfy questions that might arise in regard to the substance of the maritime law death action.[224] The historic lack of uniformity associated with the admiralty law of injury and death did not, without more advice from the Court regarding the manner in which that law should prove useful, bode well for the newly cognizable action. The second of the Court's pertinent policy determinations concerned its reluctance to identify either state or federal law as being of primary importance as a guide to the lower courts, as they proceeded in their efforts to refine the substance of the maritime law death action.[225]

In view of the wide latitude implicit in these two policy determinations, the lower courts could—and have—given varying effect to state and federal laws, producing a lack of uniformity greater than that already existing in the admiralty law prior to *Moragne*. The presence of this graduated lack of uniformity has in turn promoted uncertainty, as certainty in the law exists only in proportion to its existing uniformity. Finally, the uncertainty generated has been compounded by the general policy of the Court regarding identification and definition of substantive elements of the maritime law death action, which efforts were undertaken in largely introductory form.[226]

3. Moragne: *Uncertainty and a Resulting Lack of Uniformity*

The questionable guidance provided by *Moragne* for further refinement of the maritime law death action, and the influence of that guidance on later decisions, has taken two forms. First, the brevity of the Court's introduction of elements of the action[227] resulted in uncertainty concerning areal application,[228] an appropriate beneficiary schedule,[229] and a limitations period.[230] Second, the Court's oblique reference to the guidance available through reference to state and federal law, and the Court's failure to state a preference, affected the certainty of all elements of the action; most dramatically affected was the element

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[224] *See supra* notes 138-40, 160-61, 220-21 and accompanying text.

[225] *See supra* notes 140 & 177.

[226] *See generally supra* notes 138-83 and accompanying text. Also of consequence was the Court's affirmation of admiralty's traditional solicitude for seamen. 398 U.S. at 387. *See supra* note 146 and accompanying text. *See also infra* note 353 and accompanying text.

[227] *See generally supra* notes 138-83 and accompanying text.

[228] *See supra* text accompanying note 155. *See also infra* text accompanying notes 325-42.

[229] *See supra* text accompanying notes 157-59. *See also infra* text accompanying notes 281-91.

[230] *See supra* text accompanying notes 156-59. *See also infra* text accompanying notes 292-95.

of damages.[231]

These effects can be outlined through reference to illustrative decisions of the Supreme Court, the lower courts, and various hypothesized developments tolerated by *Moragne* and subsequent decisions concerned with the maritime law death action. This outline is of grave significance to the maritime law survival action, because the action is premised on *Moragne*[232] and likely is subject to the same effects of the *Moragne* Court's policy determinations, and the manner in which those determinations have acted in concert with traditional precepts of admiralty death law.[233] More importantly, the maritime law survival action may suffer more egregiously from these effects because it remains in a fairly nascent state of development, and may not receive the benefit of the efforts by various courts and commentators to alleviate the uncertainties resulting from *Moragne*.[234]

The reason for discussing in detail each of the following effects of the Court's reasoning is not to demonstrate the state of maritime wrongful death law. Instead, these effects are important because they illustrate the interplay of law, policy, and maritime remedies. This interplay is prefatory to understanding further impacts on the maritime law survival action.

(a) Areal Application

The death under consideration in *Moragne* took place in the territorial waters of the State of Florida. In recognizing a maritime law wrongful death action to exist, however, the *Moragne* Court did not associate it with any areal limitations.[235] The lower courts soon differed in their perceptions of this fact, some considering the action to be available throughout the admiralty jurisdiction,[236] and others finding it to have applicability only in territorial waters.[237] The Supreme Court tangentially addressed the issue in *Mobil Oil Corp. v. Higginbotham*, opining that DOHSA would represent controlling authority in regard to

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[231] *See supra* notes 6, 140 & 177. *See also infra* notes 296-302 and accompanying text.

[232] *See supra* note 187 and accompanying text. *See also supra* text accompanying notes 4-9.

[233] For a discussion analogizing the consequences of the *Moragne* Court's reasoning to the maritime law survival action, see *infra* text accompanying notes 329-46. See also *supra* note 213 for references to discussion supporting this analogy. In particular, just as state death laws could only be applied in admiralty if (1) they existed in an "interested" state, (2) they contemplated a maritime application, and (3) they represented a proper exercise of state legislative authority, so state survival statutes have to meet each criterion. Additionally, state survival statutes reflected elemental diversity much like state death statutes, again both among the states themselves, and between the states generally and pertinent federal law.

[234] *See supra* text accompanying notes 6-10.

[235] *See supra* note 155. *See also infra* notes 236-42 and accompanying text.

[236] *See supra* notes 172-73.

[237] *See supra* notes 172-73.

incidents of death occurring on the high seas, at least where the terms of DOHSA were expressly dispositive of all issues arising from the death. The Court did not appear to further consider the question of an actual areal limitation on the applicability of the maritime law death action, and the lower courts have remained divided on the issue.[238]

Apart from the obvious uncertainty inhering to areal applicability of the maritime law death action, further complications could derive from that uncertainty in view of the use of state and federal wrongful death laws to refine the substantive elements of the action.[239] First, to the extent the maritime law death action is applicable to the high seas, reference to state laws for guidance in defining elements of the action, particularly damages, may result in the extension of state legislative authority beyond its historic bounds.[240] In a related manner, if DOHSA is used together with state law in helping to define elements of the action, immediate conflicts may arise as to whether DOHSA or

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[238] The *Higginbotham* Court determined that in regard to deaths occurring on the high seas, the measure of recovery in an action for wrongful death would be controlled by DOHSA. *See supra* notes 173-74 and accompanying text. In resolving that the DOHSA "governs" such recoveries, however, the Court did not state that no general maritime law death action would lie in regard to a high seas death. Instead, the Court implied that the action would continue to be available, but that its substance could not be in conflict with the express terms of DOHSA. 436 U.S. at 625. *See also infra* text accompanying notes 262-78. *Cf.* Public Adm'r of County of New York v. Angela Compania, 592 F.2d 58 (2d Cir.), *cert. dism.*, 443 U.S. 928 (1979); Red Star Towing v. Ming Giant, 552 F. Supp. 367 (S.D.N.Y. 1983); F. & M. Nat'l Bank v. Adams, 1979 AMC 2860 (E.D. Va. 1979) (each of these courts observing *Higginbotham* to be unclear on the question of exclusivity, or perceiving that quality to appertain only to DOHSA's express terms). *But cf.* Ford v. Wooten, 681 F.2d 712 (11th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983); Hamilton v. Weiss, 1984 AMC 2058 (D. Mass. 1983); Heyl v. Carnival Cruise Lines, 625 F.2d 1012 (5th Cir.) (unpub. op.), *cert. denied*, 449 U.S. 1066 (1980); Remer v. Rockwell Int'l Corp., 587 F.2d 1030 (9th Cir. 1978) (each of these courts identify DOHSA as the exclusive means of obtaining redress for wrongful death on the high seas, other than the Jones Act).

[239] Regarding some of these potential complications, see *infra* text accompanying notes 240-42. Regarding the role of state and federal death laws in the refinement of the maritime law death action, see *supra* notes 138-40, 160-61 and accompanying text.

[240] See *supra* notes 70, 110-24, 197 and accompanying text concerning the parameters of state legislative authority in the admiralty jurisdiction. A valid question may be raised concerning whether use of state statutes for guidance, as counseled by *Moragne*, represents an exercise of state legislative jurisdiction or just a means of interpreting social values. *See supra* text accompanying notes 218-21. Most courts have appeared to refer to the laws of states "interested" in the proceedings in their quest for guidance, however, suggesting that these "interested" states may in fact be able to extend their particular legislative interests into the further reaches of the admiralty jurisdiction. *See infra* note 339. The "guidance" envisioned by the *Moragne* court apparently entailed a review of all state death legislation, not merely that of interested states. *See supra* text accompanying notes 167-71. *See also infra* text accompanying notes 248-52. If this practice was followed, it would be questionable as to whether the states could be considered to be "legislating" in any impermissible sense.

state law is of primary influence and in which areas of the admiralty jurisdiction.[241] These problems attain greater significance, apart from mere uncertainty in the maritime law, if it is remembered that state and federal wrongful death laws have historically evidenced wide diversity in terms.[242]

(b) Sources of Legal Guidance

The *Moragne* Court suggested that the law developed through personal injury litigation would be of assistance to the lower courts in their efforts to refine most elements of the maritime law death action,[243] and that with respect to damages and various other undefined elements, state wrongful death laws and DOHSA would provide adequate guidance.[244] The Court chose not to elaborate more fully, however, on the manner in which these disparate bodies of law were to be used, or concerning which of their respective elements might be presumed to have a counterpart in the maritime law death action.[245] The Court's failure to provide more insight on both of these considerations has resulted in a mystifying legal version of Pandora's box,[246] which is readily demonstrated by the Court's decision in *Sea-Land Services, Inc. v. Gaudet*.[247]

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[241] DOHSA precludes application of state wrongful death legislation to high seas incidents. *Tallentire*, 106 S. Ct. 2485 (1986). Until very recently, however, significant contrary authority existed on this point. *See supra* notes 79-91 and accompanying text. Conversely, DOHSA has no express applicability in territorial waters, where state statutes historically provided redress for wrongful death, until their imposed obsolescence following *Moragne*. *See supra* notes 68-82 and accompanying text. In view of *Higginbotham's* visible reliance on the areal scope of DOHSA, the different areal emphases of DOHSA and state laws may be significant in regard to further constructions of the maritime law death action, although the *Higginbotham* Court did suggest DOHSA would be more persuasive with respect to elements of the action other than damages. *See supra* notes 175, 177 & 179. *See also infra* note 260. Compounding this possibility is the fact DOHSA was acknowledged by the Court not to address every issue of wrongful death. *See infra* note 277 and accompanying text. But see *supra* notes 235-40 and *infra* note 241 and accompanying text regarding possible restrictions of the maritime law death action to territorial waters, reducing the question of "areal" conflicts of law. Concerning the general tensions affecting use of different bodies of law, see *infra* notes 243-86 and accompanying text.

[242] *See infra* notes 63-132 & 329-46 and accompanying text.

[243] 398 U.S. at 405-06. *See supra* note 140 and accompanying text.

[244] 398 U.S. at 408. *See supra* note 140 and accompanying text.

[245] *See supra* text accompanying notes 224-26.

[246] *Id.* In Greek mythology, Pandora was considered to be the first woman, who, upon her creation by the gods, was presented with a gift of a beautiful box which she was forbidden to open. Being curious, however, Pandora opened the box "and out flew plagues innumerable, sorrow and mischief for mankind. In terror Pandora clapped the lid down, but too late. One good thing, however, was there—Hope. It was the only good the casket had held among the many evils . . . ." E. HAMILTON, MYTHOLOGY 70 (17th printing, Mentor ed., 1962).

[247] 414 U.S. 573 (1974).

In *Gaudet*, the Court reviewed state wrongful death laws and DOHSA and, contrary to the pecuniary restrictions of DOHSA concerning damages,[248] sanctioned an award of damages for loss of society—a non-pecuniary loss—as an item of damages available under the general maritime law death action.[249] The Court also endorsed other items of damages that were compensable under DOHSA involving loss of support, loss of services, and funeral expenses.[250]

In identifying each of these items of damages as being compensable under the maritime law death action, the deciding majority clearly evidenced that it was supporting its determinations wherever possible through reference not only to DOHSA, but also to state wrongful death laws. The majority observed damages for loss of support had "universal recognition" among the states and DOHSA, loss of services had the support of an "overwhelming majority" of states, as well as DOHSA, and loss of society, while insupportable under DOHSA, had the favor of a "clear majority" of the states.[251] The majority also identified funeral expenses as a compensable item where incurred by the decedent's dependents, noting that a "majority" of states were supportive of this item of damages, and DOHSA was subject to conflicting interpretations.[252]

The *Gaudet* majority quite clearly tried to support its damages determinations through references to existing state and federal law. The majority also found it difficult, however, to identify a threshold level of state or federal support for any given item of damages that would justify inclusion of that item into the recovery available through the maritime law death action. As a result, the *Gaudet* majority provided the lower courts little guidance concerning what other items of damages, or other non-damages elements in general, might be included in the maritime law death action where they were variably popularized by state or federal legislation.[253] The majority's difficulty has remained the

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[248] *See supra* note 171 and accompanying text.

[249] 414 U.S. at 585-90. See *supra* text accompanying notes 164-71 concerning the Court's evaluation of DOHSA and various state wrongful death laws.

[250] 414 U.S. at 583-91. Regarding the Court's endorsement of these damages, see *supra* text accompanying notes 169-71 and *infra* text accompanying notes 251-52.

[251] 414 U.S. at 584-87.

[252] *Id.* at 591.

[253] Regarding the role of state and federal legislation in 'popularizing' various elements of death actions, see *supra* notes 218-19 and accompanying text. The nominal assistance provided in regard to a threshold level of support was reduced even further by the acrimony of Justice Powell's dissent, in which he was joined by three members of the Court. 414 U.S. at 595. Justice Powell particularly decried what he saw as the majority's refusal to follow *Moragne* counsel regarding reference to existing law, both generally and as it pertained to recoverable damages. *Id.* at 596. Justice Powell also predicted that the majority's reasoning would compound uncertainty in the maritime law, simply by creating a remedy likely to overlap with others already in existence, a possibility suggesting obvious difficulties with respect to using those same 'overlapped' laws for guidance. *Id.* at 608.

lower courts' bane, as they are encouraged by *Moragne* to look to such legislation in their efforts to refine the maritime law death action, and yet are provided no clear picture of what they must look for in this respect.[254]

Gaudet inspired the lower courts to deviate from the standards they had initially adopted after *Moragne* for using state and federal death laws. *Moragne* had promoted both bodies of law as a source of guidance. Consistent with that advice, most courts and commentators considered that only elements shared in common by state wrongful death laws should be incorporated into the maritime law death action;[255] incorporation was particularly suitable for elements additionally tolerated by federal wrongful death legislation. *Gaudet* inspired deviations from this attitude[256] because of the majority's perceived favoring of state laws over federal.[257]

The fragile constitution of the *Gaudet* majority and the lower court deviations inspired by its opinion led the Court to expound upon the issue of recoverable damages, and the sources of law from which various items of damages might be derived, in *Mobil Oil Corp. v. Higginbotham*.[258] While the substance of *Higginbotham* did clarify certain confusing aspects of *Gaudet*, *Higginbotham* also undesirably impacted the manner in which state and federal wrongful

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[254] The same dilemma may be associated with *Moragne's* suggestion concerning reference to the law developed through personal injury litigation. *See supra* note 243 and accompanying text. *See also supra* text accompanying notes 248-53 and *infra* text accompanying notes 255-62 regarding the Court's shifting reliance on state and federal laws as evidenced in *Gaudet* and *Higginbotham*. Some measure of clarification was provided in American Export Lines v. Alvez, 446 U.S. 274 (1980). In *Alvez*, the Court held that the spouse of an injured longshoreman could recover damages for loss of society, largely because a "clear majority" of states had such a provision. 446 U.S. at 284. A clear majority for the *Alvez* court was comprised of 41 states and the District of Columbia. In *Gaudet*, a clear majority existed where 27 of 44 states and territories possessed the pertinent legislation. 414 U.S. at 587 n.21.

[255] *See, e.g.*, Greene v. Vantage S.S. Corp., 466 F.2d 159, 168 (4th Cir. 1972); Comment, *General Maritime Law and the Wrongful Death Dilemma*, 12 DUQ. L. REV. 891, 915 (1974). *Cf.* American Export Lines v. Alvez, 446 U.S. 274, 284 n.11 (1980).

[256] The opinion of the *Gaudet* majority, being somewhat broad in its scope and exhibiting limited deference to DOHSA, prompted some courts to begin applying the *Gaudet* measure of damages to incidents of high seas deaths irrespective of DOHSA. *See, e.g.*, Law v. Sea Drilling Corp., 510 F.2d 242 (5th Cir. 1975), *on reh'g*, 523 F.2d 793 (5th Cir. 1975). Additionally, such damages were awarded irrespective of the other federal enactment applicable to admiralty causes, the Jones Act. *See, e.g.*, Landry v. Two R. Drilling Co., 511 F.2d 138 (5th Cir. 1975). Particularly, *Gaudet* sanctioned recovery for loss of society, an item of damages not recoverable under either DOHSA or the Jones Act. *See supra* notes 248-49. *See also infra* note 278. Concerning the broad scope of the *Gaudet* majority opinion, see *supra* note 173. See also *supra* text accompanying notes 164-67 concerning another manner in which the *Gaudet* majority inspired departure from widely-adopted points of law.

[257] *See infra* notes 168-72, 248-56 and accompanying text. *Cf.* Engerrand & Brann, *Troubled Waters for Seamen's Wrongful Death Actions*, 12 J. MAR. L. & COM. 327, 340 (1981).

[258] 436 U.S. 618 (1978).

death laws were used to refine the maritime law death action.[259]

In *Higginbotham*, the Court determined that in adopting DOHSA, Congress had exercised preemptive authority in creating a wrongful death action applicable on the high seas. The Court concluded that the judiciary was not free to establish a legal remedy that would circumvent the expressed will of Congress. Consequently, the DOHSA measure of damages was held to be controlling on the high seas, and the *Gaudet* measure of damages was restricted in application to deaths occurring in territorial waters.[260] This determination, while restoring some of the dignity lost by DOHSA in *Gaudet*,[261] was expressed by the Court in language that left unresolved several potentially troubling questions fostered by *Moragne's* suggested uses for state and federal wrongful death laws in the context of maritime wrongful death.[262]

The *Higginbotham* majority did not clearly advise whether DOHSA preempted the very applicability of the maritime law death action to incidents of high seas death, or simply controlled the action's measure of recoverable damages and other substantive elements for which DOHSA contained express terms.[263] If DOHSA's influence is considered merely elemental and not also areal, state wrongful death laws would retain value, as proposed by *Moragne*, as a source of reference for the lower courts.[264] If DOHSA is considered to restrict

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[259] *Higginbotham* in part acts to clarify *Gaudet* because the majority was more solidly constituted, five of the justices joining in Justice Stevens' opinion. Two of the five justices comprising the majority in *Gaudet* took no part in the *Higginbotham* decision.

[260] 436 U.S. at 623-24. The Court also advised that DOHSA would likely be of controlling influence on non-damages elements of the maritime law death action. *Id.* at 624. *See also supra* text accompanying notes 175-79. In essence, the Court considered that the *Gaudet* majority had evidenced a policy choice in awarding damages inconsistent with DOHSA, because DOHSA was not applicable in territorial waters; where the subject death occurred on the high seas, as was true in *Higginbotham*, this policy choice was considered inapplicable. *Id.* at 622. See *supra* text accompanying notes 168-71 & 248-52 concerning the differences between the *Gaudet* and DOHSA measures of recoverable damages.

[261] As observed in one leading admiralty treatise, *Gaudet* had reduced both DOHSA and the Jones Act to the "scrap heap." G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-33, at 370.

[262] *See infra* text accompanying notes 263-86. The Court's apparent endorsement of DOHSA as a primary referent in regard to non-damages elements, additionally raises questions concerning the *Moragne* Court's suggested reference to the law of personal injury. 414 U.S. at 624. *See supra* note 243 and accompanying text.

[263] *See supra* text accompanying notes 235-42. There may be some question about DOHSA's controlling role in regard to damages recoverable for deaths occurring on the high seas. *See infra* text accompanying notes 280-83.

[264] For *Moragne's* advice in this regard, see *supra* note 140 and accompanying text. State laws would remain referential only in this context, as the general maritime law death action is, where applicable, considered to preclude the collateral exercise of state wrongful death actions. *See, e.g.*, Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980); *In re* S/S Helena, 529 F.2d 744, 753 (5th Cir. 1976). *But cf.* Dugas v. National Aircraft Corp., 438 F.2d 1386 (3d Cir. 1971)

the areal applicability of the action to territorial waters, however, state wrongful death laws might resume their pre-*Moragne* level of utility regarding high seas incidents of death.[265] If this renascent use of state death laws occurred, *Higginbotham's* elevation of DOHSA to a primary level of importance in the general refinement of the maritime law death action would become largely meaningless.

Perhaps predictably, the situation posed came to pass, and for a time resulted in significant conflict among a number of the federal circuit courts of appeal. The conflict has recently been largely resolved, although not completely, by the decision in *Offshore Logistics v. Tallentire*.[266] The significance of *Tallentire* on this point is explained presently.

The Ninth Circuit, at least in apparent sympathy with *Higginbotham*, resolved that state wrongful death actions could not be exercised with respect to deaths occurring on the high seas:

> If the federal remedial scheme for death within state territorial waters takes precedence over state remedies, then certainly the federal remedial scheme for death on the high seas, where the primacy of federal interests is far clearer, should also take precedence. Were this not the case, state law would not operate in territorial waters, because preempted by general maritime law, but could be extended to the high seas, a result as damaging to the uniformity in wrongful death actions as it is illogical. We hold, therefore, that where it is applicable, the Death on the High Seas Act preempts state wrongful death statutes.[267]

In a ruling directly converse to that of the Ninth Circuit on this point, the Fifth Circuit opined that state wrongful death statutes were applicable to high seas

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(using state death statutes and not the general maritime law death action). The preclusive effect of the maritime law survival action is not settled, although it should logically be consistent with perceptions of the maritime law death action in this regard. *See, e.g.*, Spiller v. Lowe & Assoc., 466 F.2d 903 (8th Cir. 1972) and Dennis v. Central Gulf S.S. Corp., 453 F.2d 137 (5th Cir. 1972). *Spiller* and *Dennis* suggested state survival remedies could supplement a maritime law death action. As a maritime law survival action has now generally evolved, the need or utility of state statutes as envisioned by the *Dennis* and *Spiller* courts may be moot.

[265] See *supra* notes 63-132 and accompanying text regarding the pre-*Moragne* utility of state wrongful death statutes in admiralty causes. This possibility may be forestalled by the Supreme Court's recent decision in *Tallentire*, 106 S. Ct. 2485 (1986), holding DOHSA to preempt use of state death statutes on the high seas. The *Tallentire* holding might prompt congressional response, as the Court itself noted some evidence of congressional intent opposed to the Court's construction. But see *infra* note 273 on congressional efforts of this nature.

[266] 106 S. Ct. 2485 (1986).

[267] Nygaard v. Peter Pan Seafoods, Inc., 701 F.2d 77, 80 (9th Cir. 1983). The Ninth Circuit appears to consider DOHSA to be exclusive of the maritime law death remedy, although that position has never been clearly stated. *See, e.g.*, Renner v. Rockwell Int'l Corp., 587 F.2d 1030, 1031 (9th Cir. 1978).

incidents of death irrespective of DOHSA.[268] In a decision reached prior to *Higginbotham*, the First Circuit suggested, consistent with the view expressed by the Ninth Circuit, that DOHSA should be considered to have a preclusive effect on the exercise of state death statutes.[269]

In view of these conflicting holdings, and those of other circuit courts on related issues,[270] increasing uncertainty attended DOHSA's status—suggested

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[268] Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274, 1279-83 (5th Cir. 1985), *rev'd*, 106 S. Ct. 2485 (1986). The Fifth Circuit in *Tallentire* viewed DOHSA to be exclusive of the maritime law death remedy with respect to high seas incidents of death. *See* Bodden v. American Offshore, Inc., 681 F.2d 319, 329 (5th Cir. 1982). *But cf.* Sanchez v. Loffland Bros. Co., 626 F.2d 1228, 1230 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981) (the Court raising both the possibility of an exclusive DOHSA role, and an advisory one). While the *Nygaard* panel of judges all joined in the opinion of Judge Kennedy, *Tallentire* was submitted on the strength of three separate opinions. Judge Davis wrote for the majority, providing an exhaustive analysis of why DOHSA should not be construed to bar application of state death laws to high seas incidents of death. 754 F.2d at 1279-83. Judge Jolly specially concurred, expressing his reservations over the consequences of such a ruling. *Id.* at 1289. Judge Garza dissented, observing the historic perception of DOHSA as being preemptive of state wrongful death legislation. *Id.* Regarding this historic perception, see *supra* notes 79-82 and accompanying text. Judge Davis, despite the conviction of his interpretation of DOHSA's exclusivity, nonetheless expressed concern over its logical import:

> Our holding in this case does not promote the uniformity in the maritime law which the Supreme Court has nurtured for many decades, and we may agree with our brothers of the Ninth Circuit that to have state law preempted in territorial waters yet operative on the high seas is "a result as damaging to uniformity in wrongful death actions as it is illogical." 701 F.2d at 80. It is indeed profoundly unsettling . . . but this is the legacy of eighty-odd years of haphazard evolution of maritime wrongful death remedies.

754 F.2d at 1284. Judge Davis' reference to the preemption of state laws in territorial waters followed the general view that the maritime law death action (applicable to territorial waters in the Fifth Circuit) precluded the collateral exercise of state death laws in admiralty death causes. *See In re* S/S Helena, 529 F.2d 744, 753 (5th Cir. 1976). In reversing the Fifth Circuit in *Tallentire*, the Supreme Court relied on a finding of a jurisdictional savings clause in DOHSA; by this construction, not raised by any of the opinions written by the Fifth Circuit panel, the Court supported its interpretation of DOHSA's exclusivity.

[269] Barbe v. Drummond, 507 F.2d 794, 801 n.10 (1st Cir. 1974). The *Barbe* court, like *Nygaard* joining in a single opinion, acknowledged the view later expressed in *Tallentire*, but concluded that "[t]he better authority rejects this view." *Id.*

[270] There is no agreement concerning the bases of liability contemplated by the maritime law death action, or the availability of that action to non-seamen. *See supra* text accompanying notes 141-46. Assuming an exclusive availability to seamen, if negligence is not included as a basis of liability, then state death statutes would incontrovertibly apply to deaths in territorial waters where the decedent was a non-seaman, as in the pre-*Moragne* period. See *supra* note 203 concerning negligently-caused unseaworthiness. Given such applicability, state statutes would assume a role greater than the 'referential' role ascribed to DOHSA with respect to refinement of the maritime law death action. Additionally, some circuits historically considered state death statutes to have applicability on the high seas, creating state remedial competition with the maritime law available both under DOHSA and *Moragne*. *See supra* note 81. As state wrongful death remedies

in *Higginbotham*—as a primary referent for refinement of the maritime law death action.[271] *Tallentire* substantially corrected this uncertainty by re-emphasizing a plenary status for DOHSA on the high seas. *Tallentire* does not, however, entirely resolve the question of DOHSA's role in relation to the maritime law death action, for several reasons.

First, *Tallentire* does not address this relationship.[272] Second, *Tallentire* may invite congressional response acceding to the use of state death statutes on the high seas, resurrecting the problem. As the Fifth Circuit had suggested, and *Tallentire* acknowledges in part, Congress, in enacting DOHSA, may in fact have intended state death laws to retain high seas applicability.[273] The *Tallentire* Court also expressly declined to consider the use of state survival statutes on the high seas,[274] but did not discuss the high seas utility of those state statutes that evidence "merged" survival and death statutes.[275]

Presumably, these "merged" statutes retain some utility until expressly proscribed, and elements of state law may yet confict with elements of DOHSA in terms of relative primacy as a referent for the maritime law death action. Finally, because *Tallentire* did not discuss the relationship between DOHSA and the maritime law death action, it provides no guidance as to how pre-*Tallentire* decisions construing this relationship should continue to have precedential value. Use of these earlier decisions is therefore subject to uncertainty because of the tension between DOHSA and state laws as sources of guidance.

However important each of these observations may be independently, their significance may be in illustrating a basic problem inhering to the general maritime law. With state and federal laws evidencing a tremendous historic overlap in admiralty matters, and the maritime law representing a third source of law

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often differ from those available under both these federal sources of law, this situation would create significant interference with the concept of federal supremacy under article VI, paragraph 1 of the Constitution of the United States. *Cf.* Cobb Coin Co. v. Unidentified Wrecked and Abandoned Sailing Vessel, 525 F. Supp. 186 (S.D. Fla. 1981).

[271] In this regard, it is important to recall that DOHSA was initially considered by the *Moragne* Court in the context of damages alone. *See supra* notes 140 & 262 and accompanying text.

[272] An inference can be made that the *Tallentire* Court felt the maritime law death action to be limited in application to territorial waters, although the inference is necessarily drawn from dictum, and is certainly unclear: "[a]dmittedly, in the circumstances of this case, the recognition of a state damages remedy for loss of society would bring respondents' DOHSA recovery into line with the damages available to a beneficiary of a federal *Moragne* maritime cause of action arising from a death on territorial waters." 106 S. Ct. at 2500. The Court's statement could be explained, alternatively, as a reference to just the difference in damages recoverable through the action on the high seas as opposed to territorial waters. *Cf. Higginbotham*, 436 U.S. 618 (1978).

[273] 754 F.2d at 1289; 106 S. Ct. at 2494-98. But cf. *Tallentire*, 106 S. Ct. at 2498-99, suggesting potential constitutional problems affecting such efforts by Congress.

[274] 106 S. Ct. at 2491 n.1.

[275] *See supra* text accompanying notes 45-53.

making independent use of state and federal laws, uncertainty will almost necessarily confound efforts to clarify the substance of maritime law actions, even where the Supreme Court speaks directly to the issue.

Another consideration left unresolved by *Higginbotham*, still regarding *Moragne's* recommended use of state and federal death laws, concerns the extent to which the maritime law death action will incorporate elements of those laws. *Gaudet* had broached this topic to some extent by looking primarily at state law, and *Higginbotham* did so almost in the opposite sense by considering DOHSA to be preferable over state law.[276] Where state wrongful death laws include elements not addressed in DOHSA—which happens, as acknowledged by the *Higginbotham* Court[277]—interesting questions may arise as to whether those elements might be included into the maritime law death action, and what conditions will be placed on such inclusions, given the disparate emphases of *Gaudet* and *Higginbotham*.[278] These questions will be most problematic in regard to the high seas. While *Tallentire* has, in principle, made state death laws inapplicable to the high seas, those laws might nevertheless circumvent DOHSA by obtaining incorporation into the maritime law death action, providing it retains applicability to the high seas.[279]

Finally, a combination of *Higginbotham's* confusing signals regarding the exclusivity of DOHSA on the high seas and the apparent inconsistencies between *Gaudet*, *Higginbotham*, and, to a lesser extent, *Tallentire* regarding use of state

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[276] *See supra* text accompanying notes 248-52 & 260-61.

[277] 436 U.S. at 625.

[278] Concerning these emphases, see *supra* text accompanying notes 248-52 & 260-61. One additional factor affecting any resolution of these questions, quite independently of *Gaudet* and *Higginbotham*, has been the manner in which the Jones Act has been considered to interrelate with the maritime law death action. The Jones Act was one of the two federal enactments pertaining to admiralty death causes that received substantive attention from the *Moragne* Court, DOHSA being the other. 398 U.S. at 400-01. Unlike DOHSA, the Jones Act is applicable throughout the admiralty jurisdiction, not just the high seas. *See supra* notes 3 & 66. Like DOHSA, the Jones Act restricts wrongful death recoveries to the pecuniary losses sustained by a decedent's surviving beneficiaries. *See supra* note 256. Consequently, the Jones Act does not contemplate damages for loss of society. *See, e.g.*, Christofferson v. Halliburton Co., 534 F.2d 1147 (5th Cir. 1976); Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964). Contrary to the Supreme Court's affirmation of DOHSA's integrity in *Higginbotham*, however, the Jones Act may be supplemented by the maritime law death remedy, such that damages for loss of society are recoverable. Landry v. Two R. Drilling Co., 511 F.2d 138 (5th Cir. 1975); Bodden v. American Offshore, Inc., 681 F.2d 319, 327 n.29 (5th Cir. 1982). Not only does this practice reflect an inconsistent approach to federal death legislation, but in a practical sense, it promotes a further lack of uniformity by affording to seamen damages for loss of society in territorial waters which they cannot, as a result of *Higginbotham*, recover on the high seas—when the Jones Act applies to both these areas of the admiralty jurisdiction.

[279] *See supra* notes 263-65 and accompanying text.

wrongful death laws, may yet produce a notable problem. At least one federal circuit court of appeals has resolved that, under *Higginbotham*, the maritime law death action is restricted in application to territorial waters.[280] Following *Tallentire*, state death statutes are subject to a similar restriction. As both *Higginbotham* and *Tallentire* observed, however, DOHSA is preemptive only where it "speaks" to an issue.[281] Congress is not omniscient, and DOHSA is not considered to "speak" to every issue of maritime death.[282] If a high seas death creates an issue *not* resolved by DOHSA, query what law might help in its resolution, and how would the manner of selection of that law impact the use of state and federal law in refinement of the maritime law death action?[283]

Clearly, while *Higginbotham* represented a sincere effort by the Court to clarify the essential relationships existing between the maritime law death action and other bodies of law,[284] the decision has not had an altogether calming effect with respect to these relationships. In fact, the Court did not perceive any dramatic consequences as being likely to follow from its decision,[285] and therefore

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[280] *See supra* note 238. If the maritime law wrongful death action does possess high seas applicability, it would preempt state death laws. *See supra* note 264.

[281] *Higginbotham*, 436 U.S. at 625; *Tallentire*, 106 S. Ct. at 2500.

[282] *Higginbotham*, 436 U.S. at 625.

[283] The question is particularly pressing in regard to survival actions, as DOHSA does not address them, *Tallentire* does not address them, and state survival statutes generally lack applicability to the high seas, 106 S. Ct. at 2491 n.1. Comment, *Application of State Survival Statutes*, *supra* note 68, at 534, 541. Finally, *Higginbotham* is considered to be silent on the question of survival actions. *See, e.g.*, Evich v. Connelly, 759 F.2d 1432, 1434 (9th Cir. 1985).

[284] *See supra* notes 248-52 and accompanying text.

[285] *Cf. Higginbotham*, 414 U.S. at 624-25 n.20; *Tallentire*, 106 S. Ct. at 2500. One plausible explanation for the Court's rather brief treatment of the concern for uniformity is found in the interpretation of that concern undertaken by the lower courts. Predominantly, the lower courts have considered that the 'uniformity' integral to the Supreme Court's decision in *Moragne* appertained only to factors affecting duty and liability, and had no bearing on the issue of damages recoverable for maritime wrongful death. *See, e.g., In re* American Commercial Lines, Inc. 366 F. Supp. 134, 136 (E.D. Ky. 1974); Dennis v. Central Gulf S.S. Corp., 453 F.2d 137, 140 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972); Greene v. Vantage S.S. Corp., 466 F.2d 159, 165 (4th Cir. 1972). *But see Greene*, 466 F.2d at 165 n.7 (observing that as a matter of public policy, the concern for uniformity might play a role in the determination of damages recoverable under the maritime law death action).

The Supreme Court has at least indicated in *Higginbotham*, however, that its concern for uniformity does extend to damages; if so, the manner in which state and federal enactments have been manipulated to provide differing measures of damages would not have the allowance claimed, for example, of immateriality to the maritime law concern for uniformity. In *Higginbotham*, the Court acknowledged that its decision would create a different measure of damages for deaths occurring on the high seas than would be available under *Gaudet* for deaths occurring in territorial waters. 436 U.S. at 624. *See also supra* note 174. The Court then discussed further the possibility that this non-uniformity might not be significant, and suggested that a means of resolving the discord might be to make damages for loss of society a symbolic remedy, rather

quite logically did not endeavor to resolve issues that, at the time of decision, might have been purely hypothetical.[286] However logical the Court's approach, *Higginbotham* fostered an environment in which conflicting decisions flourished regarding sources of law to be applied to wrongful deaths occurring in the admiralty jurisdiction, and to the permissible scope and character of such applications. While this environment is somewhat improved by *Tallentire*, it is not altogether cured.

(c) Beneficiary Schedule

The *Moragne* Court did not propose a beneficiary schedule for the maritime law death action, but instead left the initial determination of this element to the lower courts.[287] Ostensibly, the Court adopted this peculiar tack because inadequate guidance existed in the maritime law to assist it—or the lower courts—in devising a schedule within the immediate context of decision.[288] In the absence

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than a truly economic one. *Id.* at 624-25 n.20. *See supra* note 174. *But cf.* Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455 (5th Cir. 1985). The point of interest in these discussions was that the Court was directly concerned with the interest in uniformity as it applied to the measure of damages recoverable for maritime wrongful death, belying the view that uniformity is a matter of concern only as to questions of duty and liability.

[286] The Supreme Court acts to resolve issues in actual controversy; it will not generally act in an advisory capacity, or resolve matters raised in a hypothetical context. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962).

[287] 398 U.S. at 408. *See also supra* text accompanying notes 158-59.

[288] With respect to other elements of the maritime law death action, the Court suggested that the lower courts would, in their efforts to refine those elements, receive sufficient counsel from existing personal injury and wrongful death law. *See supra* text accompanying notes 138-40. These sources of law were observed to have little bearing on the beneficiary issue, however. 398 U.S. at 406-07. This observation could likely have been based on the discordant beneficiary schedules present among federal death legislation, for example, the Jones Act and DOHSA, and state wrongful death statutes. The Jones Act beneficiary schedule entails recovery by "[t]he surviving widow or husband and child of [the decedent]; and, if none, then of such [decedent's] parents; and, if none, then the next of kin dependent upon such [decedent]." 45 U.S.C. § 51 (1982), incorporated by reference into 46 U.S.C. § 688 (1982). *See supra* note 12. DOHSA's beneficiary schedule includes much the same identified beneficiaries as the Jones Act, but differs in that the ability of DOHSA beneficiaries to recover damages is not conditioned hierarchically; instead, recovery is generally available to "[t]he decedent's wife, husband, parent, child, or dependent relative . . . ." 46 U.S.C. § 761 (1982). Both statutes restrict wrongful death damages to the surviving beneficiaries' pecuniary losses. *See supra* notes 171, 256, 278 and accompanying text. State statutes, conversely, evidence marked differences in their beneficiary schedules. *In re* Cambria S.S. Co., 505 F.2d 517, 524 n.18 (6th Cir. 1974), *cert. denied*, 420 U.S. 975 (1975). Most state statutes are similar to the federal enactments with respect to pecuniary limitations on the nature of recoverable damages. 2 S. SPEISER, *supra* note 4, § 10:18, at 159 n.62. *Cf.* Annot., 31 A.L.R.3d 379 (1970). Regarding the common and uncommon attributes of federal and state wrongful death beneficiary schedules, and their relationship to the maritime law wrongful death

of such guidance, most courts considering the issue have relied on *Moragne's* other suggested sources of guidance, principally DOHSA and various state wrongful death statutes.[289]

In this context, however, reference has usually been made to DOHSA and to statutes of only those states most interested in the circumstances of the death, not to the beneficiary schedule most commonly found in state death statutes.[290] Additionally, by referring both to DOHSA and state statutes, the courts have indicated no preference for which source of law is considered more persuasive. As a direct consequence of both these factors, the number of state statutes potentially useful in developing a beneficiary schedule introduces a greater degree of flexibility than exists for other elements.[291]

(d) Limitations Period

The question of a period for limitation of actions was raised in *Moragne* concerning the maritime law death action, but was not resolved. The Court discussed as alternatives the "borrowing" of state statutes of limitation or application of the maritime doctrine of laches, but endorsed neither.[292] In *Higginbotham*, the Court implied that the DOHSA statute of limitations could appropriately be analogized, presumably through the doctrine of laches, as DOHSA constitutes a part of the maritime law.[293] When seamen have availed them-

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action, see generally Nagy, *Non-Dependent Beneficiaries*, *supra* note 195, at 44-47.

[289] *See, e.g.*, Evich v. Connelly, 759 F.2d 1432 (9th Cir. 1985); Glod v. American President Lines, 547 F. Supp. 183 (N.D. Cal. 1982); *In re* ABC Charters, Inc., 558 F. Supp. 364 (W.D. Wash. 1983). This practice became increasingly well-defined after *Higginbotham*, given the Court's intimation that the beneficiary schedule for the maritime law death action should, with most other elements, be defined in accordance with DOHSA. *See supra* notes 175-79 and accompanying text.

[290] *See infra* note 339. A broader reference is typically made to state statutes when other elements are under consideration.

[291] Concerning the propensity of state statutes to have this unsettling influence, see *infra* note 322. Another beneficiary question left unresolved in *Moragne*, and by later decisions of the Supreme Court, concerns the identity of the decedents on whose account the maritime law death action may be brought, and from which recovered damages can then be distributed to the decedent's surviving scheduled beneficiaries. *See generally supra* notes 141-46 & 270 and accompanying text. Concerning a beneficiary schedule for the maritime law survival action, similar flexibility exists, as state statutes vary somewhat among themselves, and greatly in regard to the federal survival action available under the Jones Act. *See supra* note 12. *See also infra* note 341.

[292] *See supra* notes 156-59 and accompanying text.

[293] Regarding laches, see *supra* note 12. For *Higginbotham's* treatment of this question, see *supra* text accompanying notes 175-79. *See generally* Public Adm'r of County of New York v. Angela Compania, 592 F.2d 58, 63-64 (2d Cir. 1979) (incorporating elements of DOHSA into the general maritime law). But see *supra* note 238 and accompanying text regarding certain jurisdictions which consider DOHSA to exclude application of the maritime law death remedy to

selves of the maritime law death action, however, support could conceivably be given to using the Jones Act limitations period over that incorporated into DOHSA because of the complimentary relationship between the Jones Act and seamen.[294] While the Jones Act and DOHSA historically entailed different limitations periods, and therefore could have promoted discordant findings concerning the period in which the maritime law death action might be commenced, this potential problem has been resolved by the recent congruence of the two statutory limitations periods.[295]

(e) Damages

It is sufficient to observe, given the detail already provided on this topic,[296] two aspects of the damages issue that are introductory to the concluding section of this article. First is the critical relationship existing between the character of damages recoverable for a tortious maritime death, and the types of actions by which certain items of those damages may be recovered. A tortious death, if occurring within the admiralty jurisdiction, will customarily support a survival action on behalf of the decedent and a wrongful death action on behalf of his or her beneficiaries.[297] The policies underlying each form of action differ, and their respective measures of recoverable damages reflect those differences.[298] Both types of actions now appear to exist under the general maritime law.[299] In order to preserve the integrity of each, and to best promote the uniformity in the

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the high seas, and which therefore merely apply the terms of DOHSA to high seas incidents of death without resorting to laches. *Cf.* Sanchez v. Loffland Bros. Co., 626 F.2d 1228, 1230 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981) (applying DOHSA's statute of limitations to a high seas death action, and additionally discussing the concept of laches).

[294] Seamen and their beneficiaries are the sole object of the remedial provisions of the Jones Act. *See supra* note 12. Maraist, *Maritime Wrongful Death*—Higginbotham *Reverses Trend and Creates New Questions*, 39 LA. L. REV. 81, 92 (1978) [hereinafter Maraist, *Maritime Wrongful Death*]. Regarding the use of the Jones Act limitation period, see Tialigo v. Steffany, 1975 AMC 1549 (Am. Samoa).

[295] DOHSA historically provided for a two-year statute of limitation. 46 U.S.C. § 763, repealed 1980. 46 U.S.C. § 763(a) (1982). The Jones Act, through incorporation of the FELA, began in 1920 with a two-year statute of limitations, which was increased to three years in 1939 by amendment to the FELA. 45 U.S.C. § 56 (1982). *See* Maraist, *Maritime Wrongful Death*, *supra* note 294, at 92 n.44. By amendment dated 1980, the prescriptive period of DOHSA has been raised to three years. 46 U.S.C. § 763 (1982). Thus, discord on this point is presumably at an end. Regarding the maritime law survival action, it is unclear whether the Jones Act limitations period would be preferable to a limitations period prescribed by a "clear majority" of states.

[296] *See supra* notes 124, 161, 162-83 & 243-86 and accompanying text.

[297] *See supra* note 4.

[298] *Id. See also infra* notes 317-24 and accompanying text.

[299] *See supra* text accompanying notes 1-5. But see *infra* notes 309-11 and accompanying text for the alternative forms these actions have taken.

maritime law that has long been envisioned by the Supreme Court,[300] due care should be taken to award damages for wrongful death and survival under the general maritime law in a manner consistent with the disparate policies underlying the two types of action.[301]

The second damages consideration meriting special mention is the manner in which awards of damages have, subsequent to *Moragne*, been made—and justified—in the context of the maritime law wrongful death action. The determination of damage awards has historically been affected by apparent broad shifts in policy by the Supreme Court, inconsistent treatment of analogous federal and state wrongful death legislation by both the Supreme Court and the lower courts, and varying degrees of uncertainty concerning the relationship of the maritime law death action—and the damages recoverable through it—to wrongful death damages available through other means.[302]

Each of these observable effects is significant to the question of recoverable damages under the maritime law survival action, as that action is theoretically premised both on *Moragne* and, presumably, the subsequent evolution of the maritime law death action.[303] As the maritime law survival action is of recent origin, and remains today in a nascent state of development,[304] its future evolution may be smoothed if attention is paid to the problematic course of development exhibited by its wrongful death progenitor. The maritime law survival action may, by early resolution of the measure of its recoverable damages, promote the fundamental interests of the *Moragne* Court—and the maritime law—by offering a uniform survival remedy. The corollary aims of legal predictability and sound jurisprudence will, with respect to compensation available to a decedent suffering tortious death in the admiralty jurisdiction, be similarly promoted.[305]

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[300] *See supra* notes 154, 222 & 285. *See also infra* note 316 and accompanying text.

[301] *But see supra* note 285. See also *infra* note 316 and accompanying text regarding authorities who dispute the relationship of damages to uniformity of law.

[302] All of these characteristics are evidenced in the apparent exasperation of both courts and commentators. *See, e.g.*, Nygaard v. Peter Pan Seafoods, Inc., 701 F.2d 77, 80 (9th Cir. 1983) (in declining to expand damages recoverable under the Jones Act to include non-pecuniary losses, observing that "*Moragne* and *Gaudet* are authorities simply too oblique to justify a departure from settled law."); Bodden v. American Offshore, Inc., 681 F.2d 319, 321 (5th Cir. 1982) (observing that the Supreme Court's decisions in *Moragne*, *Gaudet*, and *Higginbotham* "[h]ave engendered heavy seas in what previously were calm waters."); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-1, at 272 (considering the Supreme Court's decisions on the maritime law death action to evidence an "eruptive volcano" which continues to foster uncertainty in the law).

[303] *See supra* notes 4-12, 24 & 131 and accompanying text.

[304] *See supra* notes 6-8 and accompanying text.

[305] Regarding the interest of the *Moragne* Court and the general maritime law in uniformity, see *supra* text accompanying notes 154, 222 & 285 and *infra* text accompanying note 316.

V. Recoverable Damages Under the Maritime Law Survival Action: Scope, Character, and Precedent

The maritime law survival action, because it is devolved in principle from the *Moragne* decision, should be developed and refined in a manner consistent with the *Moragne* Court's advice concerning the maritime law death action. Consequently, pertinent state and federal survival laws should be seen as primary referents in devising a measure of damages for the maritime law survival action.[306] This measure should consist of items of damages most commonly evidenced among the survival laws of the various states and, perhaps less importantly, in pertinent federal legislation.[307] While this approach may be logically proposed, and may in fact have been followed inexpressly by many of the lower courts awarding survival damages under the general maritime law,[308] before considering the approach further it is helpful to note certain qualities that may be ascribed to the maritime law survival action, which, by their na-

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Regarding the desirability of predictability and sound jurisprudence, see *supra* note 223 and accompanying text.

[306] The *Moragne* Court advised that the issue of damages recoverable under the maritime law death action should be resolved through reference to DOHSA and the various wrongful death legislation of the states. 398 U.S. at 408. *See supra* note 140 and accompanying text. Both sources of law appear to remain viable referents for that purpose. *See supra* text accompanying notes 263-79. DOHSA is perceived by most authorities not to address the issue of survival damages, it likely has nominal utility as a referent for resolution of the damages recoverable under the maritime law survival action. *See supra* notes 83-99 and accompanying text. The Jones Act does contain a survival provision, however, and therefore would arguably qualify as a federal law referent. *See supra* notes 12 & 99 and accompanying text. Most likely, state survival statutes will be considered to represent a primary source of guidance, however, given the exclusive orientation of the Jones Act to seamen, and not to all persons conceivably suffering tortious death in the admiralty jurisdiction. The exclusive character of the Jones Act would not be of concern, however, if the maritime law survival action is considered to afford remedy only to seamen. *See supra* notes 141-46 & 270 and accompanying text. Indeed, in the event these courts are correct, the Jones Act would provide the most logical source of guidance in the determination of survival damages recoverable under the maritime law. This view does not appear sound, however, as seamen already have a survival remedy under the Jones Act applicable throughout the admiralty jurisdiction, and if the general maritime law survival action was available only to them, it would represent an impermissible judicial interference with the express will of Congress. *Cf. Higginbotham*, 436 U.S. at 625-26. It may be, however, that this conflict has simply not been addressed by the courts. As a final caution, it should be recalled that the Supreme Court has never addressed the question of a maritime law survival action, except to reject its existence. *See supra* note 11 and accompanying text.

[307] See *supra* notes 248-56 and accompanying text regarding the inclusion of only "commonly evidenced" items of damages into the remedial component of the maritime law survival action.

[308] These awards may have accompanied recognition of a maritime law survival action, or simply been awarded under the general maritime law in connection with a wrongful death recovery predicated on *Moragne*. *See supra* notes 4, 5 & 7 and accompanying text.

ture, require further examination of the manner in which its recoverable damages should be identified.

First, it is important to note that the United States Supreme Court and a number of the federal circuit courts of appeal have not yet endorsed the concept of a maritime law survival action.[309] Notably, the Third Circuit has expressly resolved to award survival damages for tortious maritime death without any recourse at all to the general maritime law.[310] A number of other circuit courts have alternatively awarded survival damages under the general maritime law, but without collaterally recognizing a maritime law survival action.[311]

The apparent diversity of these views, echoed in more substantial number by decisions of the lower federal courts and various state courts,[312] suggests a number of different influences on the identification of damages recoverable under the maritime law survival action.[313] These potential influences bear a further, proportionate relationship to the character of the damages conceivably recoverable under the action—a relationship possessed of few uniform qualities, and many non-uniform ones.[314] Both the number of influences and their variegated character illustrate a critical quality of the maritime law survival action, at least as it is currently perceived to exist: it is not, as some commentators have suggested,[315] a settled area of the law disassociated from the problematic develop-

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[309] *See supra* notes 4, 5 & 11 and accompanying text.

[310] *See, e.g.*, Dugas v. National Aircraft Corp., 438 F.2d 1386 (3d Cir. 1971); Kuntz v. Windjammer "Barefoot" Cruises, Ltd., 573 F. Supp. 1277 (W.D. Pa. 1983). *See also supra* text accompanying notes 85-91. Curiously, the Third Circuit also appears to accept the concept of a maritime law survival action. *Cf.* Ward v. Union Barge Line Corp., 443 F.2d 565 (3d Cir. 1971).

[311] *See supra* notes 4 & 7 and accompanying text.

[312] State tribunals may exercise jurisdiction over actions commenced under the general maritime law under § 9 of the Judiciary Act of 1789. 1 Stat. 76-77: "the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it[.]" 1 Stat. 76-77. *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-3, at 277. This provision is contained, in a somewhat modified form, in 28 U.S.C. § 1333 (1976). Regarding contemporary constructions of this section, see Madruga v. Superior Court, 346 U.S. 556 (1954).

[313] A few influences may be suggested without going into detail: state law as opposed to the general maritime law; general maritime law as deriving its substance from both state and federal legislation; state law as opposed to federal law; maritime law survival damages as recoverable in an independent action, and not simply as a part of a wrongful death recovery.

[314] Regarding the non-uniform attributes of these various influences, and their relatively few common points, see *supra* text accompanying notes 34-62, 169-74 & 248-83. The relationship between varied influences and recoverable damages has been illustrated *supra* in notes 133-305 and accompanying text, with particular reference to the maritime law death action.

[315] *See, e.g.*, Swaim, *Requiem for* Moragne*: The New Uniformity*, 25 LOY. L. REV. 1, 4 (1979) (suggesting that the maritime law death action was plagued by uncertainties, but that survival remedies under the maritime law could be considered a pacific issue following the advent of a

ment of the maritime law death action. To the contrary, without careful attention to detail and logic, the former action may indeed follow the troubled course of the latter.[316]

A second less-reasoned but equally noteworthy quality of the maritime law survival action is derived simply from its *raison d'etre*. Because the action exists to compensate a decedent for losses sustained by him or her prior to death,[317] and because the decedent is not likely to enjoy the benefits of that compensation, survival damages are often considered a "windfall" to the decedent's survivors.[318] Coincidentally, there appears to be less general compulsion to even provide an award of survival damages, let alone make the variety of those damages very broad.[319] At least one commentator has suggested, prior to the advent of support for a maritime law survival action, that if the Supreme Court elected to continue the maritime law proscription against survival remedies, the election would do no disservice to considerations of justice and fairness:

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maritime law survival action).

[316] As previously noted, a number of authorities have considered that the desire for uniformity in the maritime law pertains only to concerns of duty and liability, and not to questions of recoverable damages. *See supra* note 285. Conceivably, proponents of this view would suggest that different items of damages would, though only variably awarded under the maritime law would pose no intolerable threat to the uniformity of the maritime law. *See supra* notes 313-14. Consequently, parallels between that action with the maritime law death action, and its troubled history, would be insignificant because the primary distinction between the maritime law survival and wrongful death actions is in their respective measures of recoverable damages. In anticipatory response to this suggestion however, it is noted that the very fabric of a survival action is structured on the type of damages it affords. *See supra* note 4 and accompanying text. *See also infra* notes 323-24 and accompanying text. To the extent variable items of damages are considered recoverable under the single vehicle of a maritime law survival action, uncertainty will exist with respect to what the action is designed to accomplish, and with what supporting reasons; this uncertainty should not be considered tolerable. It would impair the perceived soundness of judicial reasoning—and predictability in the law—considered essential by the Supreme Court in *Moragne*. *See supra* note 223. Of final note is the fact the Supreme Court appears to differ in its conception of the relationship between damages and interests in the uniformity of the maritime law: the Court has at least suggested that the two considerations are not immaterial to one another. *See supra* note 285.

[317] *See supra* notes 4, 13, 27 & 33-34 and accompanying text.

[318] Comment, *Application of State Survival Statutes*, *supra* note 68, at 552. *See also* 1 AM. JUR. 2D *Abatement, Survival and Revival* § 51, at 87 (1962). This conception of survival damages may apply most directly to non-pecuniary items of damages like pain and suffering. *Id.* at 87. *Cf. In re* Cambria S.S. Co., 505 F.2d 517, 523 (6th Cir. 1974), *cert. denied*, 430 U.S. 975 (1975) (stating that "[t]he liberal and humanitarian character of maritime proceedings as expressed in *Moragne* and *Gaudet* contemplates solicitude for dependents, not inanimate estates").

[319] *But cf.* 2 S. SPEISER, *supra* note 4, § 14:3-10 (observing the relatively broad variety of survival damages recoverable among the various states); Annot., 76 A.L.R.3d 125 (1977) (providing examples of the types of survival damages recoverable in some states, with particular emphasis on pecuniary-type damages).

> Such a decision arguably would do no violence to the policies which should dictate the path of maritime tort law. It is one thing to say that the beneficiaries of a person killed in maritime employment can recover nothing; it is quite another to say that those beneficiaries cannot recover, in addition to the damages which they have sustained as a result of the death, the "windfall" of the damages the victim could have recovered if he had lived. A remedy for the former may be necessary to encourage maritime employment; a remedy for the latter seemingly would have little bearing on that policy.[320]

Some authorities have proposed a more substantial purpose for survival actions, of providing a means of redress to the survivors of a decedent who has suffered a tortious death, when those survivors have for some reason been ineligible to recover any wrongful death damages in their own stead. In particular, the survival action is proposed in this context as a means of affording damages to the survivors for the decedent's lost lifetime earnings, which ordinarily would have been recovered through a wrongful death action, and which in most jurisdictions may not even be recoverable in an ordinary survival action.[321] The logical thrust of this proposal is that the same item of damages, the prospective lost earnings of the decedent, would be recoverable on account of a tortious death irrespective of the substantive manner of recovery, or the identity of its recipients.[322] Proponents of this view would obviously not be in sympathy with

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[320] Maraist, *Maritime Wrongful Death*, *supra* note 294, at 94 (1978).

[321] This purpose may merit more consideration than other items of survival damages available in a minority of states, because of the more purposive character of damages for lost earnings, and the general reflections of this purpose in the traditional character of survival actions. Concerning both the character of survival actions and items of damages occasionally available among the states, see *supra* notes 19-132 and accompanying text. The reason usually stated for disallowing damages for lost earnings in a survival action is the danger posed by double recovery—in wrongful death and in survival—of damages on account of the singular earning capacity of the decedent. MINZER, DAMAGES IN TORT ACTIONS, *supra* note 19, § 21.20, at 21-29. In a wrongful death action, the decedent's lost earnings form the primary basis of awards for survivors' pecuniary losses. *See generally* 1 S. SPEISER, *supra* note 20, § 3:1. Damages for lost earnings would simply augment an award of more common survival damages.

[322] The decedent's lost earnings are, by this analysis, considered to be personal "survival" loss sustained as a result of the death; they are suggested to be recoverable in a wrongful death action only because the decedent's lost earnings generally form the basis of damages for pecuniary loss and/or support, to which the decedent's survivors are entitled. M. MINZER, DAMAGES IN TORT ACTIONS, *supra* note 19, § 21.20, at 21-29. *See also* 22 AM. JUR. 2D *Damages* § 129, at 185-86 (1965). While this theory advocates a formless award of damages for the decedent's lost earnings, it ignores the consequences of such a policy for the different purposes of the survival and death actions, and their separable beneficiaries. *See supra* notes 4, 287 & 294-95 and accompanying text. While in most instances the decedent's estate will be distributed among identified heirs, the identity of these heirs may differ widely according to statutes affecting testate and intestate distribution, by provisions of testacy, and the like. It is easy to foresee that the identity of the heirs thus recovering the damages for lost earnings could, on this account, differ markedly from the

the perception of survival damages as being a "windfall."

One critical problem inheres to this view, and concerns the basic policy differentiation between survival actions and actions for wrongful death.[323] If awards of damages are presumed to serve any purposive function, they must logically relate to the manner of their receipt. This logical relationship is effaced if certain items of damages are considered to be recoverable by individuals primarily by an action for wrongful death, but if they do not qualify as a beneficiary of such an action, through the alternative means of a survival action. Until such time as survival actions are merged with wrongful death actions, a measure currently adopted in only a few states,[324] there must be a presumptive recognition of the separability of the two forms of action, of their respective measures of recoverable damages, and of their intended beneficiaries.[325]

Significantly for the maritime law survival action, the states evidence wide diversity in their efforts to segregate survival and wrongful death actions.[326] This diversity, to the extent it may be reflected referentially in the maritime law survival action, mandates further inquiry into the logical scope of damages to be associated with the action, which should in turn include only items of damages evidencing generalized support. Damages only infrequently available by statute, or available only through peculiar types of action, should not be considered suitable for inclusion into the damages recoverable under the maritime law survival action.[327] In this regard, it should be remembered that while survival damages were first considered recoverable in a maritime law wrongful death action, the clear trend appears to favor recognition of an independent maritime law survival action, distinguishable both in policy and substance from its

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usual character of wrongful death beneficiaries, who are generally identified with reference to their pecuniary loss following as a result of the decedent's death, or in reference to a dependency status on the decedent; these conditions are also associated with the beneficiaries of the maritime law wrongful death action. *See generally* Nagy, *Non-Dependent Beneficiaries*, *supra* note 195. Adoption of this policy of recovery in the maritime law would result in chaos with respect to identification of beneficiaries and of policies supporting their recovery of damages. *See generally supra* notes 4, 288 & 316 and accompanying text. Such a development is unwelcome in the maritime law. *See supra* notes 300 & 305. Regarding this and other means of awarding damages for lost earnings, see generally 22 AM. JUR. 2D *Damages* § 129, at 185-88 (1965). *See also* Annot., 76 A.L.R. 3d 125 (1977).

[323] *See supra* note 4.

[324] *See supra* notes 46-53 and accompanying text.

[325] The specific beneficiaries of wrongful death actions may vary among jurisdictions, see *supra* notes 141-46, 270, 297, and accompanying text, but they evidence the common character of being survivors of the decedent who demonstrably suffer loss as a result of the death. Survival actions, on the other hand, generally benefit the decedent's estate. *See supra* note 4.

[326] For an illustration of some of these responses, see 22 AM. JUR. 2D *Damages* § 129, at 185-88; Annot., 76 A.L.R.3d 125.

[327] *See supra* text accompanying notes 250-52. Common approbation does not attend the use of survival statutes to recover lost earnings.

wrongful death counterpart.[328]

A. *Maritime Law Survival Damages: Logical Scope and Character*

In the preceding sections of this article, certain points have been discussed that lead ineluctably to resolution of the logical scope and character of the damages recoverable under the maritime law survival action. Among the more salient of these points were the following: first, an illustration was provided of the items of damages typically or atypically recoverable in contemporary survival actions;[329] second, the general character of survival actions was discussed as those actions were cognizable in admiralty causes prior to *Moragne*;[330] third, *Moragne* and subsequent decisions of the Supreme Court were examined for insights concerning the maritime law wrongful death action.

Among the more significant of these insights which are equally applicable for the most part to the maritime law survival action, were the following: that the Court was not creating a "new" cause of action, but merely affording a means of access to existing death remedies; that consistent with this view, existing legislation and decisional law would provide adequate guidance regarding reso-

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[328] *See supra* notes 4-5 and accompanying text. One federal district court has, as part of a recovery cognizable under a maritime law survival action, awarded damages for the decedent's prospective lost earnings. Muirhead v. Pacific Inland Navigation, 378 F. Supp. 361 (W.D. Wash. 1974). The *Muirhead* Court relied principally on the Supreme Court's expressions in *Moragne* and *Gaudet* in sanctioning this award, particularly the apparent liberal sentiments of the *Gaudet* majority. *See supra* notes 166-71 and accompanying text. Significantly in this regard, the *Muirhead* court observed that prior to *Moragne*, a non-Jones Act case commenced with respect to a death occurring in territorial waters could, by provision of Washington state law, result in a survival recovery of lost prospective earnings. 378 F. Supp. at 363. Relying on the *Moragne* Court's suggestion that "[i]t better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules," 398 U.S. at 387, (quoting The Sea Gull, 4 F. Cas. 909 (C.C. Md. 1865 (No. 12, 578)) and the apparent embodiment of this philosophy in the majority opinion in *Gaudet*, the *Muirhead* court allowed as survival damages an award of the decedent's prospective lost earnings. 378 F. Supp. at 363. The *Muirhead* court implicitly acknowledged, however, that the Washington survival statute would not ordinarily apply to high seas incidents of tortious death. The maritime law survival action is now considered to apply to the high seas, at least in the Fifth Circuit, which is the only court to have yet directly addressed this point. Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 889, 893 (5th Cir. 1984) (cited with approval in Evich v. Connelly, 759 F.2d 1432, 1434 (9th Cir. 1985)). The *Muirhead* court's reliance on Washington state law, and its pre-*Moragne* application in admiralty, is made obsolete by this wider applicability of the maritime law survival action; the action now must be considered in a far larger perspective, and the items of damages it incorporates must be determined in the first instance by reference to the laws of all states, and to applicable federal laws, and not merely to laws representative of regional interests. *See infra* text accompanying notes 329-46.

[329] *See generally supra* notes 19-62 and accompanying text.

[330] *See generally supra* notes 63-132 and accompanying text.

lution of subsidiary elements of the maritime cause;[331] and that certain standards were eventually developed to control the manner in which these various sources of law were used by the lower courts in their efforts to resolve subsidiary issues.[332] Fourth, uncertainty plagued the maritime law death action in regard to refinement of its various subsidiary elements, despite the Court's advice.[333] Finally, the lower courts have reached no consensus concerning the existence or substantive composition of a maritime law survival action, and the Supreme Court has remained silent on the issue in the post-*Moragne* period.[334]

The basic purpose in elaborating on the foregoing points was to show, consistent with *Moragne* and later, related expressions of the Supreme Court, that the damages component of the maritime law survival action must be resolved in accord with existing laws. Additionally, this component must be refined through reference to only those items of damages evidencing the positive endorsement of at least a majority of the states, if not also pertinent federal legislation.[335] The specific character of this refinement, as proposed, may be achieved because there are certain items of survival damages that are widely endorsed by the states, as well as pertinent federal legislation, and which stand in marked contrast to items of damages available in far less frequent measure.[336]

Unless an effort is made now to identify an exact measure of damages, in the relatively early stages of the development of the maritime law survival action, a strong possibility exists that this development will mirror the same uncertainty that has attended the evolution of the maritime law death action, and will evidence the same lack of uniformity in its progenitorial decisions. Such an event would not only be patently undesirable, but because it would necessarily arise through a lack of attention to the lessons occasioned by the maritime law death action, it would be inexcusable.

Keeping the foregoing points in mind, the items of damages that experience majority support among the states are antemortem pain and suffering, earnings lost between the time of injury and the time of death, medical expenses incurred between the time of injury and the time of death, and funeral expenses where they are chargeable to the decedent's estate.[337] Significantly, these same items of damages are compensable under the Jones Act, which represents the

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[331] *See generally supra* notes 133-305 and accompanying text.

[332] *See supra* notes 243-86 and accompanying text.

[333] *See generally supra* notes 227-305 and accompanying text.

[334] *See supra* notes 4-11 and accompanying text.

[335] *See generally supra* text accompanying notes 250-86.

[336] *See generally supra* text accompanying notes 32-62.

[337] 2 S. SPEISER, *supra* note 4, § 14:6; G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, *supra* note 3, § 6-30, at 360. *See also supra* text accompanying notes 32-36 & 45-62. Regarding the question of burial expenses, see generally Note, *Recovery of Funeral Expenses in a Survival Action*, 21 U. MIAMI L. REV. 716 (1967).

one federal survival remedy applicable to admiralty causes.[338]

One consideration that must be critically associated with these generally available items of damages concerns their potential contradiction by the survival laws of certain states. While *Moragne* and its progeny counsel the use of state laws in determining damages, and advise that the maritime law death (or survival) action is to afford access to "existing remedies," these expressions can no longer viably be construed to mean that the survival law of a particular state should be considered guiding authority over the representations of the laws of all the states, simply because a death occurs that affects the one state's interests in a unique or singular fashion.[339] In fact, the Supreme Court appears clearly to favor reference to the laws of all states, and not to any one.[340]

The maritime law survival action must now be considered a single cause of action, largely unaffected in its composition by competing federal legislation.[341] As such, because it has applicability throughout the admiralty jurisdiction,[342] there is no reason to support recoveries that will vary according to the location of the subject death. If that type of variation is endorsed, there is no reason to require a maritime law survival action to exist, as it is founded on *Moragne*, and the Supreme Court in that decision expressly strove to unify the character of the maritime law by obviating the need to rely upon the variegated wrongful death

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[338] *See supra* notes 4, 32, 36, 44 & 52 and accompanying text.

[339] Throughout the evolution of the maritime law death action, courts have persisted in their reference to the laws of particular states in devising the substance of certain subsidiary elements of the maritime law death action. *See, e.g.*, Evich v. Connelly, 759 F.2d 1432, 1433 (9th Cir. 1985) (determining a beneficiary schedule for the maritime law death action); Spiller v. Lowe & Assoc., 466 F.2d 903, 905-10 (8th Cir. 1972) (determining compensability of survival damages); Muirhead v. Pacific Inland Navigation, 378 F. Supp. 361, 362-63 (W.D. Wash. 1974) (identifying recoverable survival damages).

[340] *See supra* notes 251-57 and accompanying text. *But cf. Tallentire*, 106 S. Ct. at 2491 n.1 (intimating that in regard to survival actions, the statutes of the individual states might be separately considered).

[341] This attribute of the maritime law survival action stands in contradiction to the maritime law death action, which was found to be in direct competition with DOHSA. The competition was addressed and resolved by the Supreme Court in *Higginbotham*. *See supra* notes 173-74 & 260 and accompanying text. The Jones Act could conceivably be identified as a federal enactment in conflict with the maritime law survival action, but this has apparently already been addressed and rejected *sub silentio* by the courts recognizing the action to exist. *See supra* note 278. In any event, the damages recoverable under the Jones Act are largely consistent with the damages recoverable under the majority of state statutes, so any conflict on this issue is nominal. *See supra* note 338 and accompanying text. The one area of potential significant conflict concerns the beneficiary schedule of the Jones Act survival provision, which does not include the decedent's estate, as do most state survival provisions. As the Jones Act survival provision is in this respect anomalous, it is likely that the state "estate-beneficiary" practice will be incorporated into the maritime law survival action. *See supra* note 12.

[342] Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890 (5th Cir. 1984). *See also supra* notes 3 & 147.

laws of the many states.[343] Similarly, given the apparent existence of a maritime law survival action, it should be conceived to afford a remedy that is devoid of regional affectations.

The Supreme Court has in fact shown how this regional influence is to be avoided, by noting in *Gaudet* that the courts are to look to the general state of the law in refining the substantive elements of actions cognizable under the general maritime law.[344] This stated policy is consistent with the long-standing practice of the Court of balancing federal concerns against those of the various states in regard to admiralty matters. Typically, this practice has resulted in the subordination of the states' interests to the extent they impact negatively on the uniformity of the maritime law.[345] This subordination is compelled with respect to the maritime law survival action, as without it, if the survival provisions of particular states are to be interjected into the remedies realizable through the action, the action serves no functional purpose.[346]

B. Maritime Law Survival Damages: Precedent Consistent With Their Logical Scope and Character

Among the federal circuit courts that have recognized a maritime law survival action, the only item of damages expressly acknowledged to be recoverable was the decedent's antemortem pain and suffering.[347] While some of these decisions have included language suggesting that this item of damages was exclusively recoverable,[348] a more likely perception is that pain and suffering was the only type of damages properly considered by the court under the facts in issue.[349] In this sense, these decisions are compatible with the logical construction

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[343] *See supra* note 130 and accompanying text.

[344] *See supra* notes 249-52 and accompanying text. *Cf.* American Export Lines v. Alvez, 446 U.S. 274, 284 n.11 (1980) ("clear majority").

[345] *See supra* notes 70 & 106-21 and accompanying text.

[346] If particular state law applications are permitted, broad non-uniformity in the law would result given the presence of fifty "influential" states and additional territorial jurisdictions, and the renewed debate of whether federal (Jones Act) or state law ought to be of primary influence. Regarding debate on the relationship of the interest in uniformity of the maritime law and damages recoverable under its guise, see *supra* notes 285 & 316.

[347] *See supra* note 39. For identification of the courts adopting this holding, see supra note 4.

[348] *See, e.g.*, Barbe v. Drummond, 507 F.2d 794, 799 (1st Cir. 1974) ("[W]e believe that the policy enunciated by the Supreme Court in *Moragne* provides ample support for us to hold that there is a federal maritime survival action, created by decisional law, for pain and suffering prior to death."); Spiller v. Lowe & Assoc., 466 F.2d 903, 909 (8th Cir. 1972) ("[T]he general maritime law now contains a survival action for pain and suffering"). *See also* Chute v. United States, 466 F. Supp. 61, 69 (D. Mass. 1978); Greene v. Vantage S.S. Corp., 466 F.2d 159, 166-67 (4th Cir. 1972).

[349] For instance, the District Court of Massachusetts relied on *Barbe* in making an award of

of the damages component of the maritime law survival action, which includes as an item of recovery an award on account of the decedent's antemortem pain and suffering.[350] The decisions of the federal district courts are also largely consistent with the logical construction earlier described, in that only one court appears to have departed from the enumerated items of logical damages.[351]

Two related considerations attach to the observed consistency of damages awarded under the general maritime law survival action. The first concerns the conception that these decisions now, simply by their number and age, constitute "precedent" which obviates any more expansive award under the maritime law.[352] The second is largely the antithesis of the first, and involves the maritime law doctrine that it is better to give than to withhold a remedy "when not required to withhold it by established or inflexible rules."[353] The latter doctrine is more likely to control over the former in future applications of the maritime law survival action, as a restriction of recoverable damages to pain and suffering would be inconsistent with the general character of survival remedies available in admiralty causes prior to *Moragne*, and therefore would be incongruous with *Moragne's* advice that the maritime law action was simply designed to afford access to existing remedies.[354] In view of this potential incongruity, and the questionable scope of the courts' analyses of the damages component of the action, the decisions in question should not be considered to reflect "established or inflexible rules."[355]

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pain and suffering, but additionally contemplated that survival actions in general afforded compensation for the "wages, medical expenses, and the pain and suffering of a decedent between the time of injury and death[.]" *Chute*, 466 F. Supp. at 63, n.2 (citing DOBBS, REMEDIES, § 8.2 (1973) and PROSSER AND KEETON ON TORTS, *supra* note 21, § 127). The *Chute* court was not considering an injury to an individual which, after the elapse of some period of time, resulted in the death of the injured person; consequently, no medical expenses or lost earnings were in issue. This same scenario is apparently common to the federal circuit court decisions awarding pain and suffering damages in connection with a maritime law survival action. *But cf.* Greene v. Vantage S.S. Corp., 466 F.2d 159 (4th Cir. 1972) (decedent dying thirty-six hours after injury). *Cf. Tallentire*, 106 S. Ct. at 2491 n.1 (the Court stating that the Court was not considering the question of whether survival damages for pain and suffering could be recovered on the high seas under state law; no other item of damages was mentioned).

[350] *See supra* text accompanying notes 335-46.

[351] Muirhead v. Pacific Inland Navigation, 378 F. Supp. 361 (W.D. Wash. 1974) (awarding damages for lost prospective earnings of the decedent). *See supra* note 328 and accompanying text. *Cf.* Green v. Ross, 338 F. Supp. 365 (S.D. Fla. 1972), *aff'd*, 481 F.2d 102 (5th Cir.), *cert. denied*, 414 U.S. 1068 (1973) (suggesting that an award of punitive damages might be cognizable in a maritime law survival action).

[352] Regarding conceptions of "precedent" in this concept, see generally *supra* note 39.

[353] *Moragne*, 398 U.S. at 387 (quoting *Sea Gull*, 21 F. Cas. 909, 912 (No. 12, 578) (C.C. Md. 1865)). *See also supra* notes 39, 146 & 226.

[354] Regarding *Moragne's* advices in this regard, see *supra* text accompanying notes 138-40.

[355] One exception to this proposition might be damages for a decedent's post mortem earn-

One final point may emphasize the consistency of existing decisions with the proposed damages component of the maritime law survival action. Among the circuit courts that have awarded survival damages under the maritime law without benefit of any independent recognition of a survival action,[356] pain and suffering has again been the primary item of damages expressly identified. Even if reference is made to the continued practice in at least one jurisdiction of using state survival statutes in admiralty, that practice carried to its logical extreme poses no untoward conflict with the maritime law survival action. Most state survival statutes would, if applied, afford damages consistent with the proposed damages component of the maritime action.[357]

Consequently, contemporary decisions consistently associate the maritime law survival action with its most logical scope of damages. Similarly, that same measure of damages is characteristic of damage awards made through alternative means currently effected for providing survival remedies in admiralty causes.

VI. CONCLUSION

It appears well-settled that the general maritime law now contains a survival action, and that the action is experiencing a continued frequency of application. Somewhat inconsistent with this promising development, the courts' construction of the action have generally contained little substantive detail except what might be inferred from references to philosophical support contained in *Moragne* and related Supreme Court decisions. In the absence of greater detail, any prospective consideration of the substantive character of the maritime law survival action is problematic, especially in view of the confusing history that has attended the evolution of the maritime law death action first recognized in *Moragne*.

With respect to this current, problematic state of the maritime law survival action, the most troubling consequence is the uncertainty which attaches to the measure of damages recoverable under the action. This measure of damages is integrally related to the very purpose of the survival action, and to the extent

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ings. This item of damages is generally ripe for consideration irrespective of the circumstances of death. The courts' general failure to award this item of damages might be a more affirmative rejection than simply a question of non-materiality to the grounds of decision. *See supra* note 328.

[356] See *supra* note 4 for identification of these courts and their pertinent decisions.

[357] For jurisdictions still applying state laws, see *supra* notes 85-91 & 114 and accompanying text. Concerning a possible greater utility for state survival statutes even where a maritime law survival action has been recognized to exist, see *supra* note 270. *But cf.* Dugas v. National Aircraft Corp., 438 F.2d 1386, 1388-89 (3d Cir. 1971) (suggesting that lost lifetime earnings might be compensable under state survival statutes employed in admiralty causes—though presumably only as the particular statute might provide).

the measure remains unresolved, the future integrity of the action is somewhat suspect. This particular effect is compounded by realization that the action is premised on *Moragne*, which addressed the entirely separable question of a wrongful death remedy, and *Gaudet* and *Higginbotham*, which addressed the disparate question of wrongful death damages.

In view of this undesirable cloud upon the potential efficacy of the maritime law survival action, the object of this article has been to logically project a measure of damages for that action in view of all of the factors of the action's origin, historical background, and future applications. This measure of damages includes the decedent's antemortem pain and suffering, medical expenses incurred by the decedent between the time of injury and the time of death, earnings lost by the decedent between the time of injury and the time of death, and funeral expenses where the same are chargeable to the decedent's estate. This measure of damages includes only those items of damages which may be philosophically reconciled with *Moragne* and its progeny, with the object and general character of survival actions both past and contemporary, and with the constitutionally-based interest in the uniformity of the maritime law. It is posited that this measure would be of great utility if considered to attend future applications of the maritime law survival action.

Through the Looking Glass—Finality, Interlocutory Appeals and the Hawaii Supreme Court's Supervisory Powers

by Robert Green*

The recent Hawaii Supreme Court opinion of *Mason v. Water Resources International*[1] addressed a serious problem facing our courts. Justice Padgett, writing for the court, voiced concern over the steadily increasing appellate caseload and the recurring problem of litigants prematurely appealing non-final orders.[2] Unfortunately, most fatally defective cases are summarily dismissed either sua sponte or by way of motion without a published opinion. Publication would bring the errors to the attention of the bar and hopefully lawyers could and would heed other's mistakes; absent publication, the same problems resurface with alarming regularity. Premature appeals generally will not bar a subsequent appeal following entry of a final order, however, the inherent waste of both attorney and judicial time is a serious problem.

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[1] 67 Haw. 510, 694 P.2d 388 (1985). The Hawaii Supreme Court and the Hawaii Intermediate Court of Appeals (ICA) have substantially relieved the backlog on the Hawaii appellate court dockets. In 1978, Chief Justice Richardson wrote that based on a study of the Hawaii judicial system, "even if no appeals were accepted, it would require over three years for the Hawaii Supreme Court at the current rate of disposition to dispose of all appeals pending on December 31, 1976." Richardson, *Remarks on Alternate Proposals To Remedy Appellate Court Congestion in Hawaii*, 14 HAW. B.J. 55, 58 (1978). However, in 1985, Justice Padgett's assessment of the caseload was remarkably different: "[t]he appellate courts in this State are, perhaps, unique in the United States in that they have been able to become current with their case load." 67 Haw. at 511, 694 P.2d at 389.

The federal courts are experiencing a similar rapid growth in the numbers of appeals filed. *See* Henry v. City of Detroit Manpower Dep't, 763 F.2d 757, 764 (6th Cir. 1985) (Merritt, J., dissenting) ("The number of cases in the Federal Courts of Appeal has risen tenfold in the last 20 years.").

[2] 67 Haw. at 511, 694 P.2d at 389.

While the finality doctrine in Hawaii appears simple and straightforward, the appellate path is wrought with traps to catch the unwary. Initially, appeals only lie from a final judgment, as that term is used in section 641-1 of the Hawaii Revised Statutes.[3] Our courts have unfortunately found it extremely difficult to define "final."[4] Compounding the problem are several firmly entrenched judicially created exceptions to the finality requirements. Particular rulings from the bench are so distinct from the merits of the case or so important that immediate appellate review is warranted. Furthermore, certain interlocutory orders are statutorily appealable[5] or certifiably[6] appealable by the trial judge, regardless of

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[3] Jacober v. Sunn, 5 Haw. App. 20, 26, 674 P.2d 1024, 1028 (1984). HAW. REV. STAT. § 641-1(a) (1985) provides:

> Appeals shall be allowed in civil matters from all final judgments, orders, or decrees of the circuit and district courts and the land court, to the supreme court or to the intermediate appellate court, except as otherwise provided by law and subject to the authority of the intermediate court to certify reassignment of a matter directly to the supreme court and subject to the authority of the supreme court to reassign the matter to itself from the intermediate appellate court.

It is important to bear in mind "that statutes authorizing appeals are to be strictly construed," Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 247 (1984); Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 43 (1983), and that since appellate courts are "statutory courts, [their] jurisdiction may not exceed that granted to [them] by Congress." *In re* Rini, 782 F.2d 603, 606 (6th Cir. 1986). *See generally* State *ex. rel.* Marsland v. Town, 66 Haw. 516, 521, 668 P.2d 25, 29 (1983); State v. Shintaku, 64 Haw. 307, 310, 640 P.2d 289, 292 (1982). *See also* Chambers v. Leavey, 60 Haw. 52, 57, 587 P.2d 807, 810 (1978); Samuel Mahelona Memorial Hosp. v. County of Kauai Civil Serv. Comm'n, 46 Haw. 260, 263, 377 P.2d 703, 705 (1962); *In re* Sprinkle & Chow Liquor License, 40 Haw. 485, 491 (1954). *But see In re* Coordinated Pretrial Proceedings In Petroleum Prod. Antitrust Litig., 747 F.2d 1303, 1305 (9th Cir. 1984) ("[A]ppealability . . . must be given a 'practical rather than a technical construction.' ").

[4] *See infra* notes 14 and 88 and accompanying text.

[5] HAW. REV. STAT. § 641(1)(b)-(c) (1985) provides:

> (b) Upon application made within the time period provided by the rules of court, an appeal in a civil matter may be allowed by a circuit court in its discretion from an order denying a motion to dismiss or from any interlocutory judgment, order, or decree whenever the circuit court may think the same advisable for the speedy determination of litigation before it. The refusal of the circuit court to allow an appeal from an interlocutory judgment, order, or decree shall not be reviewable by any other court.
>
> (c) An appeal shall be taken in the manner and within the time provided by the rules of court.

[6] *See* Hawaii Rules of Civil Procedure 54(b), which provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for the delay and upon an express direction for entry of a judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all of the parties shall not terminate the action as

the fact that they are in no way a final judgment. Finally, some appellants will attempt to invoke the supreme court's supervisory powers over the inferior courts in an effort to circumvent the appellate process.[7]

Out of necessity, courts have restricted both judicial and legislative exceptions to the finality rule.[8] In so doing, many cases have been dismissed sua sponte, regardless of the burdensome expense in prosecuting appeals and the inherent

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to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

HAW. R. CIV. P. 54(b).

[7] Writs of mandamus are usually sought to compel the lower courts to change the "appealed" from ruling. *See* HAW. REV. STAT. § 602-4 (1985) and HAW. REV. STAT. § 602-5 (1985) which provide in pertinent part:

602-4 . . . The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law.

602-5 . . . The supreme court shall have jurisdiction and powers as follows:

. . . .

(4) To exercise original jurisdiction in all questions arising under writs directed to courts of inferior jurisdiction and returnable before the supreme court, or if the supreme court consents to receive the case arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices; and such other original jurisdiction as may be expressly conferred by law;

. . . .

(6) To make or issue any order or writ necessary or appropriate in aid of its appellate or original jurisdiction, and in such case any justice may issue a writ or an order to show cause returnable before the supreme court;

(7) To make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.

[8] As early as 1896, the Hawaii Supreme Court, in denying an interlocutory appeal wrote:

[If such] appeals were allowed from all such rulings it would be in the power of a defendant, even in a very clear case against him, to keep the case oscillating between the original and appellate courts almost indefinitely, to the great expense and annoyance and perhaps even practical denial of justice to the plaintiff, to say nothing of the annoyance to the courts and the occupation of their time with trivial matters.

Barthrop v. Kona Coffee Co., 10 Haw. 398, 401 (1896). The obvious waste of precious judicial assets caused one court to lament:

This litigation has been unduely prolonged, unnecessarily burdening this court in this appeal, as it will burden the district court in the proceedings which will undoubtedly follow. Nevertheless, jurisdictional requirements may not be disregarded for convenience sake. "We are no happier with [a dismissal for want of jurisdiction] than you are, and yet if we have no jurisdiction, we cannot act."

Venen v. Sweet, 758 F.2d 117, 123 (3d Cir. 1985) (quoting Garth, *A View From Both Sides of The Bench*, 88 F.R.D. 93, 94 (1981).

waste of the appellate courts' valuable time.[9]

This article will address the confusion surrounding finality in Hawaii.[10] Existing federal and Hawaii case law will be analyzed to find a uniform scheme of appealability, regardless of the stage in trial proceedings.[11] Part I will address the problems inherent in the concept of "finality." Part II will analyze section 641-1(b) of the Hawaii Revised Statutes, and the permissible interlocutory appeals thereunder. Part III looks to Rule 54(b) of the Hawaii Rules of Civil Procedure in the multi-party or multi-claim context. Part IV addresses the judicially created exceptions to section 641-1(a). Finally, part V discusses the supervisory powers of the supreme court and more particularly, writs of mandamus. The following discussion will aid future appellants in Hawaii to avoid the many pitfalls of the finality doctrine while they "secure the just, speedy, and inexpensive determination of every action."[12]

I. The Concept of Finality

"The Game Isn't Over Until It's Over"[13]

In every case of appellate review, the primary inquiry must be whether the

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[9] *See, e.g.*, Familian v. Northwest, Inc., 68 Haw. ____, 714 P.2d 936 (1986); Mohl v. Bishop Trust Co., 2 Haw. App. 296, 630 P.2d 1084 (1981). This is not a problem unique to Hawaii. *See, e.g.*, Butler v. Dexter, 425 U.S. 262, 263 n.2 (1976); Shiley, Inc. v. Bentley Laboratories, Inc., 782 F.2d 992 (Fed. Cir. 1986); Bender v. Clark, 744 F.2d 1424, 1426 (10th Cir. 1984); Hoohuli v. Ariyoshi, 741 F.2d 1169, 1171 n.1 (9th Cir. 1984); Motorola, Inc. v. Computer Displays Int'l, Inc., 739 F.2d 1149, 1153-54 (7th Cir. 1984).

[10] For an excellent analysis of the mechanical procedures of appellate review in Hawaii, see Goodbody & Hood, *An Introduction To Hawaii's New Appellate System*, 15 HAW. B.J. 47 (1976). Also, this article will not address appealability in the context of labor disputes, see HAW. REV. STAT. § 380-10 (1985), probate, see HAW. REV. STAT. § 560:3-413 (1985), or condemnation, see HAW. REV. STAT. § 101-34 (1985).

[11] The published opinions bear out the fact that litigants will pursue appellate review from virtually any stage of the case. *See* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) (order disqualifying counsel); Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1 (1983) (stay of proceedings); New York Times Co. v. Jascalevich, 439 U.S. 1304 (1978) (motion to quash a subpoena); FTC v. Alaska Land Leasing, Inc., 778 F.2d 577 (10th Cir. 1985) (discovery order); Tenneco, Inc. v. Saxony Bar & Tube, Inc., 776 F.2d 1375 (7th Cir. 1985); Hoohuli v. Ariyoshi, 741 F.2d at 1169 (motion to dismiss the complaint); Familian v. Northwest, Inc., 68 Haw. ____, 714 P.2d 936 (1986) (post-judgment relief); Jezierny v. Biggins, 57 Haw. 82, 548 P.2d 251 (1976) (motion to amend pleadings); Hurtig v. Terminix Wood Treating & Contracting Co., 5 Haw. App. 221, 685 P.2d 799 (1984) (partial summary judgment).

[12] Bankers Trust Co. v. Mallis, 435 U.S. 381, 386-87 (1978) (discussing the Federal Rules of Civil Procedure). This objective a fortiori applies to rule 54(b). *See* Louisiana World Expos., Inc. v. Logue, 746 F.2d 1033, 1039 (5th Cir. 1984) (quoting *Bankers Trust* in the 54(b) context).

[13] Y. Berra, *quoted in* B. CHIEGLER, VOICES OF BASEBALL QUOTATIONS ON THE SUMMER GAME

judgment, ruling or order appealed from is final.[14] Absent a final order, appealability is rarely granted.[15] Much has been written as to what is or what is not a final judgment.[16] One commentator described the finality doctrine as an "unacceptable morass . . . a kind of crazy quilt legislation and judicial decisions;"[17] another called it "a statutory machete."[18] Early Hawaii courts dealt with the importance of finality and recognized the difficulty in formulating a universal

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156 (1983).

[14] *In re* Hawaiian Gov't Employees' Ass'n, 63 Haw. 85, 89, 621 P.2d 361, 364 (1980); *In re* Castle, 54 Haw. 276, 278, 506 P.2d 1, 3 (1973). While HAW. REV. STAT. § 641-1(a) allows appeals as a matter of right from all "final" judgments, see Chuck v. St. Paul Fire & Marine Co., 61 Haw. 552, 606 P.2d 1322 (1980), the original statute did not expressly refer to finality. *See* Act 40, § 1, 1898-1904 HAW. SESS. LAWS 78 (approved May 27, 1898); REV. LAWS HAW. § 3501 (1935); REV. LAWS HAW. § 9503 (1945); REV. LAWS HAW. § 208-3 (1955). Nonetheless, finality was found to be implicitly required. *See* Barthrop v. Kona Coffee Co., 10 Haw. 398 (1896).

[15] The only exception to a finding of the requisite finality is contained in HAW. REV. STAT. § 641-1(b). *See infra* notes 89-111 and accompanying text. All other so-called "exceptions" to the finality rule such as *Cohen*, see *infra* notes 177-215 and accompanying text, *Forgay*, see *infra* notes 217-30 and accompanying text, and *Gillespie*, see *infra* notes 232-55 and accompanying text, are not really exceptions at all. These three judicial creations have simply broadened the scope of finality.

Under *Cohen*, certain rulings and orders were so separate from the merits of the case that a decision from the bench thereon constituted a "final" order as to that issue only. *Forgay* ascribed a final nature to rulings that pose a threat of immediate and irreparable harm to the putative appellant, and was therefore, of necessity "final." In *Gillespie*, the court balanced the competing policy interests of avoidance and piecemeal appeals and the relevant need for immediate review on *ad hoc* basis.

It is important to keep this doctrinal distinction in mind when evaluating the propriety of an appeal. It is more than a matter of semantics, and in the discussion of Rule 54(b) *infra*, the distinction plays an important role in Hawaii.

[16] *See, e.g.*, Aware, *The Final Judgment Rule and Party Appeals of Civil Contempt Orders: Time For A Change*, 55 N.Y.U. L. REV. 1041 (1980); Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 LAW & CONTEMP. PROBS. 165 (1984); Leuteneker, *Interlocutory and Final Appeals In Hawaii*, 9 HAW. B.J. 45 (1971); Rosenberg, *Solving the Federal Finality—Appealability Problem*, 47 LAW & CONTEMP. PROBS. 171 (1984); Schickele & Geisinger, *Interlocutory Appeals Pursuant to 28 U.S.C. § 1292(b) and Their Use In Class Actions: Discretion Displaces The Death Knell*, 15 U.S.F. L. REV. 321 (1981); Note, *Toward A More Rational Final Judgment Rule: A Proposal To Amend 28 U.S.C. § 1292*, 67 GEO. L.J. 1025 (1979); Note, *Interlocutory Appeals in Federal Court Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607 (1975); Note, *Motion For Appointment of Counsel and the Collateral Order Doctrine*, 83 MICH. L. REV. 1547 (1985); Note, *Mandamus As A Means of Federal Interlocutory Review*, 38 OHIO ST. L.J. 301 (1977); Note, *Tightening the Collateral Order Doctrine*, 50 UMKC L. REV. 99 (1981); Comment, *The Collateral Order Doctrine After* Firestone Tire & Rubber Co. v. Risjord: *The Appealability Of Orders Denying Motions For Appointment Of Counsel*, 62 B.U.L. REV. 845 (1982).

[17] Rosenberg, *supra* note 16, at 172.

[18] Carrington, *supra* note 16, at 166.

and workable definition.[19]

A. *Definition of Final and the Finality Rule*

In spite of the inherent difficulty in defining final judgments, Hawaii courts consistently describe them as "an order ending the proceedings, leaving nothing further to be accomplished. Consequently, an order is not final if the rights of a party involved remain undetermined or if the matter is retained for further action."[20] As the Hawaii Intermediate Court of Appeals (ICA) recently noted "[t]he determinative factor is the nature and effect of the order."[21]

Conversely, the federal courts have more broadly construed the concept of finality. In the most recent United States Supreme Court pronouncement on the issue, the Court cited 28 U.S.C. section 1291[22] as vesting jurisdiction in the courts of appeal over only final decisions.[23] Final decisions, however, are "not necessarily . . . the last order possible to be made in a case."[24] Several appellate courts have recently opined that in difficult cases, finality ought to be given a "practical rather than a technical construction."[25] Under this analysis, the court

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[19] *See generally Barthrop*, 10 Haw. 398, 400 (1896) ("It is difficult, perhaps impossible, to define accurately what is or what is not a final decision for the purpose of appeal.").

[20] *Familian*, 68 Haw. at ____, 714 P.2d at 937 (quoting Gealon v. Keala, 60 Haw. 513, 520, 530 P.2d 621, 626 (1979)). *Accord In re* Hawaii Gov't Employees' Ass'n, 63 Haw. at 289, 621 P.2d at 364; Sturkie v. Han, 2 Haw. App. 140, 146, 627 P.2d 296, 301 (1981).

[21] Inouye v. Board of Trustees of the Employees' Retirement Sys., 4 Haw. App. 526, 530, 669 P.2d 638, 641 (1983). This has long been the rule in Hawaii. As the Hawaii Supreme Court opined in *In re* Castle: "[A] final judgment or decree is not necessarily the last decision of a case. What determines the finality of an order or decree is the nature and effect of the order or decree." 54 Haw. at 278, 506 P.2d at 3. *See* Monette v. Benjamin, 52 Haw. 27, 467 P.2d 574 (1970); Kalanianaole v. Liliuokalani, 23 Haw. 457 (1916); Dole v. Gear, 14 Haw. 554, 566 (1903); Humburg v. Namura, 13 Haw. 702, 704 (1901). *See also Barthrop*, 10 Haw. 398 (1896).

[22] 28 U.S.C. § 1291 (1982) is the federal counterpart to HAW. REV. STAT. § 641-1.

[23] *See* Mitchell v. Forsyth, 472 U.S. 511, 524 (1985).

[24] *Id.* (quoting Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964)). The Court's citation to *Gillespie* is important in that it heralds the adoption of a more equitable balancing approach to the finding of finality. *See infra* notes 232-55 and accompanying text.

This represents a possible departure from the Court's previous formulation wherein a final judgment was defined as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945) (citing St. Louis, I.M. & S.R. Co. v. S. Express Co., 108 U.S. 24, 28 (1883)). This language was also used in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373 (1981), and Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978).

[25] Lucas v. Bolivar County, 756 F.2d 1230, 1234 (5th Cir. 1985). *See also* United States v. Mississippi Power & Light Co., 638 F.2d 899, 903 (5th Cir. 1982) (quoting *Gillespie*, 379 U.S. at 152, *cert. denied*, 454 U.S. 892 (1981); Freeman v. Califano, 574 F.2d 264, 267 (5th Cir. 1978); Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973).

inquires into the trial court's subjective intent for purposes of determining finality.[26] If the court intends the challenged ruling to be "final" for appealability purposes, a strong argument can be made that technical defects ought not defeat appellate jurisdiction.

In the case of appeals pursuant to Rule 54(b) of the Hawaii Rules of Civil Procedure or Hawaii Revised Statutes section 641-1(b), reviewability turns, in part, on the trial judge's discretion.[27] It naturally follows that appellate courts, when appropriate, should assist the trial judge in using his discretionary powers.

Consistent with the "intent" theory are cases that deny immediate appellate

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This broadening of the finality concept is not, however, universally accepted. *See In re* King Memorial Hosp., Inc., 767 F.2d 1508, 1510 (11th Cir. 1985) ("An order is not final unless it 'ends the litigation on the merits and leaves nothing for the court to do but exercise the judgment.' ") (quoting Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368 (11th Cir.), *cert. denied*, 464 U.S. 893 (1983)) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

Even in *Lucas*, the court cited Professor Moore in dicta for the proposition that final orders are those that "leave[ ] nothing to be done in the cause save superintend, ministerially, the execution of the decree." 9 S. MOORE, B. WARD, & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 110.08[1], at 118 (1983) [hereinafter MOORE'S FEDERAL PRACTICE] (quoting City of Louisa v. Levi, 140 F.2d 512, 514 (6th Cir. 1944) (footnotes omitted)). *See* NAACP v. Hampton County Election Comm'n, 470 U.S. 1166 (1985) (defining "ministerial").

In a recent Seventh Circuit opinion, the court was faced with a judgment that decided liability, but left the determination of damages to future proceedings. Parks v. Pavovic, 753 F.2d 1397 (7th Cir. 1985). Ordinarily, such a decision is not final for 28 U.S.C. § 1291 purposes. *See, e.g.*, Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 744 (1976); Weiss v. New York Hosp., 745 F.2d 786, 802-03 (3d Cir. 1984); Freeman United Coal Mining Co. v. Director, Office Workers' Compensation Programs, 721 F.2d 629, 630 (7th Cir. 1983); Garzaro v. University of Puerto Rico, 575 F.2d 335, 337 (1st Cir. 1978); *cf.* Harris v. Goldblatt Bros., Inc., 659 F.2d 784, 786 (7th Cir. 1981). The *Parks* court held, however,

> [I]f the determination of damages will be mechanical and uncontroversial, so that the issues the defendant wants to appeal before that determination is made are very unlikely to be mooted or altered by it—in legal jargon, if only a 'ministerial' task remains for the district court to perform—then immediate appeal is allowed.

753 F.2d at 1401; *accord* Boeing Co. v. Van Gemert, 444 U.S. 472, 479 n.5 (1980); Gulf Ref. Co. v. United States, 269 U.S. 125, 136 (1925); Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 826 (7th Cir. 1984); Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs, 721 F.2d at 631; United States v. Hughes, 585 F.2d 284, 286 (7th Cir. 1978); St. Louis Shipbuilding & Steel Co. v. Casteel, 583 F.2d 876 n.1 (8th Cir. 1978); Love v. Pullman Co., 569 F.2d 1074, 1076 (10th Cir. 1978); Hattersley v. Bollt, 512 F.2d 209, 213-14 (3d Cir. 1975); *cf.* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 216 n.8 (1977).

[26] Ellender v. Schweiker, 781 F.2d 314, 317 (2d Cir. 1986) ("The teaching of the Supreme Court is that the determining factor is 'whether the district court intended the judgment to represent the final decision in the case.' " (quoting *Banker's Trust Co.*, 435 U.S. at 385 n.6)); Incas & Monterey Printing & Packaging, Ltd. v. M/V Sang Jin, 747 F.2d 958, 962 (5th Cir. 1984) (addressing an unsuccessful intent argument).

[27] *See infra* notes 95-100, 131 and accompanying text.

review of rulings that are subject to change in later trial court proceedings.[28] "[A]n order expressly subject to future reconsideration by the issuing court is generally thought to be nonappealable."[29] The "intent" theory effectuates an important policy of the final judgment rule, "to prevent an appeal on an *issue* concerning which the trial court has not yet made up its mind beyond possibility of change."[30]

However, trial courts do not have *carte blanche* to determine the immediate appealability of their rulings. Many courts, including the ICA, have quickly pointed out that "[t]he discretion of the lower court to authorize interlocutory appeals is limited."[31] A lower court's determination that a ruling is final does

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[28] *See Lucas*, 756 F.2d at 1234 (the unsuccessfully appealed order was not vested "with the finality requisite for its appeal, for the court retained jurisdiction . . . and neither denied or granted the relief requested").

[29] *In re* "Agent Orange" Prod. Liab. Litig., 745 F.2d 161, 163-64 (2d Cir. 1984); Donovan v. Robbins, 752 F.2d 1170, 1173 (7th Cir. 1985). One court used this reservation of judgment by the trial judge as a tool to deny immediate appealability of what would otherwise clearly be a reviewable order. In Samayoa v. Chicago Bd. of Educ., 783 F.2d 102, 104 (7th Cir. 1986), the court dismissed the appeal from the denial of injunctive relief because the trial judge "merely postpon[ed] consideration." Denials of injunctive relief are immediately appealable under 28 U.S.C. § 1292 (Hawaii has no statutory counterpart to § 1292, which expressly grants appeals of interlocutory orders regarding the grant or denial of injunctions).

The trial court in *Samayoa* had dismissed one count that prayed for injunctive relief of a multi-count complaint. The Seventh Circuit held, inter alia, absent Rule 54(b) certification, the trial court could amend its ruling regarding the dismissal of Count I. This was characterized as "postponing" consideration on the prayer for injunctive relief, as opposed to "denying" it. *See Samayoa*, 783 F.2d at 104.

It is submitted that this type of construction of the finality rule effectively denies a statutorily provided appeal. See 28 U.S.C. § 1292, which is a major impetus behind the movement to construe finality "practically" as opposed to "technically." In response to a similar argument regarding the granting of a stay of proceedings, the Supreme Court summarily dismissed the contention. It is "true only in the technical sense that every order short of a final decree is subject to reopening at the discretion of the district judge." Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 12 (1983). Clearly this is a better view.

[30] *"Agent Orange"*, 745 F.2d at 163 (quoting Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66, 70 (2d Cir. 1973) (emphasis original)). Other courts have addressed this issue in a variety of contexts. *See, e.g.*, Ruiz v. Estelle, 609 F.2d 118, 119 (5th Cir. 1980) (order awarding attorney's fees prior to decision on the merits could not be appealed as a collateral order since "it was manifestly subject to later reconsideration by the court"); Matthews v. IMC Mint Corp., 542 F.2d 544, 547 (10th Cir. 1976) (collateral order doctrine does not permit appeal from order that denied intervenor's motion to quash an attachment, with leave to renew the motion upon a stronger showing of title to the attached property); Gerstle v. Continental Airlines, Inc., 466 F.2d 1347, 1377 (10th Cir. 1972) (order decertifying a class not deemed final in light of trial court's statement that, if a future motion to have the case treated as a class action were filed, it would be set for hearing, and in light of other remarks showing that the determination was not beyond reconsideration).

[31] *Jacober*, 5 Haw. App. at 25 n.6, 674 P.2d at 1028 n.6 (citing Lui v. City & County, 63

not preclude an appellate court from inquiring into the propriety of the finality determination.[32] The purposes and policy underlying finality is crucial to a proper application of the rule.

B. *Policy Reasons for the "Finality Rule"*

The Hawaii Supreme Court states that the primary justification for the final judgment rule is the policy against piecemeal litigation.[33] Such piecemeal appeals add only to delay of litigation, frustrate judicial economy[34] and overcrowd the dockets.[35] Justice Frankfurter stated in the landmark opinion of *Cobbledick v. United States*:[36]

> Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.[37]

Haw. 668, 634 P.2d 595 (1981)).

[32] *Jacober*, 5 Haw. App. at 25 n.5, 674 P.2d at 1028 n.5; Sandidge v. Salen Offshore Drilling Co., 764 F.2d 252, 255 (5th Cir. 1985) ("regardless of the district court's nomenclature . . . [the order appealed from] did not constitute a final judgment").

[33] Powers v. Ellis, 55 Haw. 414, 417, 520 P.2d 431, 433 (1974) (citing Catlin v. United States, 324 U.S. 229, 233-34 (1945)). *See also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974) ("Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy."); Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("Congress . . . has, by forbidding piecemeal disposition on appeal. . ., set itself against enfeebling judicial administration."); *see* Note, *Mandamus As a Means of Federal Interlocutory Review*, 38 OHIO ST. L. REV. 301, 303 (1977).

[34] Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945) (the rule "avoids the mischief of economic waste and delayed justice"); *see* Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975) ("[t]he only means by which . . . judicial economy could be accomplished was to prohibit all appeals until the case has finally been determined . . . ."); Comment, *The Appealability of Orders Denying Motions For Disqualification of Counsel in the Federal Courts*, 45 U. CHI. L. REV. 450, 452 (1978) ("Consolidating review of all the issues of a case in a single comprehensive proceeding avoids . . . 'economic waste and . . . delayed justice.' ").

[35] *See supra* notes 1-2 and accompanying text.

[36] 309 U.S. 323 (1940).

[37] *Id.* at 325. This language has been often quoted by subsequent Supreme Court panels. *See*,

Thus, the finality rule avoids premature interference with discretionary orders issued by the trial court and the subsequent disruptive delay of legitimate trial court functions.

The fear of undue harassment of the opposing party is another justification for preventing interlocutory appeals. Finality "reduces the ability of litigants to harass opponents and clog the courts through a succession of costly and time-consuming appeals . . . [and hence is] crucial to the efficient administration of justice."[38] The Hawaii Supreme Court expressed its strong concern in *Mason* for expeditiously dispensing justice that militates strongly against allowing interlocutory review.[39]

A third policy considered in the finality doctrine is the separability of traditional roles played by trial and appellate courts. Deference should be granted to the trial judge in the exercise of his duties. The United States Supreme Court recently wrote "[t]he rule respects the responsibilities of the trial court by enabling it to perform its function without a court of appeals peering over its shoulder every step of the way."[40] Trial judges should be free to independently conduct their cases from beginning to end.[41] "The occasional injustice to a litigant that results from an erroneous district court decision is far outweighed by the far greater systemic disruption created by encouraging parties to attempt interlocutory appeals."[42]

Adoption of a more flexible approach to finality has been urged by courts and commentators alike. It has been argued that instead of hard and fast rules for determining finality, the grant or denial of finality should be evaluated in light of the policy behind the doctrine. This would protect against even the "occasional injustice" acceptable to the United States Supreme Court. The Court, however, wisely does not agree.

> [A]llowing appeals of right from nonfinal orders that turn on the facts of a partic-

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e.g., Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); *Mitchell*, 472 U.S. at 544 (Brennan, J., dissenting).

[38] Flanagan v. United States, 465 U.S. 259, 264 (1984); *accord Firestone*, 449 U.S. at 374-75; Kenyatta v. Moore, 744 F.2d 1179, 1182 (5th Cir. 1984). If such appeals were allowed, "it would be in the power of a defendant . . . to keep the case oscillating between the original and appellate courts almost indefinitely, to the great expense and annoyance and perhaps even practical denial of justice to the plaintiff." *Barthrop*, 10 Haw. at 401.

[39] This desire to economize judicial resources is another factor weighing heavily in Hawaii appellate review. *See Powers*, 55 Haw. at 418, 520 P.2d at 433-34.

[40] *Mitchell*, 472 U.S. at 544 (Brennan, J., dissenting). *See also Firestone*, 449 U.S. at 374 ("Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system.").

[41] *Moses H. Cone Memorial Hosp.*, 460 U.S. at 32 (Rehnquist, J., dissenting, joined by Burger, C.J., and O'Connor, J.).

[42] *Id.*

> ular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—"that of maintaining the appropriate relationship between the respective courts. . . . This goal, in the absence of the most compelling reasons to the contrary, is very much worth preserving."[43]

In summary, the Hawaii appellate courts should evaluate their finality rules in light of these traditional policy concerns. If a grant or denial of finality frustrates one or more of its policies, the rule should be reconsidered. A more sensible approach in certain unique situations is not to restrict finality to distinct terms. An independent evaluation of how a grant or denial of appellate review would affect the policies behind the finality doctrine makes sound judicial sense. *Gillespie v. United States Steel*[44] effectively promulgated the determination of finality based on flexible policy and will be discussed in part IV.

C. *Civil Procedure Rule 58 and the Finality Rule*

1. *Hawaii rule of civil procedure 58*

Two contexts recur so often in Hawaii regarding finality that they warrant individual attention. First, the interplay between the Hawaii Rules of Civil Procedure (Hawaii Rule)[45] and the final judgment rule has led to numerous dismissals of otherwise proper appeals. The primary culprit is Hawaii Rule 58, which requires entry of judgment by the trial court on a separate document.[46] Although Hawaii Rule 58 contains different language from its federal counterpart, the ICA has recently stated that federal precedent should guide proper

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[43] *Id.* (quoting *Coopers & Lybrand*, 437 U.S. at 476).

[44] 379 U.S. 148 (1964).

[45] Rule 54(b) is the obvious exception to this general statement since it discusses interlocutory appeals. *See* HAW. R. CIV. P. 54(b).

[46] Rule 58 of the Hawaii Rules of Civil Procedure provides:

> Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The filing of the judgment in the office of the clerk constitutes entry of judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing costs.

HAW. R. CIV. P. 58.

application.[47]

The issue is what constitutes a "judgment" as the term is used in Hawaii Revised Statutes section 641-1 for finality purposes. The absence of "one valid 'judgment' [that does not] 'adjudicate' all the claims of all parties, [does not] terminate the action as to any of the claims or parties and, absent court action under Rule 54(b), it is not final or appealable."[48] In *M.F. Williams, Inc. v. City & County of Honolulu*, the ICA noted the importance of compliance with Hawaii Rule 58.

> Our analysis and decision is not a sanctification of procedure for procedure's sake. Since Rule 73(a)'s critical thirty-day appeal period runs "from the entry of the judgment appealed from," we must be very careful when we decide what is and what is not an appealable judgment. Practitioners have enough difficulty deciding when their notices of appeal must be filed. . . . We ought not unnecessarily add to their confusion.[49]

Furthermore, the ICA issued a stern warning to litigants by "encourag[ing] trial courts and counsel to be more assiduous in satisfying the mandates of [Hawaii] Rule 58 . . . ."[50] In *M.F. Williams*, the ICA faced an appeal from a multi-party lawsuit wherein the trial court granted summary judgments, effectively disposing of all claims amongst the parties. The so-denominated "judgment" consisted of three paragraphs, one attested the case came before hearing, another ordered judgment to be entered as to some claims, and a third entered judgment on other claims.[51] Writing for the court, Chief Judge Burns distin-

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[47] M.F. Williams, Inc. v. City & County of Honolulu, 3 Haw. App. 319, 322, 650 P.2d 599, 601-02 (1982).

[48] *Id.* at 323, 650 P.2d at 603.

[49] *Id. See also* Employees' Retirement Sys. v. Big Island Realty, Inc., 2 Haw. App. 151, 627 P.2d 304 (1981); Sturkie v. Han, 2 Haw. App. 140, 627 P.2d 296 (1981).

[50] 3 Haw. App. at 323, 650 P.2d at 603.

[51] The order reads in its entirety:

ORDER GRANTING SUMMARY JUDGMENTS

Motions for Summary Judgments by Defendant/Third-Party Plaintiff CITY & COUNTY OF HONOLULU, Third-Party Defendant/Fourth-Party Plaintiff YASUO ARAKAKI, and Fourth-Party Defendant DAMES & MOORE, and a Motion for Summary Judgment by Plaintiff having come on regularly for hearing on January 29, 1980, memoranda of counsel having been reviewed and argument of counsel considered,

IT IS HEREBY ORDERED that the Motions for Summary Judgment by Defendant/Third-Party Plaintiff CITY & COUNTY OF HONOLULU, Third-Party Defendant/Fourth-Party Plaintiff YASUO ARAKAKI, and Fourth-Party Defendant DAMES & MOORE be granted. Plaintiff's Motion for Summary Judgment is hereby denied. Summary Judgment is hereby entered in favor of Defendant/Third-Party Plaintiff CITY & COUNTY OF HONOLULU, Third-Party Defendant/Fourth-Party Plaintiff YASUO ARAKAKI, and Fourth-Party Defendants DAMES & MOORE and against Plaintiff M.F.

guished between an order granting summary judgment and one entering that order, with the latter being the only proper "judgment" for Hawaii Rule 58 purposes. The message is clear: ordering a judgment to be entered is not a "final" order in Hawaii. A concomitant entry of that order is required or an otherwise valid appeal will be summarily dismissed.

2. *Federal Rule of Civil Procedure 58*

The federal courts do not read Rule 58 so narrowly. Recently, the United States Supreme Court in *Bankers Trust Co. v. Mallis* held that appellate jurisdiction is not defeated, even in the absence of a separate judgment.[52] The Court began by looking to the purpose of the Federal Rule of Civil Procedure 58 (Federal Rule) separate judgment requirement. After reviewing the Advisory Committee Notes to the original draft,[53] the Court noted,

> [t]he separate-document requirement was . . . to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely.[54]

In addressing similar concerns that apparently swayed the ICA, the United States Supreme Court decided that strict adherence to the requirement of sepa-

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WILLIAMS, INC.

Id. at 321-22, 650 P.2d at 601.

[52] *See Bankers Trust*, 435 U.S. at 383. *See also* Arango v. Guzman Travel Advisors, 761 F.2d 1527, 1530 (11th Cir. 1985) (construing *Bankers Trust* as "determin[ing] that the failure to comport with all procedural rules governing entry of judgment did not necessarily render a court of appeals without jurisdiction").

[53] The Court quoted the report as follows:

> Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted[.]" Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt where the purported entry of a judgment was effective, starting the time running for post verdict motions and for the purpose of appeal . . . .
>
> The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment.

Bankers Trust, 435 U.S. at 384-85 (citations omitted).

[54] *Id.* at 385.

rate documents is not in the best interest of our judicial system.

> The 1963 amendment to Rule 58 made clear that a party need not file a notice of appeal until a separate judgment has been filed and entered. . . . Certainty as to timeliness, however, is not advanced by holding that appellate jurisdiction does not exist absent a separate judgment. If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter a separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose.[55]

Dismissal of the appeal was not in keeping with the primary purpose of the rules of civil procedure, namely "to secure the just, speedy, and inexpensive determination of every action."[56]

The federal circuit courts have noted the expansive reading of *Bankers Trust* and almost uniformly relaxed the requirements of Federal Rule 58.[57] In *Beaudry Motor Co. v. ABKO Properties, Inc.*,[58] the Ninth Circuit held that a minute order, unsigned and not purporting to be an order disposing of the pending motions, satisfied the Federal Rule 58 requirement.[59] The Ninth Circuit focused on whether "in these circumstances a reasonable person would realize that the court had entered an order finally disposing of the case."[60]

However, the Ninth Circuit does not advocate rendering Federal Rule 58 a nullity. Two days before *Beaudry Motors* was decided, the court dismissed an appeal for lack of a final judgment in *Wood v. Coast Frame Supply*.[61] *Wood* addressed the propriety of a courtroom deputy clerk's minute order. In *Wood*, however, the court found:

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[55] *Id.* (footnote omitted). *See also* United States v. Indrelunas, 411 U.S. 216, 220-22 (1973).

The *Bankers Trust* decision has been used on several occasions to sustain jurisdiction when there was no separate document entering judgment, provided that the district court clearly evidenced that it had entered a final decision. *See, e.g.*, Diaz v. Schwerman Trucking Co., 709 F.2d 1371, 1372 n.1 (11th Cir. 1983); Hanson v. Town of Flower Mound, 679 F.2d 497, 500-02 (5th Cir. 1982). Some courts have taken jurisdiction even when the appellee objected to the lack of a separate document entering judgment. *See, e.g.*, International Bhd. of Teamsters v. Western Pa. Motor Carriers Ass'n, 660 F.2d 76, 79-80 (3d Cir. 1981) (court did not discuss fact that appellee sought to dismiss appeal on this basis); Leonhard v. United States, 633 F.2d 599, 611-12 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981) (party who objected failed to show how entertaining appeal would be prejudicial).

[56] 435 U.S. at 387; Louisiana World Expos. v. Logue, 746 F.2d 1033, 1039 (5th Cir. 1984).

[57] *See* Louisiana World Expos. v. Logue, 746 F.2d 1033 (5th Cir. 1984).

[58] 780 F.2d 751 (9th Cir. 1986).

[59] *Id.* at 755.

[60] *Id.* at n.3; *accord* Taylor Rental Corp. v. Oakley, 764 F.2d 720, 722 (9th Cir. 1985).

[61] 779 F.2d 1441 (9th Cir. 1986).

> [N]othing was done by the court . . . which can be said to constitute entry of judgment. The only act on the part of the court was oral, and the only written evidence of such action was the minute entry of the clerk. . . . [T]his minute entry alone could not stand as a final judgment of the district court. "Courts render judgments; clerks only enter them on court records."[62]

In *Beaudry Motors*, on the other hand, it was conceded by the movant that the minute order was prepared at the direction of the district court judge.[63] Furthermore, the order was noted on the civil docket and the court's copy of the order was file stamped and signed by the deputy clerk.[64] *Beaudry Motors* and *Wood* are therefore consistent. The distinguishing factor between *Wood* and *Beaudry Motors* appears to harken back to the "intent" of the trial judge regarding the finality theory. If it can be determined that in directing entry of an order the trial court intended the order to be final, Federal Rule 58 can be less mechanically applied.

One other recent federal decision squarely addressed the finality and entered judgment question presented in *M.F. Williams*. In *Arango v. Guzman Travel Advisors*,[65] the Eleventh Circuit faced an appeal in a multi-party lawsuit where no judgment had been entered against a party in default.[66] The court applied the *Banker's Trust* rationale.[67]

> The only missing item is an entry of judgment against two parties who have never entered an appearance in this lawsuit from the time it was removed to federal court in 1978. Although dismissal of the appeal might serve to deter careless practice by future litigants, we hold that under the circumstances of this case, the absence of the default judgment does not require dismissal. We instruct the district court to take appropriate action upon receipt of our remand.[68]

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[62] *Id.* at 1442.

[63] 780 F.2d at 754.

[64] *Id.*

[65] 761 F.2d 1527 (11th Cir. 1985).

[66] It is submitted that the difference between the judgment's omitted party being liable by way of default as in *Arango* and the omitted parties being liable by way of improper summary judgment order in *M.F. Williams* is immaterial for purposes of this discussion. The reason for a party's non-appearance in a judgment is not the dispositive fact; it is the non-appearance itself.

[67] 761 F.2d at 1531.

[68] *Id.* Interestingly, a distinction has been drawn between parties who have been served and those who have not for appealability purposes. If an action is dismissed as to all of the defendants who have been served and only unserved defendants remain, the district court's order may be considered final under § 1291. *See, e.g.*, Patchick v. Kensington Pub. Corp., 743 F.2d 675, 677 (9th Cir. 1984); De Tore v. Local 245, 615 F.2d 980 (3d Cir. 1980); Leonhard v. United States, 633 F.2d 599 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981); Siegmund v. General Commodities Corp., 175 F.2d 952 (9th Cir. 1949). In such circumstances there is no reason to assume that there will be any further adjudication of the action.

In Hawaii, the ICA has stated that federal case law dealing with Federal Rule 58 aids in the interpretation of Hawaii Rule 58. The modern trend in the federal system is a movement away from strict interpretation of Rule 58. Hopefully, if Hawaii appellate courts are presented with this question, they could seize the opportunity to modernize our overly strict jurisdictional quality of Rule 58. Until this happens, however, practitioners must assume the restrictive reading of Hawaii Rule 58 in *M.F. Williams* is still valid law.

D. Premature Notices of Appeal

The second point deserving attention in Hawaii appellate practice is a notice of appeal unwittingly filed prior to the entry of the final judgment. This does not include notices of appeal coming from a ruling that is deemed final through Rule 54(b) certification or a judicially created exception such as in *Cohen*, *Forgay* or *Gillespie*.[69] This discussion is limited to notices of appeal filed inadvertently from orders or rulings that in and of themselves do not constitute final, appealable orders.

Fortunately, the same strict rulings regarding Hawaii Rule 58 in *M.F. Williams* should not apply. The Hawaii Supreme Court in *City & County of Honolulu v. Midkiff*[70] faced a notice of appeal that improperly designated an earlier non-final order as the judgment appealed from. The *Midkiff* court held "the requirement that the notice of appeal designate the judgment or part thereof

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Normally, at the time of dismissal all of the interlocutory rulings otherwise unappealable merge into the final judgment and become reviewable. Sackett v. Beaman, 399 F.2d 884, 889 n.6 (9th Cir. 1968); Island Holidays, Inc. v. Fitzgerald, 58 Haw. 552, 561, 574 P.2d 884, 890 (1978); City & County of Honolulu v. Midkiff, 57 Haw. 273, 275, 554 P.2d 233, 234-35 (1976); *see* Huey v. Teledyne, Inc., 608 F.2d 1234, 1240 (9th Cir. 1979), *cert. denied*, 458 U.S. 1106 (1982); Edwin Raphael Co. v. Maharam Fabrics Corp., 283 F.2d 310, 311 (7th Cir. 1960); Atchison, Topeka & Santa Fe Ry. v. Jackson, 235 F.2d 390, 392 (10th Cir. 1956). However, in the case of a dismissal without prejudice for failure to prosecute, the merger rule has been held inapplicable. *See* Ash v. Cvetkov, 739 F.2d 493, 497 (9th Cir. 1984); Huey v. Teledyne, Inc., 608 F.2d 1234, 1239 (9th Cir. 1979); Sullivan v. Pacific Indem. Co., 566 F.2d 444, 445-46 (3d Cir. 1977). *But see* Allied Air Freight, Inc. v. Pan Am. World Airways, Inc., 393 F.2d 441 (2d Cir.) (choosing to review interlocutory orders), *cert. denied*, 393 U.S. 846 (1968). The court justified its position by reference to its earlier opinion in *Huey*. If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain a review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be seriously weakened. This procedural technique would, in effect, provide a means to avoid the finality rule embodied in 28 U.S.C. § 1291. To review the district court's refusal is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expedious disposition of cases.

[69] *See infra* notes 177-255 and accompanying text.

[70] 57 Haw. 273, 554 P.2d 233 (1976).

appealed from is not jurisdictional."[71]

The *Midkiff* court did not reach "whether notices of appeal, filed prematurely from earlier orders prior to the entry of the final order, must be refiled within the appeal period after entry of the final order in order to perfect the appeal."[72] In *Midkiff*, the premature notice of appeal was timely because it fell within the period of thirty days following entry of the judgment that finally disposed of the then-remaining issues and parties. The remaining question was whether the notice of appeal was so premature to be untimely and whether untimeliness would bar the appeal?

Two years after *Midkiff*, the Hawaii Supreme Court once again faced the effect of a premature notice of appeal. In *Island Holidays v. Fitzgerald*,[73] the

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[71] *Id.* at 276, 554 P.2d at 235. *Accord* Yoshizaki v. Hilo Hosp., 50 Haw. 1, 2, 427 P.2d 845, 846 (1967); Credit Assoc. v. Montilliano, 51 Haw. 325, 328, 460 P.2d 762, 764 (1969). The *Midkiff* court also quoted Professor Moore as follows:

> [A] mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake.

57 Haw. at 275-76, 554 P.2d at 235 (quoting 9 MOORE'S FEDERAL PRACTICE, *supra* note 25, ¶ 203.18 (1975)).

[72] *Id.* at 275, 554 P.2d at 235.

[73] Island Holidays, Inc. v. Fitzgerald, 58 Haw. 552, 561, 574 P.2d 884, 890 (1978). *Island Holidays* was decided under then HAW. R. CIV. P. 73(a), which was superceded by Haw. R. App. P. 4(a)(1) on July 1, 1984. Then HAW. R. CIV. P. 73(a), which is similar in pertinent part to HAW. R. APP. P. 4(a)(1), provided:

> An appeal permitted by law from the circuit court to the supreme court and the intermediate court of appeals shall be taken by filing notice of appeal with the circuit court within 30 days from the entry of the judgment appealed from, except that: (1) upon a showing of excusable neglect the circuit court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein described; (2) if a timely notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time herein prescribed, whichever period last expires. The running of the time period for appeal is terminated as to all parties by a timely motion made by any party pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon timely motion under such rules: or granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or to make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59. If the order or judgment appealed from is appealable only upon the allowance of the appeal by the court entering it, any application for such allowance must be made within 10 days after the allowance is granted.
>
> Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the supreme court or the intermediate court of appeals deems appropriate, which may include

appellant filed a notice of appeal while motions for a new trial and for judgment notwithstanding the verdict remained pending.[74] The *Island Holidays* court stated "a notice of appeal filed while the motions were pending before the trial court was ineffective to give [the] court jurisdiction of the appeal unless the appeal was refiled within the proper appeal period."[75]

The *Island Holidays* court allowed the appeal, however, regardless of the procedural defect.[76] The appellant had filed a supercedeas bond after the trial court disposed of two motions that "contained sufficient detail concerning the parties involved in the appeal and the judgment appealed from to constitute sufficient notice of [appellant's] intention to seek review of the . . . order."[77] After noting that appellee "was not misled or prejudiced by the defect in the procedural process,"[78] the court accepted jurisdiction.

This "substance over form" approach evinces a judicial intent to read liberally our rules of procedure with respect to certain notice of appeal provisions. If the court is faced with a situation analogous to *M.F. Williams*, it should apply its liberal reading of the notice of appeal provisions to the judgment requirement of Hawaii Rule 58. As in *Island Holidays*, the proper focus should not be on the technical form to the exclusion of equitable substance, but instead focus on the parties' intentions, their understanding of what is happening in their case and any potentially prejudicial effect occasioned by the procedural defect.

This question was squarely presented to the Fifth Circuit in *Sandidge v. Salen Offshore Drilling Co.*[79] In *Sandidge*, notice of appeal was filed on May 21, 1984, and the final judgment dismissing all claims was rendered on June 4, 1984. The Fifth Circuit held "there is an exception to the requirements of [the finality doctrine] that allows the separate appeal of a nonfinal judgment where a subsequent judgment of the district court effectively terminates the litigation."[80] The

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dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the circuit court, may dismiss the appeal upon motion and notice by the appellant.

HAW. R. CIV. P. 73(a) (*repealed* 1984).

[74] *See also* Naki v. Hawaiian Elec. Co., 50 Haw. 85, 86, 431 P.2d 943, 944 (1967); Marn v. Reynolds, 44 Haw. 655, 658, 361 P.2d 383, 386 (1961).

[75] *Island Holidays*, 58 Haw. at 562, 574 P.2d at 890; *In re* Dean Trust, 47 Haw. 304, 387 P.2d 218 (1963); Madden v. Madden, 43 Haw. 148 (1959).

[76] 58 Haw. at 562, 574 P.2d at 891.

[77] *Id.* at 562, 574 P.2d at 890.

[78] *Id.*

[79] 764 F.2d 252 (5th Cir. 1985).

[80] *Id.* at 255. *See also* Rivers v. Washington County Bd. of Educ., 770 F.2d 1010, 1011 (11th Cir. 1985); Alcorn County v. U.S. Interstate Supplies, 731 F.2d 1160, 1166 (5th Cir. 1984); Mesa Petroleum Co. v. Coniglio, 629 F.2d 1022, 1029 n.7 (5th Cir. 1980); Tower v. Moss, 625 F.2d 1161, 1164-65 (5th Cir. 1980); Jetco Electronic Indus., Inc. v. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973); Cape May Greene, Inc. v. Warren, 698 F.2d 179, 184-85 (3d Cir. 1983); Martin v. Campbell, 692 F.2d 112, 114 (11th Cir. 1982); Pireno v. New York

court explained in an earlier Fifth Circuit opinion:

> In *Jetco* the district court dismissed the action as to one of three defendants, who then filed a premature notice of appeal, and several months later the court entered an agreed judgment as to the remaining defendants. We gave effect to the notice of appeal as of the date of the agreed judgment, heeding the admonition of *Gillespie v. U.S. Steel Corp.*, . . . that "practical, not technical considerations are to govern the application of principles of finality."[81]

The court also recognized the *Sandidge* ruling was not at odds with any of the specific prohibitions against premature notices of appeal enumerated in Rule 4(a)(4) of the Federal Rules of Appellate Procedure.[82] The flexible *Sandidge*

State Chiropractic Ass'n, 650 F.2d 387, 389-90 n. 4 (2d Cir. 1981), *aff'd sub nom.*, Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982); Anderson v. Allstate Ins. Co., 630 F.2d 677, 680-81 (9th Cir. 1980).

[81] 764 F.2d at 255.

[82] HAW. R. APP. P. 4(a)(4) reads as follows:

> If a timely motion under the Hawaii Rules of Civil Procedure or the District Court Rules of Civil Procedure or the Hawaii Family Court Rules is filed in the circuit or district court by any party: (i) for judgment under Rule 50(b), HRCP; (ii) under Rule 52(b), HRCP and DCRCP, to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59, HRCP and DCRCP, to alter or amend the judgment; or (iv) under Rule 59, HRCP, DCRCP and HFCR, for a new trial; or (v) under Rule 59(g), HFCR, for reconsideration, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fee shall be required for such filing.

The concern voiced in *Sandidge*, therefore, is equally applicable to appeals in Hawaii. *See generally* Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) (holding that a notice of appeal filed before disposition of a post trial motion under FED. R. CIV. P. 59 was a nullity); Brandon v. Holt, 469 U.S. 464 (1985) (Burger, C.J., concurring) (while not condoning sloppy appellate practice, jurisdiction was allowed); Gillis v. United States Dep't of Health & Human Serv., 759 F.2d 565 (6th Cir. 1985). As the court in *Gillis* footnoted:

> Nor does FED. R. APP. P. 4(a)(4), as amended in 1979, which provides that notices of appeal filed during the pendency of FED. R. CIV. P. 50(b), 52(b) and 59 post-trial motions, shall have no effect, mandate a different result. No such motions are involved here. No request to have the judgment certified under rule 54(b) was made. However, no just reason for delay can exist after the final judgment as to all parties has been entered. *Compare Jetco*, 473 F.2d. at 1231 ("Mindful of the Supreme Court's command that practical, not technical, considerations are to govern the application of principles of finality, . . . we decline appellee's invitation to exalt form over substance by dimissing this appeal.") (citations omitted) *with* Jackson v. Tennessee Valley Authority, 595 F.2d 1120, 1121 (6th Cir. 1979) (" 'an appeal should not be dismissed because it was technically premature if in fact an appealable judgment or order was rendered below' " (quoting 9 MOORE'S FEDERAL PRACTICE, *supra* note 25, ¶ 204.14, at 983)). Since the amendment of rule 4, the Third

approach goes far in construing the Federal Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action."[83] It remains to be seen, however, whether Hawaii will give the notice of appeal and finality doctrine dichotomy such a liberal reading.

E. Conclusion

The final judgment rule, like any legal principle, has limitations. Under certain circumstances, its application results in both injustice to the litigants and inefficient use of the appellate courts' valuable time.[84] Congress has acknowledged this point by creating statutory exceptions to the finality rule,[85] and the courts have judicially followed suit.[86] These exceptions "reflect a concern on the

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and Fifth Circuits have held that premature notice of appeal continues to invoke appellate jurisdiction except in the specific circumstances prescribed in the rule. In *Cape May Greene*, the court reasoned that rule 4(a)(4) should be so restricted on the basis of rule 4(a)(2), also amended in 1979, which states that "[e]xcept as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order" shall be effective. 698 F.2d at 185. *Cape May Greene* was followed by the court in *Alcorn County*, 731 F.2d at 1166.

759 F.2d at 569 n.4.

[83] *Bankers Trust*, 435 U.S. at 386-87; *Louisiana World Expos.*, 746 F.2d at 1039.

[84] One commentator has suggested that the policy of limiting interlocutory review ought to be disregarded when it conflicts with other established goals of appellate review. These are:

(1) alleviation of hardship by providing an opportunity to review orders of the trial court before they irreparably modify the rights of the litigants; (2) supervision of the development of the law by providing a mechanism for resolving conflicts among trial courts on issues not normally open on final appeal; and (3) avoidance of a waste of trial court time by providing an opportunity to review orders before they result in fruitless litigation and wasted expense.

Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 609 (1975). *See also* Bradshaw v. Zoological Soc'y, 662 F.2d 1301, 1304 (9th Cir. 1981), ("[A] rigid insistence on technical finality would sometimes conflict with the purposes of the statute.") (quoting *Coopers & Lybrand*, 437 U.S. at 471); Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 HARV. L. REV. 1004, 1008 (1978) (Rigid adherence to the finality rule may lead to "inefficient results"); Note, *Proposals for Interlocutory Appeals*, 58 YALE L.J. 1186, 1187 (1949) ("In many instances, however, the final judgment rule may be a wasteful formality; and under certain circumstances it can gravely jeopardize the rights of litigants.") (footnotes omitted).

[85] *See infra* notes 90-111 and accompanying text. Rule 54(b) and HAW. REV. STAT. § 641-1(b) are those exceptions. *See also* C. WRIGHT, LAW OF FEDERAL COURTS § 101 (3d ed. 1976); 9 MOORE'S FEDERAL PRACTICE, *supra* note 25, ¶¶ 110.06-.08(1), ¶ 110.26; Frank, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292 (1966). *See also* S. Rep. No. 2434, 85th Cong., 2d Sess. 5256 (1958) (stating that appeals pursuant to § 1292(b) would accomplish the purpose of relaxing the rigid bar against interlocutory appeals while simultaneously avoiding delay inherent in piecemeal appeals).

[86] *See infra* notes 177-255 and accompanying text. The collateral source doctrine is by far the

part of the courts that the finality requirement be pragmatically construed so as to avoid potentially irreparable injuries to the litigant."[87] Part II of this article will focus on Hawaii Revised Statutes section 641-1(b)[88] and the proper role it plays in Hawaii appellate review.

II. PERMISSABLE INTERLOCUTORY APPEALS

"Every Great Mistake Has A Halfway Moment, A Split Second When It Can Be Recalled And Perhaps Remedied."[89]

Hawaii Revised Statutes section 641-1(b) provides the only means by which a litigant may take an interlocutory appeal.[90] Rule 54(b) of the Hawaii Rules of Civil Procedure, by way of its certification procedure, transforms interlocutory

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most common judicial exception to finality. *See Cohen*, 337 U.S. 541 (1949). *Cohen* was a shareholder's derivative suit in which the trial court declined to require the plaintiff to post security for costs despite a state law that so required. The defendant appealed the ruling before a final judgment and the appellate court reversed. The Supreme Court took this occasion to announce the collateral order doctrine and upheld the defendant's right to immediate appeal. While the collateral order doctrine is often thought to have originated in *Cohen*, the Supreme Court has noted that *Cohen* only reformulated an older rule. *See Firestone*, 449 U.S. at 375 ("*Cohen* did not establish new law; rather it continued a tradition of giving § 1291 a 'practical rather than technical construction.' " (quoting *Cohen*, 337 U.S. at 546)); *see also* Note, *Appellate Procedure:* Firestone Tire & Rubber Co. v. Risjord*: Tightening the Collateral Order Doctrine*, 50 UMKC L. REV. 99, 102 n.28 (1981) (agreeing that "only the formulation" of the doctrine was new).

In addition to the collateral order doctrine, the Supreme Court has created at least two other "exceptions" to the final judgment rule. In Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848), the Supreme Court reviewed an order immediately transferring property to a trustee in bankruptcy, although an accounting of rents and profits still had to be carried out in the trial court. *Id.* at 203. The Court recognized that as a practical matter the order was a final judgment since the land transferred was to be swiftly sold for the benefit of creditors. *Id.* at 204.

In Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), the Supreme Court suggested that orders fundamental to the continuation of litigation could be reviewed as final, at least when they fell within the "twilight zone" of marginal finality. *Id.* at 152-53. The Court spoke of balancing "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Id.* (quoting Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950). For further discussion of these exceptions, see 9 MOORE'S FEDERAL PRACTICE, *supra* note 25, ¶¶ 110.11-12; 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 3910, 3913 (1976) [hereinafter WRIGHT & MILLER].

[87] Note, *Motions For Appointment of Counsel and the Collateral Order Doctrine*, 83 MICH. L. REV. 1547, 1551 (1985). In the collateral order context, the Supreme Court has remarked "the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." Mathews v. Eldridge, 424 U.S. 319, 331 n.11 (1976); *accord Firestone*, 449 U.S. at 374.

[88] *See supra* note 5.

[89] P. BUCK, WHAT AMERICA MEANS TO ME 10 (1943).

[90] *See supra* note 5 for the text of HAW. REV. STAT. § 641-1(b) in its entirety.

rulings into "final" rulings for appeal purposes.[91] This is also true with respect to the judicially created exceptions to Hawaii Revised Statutes section 641-1(a).[92]

A. Hawaii Revised Statutes Section 641-1(b)

In 1984, the Hawaii Supreme Court faced an appeal pursuant to section 641-1(b) wherein the appellant challenged the trial judge's grant of appellate permission.[93] In *McCabe v. Berdon*,[94] the trial judge certified an appeal regarding the denial of a party's request for association of outside counsel.[95] Dismissing the appeal, Justice Padgett wrote that mere certification of the appeal is not enough. The court held that section 641-1(b) requires express findings by the trial judge regarding the proferred appeal's propensity to speed the determination of the litigation in addition to the mechanical requirements of certification. Citing *Lui v. City & County of Honolulu*[96] for the proposition that the trial court's "discretion is not unfettered but. . .circumscribed,"[97] the Hawaii Supreme Court in *McCabe* opined that exercise of discretion is limited to appeals

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[91] In interpreting HAW. REV. STAT. § 641-1(b), the ICA recently defined "interlocutory" as those judgments not "final" under HAW. REV. STAT. § 641-1(a) and Hawaii Supreme Court decisions. TBS Pac., Inc. v. Tamura, 5 Haw. App. 222, 686 P.2d 37 (1984). "The courts have determined whether a specific judgment, order, or decree was interlocutory on an ad hoc basis." *Id.* (citing Chuck v. St. Paul Fire & Marine Ins. Co., 61 Haw. 552, 606 P.2d 1320 (1980), and Jeziemy v. Biggins, 56 Haw. 662, 548 P.2d 251 (1976)).

[92] *See supra* note 15 (discussing the analytical distinction between truly final judgments and "final" judgments for appealability purposes).

[93] McCabe v. Berdon, 67 Haw. 178, 681 P.2d 571 (1984).

[94] *Id.*

[95] The court set forth both the order and the relevant transcript as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to Rule 73 of the Hawaii Rules of Civil Procedure, Plaintiff shall be allowed to take an interlocutory appeal from the court's order granting summary judgment and from the court's order denying Plaintiff's request for association of out-of-state counsel.
>
> The transcript of the hearing at which the motions for summary judgment were originally orally granted contains the following:
>
> . . . .
>
> Motion for summary judgment of the State of Hawaii and County of Hawaii will be granted. All right. If you wish to take an interlocutory appeal on this issue, I'll be glad to accommodate you. Its up to you.
>
> MR. CORRALES: Yes, I believe we would want to.
>
> THE COURT: All right. If that's the situation, the Court will also deny your request for associate counsel. You can also take that up on interlocutory appeal, all right?
>
> MR. CORRALES: Thank you, Your Honor.

Id. at 179, 681 P.2d at 572.

[96] 63 Haw. 668, 634 P.2d 595 (1981).

[97] *Id.* at 671, 634 P.2d at 598.

that will speed the trial process.[98] The words "speedy termination,"[99] therefore, set the parameters for appellate review of the trial court's discretion.[100]

The court in *McCabe* wisely did not attempt to define what will or will not speedily terminate litigation.[101] The concept does not lend itself to definition and trial courts are granted discretionary latitude in making the determination. The court only set forth the two polar extremes: "saving of time and litigation expenses, without more, do not meet the requirement of speedy termination. . . . On the other hand, if the appeal may put an end to the action, obviously the requirement is met."[102] Without more express findings, the appellate court will not decide sua sponte whether the invocation of section 641-1(b) falls within this broad area of permissible appeals. Since the record in *McCabe* did not "indicate that the trial judge determined that an interlocutory appeal from the orders entered would more speedily terminate the litigation,"[103] the appeal was summarily dismissed.[104]

The use of section 641-1(b) as a means of appellate review will probably soon grow in importance for litigants in Hawaii courts. As discussed below, the collateral order or *Cohen* doctrine as an alternative method to interlocutory appeals has recently been judicially limited. Litigants will still want to seek interlocutory review of various rulings, and it naturally follows that more litigants will turn to section 641-1(b) as a vehicle for appealing the rulings.

The United States Supreme Court has recently restricted the use of *Cohen v. Beneficial Finance Co.* to appeal rulings that do not ultimately terminate the litigation.[105] Hawaii courts have, on several occasions, looked to federal constructions of *Cohen* as persuasive authority,[106] therefore, it follows that Hawaii will also limit its applicability. This is especially true in light of the *Mason* court's stern admonitions regarding the policy of restricting appellate review.[107]

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[98] *McCabe*, 67 Haw. at 179, 681 P.2d at 572.

[99] "Speedy termination" was first used in the 1898 amendment to HAW. REV. STAT. § 641-1(b)'s predecessor statutes. The legislative committee report did not discuss it. *See Lui*, 63 Haw. at 672 n.4, 634 P.2d at 598 n.4.

[100] *McCabe*, 67 Haw. at 179, 681 P.2d at 572.

[101] *Id.*

[102] *Id.* (citation omitted) (quoting *Lui*, 63 Haw. at 672, 634 P.2d at 598).

[103] 67 Haw. at 179, 681 P.2d at 572.

[104] *Id.* at 180, 681 P.2d at 573. *See also Mason*, 67 Haw. at 511, 694 P.2d at 389 ("[T]he trial court shall carefully consider the matter of whether it thinks an interlocutory appeal will more speedily determine the litigation and, if it so concludes, will set forth, in the order allowing the appeal, its reasons for the conclusion.").

[105] The use of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), has been restricted by *Richardson-Merrell*, 472 U.S. at 430.

[106] *See infra* note 187 and accompanying text.

[107] *See Mason*, 67 Haw. at 511, 694 P.2d at 389 ("[I]t is necessary that appeals from other than final judgments . . . be strictly limited.").

Further, the ICA in *Employees' Retirement System v. Big Island Realty, Inc.*[108] strongly recommended the procedure outlined in section 641-1(b) for interlocutory appeals,[109] as opposed to the *Cohen* collateral order doctrine.[110] Both federal and state courts have evinced a strong inclination to limit appellate review of interlocutory decisions, so increasing focus will be on both the applicability of section 641-1(b) and the trial court's finding of speedy termination.[111]

An appeal under Hawaii Revised Statute section 641-1(b) should proceed when an immediate appeal would help to speedily terminate the litigation. Care must be taken by putative appellants to get the trial judge to articulate in his findings on how immediate appeal would speed along the ultimate resolution of the matter. Since the collateral order doctrine is being restricted in Hawaii, and Hawaii Rule 54(b) is limited to substantive claims, the use of section 641-1(b) in appealing non-substantive rulings will probably increase in the coming years.

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[108] 2 Haw. App. 151, 627 P.2d 304 (1981).

[109] *Id.* at 156, 627 P.2d at 307 (noting Hawaii's inclusion in those jurisdictions resisting an extension of the collateral order doctrine). *See also* 9 MOORE'S FEDERAL PRACTICE, *supra* note 25, ¶ 110.10 (1980); Chuck v. St. Paul Fire & Marine Ins. Co., 61 Haw. 552, 606 P.2d 1320 (1980).

[110] *See generally* Forsyth v. Kleindienst, 599 F.2d 1203, 1208 (3d Cir. 1979), wherein the court discussed the propriety of alleging *Cohen*-based appealability after being denied 28 U.S.C. § 1292(b) (Federal counterpart of HAW. REV. STAT. § 641-1(b)) certification):

> [D]efendants . . . are not precluded from relying on the collateral order doctrine merely because they were unsuccessful in their attempts to have the question of absolute immunity certified under 28 U.S.C. § 1292(b) . . . .
>
> [I]nstitutional efficiency is a major purpose of the certification provision. . . . A central goal of the collateral order doctrine, however, is to prevent the loss of rights merely because appellate review is delayed . . . .

Id. at 1208.

For a discussion regarding the interrelationship of HAW. REV. STAT. § 641-1(b) and HAW. R. CIV. P. 54(b), see *infra* notes 165-75 and accompanying text.

[111] Since the application of HAW. REV. STAT. § 641-1(b) has been so clearly set forth in *Mason*, *McCabe*, *Lui*, and *Employees' Retirement Sys.*, reference to federal interpretations of 28 U.S.C. § 1292(b) would serve no purpose in this article. Much has been written elsewhere regarding the federal counterpart to HAW. REV. STAT. § 641-1(b), and for discussion of this provision, see Schickele & Geisinger, *Interlocutory Appeals Pursuant to 28 U.S.C. § 1292(b) and Their Use in Class Actions: Discretion Displaces the Death Knell*, 15 U.S.F. L. REV. 321, 341-60 (1981) (28 U.S.C. § 1292(b)); Comment, *Appealability of Orders Denying Attorney Disqualification—A Look Beyond* Firestone, 1982 U. ILL. L. REV. 975, 991-1001 ("IV. Interlocutory Appeals—Section 1292(b)"); Note, *Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292*, 67 GEO. L.J. 1025, 1028-29 (1979) ("Section 1292(b)"); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607 (1975) (extensive and well documented review of the statute).

III. INTERLOCUTORY APPEALS FROM MULTI-CLAIM AND MULTI-PARTY ACTIONS—RULE 54(B)

"Certainty Generally is Illusion, and Repose is not the Destiny of Man."[112]

Rule 54(b) of the Hawaii Rules of Civil Procedure provides appellate review of final judgments entered on fewer than all claims or parties in a multi-claim or multi-party action.[113] Prompted by the liberal provisions for joinder of claims and parties, Hawaii Rule 54(b) is designed to avoid hardship to a litigant whose rights were determined early in the suit, but who nonetheless was forced to await final judgment in the entire suit before seeking appellate relief.[114] Application to severability of both claims and parties is clear.[115] Absent certification in this context, a lower court judgment disposing of some, but not all, of the claims or parties is not appealable.[116]

As the United States Supreme Court stated in the seminal case *Sears, Roebuck & Co. v. Mackey*,[117] "[Federal Rule 54(b)] scrupulously recognizes the statutory requirement of a 'final decision' under § 1291 as a basic requirement for an appeal to the Court of Appeals."[118] It merely "provide[s] a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final decisions to be rendered on *all* claims in the case."[119] The rule attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at the time that best serves the needs of the parties.[120] In *Curtiss-*

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[112] O. W. Holmes, Jr., Speech to Boston University School of Law, Jan. 8, 1897.

[113] See *supra* note 6 for the text of HAW. R. CIV. P. 54(b).

[114] *See* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511-12 (1950) (liberalization of federal civil practice allowing more parties and issues within a single action prompted a need for Rule 54(b)); Advisory Committee on Rules for Civil Procedure 70 (1946), *reprinted in* 5 F.R.D. 433, 472-73 (1946).

As the ICA has noted, FED. R. CIV. P. 54(b), is identical to HAW. R. CIV. P. 54(b). "Therefore, federal case law relating to Rule 54(b), Federal Rules of Civil Procedure, is applicable by analogy in the construction of Rule 54(b)." *TBS*, 5 Haw. App. at 235, 686 P.2d at 43 (1984).

[115] *See* 10 WRIGHT & MILLER, *supra* note 86, § 2653, at 30.

[116] *See Island Holidays*, 58 Haw. at 560, 574 P.2d at 889; Mohl v. Bishop Trust Co., 2 Haw. App. 296, 297, 630 P.2d 1084, 1085 (1981); Employees' Retirement Fund v. Big Island Realty, 2 Haw. App. 151, 627 P.2d 304 (1981).

[117] 351 U.S. 427 (1956).

[118] *Id.* at 438.

[119] *TBS*, 5 Haw. App. at 236, 686 P.2d at 44 (quoting *Mackey*, 351 U.S. at 435).

[120] Solomon v. Aetna Life Ins. Co., 782 F.2d 58, 60 (6th Cir. 1986); Makuc v. American Honda Motor Co., 692 F.2d 172 (1st Cir. 1982); Bergstrom v. Sears, Roebuck & Co., 599 F.2d 62 (8th Cir. 1979); Aetna Ins. Co. v. Newton, 398 F.2d 729 (3d Cir. 1968); WRIGHT & MILLER, *supra* note 86, at § 2654, at 37.

Wright Corp. v. General Electric Co.,[121] the Court relied on *Mackey* to support the conclusion that courts must "take into account judicial administrative interests as well as the equities involved. Consideration of the former is necessary to assure that application of the Rule effectively 'preserves the historic federal policy against piecemeal appeals.' "[122]

Rule 54(b) does not apply to judgments that dispose of the last remaining issue in the case.[123] Although a particular claim or particular party qualifies for Rule 54(b) certification, litigants are not compelled to avail themselves of immediate appellate review for fear of losing their appellate rights.[124] "[T]here is no pressing reason why a party should be *compelled* to proceed with an immediate appeal on one part of the case under Rule 54 if he is willing to wait for the end."[125] However, if a judgment is entered, appeal must be sought immediately because the appellate timetable runs from "entry of judgment,"[126] not "entry of final judgment."[127]

Another important consideration is that Rule 54(b) applies to only substantive claims. In *Mulay Plastics, Inc. v. Grand Trunk Western Railroad*,[128] the Seventh Circuit Court of Appeals reversed a Rule 54(b) certification of a discovery sanction award. The court construed the phrase "claim for relief" in Rule 54(b) as meaning substantive claims, and a grant of discovery sanctions clearly did not fall within the ambit of the rule.[129] The language of Rule 54(b) leaves,

> little room for doubt that it indeed is limited to substantive claims: 'When more

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[121] 446 U.S. 1 (1980).

[122] *Id.* at 8 (quoting *Mackey*, 351 U.S. at 438).

[123] *See* Ellender v. Schweiker, 781 F.2d 314, 318 (2d Cir. 1986); 6 MOORE'S FEDERAL PRACTICE, *supra* note 25, ¶ 54.27[3], at 334 ("[T]he Rule does not contemplate a certificate when the district court has ajudicated *all* the claims . . . .") (emphasis original); *Id.*, ¶ 54.34[1], at 522-23 ("When the court has fully adjudicated all of the claims no certificate is necessary to make that adjudication final.").

[124] *See* WRIGHT & MILLER, *supra* note 86, § 2654, at 38.

[125] Exchange Nat'l Bank v. Daniels, 763 F.2d 286, 291 (7th Cir. 1985).

[126] *See* Former HAW. R. CIV. P. 73 and current HAW. R. APP. P. 4(a)(1). See *supra* note 73 for the text of Rule 73 in full; *see also generally* Wood v. Coast Framing Supply, Inc., 779 F.2d 1441, 1443 (9th Cir. 1986).

[127] *See Exchange Nat'l Bank*, 763 F.2d at 291; Morgan v. Union Metal Mfg., 757 F.2d 792 (6th Cir. 1985); International Ass'n v. Madison Indus., Inc., 733 F.2d 656 (9th Cir. 1984); Bernstein v. Menard, 728 F.2d 252 (4th Cir. 1984); Smith v. Mine Safety Appliances Co., 691 F.2d 724 (5th Cir. 1982); Swanson v. American Consumer Inc., 517 F.2d 555, 561 (7th Cir. 1975); Scholl v. District of Columbia, 331 F.2d 1018 (D.C. Cir. 1964).

[128] 742 F.2d 369 (7th Cir. 1984).

[129] *Id.* at 371; *accord* Swanson v. American Consumer Indus., Inc., 517 F.2d at 560-61; Seigal v. Merrick, 619 F.2d 160, 164 n.7 (2d Cir. 1980); Redding & Co. v. Russwine Constr. Corp., 417 F.2d 721, 726 n.33 (D.C. Cir. 1969); Atkins, Kroll (Guam), Ltd. v. Cabrera, 277 F.2d 922, 924 (9th Cir. 1960).

> than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim . . .'; compare Rule 8(a). In any event this reading is compelled by good sense; otherwise a class of interlocutory orders would be reviewable prematurely.[130]

In Hawaii, this analysis would dictate that non-substantive claims, such as discovery sanctions, should be appealed under Hawaii Revised Statutes section 641-1(b) as opposed to Rule 54(b).

Out of necessity, Rule 54(b) certification is discretionary on the part of the trial judge.[131] The United States Supreme Court has been "reluctant either to fix or sanction narrow guidelines for the district courts to follow"[132] because of the large number of possible situations applicable under Rule 54(b). This does not mean that granting certification should be a matter of course. "[S]ound judicial administration does not require that Rule 54(b) requests be granted routinely,"[133] and one court has remarked that "certification [should be granted] only when there exists 'some danger of hardship or injustice through delay which would be alleviated by immediate appeal.' "[134] In addition,

> Especially today, with the proliferation of appeals and consequent increased burden on appellate courts, unrestrained application of Rule 54(b) is strongly disfavored. In accordance with this policy, we have followed the reasoned rule of the Third Circuit that "54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel. The power which this Rule confers upon the trial judge should be used 'in the infrequent harsh case' . . . ."[135]

Cognizant of the fact that "[t]he first characteristic of a good jurisdictional

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[130] *Mulay Plastics*, 742 F.2d at 371.

[131] *See* Solomon v. Aetna Life Ins. Co., 782 F.2d 58, 61 (6th Cir. 1986); *Curtiss-Wright*, 446 U.S. at 12. *Compare* Arimizu v. Financial Sec. Ins. Co., 5 Haw. App. 106, 114, 679 P.2d 627, 633-34 (1984) (granting trial courts "wide discretion") *with Jacober*, 5 Haw. App. at 25 n.6, 674 P.2d at 1028 n.6 ("discretion of the lower court to authorize interlocutory appeal is limited"); WRIGHT & MILLER, *supra* note 86, § 2659, at 101; R. ANIGIAN & W. CHU, DISCRETIONARY REVIEW OF TRIAL COURT RULINGS—A PRAGMATIC APPROACH, ch. 15, at 327 (1985).

[132] *Curtiss-Wright*, 446 U.S. at 11.

[133] *Id.* at 10.

[134] Ansam Assoc., Inc. v. Cola Petroleum, Ltd., 760 F.2d 442, 445 (2d Cir. 1985) (quoting Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 942 (2d Cir. 1968)).

[135] *Ansam Assoc.*, 760 F.2d at 445 (quoting Panichella v. Pennsylvania R.R., 252 F.2d 452, 455 (3d Cir. 1958)), *quoted in* Cullen v. Margiotta, 618 F.2d 226, 228 (2d Cir. 1980). *See also* Brunswick Corp. v. Sheridan, 582 F.2d 175, 183 (2d Cir. 1978); Arlinghaus v. Ritenour, 543 F.2d 461, 463-64 (2d Cir. 1976). This appears to also be the view held by Hawaii's appellate courts. *See Lui*, 63 Haw. 668, 634 P.2d 595 (1981); *Jacober*, 5 Haw. App. at 25 n.6, 674 P.2d 1028 n.6 (1984).

rule is predictability and uniform application,"[136] the Hawaii Supreme Court in *Mason v. Water Resources International* sought to establish a uniform procedure for Rule 54(b) appeals,[137]

> If an order is susceptible of certification for appeal under Rule 54(b), Hawaii Rule or DCRCP and a party requests such a certification, the trial court shall carefully consider whether or not there is any just reason for delay and whether or not entry of judgment should be directed and, only if it concludes in the affirmative on both issues, shall it then enter a judgment in the form required under Rule 54(b), Hawaii Rule.[138]

Therefore, Rule 54(b) certification is a two-step process. The court must make an express determination that no just reason for delay exists and direct entry of judgment is required.[139] Before any inquiry into the appropriate factors underlying these two steps can be made, however, it must be emphasized that trial judges cannot "merely repeat the formulaic language of . . . [Rule 54(b)], but rather should offer a brief, reasoned explanation."[140]

Without explaining its grant of Rule 54(b) relief, adequate review of the trial judge's certification cannot be conducted to determine the propriety of the certification,

> It is essential . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law . . . .[141]

Absent express findings, both the Hawaii Supreme Court and the Ninth Circuit have stated they will dismiss an appeal without an independent inquiry into the certification's propriety.[142]

The first step of Rule 54(b) certification is to determine "if there is no just reason for delay." In *Curtiss-Wright v. General Electric*, the United States Supreme Court said "in deciding whether there is no just reason to delay the appeal . . . a district court must consider judicial administrative interests as

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[136] Exchange Nat'l Bank v. Daniels, 763 F.2d 286, 292 (7th Cir. 1985).

[137] 67 Haw. at 530, 694 P.2d at 389.

[138] *Id.*

[139] *See* WRIGHT & MILLER, *supra* note 86, § 2655, at 40 (referring to the two-step inquiry).

[140] Cullen v. Margiotta, 618 F.2d 226, 228 (2d Cir. 1980).

[141] Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 364 (3d Cir. 1975) (quoting Protective Comm. v. Anderson, 390 U.S. 414, 434 (1968)).

[142] *Mason*, 67 Haw. at 521, 694 P.2d at 389; Frank Briscoe Co. v. Morrison-Knudsen, 776 F.2d 1414, 1416 (9th Cir. 1985).

well as the equities involved."[143] The test by which the trial judge should consider the delay factor is, inter alia, "whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals."[144] At least two circuits have expanded on the *Curtiss-Wright* test and attempted to summarize the relevant Rule 54(b) reason for delay factors. In *Solomon v. Aetna Life Insurance Co.*,[145] the Seventh Circuit Court of Appeals opined that the trial judges should consider:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. Depending upon the facts of the particular case, all or some of the above factors may bear upon the propriety of the trial court's discretion in certifying a judgment as final under Rule 54(b).[146]

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[143] 446 U.S. at 8.

[144] *Id.* In a footnote, the Court qualified this statement.

> We do not suggest that the presence of one of these factors would necessarily mean that Rule 54(b) certification would be improper. It would, however, require the district court to find a sufficiently important reason for nonetheless granting certification. For example, if the district court concluded that there was a possibility that an appellate court would have to face the same issues on a subsequent appeal, this might perhaps be offset by a finding that an appellate resolution of the certified claims would facilitate a settlement of the remainder of the claims.

Id. at 8 n.2. *See also* Cold Metal Process Co. v. United Eng'g & Foundry Co., 351 U.S. 445, 450 n.5 (1956).

The court expressly rejected the Second Circuit's contention that the presence of a counterclaim rendered 54(b) certification inappropriate. *Id.* at 8-9. The ICA has cited this language with approval in Hawaii. *See Arimizu*, 5 Haw. App. at 114, 679 P.2d at 633-34.

In 1985, the Seventh Circuit, without citing *Curtiss-Wright*, adopted a similar test. "An order is appealable under Rule 54(b) only if the claims designated in the order lack a substantial factual overlap with those remaining in the district court and there would not be a need for multiple appellate consideration of the same issues." *National Exchange Bank*, 763 F.2d at 291. *See, e.g.*, Parks v. Pavkovic, 753 F.2d 1397, 1401-02 (7th Cir. 1985); Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 701-02 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

[145] 782 F.2d 58 (6th Cir. 1986).

[146] *Id.* at 61 n.2. The court cited Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 364 (3d Cir. 1975) as the current third circuit view. *See also* WRIGHT & MILLER, *supra* note 86, § 2659 (for an exhaustive view of *Solomon*—type factors).

While the Hawaii appellate courts have not adopted criteria for the "just reason for delay" inquiry, *Solomon* may represent a comprehensive collection of elements that should be considered in certifying appeals pursuant to Rule 54(b). In *TBS Pacific, Inc. v. Tamura*,[147] the ICA dismissed an appeal because "the Rule 54(b) (1) determination that there is no just reason for delay and (2) direction for entry of judgment [were] lacking."[148] *TBS*, coupled with the Hawaii Supreme Court's admonition in *Mason*, clearly stands for the proposition that absent the requisite inquiry by the trial court and express findings thereof, appeals in Hawaii will be summarily dismissed.

The second step in the Rule 54(b) certification process is to make "an express direction for the entry of judgment." This factor requires more than a mechanical entry of judgment under Rule 58 of the Hawaii Rules of Civil Procedure.[149] In addition, the trial court must expressly find that there are multiple claims or multiple parties or both, and that either one or more but fewer than all the claims have been decided or that all the rights and liabilities of at least one party have been adjudicated. This determination is not left to the discretion of the trial judge, as is the "just reason for delay" element.[150] Therefore, it is imperative that the findings of the trial court regarding the two elements of Rule 54(b) be made separately. Appellate courts may freely review the lower court's assessment of the multiplicity of claims or parties and the scope of the claims adjudicated.

The first part of Rule 54(b)'s second step is whether there are multiple parties or claims. If there are multiple parties, there need only be one claim in the action. But in this context, all of the rights and liabilities of the party or parties seeking certification must be decided.[151]

The element of multiple claims absent multiple parties represents a more difficult situation. "The line between deciding one of several claims and deciding only part of a single claim is sometimes very obscure."[152] No Hawaii opinion has addressed the issue, and the latest United States Supreme Court pronouncement on Rule 54(b) offers little guidance,

> A district court must first determine that it is dealing with a "final judgment." It must be a "judgment" in the sense that it is a decision upon a cognizable claim for relief, and it must be "final" in the sense that it is "an ultimate disposition of

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[147] 5 Haw. App. 225, 686 P.2d 37 (1984).

[148] *Id.* at 236, 686 P.2d at 45.

[149] *See supra* note 46 and accompanying text (quoting rule 58 in full).

[150] *Curtiss-Wright*, 446 U.S. at 10.

[151] Instituto Nacional de Comercializacion Agricola v. Continental Ill. Bank & Trust Co., 576 F. Supp. 991, 1005 (N.D. Ill. 1983); WRIGHT & MILLER, *supra* note 86, § 2656, at 48; Baca Land & Cattle Co. v. New Mexico Timber, Inc., 384 F.2d 701 (10th Cir. 1967).

[152] WRIGHT & MILLER, *supra* note 86, § 2657, at 60-61.

an individual claim entered in the course of a multiple claims action."[153]

The Court cited *Sears, Roebuck & Co. v. Mackey*,[154] as setting forth the two-step inquiry for Rule 54(b).[155] In *Mackey*, the Court faced a complaint containing four counts, one of which sought damages under antitrust laws for injury to three of plaintiff's commercial ventures. The other three counts sought recovery on common law grounds for the injury sustained by each of the ventures. The Court was presented with the issue of how much independence of the claims was necessary for Rule 54(b) purposes.

The Court found the counts sufficiently distinct to warrant certification, even though they arose out of the same operative facts. "[T]here is no doubt that each of the claims dismissed is a 'claim for relief' within the meaning of Rule 54(b), or that their dismissal constitutes a 'final decision' on individual claims."[156] On the same day, the Court also decided *Cold Metal Process Co. v. United Engineering & Foundry Co.*,[157] another case discussing the "separability of claims" issue. Consistent with the broad reading accorded in *Mackey*, the Court upheld certification of plaintiff's claim even though a counterclaim, arising in part out of the same transaction as plaintiff's claim, remained unadjudicated.[158]

This should not be taken to mean that any variation in legal theory is a separate claim.[159] But still, the "separability of claims" issue should be given a liberal interpretation as indicated by the Court. Also, the "separability of claims" issue demands consideration with an eye towards the policy of Rule 54(b), namely whether invocation of Rule 54(b) best serves the interests of the parties, the judicial system, and the desire to avoid piecemeal appellate review.[160]

The second part of the Rule 54(b) "entry of judgment" step is a requisite finding of finality. The claim sought to be certified must be finally decided, or

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[153] *Curtiss-Wright*, 446 U.S. at 7 (citing *Sears, Roebuck & Co. v. Mackey*, 351 U.S. at 436).

[154] 351 U.S. 427 (1956).

[155] *Id.*

[156] *Id.* at 436.

[157] 351 U.S. 445 (1956).

[158] *Id.* at 447-52.

[159] *See* Allegheny County Sanitary Auth. v. EPA, 732 F.2d 1167, 1172 (3d Cir. 1984); A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chem. Group, Inc., 725 F.2d 1140 (7th Cir. 1984); Minority Police Officers Ass'n of South Bend v. City of South Bend, 721 F.2d 197, 200 (7th Cir. 1983); McIntyre v. First Nat'l Bank, 585 F.2d 190, 192 (6th Cir. 1978). *See generally* Tolson v. United States, 732 F.2d 998 (D.C. Cir. 1984) (claim against an employee and one against the employer under the theory of respondeat superior are not separate for Rule 54(b) purposes); Oyster v. Johns-Manville Corp., 568 F. Supp. 83 (E.D. Pa. 1983) (claims grounded in negligence, breach of warranty and strict liability were not separate from intentional tort allegation since the core of operative facts was the same).

[160] *See supra* notes 118-22 and accompanying text.

in the case of a party seeking certification, the claim as to that party must be final. Since the concept of finality has been discussed at length earlier,[161] it serves no purpose to reiterate it further. "In general, the standard for determining what constitutes finality under the rule is the same as that utilized in single claim cases."[162] As the United States Supreme Court has remarked, finality in the Rule 54(b) context must be "an ultimate disposition of an individual claim entered in the course of a multiple claims action."[163]

Once the trial court has determined: (1) the lawsuit involves multiple claims or parties; (2) a final judgment has been reached as to one or more, but not all, of the claims or parties; and (3) there is no just reason for delay, then certification is properly granted.[164] Obviously, there is potential overlap between Hawaii Rule 54(b) and Hawaii Revised Statute section 641-1(b) as grounds for appeal. Whether the two should be construed as mutually exclusive is currently a subject of debate. One recent ICA opinion held that they were.[165]

In *TBS Pacific, Inc. v. Tamura*, the ICA addressed whether section 641-1(b) and Hawaii Rule 54(b) overlap in certain contexts as grounds for appealing a non-final judgment. *TBS* involved a foreclosure decree and order of sale. The trial court did not dispose of a third-party complaint. Consequently, the judgment entered did not dispose of all parties and all claims for an appeal under section 641-1(a). After analyzing section 641-1(b), Hawaii Rule 54(b), and the legislative and judicial history behind both, the court concluded:

> [W]here one or more claims or the rights and liabilities of one or more parties have been fully decided but all of the claims and the rights and liabilities of all of the parties have not been fully decided, appellate jurisdiction over the fully decided claims, rights and liabilities cannot be generated by satisfying the requirements of HRS § 641-1(b). The only way to generate appellate jurisdiction in such a situation is through HRS § 641-1(a) which requires satisfaction of the requirements of Rule 54(b).[166]

In support of its conclusion, the ICA correctly found that section 641-1(b) governed only interlocutory appeals, while all appeals from traditionally final judgments must be via section 641-1(a). Furthermore, the court urged that

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[161] *See supra* notes 14-88 and accompanying text. Final judgments under HAW. REV. STAT. § 641-1(a) clearly satisfy the finality requirements under Rule 54(b). *See* Marino v. Nevitt, 311 F.2d 406 (3d Cir. 1963).

[162] WRIGHT & MILLER, *supra* note 86, § 2656, at 51.

[163] *Curtiss-Wright*, 446 U.S. at 7 (quoting *Mackey*, 351 U.S. at 436).

[164] Whether after all three elements are present and the trial court still refuses certification is "appealable" by way of writ of mandamus compelling the trial court to certify the issue is discussed *infra* at notes 256-73 and accompanying text.

[165] *TBS*, 5 Haw. App. at 237, 686 P.2d at 45.

[166] *Id.* at 231, 686 P.2d at 41.

written judgments, decrees or orders pursuant to a full adjudication of all claims and all parties, Hawaii Rule 54(b) certifications, and the *Forgay-Conrad* irreparable injury rule, discussed below, or the *Cohen* collateral order doctrine are "final" as that term is used in section 641-1(a) and thus not appealable under section 641-1(b). This led the court to conclude that in situations where entry of a "final judgment" was possible, appeal was available *only* under section 641-1(a) and not under section 641-1(b).[167]

The ICA created a distinction that neither the legislature, in adopting section 641-1, or the Hawaii Supreme Court, in promulgating the rules of procedure, intended. After finding that section 641-1(b) and Rule 54(b) did not conflict,[168] and that the rule did not effect an impermissible enlargement or modification of the statute,[169] the court went one step further and ruled that the two were mutually exclusive in their appellate jurisdiction.[170] No case law or scholarly support was cited as standing for this proposition.

The Hawaii Supreme Court, in *Wylly v. First Hawaiian Bank*,[171] intimated that appellate jurisdiction can be sought by way of either section 641-1(b) or Rule 54(b) in a multi-party or multi-claim context.[172] Furthermore, while the ICA was under the impression that federal case law supports its conclusion, the opposite is true. The Eleventh Circuit recently found that Federal Rule 54(b) does not affect appellate jurisdiction under 28 U.S.C. section 1292(a), the federal statute allowing immediate review of grants or denials of injunctive relief.[173]

The problem with *TBS* was an analytical one. As the ICA expressly found, appeal by way of Rule 54(b) was only available *after* a written "final" judgment is entered with respect to the ruling sought to be appealed.[174] Until all the entry of judgment formalities were satisfied, however, the ruling is still interlocutory, regardless of whether "finality" is available through Rule 54(b).[175]

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[167] *Id.* at 237, 686 P.2d at 45.

[168] *Id.* at 235, 686 P.2d at 43.

[169] *Id.* at 236, 686 P.2d at 44 (citing Cold Metal Process Co. v. United Eng'g & Foundry Co., 351 U.S. 445 (1956)).

[170] 5 Haw. App. at 236, 686 P.2d at 44.

[171] 57 Haw. 61, 549 P.2d 477 (1976).

[172] *Id.* at 63, 549 P.2d at 479. The ICA noted *Wylly* in *TBS*, but chose not to heed its inference.

[173] Simmons v. Block, 782 F.2d 1545, 1549 (11th Cir. 1986); *accord* United States v. County of Humbolt, 615 F.2d 1260, 1261 (9th Cir. 1980); Ransburg Electro-Coating Corp. v. Lansdale Finishers, Inc., 484 F.2d 1037, 1038 (3d Cir. 1973). Hawaii has no statutory counterpart to 28 U.S.C. § 1292(a), but analytically this does not matter. Both § 1292(a) and HAW. REV. STAT. § 641-1(b) grant appellate review of what are clearly interlocutory orders.

[174] 5 Haw. App. 235, 686 P.2d at 45.

[175] *See Simmons*, 782 F.2d at 1549 ("Whenever a court fully adjudicates a claim . . . and does not execute a FED. R. CIV. P. 54(b) certificate, . . . *the adjudication is interlocutory* if other

While it is true that once judgment is properly entered it becomes "final" and appeal by way of section 641-1(b) is improper, up until that point, however, the putative appellant has a choice. Options at this point include immediate review of the interlocutory ruling via section 641-1(b), a petition to the court for a Rule 54(b) certification transposing the interlocutory ruling into a "final" one for purposes of appeal, or a direct appeal of the ruling to the supreme court urging the ruling is "final" by way of *Forgay-Conrad* or *Cohen*. The standards of application are different, and it depends upon particular factual circumstances as to which vehicle has the best probability of success. However, the statutes or the rules do not explicitly *require* the appellant to seek one vehicle to the exclusion of the others.

IV. Judicially Created Exceptions to the Finality Rule

"No Rule Is So General Which Admits No Exceptions."[176]

A. Collateral Order Doctrine

It is well established in Hawaii that an exception to the finality doctrine exists in situations where the interlocutory ruling, order, or judgment is sufficiently collateral to the merits of the underlying action so as to warrant immediate appellate review.[177] This idea was first adopted by the United States Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*,[178] where the Court ruled that "a 'small class' of orders that d[o] not end the main litigation [are] . . . final and appealable pursuant to § 1291."[179]

The Court set forth a test to determine which interlocutory orders fall within this "small class" and warrant immediate appellate review. Under *Cohen*, review was available if the order "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[180]

Since adoption of the *Cohen* test, the Court's determination of finality has not

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claims remain pending.") (emphasis added). *See also* Ackerman-Chillingworth v. Pacific Elec. Contrs. Ass'n., 579 F.2d 484, 489 (9th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979); Hartford Fire Ins. Co. v. Herrald, 434 F.2d 638, 639 (9th Cir. 1970); Rains v. Cascade Indus., Inc., 402 F.2d 241, 243 (3d Cir. 1968).

[176] R. Burton, The Anatomy Of Melancholy (1622).

[177] *See* Estate of Henry, 2 Haw. App. 529, 531, 634 P.2d 615, 617 (1981) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)).

[178] 337 U.S. 541 (1949).

[179] Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

[180] 337 U.S. at 546.

always been consistent.[181] The Court has noted "[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."[182] Regardless, unhampered by the context in which it arises, the Court has consistently cited *Cohen* in evaluating appeals from judgments not disposing of the entire action.[183]

In four recent decisions, the United States Supreme Court has suggested a retreat from the idea that finality ought to be accorded a "practical rather than technical construction."[184] Given the admonition in *Mason v. Water Resources International*[185] by the Hawaii Supreme Court and the ICA in *Employees' Retirement System v. Big Island Realty, Inc.*[186] that Hawaii ought to restrict appellate review through *Cohen*, a strong argument can be made that the recent retrenchment by the United States Supreme Court will be followed here. The following discussion of relevant law, therefore, will focus on recent federal developments since Hawaii courts have not had the occasion to either adopt or reject the current movement.

In *Richardson-Merrell, Inc. v. Koller*,[187] the United States Supreme Court

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[181] *Compare Gillespie*, 379 U.S. at 153 ("We cannot say that the Court of Appeals chose wrongfully [in allowing an immediate appeal] under the circumstances. And it seems clear now that the case is before us that the eventual costs . . . will certainly be less if we now pass on the questions presented[.]"), *with Firestone*, 449 U.S. at 376 ("To be appealable as a final collateral order, the challenged order must constitute 'a complete, formal and, in the trial court, final rejection' . . . of a claimed right 'where denial of immediate review would render impossible any review whatsoever.' " (quoting Abney v. United States, 431 U.S. 651, 659 (1977) and United States v. Ryan, 402 U.S. 530, 533 (1971)).

[182] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974) (footnote omitted).

[183] *See, e.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Gillespie v. U.S. Steel, 379 U.S. 148 (1964); Stack v. Boyle, 342 U.S. 1 (1951). Since 1949, the Supreme Court has allowed immediate appeal from orders denying motions to dismiss based on the double jeopardy clause, Abney v. United States, 431 U.S. 651 (1977); to reduce bail, Stack v. Boyle, 342 U.S. 1 (1951); and from an order granting a motion to allocate to the defendant the costs of notice in a class action, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Conversely, the Supreme Court, pursuant to this test, has refused to allow immediate appeals from orders refusing to certify class actions under FED. R. CIV. P. 23, Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); to dismiss for failure to provide a speedy trial, United States v. MacDonald, 435 U.S. 850 (1978); to supress evidence, DiBella v. United States, 369 U.S. 121 (1962); a subpoena, United States v. Ryan, 402 U.S. 530 (1971); and to disqualify counsel, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1980); Flanagan v. United States, 465 U.S. 259 (1984); Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985).

[184] *See* Richardson-Merrell v. Koller, 472 U.S. 424 (1985); Flanagan v. United States, 465 U.S. 259 (1984); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981); Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). *But see* Mitchell v. Forsyth, 472 U.S. 511 (1985) (allowing the appeal and signalling the Court's continued affirmance of *Cohen*).

[185] *See supra* notes 105-11 and accompanying text.

[186] 2 Haw. App. 151, 627 P.2d 304 (1981).

[187] 472 U.S. 424 (1985).

characterized the collateral order doctrine as a narrow exception to the finality rule whose reach was limited to trial court orders affecting rights that will be irretrievably lost in the absence of immediate appeal.[188] After noting that most pre-trial orders are ultimately affirmed by appellate courts[189] and that the proper function of an appellate court is to review and not to intervene,[190] the Court set forth the modern formulation of *Cohen*. "To fall within the exception, an order must at minimum satisfy three conditions: It must 'conclusively determine the disputed question, . . . resolve an important issue completely separate from the merits of the action,. . .[and] be effectively unreviewable on appeal from a final judgment.' "[191] The first step of this tripartite analysis is to inquire into the finality of the appealed-from ruling. One court recently found that finality existed as long as further action on the ruling is not contemplated.[192] The fact that the trial judge has the power to amend the order does not defeat finality for *Cohen* test purposes.[193] The proper focus is therefore upon the subjective intent of the trial judge, which comports with cases in which a finality inquiry is made by the courts of appeal for purposes of 28 U.S.C. section 1291.[194] Orders in which the trial court invites future consideration[195] or are inherently open to reconsideration[196] will not satisfy this test.

The second step in the *Cohen* analysis was an inquiry into the separability between the issue appealed from and the underlying merits of the case. A sharply divided Court[197] in *Mitchell v. Forsyth* sought to determine whether the

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[188] *Id.* at 430 (citing Helstoki v. Meanor, 442 U.S. 500, 506-08 (1979)); Abney v. United States, 431 U.S. 651, 660-62 (1977). *See also* Powers v. Lightner, 752 F.2d 1251, 1255 (7th Cir. 1985) ("Like all exceptions to the finality requirement of § 1291, the collateral order doctrine should be construed narrowly."); Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860 (7th Cir. 1984) (advocating the "narrow construction" interpretation of *Cohen*).

[189] 472 U.S. at 434 (citing 15 WRIGHT & MILLER, *supra* note 86, § 3907, at 433.

[190] *Id.* at 436 (quoting *Cohen*, 377 U.S. at 546).

[191] 472 U.S. at 431 (citing *Coopers & Lybrand*, 437 U.S. at 468).

[192] *See* Henry v. City of Detroit Manpower Dep't, 763 F.2d 757, 761 (6th Cir. 1985) (en banc). *See also* 15 WRIGHT & MILLER, *supra* note 86, § 3911.

[193] 763 F.2d at 761.

[194] *See supra* notes 26-30 and accompanying text.

[195] *See* Ruiz v. Estelle, 609 F.2d 118, 119 (5th Cir. 1980) (attorney's fees award subject to later reconsideration held unappealable); Matthews v. IMC Mint Corp., 542 F.2d 544 (10th Cir. 1976) (leave to renew quashing of attachment defeats appealability); Gerstle v. Continental Airlines, Inc., 466 F.2d 1374 (10th Cir. 1972) (order decertifying class unappealable because of judge's remarks that the issue was not beyond reconsideration).

[196] *See* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); United States v. MacDonald, 435 U.S. 850 (1978); Yakowicz v. Commonwealth of Pa., 683 F.2d 778 (3d Cir. 1982); Judd v. First Fed. Saving & Loan Ass'n, 599 F.2d 820 (7th Cir. 1979); School Dist. v. Missouri, 592 F.2d 493 (8th Cir. 1979).

[197] Justice White authored the majority opinion, with Justice Powell taking no part in the decision, and Justice Rehnquist taking no part in either consideration of the case or the decision.

invocation of an absolute or qualified immunity from testifying was "completely separate from the merits of the action." The Court found that it was, "even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue."[198]

It was upon this formulation that Justices Brennan and Marshall dissented. They agreed that mere factual overlap is not enough to show a lack of separability.[199] "Rather, it is the *legal* overlap between the qualified immunity question and the merits of the case that render the two questions inseparable."[200] The majority did not agree, and by doing so adopted a test for separability that inquired into whether the interlocutory order was "conceptually distinct" from the merits of the underlying case.[201] Given the importance of this apparent relaxing of the separability requirement, it is instructive to set the Court's rationale out in full in applying its "conceptually distinct" test,

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the

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Chief Justice Burger, with whom joined Justice O'Connor, filed a concurring opinion. Justice O'Connor, with whom Chief Justice Burger joined, filed a concurring opinion in part. Justice Stevens filed an opinion concurring in the judgment and Justice Brennan, with whom Justice Marshall joined, filed an opinion concurring in part and dissenting in part.

[198] 472 U.S. at 529 (footnote omitted).

[199] *Id.* at 546 n.2 (Brennan, J., dissenting).

[200] *Id.* Justice Brennan wrote:

> As the text makes clear, when a trial court renders a qualified immunity decision on a summary judgment motion, it must make a legal determination very similar to the legal determination it must make on a summary judgment motion on the merits. Similarly, there may be cases in which, after all of the evidence has been introduced, the defendant officially moves for a directed verdict on the ground that the evidence actually produced at trial has failed to make a factual issue of the question whether the defendant violated clearly established law. The trial court's decision on the defendant's directed verdict motion would involve legal questions quite similar to a motion by the defendant for a directed verdict on the merits of the case. The point is that, regardless of when the defendant raises the qualified immunity issue, it is similar to the question on the merits at the same stage of the trial. In contrast, the trial court's decision on absolute immunity or double jeopardy—at whatever stage it arises—will ordinarily not raise a legal question that is the same, or even similar, to the question on the merits of the case.

Id.

[201] *Id.* at 528. Justice Brennan in his dissent coined the phrase "conceptually distinct" test. *Id.* at 547 (Brennan, J., dissenting).

> actions the defendant claims he took. To be sure, the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief; the same is true, however, when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit because the complained of conduct falls within the protections of the Speech and Debate Clause. In the case of a double jeopardy claim, the court must compare the facts alleged in the second indictment with those in the first to determine whether the prosecutions are for the same offense, while in evaluating a claim of immunity under the Speech and Debate Clause, a court must analyze the plaintiff's complaint to determine whether the plaintiff seeks to hold a Congressman liable for protected legislative actions or for other, unprotected conduct. In holding these and similar issues of absolute immunity to be appealable under the collateral order doctrine, . . . the Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue.[202]

Justice Brennan characterized the reformulated test as "an attempt to avoid the rigors of the second prong of the collateral order doctrine."[203] The test that was applied as recently as two days before *Mitchell* was one of *complete* separability from the merits of the action.[204] In *Richardson-Merrell*, the Court found that the disqualification of an attorney was not separate from the merits.[205] The Court supported its conclusion by rejecting an ad hoc inquiry into the interrelationship of the allegations leading to the disqualification and the merits of the underlying case,

> Even if some orders disqualifying counsel are separable from the merits of the litigation, many are not. Orders disqualifying attorneys on the ground that they should testify at trial, for example, are inextricable from the merits because they involve an assessment of the likely course of the trial and the effect of the attorney's testimony on the judgment. *Kable v. Oppenheimer & Co.*. Appellate review of orders disqualifying counsel for misconduct may be entwined with the merits of the litigation as well. If reversal hinges on whether the alleged misconduct is "likely to infect future proceedings," courts of appeals will often have to review the nature and content of those proceedings to determine whether the standard is met. In this case, for example, the Court of Appeals opinion exhaustively discussed respondent's claim on the merits, the relevance of the alleged instances of misconduct to the attorney's zealous pursuit of that claim, the pretrial proceed-

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[202] *Id.* at 2816-17 (citations and footnotes omitted).

[203] *Id.* at 2827 (Brennan, J., dissenting).

[204] *Id.* The Court used this formula in *Koller*, *Flanagan*, United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982), and *Firestone Tire & Rubber Co.* 449 U.S. at 375 (Brennan, J., dissenting).

[205] *Koller*, 472 U.S. at 431.

> ings in the trial court, and the danger that it will be difficult for the trial judge "to act with a complete impartiality in future proceedings." In light of these factors, we conclude that orders disqualifying counsel in civil cases, as a class, are not sufficiently separable from the merits to qualify for interlocutory appeal.[206]

As Justice Brennan pointed out in *Mitchell*, the inconsistency of the two opinions is all too apparent.[207] While the "complete separability" test has long been the appropriate standard for the *Cohen* second step and comports with the Court's recent line of cases seeking to limit appellate review of interlocutory orders,[208] the "toothless standard"[209] of *Mitchell* is unquestionably good law.

Fortunately, the Hawaii appellate courts are free to adopt either interpretation of the *Cohen* second step, and given the obvious desire of the supreme court and the ICA to restrict interlocutory review to only those cases that are absolutely necessary, it does not appear that the *Mitchell* standard will be looked upon favorably. The better rule is to require complete separability of the interlocutory ruling and the merits of the case; anything short of this would foster appellate review of matters subject to future litigation in the trial court, a result that flies in the face of the concept of "finality."

The third and final element of a successful collateral order is a finding of unreviewability at the end of the lawsuit.[210] In the context of a denial of absolute immunity or an asserted privilege, it is conceptually easy to understand this requirement. If, for instance, a witness is ordered to testify even though he or she has claimed that the subject of the testimony is privileged, appealability takes on a "now or never" quality. Review after final disposition of the case means that the witness was required to testify as to the assertedly privileged information and any harm occasioned thereby cannot be cured after the fact. The same logic applies in cases where a party asserts immunity as a defense. Since the nature of immunity is to preclude lawsuits against the immune party or entity, to subject them to suit before appellate review would frustrate the very premise of the doctrine.[211]

The important distinction to be made lies in whether the asserted defense is actually a defense as that term is commonly used or is an immunity from being

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[206] *Id.* at 439-40.

[207] *Mitchell*, 472 U.S. at 522 n.6.

[208] *See supra* note 184 and accompanying text.

[209] 472 U.S. at 548 (Brennan, J., dissenting).

[210] *See* Stack v. Boyle, 342 U.S. 1, 12 (1952) ("unless it can be reviewed before [the proceedings terminate], it can never be reviewed at all.") *quoted in Mitchell*, 472 U.S. at 525. *See also* United States v. Hollywood Motor Car Co., 458 U.S. 263, 266 (1982); Nixon v. Fitzgerald, 457 U.S. 731 (1982).

[211] *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982); Helstoski v. Meanor, 442 U.S. 500 (1979). In *Mitchell*, the Court also granted the same right to immediate appellate review of a denial of a qualified immunity. 472 U.S. at 526.

forced to litigate the claim. Certain cases are easily classifiable as one or the other. For example, governmental immunity seeks to bar lawsuits against the various governmental entities ab initio; not to allow the suit and merely immunize certain governmental conduct. It therefore falls within the latter category. Conversely, a defense to liability is not premised upon the protection from the rigors of litigation, but upon defeating liability on the merits of the claim. Appellate review after the lawsuit is final does not irreparably damage the putative appellant, except that it may burden him with the costs of suit when immediate appeal would have overruled the trial court and even possibly necessitated dismissal of the underlying lawsuit.

"But the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress."[212] The Court in *Richardson-Merrell* held that this third step of *Cohen* should not consider litigation expenses imposed by a possibly erroneous ruling, but rather whether the right affected by the ruling can and should be protected by appeal prior to judgment.[213]

Orders in other contexts can be used to exemplify the irreparable harm element. For instance, in *Premium Service Corp. v. Sperry & Hutchinson*,[214] interlocutory appeal was allowed under *Cohen* from an order limiting discovery in one jurisdiction in aid of a judgment secured in another. No further proceedings were contemplated in the jurisdiction that discovery was sought in, and the jurisdiction in which judgment was had could not exercise its jurisdiction over the party from whom discovery was requested, therefore, the appealing party was left with no avenue for review absent interlocutory relief.

Discovery orders are also immediately appealable when they are entered against nonparties.[215] Since they are not parties to the suit, there is no reason to delay appellate review. The order appealed from is clearly final as to them.

In summary, the collateral order doctrine is the most often used mode of immediate appellate review in Hawaii. It is therefore important to the future of our appellate machinery to clearly set forth its parameters and to assist potential appellants in determining whether the order they seek to appeal falls within those limits. The evil sought to be avoided by limiting appellate review is a waste of the court's time deciding piecemeal appeals; it is no less a waste to require the courts to rule on the initial propriety of appeal. Given the limita-

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[212] *Koller*, 472 U.S. at 436 (citing *Coopers & Lybrand*, 437 U.S. at 476 n.28); Will v. United States, 389 U.S. 90, 98 n.6 (1967). "If the expense of the litigation were a sufficient reason for granting an exception to the final judgment rule, the exception might well swallow the rule." Lusardi v. Xerox Corp., 747 F.2d 174, 178 (3d Cir. 1984).

[213] *Koller*, 472 U.S. at 436.

[214] 511 F.2d 225 (9th Cir. 1975).

[215] *See* United States Marshalls Serv. v. Means, 724 F.2d 642, 644-45 (8th Cir. 1983); Cheng v. GAF Corp., 713 F.2d 886, 888-90 (2d Cir. 1983).

tions recently espoused by both the supreme court and the ICA, future appellants and trial judges ought to look hard at the petition for and grant of appeals from those rulings that do not finally dispose of a case.

B. *The* Forgay-Conrad *Rule—"You Cannot Put The Same Shoe On Every Foot"*[216]

Another judicially created exception to the finality requirement is the *Forgay-Conrad* rule.[217] It has been used sparingly in Hawaii, but its utility in appealing grants of injunctive relief should not be ignored. In this regard, recent federal case law is unhelpful because 28 U.S.C. section 1292(a)(1) grants immediate appealability from interlocutory orders "granting, continuing, modifying, refusing, or dissolving injunctions."[218] A few appellate courts have, however, cited *Forgay* recently.[219]

Decided in 1848, *Forgay v. Conrad*,[220] was the Supreme Court's first case relaxing the finality requirement. In *Forgay*, the Court held appealable a decree declaring various deeds as fraudulent and ordering immediate delivery of property, even though an accounting of profits had yet to be made.[221] Because the

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[216] P. SURUS, MORAL SAYINGS (1st Century B.C.).

[217] *See* Pennsylvania v. Transportation Lease Haw., Ltd., 2 Haw. App. 272, 274, 630 P.2d 646, 649 (1981).

[218] 28 U.S.C. § 1292(a)(1) provides in full:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
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> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292(a)(1) (1982). Any discussion of the applicability of 28 U.S.C. § 1292(a)(1) is outside the scope of this article. *See generally* Carson v. American Brands, Inc., 450 U.S. 79 (1981); Pioneer Properties, Inc. v. Martin, 776 F.2d 888 (10th Cir. 1985); International Ass'n of Machinists and Aerospace Workers v. Aloha Airlines, 776 F.2d 812 (9th Cir. 1985); Shanks v. City of Dallas, 752 F.2d 1092 (5th Cir. 1985) (all four cases containing a discussion of the general applicability of 28 U.S.C. § 1292(a)(1)).

A strong argument should be made for the Hawaii Legislature to enact a similar provision. Given that one of the policies of appellate jurisdiction is a desire to obtain consistent results, adopting a statutory framework better puts that policy into effect than relying on a common law doctrine such as *Forgay*.

[219] *See* Simmons v. Block, 782 F.2d 1545, 1549 (11th Cir. 1986) (straight application to injunction); *In re* American Colonial Broadcasting Corp., 758 F.2d 794, 803 (1st Cir. 1985) (applying *Forgay* in the bankruptcy context).

[220] 47 U.S. (6 How.) 201 (1848).

[221] *Id.* at 204.

accounting had not been performed, the decree was not yet final. The Court reasoned, however, that the decree subjected the defendants to irreparable injury,[222] and therefore, warranted immediate appellate review. Without it, the ultimate right of appeal would be rendered of "very little value."[223]

The *Forgay* rule is a very narrow one, confined to its facts.[224] In authoring the opinion, Chief Justice Taney, cautioned appellants that such orders should be avoided and allowed the appeal only because, aside from the accounting, "[i]n all other respects, the whole of the matters brought into controversy . . . [were] finally disposed."[225] Two United States Supreme Court opinions seem to suggest that *Forgay*, at least in federal courts, will apply only to situations where an order directs immediate delivery of property and all that remains is an accounting.[226]

While the irreparable injury requirement appears much like the second step in *Cohen*,[227] it is important to keep separate the two theories of interlocutory review. *Forgay* does not involve orders that are "separable from, or collateral to, rights asserted in the action."[228] As Professors Wright and Miller point out "[b]eyond this conceptual difference lies the more important practical concern that if the *Forgay* cases were blended into the collateral order cases, they might foster an expansion of the collateral order doctrine into a more sweeping principle of hardship finality than now exists."[229] Given the Hawaii court's desire to restrict the *Cohen* collateral order doctrine,[230] there is little chance of this

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[222] The theory espoused in the case is alternately called "the *Forgay* doctrine" or "the irreparable injury exception."

[223] *Id.* at 205.

[224] *See* WRIGHT & MILLER, *supra* note 86, § 3910, at 453.

[225] 47 U.S. at 204.

[226] *See* Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 125-26, n.2 (1945) (Supreme Court may review judgment of state supreme court as final order when federal license granted and transfer approved by FCC but state court determined fraud in the transfer and ordered accounting for damages); McGourkey v. Toledo & Ohio Cent. Ry., 146 U.S. 536, 547 (1892) (*Forgay* limited to "peculiar circumstances of that case" involving property loss before adjustment for accounting). This is apparently based on the Court's express desire that its opinion be so limited:

> [W]hen the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant . . . the decree must be regarded as a final one . . . and authorizes an appeal to this court, although . . . [it] is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.

48 U.S. at 204. *See also* Hillery v. Rushen, 702 F.2d 848 (9th Cir. 1983); Meche v. Dan-Tex Int'l, 681 F.2d 264 (5th Cir. 1982); Midway Mfg. Co. v. Omni Video Games, Inc., 668 F.2d 70, 72-73 (1st Cir. 1981).

[227] *See supra* notes 197-209 and accompanying text.

[228] *See Cohen*, 337 U.S. at 546.

[229] WRIGHT & MILLER, *supra* note 86, § 3910, at 462.

[230] *See supra* notes 184-86 and accompanying text.

happening.

C. Gillespie *"Balancing Test Doctrine"—"Rigid Law Is The Greatest Injustice."*[231]

The third and final major judicial exception to the rule of finality is the *Gillespie* doctrine. In *Gillespie v. United States Steel Corp.*,[232] an interlocutory appeal was allowed because the order sought to be appealed from was "fundamental to the further conduct of the case."[233] Because of the wide variety of contexts in which it might apply, the doctrine has been called the Court's "broadest and most flexible exception to the final judgment rule."[234]

Gillespie involved a wrongful death action wherein the trial judge refused an interlocutory appeal pursuant to 28 U.S.C. section 1292(b).[235] In affirming the grant of appellate jurisdiction, Justice Black described the order as one falling within the "twilight zone" of finality.[236] He wrote:

> [O]ur cases long have recognized that whether a ruling is "final" within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases. . . . Because of this difficulty, this Court has held that the requirement of finality is to be given a "practical rather than a technical construction." . . . [I]n deciding the question of finality the most important competing considerations are "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other."[237]

As one recent case stated, the inquiry under *Gillespie* is a two-step analysis. First, does the appealed from ruling raise issues separate and distinct from those raised by the remaining allegations? Second, will the goal of judicial economy be served by immediate appellate review?[238]

The *Gillespie* case has only been cited once in Hawaii, and then only tangentially. In *Abercrombie v. McClung*,[239] the Hawaii Supreme Court referred to

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[231] T. FULLER, GNOMOLOGIA (1732).

[232] 379 U.S. 148 (1964).

[233] *Gillespie*, 379 U.S. at 154.

[234] Note, *Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292*, 67 GEO. L.J. 1025, 1033 (1979).

[235] *Id.* at 151. *See generally supra* note 111 (28 U.S.C. § 1292(b) citations).

[236] 379 U.S. at 152.

[237] *Id.* at 152-53.

[238] Tenneco Resins, Inc. v. Reeves Bros., Inc., 736 F.2d 1508, 1511 (Fed. Cir. 1984); *accord* Knickerbocker Toy Co. v. Faultless Starch Co., 467 F.2d 501, 507 (1972).

[239] 54 Haw. 376, 507 P.2d 719 (1973) (slander action arising out of remarks made by a

Gillespie as supporting the proposition that finality ought not be given a hypertechnical construction.[240] The court went on, however, to grant the immediate appeal of a denial of summary judgment even though "[i]t is well established that under usual circumstances a denial of a motion for summary judgment would be interlocutory."[241]

The question presented in *Abercrombie* was whether a denial of summary judgment based upon absolute immunity ought to be exempt from the general rule of nonappealability of summary judgment denials. The court analogized the situation to placing "the cart before the horse."[242] "[I]t is ridiculous to resolve the question of law as to whether the appellant can be held answerable before 'any other tribunal' after he has been subjected to trial."[243] The court supported its deviation from established finality principles by noting that its holding was "a just and expeditious [resolution that met] the need of sparing the litigants unnecessary expenditure of time, effort and money."[244]

Implicit in this ruling is an adoption of the *Gillespie* balancing approach. It is not important that the court carved out a judicial exception to Hawaii Revised Statute section 641-1(a)'s finality requirements in the absolute immunity context, because in the court's discussion of *Cohen*, it notes that the United States Supreme Court has said that denials of immunity are immediately appealable.[245] What is important is that the Hawaii Supreme Court is willing to give finality a *Gillespie* practical rather than technical construction in those special cases where the interests of justice outweigh the policy against piecemeal appellate review.

The federal courts have not been quick to adopt the *Gillespie* approach. Many courts construe *Gillespie* narrowly as to employ it literally.[246] Further-

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legislator, the defense was immunity).

[240] *Id.* at 380, 507 P.2d at 721. Most of the recent federal cases citing *Gillespie* do so for the same purpose. *See Sandidge*, 764 F.2d at 255 (quoting *Gillespie*, 379 U.S. at 152 ("practical, not technical considerations are to govern the application of principles of finality")); United States v. State of Wash., 761 F.2d 1404, 1406 (9th Cir. 1985) (quoting *Gillespie*, 379 U.S. at 152 ("[F]inal . . . does not necessarily mean the last order possible to be made in the case.")); Lucas v. Bolivar County, 756 F.2d 1230, 1234 (5th Cir. 1985) (quoting the practical versus technical construction language). *See also* United States v. Mississippi Power & Light Co., 638 F.2d 899, 903 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981); Freeman v. Califano, 574 F.2d 264, 267 (5th Cir. 1978); Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973) (All cases wherein a difficult question regarding finality led the court to employ *Gillespie*.); Dias v. Bank of Hawaii, 764 F.2d 1292, 1296 (9th Cir. 1985) (Farris, J., concurring) (using *Gillespie* as support for what he thought was a "fair" decision).

[241] *Abercrombie*, 54 Haw. at 380, 507 P.2d at 721.

[242] *Id.* at 381, 507 P.2d at 722.

[243] *Id.*

[244] *Id.*

[245] *See* Mitchell v. Forsyth, 472 U.S. 511 (1985). *See also supra* note 211.

[246] *Compare* Van Hoomissen v. Xerox Corp., 497 F.2d 180, 182 (9th Cir. 1974) (no compel-

more, the United States Supreme Court expressly narrowed the scope of *Gillespie* in *Coopers & Lybrand v. Livesay*.[247] In a footnote, the Court admonished that "[i]f *Gillespie* were extended beyond the unique facts of that case, [U.S.C. section] 1291 would be stripped of all significance."[248]

At least three recent federal court decisions, however, have engaged in a *Gillespie*-type balancing approach without specifically citing the case. In *Richardson-Merrell, Inc. v. Koller*,[249] the Supreme Court addressed the appealability of disqualifications of attorneys. In dismissing the appeal, the Court weighed the harm resulting from the occasional erroneous disqualification against the delay that would result from allowing piecemeal appeals.[250] The parallel to Justice Black's balancing formula is obvious. The Court probably attempted to be consistent with its earlier limitation of *Gillespie* in *Coopers & Lybrand* and, therefore, refrained from citing *Gillespie* outside of a factually analogous context. However, the affirmance of an equitable balancing test in close cases is undeniable.

In *Bender v. Clark*,[251] the Tenth Circuit Court of Appeals also applied the *Gillespie* test without citation.

> The circumstances of the instant case require the application of . . . a balancing test rather than the mechanical analysis of the collateral order exception. The critical inquiry is whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review. . . . Our analysis of the competing considerations in this dispute convinces us that the need for im-

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ling reason to resolve doubts in favor of finality; *Gillespie* distinguishable because the question of finality was close and dismissal of appeal would work hardship on appealing party); Clark v. Kraftco Corp., 447 F.2d 933, 936 (2d Cir. 1971) (expansion of appellate jurisdiction recognized in *Gillespie* should be used sparingly); *In re* United Southern Co., 410 F.2d 377, 378 (5th Cir. 1969) (per curiam) (no indication that irreparable injury would result from dismissal of appeal; consequently *Gillespie* not controlling); United States v. Fort Sill Apache Tribe, 507 F.2d 861, 864 (Ct. Cl. 1974) (appeal from Indian Claims Commission; government failed to show importance or urgency necessary for invocation of *Gillespie* rule) *with* United States v. 58.16 Acres of Land, 478 F.2d 1055, 1060-61 (7th Cir. 1973) (*Gillespie* test applied to appealability of condemnee's challenge to Government's taking of property before trial on merits); Thoms v. Heffernan, 473 F.2d 478, 482 (2d Cir. 1973) (appeal from three-judge district court declaring state statute unconstitutional but neither granting nor denying injunctive relief), *vacated on other grounds*, 418 U.S. 908 (1974); Toro Co. v. Hardigg Indus., Inc., 549 F.2d 785, 788 (C.C.P.A. 1977) (ruling on res judicata within *Gillespie* doctrine of matters fundamental to further conduct of case).

[247] 437 U.S. 463 (1978).

[248] *Id.* at 477 n.30.

[249] 472 U.S. 424. *See supra* notes 187-91 and accompanying text (discussing the *Koller* case more fully).

[250] *Id.* at 433-34.

[251] 744 F.2d 1424 (10th Cir. 1984).

mediate review clearly outweighs the concern over piecemeal review.[252]

This was also the case in In re *"Agent Orange" Product Liability Litigation*,[253] although the court found the scales tipped the other way. "Underlying the final judgment rule and the collateral order exception of *Cohen* are the competing interests of judicial economy and fairness to the litigants. A balancing of these interests in the present case . . . requires dismissal of the appeal."[254] Again the imprint of *Gillespie* was unmistakable.

It is not suggested that the Hawaii appellate courts adopt a *Gillespie* balancing approach in all finality doctrine. The potential case, however, should not be summarily disregarded. As Justice Black wrote in the *Gillespie* opinion, it should be confined to situations that present "so close a question that decision of [the finality issue] either way can be supported with equally forceful arguments."[255]Where application of the established rules regarding finality and the exceptions thereto lead to an anomalous result and defeat the policies underlying them, ritualistic application does disservice to our judicial system. What should be of paramount importance is, in light of the policies supporting finality and denying interlocutory appeals, is it fair and in the interests of justice to deny immediate review? Under most circumstances, the established finality doctrine in Hawaii will answer the question properly. But in those unusual situations wherein they do not, resort to the *Gillespie* balancing approach, as the Hawaii Supreme Court did in *Abercrombie*, should remain available.

V. Supervisory Powers of the Hawaii Supreme Court

Appeal is not the only means by which the Hawaii Supreme Court can review the proceedings of lower courts. Hawaii Revised Statutes section 602-5 grants the court original jurisdiction to issue writs of mandamus and prohibition. In addition, Hawaii Revised Statutes section 602-4 commits to the supreme court the general superintendence of all courts of inferior jurisdiction to prevent errors and abuses therein.[256] Some creative appellants have sought review by way of these vehicles, and therefore any analysis of appellate avenues in Hawaii must include a discussion of the writs' applicability.

Preliminarily, it is most important to note that mandamus is not intended to act as a substitute for appeal.[257] Resort to the writ is only proper when the

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[252] *Id.* at 1427-28.

[253] 745 F.2d 161 (2d Cir. 1984).

[254] *Id.* at 165.

[255] 379 U.S. at 152.

[256] *See supra* note 7 (setting out the text of Haw. Rev. Stat. §§ 602-5 and -4).

[257] Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 712 (7th Cir. 1986); Marsland v. Shintaku, 64 Haw. 307, 310, 640 P.2d 289, 292, (1982); Gannett Pac. Corp. v.

"petitioner has a 'clear and indisputable' legal right to performance of a duty owed by respondent . . . and [the] petitioner lacks other means of adequately redressing the wrong or of obtaining the relief sought."[258] The Hawaii Supreme Court has repeatedly stated that issuance of writs and invocation of its supervisory powers to correct trial court errors should be reserved for rare and exigent circumstances.[259] As the United States Supreme Court remarked recently "[a]lthough [the All Writs] Act[260] empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate."[261]

Mandamus is properly invoked when an inferior tribunal has failed to lawfully exercise its jurisdiction.[262] It is not proper if jurisdiction is discretionary,[263]

Richardson, 59 Haw. 224, 227, 580 P.2d 49, 53 (1978); Chambers v. Leavey, 60 Haw. 52, 57, 587 P.2d 807, 810 (1978); McClung v. Fukushima, 53 Haw. 295, 300, 492 P.2d 128, 131 (1972).

[258] *Shintaku*, 64 Haw. at 309, 640 P.2d at 292 (citations omitted), *quoted in* Marsland v. Town, 66 Haw. 516, 523, 668 P.2d 25, 30 (1983).

> The reasons for this Court's chary authorization of mandamus as an extraordinary remedy have often been explained. Its use has the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed until after final judgment has been rendered by the trial court. A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would "run the real risk of defeating the very policies sought to be furthered by that judgment of Congress." In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires, and that he satisfy the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.' " In short, our cases have answered the question as to the availability of mandamus in situations such as this with the refrain: "What never? Well, *hardly* ever!"

Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35-36 (1980) (emphasis original) (citations omitted).

[259] *See* State v. Fields, 67 Haw. 268, 276, 686 P.2d 1379, 1386 (1984); *Shintaku*, 64 Haw. at 313, 640 P.2d at 294; *Gannett Pac. Corp.*, 59 Haw. at 227, 580 P.2d at 53.

[260] The All Writs Act, 28 U.S.C. § 1651, is the federal counterpart of HAW. REV. STAT. § 602-5.

[261] Pennsylvania Bureau of Corrections v. United States Marshalls Serv., 474 U.S. 34, ____, (1985).

[262] *See In re* Doe, 67 Haw. 466, 467, 691 P.2d 1163, 1165 (1984); *Shintaku*, 64 Haw. at 312, 640 P.2d at 293; *In re* Liverpool, 14 Haw. 481, 489 (1902); *In re* Waterhouse, 2 Haw. 241, 244 (1860); Note, *Supervisory and Advisory Mandamus Under The All the Writs Act*, 86 HARV. L. REV. 595, 598 (1973).

[263] *Town*, 66 Haw. at 526, 668 P.2d at 31; *Shintaku*, 64 Haw. at 312, 640 P.2d at 293; *In re* Tactacan, 42 Haw. 141, 142-43 (1957); *In re* Lorigan, 25 Haw. 445, 451 (1920); *Liverpool*, 14 Haw. at 488.

except in certain exceptional cases.[264] Outside of a trial court's refusal to exercise its jurisdiction, the supreme court has stated a writ will not properly issue unless an appeal is clearly an inadequate remedy.[265] Justice Nakamura wrote in *Marsland v. Town* that "[o]rdinarily, a judicial lapse would be correctable on appeal; but . . . [if] relief for the State through the avenue of appeal [is] precluded, . . . [then] we are presented with a rare situation where mandamus lies to direct the action of a court below."[266]

As a further bar to mandamus' applicability in an appellate context, courts are generally reluctant to grant the writ and must be convinced of its merit "clear[ly] and indisputab[ly]."[267] This is not to say, however, that mandamus will never lie. The Hawaii courts have allowed the writ to issue where, inter alia, the trial judge erroneously ruled upon the production of allegedly privileged material,[268] the family court dismissed a waiver of juvenile court jurisdiction,[269] the trial court imposed probationary conditions on a criminal defendant

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[264] *Shintaku*, 64 Haw. at 313-14, 640 P.2d at 293-94; Fong v. Sapienza, 39 Haw. 79, 81 (1951). In a footnote, the court in *Shintaku* set forth the parameters of this exception:

> The precise extent of this exception as articulated in Fong v. Sapienza was first brought into question in *In re* Akana which criticized the *Fong* court for its ruling as based on a quotation taken out of context in a former case. The majority in *Fong*, faced with the question of whether mandamus would lie to compel an inferior court to exercise its discretion in a particular way, ruled that mandamus could so be issued where such discretion had been abused, based on a quotation from *In re* Ivers, which ended as follows: "[Mandamus] does not lie to control judicial discretion, except when that discretion has been abused." The *Akana* court, questioning this departure from the general rule of non-interference by way of mandamus where the judge has discretion, noted as had the lone dissenter in *Fong* that the quotation from *Virginia* should have been completed as follows: ". . . but it is a remedy when the case is outside the exercise of this discretion, and outside of the jurisdiction of the court or officer to which or whom the writ is addressed." It did not rule on the extent of *Fong's* applicability in light of the completed quotation, however, as it found no abuse of discretion.
>
> In Brown v. Hawkins, the court saw no need to accept *Fong* as controlling, finding no abuse of discretion in the case before it. It therefore adhered to the rule of Territorial *ex rel.* Scott v. Stuart, that mandamus will not lie to enter a particular judgment or to set aside a decision already made. We similarly need not rule on the extent of Fong's applicability for the reasons set forth herein.

64 Haw. at 312 n.8, 640 P.2d at 293 n.8 (citations omitted).

[265] *See McClung*, 53 Haw. at 300 (quoting *Ex parte* Fahey, 332 U.S. 258, 259 (1947)). *See also* J. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES 15 (3d ed. 1896); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 27-28 (1943); United States *ex rel.* Girard Trust Co. v. Helvering, 301 U.S. 540, 544 (1937).

[266] *Town*, 66 Haw. at 525, 668 P.2d at 32.

[267] *Shintaku*, 64 Haw. at 313, 640 P.2d at 292 (citing Will v. United States, 389 U.S. 90, 96 (1967)); Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953).

[268] Kaneshiro v. Au, 67 Haw. 442, 690 P.2d 1304 (1984). *See also* Bogosian v. Gulf Oil Corp., 738 F.2d 587 (1984).

[269] *In re* Doe, 67 Haw. 466, 691 P.2d 1163 (1984).

that violated her constitutional rights[270] and the lower court disqualified an attorney.[271] The court has also used its supervisory powers in one case to "decide" an appeal that was simultaneously being dismissed for lack of a final order.[272]It is clear, however, that the use of the Hawaii Supreme Court's supervisory powers and its ability to issue writs of mandamus ought to be an appellant's last resort. If appeal is available and will adequately redress any alleged wrongs committed by the trial court, mandamus will not lie. This interpretation is in keeping with the supreme court's admonition that "the object of mandamus is to supplement, not supercede legal remedies in extraordinary cases."[273]

VI. CONCLUSION

Traditionally, only those judgments, rulings, orders and decrees that dispose of all but ministerial tasks are appealable. The legislature, through Hawaii Revised Statutes section 641-1(b), has allowed certain interlocutory appeals in the discretion of the trial judge. Also, over the years, various courts have adopted other exceptions to the final judgment rule that allow appeals regardless of the fact that more than ministerial tasks remain to be performed. These judicial exceptions help to avoid the often harsh and inequitable result of a strict application of the final judgment rule in all contexts.

The Hawaii Supreme Court and the ICA have both expressed concern over the increasing appellate docket and the recurrence of litigants mistakenly appealing under the rubric set out here. The Hawaii courts have sought to establish specific guidelines for bench and bar to follow in seeking appellate review, and in doing so have made it none too clear that the exceptions to the traditional final judgment rule will be strictly construed. In the interest of reducing the substantial appellate docket, this is a necessary evil; for overcrowding the appellate courts performs a disservice to the legal community because our appellate courts are otherwise not allowed to spend time more appropriately shaping Hawaii common law.

However, there is a need for a safety valve to temper this approach. The *Gillespie* balancing test is just such a mechanism, as it provides the courts a means by which to avoid the injustice that might accrue in the extraordinary case without hampering the preferred course of restricting interlocutory review.

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[270] State v. Fields, 67 Haw. 268, 686 P.2d 1379 (1984).

[271] Chuck v. St. Paul Fire & Marine Ins. Co., 61 Haw. 552, 606 P.2d 1320 (1980).

[272] BDM, Inc. v. Sageco, Ins., 57 Haw. 73, 549 P.2d 1147 (1976). While the court did not issue an opinion on the merits of the appeal per se, it did address the appellant's points of error and set forth the relevant law to be applied by the trial court after dismissal of the appeal. Arguably, this is an improper use of the supervisory power because appellant was not precluded from appealing again from a proper final judgment.

[273] *Shintaku*, 64 Haw. at 309, 640 P.2d at 291-92.

Hopefully our appellate courts will heed its call to prevent unfair results in the unusual cases to which the doctrine is intended to apply.

Remedies For Civil Wrongs: A Pacific Perspective*

by Samuel P. King**

The common law's favored remedy for a civil wrong is a money judgment against the wrongdoer. Justice is deemed to have been done even though the award may be too little or too much or uncollectable.

Enough big-money judgments have been collected, however, to fuel the growth of tort law and of tort practice. This development has been tracked by the insurance industry to the extent that, in the United States of America, the scope of tort law may well depend upon whether a claim is insurable, and the practice of tort law is generally the art of settling with the insurance company.

Money awards for noneconomic losses (that is, for pain and suffering and for emotional distress) and money awards for reprehensible conduct (that is, as punitive or exemplary damages, and costs of litigation) have led to perceived crises in the insurance industry. One of these crises has affected the practice of medicine. This and other problems have created the current demand, in the United States, for "tort reform."

My thesis is that South Pacific jurisdictions have a rare opportunity to contribute to the development of tort law by profiting from the experience of others to avoid their excesses and making the experience of South Pacific legal systems available to others.

The realities of tort practice in the United States may be illustrated by the story of the small storekeeper in a small town in a western state. Starting with very little, over several years he built his business to a point where he could relax a bit when a new highway bypassed his store and thus ruined his business. He relocated and started over again. After several more years he had just

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* This article is based upon a speech presented to the First South Pacific Law Conference in Apia, Western Samoa on August 29, 1986.

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about reached his former affluence when a prolonged labor strike against the town's largest employer reduced his volume of sales and drove him into bankruptcy. Starting all over again, after several more years he was still struggling to make ends meet. One day as he crossed the street to open his store, he was hit by a truck and knocked unconscious. He awoke in a hospital bed. His wife was looking at him anxiously. "What happened?" he asked. "You were hit in the crosswalk by a utility company truck driven through a red light by a driver who had been drinking on the job and who claims the brakes didn't work. The doctors say you will probably never be able to work again," his wife answered. "Thank God," said the storekeeper, "Our luck has finally changed for the better."

Every legal system tries to redress harm done by one person to another. The problem becomes how best to accomplish this laudable purpose within a given legal system. There is no reason to believe that borrowing the principles and procedures of one legal system will produce acceptable results in any other.

All Micronesian jurisdictions that have been formed out of the Trust Territory of the Pacific Islands are confronted with "borrowings" from the United States. Under a Trust Territory statute, United States common law, as set forth in the Restatements of the American Law Institute, was established as a residual source of law in the absence of written law or local customary law.[1] This provision was subsequently adopted by the Congress of Micronesia.[2]

The Constitution of the Federated States of Micronesia (FSM), however, provides that "[c]ourt decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia."[3] The framers of this Constitution thus intended this provision to substitute Micronesian customs and Micronesian concepts of justice (if they conflict with American common law) as the source of law in the absence of statute.

The Supreme Court of the Federated States of Micronesia has underscored its adherence to this Constitutional guidance in a recent case:[4]

> Of course, this Court can and should consider the *Restatement* and reasoning of courts in the United States and other jurisdictions in arriving at its own decisions. What is clear from the Constitution, however, is that we are not to consider

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[1] 1 T.T. CODE § 103 (1980).

[2] 1 FSM CODE § 203 (1982). *But see* Rauzi v. Federated States of Micronesia, 2 FSM Intrm. 8, 13-14 (Tr. Div. Pohnpei 1985) (holding that 1 FSM CODE 203 "applies only to courts of the Trust Territory, not to courts of the Federated States of Micronesia or the various states").

[3] FSM CONST. art. XI, 11. The text of the FSM Constitution is reprinted in Turcott, *The Beginnings of the Federated States of Micronesia Supreme Court*, 5 U. HAW. L. REV. 361 app. at 372-383 (1983).

[4] *Rauzi*, 2 FSM Intrm. at 14-15 (quoting Alaphonso v. FSM, 1 FSM Intrm. 209, 213 (App. Div. Truk 1982)).

> ourselves bound by those decisions and must not fall into the error of adopting the reasoning of those decisions without independently considering suitability of that reasoning for the Federated States of Micronesia.

In a subsequent case, Chief Justice Edward King has noted "there is reason to doubt that this court is bound by" the statutory provision regarding the Restatement as a source of law.[5] Thus, the court was free to depart from the Restatement's rule of contributory negligence:

> The trial proceeded on the basis that the doctrine of comparative negligence was inapplicable, apparently on the theory that application of the Restatement (Second) of Torts, was required . . . . The Restatement refers only to contributory negligence and is silent about comparative negligence . . . . We suggest that comparative negligence, which has displaced contributory negligence in most jurisdictions in the United States, should be given careful consideration in future cases.[6]

If the court is not bound to follow the Restatement (Second) of Torts in one respect, why in others? If in the FSM, why not in other jurisdictions? We need only examine the current literature on "tort reform" to find several fruitful areas for judicial correction.[7]

Tort law developed largely as judge-made law. The law of torts was insignificant before 1850. Thereafter, it grew explosively keeping pace with the industrial revolution, whose machines, in the words of Professor Lawrence M. Friedman, "had a marvelous capacity for smashing the human body."[8]

Beginning from basic principles of the English common law,[9] American courts took off on their own, following the railroads across the United States. In

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[5] Ray v. Electrical Contracting Corp., 2 FSM Intrm. 21, 23 n.1 (App. Div. Truk 1985) (dictum) (citing *Rauzi*).

[6] *Id.* Coming as it does from the Chief Justice, that bit of advice captures one's attention. The appellate panel in *Ray* consisted of Chief Justice Edward C. King, Associate Justice Alan Lane of the Supreme Court of the Republic of Palau, and the author of this paper. Having only two judges on its Supreme Court and requiring three judges (not including the judge from whom an appeal is taken) to constitute an appellate panel, the FSM invites judges from other jurisdictions to sit for a particular session. *See* FSM CONST. art. XI, § 9(b); 4 FSM CODE § 104 (1982). *See generally* Burdick, *The Constitution of the Federated States of Micronesia*, 8 U. HAW. L. REV. 419, 451-53 (1986).

[7] *Cf.* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163-81 (1982) (developing the thesis of judicial "updating" of statutes).

[8] L. FRIEDMAN, A HISTORY OF AMERICAN LAW 467 (2d ed. 1985).

[9] *See, e.g.*, Priestley v. Fowler [1837] 150 Eng. Rep. 1030 (the fellow servant rule); Davies v. Mann 10 M. & W. 546 (1842) (last clear chance) (discussed in Schoefeld, Davies v. Mann: *Theory of Contributory Negligence*, 3 HARV. L. REV. 263 (1890)); Rylands v. Fletcher [1868] L.R. 3 H.L. 330 (liability for extrahazardous activities).

the process, the American courts were legislating, often clearly legislating. For example, in *Ryan v. New York Central Railroad Co.*,[10] the court refused to hold the railroad company liable for burning down the plaintiff's house. The fire had started in the railroad's woodshed because of the "careless management" of an engine. Plaintiff's house, "situated at a distance of 130 feet from the shed, soon took fire from the heat and sparks, and was entirely consumed."[11] The court stated, in part:

> To sustain such a claim . . . would subject [the railroad company] to a liability against which no prudence could guard, and to meet which no private fortune would be adequate . . . . In a country . . . where men are crowded into cities and villages . . . it is impossible [to] . . . guard against the occurrence of accidental or negligent fires. A man may insure his own house . . . but he cannot insure his neighbor's . . . . To hold that the owner . . . must guarantee the security of his neighbors on both sides, and to an unlimited extent . . . would be the destruction of all civilized society . . . . In a commercial country, each man, to some extent, runs the hazard of his neighbor's conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss.[12]

This reads more like the report of a legislative committee than a judicial decision.

Many of the doctrines of tort law that were developed by the courts during the late nineteenth and early twentieth centuries were designed to put limits on recovery.[13] Among these were contributory negligence,[14] the fellow-servant rule,[15] assumption of risk,[16] actions for personal injuries dying with the person,[17] immunity of charities from actions sounding in tort,[18] and imputed neg-

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[10] 35 N.Y. 210 (1866).

[11] *Id.* at 210.

[12] *Id.* at 217.

[13] See generally L. FRIEDMAN, *supra* note 8, at 467-87 for a discussion of the historical development of tort law in the United States.

[14] *See, e.g.*, Haring v. New York & Erie Ry., 13 Barb. 2 (N.Y. App. Div. 1852) ("A man who rushed headlong against a locomotive engine, without using the ordinary means of discovering his danger, cannot be said to exercise ordinary care.").

[15] *See, e.g.*, Mosley v. Chamberlain, 18 Wis. 700, 705 (1861) (The rule had been "sustained by the almost unanimous judgments of all courts . . . [in an] unbroken current of judicial opinion.").

[16] *See, e.g.*, Lumsden v. L.A. Thompson Scenic Ry., 130 A.D. 209, 114 N.Y.S. 421 (1909) (rider on roller coaster assumed known risk of injury).

[17] *See, e.g.*, Carey v. Berkshire R.R., 55 Mass. (Cush.) 475 (1848) (widow of a railroad worker denied recovery on grounds that personal injury action dies with the person).

[18] *See, e.g.*, McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432 (1876) (Denying claim that broken bone was improperly set, the court found that the hospital's only responsibility was to use reasonable care in the selection of employees—with no responsibility for the actual treatment then given by the employees.).

ligence.[19] Judges who were more sympathetic to the injured plaintiff than the responsible enterprise developed counter-doctrines. Gross negligence,[20] comparative negligence,[21] last clear chance,[22] and *res ipsa loquitur*,[23] eased some of the harshness of defendant-oriented doctrines. Thus American courts have felt free to reverse themselves, invent new doctrines, and disinvent old doctrines.[24]

Nevertheless, legislatures entered the fray to moderate some of the less acceptable aspects of tort law. Workers' compensation laws, survival statutes, wrongful death statutes, and comparative negligence statutes have illuminated some of the dark alleys down which judges had allowed themselves to be led by logic and bias.

Today, much is written about an "insurance crisis" in the United States purportedly caused by an increase in the number of tort suits filed and allegedly excessive settlements and judgments. The Reagan administration appointed a working group chaired by Assistant United States Attorney General Richard K. Willard to study and to report on the problem. The group has filed an eighty-page report proposing the following eight reforms:

> (1) Return to the legal concept of "fault-based liability" by rebuffing the increasing application of a "strict liability" standard.
> (2) Restrict the use of joint and several liability to those situations where the defendants have actually acted in concert.
> (3) Put a cap on noneconomic damages, limiting such awards to "a fair and reasonable maximum dollar amount."
> (4) Limit attorney fees to 25% of the first $100,000, 20% of the second $100,000, 15% of the third $100,000, and 10% of any remainder.

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[19] *See, e.g.*, Prideaux v. City of Mineral Point, 43 Wis. 513 (1878), *ovrl'd*, Reiter v. Grober, 173 Wis. 493, 181 N.W. 739 (1921) (invited passenger in private vehicle not liable for driver's negligence); Koplitz v. City of St. Paul, 86 Minn. 373, 90 N.W. 794 (1902) (carriage driver's negligence not imputed to passenger who did authorize, participate in, or control his conduct).

[20] *See, e.g.*, Galena & Chicago Union R.R. v. Jacobs, 20 Ill. 478 (1858) (Plaintiff might recover where his negligence was comparatively slight and the defendant's was gross.).

[21] For a now discarded form of comparative negligence which allowed recovery if the plaintiff's contributory negligence was slight and the defendant's negligence was gross, see, e.g., Galena & Chicago Union R.R. v. Jacobs, 20 Ill. 478 (1858), *clarified in* Calumet Iron & Steel v. Martin, 115 Ill. 358, 3 N.E. 456 (1885) (slight negligence can be consistent with ordinary care by plaintiff for personal safety).

[22] *See, e.g.*, Fuller v. Illinois Central R.R., 100 Miss. 705, 56 So. 783 (1911) (wagon driver injured at railroad crossing).

[23] *See, e.g.*, Illinois Central R.R. v. Phillips, 449 Ill. 234 (1868) (explosion of a boiler).

[24] The term disinvent is Professor Friedman's. *See* L. FRIEDMAN, *supra* note 8, at 476. For a general discussion of these developments in American tort law, see *id.* at 476-87. Courts today continue to adapt tort law in this way. In Hawaii, for example, the supreme court abolished the distinction among trespassers, licensees, and invitees simply by judicial fiat. Pickard v. City & County of Honolulu, 51 Haw. 134, 452 P.2d 445 (1969).

(5) Reject expert testimony based on "junk science."
(6) Take into account compensation gained from collateral sources.
(7) Spread the period of payment of damages over the period of the damage.
(8) Encourage alternative dispute resolution.[25]

The group's conclusions have been summarized by Mr. Willard: "The underlying causes of the crisis are changes in jurisprudence—a move toward no-fault liability, an undermining of traditional principles of causation, the misuse of scientific evidence, and the awarding of damages that bear little proportion to injuries actually suffered."[26]

Let us assume for present purposes that these and other proposed reforms are desirable. May the courts of the Federated States of Micronesia (and of other Pacific jurisdictions) effect these reforms, or, more accurately, choose not to apply the principles of law that create the perceived need for reform, without further statutory assistance?

As we have seen, tort law in the United States is nothing more or less than judge-made law; law which is not even uniform throughout the United States. Tort law is law which judges have felt free to modify according to the circumstances of the particular case and of the society and age in which they lived.

Clearly the Supreme Court of the Federated States of Micronesia is capable of choosing legal principles that avoid the current set of problems in the application of tort law in the United States. Let us take, for example, the question of joint and several liability. A recent case in Hawaii illustrates the problem.[27]

A car driven by a person who had been drinking failed to negotiate a double curve on a city highway. The car hit a utility pole. A passenger was severely injured as a result. Suit was brought on behalf of the passenger against the driver, the owners of the car, the manufacturer of the car, the owner of the utility pole, the owner of the drinking establishment where the driver had been drinking, and the city responsible for maintaining the road in question. The owner of the utility pole and the manufacturer of the car settled out. A special jury verdict found the driver ninety-nine percent negligent and the city one percent negligent and awarded damages in the amount of $725,000. Judgment was rendered against the driver and the city jointly and severally. The city was faced with having to pay most of this judgment although only one percent negligent.

The Supreme Court of Hawaii reversed on evidentiary issues.[28] The court

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[25] REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (Feb. 1986).

[26] Willard, *Wheel of Fortune*, POL'Y REV. 40 (Spring 1986).

[27] Kaeo v. Davis, 68 Haw. ____, 719 P.2d 387 (1986).

[28] The supreme court held that the trial court abused its discretion by excluding evidence that the driver consumed alcohol prior to the accident. *Id.* at ____, 719 P.2d at 392. The supreme

took the occasion to note also that the trial court erred in not giving a requested instruction explaining the possible legal consequences of a verdict apportioning negligence among joint tortfeasors.[29]

Thus the court left to the jury the task of saving the city from an unjust judgment. A less tortuous approach would have been simply to redefine joint and several liability.[30]

A rule that limits the amount of recovery against a defendant to that defendant's percentage of liability is rational, appropriate, and well within the historical rule-making power of a common law court. An exception—and there must, as a matter of course, be at least one exception—would hold each of several unrelated defendants liable for all damages suffered by a plaintiff if the defendants had acted in concert.

The question of attorneys' fees presents another fertile area for statesmanlike judgemanship. Here in the South Pacific, we have immediate confrontation from country to country between the British Rule and the American Rule. At common law, costs were not allowed; but for centuries in England there has been statutory authorization to award costs, including attorneys' fees. Although the matter is in the discretion of the court, counsel fees are regularly allowed to the prevailing party. In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser in the absence of statute or contract.[31] However, American courts have exercised equity power to award attorneys' fees in the interests of justice without specific legislative authority or contractual agreement.[32]

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court further held that the exclusion of evidence of prior accidents, when offered for the purpose of notice of a potentially dangerous condition was reversible error. *Id.* at ____, 719 P.2d at 394.

[29] *Id.* at ____, 719 P.2d at 396. The Hawaii legislature in special session has modified the rules governing joint and several liability. *See* HAW. REV. STAT. § 663-10.9 (Supp. 1986).

[30] *See also* Willard, *supra* note 26, at 42. ("In recent years, joint liability has been increasingly used for a different purpose: making a defendant with only a limited role in causing an injury bear the full cost of compensating the plaintiff. . . . [T]his has been particularly devastating for municipal governments and taxpayers.").

[31] There are, however, over 100 federal statutes providing for fee shifting. *See* A. TOMKINS & T. WILLGING, TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS 31 (Federal Judicial Center 1986) [hereinafter TAXATION]. A 1983 study found over 1,900 state statutes which shifted fees. *See* Note, *Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 323 (1984). Alaska has a comprehensive scheme which essentially replaces the "American Rule" altogether. *See* ALASKA STAT. § 09.60.010 (Supp. 1986). *See also* McDonough v. Lee, 420 P.2d 459 (Alaska 1966) (Statutory authorization for the allowance of attorney's fees in Alaska originated in Act of Congress of June 6, 1900, 31 Stat. 415-18.).

[32] *See, e.g.*, Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240 (1974). *See generally Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 1 (1984) (symposium); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974). *But see* Fleischman Distilling Corp. v. Maier, 386 U.S. 714 (1967) (reviewing the history of the Ameri-

According to an in-house staff attorney for a major mutual insurance company, the American Rule coupled with the abuse of the contingent fee arrangement has been a major source for the increase in both the numbers and cost of litigation. He argues that the combination of no necessity for financing litigation and no liability for losing, results in a situation where the plaintiff has nothing to lose and everything to gain by filing a lawsuit. The more suits that are filed, the more frivolous suits there are. Increased litigation results in higher insurance premiums to finance defendants' costs which are not recoverable even if a defendant wins.[33]

A possible solution is to abandon the American Rule and adopt the British Rule. There are already so many exceptions to the American Rule as to make the final step less than revolutionary. American courts have awarded attorneys' fees, in the absence of statute or contract, as consequential damages, where equity requires, where a party acted in bad faith, for obdurate behavior, to a private attorney general, out of a common fund, as sanctions during pretrial proceedings, and under very unusual circumstances.[34]

Remedial legislation in recent years has usually contained a provision allowing the plaintiff to recover attorneys' fees.[35] Legislatures have provided fewer opportunities for the defendant to recover his attorneys' fees in proving that he was blameless.[36] Both needs are met by adopting the British Rule.

It is important to point out that the rule on attorneys' fees, whether American or British, does not address the separate issue of contingent fees.[37] Furthermore, the British Rule does not require that the prevailing party be awarded the total amount that he had paid out or incurred in costs. The actual amount awarded is in the discretion of the court and is subject to considerations of

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can Rule); Semens v. Continental Airlines, Inc. (II), 2 FSM Intrm. 200 (1986) (refusing to adopt the British Rule for the FSM).

[33] Middleton, *To the Victor, the Spoils: Proposal to Abandon the American Rule*, 41 MO. B.J. 79 (Mar. 1985).

[34] See TAXATION, *supra* note 31, at 31 n.107 and sources cited therein.

[35] *See, e.g.*, 42 U.S.C. § 1988 (1982) (civil rights actions, allowing fees to the "prevailing party").

[36] *See, e.g.*, Middleton, *supra* note 33, at 81 ("There is little or no [Missouri] statutory authority for the defendant to recover his attorneys' fees in a lawsuit in which he prevails.").

[37] Contingent fees are in fact prohibited in England; however, this is based on the historical prohibitions against champerty. LORD DENNING, WHAT NEXT IN THE LAW 90 (1982) ("English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a 'contingency fee'. . . . Such an agreement was illegal on the ground that it was the offense of champerty."); 4 W. BLACKSTONE 134-35 (1769 & photo. reprint 1979).

Prior to Legal Aid in England there were "firms of solicitors who were called 'ambulance chasers'. . . . This practice was regarded by many as undesirable—even as unprofessional. The understanding was 'No cure, no pay.' " LORD DENNING, *supra*, at 91. For the modern English view, see *id.* at 105-06 ("Legal aid has saved us from . . . any danger of 'contingency fees.' That is much to be thankful for.").

reasonableness and other equitable doctrines.[38]

To some extent, the allowance of noneconomic damages in the United States permits the finder of fact to circumvent the American Rule regarding attorneys' fees. Juries—and judges—are well aware that plaintiff's attorneys generally take one-third or more of a plaintiff's recovery. There is no formula for calculating a money equivalent for pain and suffering or for emotional distress. Thus, a sufficient sum may be awarded under these categories to cover an injured plaintiff's attorneys' fees. The adoption of the British Rule on costs removes one of the hidden supports for uncontrolled noneconomic damages.

Damages as compensation for civil wrongs are awarded in accordance with judge-made rules which are still in the process of development. When I was in law school a few decades ago, in most jurisdictions, a grandmother in a rocking chair watching her grandchild being run over by a speeding car could not recover for emotional distress. Now, in most jurisdictions, a bystander who witnesses injury to a family member may recover for emotional distress.[39] This change was brought about by judges in accordance with their own views of public policy.

The present legislative trend in the United States is to put a dollar cap on noneconomic damages, somewhere in the range of $250,000 to $500,000.[40] In

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[38] G. RADAR & G. CROSS, THE ENGLISH LEGAL SYSTEM 325 (6th ed. 1977). It is true that adopting the British Rule could lead to the development of a whole new class of civil servant.

> "Taxing masters" [in England] take a very strict view of what costs were really necessary to be incurred by a litigant . . . . In all actions there therefore is a substantial difference between the costs which the successful party will have to pay his own solicitor . . . and the costs . . . he will recover from the loser.

Id. *See also* TAXATION, *supra* note 31, at 73-77 (discussing use of nonjudicial fee decision makers).

[39] For a general discussion of the history of liability for emotional distress, see W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 365-67 (5th ed. 1984). *See also* Leong v. Takasaki, 55 Haw. 398, 520 P.2d 735 (1974) (physical impact not required). *But see* Kelley v. Kokua Sales and Supply Co., 56 Haw. 204, 532 P.2d 673 (1975) (father in California hearing by telephone of accident harming his children not within "reasonable distance" from accident and thus outside the zone of recovery for emotional distress).

[40] For cases holding laws with a cap on damages to be unconstitutional, see, e.g., Boyd v. Bulala, 647 F. Supp. 781(W.D. Va. 1986) (medical malpractice); McGuire v. C & L Restaurant, Inc., 346 N.W.2d 605 (Minn. 1984) (Minnesota Dram Shop Act); Carson v. Maurer, 130 N.H. 925, 424 A.2d 825 (1980) (medical malpractice). For cases upholding damage limitations against constitutional challenges, see, e.g., Fein v. Permanente Med. Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985) (medical malpractice); Florida Patients Compensation Fund v. Von Stetina, 474 So. 2d 783 (Fla. 1985).

There have also been suggestions that punitive damages should be payable to a public fund rather than to individual plaintiffs. *See, e.g.*, Schwartz, *Tort Reform and the Liability Crisis*, in 3 NATIONAL LEGAL CENTER FOR PUBLIC INTEREST, THE LEGAL SYSTEM ASSAULT ON THE ECONOMY 11, 16 (1986) (based on testimony before the Senate Judiciary Committee in January 1986) ("It has long been suggested that punitive damages are an arbitrary windfall to injured claimants and

some areas, courts themselves have begun to limit unmeasurable recoveries. The Supreme Court of California has held that persons who are embarrassed by the publication of false statements cannot maintain an action for libel without proof of financial injury.[41] The Supreme Court of the United States has refused to allow nonpecuniary damages based on the abstract "value" or "importance" of constitutional rights.[42]

In jurisdictions in which there are no jury trials, it should be possible to evolve better guidelines for nonpecuniary damages than the kinds of formulations now given to juries.

One example of this type of limitation is seen in three cases of the Supreme Court of Canada which held that $100,000 (Canadian)[43] "should be the upper limit of non-pecuniary loss"[44] in tort actions. That figure has been allowed to rise with inflation and reached $185,000 (Canadian) in 1986.[45]

A place may be found in the law of damages for traditional ceremonies of reconciliation.[46] For example, under the Samoan custom of *ifoga*, one family

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that these damages should go to the government itself.").

[41] Fellows v. National Enquirer, 42 Cal. 3d 234, 721 P.2d 97, 228 Cal. Rptr. 215 (1986) (en banc).

[42] Memphis Community School Dist. v. Stachura, 106 S. Ct. 2537 (1986).

[43] *See* Andrews v. Grand & Tot Alberta Ltd., [1978] 2 S.C.R. 229, 233 (young adult quadriplegic); Thornton v. Board of School Trustees of School Dist. No. 57 (Prince George), [1978] 2 S.C.R. 267, 270 (high school student with severe neck injuries requiring constant care); Arnold v. Teno, [1978] 2 S.C.R. 287, 334-35 (severe disability of infant justifies maximum award for non-pecuniary loss).

[44] "Non-pecuniary loss" is defined as "including such factors as pain and suffering, loss of amenities, and loss of expectation of life." *Andrews*, 2 S.C.R. at 264.

[45] In Lindal v. Lindal, [1982] 1 W.W.R. 433, 433 (S.C.C.), Mr. Justice Dickson (now Chief Justice) stated that the rough upper limit "should be adjusted where the party can prove the effect of inflation since the rule was established." In *Lindal*, an award of $135,000 was rolled back to $100,000 as inflation was not proven since the injury had occured in 1975, the same year as the trilogy cases. For an example of an award which was adjusted for inflation, see Blackstock Vincent v. Patterson, [1985] 4 W.W.R. 519 (B.C.C.A.).

In *Andrews*, the court set forth the policy considerations:

> The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one . . . .
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> . . . In particular, this is the area [non-pecuniary losses] where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.
>
> It is also the area where there is the clearest justification for moderation.

Andrews, 2 S.C.R. at 261.

[46] A similar custom was noted in Tahitian culture in the eighteenth century. *See, e.g.*, J.

renders a formal apology to another for a serious offense, such as bodily injury inflicted by one family member against a member of the other family.[47] Through this ceremony, the family of the wrong doer humbles itself to the family of the person wronged.[48] As a part of the ceremony there may be offerings of gifts or money, but the primary focus is an expression of remorse.[49] If the *ifoga* or apology is accepted by the other family, the honor of both families is upheld and they can live in peace together.[50]

MORRISON, THE JOURNAL OF JAMES MORRISON: BOATSWAIN'S MATE OF THE BOUNTY 194 (1935) ("This and all other Disputes is settled by the Neighbors and the party who is declared to be in the wrong, and almost always submits at the first word and making a Peace offering to the Man offended, declares himself in fault, and desires he may think no more of it."). *Cf.* Hickson, *Heirarchy, Conflict, and Apology in Fiji*, *in* 4 ACCESS TO JUSTICE: THE ANTHROPOLOGICAL PERSPECTIVE, PATTERNS OF CONFLICT MANAGEMENT: ESSAYS IN THE ETHNOGRAPHY OF LAW 17, 22 (K. Koch ed. 1979) ("Fijians resort to the *i soro* [ceremonial apology] to avoid punishment both in cases in which the offense was intentional as well as . . . unintentional"); Marcus, *Litigation, Interpersonal Conflict, and Noble Succession Disputes in the Friendly Islands*, *in* 4 ACCESS TO JUSTICE, *supra*, at 69 (In Tonga, *kole fakamolemole*, meaning "to ask to make smooth or to straighten out," is offered only after the injured has expressed *loto mamahi*, "pained or hurt within one's being.").

[47] Samoan custom is known as *fa'a Samoa*, or "the Samoan way." For a discussion of *ifoga* and its relationship to American Samoan law, see generally Stewart, *Ifoga: The Concept of Public Apology, The Family, and the Law in American Samoa*, 10 J. INT'L LAW & ECON. 183 (1975). See also King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977) for a discussion of traditional Samoan ways, including *ifoga*, and their relationship to the American constitutional right to trial by jury.

[48] Stewart, *supra* note 47, at 186-87. The immediate family of the wrongdoer generally participates, but often members of the extended family also help in performing the ceremony. *But cf.* Hickson, *supra* note 46, at 23 (In Fiji, "[i]f the offender is young or occupies a particularly low status vis-á-vis the person who has been offended, the offender will not presume to speak for himself, but will ask a relative of higher status to speak for him. In any case, the move to perform the *i soro* is initiated by the offender, and he alone assumes responsibility for wrongdoing."); Marcus, *supra* note 46, at 76 (In Tonga, "[i]n the simple case, the offender goes alone to the house of the offended and merely asks forgiveness with little or no ceremony. At the other extreme, the offender and his kinsmen . . . walk in procession to the household of the offended and sit in the yard waiting for an acknowledgement.").

[49] Stewart, *supra* note 47 at 187-88. Gifts might include highly valued, finely woven mats (often family heirlooms), food, and in more recent times money. It is important to note that these were offered as an expression of remorse not as financial settlement of the dispute. *Cf.* Hickson, *supra* note 46, at 22 ("[T]he offending individual admits fault, and, in a formulaic speech, begs the forgiveness of the person whom he has offended. In addition, the offender presents a gift of ceremonial value, such as a whale's tooth or a few ounces of kava."); Marcus, *supra* note 46, at 76 ("Finally, the offender formally asks for foregiveness and expresses his *iofa* or love, and the prepared food such as pig and yams is presented to the offended.").

[50] Stewart, *supra* note 47, at 187 ("In previous centuries, a rejection of a proferred *ifoga* was not particularly uncommon and vengeance might be taken out forthwith on the assembled apologists . . . . It would be unusual for an *ifoga* to end in violence today."). *See also* F. KEESING, MODERN SAMOA 218 (1934) (Under the influence of the missionaries, "it became all but obligatory for an offended person to accept the abasement of the *ifoga* with its accompanying compensa-

What effect should the *ifoga* have on proceedings within the justice system? Should an injured party who has accepted an apology be able then to sue for damages?[51] And, if he can, what significance should the court attach to the fact that this traditional ceremony has been performed?[52] This is perhaps more easily illustrated in cases involving crimes.[53] On the one hand, the prosecutor may exercise his discretion in determining not to bring charges if he feels the *ifoga* has adequately resolved the issues. On the other hand, and particularly if a more serious crime is involved, the prosecutor may determine that charges must be brought "in the interests of society."[54] This is not to say that the *ifoga* will have no further effect. Clearly, the fact that an *ifoga* was offered and accepted can be an important mitigating circumstance at the time of sentencing.[55]

The same principles would apply in civil cases. If the injured party pursues a tort remedy, the fact that the "tortfeasor" has participated in an *ifoga* can be an important factor in the awarding of damages, particularly where some form of compensation was given to the injured family as an element of the ceremony.[56]

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tion as a sincere Christian humility, hence sufficient to heal the wound or breach caused by an offense."). *Cf.* Hickson, *supra* note 46, at 31 ("Although it is possible, in Fiji, for an individual who has been wronged to refuse the *i soro*, this rarely occurs.").

[51] See, e.g., Hsu Kuo Yeh v. Pratt, 4 A.S.R. 752 (Civ. Tr. Div. 1967), where the court writes that "[b]oth of the Samoan Judges emphatically agreed that the traditional Samoan 'Ifoga' presented to the family of the deceased by the family of the wrongdoer is not meant to compensate the family of the deceased at all, but merely an expression of sorrow and apology." *Id.* at 754 (no recovery for wrongful death absent a wrongful death statute). *Cf.* Hickson, *supra* note 46, at 23 ("The gift that Fijians present with the *i soro* honors rather than compensates the recipient."); Marcus, *supra* note 46, at 77 ("The informal reconciliation of disputes usually pays no attention to any material compensation for the offended, other than a presentation of food.").

[52] *See generally* Stewart, *supra* note 47, at 190-96.

[53] *See* cases discussed *id.* at 192-94.

[54] *See, e.g.*, Government v. Habenschuss, Am. Samoa Crim. No. 717-71, *cited in* Stewart, *supra* note 47, at 194 (The Samoan judges felt prosecution was inappropriate because apology had been accepted. The associate justice, however, felt it was "not merely an offense against the victim, and the victim's family, nor . . . the village . . . but it was an offense against the Government and the people of American Samoa.") (quoting Record at 3).

[55] *Id.* ("We do feel, however, that the fact that such a presentation was made is important in considering sentence, and, of course Samoan customs should be considered at all stages of our proceeding.") (quoting Record at 4, *Habenschuss*). See also Record at 3, *Habenschuss*, where the Samoan Judges were quoted as saying "we should recognize the law of Samoa by imposing a severe sentence . . . and then should recognize the Samoan custom by suspending the sentence." (quoted in Stewart, *supra* note 47, at 194); Government v. Tafele, Am. Samoa Crim. No. 427-69, *cited in* Stewart, *supra* note 47, at 192. The court in *Tafele* did not specify the basis of its granting a motion for reduction of sentence which was based upon performance of an *ifoga* as well as other factors.

Ifoga is recognized in the statutory law of American Samoa related to sentencing. *See* 46 AM. SAMOA CODE § 1910(b). *See also* King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977).

[56] This was noted by the court in King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977):

Although courts have been at times reluctant to extend customary law beyond the old factual context in which it developed,[57] it is important that they remain open to the benefits which traditional ways have to offer and to articulate the traditional systems being integrated or deferred to. In this manner the law can hold onto the benefits of traditional remedies and avoid some of the problems tort reformers in the United States are trying to correct.

The judicial approach to tort reform assumes the continuing vitality of tort law. Suppose tort law is abandoned rather than being reformed?[58] We already have workers' compensation laws and no-fault insurance laws and other specialized legislation modifying traditional common law principles and practice. Why not simply abolish, for example, personal injury lawsuits? That is exactly what New Zealand did in 1974.[59]

The New Zealand Accident Compensation Act provides that no claim, either at common law or under a statute, may be brought for damages arising out of personal injury or death suffered by accident. Instead, an injured person, whether at fault or not, must apply to a government body, the Accident Compensation Corporation, for compensation. The Corporation provides virtually all medical, rehabilitation, and funeral expenses, plus income replacement equal to eighty percent of income actually lost. In addition, an amount of nonpecuniary compensation (modest by tort standards) is available for physical disability, loss of enjoyment of life, and pain and suffering.[60]

> Apparently the *ifoga* is becoming a thing of the past. One witness (a chief) has observed four in thirty-five years. Another chief was involved in one *ifoga* in a period of seventeen years. Yet another witness who has been a *matai* eighteen years has never participated in such an affair. And the Samoan delegate to the United States remembers his last *ifoga* as an occurrence long before World War II.

Id. at 15. One issue in this case was whether a jury was feasible in a culture with "strict societal distinctions."

As early as 1934 it was observed that "the significance of this custom has not been appreciated by officials in recent years, though it was recognized and utilized by the Germans." F. KEESING, *supra* note 50, at 242.

[57] *See, e.g.*, Ychitaro v. Lotius, 3 T.T.R. 3, 142 (Truk 1965) (insufficient proof of local custom excusing from civil liability a teacher whose negligence caused a child's death and who had made a traditional apology to the family. "The court . . . strongly urges that all persons in the Trust Territory engaged in activity not clearly covered by local custom, should give careful consideration to the liabilities imposed by the common law for damages caused by negligence.").

[58] For a comprehensive discussion of the theoretical basis of "accident law," see G. CALABRESI, THE COSTS OF ACCIDENTS (1970). *See also* O'Connell, *Alternatives to the Tort System for Personal Injury*, 23 SAN DIEGO L. REV. 17 (1986) (suggesting reform by legislation and contract).

[59] Accident Compensation Act 1972, [1972] 1 N.Z. STAT. 521; Accident Compensation Act 1982, [1982] 3 N.Z. STAT. 1552.

[60] For a discussion of the New Zealand system, see, e.g., Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CALIF. L. REV. 976 (1985); Harris, *Accident Compensation in New Zealand: A Comprehensive Insurance System*, 37 MOD. L. REV. 361 (1974).

The New Zealand system is not as generous as the American system. On the other hand, all accident victims are compensated. Furthermore, this compensation is obtained without the legal and judicial expenses associated with court proceedings. The total cost to society is probably comparable to what it was prior to the changeover. Yet despite some criticism, there is little talk in New Zealand of restoring personal injury lawsuits.[61]

A *Lex Pacifica* does not require that all jurisdictions respond in the same way to similar situations. Neither does it require that newer jurisdictions remain hidebound by an imposed jurisprudence. South Pacific jurisdictions have the opportunity to improve upon traditional common law remedies for civil wrongs, to learn from each other, and to be an example for others to follow.

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[61] *See* Selsor, *The Death of Tort Down Under: A Study of the World's Most Comprehensive No-Fault System and Its Implications for American Tort Law* in 3 NATIONAL LEGAL CENTER FOR PUBLIC INTEREST, THE LEGAL SYSTEM ASSAULT ON THE ECONOMY 51 (1986) (reviewing the first 14 years of the New Zealand system).

Gramm-Rudman-Hollings: A Misapplication of Separation of Powers?

I. INTRODUCTION

The Gramm-Rudman-Hollings Act (Gramm-Rudman)[1] was passed in December 1985 by a Congress determined to attack the problem of the burgeoning federal deficit. Both political branches supported the Act—Congress by a wide majority vote and the President with his signature. Before the political branches had an opportunity to implement the "bold experiment in fiscal control,"[2] the judicial branch allowed a challenge by the Act's opponents. Applying a strict construction analysis used in recent separation of powers cases,[3] the United States Supreme Court invalidated a key provision of the Act. The Court's formalistic analysis is not well-suited to the present structure of the federal government in which independent agencies perform legislative, administrative and quasi-judicial functions.[4]

Nonetheless, in *Synar v. United States*,[5] a special three judge panel[6] of the United States District Court for the District of Columbia held unconstitutional an automatic sequestration provision[7] in Gramm-Rudman.[8] The court invalidated this critical provision under the separation of powers doctrine.[9] It held

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[1] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985), popularly named Gramm-Rudman-Hollings after its authors, and further shortened to Gramm-Rudman by the media, was passed by both houses of Congress on December 11, 1985 and signed into law by the President on Dec. 12, 1985 [hereinafter Gramm-Rudman or the Act].

[2] Brief of the Speaker and Bipartisan Leadership Group of the House at 14-15, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[3] *See, e.g.*, I.N.S. v. Chadha, 462 U.S. 919 (1983) (one House legislative veto struck overriding immigrant deportation decisions of the U.S. Attorney General); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (Bankruptcy Act of 1978 unconstitutional because it transgressed an unambiguously enunciated fundamental principle in article III); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (President has absolute immunity from civil liability for acts performed in office, by virtue of office).

[4] Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 625-40 (1984).

[5] 626 F. Supp. 1374 (D.D.C. 1986).

[6] *Id.* at 1377. The panel consisted of Circuit Judge (currently Justice) Scalia of the United States Court of Appeals for the District of Columbia Circuit, and District Judges Johnson and Gasch of the United States District Court for the District of Columbia.

[7] Gramm-Rudman, *supra* note 1, § 252(a)(3). Order to be Based on Comptroller General's Report. The invalidated provision mandated automatic across-the-board reductions in federal funds if Congress and the President failed through the regular budget process to meet the reductions specified by the Act.

[8] Gramm-Rudman, *supra* note 1.

[9] The United States Constitution, in articles I, II, and III, divides the powers of the federal government among three branches and establishes a system of checks and balances. The focus is on "the degree to which various government arrangements comport with, or threaten to undermine, either the independence and integrity of one of the branches . . . of government, or the

that the fatal flaw of the provision was its reliance on the Comptroller General[10] to perform executive branch functions[11] while being subject to removal by Congress and, therefore, not sufficiently independent of the legislative branch.[12]

Congress, anticipating challenges, provided a "fallback" procedure[13] in the Act for deficit reduction in case the court should find the automatic process unconstitutional. The Act provided for a direct appeal to the United States Supreme Court under an expedited process[14] and for a stay of the judgment of the district court during the pendency of such appeal.[15] Following the district court's order on February 7, 1986, immediate appeals were filed with the United States Supreme Court[16] which heard arguments on April 23. On July 7, 1986, the Supreme Court upheld the lower court ruling.[17]

This comment first focuses on the passage of the Gramm-Rudman Act with particular attention to the automatic sequestration provision and the role of the Comptroller General under the Act,[18] the first few months of the Act's implementation,[19] and the district court's opinion to a facial challenge that the Act was unconstitutional.[20] Next, the comment addresses the arguments presented on appeal,[21] the United States Supreme Court's ruling on the Act,[22] and congressional implementation of Gramm-Rudman in 1986 without the automatic provision.[23]

The author contends that, in this modern day clash between the three branches of government, the Court could have either avoided a decision on constitutional separation of powers grounds because the parties lacked standing; or the issue presented was a political question; or the Court could have used a checks and balances analysis for the separation of powers issue and upheld the Act.[24]

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ability of each in fulfilling its mission in checking the others so as to preserve the interdependence without which independence can become domination." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 15 (1978).

[10] *See infra* notes 264-65.

[11] *Synar*, 626 F. Supp. at 1377.

[12] *Id.*

[13] Gramm-Rudman, *supra* note 1, § 274(f); *see infra* notes 67-71 and accompanying text.

[14] Gramm-Rudman, *supra* note 1, § 274(a).

[15] *Id.* at § 274(b), (e).

[16] Bowsher v. Synar, 106 S. Ct. 3181 (1986), decided together with United States Senate v. Synar, No. 85-1378 and O'Neill v. Synar, No. 85-1379.

[17] *Id.*

[18] *See infra* notes 26-78 and accompanying text.

[19] *See infra* notes 79-92 and accompanying text.

[20] *See infra* notes 93-123 and accompanying text.

[21] *See infra* notes 124-28 and accompanying text.

[22] *See infra* notes 316-64 and accompanying text.

[23] *See infra* notes 365-409 and accompanying text.

[24] *See infra* notes 129-364 and accompanying text.

Finally, the author comments on the potential impact of the Supreme Court's decision on the future role of the Comptroller General, and independent federal regulatory agencies.[25]

II. HISTORICAL DEVELOPMENT

A. Legislative Enactment of Gramm-Rudman

On the final day before being in default for exceeding the statutory debt ceiling, Congress voted to increase the statutory limit on the public debt,[26] and passed an attached amendment designed to assure a balanced budget by fiscal year 1991. The amendment, The Balanced Budget and Emergency Deficit Control Act of 1985, established "a 'maximum deficit amount' for each of the fiscal years 1986 through 1991."[27]

Citing fears of the economic and political consequences of continued deficit spending,[28] both the House and the Senate passed the Act with strong bipartisan support.[29] The budget balancing plan underwent several revisions by an unconventional conference committee that "devised the final version in private

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[25] *See infra* notes 410-33 and accompanying text.

[26] Rep. Rostenkowski, presenting CONF. REP. NO. 433 for the final House of Representatives vote, stated: "Over two months ago the House found itself up against a wall because of a Senate amendment to the legislation increasing the public ceiling." 131 CONG. REC. H11875 (daily ed. Dec. 11, 1985).

Congressmen and Senators frequently attach amendments to important legislation to ensure their passage. One congressional reporter wrote:

> Enactment of the budget plan prevented a major fiscal crisis for the federal government, because the budget measure was an amendment to legislation raising the ceiling on the federal debt to $2.079 trillion, from $1.824 trillion. Without the increase the federal government faced its first default in history, on Dec. 12.

43 CONG. Q. WEEKLY 2604, 2605 (1985).

[27] *Synar*, 626 F. Supp. at 1377. *See infra* note 37. Congress ordinarily sets a year by year goal. This is the first methodical legislative approach to eliminating the federal deficit.

[28] Senator Domenici stated on the floor of Congress:

> If you are concerned about the continuation of $200 billion deficits, with little or no hope of ameliorating them during good times to a substantial degree and in a predictable way, then I can tell you . . . that this bill is more apt to solve the problem than leaving the system the way it is.

131 CONG. REC. S17385 (daily ed. Dec. 11, 1985).

Sponsor Rudman called it "a bad idea whose time has come." 43 CONG. Q. WEEKLY 2604 (1985). Sen. Packwood, R-Or., said, "I pray that what we are about to undertake will work." 131 CONG. REC. S17383 (daily ed. Dec. 11, 1985).

[29] CONF. REP. No. 433, 99th Cong. 1st Sess. (1985) passed the Senate by 61-31 vote. 131 CONG. REC. S17443-44 (daily ed. Dec. 11, 1985). The measure passed the House by 271-154 vote. 131 CONG. REC. H11903 (daily ed. Dec. 11, 1985).

sessions."[30]

An accelerated enactment process followed two and a half months of intense negotiation and writing to develop the plan.[31] A final vote by the conference committee took place at 1:00 a.m. on December 10, 1985.[32]

The Senate passed the conference report on December 11 after nine hours of speeches[33] and the House passed the measure at 10:15 p.m. on the same day.[34] President Reagan's signature on December 12 made the Act effective immediately, instituting a radical departure from federal budgeting processes of the past.[35]

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[30] Wehr, *Congress Enacts Far-Reaching Budget Measure*, 43 CONG. Q. WEEKLY 2604 (1985). The report further stated:

> A first conference on the legislation disbanded in disagreement on Oct. 31, [1985]. The House then, on Nov. 1, passed a revised version of the budget balancing amendment that had been worked out by its conferees. The Senate voted again for its plan, with some modifications, on Nov. 6. A second, 66-member conference quickly shrank to a tiny working group that devised the final version in private sessions.
>
> There was no conventional committee action, in either chamber, on the budget measure, which had been introduced as S-1704 on Sept. 25. Without the formal economic, procedural or legal analyses that legislation of such importance would ordinarily undergo, members acted largely on speculative statements about what the legislation would do.

Id. at 2605-06.

Rep. Lott, R-Miss., who voted for the Act, stated:

> This is the product of a small handful of House Democrats and Senate Republicans and their staff. They shaped the deals and details behind closed doors and then plopped this 158-page document down in front of the full conference at 5 o'clock yesterday for a vote, without an explanation or even a summary.

131 CONG. REC. H11878 (daily ed. Dec. 11, 1985).Senator Gramm, R-Tex., who co-authored the bill, disagreed. "This bill is the most thoroughly analyzed piece of legislation that I have observed in my 7 years of Congress." 131 CONG. REC. S17388 (daily ed. Dec. 11, 1985). Following adoption of the conference report, the majority leader of the Senate stated: "Mr. President, I would only indicate that we considered this bill on October 3, 4, 5, 6, 8, 9, and 10; November 1, 4, 5, and 6 and December 11. Twelve days of consideration for total of 70 hours and 30 minutes. We had 39 amendments." 131 CONG. REC. S12744 (daily ed. Dec. 11, 1985) (remarks of Sen. Dole).

[31] 43 CONG. Q. WEEKLY 2604 (1985).

[32] *Id.*

[33] *See supra* note 29.

[34] *Id.*

[35] New procedural rules and a strict timetable are two of the most important changes in the budgeting process. In the past "budget cutting has been a confusing chase after multiple moving targets." Wehr, *Court Strikes Down Core of Gramm-Rudman*, 44 CONG. Q. WEEKLY 1559, 1562 (1986).

In addition, former budget resolutions set broad spending targets which meshed poorly with program specific bills. Gramm-Rudman requires any new spending proposals to be matched with an equivalent increase in revenue or reduction in another program. *Id.*

B. Major Provisions of Gramm-Rudman

The 1986 fiscal ceiling on the federal debt was $2.079 trillion[36] making the largest item in the budget the payment of interest on the federal debt. Gramm-Rudman mandates a balanced budget by 1991. It requires the federal deficit ceiling to be decreased by $36 billion each year with maximum allowable federal budgets mandated for 1986 through 1991.[37] If the deficit is anticipated to exceed the ceiling in any fiscal year, an automatic procedure would achieve across the board reductions in the federal budget.[38] In other words, if the President and Congress fail, through the regular budget process, to meet the reductions specified by the Act, the automatic sequestration procedure in the Act will be triggered to ensure that the annual reduction goal is met.[39]

Although it is the most controversial[40] feature of the Gramm-Rudman Act, automatic sequestration is the final step in the annual budgeting process and is only implemented if budget negotiations between the executive and legislative branches during January through August are unsuccessful.[41] The congressional

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[36] Increasing the Statutory Limit on the Public Debt, H.J. Res. 372, 99th Cong., 1st Sess., passed Senate Nov. 6, 1985.

[37] Gramm-Rudman, *supra* note 1, § 201(a)(7) establishes maximum deficit amounts for the following fiscal years:

1986 — $171,900 billion
1987 — $144,000 billion
1988 — $108,000 billion
1989 — $ 72,000 billion
1990 — $ 36,000 billion
1991 — zero.

[38] Gramm-Rudman, *supra* note 1, §§ 251-52; *see also infra* notes 50-54 and accompanying text.

[39] *See infra* notes 50-58 and accompanying text.

[40] Sponsors of the Act "fashioned a document that [would] enforce discipline. . . . If discipline is enforced the [sequestration provision] will never be triggered. There will never be a cut, there will never be a sequester." 131 CONG. REC. S17391 (daily ed. Dec. 11, 1985) (remarks of Sen. Hollings).

Thus, advocates believed that the "threat of automatic cuts will force the president, Congress and Americans jointly to decide to spend less" or agree to pay higher taxes or both. 43 CONG. Q. WEEKLY 2604-05 (1985).

Opponents of the Act believed it would be impossible for Congress to agree on budget cuts and that the primary budgeting for the country would be done by the process outlined in the bill as the trigger or last resort. In addition, opponents believed the provision, which allowed the OMB, CBO and Comptroller General to determine the percentage that needed to be cut, was unconstitutional. Opponents said the controversial provision "improperly shifted power away from the legislative branch." *Id. See also infra* note 168.

[41] Gramm-Rudman, *supra* note 1, §§ 251-52. Sequestration actually takes place after three additional opportunities for legislative intervention by Congress. If legislation passed by Congress exceeds the mandatory deficit ceilings set in Gramm-Rudman, the joint report from the OMB

budget process adopted in Gramm-Rudman differs considerably from the former federal budget process.[42] Notably, it establishes an accelerated congressional and executive timetable setting forth the major dates and steps for completion of budget related action.[43]

The steps of the Act require that the President submit his budget request the first Monday after January 3.[44] By June 30, Congress must complete its budget resolution, reconciliation, and appropriations activity[45] under the specific guidelines of the Act.

The Congressional Budget Office (CBO)[46] and the Office of Management

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and CBO directors to the Comptroller General will indicate that the automatic provision may be triggered. Following the Comptroller General's review and revisions the President must order across-the-board reductions.

The sequestration still need not take place, however. If Congress exceeded the budget the first time around, the Act provides for a "second bite of the apple." 131 CONG. REC. S17382 (daily ed. Dec. 11, 1985) (Sen. Packwood, R-Ore.). Congress has the month of September to enact deficit-cutting legislation that eliminates the need for budget sequestration.

Following the President's final sequestration order, Congress has a third opportunity to legislate an alternative to sequestration. Gramm-Rudman, *supra* note 1, § 254(b)(1)(B).

[42] Gramm-Rudman amends the Congressional Budget Act of 1974 to enable Congress and the President to meet the succeeding deficit reductions. The amendment incorporates wholesale many proposed budget recommendations developed over several years by a committee chaired by Rep. Beileman, D-Cal., 43 CONG. Q. WEEKLY 2608 (1985). *See also supra* note 35.

[43] The accelerated timetable is as follows:

On or before:	*Action to be completed:*
First Mon. after Jan. 3	President submits his budget.
Feb. 15	CBO submits report to Budget Committees.
Feb. 25	Committees submit views & estimates to Budget Comm.
Apr. 1	Budget Comm. reports concurrent resolution on the budget.
Apr. 15	Congress completes action on concurrent resolution on the budget.
May 15	Annual appropriation bills may be considered in House.
June 10	House Appropriations Comm. reports last annual appropriation bill.
June 15	Congress completes action on reconciliation legislation.
June 30	House completes action on annual appropriations bills.
Oct. 1	Fiscal year begins.

Gramm-Rudman, *supra* note 1, § 300.

[44] *Id.* In fiscal 1987 only, the President's budget was due February 5, 1986. H. CONF. REP. No. 433, 99th Cong. 1st Sess. 72 (1985).

[45] *Id.*

[46] The Congressional Budget Office is described in federal statute as follows:

> Congressional Budget Office is an office of the Congress with a director appointed by the Speaker of the House of Representatives and the President pro tempore of the Senate after considering recommendations from the House and Senate Budget Committees. The Director may be removed by either house by resolution. The Director is authorized to secure

and Budget (OMB),[47] independently, through specifically detailed procedures,[48] estimate the amount of anticipated deficits in the various budget accounts. If, at this point, the budget has been reduced to a level that does not exceed (by ten billion dollars or more) the maximum deficit level for the particular fiscal year,[49] no additional reduction steps would be necessary.

Assuming the total projected deficit for the year exceeds the limit by ten billion dollars or more, the Directors of OMB and CBO consolidate their independent reports, agreeing on specific deficit amounts when they can or taking the average of the two.[50] One report is presented to the Comptroller General[51] on August 20 together with each Director's report. The Comptroller General applies the detailed rules for exemptions and limitations[52] and calculates uniform percentage deductions to apply to remaining accounts necessary to bring the deficit under the ceiling.[53] This constitutes the sequestration order which the Comptroller General presents to the President on August 25.[54]

If, on September 1, the Comptroller General requires the President to issue a sequestration order,[55] Congress still has until October 1 to amend the budget to bring it within the maximum allowable deficit for the fiscal year.[56] If Congress and the President cannot agree on further reductions or on increasing revenue, the initial order takes effect on October 1 with a final order effective on October 15.[57] Sequestered amounts must be divided equally between defense and non-

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information, data, estimates, and statistics directly from executive branch agencies, departments and establishments necessary to perform his duties.

2 U.S.C. § 602 (1982).

[47] Office of Management and Budget is an Office in the Executive Office of the President. 31 U.S.C. § 501 (1982).

[48] Gramm-Rudman, *supra* note 1, § 251(a); *see also* H. CONF. REP. NO. 433, 99th Cong. 1st Sess. (1985), 131 CONG. REC. H11703 (daily ed. Dec. 19, 1985).

[49] *See supra* note 37.

[50] Gramm-Rudman, *supra* note 1, § 251(a)(2).

[51] *See infra* notes 264-65 (appointment and removal of the Comptroller General in the General Accounting Office).

Originally the Senate version of the Act had OMB and CBO making the calculations to determine if across the board cuts would be needed to achieve the required deficit reduction. These two agencies were later relegated to advisory roles and the duty to report excess deficits was conferred upon the Comptroller General "precisely because Congress knew that he was politically independent of both the President and the Congress." Brief of Appellant United States Senate at 40, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[52] *See infra* notes 59-64 and accompanying text.

[53] Gramm-Rudman, *supra* note 1, § 251(a).

[54] *Id.* § 251(b); *see also id.* § 251(b)(2) (contents of Report).

[55] Gramm-Rudman, *supra* note 1, § 252 (Presidential Order).

[56] *See supra* notes 37 & 43.

[57] 43 CONG. Q. WEEKLY at 2608 (1985) (final sequestration order, based on revised report, becomes effective October 15). *See also* Gramm-Rudman, *supra* note 1, § 252(b).

defense[58] and then reduced by a uniform percentage.

The Act exempts interest on the national debt,[59] social security,[60] two veterans programs,[61] and six low income programs,[62] and applies special rules to six social programs and five health programs.[63] Federal retirement cost of living allowance (COLA) would be split equally between defense and non-defense.[64] "The President may not modify . . . the General Accounting Office (GAO) report"[65] making the President's task ministerial[66] under the sequestration process.

Because of continued concern by members of both chambers that the automatic sequestration process might not withstand a constitutional challenge, a "fallback" provision was added.[67] It establishes that, "in the event that any of

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[58] The Act requires reductions in the federal budget to come half from defense and half from nondefense programs.

> Subject to the exemptions, exceptions, limitations, special rules, and definitions . . . reductions necessary to eliminate one-half of the deficit excess for the fiscal year shall be made in outlays . . . under "defense programs" and the reductions necessary to eliminate the other half . . . shall be made in outlays . . . under "nondefense programs."

Gramm-Rudman, *supra* note 1, § 251(a)(3).

[59] 131 CONG. REC. H11877 (daily ed. Dec. 11, 1985).

[60] Social Security and Tier I Railroad Retirement Benefits are exempt from reduction. Gramm-Rudman, *supra* note 1, § 255(a).

[61] Veterans' compensation and veterans' pensions are exempt. Gramm-Rudman, *supra* note 1, § 255(b).

[62] The Act exempts Medicaid; Aid to Families with Dependent Children; Women, Infants, and Children Program; Supplemental Security Income Program; Food Stamps; and Child Nutrition Program. Gramm-Rudman, *supra* note 1, § 255(g)(1).

[63] Special rules would apply for the following: foster care and adoption assistance, unemployment compensation, child support enforcement, guaranteed student loans, and the Commodity Credit Corporation.

Special procedures would apply to the following health programs: Medicare, Veterans Health, Indian Health, Community Health and Migrant Health. Gramm-Rudman, *supra* note 1, § 256.

[64] Any reductions in automatic spending increases (COLA) for federal retirement programs must be shared equally by defense and nondefense categories. CONF. REP. NO. 433, 131 CONG. REC. H11705 (daily ed. Dec. 10, 1985); *see also* Gramm-Rudman, *supra* note 1, § 252(a)(6)(C)(i); *see infra* notes 90-91.

[65] "The President may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts or percentages set forth in the [Comptroller General's Report]." Gramm-Rudman, *supra* note 1, § 252(a)(3).

[66] Rep. Rostenkowski stated:

> The use of CBO, OMB, and GAO, combined with the detailed direction to the President, makes the President's task ministerial. The bill is tightened to assure that the President adheres strictly to the deficit reduction process we have developed in the legislation.

131 CONG. REC. H11876 (daily ed. Dec. 11, 1985).

[67] Gramm-Rudman, *supra* note 1, § 274(f).

the reporting procedures . . . are invalidated,"[68] the report of the Directors of OMB and CBO would go to the Temporary Joint Committee on Deficit Reduction[69] for passage as a joint resolution within five days.[70]

The President's signature would be required for the sequestration order to take effect.[71] If vetoed by the President, a two-thirds majority vote of both the House and Senate would be required to override the veto.

The Gramm-Rudman Act became effective when signed by the President on December 12, 1985. Since the 1986 fiscal year had already begun on October 1, 1985, special provisions and timetable govern the 1986 fiscal year operation.[72] The Act was designed to take effect immediately after passage by Congress and signing by the President because of the seriousness of the rising deficit and recognition by the legislative and executive branches of the need to control the deficit.[73]

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[68] *Id.* § 274(f)(1).

[69] *Id.* § 274(f)(2).

[70] *Id.* § 274(f)(3).

[71] *Id.* § 274(f)(5).

[72] *See infra* note 84 and accompanying text. *See also* Special Timetable for Fiscal 1986:

Date	*Action*
Jan. 10	"snapshot" of economic indicators, laws affecting spending, revenues and projected deficit taken by CBO and OMB.
Jan. 15	CBO and OMB report to GAO on deficit & content of the so-called sequester order making automatic spending cuts to achieve deficit targets.
Jan. 20	GAO forwards deficit and sequester report to President.
Feb. 1	President issues sequester order based on report.
Mar. 1	Sequester order takes effect.
Apr. 1	GAO issues compliance report on sequester order.

43 CONG Q. WEEKLY at 2609 (1985).

[73] The following are statements made by Congressmen regarding their perceptions of the seriousness of the federal debt and the legislative and executive inability to control it: "Our actions speak louder than our words. It is obvious that Congress is incapable of exercising budgetary restraint. With passage of the Gramm-Rudman bill, I am now hopeful that we can finally begin to solve our serious deficit problem." 131 CONG. REC. H11880 (daily ed. Dec. 11, 1985) (remarks of Rep. Barton).

"[The] numbing figure of two trillion dollars . . . is the most convincing argument that the discipline needed to make the budget process work is simply not there." 131 CONG. REC. S12084 (daily ed. Sept. 25, 1985) (remarks of Sen. Hollings).

"The President out of ideological rigidity has failed to propose responsible budgets. This Congress out of political timidity has refused to adopt responsible budgets and so as a result of that mutual failure, we have Gramm-Rudman." 131 CONG. REC. H11887 (daily ed. Dec. 11, 1985) (remarks of Rep. McHugh).

"[T]his bill is in a real sense an act of legislative desperation . . . it seeks to place a political straitjacket on both the executive and the legislative branches of Government and force both

Another provision of the Act authorizes members of Congress or any person injured by the automatic sequestration provision to bring lawsuits to test its constitutionality.[74] This same section allows for an expedited decision by a special three judge district court[75] and direct appeal to the United States Supreme Court for an expedited review.[76]

Judicial review is also provided in case a President cites his constitutional responsibilities as Commander-in-Chief and refuses to cut defense spending as required by the Act.[77] If the President's constitutional claim is upheld, the entire order making automatic cuts for that fiscal year would be null and void.[78]

C. *Implementation of Gramm-Rudman—December 12, 1985 to March 1, 1986*

Congress reconvened following Christmas recess on January 21, 1986, and immediately faced the realities of the stringent budget timetable they had set for themselves[79] by passing the Gramm-Rudman Act. The OMB and CBO each took their "snapshot" of the economy[80] and determined that the deficit in fiscal 1986 would exceed $220 billion.[81]

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branches to face unpleasant facts. To the degree that that may be necessary, it is the inevitable result of our fiscal excesses, particularly those of the last five years which have doubled the national debt." 131 CONG. REC. H11903 (daily ed. Dec. 11, 1985) (remarks of Rep. Wright).

"[The] legislation which we are passing today is a club over the head of both the President and the Congress designed to force action to reduce the deficit and to produce a balanced budget by 1991." 131 CONG. REC. S17420 (daily ed. Dec. 11, 1985) (remarks of Sen. Levin).

"A majority cannot be mustered for any single viewpoint and the red ink continues to gush forth." 131 CONG. REC. S17432 (daily ed. Dec. 11, 1985) (remarks of Sen. Chafee).

"It is not the greatest way to manage a magnificent country. But we have political gridlock at this point, and the existing processes of our Government, executive and legislative, invite the continuation of the gridlock." 131 CONG. REC. S17386 (daily ed. Dec. 11, 1985) (remarks of Sen. Domenici).

[74] Gramm-Rudman, *supra* note 1, § 274(a)(l) & (2).

[75] *Id.* § 274(a)(5).

[76] *Id.* § 274(b), (c).

[77] *Id.* § 274(d).

[78] *Id.*

[79] *See supra* notes 37 & 72.

[80] *See supra* note 72. The "snapshot" is a detailed procedure spelled out in § 251 of the Act. Essentially, it is the first step in the sequestration process whereby directors of OMB and CBO determine the base from which all other calculations will be made. The base is each Director's assumption as to the revenues and outlays for the fiscal year. Gramm-Rudman, *supra* note 1, § 251.

[81] In their report on Jan. 10, 1986, OMB estimated the deficit for the current fiscal year to be $220.1 billion and CBO estimated $220.9 billion. 51 Fed. Reg. 1923 (1986).

The Comptroller General received a consolidated report from OMB and CBO on January 15.[82] He examined the estimates and concluded that no alternative set of assumptions could be adopted that would result in a deficit of less than $171.9 billion,[83] the ceiling for triggering the automatic sequestration procedure for fiscal year 1986.[84] Consequently, the Comptroller General issued his report to the President on how and where to cut $11.7 billion from current year budgeted funds.[85] The President issued the first sequestration order under Gramm-Rudman on February 1, 1986.[86] The President did not recommend to Congress any alternatives to the February 1 order although he is entitled by law to do so.[87]

The order became final on March 1, 1986,[88] but the actual outcome of the sequestration order was uncertain because of the district court's decision and stay of its judgment.[89] The validity of the order would be certain only after the Supreme Court ruled on the constitutionality of the process under which the

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[82] 51 Fed. Reg. 1919 (1986); *see also supra* note 72.

[83] 51 Fed. Reg. 2814 (1986).

[84] A sequestration was virtually assured for 1986, even as the legislation was being passed. The deficit target was set at $171.9 billion (far below the deficit estimates at the time of $200 billion or more). Consequently, special provisions were written into § 251 and § 252 which apply only to 1986. Gramm-Rudman, *supra* note 1, §§ 251-52.

The amount to be sequestered in 1986 was capped at $20 billion no matter how much over that the actual deficit went. The first sequestration order took place on March 1, 1986. Thus, the $20 billion cuts were prorated to cover only the seven remaining months of Fiscal Year 1986 (March-October). This means that $11.7 billion (7/12ths of $20 billion) was cut in 1986, half of it coming from the defense budget and the other half from nondefense accounts. 51 Fed. Reg. 2814 (1986).

[85] In accordance with the Act, the Comptroller General appraised the accuracy of the OMB/CBO economic forecasting and concluded that the assumptions were within a reasonable range for Fiscal Year 1986. The only changes he made in the averaged report he received from OMB/CBO were legally required adjustments (*e.g.*, the Comptroller found no legal authority to exempt $6.3 billion in defense programs, and no legal basis to sequester principal and interest on bonds guaranteed by the U.S. for the Washington Metropolitan Area Transit Authority) 51 Fed. Reg. 2813, 99th Cong., 2d Sess. (1986).

[86] President Reagan sent to Congress on February 1 the following message:

> I herewith report the issuance of the Order to affected agencies to suspend automatic spending increases or reduce budgetary resources consistent with the Comptroller General's January 21 sequestration or reduction determinations required by the Act to eliminate the $11.7 billion deficit excess for fiscal year 1986.

132 CONG. REC. S847 (daily ed. Feb. 3, 1986).

[87] Gramm-Rudman, *supra* note 1, § 252(c) states that the President's report "may be accompanied by a proposal setting forth in full detail alternative ways to reduce the deficit . . . to an amount not greater than the maximum deficit . . . for such year."

[88] *See supra* note 72.

[89] The district court's decision declared the automatic deficit reduction process in the Act unconstitutional and the President's February 1, 1986, sequestration order without legal force and effect, but stayed the effect of its judgment pending any appeals. *Synar*, 626 F. Supp at 1404.

order was issued.

Pursuant to another provision of the Act, on January 1, 1986, automatic cost of living spending increases that were supposed to go into effect at the first of the calendar year, were suspended.[90] They remained suspended until the President's March 1 order became effective. By his order they were permanently cancelled,[91] affecting both active and retired federal employees.[92]

D. District Court Invalidates of the Automatic Sequestration Provision

Representative Mike Synar[93] challenged the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985 by filing suit in the United States District Court in the District of Columbia[94] on the same day the President signed the Act into effect. Eleven other members of the House of Representatives[95] who claimed they were injured by the automatic reduction provisions of the Act[96] joined Synar in seeking a declaratory judgment. They alleged that the automatic deficit reduction process, whereby the President issues a sequestration order[97] implementing a report from the Comptroller General,[98] was unconstitutional in two respects. First, Congress's delegation of power to the President and other government officials was an unconstitutional delegation of legislative power.[99] Second, the powers assigned to the Comptroller General and

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[90] Cost of living adjustments (COLA) are suspended under the Act and are cancelled if the automatic sequestration is ordered. Gramm-Rudman, *supra* note 1, § 252(a)(6)(C)(i)-(ii).

[91] Although ordered, cancellation of COLA awaited the Supreme Court's determination as to the validity of the automatic sequestration mechanism. Had the deficit been less and the sequestration order not issued, the Act allows for restoration of suspended COLA. Gramm-Rudman, *supra* note 1, § 252(a)(6)(C)(i).

[92] The United States Senate explained the purpose of this provision as ensuring that recipients of COLA would bear their fair share of budget cuts if sequestration were required. Supplemental Brief of Intervenor United States Senate in Response to January 13, 1986 Order at 3, Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986).

[93] Synar is the Democrat from Oklahoma who voted against the Act.

[94] Gramm-Rudman, *supra* note 1, § 274(a)(1), authorizes a member of Congress to sue on the ground that § 252 is unconstitutional.

[95] Additional plaintiffs in the *Synar* suit were: Representatives Gary L. Ackerman, Albert G. Bustamante, Silvio O. Conte, Don Edwards, Vic Fazio, Robert Garcia, John J. Lafalce, Jim Moody, Claude D. Pepper, Robert G. Torricelli, James A. Traficant, Jr., Amended Complaint for Declaratory Relief at 1, Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986).

[96] *Id.* at 5. The representatives allege that they were injured by the Act's interference with their constitutional duty to enact federal spending laws; by the automatic reduction in their salaries, staff salaries, and office expense; and by the automatic reduction in programs that benefit their constituents.

[97] Gramm-Rudman, *supra* note 1, § 252.

[98] *Id.* § 251.

[99] Memorandum of Plaintiffs in support of Motion for Summary Judgment at 1, Synar v.

CBO Director, both legislative branch officials according to the plaintiffs, must be assigned to executive branch officials.[100] The plaintiffs sought a declaratory judgment that the automatic deficit reduction process was unconstitutional and that the President was, therefore, without power to order spending cuts by that process.[101]

The National Treasury Employees Union[102] challenged the Act on behalf of retired federal employee members whose benefits were subject to sequestration under the Act.[103] The basis of their claim was identical to that of the representatives.[104]

The district court consolidated[105] the two actions against the defendant, the United States. The Justice Department, representing the United States, defended the delegation of authority challenge and moved to invalidate the automatic deficit reduction provision on other grounds.[106] The Department alleged that the Act was unconstitutional because it assigned executive authority to the Comptroller General,[107] a legislative branch official.

The Comptroller General, the Speaker and Bipartisan Leadership Group of the House of Representatives,[108] and the Senate intervened to defend the Act.[109] The Justice Department moved to dismiss the plaintiffs-representatives' suit for lack of standing,[110] but conceded that the National Treasury Employees Union had standing.[111]

A three judge panel in the United States District Court for the District of Columbia[112] heard argument on January 10 and issued its opinion and order

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United States, 626 F. Supp. 1374 (D.D.C. 1986).

[100] *Id.* at 2.

[101] *Id.*

[102] The National Treasury Employees Union is an unincorporated association of both active and retired federal employees.

[103] *See supra* note 64. *See also infra* note 152.

[104] *Synar*, 626 F. Supp. at 1378.

[105] *Id.*

[106] *Id.* The Justice Department for the United States was the defendant in name only. However, the Department challenged the Act rather than defended it.

[107] *Id.*

[108] The participation of the Speaker and Bipartisan Leadership Group is the regular mechanism for the House of Representatives to present its institutional interest in litigation. House parties are the Honorable Thomas P. O'Neill, Speaker of the House of Representatives; the Honorable Jim Wright, Majority Leader; the Honorable Robert H. Michel, Minority Leader; the Honorable Thomas S. Foley, Majority Whip; and the Honorable Trent Lott, Minority Whip. Memorandum of Speaker and Bipartisan Leadership Group of the House of Representatives at 2, Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986).

[109] *Synar*, 626 F. Supp. at 1379.

[110] *Id.*

[111] *Id.*

[112] *See supra* note 6.

on February 7, 1986.[113]

The district court considered three main issues. First, did the plaintiffs have standing to sue on the issues raised? Second, did the Act delegate legislative powers that may be constitutionally exercised only by Congress? Third, if the Act withstands a challenge on the delegation of authority grounds, does the Act confer executive powers on the Comptroller General that may not be constitutionally given to an officer removable by Congress?[114] The district court held

> that since the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot constitutionally be exercised by an officer removable by Congress, those powers cannot be exercised and therefore the automatic deficit reduction process to which they are central cannot be implemented.[115]

It "[o]rdered that the automatic deficit reduction process . . . be, and hereby is, declared unconstitutional on the ground that it vests executive power in the Comptroller General, an officer removable by Congress."[116] The court found it "strictly unnecessary"[117] to decide the plaintiffs' allegation that the Act "violates the constitutional provision vesting 'all legislative power' in the Congress."[118] The Act's deficit targets remained intact. The ruling affected only the automatic procedure.

The district court stated that it was unnecessary to decide the issue of severability[119] of *this* provision because the Act provided a fallback provision[120] in case the automatic sequestering provision was declared unconstitutional. The court declared the President's February 1, 1986 sequestration order "without legal force and effect."[121] The court stayed the effect of its judgment during the pendency of any appeals,[122] because in the section of the Act providing for

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[113] *Synar*, 626 F. Supp. at 1404.

[114] *Id.* at 1377.

[115] *Id.* at 1403.

[116] *Id.*

[117] *Id.* at 1382.

[118] *Id.* The delegation of power issue need not be decided because the court held the Act unconstitutional on separation of powers grounds. The district court, however, in order to expedite review by the Supreme Court, chose to express its views *obiter dicta* on the excessive delegation of authority challenge.

[119] *See infra* text accompanying note 305.

[120] Gramm-Rudman, *supra* note 1, § 274(f); *see also supra* text accompanying notes 67-71.

[121] *Synar*, 626 F. Supp. at 1404.

[122] *Id.* Regarding the stay of a judgment, Gramm-Rudman, *supra* note 1, § 274(e) reads as follows:

> No order of any court granting declaratory or injunctive relief . . . shall take effect during the pendency of the action before such court, during the time appeal may be taken, or, if appeal is taken, during the period before the court to which such appeal is taken has

judicial review,[123] Congress included a direct and expedited appeal process to the Supreme Court.

III. Arguments on Appeal

A. Parties and Issues

Appellants were the three intervenor-defendants below: the Comptroller General, the United States Senate, and the Speaker and Bipartisan Leadership Group of the House of Representatives.[124] The appellants claimed that the Comptroller General was an independent officer who could appropriately and constitutionally perform the duties assigned by the Gramm-Rudman Act. The appellants contended that the district court erred in ruling that the Comptroller General was subservient to Congress because of the removal clause in the 1921 Act that created the General Accounting Office. The appellants further asserted that if the Comptroller General's removal provision was ruled incompatible with his ability to perform administrative functions, the removal provision should be held invalid. Thus, the Gramm-Rudman automatic sequestration provision would survive and the Comptroller's removal clause would be severed from the 1921 Act.[125]

The plaintiffs-appellees: Mike Synar, the other Representatives, and the National Treasury Employees Union, sought to have the judgment affirmed.[126] On appeal the plaintiffs-appellees presented, as additional grounds for affirmance, arguments that were rejected by the district court.[127]

Although the United States was the named defendant in the district court case, the Justice Department, on behalf of the United States, joined the plaintiffs in seeking the invalidation of the automatic provision. As such, the Justice Department did not appeal the district court decision on the merits, but did seek to have the judgment affirmed. The Department did, however, challenge

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entered its final order disposing of such action.

[123] Gramm-Rudman, *supra* note 1, § 274 (b), (c).

[124] Appellants' Brief for Joint Motion (1) to Consolidate Appeals, (2) to Expedite Consideration of Jurisdictional Statements, (3) Establish Expedited Schedule for Briefing and Argument If Probable Jurisdiction is Noted, and (4) Permit Initial Filing Typewritten Jurisdictional Statements and Responses and Reply Briefs at 6, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[125] Briefs of Appellants the United States Senate at Table of Contents, the Brief of Comptroller General of the United States at Table of Contents, and the Brief of Speaker and Bipartisan Leadership Group of the House at Table of Contents, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[126] *See supra* note 124.

[127] Those arguments relate to the Act's delegation of authority and the role of the Congressional Budget Office in the sequestration process, a separation of powers concern. Appellants' Brief, *supra* note 124, at 7.

the district court's ruling granting standing to the congressional plaintiffs and challenged the plaintiffs-appellees' second attempt to have the Act invalidated on undue delegation of authority grounds.[128]

B. *Standing*

"Standing is a jurisdictional issue which concerns the power of federal courts to hear and decide cases and does not concern the ultimate merits of substantive claims involved in the action."[129] Standing is a threshold issue in every case in federal court and can be raised at any point in the proceeding by the parties or by the court itself.[130] In *Synar*, the district court found that both the congressional plaintiffs and the union plaintiffs had standing to challenge the Act. The Supreme Court addressed the standing issue in one short paragraph,[131] noting that it "need not consider the standing issue as to the Union or Members of Congress"[132] because one union member, an appellee, had standing.[133] Had either the district court or the Supreme Court chosen to avoid deciding this case on the merits, standing, and the prudential doctrines surrounding standing, would have provided the opportunity to dismiss the case.

1. *National Treasury Employees Union*

Consolidating two cases "does not merge the suits into a single cause, or change the rights of the parties . . . ."[134] Following this rule, the district court determined the standing for the plaintiffs in each case separately,[135] even though the standing of the National Treasury Employees Union had not been challenged.[136]

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[128] *Id.* at 6. Although the United States and the plaintiffs are nominally appellees, they are in conflict on the issues of congressional standing and delegation of legislative authority.

[129] Weiner v. Bank of King of Prussia, 358 F. Supp. 684, 695 (E.D. Pa. 1973).

[130] *See* Bender v. Williamsport Area School Dist., 741 F.2d 538 (3rd Cir. 1984), *vacated*, 106 S. Ct. 1326 (1986) (case dismissed by Supreme Court for lack of standing which had not been addressed by the lower courts).

[131] *Bowsher*, 106 S. Ct. at 3186.

[132] *Id.*

[133] 106 S. Ct. at 3185 n.2. An individual member of the union whose benefits had been suspended was later added as a plaintiff. The Supreme Court, on March 31, 1986, granted a motion to add union member Van Riddel as a plaintiff on appeal. Brief of the United States at II, *Bowsher*, 106 S. Ct. at 3181.

[134] Johnson v. Manhattan Ry., 289 U.S. 479, 496-97 (1933), *quoted in Synar*, 626 F. Supp. at 1379.

[135] *Synar*, 626 F. Supp. at 1379.

[136] *Id.* Defendant United States Justice Department moved to dismiss only the representatives' suit for lack of standing.

The Constitution extends judicial power to all cases and controversies but limits such power to that authorized by the Constitution and statutes enacted by Congress under the Constitution.[137] As such, every federal appellate court must be satisfied, not only of its own jurisdiction, but also that of the lower courts in a cause under review.[138] If a federal court decides a case, an appellate court may dismiss because the plaintiff lacked standing.[139]

The "obligation to notice defects in a [federal court's] subject-matter jurisdiction assumes a special significance when a constitutional question is presented."[140] In cases with constitutional issues, the Supreme Court must strictly adhere to standing requirements.[141]

The need to determine standing is derived from the court's role in developing principles to optimize the conditions for sound adjudication.[142] Justice Brennan framed the "gist of the question of standing" thusly: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adversariness which sharpens the presentation of issues upon which the Court so largely depends for the illumination of difficult constitutional questions?"[143]

In addition to adversariness, petitioners must allege and show that they personally have been injured, not that other unidentified members of their class have suffered.[144] The petitioner must show he "has sustained or is in immediate danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally."[145] Put another way, if personal injury is threatened, the party need not await its consummation in order to have standing, "[i]t is sufficient that the injury is imminent."[146]

Article III standing principles involve associations as well as individuals. "There is no question that an association may have standing in its own right to

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[137] U.S. CONST. art. III, § 2 reads, in part: "The Judicial Power shall extend to all Cases . . . to Controversies . . . ."

[138] *Bender*, 106 S. Ct. 1326 (1986).

[139] *Id.*

[140] *Id.* at 1331.

[141] *Id.* The Supreme Court has strictly adhered to standing requirements in cases presenting constitutional issues in order to make certain that an adversarial situation exists and to have the best possible presentation of relevant facts. *Id.* at 1331.

[142] Flast v. Cohen, 392 U.S. 83 (1968) (federal taxpayers had standing to enjoin federal aid to religious schools as violative of the first amendment).

[143] Baker v. Carr, 369 U.S. 186, 204 (1962) (legislative reapportionment was not political question to be avoided by the courts).

[144] Warth v. Seldin, 422 U.S. 490 (1975) (petitioners lacked standing to sue for injunctive and declarative relief from a city's discriminatory zoning laws because no direct injury shown).

[145] Frothingham v. Mellon, 262 U.S. 447, 488 (1923) (federal taxpayer lacked standing to challenge the constitutionality of a federal maternity act because she lacked direct injury).

[146] Babbit v. Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

seek judicial relief from injury to itself."[147] An association may assert the rights of its members if those "challenged infractions adversely affect its members' associational ties."[148] In order to have standing to sue as a representative of its members, an "association must allege that its members . . . are suffering immediate or threatened injury . . . that would make out a justiciable case had the members themselves brought suit."[149]

The Supreme Court has not always been consistent in its definition of article III[150] standing concepts. Certain basic standing requirements repeatedly recognized by the Supreme Court were, however, adopted in the district court's analysis. These principles included, at a minimum, a showing by the plaintiffs of "(1) actual or threatened injury, (2) traceable to the defendant, and (3) amenable to judicial remedy."[151]

The National Treasury Employees Union sued on behalf of its retired members whose cost of living allowances were suspended on January 1 by a provision of the Act.[152] The allowances were permanently cancelled two months later by the President's use of the automatic sequestration provision.[153] Thus, the Union retirees suffered "direct and personal injury" as a result of the Act's automatic budget reduction provision.

That injury, the district court concluded, could clearly be redressed by the court's invalidation of the provision under which the cost of living allowances were cancelled,[154] thus making the President's order null and void. The Union admitted that there was "no constitutional problem" with the fallback process set out in the Act[155] and took the position that the fallback process "must take

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[147] *Warth*, 422 U.S. at 511.

[148] *Id.*

[149] *Id.*

[150] Article III of the U.S. Constitution limits federal jurisdiction to "cases or controversies." The threshold question in every federal case is whether within the meaning of article III the plaintiff has made out a case or controversy. *Warth*, 422 U.S. at 498.

[151] *Synar*, 626 F. Supp. at 1380.

[152] Gramm-Rudman, *supra* note 1, § 252(a)(6)(C)(i) provides in pertinent part:

> Notwithstanding any other provision of law, any automatic spending increase that would (but for this clause) be . . . paid [between the enactment of the Act and the effective date of a sequestration order for fiscal year 1986] shall be suspended until such order becomes effective, and the amounts that would otherwise be expended during such period with respect to such increases shall be withheld. If such order provides that automatic spending increases shall be reduced to zero during [fiscal year 1986], the increases suspended pursuant to the preceding sentence and any legal rights thereto shall be permanently cancelled.

[153] The district court had granted standing, heard, and decided the case by the time the COLA cancellation took place, but the resulting sequestration was stayed until appeal was heard by the Supreme Court.

[154] *Synar*, 626 F. Supp. at 1381.

[155] *See supra* notes 67-71 and accompanying text.

effect" if the court invalidated the automatic process.[156] Under either of the two provisions, the Union retirees *could* be deprived of their anticipated cost of living allowances. As such, a district court decision favorable to the Union would fail to redress their injuries.[157] Without assurance of having their injury redressed, they would lack standing to sue.

But this contingent possibility should not deny standing to plaintiffs whose injuries could well be redressed by legislation enacted under the fallback process once the automatic sequestration provision was invalidated.[158] Thus, the district court concluded that the National Treasury Employees Union had a sufficiently concrete claim to support article III standing.[159] The Supreme Court decision did not discuss the issue.

2. *Congressional standing*

The congressmen based standing on three types of injuries: interference with (1) their constitutional duty to enact federal spending laws, (2) their salaries and staff salaries, and (3) programs for their constituents.[160] The district court considered only the claim of interference with their constitutional duties. Representative Synar and eleven other representatives claimed that the automatic deficit reduction process interferes with their "constitutional duties to enact laws regarding federal spending" and infringes upon their lawmaking powers under the Constitution, in that spending reductions made pursuant to the challenged process will, in effect, override earlier, duly enacted appropriations law in a

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[156] National Treasury Employees Union Memorandum at 17, Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986). The fallback process requires further legislative action by Congress before a sequestration may be ordered, but this provision, too, could deprive Union retirees of their anticipated benefits. *See* Gramm-Rudman, *supra* note 1, § 274(f).

[157] *Synar*, 626 F. Supp. at 1381.

[158] The court relied on the principle that "[t]he mere possibility that subsequent legislation might produce the same harm for which a judicial remedy is sought is not sufficient to eliminate redressability and hence standing." Orr v. Orr, 440 U.S. 268, 272 (1979), *cited in Synar*, 626 F. Supp. at 1381.

[159] *Synar*, 626 F. Supp. at 1381.

[160] Amended Complaint for Declaratory Relief at 5, Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986).

The Justice Department's arguments were: (1) congressional salaries will not be diminished because they are permanently provided for in another act (Pub. L. No. 97-51 § 130(c), 95 Stat. 966 (1981)); (2) staff salaries need not be cut because savings could be realized through such management practices as attrition and new hire at lower pay; and (3) these staff salaries and any reduction in programs to constituents are third-party injuries and do not confer standing on congressional plaintiffs. The court appears to have accepted the Justice Department's arguments.

The court ignored the representatives and Union plaintiffs attempt to invoke district court jurisdiction under the judicial review provisions contained in the challenged Act and relied on article III analysis to determine standing. *Synar*, 626 F. Supp. at 1379.

manner other than that prescribed by article I, section 7.[161]

The district court rejected the Justice Department's response that the congressmen shared a generalized grievance with all other citizens and, thus, had not demonstrated injury sufficient to support standing.[162] The district court concluded that the congressmen did have standing based on the law of the circuit[163] which confers standing on a member of Congress who "alleges a 'specific and cognizable' [injury] arising out of an interest 'positively identified by the Constitution.' "[164]

The plaintiffs' "specific and cognizable injury" was that the automatic deficit reduction process gave the Comptroller General and the President formal power to amend or repeal lawfully passed appropriations legislation, thus nullifying the congressmen's earlier votes on those laws.[165] The Act's interference with the congressmen's interest in having laws made in the manner prescribed by the Constitution,[166] the court determined, was a specific and discernable injury arising out of an interest identified by the Constitution.[167]

Further, the court did not exercise its equitable discretion to deny relief under this Act to members of Congress because the Act indicates clear legislative intent by specifically providing judicial remedies for congressmen.[168] Thus, the congressional plaintiffs were allowed standing to present their claims.

The phenomenon of litigation directly between the President and Congress

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[161] *Id.* at 1381.

[162] *Id.* at 1382.

[163] The court stated that the law of the federal circuit court of the District of Columbia Circuit recognizes a personal interest by members of Congress in the exercise of their governmental powers, limited by an equitable discretion in the courts to withhold specific relief. *Id.* Although the "equitable discretion limitation" is not unanimously accepted in this circuit, it is clearly recognized that specific injury to a legislator in his official capacity may constitute cognizable harm sufficient to confer standing upon him. *Id.*

[164] United Presbyterian Church v. Reagan, 738 F.2d 1375, 1381 (D.C. Cir. 1984) (quoting Moore v. United States House of Representatives, 733 F.2d 946, 951 (1984)), *cited in Synar*, 626 F. Supp. at 1382.

[165] *Synar*, 626 F. Supp. at 1382.

[166] U.S. CONST. art. I, § 7 states in part: "[1] All Bills for raising Revenue shall originate in the House of Representatives . . . [2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States."

[167] *Synar*, 626 F. Supp. at 1382.

[168] Gramm-Rudman, *supra* note 1, § 274(a)(1), (2). Plaintiffs argued for standing to be based on the face of the Act because House and Senate conferees had agreed to include the specific provision to make it clear that Congress "wants the Judicial Branch to resolve the merits of the constitutional questions raised by the Budget Act as quickly as possible" so that if the sequestration mechanism is declared invalid, the "fall-back" provision, which everyone concludes is constitutional, can be implemented. Affidavit of Rep. Synar Jan. 3, 1986, ¶ 8, Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986).

concerning their respective constitutional prerogatives and powers is a recent and highly controversial one.[169] Congressional standing recognized by the District of Columbia Circuit is seen by some as conflicting with the traditional article III standing requirements.[170] The conflict arises from different interpretations of article III and the doctrine of separation of powers.[171]

Proponents of the traditional view find it beyond contention that article III standing requirements are to limit federal judicial power to concrete injury directly traceable to the defendant's conduct. When the injury is grounded in a constitutional issue and can be remedied by a favorable decision, standing should be granted.[172]

"[R]epeated and essentially head-on confrontation between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either."[173] But when a proper constitutional conflict arises between the branches, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[174] The judicial branch can neither "shrink from a confrontation with the other two branches" nor accept claims of constitutional violation for adjudication if the claimant has not suffered cognizable injury.[175] Under this analysis, congressional standing falls within the boundaries of traditional article III standing and no conflict exists. Nor does congressional standing, when viewed as described above, offend the separation of powers doctrine. Thus, standing could properly be granted to congressional plaintiffs claiming an injury to their constitutionally mandated powers.[176]

This view is not universally accepted, however. The dissent in a case later vacated by the Supreme Court as moot "propounds the view that neither individual congressmen nor the houses of Congress may challenge in federal court

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[169] The question of congressional standing was before the Supreme Court in another context this session. The Court granted certiorari to the Court of Appeals for the District of Columbia on a case which involved the pocket veto power of the President and the right of Congress or its members to challenge presidential actions in court. A three judge panel held, over strong dissent, that the congressional plaintiffs had legal standing to sue. Barnes v. Kline, 759 F.2d 21 (1985), *cert. granted sub nom.*, Burke v. Barnes, 106 S. Ct. 1258 (1986), *vacated*, 107 S. Ct. 734 (1987) (case is moot, no live case or controversy).

[170] *Barnes*, 759 F.2d at 52 (Bork, J., dissenting).

[171] *Id.* at 26.

[172] *Id.* at 28 n.14.

[173] United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

[174] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* United States v. ICC, 337 U.S. 426, 430 (1949) (federal courts may not avoid resolving genuine cases or controversies that are traditionally justiciable on the basis that one or both of the parties are coordinate branches).

[175] Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474 (1982).

[176] Goldwater v. Carter, 444 U.S. 996 (1979) (suit by congressional plaintiffs dismissed on ripeness and political question grounds, but not on standing grounds).

the President's invocation of the pocket veto power."[177] Circuit Judge Bork, the dissenting judge in *Barnes v. Kline*,[178] in fact, interprets article III to "bar *any* governmental official or body from pursuing in federal court any claim, the gravamen of which is that another governmental official or body has unlawfully infringed the official powers or prerogatives of the first." He flatly states that "[w]e ought to renounce outright the whole notion of congressional standing,"[179] because "congressional standing" is only a subset of "governmental standing" which has no limits.[180]

This extreme view results from a narrow reading of article III and a restrictive application of the separation of powers doctrine that is difficult to reconcile with the complexity of federal government that exists today. Not every disputed issue between the executive branch and the legislative branch is capable of political compromise. Furthermore, the Constitution spells out certain congressional powers in explicit detail[181] and binds senators and representatives "by Oath or Affirmation to support [the] Constitution."[182] If the issue at stake is a constitutional issue, the courts must be available to resolve it even if the plaintiffs are in one of the other two named branches of government.

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[177] *Barnes*, 759 F.2d at 26. In *Barnes*, 33 U.S. Representatives, the U.S. Senate and the Speaker and Bipartisan Leadership of the House sued the Executive Clerk of the White House and acting director of General Services Administration seeking declaratory and injunctive relief to nullify the President's pocket veto of certain legislation requiring human rights certification as a condition of continued military assistance to El Salvador. The United States District Court for the District of Columbia found for the defendants. The Court of Appeals reversed and remanded holding that:

> (1) plaintiffs had standing; (2) dispute was not one beyond the court's authority and was not one as to which the court was to shirk its duties merely because the parties were coordinate branches of government; and (3) adjournment of the Ninety-eighth Congress at end of its first session did not prevent return of a bill presented to the President on the date of adjournment so as to create opportunity for a pocket veto.

Id. at 21. The appellate panel for the District of Columbia Circuit consisted of Chief Judge Robinson, Senior Circuit Judge McGowan, and Circuit Judge Bork. Judge Bork filed a 63 page dissent assailing the congressional standing doctrine. *See* Barnes v. Kline, 759 F.2d 21 (1985) (Bork, J. dissenting).

[178] *Id.* at 26 (Bork, J., dissenting).

[179] *Id.* at 41 (Bork, J., dissenting).

[180] *Id.* at 44 (Bork, J., dissenting). Judge Bork extended the idea of standing based on constitutional controversies to statutory or regulatory infringements to confer standing on any official who thought an interest had been invaded. He concluded that congressional standing was uncontrollable. *Id.*

[181] U.S. CONST. art. I, § 8, cl. 1-18. *See, e.g., id.* § 8, cl. 18 stating: "Congress shall have the power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ."

[182] U.S. CONST. art. VI, cl. 3 states in part "[3] The Senators and Representatives before mentioned . . . and all executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution."

A dispute between the President and Congress is ripe for judicial review when "each branch has taken action asserting its constitutional authority," or in other words, when "the political branches reach a constitutional impasse."[183] In *Barnes*,[184] a clear instance of constitutional impasse existed between the legislative and executive branches:

> Congress has passed an Act; the President has failed to sign it, and has declared it not to be a law; Congress has challenged the validity of that declaration. *The court is not being asked to provide relief to legislators who failed to gain their ends in the legislative arena. Rather, the legislators' dispute is solely with the Executive Branch.* And it cannot be said that Congress is asking for an advisory judicial opinion on a hypothetical question of constitutional law; Congress is seeking a declaration, not about the legal possibility . . . but about the validity of action that has actually occurred.[185]

Synar[186] can be distinguished from *Barnes* on the standing question. Congress overwhelmingly passed the Gramm-Rudman Act; the President signed it and began the first steps toward implementing the Act; a few members of the House challenged the constitutional validity of one provision of the Act. The representatives' challenge could be interpreted as requesting the court to provide relief because they "failed to gain their ends in the legislative arena."[187] The adversaries in the legislature simply moved their argument to the judicial arena. The representatives, finding themselves outvoted in Congress, brought suit in federal court. Those who carried the vote in Congress—the majority in the Senate and House—defended the legislation in court.

A majority vote, however, does not ensure the constitutionality of a statute. The representatives claimed that one provision of the statute interfered with their duly enacted laws. The Justice Department refuted that allegation but challenged the constitutionality of the Act on other grounds. With the United States, represented by the Justice Department, challenging, rather than defending the Act, no adversarial relationship existed. In *I.N.S. v. Chadha*,[188] however, the Court held that Congress was the proper party to defend a law and that Congress's intervention provided the necessary adversariness.[189] Thus, in

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[183] *Goldwater*, 444 U.S. at 997.

[184] 759 F.2d 21.

[185] *Id.* at 28 (emphasis added).

[186] Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986).

[187] 759 F.2d at 28.

[188] 462 U.S. 919, 939 (1983).

[189] 462 U.S. 919. The lack of adversariness argument was raised in *Chadha* because INS and Chadha took the same position on constitutionality of the one house veto. The Court stated, "It would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments

Synar, the congressional intervenors defended against both the Justice Department and the representatives' challenges.

To confer congressional standing, a clear instance of constitutional impasse must be present between the executive and the legislative branches. In *Synar*, the parties and issues reversed. The legislative branch challenged and defended; the executive branch challenged and defended. Although a constitutional question was raised, it was not a clear instance of constitutional impasse. It is conceivable that the judiciary could have refrained from hearing the case because of the court's requirement to not issue advisory opinions.

Congress can expand standing by statute.[190] In passing the Gramm-Rudman Act, Congress specifically provided that any member of Congress may bring an action[191] and that the Senate and the House could intervene in such action.[192] But the circumstances surrounding *Synar* point to the conclusion that it is a "friendly suit." A friendly suit lacks the degree of adversariness required to gain standing in federal court because it would render the court's decision an advisory opinion. The provisions for judicial review formed "an essential part of the legislative compromise that led to the passage of the Act."[193] The opponents of the legislation wrote into the Act expansive standing to enable them to sue. Then, proponents of the legislation wrote a special provision allowing immediate intervention.[194] Although the suit was brought against the United States, the Justice Department did not vigorously defend the Act's constitutionality. Rather, the Justice Department, on behalf of the United States, also challenged the Act's automatic sequestration provision. Furthermore, the real impact of the Act had not been felt by the time the suit was brought, so the issues were abstract and unfocused. "Constitutional adjudication should operate upon the basis of realities, not general propositions."[195] This statement and the policy reasons for standing requirements temper exercise of judicial power lest every constitutional issue be decided by the courts. Although the plaintiffs, arguably, had congressional standing, the district court should not have heard the case.

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asserted by the individual." *Id.* at 939. *See also* Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

[190] *See, e.g.*, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) (Congress may expand standing to the full extent permitted by article III, thus permitting litigation by one who would otherwise be barred by prudential standing rules).

[191] Gramm-Rudman, *supra* note 1, § 274(a)(1).

[192] *Id.* at § 274(a)(4). Section 274(a)(5) reads in part: "Nothing in this section or in any other law shall infringe upon the right of the House of Representatives to intervene in an action brought under [this Act] without the necessity of adopting a resolution to authorize such intervention."

[193] *See* Affidavit of Rep. Synar, Jan. 3, 1986 ¶ 8, Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986). *See also supra* note 168.

[194] *See supra* note 192.

[195] *Barnes*, 759 F.2d at 54 (Bork, J., dissenting).

Congressional standing is beneficially employed when absolutely necessary. This was not the time. The Act was challenged on its face and too little was known about its actual impact. It was not yet ripe for adjudication. On the other hand, a great deal was known about the economic crisis that pushed Congress to pass and the President to sign this critical legislation.

The Gramm-Rudman Act "is a carefully crafted political compromise—an attempt by a near-paralyzed Congress and frustrated executive branch to reduce the deficit."[196] That political process, barely begun by the passage of legislation, should be given an opportunity to work. "The lower court's foray into the politics of deficit reduction is unnecessary, unwise and impolitic . . . [t]he judiciary can only discredit itself by interfering in what is essentially a political attempt to confront and solve a major public-policy problem."[197]

An additional paradox surrounds the congressional standing issue. To confer congressional standing, a constitutional dispute must exist. In order to make that determination, the court must address to the merits. Thus, to decide if the plaintiffs have standing to sue, a decision on the merits must first be made. That is the paradox of congressional standing. The court addresses the merits to see if a constitutional issue exists so that the court can confer standing to decide the case.

The Supreme Court avoided addressing these issues by conferring standing to appeal on one member of the National Treasury Employees Union.[198] The appellee, who was not a party to the suit below, would be injured by the automatic sequestration provision of the Act because his cost of living allowance would not be increased under the Act.

In summary, it appears that the district court, and the Supreme Court could have avoided a constitutional adjudication of this case had they chosen to. For example, the courts could have denied the Union plaintiffs standing based on the uncertainty of whether the fallback provision would redress their injuries.[199] Congressional standing could have been denied on the basis of their suit being a request for an "advisory judicial opinion on a hypothetical question of constitutional law."[200]

C. Delegation of Power Issue

The delegation doctrine is a separation of powers principle derived from the

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[196] Feinberg, *Gramm-Rudman is Not Court Material*, N.Y. Times, Mar. 11, 1986, at 31, col. 1 [hereinafter N.Y. Times].

[197] *Id.*

[198] *Bowsher*, 106 S. Ct. at 3186. *See also supra* note 133.

[199] *See supra* text accompanying note 157.

[200] *Barnes*, 759 F.2d. at 28.

Constitutional three branch system of government and enunciated by the courts. Chief Justice Taft developed the now classic governing test[201] which states that Congress may delegate legislative power if it is clear what the body or person is authorized to do.[202]

The Supreme Court has used the delegation doctrine only twice in almost 200 years to invalidate legislation[203] that failed to "articulate a policy or set of standards which would serve to confine the discretion of the individuals exercising the delegated authority."[204] Following these cases, greater deference was given to congressional actions than prior to those cases.[205] The mode of analysis applied by the Court relied on factual comparisons with cases adjudicated.[206]

In *Synar*, both the National Treasury Employees Union and the congressional plaintiffs challenged only the automatic sequestration provision and conceded that there would be no constitutional issue presented if the same cuts were made under the "fallback" provision of the Act.[207] Thus, their argument was not that the "legislative" powers, which can only be exercised by Congress, had been conferred on the President.[208] Rather, the plaintiffs urged that Congress had turned over its budget making decisions to "unelected bureaucrats" and "put the entire government on automatic pilot"[209] by passing the Gramm-

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[201] Chief Justice Taft's delegation of authority test explains:

> [t]he separation of powers principle does not prevent the legislative branch from seeking "assistance" of coordinate branches; "the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination"; and *so long as Congress "lay[s] down by legislative act an intelligible principle* to which the person or body authorized to [exercise delegated authority] is directed to conform, *such legislative action is not a forbidden delegation of legislative power.*"

J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928) (emphasis added).

[202] *Id.*

[203] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (National Industrial Recovery Act of 1933 invalid on ground of excessive delegation to the President); Panama Ref. Corp. v. Ryan, 293 U.S. 388 (1935) (statute invalid because it appeared that Congress threw control of the entire process of government into the President's hands).

[204] *Synar*, 626 F. Supp. at 1383.

[205] *Id.* at 1384.

[206] *Id.*

[207] Memorandum of Plaintiff in Support of Motion for Summary Judgment at 14, 15, Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986).

[208] *Id.* at 20. The memorandum stated: "Plaintiffs are not complaining about discretion given to the President, since he has virtually none under the Act."

[209] *Id.* at 36. In their arguments, plaintiffs "assume[d]" that (a) the congressional delegation is functionally to the Office of Management and Budget (OMB) in the executive branch or, (b) that the delegation is unconstitutional because it is "made to a composite decisional authority" including legislative and executive agencies.

The House of Representatives intervenors refuted the contention that the delegation was to OMB. Memorandum of Speaker and Bipartisan Leadership Group of the House of Representatives at 5, Synar v. United States, 626 F. Supp. 1374 (1986). In reference to the role of the

Rudman Act with the automatic sequestration provision.

The district court found it "strictly unnecessary" to decide the issue of delegation by Congress to administrative officials of its lawmaking power, because it held the challenged provisions of the Act unconstitutional on other grounds.[210] In order to expedite review by the Supreme Court,[211] however, the court chose to express its views *obiter dicta*[212] on the contention that the Act violates the provision of the Constitution that vests all legislative power in Congress.[213]

Specifically, the plaintiffs alleged that the Act violated this constitutional provision in three ways: it delegated authority so central to the legislative function that it may not be delegated (per se or "core function" arguments);[214] the delegation was excessive because standards given were insufficient to confine the exercise of administrative discretion;[215] and the authority delegated precluded judicial review.[216]

Under the "core function" allegation, the plaintiffs presented a number of arguments to establish what the court terms per se nondelegability of powers.[217] The plaintiffs contended that the legislative powers over appropriations conferred by the Constitution[218] constitute such a "core function" that only Congress can perform them. The plaintiffs alleged that the "core function" principle is particularly true where the delegated authority could affect a broad range of federal programs and "would allow 'unelected bureaucrats' to 'override' portions

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OMB, the memorandum states:

> The depth of the House's suspicion of OMB makes unmistakably clear that the House accepted the final version only with the intention that this joint initial input, while useful, would be provided to a final decisionmaker . . . [s]pecifically . . . the nation's accounting watchdog [the Comptroller General who is] appointed by the President but not controlled by either the President or the Houses of Congress.

Id.

[210] *Synar*, 626 F. Supp. at 1382. Plaintiffs had claimed that the "Act's delegation to administrative officials of the power to make the economic calculations" to estimate the federal deficit "violates the constitutional provision [art. I, § 1] vesting 'all legislative power' in the Congress." *Id.*

[211] The U.S. Supreme Court in *Bowsher* did not devote so much as a sentence to the delegation of authority issue.

[212] *Obiter dicta* is Latin for by the way; in passing; incidentally; collaterally. BLACK'S LAW DICTIONARY 967 (5th ed. 1979).

[213] U.S. CONST. art. I, § 1 states: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

[214] *Synar*, 626 F. Supp. at 1385.

[215] *Id.* at 1387.

[216] *Id.* at 1389.

[217] *Id.* at 1385.

[218] U.S. CONST. art. I, § 8, cl. 1 states: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"; U.S. CONST. art. I, § 9, cl. 7 states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

of duly enacted appropriations laws."[219]

The district court rejected the "core functions" argument noting that the plaintiffs could cite no Supreme Court case which held that any legislative power, much less appropriations power, could not be delegated because of its "core function" status.[220] Pointing to the similarity between appropriations and taxing power, the district court relied on a Supreme Court decision upholding a statute that delegated taxing power by allowing the President to decide whether to increase duties on foreign commerce articles.[221]

In considering the plaintiffs' other per se nondelegability issues, the district court found the breadth of the power allocated to administrative officials to be "no broader than delegations that have been upheld,"[222] and that such delegation need not be "supported by some rigorous 'principle of necessity.' "[223] The district court also disagreed with the argument that the present delegation is invalid per se because it allows administrators to "nullify" or "override" laws.[224] Rather, the district court classified Gramm-Rudman as a form of contingent legislation[225] no different from that approved in prior cases.[226]

The three judge panel next turned to the second principal argument on delegation of authority: that the Act fails to confine administrative discretion adequately because of the lack of standards and the inherent imprecision of the duties delegated.[227] To determine whether the standards were adequate to restrict administrative discretion, the district court carefully reviewed the stat-

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[219] *Synar*, 626 F. Supp. at 1385.

[220] The court reasoned that "core" and "non-core" legislative functions are not distinguished by any constitutional provision and that the Supreme Court had stated: "A constitutional power implies a power of delegation of authority under it sufficient to effect is purposes." Lichter v. United States, 334 U.S. 742, 778-79 (1948), *quoted in Synar*, 626 F. Supp. at 1385.

[221] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

[222] *Synar*, 626 F. Supp. at 1386.

[223] The court noted that "lack of necessity" has never been used by the Supreme Court in striking a delegation of authority even though "necessity" has been noted in upholding one. *Id. See, e.g.*, Butterfield v. Stranahan, 192 U.S. 470, 496 (1904).

[224] *Synar*, 626 F. Supp. at 1386.

[225] The court considered the Act contingent because "Congress has stipulated that the full effectiveness of all appropriations legislation enacted for fiscal years 1986 to 1991 will be contingent upon the administrative determination whether all appropriated funds, when measured against revenues, result in a budget deficit in excess of required target figures." *Id.*

[226] The Supreme Court has upheld delegations permitting officials to determine when, if ever, a law should take effect. *See, e.g.*, United States v. Rock Royal Coop., 307 U.S. 533, 577 (1939); Currin v. Wallace, 306 U.S. 1, 15 (1939); The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1812), *cited in Synar*, 626 F. Supp at 1387.

[227] "The essential inquiry is whether the specified guidance 'sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will,' " *Synar*, 626 F. Supp. at 1387 (quoting Yakus v. United States, 231 U.S. 414, 425 (1944)).

ute.[228] The court concluded that the "totality of the Act's standards, definitions, context and reference to past administrative practice provide[d] an adequate 'intelligible principle' to guide and confine administrative decisionmaking."[229] The court distinguished the Act from other cases in which delegation of authority has been upheld because the *only* discretion conferred in the Act is ascertaining and predicting the facts. The Comptroller General does not make a single policy judgment, according to the court, making this delegation "remote from legislative abdication."[230]

The third major argument, the preclusion of judicial review, which extends only to one provision of the Act,[231] provided no basis for the court to find the delegation invalid.[232] Judicial review is not totally precluded by this section, the court pointed out. Rather, the Act facilitates the bringing of constitutional challenges,[233] preserves the rights guaranteed by other laws,[234] and expressly provides for review of presidential sequestration orders.[235] The district court rejected the view that judicial review is essential to sustain a delegation because the exercise of many validly delegated authorities upheld by the U.S. Supreme Court were statutorily insulated from judicial review.[236]

The panel rejected plaintiffs' assertion that Congress declined to make the "hard political choices." Holding that Congress made the policy decisions that constitute the essence of the legislative function, the court rejected the plaintiffs' delegation of authority challenge.[237] The district court summed up the aggregate factors identified by the plaintiffs and concluded that the delegation made

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[228] The court reviewed the entire statute generally and section 251 specifically, *Synar*, 626 F. Supp. at 1387-88. *See supra* text accompanying notes 44-46.

[229] *Synar*, 626 F. Supp. at 1389.

[230] *Id.*

[231] Gramm-Rudman, *supra* note 1, § 274(h). The Act states: "The economic data, assumptions, and methodologies used by the Comptroller General in computing the base levels of total revenues and total budget outlays . . . *shall not be subject to review in any judicial or administrative proceeding.*" *Id.* (emphasis added).

[232] *Synar*, 626 F. Supp. at 1390.

[233] Gramm-Rudman, *supra* note 1, § 274(a).

[234] Gramm-Rudman, *supra* note 1, § 274(g). The Act states: "The rights created by this section are in addition to the rights of any person under law, subject to subsection (e)" which refers to a stay during an appeal. *Id.*

[235] Gramm-Rudman, *supra* note 1, § 274(d) provides if a "court of competent jurisdiction" determines that the President is not in compliance with the sequestration order he "shall, within 20 days after such determination is made, revise the order in accordance with such determination."

[236] *See, e.g.*, Southern Ry. v. Seaboard Allied Milling Corp., 442 U.S. 449 (1979) (construing provision of Interstate Commerce Act); Thompson v. Clark, 741 F.2d 401 (D.C. Cir. 1984) (construing provision of Regulatory Flexibility Act).

[237] *Synar*, 626 F. Supp. at 1391.

by the Act passed constitutional muster.[238]

D. *Separation of Powers*

The plaintiffs in *Synar* concentrated their challenge of Gramm-Rudman on the allegation that it was an unconstitutional delegation of authority. The issue of impairment of the separation of powers doctrine was scarcely mentioned. Once the suit had been filed, however, the defendant in the action—the United States—became, in effect, an additional plaintiff and argued the Act's unconstitutionality on separation of powers grounds.[239] The district court struck a critical provision of the Act in accordance with the argument of the United States. The Supreme Court, on appeal, affirmed.[240]

The Constitution, in the first three articles, establishes the three branch structure of government. Article I vests all legislative powers in a House and Senate, describes the responsibilities and composition of each and how the two, as one Congress, legislate. Article II vests the executive power in a President[241] who is, in the checks and balances scheme, the "unitary, politically accountable head of all law-administration sufficiently potent in his own relationships with those who actually perform it to serve as an effective counter to a feared Congress."[242] Article III establishes the Supreme Court and specifies limitations on the Court's authority.[243] The Constitution reveals little regarding the intent or activities of unelected officials who do the bulk of government work in contemporary times.[244] The system of checks and balances created by the framers of the Constitution gives the President veto power and Congress the "authority to

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[238] *Id.* at 1390-91.

[239] *Id.* at 1379.

[240] *Bowsher*, 106 S. Ct. at 3194.

[241] U.S. CONST. art. II, §§ 2, 3, authorize, but do not limit the President to the following responsibilities and/or powers: to appoint those "Officers of the United States . . . which shall be established by Law," subject to the requirement of senatorial confirmation; and "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration" proposed legislation, and to "take Care that the Laws be faithfully executed."

[242] Strauss, *The Place of Agencies in Government: Separation of Powers and The Fourth Branch*, 84 COLUM. L. REV. 573, 597 (1984).

[243] U.S. CONST. art. III, §§ 1, 2, cl. 1 read:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judicial Power shall extend to all Cases, in Law and equity, arising under this Constitution, the Laws of the United States, and . . . to all Cases [and] . . . Controversies.

[244] "The size alone of contemporary American administrative government places strains on the eighteenth-century model." Strauss, *supra* note 242, at 582. The government "outlined in Philadelphia in 1787 envisioned" a few secretaries directly responsible to the President to carry out the "scanty business of [the federal] government." *Id.*

create the infrastructure of executive government and the exercise of plenary control over the President's expenditure of funds."[245] This structure built in the "interdependence of the three branches and [established] the place of agencies as subsidiary to all three."[246]

The separation of powers question in *Synar* was not an important issue to the plaintiffs. They raised the issue in a one paragraph statement and merely agreed with the Justice Department that the Comptroller General is sufficiently legislative in nature to preclude his carrying out the sequestration order authorized under Gramm-Rudman.[247] The real challenge on separation of powers grounds, and the one upon which the district court based its decision,[248] was advanced by the United States Justice Department. The Department successfully argued in district court that the separation of powers under the Constitution barred the Comptroller from performing the executive functions assigned by the Gramm-Rudman Act.

Those[249] who sought to have the district court decision reversed knew that reversal depended, to a great extent, on whether the Supreme Court applied a strict separation of powers analysis or a checks and balances analysis. The checks and balances analysis turns on a recognition of interrelationships in government.

The Justice Department urged the Supreme Court to adhere to a rigid division of the federal government into three branches "to assure, as nearly as possible, that each Branch operate only within its assigned sphere of responsibility . . . "[250] and "to furnish 'a vital check against tyranny.' "[251] The Department interpreted the Constitution to bar involvement by one branch in the affairs of another unless affirmatively authorized.[252]

The appellants argued that the Court had rejected the rigid separation of powers analysis, particularly where, as with Gramm-Rudman, the challenged Act does not "run afoul of any specific constitutional prohibition."[253] In *Nixon*

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[245] *Id.* at 603.

[246] *Id.* at 604.

[247] Memorandum of Plaintiffs in Support of Motion for Summary Judgment at 38, Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986).

[248] *See supra* text accompanying notes 239, 240.

[249] Intervenors in the district court case and appellants at the Supreme Court were the United States Senate, the Speaker and Bipartisan Leadership Group of the House of Representatives, and the Comptroller General. *See also supra* notes 108-09 and accompanying text.

[250] Brief for Appellee the United States at 14, Bowsher v. Synar, 106 S. Ct. 3181 (1986) (citing I.N.S. v. Chadha, 462 U.S. 919, 951 (1983)).

[251] Brief for Appellee the United States at 14, Bowsher v. Synar, 106 S. Ct. 3181 (1986) (citing Buckley v. Valeo, 424 U.S. 1, 121 (1976)).

[252] Brief for Appellee the United States at 14, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[253] Brief for Appellant Speaker and Bipartisan Leadership Group of the House of Representatives [hereinafter "House parties"] at 14, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

v. Administrator of General Services,[254] the Court rejected the "archaic view of the separation of powers as requiring three airtight departments of government"[255] and held that the proper inquiry focuses on the extent to which a statute "prevents the Executive Branch from accomplishing its constitutionally assigned functions."[256] Similarly, the Court noted in *Buckley v. Valeo*[257] that the "hermetic sealing of the three branches . . . from one another would preclude the establishment of a Nation capable of governing itself effectively."[258]

Thus, the "Court has . . . been mindful that the boundaries between each branch should be fixed 'according to common sense and the inherent necessities of governmental coordination' "[259] even where, as in *Chadha*,[260] the Court rejected the policy determination made by the political branches. Two other recent cases held acts of Congress unconstitutional on separation of powers grounds because the Court was faced with clear direction from the Constitution.[261] The appellants in *Bowsher* argued that "[n]o specific constitutional provision bars this Act."[262]

The Justice Department alleged that the President's constitutional duty to "take Care that the Laws be faithfully executed" was prevented by the Comptroller's role in the Gramm-Rudman Act. Under the Act, the President was required to abide by the Comptroller General's report even if it differed from the judgments he would have made.[263] The President's responsibility would be further impaired, the government argued, because the Comptroller General,

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[254] 433 U.S. 425 (1977).

[255] *Id.* at 443.

[256] *Id.*

[257] 424 U.S. 1 (1976).

[258] *Id.* at 121.

[259] *Chadha*, 462 U.S. at 962 (Powell, J., concurring) (quoting J. W. Hampton Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)).

[260] 462 U.S. 919. In distinguishing *Chadha* from the instant case, the House parties noted that the requirements of bicameralism and presentment, "the explicit constitutional provisions found to be violated, 'were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented.' " *Id.* at 946-47, *cited in* Brief for Appellant House Parties, at 17 n.17, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[261] Buckley v. Valeo, 424 U.S. 1 (1976) (appointments by Congress of some Federal Election Commissioners violated the Constitution's explicit Presidential appointments clause); Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (Bankruptcy Act of 1978 unconstitutionally transgressed an "unambiguously enunciate[d] . . . fundamental principle" found in the text of article III). Brief for Appellant House Parties at 17 n.17, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[262] Brief for Appellant House Parties at 17, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[263] Brief for Appellee the United States at 33, Bowsher v. Synar, 106 S. Ct. 3181 (1986). The Appellants' Briefs do not question the district court's opinion that the duties performed by the Comptroller General under § 251 of the Act "cannot be regarded as anything but executive powers in the constitutional sense." *Synar*, 626 F. Supp. at 1400.

who is appointed by the President with the advice and consent of the Senate[264] can be removed not only by impeachment but also by joint resolution of Congress for specific causes.[265]

Setting aside the removal question and looking only at the Comptroller's responsibilities under the Act, one could conclude that the computations made by the Comptroller and included in his report to the President in no way impair the Presidency.[266] The constitutional checks and balances scheme gives the President veto power.[267] It gives Congress authority to create the government infrastructure and to exercise control over the President's expenditure of funds.[268]

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[264] The General Accounting Office was established by the Budget and Accounting Act of 1921 as an instrumentality of the United States Government independent of the executive departments for the purpose of providing independent audits of government agencies. 31 U.S.C. § 702(a) & (b) (1982). The head of the Office, the Comptroller General of the United States [is] appointed by the President, by and with the advice and consent of the Senate. 31 U.S.C. § 703(a)(l) (1982). Except as provided in subsection (e) of this section, the term of the Comptroller General is 15 years. 31 U.S.C. § 703(b) (1982).

[265] The removal provision of the statute is as follows:

> (e)(l) A Comptroller General . . . retires on becoming 70 years of age. [He] may be removed at any time by—
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> (A) impeachment; or (B) joint resolution of Congress, after notice and an opportunity for a hearing, only for—
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> (i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude.

31 U.S.C. § 703(e)(l) (1982).

[266] The duty the Comptroller is required to complete is that of a super-auditor or bookkeeper independent of any supervision from Congress or the President. "The *only* discretion conferred is in the ascertainment of facts and the prediction of facts. [He] is not made responsible for a single policy judgment." *Synar*, 626 F. Supp. at 1389 (emphasis original).

His actions are functions similar to those performed throughout government by independent agencies. "It is commonplace for Congress to delegate factfinding responsibilities to independent agencies and to give the agencies' determinations the effect of law, binding on both executive departments and on private individuals." Brief for Appellant Comptroller General of the U.S. at 45, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

It is only the revenue and total expenditure information that must, of necessity, be supplied and applied to the selected budget categories as close to the sequestration deadline as feasible in order to be as current in projections as possible. The steps for completing these processes are spelled out in the Act. Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986).

[267] The President could have vetoed this legislation if he was convinced that a constitutional problem existed. The challenge was on the face, not the application, of the Act.

[268] *See* Strauss, *supra* note 242, at 603; see also Professor Black's example of Congress's power of the purse:

> My classes think I am trying to be funny when I say that, by simple majorities, Congress could at the start of any fiscal biennium reduce the President's staff to one secretary for answering social correspondence, and that, by two-thirds majority, Congress could put the White House up at auction. But I am not trying to be funny; these things are literally true.

Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13,

The Comptroller's role is consistent with this principle and in no way interferes with the President's constitutional duty to "faithfully execute" the Gramm-Rudman Act.

The district court's reliance on *Chadha*[269] to find an *ex ante* legislative veto[270] in this case was misplaced. The veto provision in the Immigration and Nationality Act, struck down in *Chadha*, was clearly legislative in purpose and effect and altered the "legal rights and duties" of individuals. It did not encroach on executive functions, as Justice Powell explained in his concurring opinion. Rather, the veto provision in that Act allowed Congress to usurp a judicial right.[271] Such was not the case with the Gramm-Rudman economic legislation.

It is not clear from the majority opinion in *Chadha* that the Court, in fact, invalidated all forms of legislative veto.[272] If the district court had been correct in characterizing Gramm-Rudman as a form of legislative veto, it would not be invalid per se, but would require a factual analysis of the surrounding circumstances.

The intrusion of the judiciary into the Gramm-Rudman solution to a purely political problem was an inappropriate infringement by one branch on the affairs of the others.[273] The House and Senate, seeking the same goal of reducing the spiraling deficit, passed the Gramm-Rudman Act after numerous com-

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15 (1974).

[269] 462 U.S. 919 (1983). Chadha, an alien whose deportation had been suspended by an immigration judge and reported to Congress as required by law, had his suspension vetoed by the House of Representatives and was ordered deported. He challenged through the federal courts that the action taken by the House was legislative in effect and purpose and, therefore, required constitutional bicameral and presentment procedures to be valid. The Court struck the veto provision from the statute.

[270] *See supra* note 225.

[271] *See supra* note 269.

[272] The majority in *Chadha* implied but did not say explicitly that *all* use of legislative veto was invalid. Moses, *Re-Separating the Powers: The Legislative Veto and Congressional Oversight After* Chadha, 33 CLEV. ST. L. REV. 145, 169 (1984-85). Therefore, it is clear only that the one House veto used to adjudicate the legal rights and duties of individuals is unconstitutional. This was not the issue in *Synar*.

It is significant in light of the sweeping language used in *Chadha* that Congress has enacted at least a dozen committee vetoes since that decision. "As with the invalidated legislative vetoes, these prohibitions prevent executive actions such as specified expenditures, reprogrammings, or transfers of public funds—unless and until congressional approval is granted or disapproval withheld." Kaiser, *Congressional Control of Executive Actions in the Aftermath of the* Chadha *Decision*, 36 ADMIN. L. REV. 239, 243 (1984).

[273] N.Y. Times, *supra* note 196, at 31, col. 1 (lower court's foray into the politics of deficit reduction is unnecessary, impolitic and unwise); *see also* Brief for Appellant House parties at 14, Bowsher v. Synar, 106 S. Ct. 3181 (1986) (peculiar responsibility of the political branches rather than the life-tenured branch).

promises on its content. The decision to include the Comptroller General in the process broke the "logjam that threatened to prevent enactment of the law."[274] The Court could have shown respect for the judgment of the Congress that the automatic sequestration provision was essential to achieving its deficit reduction goal. The Court could also have respected the President's judgment in signing rather than vetoing the legislation. The three branches of government are duty bound to uphold the Constitution. When the political branches act within the confines of the Constitution, the Court should consider whether the issue is a "political question beyond the authority or competence of the judiciary."[275]

Calling the Act a "bold experiment in fiscal control" the House parties invoked Justice Brandeis's eloquent plea that legislatures be allowed to engage in "experimentation."[276] When a federal court exercises its power to review the constitutionality of a legislative act, it should do so with caution. "[A] ruling of unconstitutionality frustrates the intent of the elected representatives of the people."[277] The Court should have allowed the political branches to deal with this national economic problem. Avoiding a constitutional issue adjudication based on the political question doctrine would have been appropriate.

1. *Comptroller General as an agent of Congress*

The district court flatly rejected the intervenors'[278] arguments that the case

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[274] *See* N.Y. Times, *supra* note 196, at 31, col. 1.

[275] Baker v. Carr, 369 U.S. 186 (1962). The Court established a test for determining when a constitutional issue may be a political question beyond the competence or authority of the judiciary. If any one of six conditions exist, the issue is a nonjusticiable political question:

> [1] textually demonstrable constitutional committment to a coordinate political department; or a
>
> [2] lack of judicially discoverable and manageable standards for resolving it; or the
>
> [3] impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the
>
> [4] impossibility of court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an
>
> [5] unusual need for unquestioning adherence to a political decision already made; or the
>
> [6] potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. *See* Rosenberg v. Flueti, 374 U.S. 449 (1963) (cardinal rule of the Court, there exists duty not to pass on constitutional issue at all, however narrowly confined, if case may, as a matter of intellectual honesty, be avoided or decided on other grounds).

[276] New State Ice Co. v. Liebermann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), *cited in* Brief for Appellant House parties at 15, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[277] Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (severability is primarily a question of legislative intent, yet court should act with restraint and invalidate no more than absolutely necessary).

[278] *Synar*, 626 F. Supp. at 1392-94. Intervenors were the United States Senate, the Speaker

was not ripe for adjudication until removal of the Comptroller was attempted.[279] According to the district court, "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises the separation of powers problems."[280] The Comptroller argued, however, that such reasoning would invalidate the statutory fixed terms for all independent officers of the United States performing administrative duties because they would be "subservient" to the President and the Senate who share the reappointment power.[281] The district court's theory of subservience to another branch, the appellants argued, would require that the "longstanding practice of giving independent officers fixed, renewable terms would itself have to be struck down."[282]

An additional argument of the appellants was that the manner of removing the Comptroller General was essentially the passage of legislation[283] and, therefore, did not present any separation of powers problems. The district court had rejected this argument, stating that it was Congress's statutory authority to remove the Comptroller General that has the immediate effect, and presumably the immediate purpose, of causing the Comptroller to look to the legislative branch rather than the President for guidance.[284] The district court explored the cases dealing with removal of officers.[285] They addressed the extent to which the implicit presidential removal power extends,[286] the extent to which it can be

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and Bipartisan Leadership Group of the House of Representatives, and the Comptroller General of the United States.

[279] *Id.* at 139. The court stated: "This argument is flatly contradicted by the decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)."

The district court analogized the Comptroller General's removal clause to the 14-year term of the bankruptcy judge. It reasoned that just as the possibility of nonrenewal of term created a subservience of a bankruptcy judge to the President, so did the possibility of removal for cause by Congress create a subservience of the Comptroller General to Congress. This reasoning disregards the special constitutional status of article III judges. Brief for Appellant Comptroller General at 11, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[280] *Synar*, 626 F. Supp. at 1392.

[281] Brief for Appellant Comptroller General at 11, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[282] *Id.*

[283] 31 U.S.C. § 703(e)(1)(B) (1982) provides for removal by joint resolution of Congress which requires the President's signature or a two-thirds vote of Congress to override a Presidential veto. This provision meets the bicameral and presentment requirements which the Court found flawed in *Chadha*.

[284] *Synar*, 626 F. Supp. at 1392.

[285] Officers and employees are treated quite differently under congressional removal power; however, this is not an issue since all parties conceded that the Comptroller General is an officer. *Id.* at 1394 n.23.

[286] The President has had, since the early days of the Republic, the implicitly conferred power of the Constitution to remove civil officers whom he appoints, at least those who exercise executive powers. *Synar*, 626 F. Supp. at 1395; *see also In re* Hennen, 38 U.S. (13 Pet.) 230 (1839) (the power of removal is incident to the power of appointment).

restricted,[287] and the extent to which it can be conferred by legislation upon the Congress itself.[288] The district court stated that the Supreme Court last discussed the constitutional authority of Congress over the power of the removal in 1935,[289] where it "swept away much of the reasoning" of the previous decisions and "revolutionized separation of powers analysis."[290] Having determined that the Comptroller General did not fit purely into either the legislative or executive branch, the district court found its framework for analyzing the Comptroller General's role between the *Myers v. United States*[291] and *Humphrey's Executor v. United States*[292] analyses.

In *Myers*,[293] the Court held that the power to appoint includes the power to remove, and that the President's removal power did not require Senate concurrence. The Court distinguished *Myers* a few years later in *Humphrey's Executor*[294] when it decided that although the power to remove did not require Senate concurrence, it did require "cause." The district court in *Synar* thus concluded that the power of Congress over the executive branch created by the removal clause violated the separation of powers principle.[295]

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[287] In United States v. Perkins, 116 U.S. 483 (1886), the Court stated:

> [W]hen Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.

Id. at 485, *quoted in Synar*, 626 F. Supp. at 1396.

[288] In Myers v. United States, 272 U.S. 52 (1926), the Court dealt with the constitutional validity of a statutory provision giving Congress a role in the removal process, holding that Congress has no authority to limit the President's removal power. The *Synar* district court sees the holding as applicable to officers whose functions include "duties of a quasi-judicial character." *Synar*, 626 F. Supp. at 1396.

[289] Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935) (Congress may "fix the period during which [the officer] shall continue in office, and . . . forbid . . . removal except for cause in the meantime."), *cited in Synar*, 626 F. Supp. at 1397.

[290] *Synar*, 626 F. Supp. at 1397.

[291] 272 U.S. 52 (1926).

[292] 295 U.S. 602 (1935). The court's analysis was that the statute upheld in *Humphrey's Executor* imposed a partial restriction on Presidential power of removal in contrast with the Comptroller General's statute which eliminates all presidential power of removal and confers it on Congress. The Supreme Court has never sanctioned such congressional assertion of power. Therefore, Congress's power to remove an officer cannot be approved with regard to one who actually participates in the execution of laws. *Synar*, 626 F. Supp. at 1401.

[293] 272 U.S. 52 (1926).

[294] 295 U.S. 602 (1935) (political incompatibility was not sufficient cause for removal).

[295] The district court ruled:

> We hold, therefore, that since the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, *which cannot constitutionally be exercised by an officer removable by Congress*, those powers cannot be exercised and

On appeal, the House parties insisted that the challengers strained to reach removal issues in the district court case.[296] They pointed out that the district court "relied solely upon the Executive Branch's argument" regarding the removal clause,[297] notwithstanding the Comptroller General's affidavit which "amply demonstrated the absence of Congressional influence."[298] Furthermore, appellants argued, there was no support for the district court's presumption that the Comptroller General was subservient to Congress. Senate appellants argued that the existence of the Comptroller General's for-cause removal provision makes him "no more subservient to the Congress than a member of the Federal Reserve Board, who is removable by the President only for cause . . . is subservient to the President."[299]

The President appoints the Comptroller in accordance with the Appointments Clause, making him an officer of the United States, not an agent of Congress. Making the Comptroller General removable for cause by the President should not alter the Comptroller's status. It is the appointment of the Comptroller General that controls, the appellants argued, not the removal power.

The appellants pointed out that a very recent decision by the United States Court of Appeals for the Third Circuit held that the "GAO is a hybrid agency and that the Comptroller General may constitutionally exercise executive functions in reviewing bid protests."[300] The circuit court in *Ameron, Inc. v. Army Corps of Engineers*[301] recognized that the GAO performs legislative, executive,

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therefore the automatic deficit reduction process to which they are central cannot be implemented.

Synar, 626 F. Supp. at 1403 (emphasis added).

[296] Brief for Appellant House parties at 44, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[297] *Id.*

[298] *Id.*

[299] Brief for Appellant United States Senate at 24, Bowsher v. Synar, 106 S. Ct. 3181 (1986). "Given the statutory requirements for notice and hearing, and the constraints that bicameralism and presentment impose on the enactment of a joint resolution, the independence of the Comptroller General is far more secure than that of Federal Trade commissioners or Federal Reserve Board members." *Id.*

The Federal Reserve System, Board of Governors are appointed by the President with the advice and consent of the Senate to serve a 14-year term "unless sooner removed for cause by the President." 12 U.S.C. § 221 (1982). Other independent agencies' codes have similar, some identical, wording.

[300] Ameron, Inc. v. Army Corps of Eng'rs, 787 F.2d 875 (3d Cir. 1986); *see also* Buckley v. Valeo, 424 U.S. 1 (1976).

[301] 787 F.2d 875 (3d Cir. 1986). In *Ameron*, the 1984 Competition in Contracting Act application was challenged by a disappointed bidder who claimed that the Army had arbitrarily rejected its bid. He sought a preliminary injunction to restrain the Army and the victorious bidder from proceeding with the contract. President Reagan had declared the automatic stay provision unconstitutional and ordered the OMB to instruct executive agencies not to abide by it. The court

and quasi-judicial functions and, as such, resembles a modern regulatory agency, part of the "headless 'fourth branch' of government having significant duties in both the legislative and executive branches but residing not entirely within either."[302]

Such pragmatic reasoning is well-suited to the present structure of the federal government, and is conducive to a check and balances analysis of the separation of powers doctrine.[303] Under this analysis, the inquiry becomes "whether [the] Act disrupts the proper balance between the coordinate branches,"[304] rather than to which branch of government the Comptroller General belongs.

2. *GAO removal provision*

The Court will sever a part of a law and not affect the validity of the remainder if (1) the remainder is capable of standing alone, and (2) the legislature would have intended the valid provisions to stand without the severed part.[305]

The appellants contended[306] that if a conflict exists between the Comptroller's power conferred by the Act and the removal authority of Congress, the Court should look to congressional intent and, in this case, strike the removal provision.[307] The appellants urged the Supreme Court to review Congress's intent in enacting both the 1921 General Accounting Office organic law and the 1985 Gramm-Rudman Act. They presented two issues: "(1) whether Congress would have assigned administrative duties to the Comptroller in 1921, independently of the removal provision, and (2) whether Congress would have assigned additional functions to the Comptroller under the [Gramm-Rudman] Act in 1985, independently of the removal provision."[308]

The district court had rejected this argument, applying only cases that set aside the provision that authorizes or prohibits the injury-in-fact that confers standing on the plaintiffs.[309] Appellants argued that the plaintiffs had no legally

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upheld the stay provision and Congress's delegation to the Comptroller to lift the stay. *Id.*

[302] *Id.*

[303] *See* Strauss, *supra* note 242, at 616.

[304] Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (rejection of the "archaic view of separation of powers as requiring three airtight departments of government").

[305] Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937).

[306] Brief for Appellant Comptroller General at 33-48, Brief for Appellant U.S. Senate at 31-36, Brief for Appellant House parties at 49-50, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[307] Regan v. Time, Inc., 468 U.S. 641, 653 (1984) (determination of severability is "largely a question of legislative intent").

[308] Brief for Appellant U.S. Senate at 36, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[309] The court cited Springer v. Government of the Philippine Islands, 277 U.S. 189 (1928); Myers v. United States, 272 U.S. 52 (1926); Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). *Synar*, 626 F. Supp. at 1393. But the court made no logical

cognizable interest in which of the two provisions would be invalidated as long as their injury was redressed.[310]

According to the Senate appellants, Court decisions refute the contention that a court cannot review both statutes when a removal provision and the authority challenged appear in separate statutes.[311] In reviewing the challenged authority of an officer, the Senate appellants argued, it is necessary to look to the organic statute that created the office as well as to the statute that conferred the challenged authority.[312]

The Justice Department insisted that Congress's passage of a "fallback" provision demonstrated that the removal provision should not be severed.[313] The district court agreed and looked only at legislative intent of Gramm-Rudman. The court severed the challenged automatic sequestration provision without examining the other statute.[314] The appellants renewed their arguments before the Supreme Court, but were similarly rejected.[315]

IV. UNITED STATES SUPREME COURT DECISION

Bowsher v. Synar[316] was argued April 23 and decided July 7, 1986. Five months to the day after the district court declared the automatic sequestration provision of the Gramm-Rudman Act unconstitutional, the Supreme Court affirmed that decision. Chief Justice Burger, writing for the majority,[317] first considered the threshold issue of whether the Members of Congress, the members of the National Treasury Employees Union or the Union itself had standing to

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connection between these bases asserted for standing and the appropriate relief.

[310] Brief for the Appellant U.S. Senate at 33, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[311] *Id.* at 34.

[312] Glidden Co. v. Zdanok, 370 U.S. 530 (1962) (Court sustained statutes assigning article III court duties to court of claims and court of appeals judges).

[313] Brief for Appellant Justice Department at 57, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[314] The congressional intent, according to the court, is strongly suggested by the fallback provision established to take effect if the automatic deficit reduction process is invalidated. It is clear that the participation of the Comptroller in implementing the Act, specifically addressed during the passage of the legislation, should give way to the provision governing his removal from office. But, the district court did not look to the organic act's legislative intent. *Synar*, 626 F. Supp. at 1394.

[315] The Supreme Court stated that "[f]ortunately this is a thicket we need not enter" in addressing the appellants' arguments that the Court look at the legislative intent of the organic act of 1921. Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[316] 106 S. Ct. 3181.

[317] The majority opinion was delivered by Chief Justice Burger; Justices Brennan, Powell, Rehnquist and O'Connor joined. A concurring opinion was written by Justice Stevens with Justice Marshall. Separate dissents were written by Justices Blackmun and White. Bowsher v. Synar, 106 S. Ct. 3181 (1986).

sue.[318] The Court concluded that it was unnecessary to consider the standing issue as to the Union or Members of Congress because it was "clear that members of the Union, one of whom [was] an appellee . . . [would] sustain injury by not receiving a scheduled increase in benefits. . . . This [was] sufficient to confer standing under [the Act] and Article III."[319] The Court did not address whether invalidating the automatic sequestration provision of the Act would redress that Union member's injury. "The majority then turned to the question of whether the assignment by Congress to the Comptroller General of the United States of certain functions under the Balanced Budget and Emergency Deficit Control Act of 1985 violate[d] the doctrine of separation of powers."[320]

Employing a "distressingly formalistic view of separation of powers,"[321] the majority reasoned that "a direct congressional role in the removal of officers" other than by impeachment is inconsistent with the constitutional separation of powers.[322] The Court relied on its 1925 separation of powers decision in *Myers v. United States*,[323] where the United States Supreme Court declared unconstitutional a statute providing that the President could remove certain postmasters only with the advice and consent of the Senate. The majority distinguished *Humphrey's Executor v. United States*[324] stating that the issue relied on by appellants was not in question in *Bowsher*.[325] Nonetheless, Chief Justice Burger relied on Justice Sutherland's traditionalist language in *Humphrey's Executor*[326] to

> underscore [ ] the crucial role of separated powers in our system: "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question."[327]

Chief Justice Burger, who had delivered the recent opinion in *I.N.S. v. Chadha*,[328] relied heavily on that decision to support his conclusion that "the

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[318] *Bowsher*, 106 S. Ct. at 3186.

[319] *Id.* at 3186.

[320] *Id.* at 3184.

[321] *Id.* at 3205 (White, J., dissenting).

[322] *Id.* at 3187.

[323] 272 U.S. 52 (1926).

[324] 295 U.S. 602 (1935).

[325] *Id.* According to the majority in *Bowsher*, the issue in *Humphrey's Executor* was the power of Congress to limit the President's powers of removal of a Federal Trade Commissioner. Seen more broadly, the issue was Congress's power to specify removal provisions for Officers of the United States. 106 S. Ct. at 3188.

[326] 295 U.S. 602.

[327] 106 S. Ct. at 3188 (quoting *Humphrey's Executor*, 295 U.S. at 629-30).

[328] 462 U.S. 919 (1983) (Congress's use of the one house "legislative veto" held unconstitutional because it violated the constitutional requirement for passage of legislation—bicameral pas-

Constitution does not permit Congress to execute the laws" and that Congress cannot, therefore, "grant to an officer under its control what it does not possess."[329] Permitting an "officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto."[330] The Court's decision in *Chadha* would not permit the role spelled out for the Comptroller General in Gramm-Rudman.

The majority next assessed whether the Comptroller General is controlled by Congress. Refuting the appellants' contentions that the Comptroller "performs his duties independently and is not subservient to Congress,"[331] the Court found the critical factor to be the existence of the Comptroller's removal provision.[332] "In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress."[333] The majority added "that the dissent is simply in error to suggest that political realities reveal that the Comptroller General is free from influence by Congress."[334]

Justice White in dissent expressed that "common sense indicates the existence of the removal provision poses no threat to the principle of separation of powers."[335] The question to be assessed in separation of powers issues, according to Justice White, is "whether there was a genuine threat of 'encroachment or aggrandizement of one branch at the expense of the other.' "[336] Justice White found no such threat here.

The limited removal authority is more properly viewed as a motivating influence on the Comptroller to adhere to statutory standards, Justice White reasoned, than as inducing subservience to the institution that enforces those standards. In reality, Congress's power of the purse and unquestioned authority to legislate the Comptroller General out of existence poses more of a "spur for subservience"[337] than the removal provision. Thus, the practical result of the removal clause is to make the Comptroller "one of the most independent officers in the entire federal establishment."[338]

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sage and presidential presentment).

[329] 106 S. Ct. at 3188.

[330] *Id.* at 3189.

[331] *Id.*

[332] See *supra* note 265 for removal provision statute.

[333] 106 S. Ct. at 3191.

[334] *Id.* (Justice White dissented from the Court's decision to strike down Gramm-Rudman on the basis of a solitary provision in a 65-year-old statute that has lain dormant since its passage).

[335] 106 S. Ct. at 3211 (White, J., dissenting).

[336] *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)).

[337] 106 S. Ct at 3212 (White, J., dissenting).

[338] 106 S. Ct. at 3213. Six Comptrollers General have served since 1921 and none has ever been threatened with removal. Scholars who have studied the GAO agree that substantive and procedural limits on the removal power by Congress and the President make the Comptroller's removal against his will virtually impossible.

Nonetheless, the majority determined that because Congress retained the authority to remove the Comptroller from office, he was not to be "entrusted with executive powers."[339] Chief Justice Burger warned that "the separated powers of our government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress."[340]

The Court then examined the question of whether the Comptroller General had been assigned executive functions under the Gramm-Rudman Act. The Court reviewed the reporting procedures of OMB and CBO as spelled out in the Act.[341] The Court viewed the actions of the Comptroller with respect to the CBO/OMB report[342] as "interpreting a law" and, therefore, the "very essence of 'execution' of the law."[343] "As *Chadha* makes clear," the Chief Justice wrote, once Congress has drafted and passed legislation its participation ends.[344] In Gramm-Rudman, Congress retained control over the execution of the Act by "placing responsibility for [its] execution in the hands of an officer who is subject to removal only by itself."[345] The majority found the Comptroller's role to be an impermissible intrusion by the legislative branch into executive branch functions.

In his dissent, Justice White quoted Justice Holmes' dissent in *Myers v. United States*:[346] "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."[347] Justice White pointed out that the responsibilities of the Comptroller under Gramm-Rudman "are not such that vesting them in an officer not subject to removal at will by the President would in itself improperly interfere with Presidential powers."[348]

Determining the level of federal spending is a legislative, not executive, function.[349] In Gramm-Rudman, Congress articulated a precise formula for making those spending determinations. The district court found, and the Supreme Court did not dispute, that the Act left no discretion to the officer charged with carrying out the calculations and, thus, passed constitutional muster as being

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[339] 106 S. Ct. at 3191.

[340] *Id.*

[341] *Id.* at 3192; *see supra* text accompanying notes 46-54.

[342] *See supra* notes 264-66 and accompanying text.

[343] 106 S. Ct. 3192.

[344] *Id.*

[345] *Id.*

[346] 272 U.S. 52, 177 (Holmes, J., dissenting).

[347] 106 S. Ct. at 3207. Justice White noted that Justice Holmes may have overstated his case because there may be executive functions that need to be performed by officers subject to removal at will by the President. *Id.*

[348] *Id.*

[349] *See supra* notes 218 & 268.

capable of delegation by Congress.[350] Delegating this responsibility "to an officer independent of the President's will does not deprive the President of any power he would otherwise have or that is essential to the performance of the duties of his office."[351]

Furthermore, Justice White emphasized, the Comptroller is not an agent of Congress in the *Buckley* sense that Congress would be precluded from directing the Comptroller to implement a law.[352] The Comptroller is an officer of the United States appointed by the President with the advice and consent of the Senate. "*Buckley* neither requires that the Comptroller be characterized as an agent of the Congress nor in any other way calls into question his capacity to exercise 'executive' authority."[353] The majority found the Comptroller General's role in Gramm-Rudman an unconstitutional intrusion into executive functions. Thus, it turned to the issue of remedy.

The appellants had urged the Court, if it found the Comptroller's role unconstitutional, to strike the removal provision in the 1921 Act rather than striking the automatic sequestration provision of the 1985 Gramm-Rudman Act.[354] The appellants argued that any incompatibility should be cured by refusing to allow Congress to remove the Comptroller if it ever attempted removal. The "only sensible way to choose between two conjunctively unconstitutional statutory provisions is to determine which provision can be invalidated with the least disruption of congressional objectives."[355]

Justice Blackmun noted that the Court had done that in *Glidden v. Zdanok*,[356] where the Court recognized "that it makes no sense to resolve the constitutional incompatibility between two statutory provisions simply by striking down whichever provision happens to be challenged first."[357] "Momentous issues of public law should not be decided in so arbitrary a fashion," Blackmun

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[350] *See supra* notes 201-39 and accompanying text.

[351] 106 S. Ct. at 3208. The President never has the discretion to determine the levels of funding available to the executive branch. *See supra* note 268.

[352] 424 U.S. at 119. Some members of the Federal Election Commission were appointed by Congress, not the President. The Supreme Court held unconstitutional the statute that permitted such appointments.

[353] 106 S. Ct. at 3209 (White, J., dissenting).

[354] 106 S. Ct. at 3192; *see also* Brief for Appellants U.S. Senate at 31-43, Brief for Appellants House Parties at 49, Brief for Comptroller General at 33-47, Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[355] 106 S. Ct. at 3216 (Blackmun, J., dissenting).

[356] 370 U.S. 530 (1962).

[357] 106 S. Ct. at 3217 (Blackmun, J., dissenting). In *Glidden*, the Court of Claims and the Court of Customs and Patent Appeals were challenged as not falling within article III requirements. Justice Harlan, writing the plurality opinion, reasoned that "if necessary the particular offensive jurisdiction (advisory opinions) and not the courts, would fall." 370 U.S. at 583.

admonished,[358] making clear his view that the Court should decide rather than having the decision made by whichever litigant files first. Justice White agreed with Justice Blackmun that it would be preferable to strike the removal provision,[359] because "striking down the provisions of [the Act] . . . is a grossly inappropriate remedy for the supposed constitutional infirmity."[360] Both dissenting justices proposed a weighing of the importance Congress attached to the removal provisions in the 1921 Act against the importance of the Comptroller's role in the Gramm-Rudman Act.

The majority stated: "Fortunately this is a thicket we need not enter."[361] They considered the fallback provision to be Congress's expression that it would choose to see the automatic sequestration provision fall. "[R]ather than perform the type of creative and imaginative statutory surgery urged by appellants,"[362] the majority relied on the fallback provision. It affirmed the judgment and order of the district court holding: "We conclude the District Court correctly held that the powers vested in the Comptroller General under § 251 violate the command of the Constitution that the Congress play no direct role in the execution of the laws."[363] The Supreme Court stayed its judgment for up to sixty days to permit Congress to implement the fallback provisions.

Unfortunately, the Supreme Court's separation of powers analysis went no deeper than trying to pigeonhole the Comptroller in one of the two political branches and making that determination on the basis of a never used sixty-five-year old removal provision. A more appropriate analysis would have focused on "whether the Act so alter[ed] the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law."[364]

V. IMPACT

A. *What is Left of Gramm-Rudman?*

The Gramm-Rudman Act, passed by Congress in December 1985 with a goal of eliminating the federal deficit by 1991, had its key provision invalidated by the Court in *Bowsher v. Synar*[365] on July 7, 1986. Under the Act, the Comptroller General was to take reports from the Office of Management and

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[358] 106 S. Ct. at 3216.

[359] *Id.* at 3214 n.14.

[360] *Id.*

[361] *Id.* at 3193.

[362] *Id.* See *supra* text accompanying notes 67-71 for an explanation of the fallback provision.

[363] *Id.* at 3194.

[364] *Id.* at 3214 (White, J., dissenting).

[365] *Id.* at 3181.

Budget (OMB) and the Congressional Budget Office (CBO)[366] and prepare a final report that would go to the President as the basis of the presidential sequestration order.[367] Following the Comptroller's presentation of the sequestration order to the President, Congress would have an opportunity to reduce the expected deficit to come within the statutory target, thus relieving the President of the need to issue the sequestration order.[368]

The Supreme Court held the role of the Comptroller General unconstitutional, anticipating that Congress would implement Gramm-Rudman by using the fallback provision in the Act.[369] That provision called for the CBO and OMB reports to go directly to a special committee of both houses[370] to be drafted into a joint resolution.[371] If passed by Congress and signed by the President, the joint resolution would authorize a presidential sequestration order.[372]

l. Proposals to "fix" the Act

Congress did not, however, turn blindly to the fallback provision that it had enacted. Members of Congress developed additional alternatives to their statutory alternative. Proposals advanced by senators and representatives to repair the wounded Act included: eliminating congressional authority to initiate removal of the Comptroller General,[373] reestablishing the automatic sequestration provi-

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[366] The reports estimated the deficit and calculated the spending cuts needed to meet the Act's deficit target for a given year. *See supra* notes 46-54 and accompanying text.

[367] The sequestration order would impose an across the board percentage reduction of all nonexempt programs with equal amounts coming from defense and nondefense categories. *See supra* notes 57-66 and accompanying text.

[368] *See supra* note 41 and accompanying text.

[369] Alan Morrison, the Washington, D.C. attorney who represented Congressman Synar, attributed the Supreme Court's decision, in part, to the fact that a "fallback mechanism in the Act—triggered by a ruling that parts of the Act were unconstitutional—made it easier to strike it down." Stewart, *Gramm-Rudman Held Invalid*, A.B.A. J., Oct. 1, 1986, at 52.

[370] *See supra* notes 67-71 and accompanying text.

[371] *Id.*

[372] *Id.* "There is, of course, no bar on Congress passing legislation cutting the deficit in some manner other than the sequester order. That, in fact, was what the authors of Gramm-Rudman hoped would happen." Wehr, *The Fallback: An Impossible Timetable?*, 44 CONG. Q. WEEKLY 1563 (1986).

[373] 44 CONG. Q. WEEKLY 1559, 1562 (1986). Senators Gramm and Rudman, who wanted to save their 1985 Deficit Reduction Act at any cost, and Chairman of the Senate Budget Committee, Pete Domenici R-N.M. proposed an amendment that would satisfy the Supreme Court's concern regarding the Comptroller's removal clause. *Id. See also* Tumulty, *Deficit Law Sponsors Press to Restore Automatic Cuts*, L.A. Times, Aug. 14, 1986, at I-26, col. 3.

Representative Jack Brooks D-Tex., chairman of the Government Operations Committee, strongly opposed the amendment known as "Gramm-Rudman-Hollings II." 44 CONG. Q. WEEKLY 1562 (1986). Brooks, who relies on the Comptroller to conduct extensive audits of the

sion but without reliance on the Comptroller General,[374] mandating the use of the fallback provision,[375] and repealing the entire Gramm-Rudman Act.[376]

Three of the four possible solutions were quickly dismissed by Congress.[377] A Senate proposal to revise the 1921 General Accounting Office (GAO) organic act to allow a President to remove the Comptroller General from office for specified causes met with strong opposition in the House. Opponents of the plan refused to consider any changes that would compromise the independence of the Comptroller General.[378] The Senate rejected amendments by members of their own body to insist that Congress use the fallback procedure or to repeal the entire Act.[379]

On July 23, 1986 the original authors of the Gramm-Rudman-Hollings Act brought an amendment to the Senate floor that would restore the automatic sequestration provision without the Comptroller General performing the unconstitutional task of giving the President a binding sequestration report.[380] The amendment proposed by the authors of the original Act would retain all the specifications of the original law as to how budget cuts are to be made,[381] but would insert the director of OMB between the Comptroller General and the President.[382] Under this arrangement, the Director of OMB, an executive officer, would take the action that the Supreme Court found unconstitutional for Congress to assign to the Comptroller General.

The biggest criticism of this proposal, which was known as the Gramm-Rudman "fix," was that the amendment would give "too much power to . . . OMB by authorizing it to make final decisions on how to slash spend-

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executive branch for Congress, stated: "I am absolutely opposed to amending the manner in which the comptroller general can be removed from office." *Id.* The force of the House opposition caused the Senate to seek other ways of fixing the Gramm-Rudman Act.

[374] 44 CONG. Q. WEEKLY 1680, 1725 (1986).

[375] A motion by Senator J. James Exon, D-Neb. to force Congress to use the Gramm-Rudman "fallback" procedure was defeated by a 66 to 33 vote. 44 CONG. Q. WEEKLY 1723, 1724 (1986).

[376] *Id.* The Senate rejected by a 30-69 vote an amendment by Senators Gary Hart, D-Colo. and Daniel Patrick Moynihan, D-N.Y. to repeal the entire Gramm-Rudman-Hollings Law.

[377] *See supra* notes 373, 375 & 376.

[378] *See supra* note 373.

[379] *See supra* notes 375 and 376.

[380] 44 CONG. Q. WEEKLY 1680 (1986).

[381] The most important specification to be retained by the proposed amendment is the requirement that all budget cuts in a sequestration order must come half from defense and half from domestic programs. 44 CONG. Q. WEEKLY 1680 (1986).

[382] *Id.* The proposed amendment would require OMB and CBO to make their initial determinations with review and revisions by GAO. The GAO's report would then go to OMB (not directly to the President as in the 1985 Act) for review, revisions and sending to the president for promulgation. *Id.*

ing in the automatic cut process."[383]

The Senate adopted the "fix" on July 30, 1986,[384] knowing that it faced strong opposition in the House and only "grudging" acceptance by the White House.[385] Because its chances for passage in the House were slim, the sponsors of the "fix" sought to ensure passage by attaching it to the legislation raising the debt ceiling,[386] the same vehicle that carried the 1985 Act to passage.

Neither attaching to the federal deficit ceiling nor other valiant attempts by the sponsors proved successful during the second session of the Ninety-ninth Congress.[387] Because the Senate had attached so many controversial amendments to the legislation to raise the federal debt ceiling, it failed to pass before the extended session ended.[388] Ironically, after several short-term amendments to raise the debt ceiling, the debt ceiling increase legislation was tacked onto the crucial deficit reduction bill and passed.[389] The debt ceiling amendment extends the government's borrowing time to May 15, 1987, and is certain to attract another attempt by sponsors of Gramm-Rudman to "fix" the Act.[390]

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[383] 44 CONG. Q. WEEKLY 1680 (1986). Senators Gary Hart and Daniel Patrick Moynihan led the attack on the proposed amendment arguing that OMB Director was too political to be allowed to make such judgments and that he could hide the real size of the deficit or devastate domestic programs or defense programs. *Id.*

Much of the distrust of OMB was based on Congress' experience with the 1981-85 former OMB Director David Stockman. In his memoirs published in 1986, Stockman openly ridiculed Congress and revealed that he masked the enormity of the federal deficit resulting from 1981 tax cuts. *Id.* at 1682.

[384] The Senate voted 63-36 to adopt an amendment to Gramm-Rudman empowering OMB to make determinations formerly made by the Comptroller in the 1985 Act. 44 CONG. Q. WEEKLY 1723 (1986).

[385] The Administration objected to the tight limits on OMB's discretionary power under the amendment. *Id.*

[386] The legislation raising the federal debt from $2,079 to $2,323 trillion became bogged down by more than 60 amendments attached to it by the Senate. 44 CONG. Q. WEEKLY 1944 (1986).

[387] On August 16, 1986, sponsors of the 1985 Act fought to attach a one-year version of their "fix" to legislation (HR 5395 and H.Rep. 99-789) raising the ceiling on federal borrowing. The legislation was limited in order to last only until September 30, 1986, the end of the current fiscal year. *Short-Term Debt Bill Clears Without Gramm-Rudman Fix*, 44 CONG. Q. WEEKLY 1944 (1986).

The short term borrowing amendment with the Gramm-Rudman "one year fix" attached passed the Senate by a voice vote on August 15. "With virtually no debate, the House voted 175 to 133 to strip off the Gramm-Rudman amendment and send the bill back to the Senate." *Id.*

[388] *See supra* note 386.

[389] *Debt-Limit Hike Added to Deficit Bill*, 44 CONG. Q. WEEKLY 2588 (1986).

[390] Senator Gramm, disappointed that he was unable to get an amendment passed in time to affect 1987 spending decisions, vowed to continue his efforts to attach the amendment to the long-term debt ceiling increase. 44 CONG. Q. WEEKLY 1944 (1986).

Some members of Congress were equally strong in their resolve not to "fix" the Act. Rep.

2. Gramm-Rudman and the 1987 budget process

Congress swiftly moved to affirm the $11.7 billion in budget cuts which took place on March 1, 1986,[391] by sequestration order. The cuts were nullified by the Court's decision in *Bowsher v. Synar*,[392] but a Joint Resolution signed by the President reinstated the cuts.

The Supreme Court struck only the automatic sequestration provision of the Act, leaving in place the deficit targets to reduce the federal deficit to zero by 1991.[393] The budget process timetable under the fallback provision and other procedural levers "intended to curb over-budget legislation" remain intact.[394] One restraint Congress imposed on itself through passage of the Act was the

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Schumer, in a letter to the editor wrote: "[If] Congress 'fixes' Gramm-Rudman-Hollings according to Senator Gramm's design we'll be back in court on the delegation issue for at least another six months, as that issue was clearly never resolved." *Quick Fix Can't Cure Gramm-Rudman Act*, N.Y. Times, Aug. 5, 1986, A-22, col. 4 (Rep. Schumer, D-N.Y. letter to editor).

[391] The Joint Resolution to ratify the President's 1986 sequestration order states:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, effective on and after March 1, 1986, the Congress hereby ratifies and affirms as law the February 1, 1986, sequestration order of the President as issued under section 252(a)(1) of the Balanced Budget and Emergency Deficit Control Act of 1985 and as affected by laws enacted after February 1, 1986, and before the date of adoption of this joint resolution. Approved July 31, 1986.

Pub. L. No. 99-366, H.J. Res. 692, 99th Cong., 2d Sess., 100 Stat. 773 (1986).

[392] 106 S. Ct. 3181.

[393] House Majority Whip Thomas Foley, D-Wash. said that the Court's decision produced the "worst of all possible worlds" by removing the guillotine that was to have fallen on Congress and the Administration and leaving intact the "targets, restrictions and obligations." 44 CONG. Q. WEEKLY 1563 (1986). Without the great sword of Damocles, Foley predicted, "Congress will never pass, nor will this president ever sign a sequestration order." *Id.*

[394] 44 CONG. Q. WEEKLY 1562 (1986). The timetable under the fallback provision is practically the same as that under the automatic provision:

Date	*Action*
Aug. 15	CBO/OMB "snapshot"
Aug. 15	Congress recess to Sept. 8.
Aug. 20	CBO/OMB report to Special Committee.
Aug. 25	Special Committee reports the proposed spending cuts as a joint resolution to both houses for vote.
Sept. 13	After Congress' vote, joint resolution goes to President for signature or veto.
Oct. 1	Sequestration takes effect.
Oct. 6	CBO/OMB new snapshot (includes latest economic developments).
Oct. 15	Final sequestration ordered.

requirement that all fiscal decisions be "deficit neutral."[395] In other words, any proposed spending increase must be offset by a proposed revenue increase or spending cut in another program. Congress, in order to meet its 1987 goal, had to keep the spending deficit below $144 billion.

In June, 1986, Congress passed a budget resolution that would meet the Gramm-Rudman target for 1987 without raising taxes.[396] On July 31, 1986, the budget committee of each House in its reconciliation process approved legislation setting out the expenses and revenues anticipated for 1987.[397] If passed by Congress in their existing form, these bills would have failed to meet the required savings target according to the official OMB - CBO snapshot submitted on August 20, 1986.[398] The snapshot of anticipated revenues and expenses showed that Congress needed to reduce the deficit by an additional $19.4 billion, ideally, and by $9.4 billion, absolutely, to avoid across the board percentage cuts of all non-exempt programs.[399] CBO and OMB, under the fallback provision, sent their August 20 reports to Congress which was in recess until September 8.[400] The fallback provision of the Act requires a joint committee of Congress to make the necessary across-the-board percentage cuts in order to meet the target. Congress's timetable required passage of a joint resolution ad-

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BUT IF, ON	
Aug. 25	Congress did not vote to sequester and voted to increase revenue and/or cut exenses, then
Oct. 6	CBO/OMB new snapshot (reflecting changes since Aug. 15) would indicate that the target would be met and no automatic cuts would be necessary.

Wehr, *supra* note 372; CONF. REP. NO. 433, 99th Cong., 1st Sess. (1985) *reprinted in* 131 CONG. REC. H11684 (daily ed. Dec. 10, 1985). *See also* Gramm-Rudman, *supra* note 1, §§ 274(f), 254(a)(4).

[395] Wehr, *supra* note 372. Senator Rudman refers to the provision as a " 'zero-sum process' which forces [legislators] to look at the deficit consequences of what they do." *Id.*

[396] Hook, *Congress Heads for Grand Legislative Finale*, 44 CONG. Q. WEEKLY 1960 (1986). The fiscal 1987 budget resolution serves as a guide for the House and Senate to which they each strive to "reconcile" their budgets.

[397] Each chamber approved packages of legislation (S 2706 and HR 5300) to reconcile current laws with spending targets set by the budget resolution. Gettinger, *Deficit-Cutting Measures Fall Well Short of Savings Targets*, 44 CONG. Q. WEEKLY 1726 (1986).

[398] The average of the CBO and OMB estimates (a snapshot) indicates that current laws would produce a deficit of $163.4 billion in 1987, $19.4 billion over the ceiling of $144 billion. In order to avoid across the board cuts, Congress must reduce the deficit—either by adding revenues or cutting expenses—of at least $9.4 billion. The Act allows a $10 billion leeway, making Congress's absolute ceiling $154 billion in 1987. Gettinger, *Gramm-Rudman Deficit Target Is In Sight*, 44 CONG. Q. WEEKLY 1943 (1986). *See also supra* note 394.

[399] *See supra* note 394.

[400] *Id.*

justment to the budget within five days, by September 13, with presentment to the President for his signature or veto.[401]

Nothing in the Act, however, prohibits Congress from using the regular process of passing bills to increase revenues or to decrease expenses. In other words, Congress could avoid its own across the board equal percentage reduction method of meeting the statutory limit set in Gramm-Rudman by "making the hard choices"[402] on reconciliation bills. The proponents of the Act had hoped that the threat of automatic cuts would force compromises and that the need to be responsible in reducing the deficit would force adherence to the annual deficit targets.[403]

When the new snapshot was taken by CBO and OMB on October 6, 1986, reflecting legislative action since the August 15 snapshot, nothing had changed. The October CBO/OMB report noted, however, that legislative activity underway at that time would "bring the deficit below the $154 billion threshold."[404]

Although they missed their own deadline of October 1 for completing the budget reconciliation, the measure eventually passed and Congress met the deficit target set by Gramm-Rudman for fiscal 1987.[405] Legislators reduced their August deficit projections of $170.6 billion to $151 billion by the close of the Ninety-ninth Congress on October 17, 1986.[406] A substantial part of this deficit reduction came from a first year windfall of $11 billion from a new tax

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[401] *Id.*

[402] "The choices facing lawmakers are, in fact, so unpalatable that Budget Committee staffers refer to Gramm-Rudman as 'the Anti-Incumbency Act of 1985.'" Conot, *Minus Again In America*, L.A. Times, Sept. 21, 1986, at V-1, col. 1.

[403] *See supra* note 372. The across-the-board cuts in the Act seemed to serve its stated purpose. On Sept. 19, 1986, the Senate voted against a bill to make the cuts specified in the CBO/OMB report. S.J. Res. 412, defeated by 80-15 vote, Sept. 19, 1986.

In the House, on Oct. 10, Budget Committee Chairman W. Gray, D-Pa. threatened to have the Special Committee report for across-the-board cuts if the reconciliation conferees did not finish up their work. *Gramm-Rudman-Hollings: Forgotten But Not Gone*, 44 CONG. Q. WEEKLY 2526 (1986).

[404] *Id. See also* CBO/OMB Revised Sequestration Report for Fiscal Year 1987, 51 Fed. Reg. 35,623 (1986).

[405] 1987 Budget Reconciliation, Pub. L. No. 99-509, 100 Stat. ____ (1986).

> The 1987 budget held defense expenditures to $292.2 billion in budget authority compared to $320 billion requested by President Reagan. Most domestic programs were held to fiscal 1986 levels or trimmed, but no program was eliminated altogether. Almost all of the suggestions in the president's budget for heavy cuts in domestic programs were ignored.

Economic Affairs, 44 CONG. Q. WEEKLY 2655 (1986). The President did persuade Congress not to raise taxes. The reconciliation bill includes about "$6 billion in new taxes against a revenue base of approximately $850 billion." *Id.*

[406] Gettinger, *Budget Measure Helps Congress Hit Deficit Goal*, 44 CONG. Q. WEEKLY 2709 (1986).

law[407] and $8 billion in asset sales or other one shot savings.[408]

Assessments of Gramm-Rudman after Congress's first opportunity to try it ranged from mild praise to "disgusted rejection."[409] This comment, however, addresses not the wisdom or illogic of the political process, but the right in our democratic society for that process to take place. Voters should make the determination as to whether or not Gramm-Rudman-Hollings provides a suitable approach to the country's economic problems. That determination is made at the polls, not in the courts.

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[407] Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. ____ (1986).

[408] Revenue increases in addition to the tax windfall were termed "golden gimmicks" and a "massive yard sale" by Rep. Latta, R-Ohio because they depended on one-time asset sales and accounting devices rather than long-term spending or tax changes. *Economic Affairs*, 44 CONG. Q. WEEKLY 2655 (1986).

[409] *Id.* Views of the effectiveness or ineffectiveness of the Act vary greatly. One commentator stressed:

> The congressional debate over how to meet deficit reduction targets in the 1987 budget has obscured what promises to be the smallest increase in federal spending since the Vietnam War buildup began 20 years ago. . . . Spending [in 1987] is likely to go up only 1 or 2 percent. . . . [This] comes on the heels of a modest 4 1/2 percent increase in spending in fiscal 1986 . . . the smallest rise in percentage terms since 1969.

Berry (Wash. Post Serv.), *'87 May Be Year U.S. Corrals Years of Breakneck Spending*, Honolulu Star-Bull. & Advertiser, Oct. 12, 1986, at A-19, col. 1.

"[Gramm-Rudman] 'clearly has worked.' Whereas total discretionary spending has grown an average of 11.2% in each of the past 10 election years . . . it is expected to decline slightly as result of the bills being passed this year for fiscal 1987." Tumulty, *Balanced Budget Proving Elusive*, L.A. Times, Sept. 28, 1986, at I-12, col. 3 (quoting Sen. Gramm). " 'If you look at Gramm-Rudman in the narrow focus of getting the deficit down and tying Congress' hands, it's done that,' said Steve Bell, former top aide to Senate Budget Committee." *Id.*

The same article pointed out that it is too early to tell if the Act will have a serious impact on the deficit. "Most analysts and even lawmakers themselves say that Congress also greatly exaggerated the deficit reduction that will result from the steps it has taken. When the books are closed on fiscal 1987, analysts and many congressmen say, the actual deficit will prove to be more like $180 billion than $154 billion." *Id.*

A New York Times editorial was highly critical of the Act:

> Sensible budget planners know that new circumstances require new approaches. Gramm-Rudman-Hollings was and is a foolish place to start. Presuming to set five firm annual budget targets is arrogant. . . . Congress would be much smarter to concentrate on the truly big spending commitments that stretch into future years—like military contracts, farm programs, Social Security.

Ducking The (Even-Bigger) Deficit, N.Y. Times, Aug. 7, 1986, at A-26, col. 1. *See also supra* notes 404 & 405.

B. The Future of the Comptroller General and Independent Agencies

1. The General Accounting Office and the Comptroller General

Bowsher v. Synar[410] held only that the Comptroller General cannot constitutionally calculate the percentage cuts for sequestration of funds to take place. A logical question follows: If the Comptroller cannot perform executive branch functions, what other responsibilities which he now performs will he be unable to do?

The Court's specified constitutional defect in the comptroller's role in Gramm-Rudman was *not* that he was delegated authority that an officer of the government could not perform.[411] Rather, the criticism was that he had been delegated responsibilities that the Court determined had to be performed by an executive branch official. The Court further found the Comptroller General to be in the legislative branch and not the executive, making him unable to perform the required calculations. The key determinant of the Comptroller's designation by the Court was the removal clause in the Act which created the GAO and set up the Comptroller General as its director.[412] That provision allows the Comptroller, who is appointed by the President with advice and consent of the Senate, to be removed by a joint resolution of Congress or by impeachment.[413] Because the President is unable to *initiate* removal of the Comptroller, the high Court said that the Comptroller "may not be entrusted with executive powers."[414]

The Court has spoken. Congress could amend the 1921 GAO Act to allow for presidential removal for specified causes. Amendment seems highly unlikely at this time, however.[415] Without a change in the Comptroller's status, he carries the label of a "legislative officer" and may be foreclosed from providing those services which could be characterized as executive (administrative and/or adjudicatory).

One such case is currently before the Court.[416] It is very likely that the decision on the Gramm-Rudman Act could determine the future of the Competition in Contracting Act,[417] where the Comptroller exercises executive functions

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[410] 106 S. Ct. 3181.

[411] *Id.* at 3193 n.10.

[412] *See supra* notes 264 & 265.

[413] *Id.* Most officers of the federal government are subject to removal for cause by the President.

[414] 106 S. Ct. at 3191.

[415] *See supra* note 373 and accompanying text.

[416] Ameron, Inc. v. Army Corps of Eng'rs, 787 F.2d 875 (3d Cir. 1986); *see supra* note 301 and accompanying text.

[417] *Ameron*, 787 F.2d 875.

in reviewing bid protests. The Contracting Act was held constitutional by the United States Court of Appeals for the Third Circuit but the Administration has appealed.[418]

It will be difficult for the Supreme Court as it must, in its strict separation of powers analysis, to categorize all of the functions of the Comptroller into either of the two political branches to determine which are legitimate GAO activities and which are not. For the GAO has expansive powers, "a purview as broad as government itself."[419]

The GAO is considered a legislative-executive hybrid by the defenders of Gramm-Rudman because the Comptroller performs some functions that have little to do with Congress.[420] Furthermore, Comptroller Bowsher declared that the diverse activities of the GAO "need to be independent of any direct political influence" from either branch.[421]

The Court, however, has sent a clear message to Congress. If the legislative branch adopts a wait and see attitude, it is probable that the Justice Department will challenge one after another of the GAO's functions. It is equally probable that the Supreme Court will invalidate those functions using the same strict separation of powers analysis that was used to invalidate the Gramm-Rudman automatic provision.

Congress needs to address this problem. The legislative branch should consider amending the GAO Act which was passed in 1921 to insulate the Comptroller General from the executive branch. Congress could specify in statute those specific causes that would allow Presidential initiation of removal. With such amendment the independence and effectiveness of the GAO could be maintained and the checks and balances of the democratic process would be

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[418] Stewart, *Supreme Court Report: Gramm-Rudman Held Invalid*, A.B.A. J., Oct. 1, 1986, at 61.

[419] Hook, *Court Ruling on Budget Law Puts Spotlight on GAO Role*, 44 CONG. Q. WEEKLY 298, 300 (1986). In 1986, GAO had a staff of 5100 and a budget of $288 million and spent "about 80% of its time conducting investigations and audits of how executive branch agencies spend taxpayers dollars." *Id.* For example, GAO takes credit for saving $500 million in 1985 by advising Congress to reduce the Defense Department's ammunition budget. *Id.*

[420] *Id.* Janet Hook, in her article, reports:

> Almost 15 years ago, during the Nixon administration, GAO played a role in exposing financial improprieties of the Committee to Re-elect the President . . . .
>
> In 1984, GAO reported that the Reagan administration had improperly financed military activities in Honduras . . . .
>
> And last year, GAO auditors were called in for a recount of ballots from a contested 1984 House election in Indiana's 8th District.

Id.

[421] *Id.* Comptroller Bowsher stated: "We must be independent of pressures from the executive branch and from Congress."

allowed to govern.

2. *Independent regulatory agencies*

A second logical question following the Supreme Court's invalidation of the Comptroller's role in the Gramm-Rudman Act is: What other independent regulatory agencies might have their responsibilities curbed under the Court's separation of powers analysis?

The proliferation of independent agencies[422] in the federal government dates from the Court's decision in *Humphrey's Executor*[423] in 1935. The Court held in that case that Congress could insulate certain agency officers from removal at will by the President.[424] The *Humphrey's Executor* approach to separation of powers that was followed by the Court for half a century has given way to a new formalism.[425]

Attorney General Meese has publicly criticized the continuation of federal agencies exercising executive power independent of Presidential authority.[426] "The status of independent agencies has been questioned for years by the U.S. Justice Department's Office of Legal Counsel."[427] Leading proponents of the theory that independent agencies are unconstitutional include current Chief Justice Rehnquist and newly appointed Justice Scalia, "who is widely believed to have written the unsigned [lower court] Gramm-Rudman decision."[428] In that opinion, "the judges implied that independent agencies may be unconstitutional."[429] The *Bowsher* Court, however, in a footnote[430] reprimanded the ap-

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[422] Swire, *Incorporation of Independent Agencies Into the Executive Branch*, 94 YALE L.J. 1766 n.1 (1985). In footnote 1, the article lists the existing independent regulatory agencies of the federal government.

[423] 295 U.S. 602 (1935); *see supra* notes 289 & 292.

[424] *Humphrey's Executor*, 295 U.S. at 629.

[425] *Ameron*, 787 F.2d 875, 887 n.5 (3d Cir. 1986). *See, e.g.*, I.N.S. v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[426] *See* Taylor, *A Question of Power, A Powerful Questioner*, N.Y. Times, Nov. 6, 1985, at B-8, col. 3.

[427] Dwyer, *The Gramm-Rudman Ruling May Turn Into a Deadly Weapon*, BUS. WEEK, Mar. 3, 1986 at 36.

[428] *Id.*

[429] *Id.*

[430] The Court noted:

> Appellants therefore are wide of the mark in arguing that an affirmance in this case requires casting doubt on the status of "independent" agencies because no issues involving such agencies are presented here. The statutes establishing independent agencies typically specify either that the agency members are removable by the President for specified causes, see, *e.g.*, 15 U.S.C. § 41 (members of the Federal Trade Commission may be removed by the President "for inefficiency, neglect of duty, or malfeasance in office"), or else do not specify a removal procedure, *see, e.g.*, 2 U.S.C. § 437c (Federal Election Commission). This

pellants for arguing that an affirmative vote in this case might jeopardize the future status of independent agencies.

Fears that the Supreme Court might declare all federal independent agencies unconstitutional under the precedent of *Bowsher* are unfounded. The Court's specific criticism in *Bowsher* was that Congress alone can initiate removal of the Comptroller. "He is apparently the only Federal Officer who can be removed by a joint resolution."[431]

Independent agency officials, all of whom are removable by the President, enjoy certain procedural safeguards. "[A]ny attempt to remove an agency official would have to be on the record and judicially reviewable, which acts as a constraint upon the exercise of removal power."[432] Thus, "talk of the impending demise of independent agencies is greatly exaggerated."[433]

VI. CONCLUSION

The importance of the Gramm-Rudman Act on this nation's economy can scarcely be doubted. Congress labored to come up with legislation—a mandate to itself—to balance the federal budget by 1991. Because past attempts at containing the burgeoning cost of government had been unsuccessful, the legislators created a mechanism that would make the cuts automatically if the anticipated deficit exceeded the statutory target for a given year.

The linchpin of the Act was the role of the Comptroller General, the head of the General Accounting Office. Congress delegated to the Comptroller the responsibility for determining if a sequestration needed to be ordered. The Supreme Court held the automatic sequestration mechanism invalid on separation of powers grounds. Through a "distressingly formalistic view of separation of powers" the Court struck "one of the most novel and far-reaching legislative responses to a national crisis since the New Deal."[434] A functional analysis of the separation of powers doctrine would perhaps have had a different result.

Congress could amend the Gramm-Rudman Act, making the Comptroller removable for specified causes by the President. Such a move would probably

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case involves nothing like these statutes, but rather a statute that provides for direct Congressional involvement over the decision to remove the Comptroller General. Appellants have referred us to no independent agency whose members are removable by the Congress for certain causes short of impeachable offenses, as is the Comptroller General . . . .

Bowsher, 106 S. Ct. at 3188 n.4.

[431] Pear, *High Court Is Asked to Uphold New Budget Law*, N.Y. Times, Feb. 19, 1986 at Y-10, col. 3.

[432] Verkuil, *Are Independent Agencies Doomed?*, Wash. Post, Aug. 24, 1986, at C-7, col. 1.

[433] *Id.* The author, Paul R. Verkuil, is president of the College of William and Mary and a professor of administrative law.

[434] *Bowsher*, 106 S. Ct. at 3205 (White, J., dissenting).

survive even a strict separation of powers analysis and would provide a truer test of the built-in tension necessary for a balance of powers administration of government.[435]

Notwithstanding the above suggestions, this case should not have come before the courts. The Court ignored the political dynamics that gave rise to the political branches' solution to a major public-policy problem.[436] Instead, it should have followed its own cardinal rule and not passed on a constitutional issue at all if the case could have been avoided or decided or other grounds.[437]

Carol Eblen

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[435] *See generally* Strauss, *supra* note 4.

[436] N.Y. Times, *supra* note 196, at 31, col. 1.

[437] *See supra* note 275; *see also supra* text accompanying notes 273-77.

Adequate Remedies for Tender Offer Abuse: Resurrecting Manipulation and Reforming the Business Judgment Rule

I. INTRODUCTION

Contests for corporate control have become ever more frequent phenomena on the American business scene. Waged with the intensity of military campaigns and the weaponry of seemingly bottomless bankrolls, these battles determine the destinies of large and small corporations alike. Elaborate stategies and ingenious tactics have been developed both to facilitate takeover attempts and to defend against them.[1]

In recent years, substantial changes to corporate control have occurred in part from planned mergers, sales of substantial portions of corporate assets, proxy fights, and tender offers.[2] Of these, the tender offer is the most frequently utilitzed method to change control of a corporation.[3]

A tender offer is made when an offeror, deciding that acquiring control of another corporation is of value, pursues the acquisition by offering a premium to the target company shareholders in exchange for the tendering of a specified number of their shares.[4] The offeror's goal is to gain control of the target.[5] Despite offering a premium, the offeror anticipates making a profit from a takeover since he perceives present management to be inefficient[6] or the stock of the

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[1] Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 258 (2d Cir. 1984).

[2] Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 842 (1981).

[3] *Id.* at 819.

[4] Note, *Section 14(e) of the Williams Act: Can There be Manipulation with Full Disclosure or Was the* Mobil *Court Running on Empty?*, 12 HOFSTRA L. REV. 159, 160 (1983) [hereinafter Note, *Manipulation with Full Disclosure*].

[5] Note, *"Leg-Ups" and "Lock-Ups": An Analysis of Manipulation Under Section 14(e) of the Williams Act*, 49 ALBANY L. REV. 478, 485 (1985) [hereinafter Note, *Leg-Ups and Lock-Ups*].

[6] Judge Easterbrook and Professor Fischel suggest that the target company management may be inefficient and that by changing and improving management, higher profits can be generated. *See* Easterbrook & Fischel, *The Proper Role of Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1165-74 (1981).

target to be undervalued by the market.[7] Multi-million dollar tender offer transactions have become commonplace. As a result, nearly half of the United States manufacturing assets are held by approximately one hundred companies.[8]

When confronted with a tender offer, the target company board of directors must decide whether to support the offer, remain neutral, or oppose the offer.[9] If the board decides to oppose the tender offer, any conduct taken to implement that decision is known as a "defensive tactic."[10] To justify its decision, the board and existing management often inform shareholders that the proffered tender offer is insufficient or that the corporation would be harmed by the new purchasers.[11]

An adverse managerial stance to a tender offer raises questions of inherent conflicts of interest between management and shareholders.[12] Because a tender offer is the principal mechanism utilized by offerors to remove incumbent management from control of the corporation, management will naturally tend to resist tender offers which would result in a change of management.[13] From the incumbent management's perspective, the thought of losing their jobs may very well outweigh the possible benefits to the corporation when the projected benefits of the tender offer are balanced.[14] By implementing certain defensive tactics, management can effectively prevent or defeat the offer, and thus deprive shareholders of their opportunity to sell their shares for a substantial premium.[15]

This comment reviews and evaluates the current regulation of defensive tactics and offers certain proposals for reform. Part II describes some of the various defensive tactics that target management has utilized to counter hostile tender offers. Part III discusses the Williams Act which was an attempt by Congress to protect shareholders confronted with a tender offer. Part III also examines the significance of the Supreme Court's decision in *Schreiber v. Burlington Northern, Inc.*,[16] and its ramifications on the regulation of tender offers. Part III concludes by suggesting that reform to federal security laws is needed but concedes that remedies are limited under federal law and the best remedies lie under state regulation of tender offers. Because shareholder protection is best afforded at the state level, Part IV examines the impact of the traditional business judgment

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[7] Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 COLUM. L. REV. 249, 288-90 (1983).

[8] Rodino, *Regulatory Relief: A Plan to End Hostile Takeovers*, 8 DIRECTORS & BOARDS 14 (1984).

[9] *See* Note, *Leg-Ups and Lock-Ups*, *supra* note 5, at 486-487.

[10] *Id.*

[11] Easterbrook & Fischel, *supra* note 6, at 1161.

[12] Gilson, *supra* note 2, at 819.

[13] *Id.*

[14] *See* Note, *Manipulation with Full Disclosure*, *supra* note 4, at 162.

[15] Gilson, *supra* note 2, at 819.

[16] 472 U.S. 1 (1985).

rule under state law and its effect on defensive tactics. Finally, Part V recommends that in shareholder derivative actions for tender offer disputes, courts should abandon the business judgment rule in favor of judicial inquiry into the good faith and reasonableness of management's actions.

II. DEFENSIVE TAKEOVER TACTICS

Target management has resorted to using a multitude of defensive tactics to fight off hostile tender offers. Tactics include: filing suits against the offeror;[17] issuing treasury shares to friendly parties to dilute an offeror's holdings;[18] acquiring a business which is either a competitor, supplier, or customer of the corporation making the tender offer, thereby creating anti-trust problems for the offeror;[19] amending corporate bylaws to include shark repellant provisions;[20] Pac-man offers;[21] crown jewel options;[22] golden parachute agreements;[23] and self-tendering target shares.[24] The most effective defensive tactics utilized by

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[17] Target companies have sought court injunctions for the offeror's failure to disclose material facts, or for their failure to disclose the true purpose of their acquisitions, or have alleged conspiracy to violate anti-trust laws. Schmults & Kelly, *Cash Takeover Bids: Defensive Tactics*, 23 BUS. LAW. 115, 129 (1967).

[18] By selling authorized but unissued stock to parties other than the offeror, all shareholder holdings become diluted and the offeror thus needs to tender more shares to achieve the percentage of control desired. *See, e.g.*, Treadway Cos., Inc. v. Crane Corp., 638 F.2d 357, 365-70 (2d Cir. 1980).

[19] Many corporations making a tender offer are conglomerates whose activities are subject to continuing review by the Justice Department and the Federal Trade Commission. Schmults & Kelly, *supra* note 17, at 126.

[20] Shark repellants are amendments to a potential target company's charter or by-laws that are devised to discourage unsolicited approaches from bidders, such as requiring "supermajority" shareholder approval of mergers. Goldberg, *Regulation of Hostile Tender Offers: A Dissenting View & Recommended Reforms*, 43 MD. L. REV. 225, 238 (1984).

[21] In a "Pac-Man" defensive tactic, the target counters an unwanted tender offer by making its own tender offer for the stock of the would-be acquiror. *Id.* at 237.

[22] Crown jewel options involve the granting of an option to purchase the prized asset of the target, commonly referred to as its "crown jewel." *Id.*

[23] A golden parachute is a contract that provides financial security for top management of a target company if control of the corporation changes and the executives are terminated. *Id.*

Some proponents of golden parachute agreements contend that such agreements promote objectivity since managers are better able to act in the shareholder's best interests without regard to outside pressures and can weigh the tender offer without concern for the security of their own source of income. Klein, *A Golden Parachute Protects Executives But Does it Hinder or Foster Takeovers?*, Wall St. J., Dec. 8, 1982, at 56, col. 1. Critics of golden parachute agreements maintain that since executives are already well paid, these agreements lack consideration and thus constitute a waste of corporate assets. Johnson, *Those "Golden Parachute" Agreements: The Taxman Cuts the Ripcord*, 10 DEL. J. CORP. L. 45, 51 (1985).

[24] A corporation may decide to enact a self-tender for its outstanding shares against a two-

target management are lock-ups, issuance of poison pill preferred stock, and greenmail.

A. Lock-Ups

A lock-up option is defined as "an arrangement, made in connection with the proposed acquisition of a publicly held business that gives the proposed acquirer an advantage in acquiring the target over other bidders."[25] Originally, a lock-up referred to the purchase by the acquiring company of a large block of shares from a major shareholder of the target company prior to the making of a tender offer.[26] Recently, target companies have varied the concept of lock-ups by granting to a friendly third party, known as a white knight, an option to purchase an amount of stock sufficient to enable the white knight to gain control of the target company.[27] By granting the control to the white knight, a hostile tender offeror is prevented from gaining control of the target company, preempting competitive bidding among tender offerors.[28] As a result of the lock-up, an artificial ceiling is put on the price shareholders of a target company might receive for their stock.[29] Shareholders are thus deprived of the opportunity to receive the highest premium for their stock.

Another variation of the lock-up involves granting an option of a target's "crown jewels" to a white knight in conjunction with issuance of treasury stock.[30] While selling the crown jewels alone could deter a tender offer, combining a stock and asset lock-up virtually defeats a tender offer, since this tactic makes the target an unattractive acquisition for anyone other than a white knight.[31] An example of a combined stock and asset lock-up occurred in *Mobil*

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tiered tender offer if it decides the offer is inadequate or has a coercive effect to its shareholders. *See, e.g.*, Unocal Corp. v. Mesa Petroleum, 493 A.2d 946 (Del. 1985).

[25] Prentice, *Target Board Abuse of Defensive Tactics: Can Federal Law Be Mobilized to Overcome the Business Judgment Rule?*, 8 J. CORP. LAW 337, 342 (1983).

[26] Note, *"Lock-Up" Enjoined Under Section 14(e) of Securities Exchange Act*, 12 SETON HALL L. REV. 881 (1982).

[27] *See* Note, *Leg-Ups and Lock-Ups*, *supra* note 5, at 479. A white knight is a third company with which the target arranges a "friendly" merger in order to defeat the attempted takeover.

[28] *Id.*

[29] *Id. See also* Easterbrook and Fischel, *supra* note 6, at 1164. When management engages in defensive tactics which ultimately defeat a tender offer, shareholders suffer since they lose the tender premium.

[30] The "crown jewels" are usually the most prized assets of a corporation. *See* Goldberg, *supra* note 20, at 237.

[31] In a sale of the crown jewels, competitive bidding is not precluded but is merely deterred. But when a tender offeror is totally precluded from gaining any possible control of the corporation, all subsequent bidding comes to a halt. *See* Note, *Leg-Ups and Lock-Ups*, *supra* note 5, at 490.

Corp. v. Marathon Oil Co.[32] In *Mobil Corp.*, a cash tender offer was made for a controlling interest in Marathon Oil but was rejected as insufficient by the Marathon board.[33] Following Marathon's effort to secure a white knight,[34] U.S. Steel agreed to purchase thirty million shares of Marathon stock. The agreement was conditioned on U.S. Steel receiving an irrevocable option to purchase ten million authorized but unissued shares of Marathon common stock[35] and an option to purchase Marathon's interest in the lucrative Yates Oil Field.[36] As a direct result of these lock-up transactions, Mobil's tender offer was defeated.[37]

B. Poison Pills

A second defensive tactic utilized by target management is the "poison pill." A poison pill, formally known as a "common share rights plan," is an agreement in a corporation's charter which gives target company shareholders the right to purchase special preferred stock of the target corporation under certain conditions.[38] Target corporations have enacted various poison pill provisions into their charters, all of which have the effect of making the target less attractive. For example, Princeville Development Corp., a Colorado corporation doing business in Hawaii, recently adopted a poison pill plan.[39] Although management stated the plan would not prevent a takeover, it acknowledged that the plan would make takeover of the company more difficult.[40]

Some target corporations have utilized poison pills to combat hostile two-tiered takeovers[41] by issuing special dividends of convertible preferred stock.[42]

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[32] 669 F.2d 366 (6th Cir. 1981).

[33] *Id.* at 367. Mobil offered to purchase 40 million outstanding common shares at $85 per share and conditioned the purchase upon receipt of 30 million shares. Mobil stated that it intended to acquire the balance of the Marathon shares by a merger.

[34] *Id.*

[35] The option price was $90 per share. *Id.*

[36] Mobil would be allowed to purchase Marathon's 48% interest in oil and mineral rights in Marathon's prized asset for $2.8 billion. The option could be exercised only if U.S. Steel's offer did not succeed and if a third party gained control of Marathon. *Id.*

The importance of the Yates Field to a tender offeror was illustrated by the fact that all the other potential white knights indicated they would propose a tender offer only upon the assurance they would have an option to purchase Marathon's interest in the Yates Field. *Id.* at 370.

[37] Mobil sued to enjoin the stock and asset lock-ups but the district court denied the injunction on the basis that the lock-ups were not manipulative acts in violation of section 14(e). *Id.*

[38] Reiser, *Corporate Takeovers: A Glossary of Terms and Tactics*, 89 CASE & COM. 39(5) (1984).

[39] *Princeville Adopts "Poison Pill,"* Honolulu Star-Bull., Aug. 15, 1986, at A-17, col. 4.

[40] *Id.* Spinner Corp., a California based company which had earlier attempted to make a takeover bid for the Princeville stock, opposed the adoption of the rights plan. *Id.*

[41] A two-tiered tender offer is a partial tender offer coupled with an announced plan to follow up with a second-step merger at a lower price per share. Mirvis, *Two-Tier Pricing: Some Appraisal*

The purpose of issuing preferred stock is to provide some resistance in the event of a hostile takeover. The defensive feature of the preferred stock is triggered when a third party acquires a certain percentage of control of the corporation.[43] Upon the triggering event, the preferred holders are entitled to redeem their shares for cash at any time. Typically, the redemption price would be equal to the highest price paid by the raider during the last twelve months in acquiring shares of common or preferred stock.[44]

The most controversial aspect of the convertible preferred stock is the flip-over conversion feature. Under this feature, if a tender offer is followed by a freeze out merger,[45] the convertible preferred becomes exchangeable for substitute preferred stock of the raider.[46] Following the announcement of a freeze out merger, the conversion rights flip over, causing the substitute preferred to convert into an equivalent amount of common stock of the raider.[47] This substitute preferred stock would have a market value equal to at least the highest price paid by the raider during the prior twelve months during the acquisition of the target shares.[48]

One version of a poison pill rights plan with a flip-over provision was adopted by the Household International, Inc. board in *Moran v. Household International, Inc.*[49] Under the plan, Household's common shareholders were entitled to the issuance of one right per common share under certain triggering conditions.[50] Each right entitled the holder to purchase 200 dollars of common

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and "Entire Fairness" Valuation Issues, 38 BUS. LAW. 485 (1983). In a two-tiered tender offer, shareholders may be pressured into tendering out of fear of being forced to accept a lower second-step price, or being relegated to the status of minority shareholders in a controlled company. *See* Note, *Protecting Shareholders Against Partial and Two-Tiered Takeovers: The "Poison-Pill" Preferred*, 97 HARV. L. REV. 1964, 1966-67 (1984) [hereinafter Note, *Protecting Shareholders*].

[43] *See, e.g.*, Moran v. Household Int'l Inc., 500 A.2d 1346 (Del. 1985); Asarco, Inc. v. MRH Holmes A Court, [1985 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,220, at 91,616 (N.J. May 1, 1985).

[44] *See*, Note, *Protecting Shareholders*, *supra* note 41, at 1964.

[45] *Id.* at 1965. By permitting the holders to redeem at the highest prices, they will not be faced with having to tender their shares on the first step of a coercive two-tier offer out of fear of being forced to accept highly subordinated bonds at the back end of the merger. This redemption privilege discourages the making of partial tender offers by giving the holders power to deplete the target's assets substantially.

[45] In a freeze out merger, after a firm has acquired a controlling interest in the target firm, the acquiror causes a merger between itself and the target firm. This merger eliminates the equity interests of the remaining shareholders of the surviving firm. Macey & McChesney, *A Theoretical Analysis of Corporate Greenmail*, 95 YALE L.J. 13, 19 (1985).

[46] Block & Pitt, *Hostile Battles for Corporate Control*, 439 PRAC. L. INST. 197, 198-99 (1984).

[47] *Id.*

[48] *Id.*

[49] 500 A.2d 1346 (Del. 1985).

[50] The rights would be triggered either when a tender offer for 30% of Household's shares was

stock of the tender offeror for 100 dollars.[51] This plan allowed remaining shareholders to fight a tender offeror by substantially increasing the cost of a takeover.[52]

Under a poison pill plan with a flip-over provision, the remaining nontendering shareholders in a two-tier tender offer[53] or a freeze-out merger have substantial power. Their ability to dilute the ownership power of an acquiring company tends to discourage raiders from attempting any tender offers for less than one hundred percent of the shares of a target.[54]

As a result of the conversion and redemption features, any hostile acquisition becomes less attractive because of the dilution of the surviving entity's value.[55] Since these poison pills are generally adopted by the corporation's board of directors before an actual tender offer is announced, potential tender offerors may be deterred, thus reducing competitive bidding. Just as shareholders in lock-up situations are deprived of the opportunity to receive the highest premium for their stock, shareholders of corporations with poison pill preferred stock will likewise be deprived.

C. *Greenmail*

The third defensive tactic used by target management involves targeted stock repurchases, otherwise known as greenmail. Greenmail is defined as a firm's targeted repurchase of its own common stock at a premium above the current price from an investor who purchases a substantial block of the target company's securities.[56] Target management often has paid large premiums to repur-

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made or when 20% of Household's shares were acquired by any single group or entity. *Id.* at 1348.

If an announcement of a tender offer for 30% of its shares were made, the rights would be issued and would be immediately exercisable to purchase 1/100 of a share of new preferred stock for $100, and would be redeemable by the board for $.50 per right. If 20% of its shares were acquired by anyone, the rights would be issued and become non-redeemable and would be exercisable to purchase 1/100 of a share of preferred stock. *Id.* at 1349.

[51] *Id.* If the right is not exercised for preferred stock and a merger or consolidation subsequently occurs, then the rights holder could exercise each right to purchase $200 of the tender offeror's stock for $100. *Id.*

[52] *Id.* Because of the special "rights" provision, a raider would have its own equity eroded.

[53] *See* Goldberg, *supra* note 20, at 238. A two-tier tender offer is a two step acquisition technique. In the first step, a cash tender offer is made. However, in the second step, remaining target shareholders may receive securities of the trader valued less than the amounts paid in the initial cash tender offer.

[54] *See* Note, *Protecting Shareholders*, *supra* note 41, at 1968.

[55] *"Poison Pill" Tactic Passes First Legal Test*, 71 A.B.A. J. 122 (1985).

[56] *See, e.g.*, Goldberg, *supra* note 20, at 238; Macey & McChesney, *supra* note 45, at 13. Many corporate raiders purchase these blocks of a target's securities with the primary intention of

chase blocks of common stock from individual shareholders to reduce the threat of losing control of the firm through a tender offer or proxy fight.[57] Because the payment of greenmail has grown tremendously and has provided large profits to these investors or "raiders," greenmail has become a controversial issue.[58] During a one year period between November 1983 to 1984, at least eight investors have earned between 32 million dollars and 400 million dollars in profits by selling their stock back to the target.[59]

Greenmail is more controversial than other defensive tactics because greenmail deliberately discriminates among a corporation's shareholders.[60] Shareholders who do not have the opportunity to resell their shares to the corporation suffer because of the significant price declines following the announcement of a greenmail transaction.[61] The price declines are directly attributable to the greenmail payments. First, the greenmail payment reduces the probability of any beneficial outcome since it represents the cessation of a takeover attempt.[62] Secondly, the price decline reflects the loss the remaining shareholders must bear as a transfer of wealth is made to the block seller.[63]

Heckmann v. Ahmanson[64] illustrates the effect of a greenmail transaction. In 1984, the Steinberg group[65] purchased more than two million shares of Disney stock. Despite the Disney directors' attempt to make the corporation less attrac-

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coercing the target into repurchasing the stocks at a premium.

[57] The Impact Of Targeted Share Repurchases (Greenmail) On Stock Prices, Study by Office of Chief Economist of the SEC, [1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 83,713, at 87,173 [hereinafter *Targeted Share Repurchases*].

It has been estimated that from January 1979 to March 1984, about $5.5 billion dollars was paid by firms to repurchase blocks of their common stock from shareholders or a particular group of shareholders. *Id.*

[58] Note, *Greenmail: Targeted Stock Repurchases and the Management Entrenchment Hypothesis*, 98 HARV. L. REV. 1045, 1046 (1985) [hereinafter Note, *Greenmail*].

[59] *Id.* The Bass Brothers, Coastal Corp., Rupert Murdoch, Sir James Goldsmith, Loews Corp., Saul Steinberg and Mesa Partners are examples of major investors who profited greatly in 1984 from tremendous greenmail profits. *Id.* at 1046 n.8.

In March 1984, four major American companies repurchased large blocks of minority shares at substantial premiums, including Warner Communications' repurchase of 5.6 million of its shares from Rupert Murdoch at 33% above the market price. *See* Macey & McChesney, *supra* note 45, at 14.

[60] Macey & McChesney, *supra* note 45, at 14.

[61] *See Targeted Share Repurchases*, *supra* note 57, at ¶ 87,174.

[62] *See* Note, *Greenmail*, *supra* note 58, at 1054.

[63] *Id.*

[64] 168 Cal. App. 3d 119, 214 Cal. Rptr. 177 (1985).

[65] The Steinberg group consists of Saul P. Steinberg, Reliance Financial Services Corp., Reliance Group, Inc., Reliance Group Holdings, Inc., Reliance Insurance Co., Reliance Insurance Co. of New York, United Pacific Insurance Co., United Pacific Life Insurance Co., and United Pacific Life Insurance Co. of New York. *Id.* at 123 n.2, 214 Cal. Rptr. at 180 n.2.

tive by acquiring the Arvida Corporation,[66] the Steinberg group purchased two million more shares and advised the Disney directors of its intention to make a tender offer for forty-nine percent of the outstanding shares.[67] To combat the impending tender offer, Disney agreed to repurchase all the stock held by the Steinberg group and reimburse the estimated costs incurred in preparing the tender offer.[68] This agreement resulted in a total payoff of 325 million dollars and a profit of 60 million dollars for the Steinberg group.[69] Because of this transaction and the debt assumed from Disney's earlier acquisition of Arvida, Disney's total indebtedness increased to 866 million dollars, two-thirds of Disney's entire shareholder equity.[70] As a result, the Disney stock plummeted and the Steinberg group walked away with a substantial profit.[71]

Greenmail is inherently unfair to the remaining shareholders because these shareholders bear the loss suffered through price declines and are precluded from competitive bidding for their shares. In a typical greenmail transaction, the ultimate loser is usually the shareholder and the winner is the "defeated" potential raider.

D. The Common Element: Lost Shareholder Perogative

Unlike other defensive tactics where shareholders retain the right to receive the bidder's offer and to make their own determination of whether to tender, lock-ups, poison pills and greenmail tactics impede or preclude a target's shareholders from considering a bidder's offer.[72] While other defensive tactics may inhibit rival bidders[73] from fully participating in the bidding process, such tactics generally do not usurp the decision making power of the target's shareholders or economically harm them.

Corporate officers and directors have a fiduciary duty to act in good faith and

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[66] Disney acquired Arvida Corporation for $200 million in newly issued Disney stock and assumed Arvida's $190 million debt. *Id.* at 180.

[67] Steinberg offered to purchase 49% of the outstanding shares at $67.50 per share and later tender the balance at $72.50 per share. *Id.*

[68] *Id.* at 180-81.

[69] *Id.* at 181.

[70] *Id.*

[71] *Id.* After the announcement of the repurchase agreement, the Disney stock dropped below $50 per share.

[72] Lynch & Steinberg, *The Legitimacy of Defensive Tactics in Tender Offers*, 64 CORNELL L. REV. 901, 932-33 (1979).

[73] Although Pac-Man offers and crown jewel options may have a chilling effect on the bidding process in that other bidders may drop out because they are unable to compete, this article will not focus on these two tactics. *See, e.g.*, Note, *Target Defensive Tactics as Manipulative Under Section 14(e)*, 84 COLUM. L. REV. 228, 254 (1984) [hereinafter Note, *Defensive Tactics*]; *see also* Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623 (D. Md. 1982).

to exercise due care with regards to the corporation and its stockholders.[74] Because of these fiduciary duties, target management has a duty to evaluate the tender offer as to the benefits and drawbacks to the shareholders and then advise the shareholders of their evaluation. In informing the shareholders as to possible options and alternatives, management may advise them as to what course to follow. Management should not be allowed to take any action that eliminates or substantially impairs shareholders' ability to make their own choice and exercise their option. This view is derived from the fact that a shareholder has an interest in the nature of his investment.[75] The shareholder invests in a particular corporation because he may perceive the stock's price to be undervalued; he may like the business the corporation currently engages in; or he may be satisfied with the corporation's long range goals. If management can employ tactics which materially affect the shareholder's ability, his property interest is affected.[76]

The following section discusses how federal securities laws fail to prevent defensive tactics from impeding or precluding target shareholders' right to consider a bidder's offer.

III. Federal Regulation of Tender Offers—The Limitations of the Williams Act in Regulating Manipulation

Congress enacted the Williams Act[77] in 1968 to protect stockholders of a target corporation faced by a cash tender offer.[78] The purpose of the act was to protect shareholders confronted with an investment decision of deciding whether to retain or to sell the security pursuant to a cash tender offer.[79] The act required full and fair disclosure by the tender offeror concerning the persons seeking control of the corporation, the source of their funds, and their plans

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[74] *See, e.g.*, Pepper v. Litton, 308 U.S. 295 (1939).

[75] Chang, *The Role of the State Courts After the Model Business Corporation Act*, 3 U. Haw. L. Rev. 171, 187 n.70 (1981).

[76] Some commentators have attacked the view that a shareholder has an interest in the form of his investment. Professor Chang states that a shareholder's property right is simply a right to an economic return. Under this so-called "Monte Carlo" theory, a shareholder's interest in a corporation is like a chip on a roulette table. There are no rights to control the form and nature of the investment. *Id.* at 187.

[77] 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982).

[78] H.R. Rep. No. 1711, 90th Cong., 2nd Sess. 2, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2811 [hereinafter H.R. Rep. No. 1711].

[79] According to the legislative history of the Act, failure to provide adequate disclosure to investors in connection with a cash takeover bid or other acquisitions which may cause a shift in control would disadvantage a shareholder contemplating tendering his shares. Since a proxy contest or a stock for stock exchange in corporate control changes require disclosures, a cash tender offer situation should also have the same disclosure requirements. *Id.* at 2812-13.

following the stock acquisition.[80] During legislative hearings, opponents urged that takeover bids should not be discouraged because it served a useful purpose in providing a check on entrenched but inefficient management.[81] The congressional committee, however, recognized that bids are made for other reasons and do not always reflect a desire to improve incumbent management.[82] As a compromise, Congress intended the act to have a neutral stance in order to permit the offeror and target management equal opportunity to fairly present their respective positions to the shareholders.[83]

A. *Application of Anti-Fraud Provisions: Definition of "Manipulation"*

Since its enactment, section 14(e) of the Williams Act has spawned much litigation.[84] The prime protection of section 14(e) is against "manipulative acts or practices" made in connection with any tender offer.[85] Unfortunately, courts have expressed conflicting views in interpreting the anti-fraud provisions of section 14(e).

Some courts have held that section 14(e) was intended to create a rule of federal fiduciary duty that could be used to regulate the substantive conduct of parties involved in tender offers.[86] These courts have enjoined the target's use of

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[80] The offeror must provide information regarding: (1) the purchaser's background, identity, and residence; (2) the source and amount of funds, or other consideration used in paying for the shares, and whether any part of the purchase price was borrowed or raised specifically for the purchase; (3) the plans of such purchasers to acquire control, liquidate, merge, or make other major changes in the business or corporate structure of the target company; and (4) the existence of any contracts, arrangments, or understandings between the purchaser and any person with respect to any securities of the target company. 15 U.S.C. § 78m(d)(l) (1982). *See also* Note, *Leg-Ups and Lock-Ups*, *supra* note 5, at 481-82.

[81] *See* H.R. REP. NO. 1711, *supra* note 78, at 2813.

[82] *Id.*

[83] *Id.*

[84] Section 14(e) of the Williams Act provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request or invitation. The commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent such acts or practices as are fraudulent, deceptive, and manipulative.

15 U.S.C. § 78n(e) (1982).

[85] *See* H.R. REP. NO. 1711, *supra* note 78, at 2821.

[86] *See* Applied Digital Data System, Inc. v. Milgo Elec. Corp., 425 F. Supp. 1145 (S.D.N.Y. 1977); Royal Indus., Inc. v. Monogram Indus., Inc. [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95, 683 (C.D. Cal. 1976).

defensive tactics, such as the sale of unissued stock to an ally, when bidders demonstrated that the target lacked a valid business purpose for the transaction. But following the United States Supreme Court's decision in *Santa Fe Industries, Inc. v. Green*,[87] which held that section 10(b) of the 1934 Act[88] did not govern matters of internal corporate management traditionally regulated by state law, apparently no fiduciary claims can be brought under federal securities laws.

The coverage of section 14(e) seemed stable until the Sixth Circuit in *Mobil Corp.*[89] found that the prohibition of "manipulative acts or practices" encompassed substantive conduct and held that certain defensive tactics tended to circumvent the natural forces of market demand and thus amounted to manipulation.[90] The Second and Eighth Circuits refused to adopt such an interpretation by stressing that the Supreme Court has limited the meaning of manipulation to disclosure violations and that section 14(e) was solely a disclosure provision.[91] Because of the split in the circuits as to whether misrepresentation or non-disclosure was a necessary element of a violation of section 14(e), the United States Supreme Court granted certiorari in *Schreiber v. Burlington Northern, Inc.* to resolve the conflict.

In *Schreiber*,[92] the Supreme Court held that "manipulative" acts under section 14(e) required misrepresentation or non-disclosure. On December 21, 1982, Burlington Northern made a hostile tender offer for El Paso Gas Co.[93] After some negotiations with El Paso management, Burlington Northern announced a new and friendly takeover agreement[94] which would have rescinded the December tender offer and substituted a new tender offer for only 21 million shares. The new tender offer was oversubscribed and all those who retendered were subject to substantial proration.[95] An El Paso shareholder filed an action alleging that Burlington Northern, El Paso, and El Paso directors

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[87] 430 U.S. 462 (1977).

[88] 15 U.S.C. § 78j(b) (1982).

[89] 669 F.2d 366 (6th Cir. 1981).

[90] *Id.* at 376-77.

[91] Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757 (2d Cir.), *cert. denied*, 464 U.S. 1018 (1983); Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1 (2d Cir.), *cert. denied*, 465 U.S. 1052 (1984); Feldbaum v. Avon Products, Inc., 741 F.2d 234 (8th Cir. 1984).

[92] 472 U.S. 1 (1985).

[93] Burlington proposed to purchase 25.1 million El Paso shares at $24 per share. El Paso management initially opposed the takeover, but its shareholders responded favorably and the tender offer was fully subscribed by the deadline. *Id.* at 2-3.

[94] The new agreement would essentially (1) rescind the December tender offer; (2) purchase 4,166,667 shares from El Paso at $24 per share; (3) substitute a new tender offer for only 21 million shares at $24 per share; (4) provide procedural protections against a squeeze-out merger; and (5) recognize the golden parachute contracts between El Paso and four of its senior officers. *Id.* at 3-4.

[95] More than 40 million shares were tendered in response to the new tender offer. *Id.* at 4.

violated section 14(e). The plaintiffs contended that Burlington Northern's withdrawal of the December tender offer coupled with the substitution of the smaller tender offer was a "manipulative" distortion of the market for El Paso stock.[96] The district court dismissed the suit[97] and the Third Circuit affirmed the dismissal.[98]

The Supreme Court focused on the phrase "fraudulent, deceptive or manipulative acts or practices"[99] and attempted to determine how other courts had defined this phrase.[100] The Court concluded that, based on the legislative history of the Williams Act, the thrust of the provision was to require persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors, to make full disclosure of material information to those with whom they deal.[101] The Court noted that nowhere in the legislative history was there any suggestion that section 14(e) served any purpose other than disclosure, or that "manipulative" should be read as an invitation for the courts to judge the substantive fairness of tender offers.[102] The Court further held that the term "manipulative," as used in section 14(e) required misrepresentation or non-disclosure and connotes conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.[103]

Although *Schreiber* did not specifically deal with a defensive takeover tactic

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[96] *Id.* Plaintiff also alleged that the new January offer failed to disclose the "golden parachutes" and thus violated section 14(e). *Id.*

[97] The district court dismissed the suit on the ground that the alleged manipulation was not a misrepresentation and thus did not violate section 14(e). *Id.*

[98] Schreiber v. Burlington Northern, Inc., 731 F.2d 163, 165 (3d Cir. 1984). The Third Circuit affirmed and held that the alleged acts did not violate the Williams Act because section 14(e) was not intended to create a federal cause of action for all harms suffered because of the proffering or the withdrawal of tender offers.

[99] 472 U.S. at 6. The petitioners interpreted the phrase to include acts, although fully disclosed, that "artificially" affected the price of the takeover target's stock, but the Court rejected petitioner's interpretation since it conflicted with the normal reading of the term. *Id.*

[100] 472 U.S. at 6-7. The Court discovered that in the context of an alleged section 10(b) violation, one court found that the term connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities. *Id.* (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976)). Other cases interpreted the term to refer generally to practices such as wash sales, matched orders, or rigged prices that were intended to mislead investors by artificially affecting market activity. 472 U.S. at 6-7 (citing Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 476 (1977)).

These latter cases held that the policy of the 1934 Act was to promote full disclosure instead of a caveat emptor philosophy since non-disclosure was usually essential to the success of a manipulative scheme. *Schreiber*, 472 U.S. at 6-7.

[101] *Id.* at 11.

[102] *Id.* at 11-12. The Court further noted that to allow judges to decide what is "manipulative" with their own sense of what constitutes "unfair" or "artificial" conduct would definitely make the tender offer process more uncertain. *Id.*

[103] *Id.* at 12.

employed by the target management, the allegations against the directors for agreeing to cancel the prior tender offer, the issuance of treasury shares and the acceptance of the golden parachute agreements amounted to defensive tactics. As a result of *Schreiber*, securities claims cannot be brought under section 14(e) unless there is an allegation of deception, non-disclosure or misrepresentation. Consequently, any shareholder injured as a result of target management's defensive acts absent deception, non-disclosure or misrepresentation will have to seek relief in state courts.

B. Schreiber v. Burlington Northern*: A Critique*

The Court in *Schreiber* misinterpreted section 14(e) and incorrectly defined the scope of manipulation in reaching its conclusion. Congress intended the disclosure provisions of the Williams Act to serve as a means of allowing shareholders to have sufficient information to make informed decisions in deciding whether to tender their shares.[104] During Congressional hearings, then Securities Exchange Commission (SEC) chairman Manuel F. Cohen testified that the purpose of the act was to provide investors with the opportunity to evaluate the tender offer without pressure to make a decision and without being subject to unwarranted techniques designed to prevent the investor from reaching such a decision.[105]

Since the act's goal was to promote informed investment decisions, the Court should not have limited the act to the adequacy of disclosure. Instead, the Court should have extended the act to protect a shareholder's right to make his own independent decision rather than management making the investment decision for him.[106] Under this rationale, no matter how extensive the disclosures, it is irrelevant if the target management employs defensive tactics that deprive or otherwise materially impede the investor's freedom of choice.[107]

In *Schreiber*, the Court relied heavily on its previous decisions in attempting to define "manipulation," since Congress had never defined the term. The Court first looked to its decision in *Ernst & Ernst v. Hochfelder*.[108] In *Ernst*, the Court held that, before an accounting firm could be liable under section 10(b) for damages resulting from inaccuracies in financial statements based on a negligent audit, scienter was required.[109] The Court found that "manipulative" was

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[104] *See* H.R. REP. NO. 1711, *supra* note 78, at 2813.

[105] Lynch & Steinberg, *supra* note 72, at 912, (citing *Senate Committee On Banking And Currency, Full Disclosure Of Corporate Equity Ownership And In Corporate Takeover Bids*, S.R. NO. 550, 90th Cong., 1st Sess. 3 (1967)).

[106] Lynch & Steinberg, *supra* note 72, at 910.

[107] *Id.* at 911.

[108] 425 U.S. 185 (1976).

[109] *Id.* at 188-93.

a term of art when used in connection with the securities market.[110] The Court recognized that "manipulative" conduct connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.[111] After examining the legislative history of section 10(b), the Court concluded that manipulation included "any other cunning devices." Therefore, no liability would exist for mere negligent acts or omissions.[112]

Similarly, in the subsequent case of *Santa Fe Industries v. Green*,[113] the Court found that the use of a short form merger to eliminate minority shareholders was not manipulative under section 10(b) since the essence of the complaint was that shareholders were unfairly treated by a fiduciary.[114] The Court concluded that manipulation referred to practices which were intended to "mislead investors" by artificially affecting market activity."[115]

While *Ernst* and *Santa Fe* ostensibly defined manipulation to encompass conduct designed to intentionally mislead or defraud investors, the Court in *Schreiber* placed too much reliance on these decisions. First, *Ernst* and *Santa Fe* only incidentally and summarily dealt with the definition of manipulation.[116] *Ernst* involved non-disclosure and no acts artificially affecting the market were alleged. The Court, while attempting to decide whether scienter was required under section 10(b) for non-disclosure cases, only reviewed manipulation in the limited context of the facts before it.[117] Likewise in *Santa Fe*, only fraud and fiduciary duty issues were before the Court.[118] The Court emphasized that, since the minority shareholders were accorded a state law remedy, absent a clear congressional intent, the Court would not find such corporate mismanagement to come within the scope of section 10(b).[119]

Secondly, the Court's reliance is inappropriate because *Ernst* and *Santa Fe* involved claims brought under section 10(b) of the 1934 Act and rule 10b-5,[120] whereas *Schreiber* involved claims under section 14(e). Unlike section 10(b), section 14(e) explicitly prohibits "fraudulent" acts or practices.[121] Rule

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[110] *Id.* at 199.

[111] *Id.*

[112] *Id.* at 202-03.

[113] 430 U.S. 462 (1977).

[114] *Id.* at 477.

[115] *Id.* at 476-77.

[116] *See* Note, *Defensive Tactics*, *supra* note 73, at 246.

[117] *Id.*

[118] 430 U.S. at 473.

[119] *Id.* at 477-79.

[120] Section 10(b) is codified at 15 U.S.C. § 78j (1982). The statute has been interpreted and enforced by the SEC under 17 C.F.R. § 240.10b-5 (1983), known as 10b-5. 430 U.S. at 471-74.

[121] Section 78n(e) makes it unlawful for any person "[t]o engage in any fraudulent, deceptive,

10b-5 includes fraudulent conduct within its prohibition but the *Ernst* Court held that the scope of Rule 10b-5 was subject to the reach of section 10(b) since the rule was adopted pursuant to the authority granted to the SEC.[122] The difference in the statutory language and the extensive legislative history of section 14(e) clearly indicates that section 14(e) has a broader reach than section 10(b). If Congress intended section 14(e) to be interpreted identically to section 10(b), it would have utilized identical language.[123] Congress' use of the ambiguous term "fraudulent" shows its intent to allow section 14(e) to encompass broader coverage than section 10(b).

Furthermore, the Court's reliance on *Ernst* and *Santa Fe* is inappropriate because tender offers developed many years after Congress enacted the Securities Exchange Act of 1934.[124] Thus, the manipulative practices which gave rise to the section 10(b) legislation were different from those which exist in a tender offer setting.[125] Defensive tactics which preclude or frustrate competitive bidding certainly were not contemplated by Congress at the time section 10(b) was enacted. Consequently, because of the time period between the enactment of sections 10(b) and 14(e), Congress clearly intended section 14(e) to have a broader interpretation than section 10(b).

Prior to *Schreiber*, several lower courts concluded that section 14(e) had a broader reach. In *Mobil Corp. v. Marathon Oil Co.*,[126] the Sixth Circuit held that under section 14(e), "manipulative acts or practices" encompassed substantive conduct. Certain defensive tactics which tended to circumvent the natural forces of market demand were manipulative. Mobil made a cash tender offer for a controlling interest in Marathon which was subsequently rejected by the Marathon board.[127] In considering alternatives, Marathon's board recommended approval of a proposed merger with U.S. Steel Corp.[128] As a condition of the

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or manipulative acts or practices" in connection with a tender offer. 15 U.S.C. § 78n(e) (1982).

[122] 425 U.S. 185, 212-14 (1976). The rulemaking power granted to an administrative agency charged with administration of a federal statute is not the power to make the law. *Id.* at 213.

[123] Lowenstein, *Section 14(e) of the Williams Act and the Rule 10b-5 Comparisons*, 71 GEO. L.J. 1311, 1349-52 (1983). Professor Lowenstein suggests that since the Supreme Court has paid much attention to statutory language in past securities law decisions, one could be tempted to say that if Congress wanted section 14(e) to be construed identically to section 10(b), it could have easily done so by utilizing identical language. Since Congress purposely used the ambiguous term "fraudulent," it intended the courts to give broader meaning to section 14(e) than to section 10(b).

[124] 113 CONG. REC. S24664 (daily ed. Aug. 30, 1967) (statement of Sen. Williams).

[125] Note, *Hostile Tender Offers and Injunctive Relief for 14(e) Manipulation Claims: Developments After* Mobil Corp. v. Marathon Oil Co., 40 WASH. & LEE L. REV. 1175, 1182 (1983).

[126] 669 F.2d 366 (6th Cir. 1981).

[127] Marathon began negotiations with several potential white knights to arrange a friendly merger. *Id.* at 367.

[128] U.S. Steel would purchase thirty million Marathon shares at $125 per share which repre-

proposed merger, U.S. Steel received a stock option[129] and a lock-up option to purchase Marathon's crown jewels.[130]

Mobil sought to enjoin the proposed merger or the exercise of any options on the grounds the lock-up arrangement defeated any competitive offers and constituted a manipulative practice in violation of section 14(e).[131] In reversing the district court ruling,[132] the Sixth Circuit held that the Yates Field option and the stock options were "manipulative" acts under section 14(e) since they had the effect of circumventing the natural forces of market demand in the tender offer.[133] The court noted that while nondisclosure is usually essential to a manipulative scheme, manipulation could still occur even after full disclosure was made.[134]

The most support for the *Mobil* court's analysis occurred in *Data Probe Acquisition Corp. v. Datatab, Inc.*[135] In *Data Probe*, the United States District Court for the Southern District of New York held that a lock-up violated the Williams Act since target management has a duty to refrain from any conduct that unduly impedes shareholders' exercise of decision-making prerogative. Datatab approached CRC to inquire whether CRC would be interested in acquiring Datatab.[136] The companies eventually entered into a proposed merger

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sents approximately one-half of the outstanding shares. The initial offer, if successful, would be followed up with a merger for the remaining shares. *Id.*

[129] U.S. Steel required an irrevocable option to purchase ten million authorized but unissued shares of Marathon common stock for $90 per share. *Id.*

[130] U.S. Steel required an option to purchase Marathon's 48% interest in oil and mineral rights to the lucrative Yates Field. The Yates option could only be exercised if U.S. Steel's offer did not succeed and if a third party gained control of Marathon. Thus, in effect, a competing tender offeror could not acquire Yates Field upon a merger with Marathon. *Id.*

[131] *Id.* at 368.

[132] The district court granted in part Mobil's motion for a temporary restraining order but subsequently denied its application for a preliminary injunction and held that the lock-ups were not manipulative acts. *Id.* at 368-69.

[133] *Id.* at 374. The Sixth Circuit found that the options granted to U.S. Steel prevented all other tender offerors from competing with U.S. Steel and tipped the scales in their favor. The court also found the stock option artificially and significantly discouraged competitive bidding for the Marathon stock. *Id.* at 376.

[134] The court noted that the artificial ceiling price set by U.S. Steel's $125 proposal is manipulation even after full disclosure since, in not initially tendering their shares to U.S. Steel, the shareholders risk being forced to accept a lesser amount as a later forced merger. *Id.* at 377.

The Sixth Circuit noted that although "manipulative" was not defined by the Security Exchange Act or the Williams Act, the U.S. Supreme Court indicated that manipulation is an affecting of the market for, or price of, securities by artificial means, unrelated to the natural forces of supply and demand. *Id.* at 374.

[135] 568 F. Supp. 1538 (S.D.N.Y. 1983). The Second Circuit, however, reversed the district court's decision and expressly rejected the *Mobil* approach. 722 F.2d 1 (2d Cir.), *cert. denied*, 465 U.S. 1052 (1984).

[136] 568 F. Supp. at 1541.

agreement whereby CRC would acquire all the Datatab common stock and merge into CRC.[137] Data Probe made a cash tender offer conditioned on the rejection of the proposed sale-by-merger.[138] CRC countered and agreed to raise its offer on the condition that it be granted an irrevocable option to purchase approximately 1.4 million authorized but unissued shares of stock.[139] Data Probe subsequently commenced the action claiming that Datatab's granting a lock-up agreement constituted a manipulative act or practice and thus violated section 14(e).[140] The court concluded that because the shareholders were deprived of any real choice after the lock-up agreement was executed, the lock-up was a manipulative act.[141]

Although *Mobil* and *Data Probe* have effectively been overruled by *Schreiber*, these cases along with the foregoing discussion clearly indicate Congress intended a broader interpretation of section 14(e). Since Congress intended the scope of manipulation under section 14(e) to be more encompassing than section 10(b), the *Schreiber* holding is incorrect. As a result, Congress should amend section 14(e) to clarify its intended meaning of "fraudulent, deceptive and manipulative" misconduct.

C. Amending Section 14(e) to Regulate Defensive Takeover Tactics

Under *Schreiber*, target shareholders, deprived of the prerogative to tender their shares, have no recourse under federal securities law in the absence of fraudulent misrepresentation or nondisclosure. If shareholders are to be accorded any protective rights, some regulatory reform aimed at tender offer defensive tactics is necessary.

As indicated by the legislative history of the Williams Act, the lack of disclosure to investors in a cash tender offer is in sharp contrast to other regulatory requirements in stock-for-stock exchanges and proxy fights for corporate control.[142] In a stock-for-stock exchange, the seller is fully informed as to the purchaser and his eventual plans for the company.[143] When a proxy fight is em-

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[137] The proposed agreement would have all the common stock acquired at $1.00 per share and would permit Datatab's principal officers to receive three year contracts. *Id.*

[138] *Id.* at 1542. The tender offer was for $1.25 per share.

[139] *Id.* In exchange for the increase in the price to $1.40 per share, Datatab gave CRC a lock-up of unissued stock equal to 200% of all outstanding shares and not subject to shareholder approval.

[140] *Id.* at 1543.

[141] *Id.* at 1560.

[142] *See* H.R. REP. NO. 1711, *supra* note 78, at 2812.

[143] In a stock-for-stock exchange the offer must be registered under the Securities Act of 1933. The shareholder receives a prospectus setting forth all material facts about the offer. The shareholder knows who the purchaser is and what plans have been made for the company. *Id.*

ployed to gain corporate control, the Securities Exchange Act requires that shareholders be informed of the identity of the participant and their associates, their holdings and the date of acquisition of these shareholdings.[144]

Congress noted that a cash tender offer is similar to a stock exchange since the investment decision, whether to retain the security or to sell it, is no different.[145] Likewise, a cash tender offer is similar to a proxy contest in that, without a fair disclosure of information, a shareholder cannot make an informed decision.[146] Although the disclosure provision is intended to apply to those parties attempting to acquire the stocks, management should be required to "disclose" the impact the defensive actions may have on shareholders.

1. *Shareholder approval: A prerequisite for defensive tactics*

Management should be required to seek shareholder approval by using procedures similar to those used in proxy solicitations before implementing defensive tactics. Management would be allowed the right of initiative on takeover defenses, subject to shareholder veto power through proxy solicitations.[147] By requiring shareholder approval, management would be required to disclose all the details, implications, and financial consequences of the defensive tactics before they occur.[148] The disclosure provisions would have immediate consequences. With full disclosure, shareholders would be able to make an informed decision and likely approve the defensive tactic if it would advance their ends.[149] For example, if a corporation sought approval for a lock-up option, shareholders would approve it if competitive bidding was improved, but would reject the proposal if it tended to foreclose further competition for the stock.

Alternatively, shareholders could empower the board to take only defensive maneuvers reasonably calculated to increase the consideration received by shareholders.[150] With this type of limitation, courts will have an easier time assessing defensive conduct since it would appear obvious that shareholders wanted the board to react if they could increase the price.[151] By allowing shareholders to make the ultimate decision without excessive pressure and with adequate information, the proposal would comport with the goals of the Williams Act.

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[144] *Id.* at 2813. Like the exchange offer, the proxy fight information is filed with the Securities Exchange Commission and is subject to statutory requirements and sanctions.

[145] *Id.*

[146] *Id.*

[147] Lowenstein, *supra* note 7, at 329-30.

[148] *Id.* at 330.

[149] *Id.* at 329-30.

[150] Green & Junewicz, *A Reappraisal of Current Regulations of Mergers and Acquisitions*, 132 U. PA. L. REV. 647, 725 (1984).

[151] *Id.*

While appearing to relinquish authority to make takeover decisions, management still retains the power since they initially decide whether to approve or resist an offer. Only when management elects to resist an offer would shareholders have the right to decide whether to implement the defensive tactic.[152]

2. *Lengthening the tender offer period*

Critics may argue that this proposal would be burdensome on management since proxy solicitations require an immense amount of time and money to implement. Furthermore, if a "raider" began making open market purchases prior to the announcement of a tender offer, the delay involved may place the target corporation at an inherent disadvantage.[153] To offset these concerns, takeover bids should be required to remain open for a longer period of time. One suggestion would require tender offer bids to remain open for at least six months.[154] While Congress and the courts have spoken out against permitting delays in the tender offer process,[155] having a six month period will permit target boards to respond more deliberately and thoughtfully by weighing its alternatives to a hostile bid.[156] If management then elects to reject the bid, the extended period would be helpful in order to properly solicit shareholder approval.[157]

Although requiring tender offer bids to remain open longer comports with the proposal to require shareholder approval of defensive tactics, a six month requirement would definitely undermine the impact of a tender offer. This requirement would tend to tip the balance of regulation in favor of the target and thus be contrary to the intent of the Williams Act.[158] In order to balance the impact of a tender offer against the policy of informed decision making by a shareholder, the tender offer should remain open for three months or for a period which will be sufficient to enable shareholders the opportunity to vote on management's use of a defensive tactic.

Requiring shareholder approval is logical since shareholders are the real target

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[152] Lowenstein, *supra* note 7, at 330.

[153] When a person directly or indirectly acquires 5% of any class of securities, he is required to file Schedule 13D within 10 days. 17 C.F.R. § 240.13d-101.

[154] In Edgar v. Mite, 457 U.S. 624, 644-46 (1982), the Supreme Court invalidated the Illinois state takeover statute on the theory that delay would injustifiably burden takeovers. Congress was also concerned that delay may work against the initial bidders. *See* H.R. REP. NO. 1373, 94th Cong., 2nd Sess. 12, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2637, 2644.

[155] Lowenstein, *supra* note 7, at 322-23.

[156] *Id.* at 323.

[157] *Id.* at 322.

[158] H.R. REP. NO. 1711, *supra* note 78, at 2813.

of the bid and should determine the nature of management's response.[159] By requiring shareholder approval, courts would have clear rules to apply in determining whether the directors acted properly.[160] If shareholders vote and specify the tactics management can utilize, management would thus be guided as to the amount of discretion they have and perhaps reduce the amount of shareholder litigation in the future.[161]

Even if section 14(e) is amended, shareholder remedies under federal securities laws are limited. As a result, shareholders have sought relief in state courts since regulation of corporations is essentially a matter for state law. The following section discusses how the state common law business judgment rule generally fails to prevent defensive tactics from precluding shareholders' right to consider a bidder's offer.

IV. STATE REMEDIES AND THE PREEMPTIVE EFFECT OF THE BUSINESS JUDGMENT RULE

Because federal securities laws do not provide an adequate remedy for shareholders contesting the harmful effects of defensive tactics, they must resort to state law fiduciary standards for relief. Under state law, officers and directors of a corporation are fiduciaries of the corporation and its shareholders.[162] As fiduciaries, they must administer the corporate affairs for the good and benefit of all shareholders and use their best care, skill and judgment in the management of the corporation.[163] Consequently, officers and directors have a duty to exercise good faith in all transactions in addition to adhering to the strict rule of honesty and fair dealing.[164] Whether management has discharged its fiduciary duty to a corporation and its shareholders is determined on the basis of the common law business judgment rule.

A. Court Deference to the Business Judgment Rule

Traditionally, the business judgment rule requires courts to defer to the corporate officers' and directors' business judgments in the absence of any evidence of bad faith, fraud or self-dealing.[165] This doctrine rests on several rationales.

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[159] Green & Junewicz, *supra* note 150, at 725.

[160] *Id.*

[161] *Id.*

[162] First Hawaiian Bank v. Alexander, 558 F. Supp. 1128 (D. Haw. 1983).

[163] 3 W. FLETCHER, CYCLOPAEDIA OF THE LAW OF PRIVATE CORPORATIONS § 848 (Perm. ed. 1975). The corporate officers and directors have been likened to a trustee.

[164] *Id.* at § 850.

[165] *See* Treadway Cos. v. Care Corp., 638 F.2d 357, 382 (2d Cir. 1980).

First, the business judgment rule allows management the freedom to formulate corporate policy without guaranteeing the success of those decisions.[166] Second, the shield from liability provided by the business judgment rule allows competent directors to take necessary risks without the fear of personal liability for honest errors in judgment.[167] Third, because courts lack the necessary expertise to assess complex corporate decisions, the courts are reluctant to substitute their judgments for those of management.[168]

Courts presume that management has acted in good faith, on an informed basis, and in the honest belief that their actions were taken in the best interest of the corporation.[169] Essentially, the business judgment rule protects the management or directors from liability for honest mistakes of judgment which are an incident of corporate management by assuming they have fulfilled their fiduciary duties of loyalty and care.[170] This presumption creates a heavy burden on parties challenging management's actions to show that they abused their fiduciary duties either by acting without care or disregarding their duty of loyalty by allowing personal motives to influence their decisions.[171]

To prove that the directors breached their fiduciary duty of care, plaintiffs must show that the directors failed to review the relevant information necessary to make proper decisions.[172] Once the directors demonstrate that they consulted with outside experts or reviewed different proposals or alternatives, their duty of care requirement is satisfied. However, in the context of tender offers, the duty of loyalty is difficult to apply since tender offers often create conflicts of interest between management and the shareholders.[173] The conflict arises when management resists a tender offer out of fear of being replaced after a takeover, even if

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[166] *See* Block & Prussin, *The Business Judgment Rule and Shareholder Derivative Actions: Viva* Zapata*?*, 37 BUS. LAW. 27, 32 (1981).

[167] *Id.* at 32-33.

[168] Auerbach v. Bennett, 47 N.Y.2d 619, 629, 419 N.Y.S.2d 920, 926 (1979). Because there can be no escapable objective standard by which the correctness of every corporate decision can be measured, the courts defer to management.

[169] Steinberg, *Some Thoughts on Regulation of Tender Offers*, 43 MD. L. REV. 240, 242 (1984). The business judgment rule provides that corporate officers and directors will be shielded from judicial inquiry into the propriety of their decisions and from liability for harm to the corporation resulting from their decisions, so long as: (1) the decisions were within management's authority to make, and (2) such corporate fiduciaries have [a] informed themselves and made reasonable inquiry with respect to the business judgments; [b] acted in good faith and without a disabling conflict of interest; and [c] had a rational basis for the business judgment. *Id.*

[170] Note, *Tender Offer Defensive Tactics and the Business Judgment Rule*, 58 N.Y.U. L. REV. 621, 651 (1983).

[171] Siegel, *Tender Offer Defensive Tactics*, 36 HASTINGS L.J. 377, 381 (1985).

[172] *Id.*

[173] *See, e.g.*, Crane Co. v. Harsco Corp., 511 F. Supp. 294, 305 (D. Del. 1981). The court stated that when a stock purchase occurs during a tender offer, directors have an inherent conflict of interest.

the tender offer would benefit the corporation and shareholders.[174]

B. *Presumption of Sound Business Judgment in the Context of Tender Offers*

Since an inherent conflict of interest exists in management's efforts to resist takeovers, the presumption of sound business judgment ceases and management must demonstrate the intrinsic fairness of their actions.[175] Unfortunately, courts have almost uniformly applied the business judgment rule in lieu of the "intrinsic fairness" test normally applied in conflict of interest situation.[176] Under the intrinsic fairness test, the burden of proving the entire fairness of a transaction shifts to the proponents of the transaction.[177] In gauging the issue of fairness, courts have expanded the inquiry by looking at the fairness of dealing and fairness of price.[178] Fairness of dealing inquires into when the transaction was timed, how it was initiated, structured or negotiated.[179] Fairness of price involves a comparison of the value of what the corporation or its shareholders received with what was given up.[180]

Because of the courts' refusal to apply the intrinsic fairness test, plaintiffs have not been able to establish the requisite level of proof to show management self-interest to overcome the presumption of the business judgment rule. In *Whittaker Corp. v. Edgar*,[181] the United States District Court for the Northern District of Illinois held that the board's decision to sell its crown jewels enjoyed a presumption of sound business judgment and that the court would not overturn the decision if there was any rational business purpose.[182] Furthermore, in

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[174] Gilson, *supra* note 2, at 819.

[175] Comment, *The Misapplication of the Business Judgment Rule in Contests for Corporate Control*, 76 NW. U.L. REV. 980, 998 (1982) [hereinafter Comment, *Misapplication*].

[176] *See, e.g.*, Treadway Cos. v. Care Corp., 638 F.2d 357, 383 (2d Cir. 1980) (construing statute requiring disinterested directors to approve contract between corporation and another director to protect directors under business judgment rule); Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 702-03 (2d Cir. 1980) (directors entering into merger agreement to prevent hostile takeover protected by business judgment rule); Johnson v. Trueblood, 629 F.2d 287, 293 (3d Cir. 1980) (business judgment rule protects directors unless retaining control is the sole motive), *cert. denied*, 450 U.S. 999 (1981).

For further discussion regarding the "intrinsic fairness" test, see *infra* text accompanying notes 177-80.

[177] *See, e.g.*, Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971).

[178] Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983). The Delaware Supreme Court noted that since some of the members of the UOP board were in positions of conflict, they were required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain. *Id.* at 710.

[179] *Id.* at 711.

[180] *Id.*

[181] 535 F. Supp. 933 (N.D. Ill. 1982).

[182] *Id.* at 950-51.

Treadway Cos. v. Care Corp.,[183] the Second Circuit held that plaintiff must show that the "directors acted in bad faith, or in furtherance of their own interests, or for some other improper purpose" before they would be liable for selling its stock to a white knight.[184] Similarly, in *Crouse-Hinds Co. v. InterNorth*,[185] the Second Circuit held that even if the directors would retain control of the corporation as a result of their defensive tactic, it was insufficient to shift the burden of proof to the directors, and therefore, they were entitled to the protection of the business judgment rule.[186]

Even if a plaintiff demonstrates that management had an improper motive when it utilized the defensive maneuver, the burden shifts to management to prove a legitimate business purpose. A proper business purpose is easily shown under the business judgment rule. Although the directors' desire to retain control may be the primary motive for their actions, courts have often deferred to management, thereby allowing management maximum freedom to implement maneuvers which could severely restrict the shareholders' ability to tender their stock.[187]

Recently, however, the Delaware Supreme Court and the Second Circuit decided a series of cases in which the protection of the business judgment rule was denied to management.[188] These decisions do not suggest a new standard for evaluating management decisions. Instead, they merely clarify that certain types of corporate behavior, including gross and reckless conduct, are prohibited

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[183] 638 F.2d 357 (2d Cir. 1980).

[184] *Id.* at 381. The court found that under the business judgment rule, it was reasonable that Treadway's board had to make a judgment as to the best interest of Treadway. The court noted that once the board determined that a takeover would be detrimental to Treadway, it was reasonable that the directors should move to oppose it.

[185] 634 F.2d 690 (2d Cir. 1980).

[186] *Id.* at 702. In response to an unsolicited tender offer, the Crouse-Hinds directors approved a defensive merger whereby the directors would remain in office. The district court found that this evidence was sufficient to show that the Crouse-Hinds board had acted to preserve its control of the corporation. In interpreting *Treadway*, the court found that if a director remained in office following a consummation of a merger, the burden would shift to the directors to prove the merger was fair and reasonable. *Id.* at 702-03.

[187] Siegel, *supra* note 171, at 387. Since replacement of target management is typically a motive for making a tender offer or for shareholders tendering their shares, a serious conflict of interest inheres in any decision for management resisting a tender offer. Easterbrook & Fischel, *supra* note 6, at 1198.

[188] Some commentators have suggested that these courts have reformulated and reinvigorated the business judgment rule for defensive maneuvers taken in fights for control. Greene & Palmiter, *Business Judgment Rule Tightened for Takeovers*, Legal Times, Jan. 20, 1986, at S3, col. 1.

While conceding that the recent line of decisions has often seemed unprincipled and lacking any articulated coherent theory, these commentators conclude that court passivity has been replaced by scrutiny and deference by skepticism. *Id.*

under the business judgment rule. Although substantial changes were arguably made in the application of the business judgment rule, the cases appear to have been decided on extraordinary facts.

In *Norlin Corp. v. Rooney, Pace, Inc.*,[189] Norlin attempted to defend against an attempted takeover.[190] Having failed to obtain an injunction, Norlin issued new common and voting preferred stock to a wholly-owned subsidiary and a newly created stock option plan (ESOP).[191] The United States District Court for the Southern District of New York granted Piezo preliminary injuctions preventing the Norlin directors from voting the subsidiary's and ESOP shares.[192]

On appeal, the Second Cirsuit found sufficient evidence of self-interest in the transaction to cause the director's duty of loyalty to be questioned and to supercede the presumption of care provided by the business judgment rule.[193] In addition to all the transferred stock being voted by the directors, it appeared the ESOP was created to solidify a management entrenchment effort and not for the benefit of the employees. The court explicitly rejected Norlin's assertion that the board could take any action necessary to forestall any takeover attempt they deemed not to be in the best interest of the company.

The court was influenced by the fact that management could vote all the transferred stock, that the ESOP was created and issued stock on the same day, and that three board members were appointed plan trustees. These factors created an inference sufficient to show management's interest in fortifying control of the corporation. An additional factor affecting the court's decision was Norlin's cavalier attitude towards delisting by the New York Stock Exchange (NYSE).[194] Prior to the transfer, Norlin was warned by the NYSE that if a stock transfer was made without shareholder approval, the exchange could delist

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[189] 744 F.2d 255 (2d Cir. 1984).

[190] Piezo Electric in conjunction with Rooney, Pace, Inc. purchased some 32% of the common stock of Norlin. Norlin filed suit on January 13, 1984 alleging securities laws violations and sought to enjoin Piezo and Rooney from purchasing any more stock, to force divestiture of the stock already purchased, and to bar voting on the Norlin stock. The court denied Norlin's motion for a temporary restraining order on the grounds that Norlin had not demonstrated irreparable harm from the stock purchase. *Id.* at 259.

[191] Norlin's board approved transfer of 28,395 shares of common stock to its subsidiary (Andean) along with 800,000 shares of authorized but unissued preferred stock. In addition, the board created the Norlin Employee Stock Option Plan (ESOP) and transferred 185,000 common shares to the ESOP in exchange for a $6,824,945 promissory note. *Id.* at 259. Prior to the issuance of the stocks, the board was warned by their financial advisors that absent shareholder approval, the stock transactions violated the NYSE rules and might result in the delisting of the Norlin common stock. *Id.* at 259-60.

[192] *Id.* at 258.

[193] *Id.* at 265-66.

[194] *Id.* at 268.

the Norlin stocks. Norlin failed to heed the warning and the court reasoned it would chave caused irreparable harm if an injunction was not granted.[195]

In *MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.*,[196] the Delaware Supreme Court affirmed a chancery court decision which invalidated an asset lock-up option[197] in a leveraged buyout[198] where management would have a significant equity interest and where further bidding in an active bidding war was foreclosed.[199] In response to a possible hostile tender offer from Pantry Pride, the Revlon board adopted a poison pill purchase rights plan.[200] Subsequent to Pantry Pride making its offer, Revlon's board approved a proposal to repurchase some of its common stock by exchanging senior subordinated notes which contained restrictive covenants.[201] Pantry Pride revised its offer and offered to merge with Revlon but the Revlon board instead approved a plan to enter a leveraged buyout with Forstmann Little.[202] Following further price increases in Pantry Pride's offers, Forstmann increased its offer and demanded a lock-up option on two of Revlon's divisions.[203] The Revlon board approved Forst-

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[195] *Id.* at 269.

[196] 506 A.2d 173 (Del. 1986).

[197] For a discussion of lock-ups, see *supra* text accompanying notes 25-31.

[198] In a leveraged buyout, the acquiring entity purchases a company through a secured loan with assets of the acquired corporation pledged as collateral. Torres, *Minority Shareholder Protection in Leveraged Buyouts*, 13 SEC. REG. L.J. 356 (1986).

[199] 506 A.2d at 183.

[200] *Id.* at 177. The Revlon board rejected Pantry Pride's proposed $45 tender offer because it felt the figure was grossly inadequate and believed Pantry Pride would finance the tender offer with "junk bonds," and then would sell off some of Revlon's divisions to pay for the financing. *Id.* The board adopted the rights plan which would provide Revlon's shareholders with one Note Purchase Right as a dividend on each share of common stock. The holder could exchange one share of common stock for a 1 year, 12% Revlon note. The rights would be triggered when anyone acquired 20% or more of Revlon's shares unless the acquiror agreed to pay at least $65 per share. The plan provided that no rights certificate could be issued to the 20% acquiror and the Board could redeem each right for $.10 each prior to an acquisition of 20% or more. *Id.*

[201] These notes contained covenants designed to deter potential raiders since it severely limited Revlon's ability to incur additional debt, sell assets or pay dividends without approval by the independent directors. *Id.*

All 10 million shares were accepted in this exchange offer and Revlon incurred $475 million in new debt as a result. *Id.* at 177-78.

[202] Forstmann Little agreed to assume the $475 million debt from Revlon's exchange agreement on the condition that the covenants were waived. *Id.* at 178.

The leveraged buyout offer also permitted Revlon's management to become equity participants by using the proceeds of their golden parachutes. As a result, the exchanged notes began trading at a substantial discount. *Id.*

[203] If any person or group acquired 40% of Revlon's shares, Forstmann could acquire the Vision Care and National Health Laboratories divisions for $525 million, some $100-$175 million below their estimated value. *Id.*

mann's proposals[204] and Pantry Pride sued to enjoin the lock-up provision.

The court upheld the poison pill rights plan and the note exchanges under the business judgment rule. However, once the breakup of Revlon seemed inevitable, the court held that the board's sole role became that of an "auctioneer" attempting to secure the highest price for the pieces of Revlon.[205] The court noted that by permitting the lock-up and restricting itself from pursuing other bidders, the board effectively ended bidding for all Revlon stock and only further entrenched management.[206]

The court focused on the favoritism given to Forstmann during the intense bidding. Although Forstmann's bid was one dollar more than Pantry Pride's, the court held that in light of the conflict of interest created by management's equity participation in the leveraged buyout, assets being undervalued by at least eighty million dollars, and that future bidding in active bidding war was being stopped, the directors breached their duty of loyalty to the shareholders.

In *Hanson Trust PLC v. ML SCM Acquisition, Inc.*,[207] the Second Circuit held that SCM's directors breached its duty of care by granting Merrill Lynch an asset lock-up without gathering and considering material information to make an informed decision. In *Hanson*, SCM negotiated with Merrill Lynch for a leveraged buyout after being confronted by a hostile tender offer.[208] As part of the leveraged buyout proposal, SCM agreed to pay Merrill Lynch a 1.5 million dollar engagement fee[209] and a nine million dollar breakup fee.[210] Following some discussion, the nine independent directors approved the merger agreement. Hanson immediately countered the Merrill Lynch offer,[211] but Merrill Lynch raised its offer after receiving additional consideration from SCM which included a lock-up option on its main product divisions.[212] The board ap-

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[204] Forstmann's offer was only $1.00 more than Pantry Pride's. *Id.* at 178-79.

[205] *Id.* at 182.

[206] *Id.* at 183.

[207] 781 F.2d 264 (2d Cir. 1986).

[208] On August 21, 1985, Hanson made a $60 cash tender offer for any and all shares of SCM common stock. SCM then initiated discussion with several leverage buyout firms including Merrill Lynch. Subsequently, Merrill Lynch agreed to make a counter cash tender offer of $70 per share for approximately 85% of the shares, followed by a merger for the remaining 15%. *Id.* at 268-69.

[209] SCM gave Merrill this "hello" fee as a guarantee that Merrill would profit from its efforts. *Id.*

[210] In the event another party would acquire ⅓ or more of the outstanding shares of SCM common stock prior to March 1, 1986, Merrill would get a "goodbye" fee. *Id.*

[211] Following the announcement, Hanson raised its offer to $72 per share cash on the condition that SCM not grant a lock-up. *Id.* at 270.

[212] This offer had a greater proportion of debenture financing. As consideration for the new offer, SCM paid an additional $6 million "hello again" fee to Merrill and placed the $9 million break-up fee into escrow. SCM also agreed to sell its Pigments business for $350 million and its Consumer Foods division for $80 million. *Id.*

proved the revised offer without regard to inquiring about the assets' potential market value.[213]

Hanson subsequently failed in its motion to restrain Merrill Lynch and SCM from exercising the lock-up option.[214] The Second Circuit found that while the directors' actions in approving the lock-up did not rise to a level of gross negligence, the board failed in its duty of due care to the shareholders by not fully investigating the best value of the two assets. The court emphasized that since management was self-interested in proposing a defensive leveraged buyout, the independent directors had an important duty to protect the shareholders' interests.[215] Consequently, the court refused to allow the business judgment rule to shield the directors because of their lack of due care in selling its prized food and pigments divisions for at least eighty million dollars below its fair market value without even questioning the fair market value of these assets.[216]

As illustrated by the foregoing cases, these courts refused to allow the business judgment rule to shield the directors from liability because their actions were so extreme and would cause immeasurable damage to all the shareholders. Since the directors' conduct essentially amounted to gross negligence, any court decision to the contrarywould have been unreasonable.

Despite the opinion that courts may be scrutinizing directors' actions more closely in the future in takeover situations, courts will probably continue its deference to management unless the directors recklessly or negligently breach their duty of loyalty or care. Since the business judgment rule will still give immunity to almost all defensive maneuvers, reforms are needed to limit the scope of the business judgment rule in tender offer situations.

V. Reform Proposal: Limiting the Business Judgment Rule in Tender Offers

The business judgment rule has effectively prevented aggrieved shareholders injured by harmful defensive tactics from any judicial relief. Tender offers often

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[213] The court mentioned that the lock-up option was approved during a three hour late night meeting based on a financial advisor's conclusory opinion that the option price was "within the range of fair values." *Id.* at 271.

[214] Hanson withdrew its tender offer because of the lock-up and purchased 545,000 shares on the market to increase its holdings to about 33%. Merrill then withdrew its $9 million break-up fee. *Id.* at 272.

[215] *Id.* at 277.

[216] The court found that the value of the Pigments division ranged between $420 million to $500 million. Based on the $350 million sales price, the court found a $70 million undervaluation. For the Consumer Foods Division, the asset was valued between $90 million to $110 million. Based on the $80 million sales price, the sale was conservatively undervalued by $10 million. *Id.* at 279-80.

create inherent conflict of interest problems for managers if they elect to resist the offer.[217] Under the traditional doctrine, the business judgment rule does not apply when the board faces a conflict of interest. Instead the directors must bear the burden of showing the "intrinsic fairness" of their actions.[218] Courts, however, have confused the test and instead have utilized the business judgment rule.

In applying the rule, the courts typically use motive or primary purpose instead of substance to determine liability.[219] In using motive or primary purpose as the test, the board merely has to show that the defensive tactic was motivated by a valid business purpose.[220] The problem with this test is that the primary purpose or motive can easily be masked and true motives are difficult to prove.[221] Thus, judicial inquiry into management's motives becomes a futile exercise in all but the most blatant cases of misconduct.

Because of the lenient standard imposed on directors to justify their decision in resisting a takeover, courts should uniformly reject the application of the business judgment rule in the context of tender offer defensive tactics. The original purpose of the rule was to test decisions made by directors to maximize corporate profits.[222] Courts liberally deferred to corporate management since review of the decision required intimate financial and technical knowledge of the company.[223] Unlike day to day decisions or merger or sale of corporate assets decisions, tender offers are not corporate transactions.[224] Instead, a tender offer is merely a transfer of stock ownership, and therefore, management should not have control or veto power to affect the shareholder's decision.[225]

Since decisions relating to tender offers are reserved for the shareholder, any management action utilizing defensive tactics should be scrutinized to insure the actions were taken for the corporation's best interest and were intrinsically fair to the corporation and its shareholders. Under this proposal, once a plaintiff is able to show that target management undertook a defensive action which would prevent competitive bidding for the corporation's stocks, the burden

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[217] For a discussion regarding management's conflict of interest, see *supra* text accompanying notes 173-74.

[218] *See* Note, *Protecting Shareholders*, *supra* note 41, at 1969.

[219] *Id.*

[220] *Id.*

[221] *Id.* at 1970.

[222] Green & Junewicz, *supra* note 150, at 712. Shareholders give directors a broad mandate to manage or oversee the business, which involves countless business decisions.

[223] *Id.*

[224] Siegel, *supra* note 171, at 393.

[225] *Id.* at 393-94. Those that support an active management role agree that although a tender offer is a stock purchase, it is functionally equivalent to an asset purchase. Proponents further argue that since management controls the terms for the sale of assets, they should likewise have broad discretionary authority in tender offers.

would shift to management to show that the transaction was intrinsically fair. This inquiry would not necessarily focus on whether the corporation's assets were wasted or whether management received a fair price, but instead it would focus on whether it was fair for management to step in and implement the defensive maneuver.[226] The court would then have to decide whether it was fair to thwart a possible change of control under the circumstances.[227] By shifting this burden of proof unto target management, shareholders will be able to have a better opportunity to challenge management's actions.

Opponents argue that courts are not equipped to assess complex business decisions made by management and the applicable standard should be the standard deference provided under the business judgment rule. The problem with using the business judgment rule deference is that management can almost always justify its actions, even where management has a conflict of interest. As such, courts must intervene to test the fairness of management's actions. By way of analogy, a test utilized by the Delaware Supreme Court in *Zapata Corp. v. Maldonado*[228] may be helpful.

In *Zapata*, a shareholder instituted a derivative action against the corporation's officers and directors for breaches of fiduciary duty. The litigation committee, after investigating the shareholder's claims, concluded that the derivative claims should be dismissed.[229] The Delaware court, in reviewing the fairness of the committee's decision held that a two-part test should be applied.[230] First, the court inquires into the independence and good faith of the committee. The corporation has the burden of showing independence, good faith, and reasonableness in its investigation.[231] Once the corporation meets the initial burden of proof, the court would then determine whether the committee's decision was fair by applying its own business judgment.[232] This step would allow the court to overcome incorrect results when the corporation's actions met the criteria of step one.

Courts could adopt a similar test to review actions by target management. The court would initially review the board's decison to insure that there was

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[226] *Id.* at 395.

[227] Gilson, *supra* note 2, at 827. Gilson has suggested that in determining whether management's decision to undertake a defensive maneuver was fair, the inquiry must center on whether the shareholder would have sold their shares. If they would have, then management would be liable since the decision to sell shares is a shareholder investment decision. *Id.*

[228] 430 A.2d 779 (Del. 1981).

[229] *Id.* at 780. The board created a committee composed of two new directors to investigate plaintiff's claims.

[230] *Id.* at 788.

[231] *Id.* This approach required the corporation to prove their independence, good faith and reasonableness rather than presuming it.

[232] *Id.* at 789.

independence, good faith and reasonableness in their action.[233] In reviewing the board's independence, the court would first inquire into how many independent directors were on the board and how they voted for the proposal. For the good faith and reasonableness factors, the court would review the scope of the information presented by the parties to insure that there was adequate foundation to make their decision. Because the burden of proof would be on management, they would need to present sufficient evidence to justify the fairness and reasonableness of their actions. Following the presentation of evidence, the judicial inquiry would finally focus on whether the court, in applying its own business judgment, found the action fair to the corporation and its shareholders.

VI. CONCLUSION

Corporate expansion through tender offers has become commonplace in recent years. In response, corporations have utilized various defensive tactics to stave off these corporate "raiders." The defensive actions taken by the target management has been the source of much litigation. Unfortunately, because of the Supreme Court's decision in *Schreiber*, management will have almost unbridled discretion in their defensive actions in the absence of misrepresentation or non-disclosure by management. As a result, Congress should amend the securities laws by requiring management to obtain shareholder approval before implementing any defensive tactic. Shareholder approval comports with the intent of the Williams Act since the decison to tender or retain the shares belongs to the shareholder.

Although federal law is one avenue for relief, the bulk of the shareholder litigation would come under state fiduciary law. The problem with litigation under state law is that courts rely on the business judgment rule and usually defer to management's actions. But the business judgment rule should not apply to defensive tactics since management has an inherent conflict of interest. In these situations, courts should utilize their independent business judgments and determine if the management's actions were fair to the corporation and to its shareholders. By implementing these changes to federal and state law, shareholders will be accorded more fairness in the decision to fight a tender offer.

Michael H.Q.L. Lau

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[233] MODEL BUSINESS CORP. ACT § 8.31 (1984) sets out guidelines how courts may evaluate transactions if a director has a conflict of interest. Part of the inquiry focuses on whether the ratification was made by disinterested directors, or if the conflict was disclosed in advance, or if the transaction was fair to the corporation.

The Medical Malpractice Crisis: Will No-Fault Cure The Disease?

I. INTRODUCTION

Problems surrounding medical professional liability have reached crisis proportion.[1] The frequency and severity of malpractice suits are increasing, resulting in extraordinary surges in insurance premiums.[2] Some physicians pay as much as $82,000 per year for malpractice insurance.[3] High premiums coupled

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[1] The early 1970's witnessed the first crisis in medical professional liability, which spawned a detailed study of the problem by the federal government. *See* DEP'T OF HEALTH, EDUCATION & WELFARE, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE, DHEW Pub. Nos. (05) 73-88, 73-89 (1973) [hereinafter SECRETARY'S REPORT]. The State of Hawaii also launched its own study of the malpractice problem at that time. *See* DEP'T OF REGULATORY AGENCIES, MEDICAL MALPRACTICE: ISSUES, DISCUSSIONS AND PROPOSALS FOR CHANGE, STATE OF HAWAII (1976).

Physicians uniformly feel they are presently experiencing a second malpractice crisis. *See* American Medical Association Special Task Force on Professional Liability and Insurance, PROFESSIONAL LIABILITY IN THE 80'S, Reports 1, 2 & 3 (1984-85) [hereinafter AMA REPORT]; *The Malpractice Blues*, TIME, Feb. 24, 1986, at 60; OFFICE OF THE ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE, REPORT OF THE TORT POLICY STUDY GROUP ON THE CAUSES, EXTENT & POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986) [hereinafter TORT POLICY WORKING GROUP]; *Sorry, America, Your Insurance Has Been Cancelled*, TIME, Mar. 24, 1986, at 16-26 [hereinafter SORRY AMERICA, YOUR INSURANCE HAS BEEN CANCELLED].

But see Neubauer, *Medical Malpractice Legislation: Laws Based on a False Premise*, 1985 TRIAL 64 (1985); Blodgett, *Malpractice Crisis?*, 71 A.B.A. J. 18 (1985). The ABA also rejected the AMA's contention that the increase in malpractice insurance rates is a crisis. "This committee believes that although there is a problem in the area of medical malpractice insurance, the term 'crisis' is an overstatement." Silas, *Bitter Medicine*, 72 A.B.A. J. 20 (1986).

[2] AMA REPORT 1, *supra* note 1, at 6-15. "The St. Paul [Insurance] Companies, with 14.6% of the national medical market, reported 5,870 claims in 1983—2,757 more than in 1979, an increase of 88.6%." *Id.* at 10. In Hawaii, 155 malpractice claims were filed with the Medical Claims Conciliation Panel in 1985, compared to 84 in 1980. J. MARDFIN, MEDICAL MALPRACTICE IN THE STATE OF HAWAII, Dep't of Commerce and Consumer Affairs 14 (Jan. 1986).

[3] AMA REPORT 1, *supra* note 1, at 8. *See also* Blodgett, *supra* note 1, at 18, where premiums as high as $82,000 were quoted. Hawaii's annual malpractice insurance premium for an obstetrician ($1 million/$3 million, claims-made policy) was $42,783 in August, 1985. (Medical Insur-

with the possibility of subjection to the ordeal of a lawsuit have caused some physicians to either abandon or restrict their practices, particularly in high risk specialties such as obstetrics and neurosurgery.[4] As a result, some geographic areas have lost certain types of medical services.[5]

The malpractice threat, many doctors believe, has contributed to the erosion of the doctor-patient trust relationship, and to the practice of "defensive medicine."[6] One estimate placed the cost of defensive medicine at $15.1 billion per year,[7] a cost ultimately borne, to a large extent, by the consumer.Are patients unrealistic in their expectations of medical cures, seeking legal redress whenever results are less than perfect?[8] Is physician carelessness largely responsible?[9] Or is this unhappy situation the result of the breakdown of the traditional tort system?[10] Whatever the reason, the situation is tragic when one considers

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ance Exchange of California data on file at the Hawaii Medical Association, Honolulu, Hawaii).

[4] AMA REPORT 1, *supra* note 1, at 16-20.

[5] In Hawaii, obstetric services on the island of Molokai were recently suspended because of unaffordable insurance premiums. Deliveries are currently being performed by a midwife insured under the state hospital's liability policy. Kona and the Kohala area of the Big Island of Hawaii have one remaining obstetrician, down from four. Testimony by Stan Snodgrass, President, Hospital Association of Hawaii, before the House Judiciary Committee in Honolulu, Haw. (Feb. 26, 1986).

> On the Hawaiian island of Molokai, pregnant women who want a doctor in attendance when they give birth fly to neighboring Oahu or Maui. The five Molokai doctors who once delivered babies have stopped doing so because malpractice insurance would cost them more than the total of any obstetrical fees they could hope to collect.

Sorry, America, Your Insurance Has Been Cancelled, *supra* note 1, at 16.

[6] Defensive medicine is the procedure of conducting tests or treatment for legal, rather than medical reasons. *See generally* Neubauer, *supra* note 1. "Forty percent of responding physicians said they prescribed additional diagnostic tests and 27.2% said they provided additional treatment procedures as a response to the increased risk of a professional liability action." AMA REPORT 1, *supra* note 1, at 16. *But see* Bernzweig, DEFENSIVE MEDICINE, in SECRETARY'S REPORT app., *supra* note 1, at 40; ("That the phenomenon exists cannot be denied, but to say that all defensive medicine practices are invariably harmful, or that the threat of malpractice litigation is the only reason they occur, is much less supportable, based on the evidence at hand.").

[7] AMA REPORT 1, *supra* note 1, at 16. By way of perspective, the health care industry expends some $400 billion annually. Levey, *Bottom-Line Health Care?*, 312 NEW ENG. J. MED. 644 (1985).

[8] "The promise of expertise must be kept. Humanity has split the atom and walked on the moon. Nothing less than a comparable performance in health care can be considered acceptable. Failure is no longer tolerated." R. POLLACK, CLINICAL ASPECTS OF MALPRACTICE 3 (1980).

[9] *See generally* H. JACOBS, THE SPECTER OF MALPRACTICE: THIS BOOK MAY SAVE YOUR LIFE (1978) (Dr. Jacobs places the blame squarely on the shoulders of negligent providers of health care.).

[10] O'Connell, *No-Fault Insurance For Injuries Arising From Medical Treatment: A Proposal for Elective Coverage*, 24 EMORY L. J. 21 (1975); O'Connell, *It's Time For No Fault for All Kinds Of Injuries*, 60 A.M.A. J. 1070 (1974); Havighurst & Tancredi, *Medical Adversity Insurance—A No-Fault Approach To Medical Malpractice and Quality Assurance*, 51 MILBANK MEMORIAL FUND

the injured patient's plight. Patient ignorance or misplaced "loyalty" often prevents the filing of meritorious claims.[11] Even those who file suit may not prevail because of the difficulty of establishing fault.[12] Moreover, those who prevail are compensated only after many years of litigation.[13]

In medical malpractice litigation, attorneys and expert medical[14] witnesses often derive the greatest financial benefit at the expense of many undercompensated injured patients and the beleaguered physicians.[15] The impact on society is unclear. Society must bear the burden of higher medical costs, maldistribution of medical services, and the specter of the reduced number and quality of medical care providers. To the extent that the tort system deters careless con-

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Q. 125 (1973), *reprinted in* 613 INS. L. J. 69 (1974); TORT POLICY WORKING GROUP, *supra* note 1; AMA REPORT, *supra* note 1.

[11] No one knows for certain how often malpractice occurs. Everyone acknowledges, however, that many meritorious claims are never pursued because of misplaced "loyalty" in the treating physician. The usual patient response is "it's God's will." *See* P. DANZON, MEDICAL MALPRACTICE (1985); Pocincki, *The Incidence of Iatrogenic Injuries*, SECRETARY'S REPORT, app., *supra* note 1, at 50. "Some medical errors are literally buried six feet under ground. These and others also may be buried in medical records. A patient's family may be told by their physician that 'It was an act of God'; 'It was an unfortunate circumstance . . . .'" JACOBS, *supra* note 9, at 19.

[12] O'Connell, *It's Time For No Fault For All Kinds Of Injuries*, 60 J. A.M.A. 1070 (1974).

> An even worse [than product liability] situation exists for medical malpractice claims. Under the auspices of the Secretary of Health, Education, and Welfare, the Report of the Commission on Medical Malpractice recently documented the cumbrous nature of the legal system in processing medical service claims. Despite soaring liability premiums, few victims are paid for their losses, and those who are suffer long delays while litigants battle over the arcane issues of the propriety of medical procedures.

Id. at 1070. *See also* Havighurst, *Medical Adversity Insurance—Has Its Time Come?*, 1975 DUKE L.J. 1233 (1975). Professor Havighurst cites the high legal and administrative costs of litigation, the psychic and time costs to physicians, the antagonisms unleashed, defensive medical practice, and the haphazard incidence of claims as mandating a replacement of the present tort system for redressing medical malpractice claims. *Id.* at 1234-35.

[13] "It takes an average of seven years to adjudicate a malpractice claim." J. COM., Jan. 16, 1984, at 9C, cols. 4-5. "On the average, [in medical malpractice claims] only half are closed within 18 months after they are opened; ten percent remain open 6½ years after they are opened." SECRETARY'S REPORT, *supra* note 1, at 11. In Hawaii, 55% of the claims filed with the Medical Conciliation Claims Panel from 1979 through 1983 were resolved within a half year of filing and 75% were resolved within nine months. However, resolution for 18% took over one year. MARDFIN, *supra* note 2, at 23-24.

[14] "Personal injury litigation is probably the most lucrative area of law in the United States—dwarfing even the returns from Wall Street firms . . . personal injury lawyers share in the equity from huge verdicts and settlements, earning annual incomes that can approach or exceed $1,000,000." O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898, 903 (1985).

[15] Medical expert fees generally run between $150 and $300 per hour. J. HORSLEY, TESTIFYING IN COURT 117 (1983).

duct, however, society benefits from an improved medical care system.[16]

This comment will identify the objectives of an ideal system for handling medical malpractice and explore the reasons why the present tort system has failed to achieve these objectives. Tort reforms, presently considered in many states,[17] will be analyzed within the framework of these objectives. These reforms are likely to prove somewhat effective in curbing runaway costs, but may not ultimately solve the underlying inefficiency, waste, and unfairness. Finally, this comment discusses no-fault as a solution to the malpractice problem, highlighting a proposal for a modified medical no-fault compensation system.[18]

II. OBJECTIVES OF AN IDEAL MEDICAL MALPRACTICE SOLUTION

Justice, compensation, and deterrence are the ostensible objectives of the present tort system.[19] Advocates of this system assert that its objectives are equally well accomplished in medical torts as they are in other personal injury situations.[20] They contend that negligent conduct can be ascertained, and that fault-based tort actions effectively deter substandard care by a profession that has failed to police itself.[21]

On the other hand, others point to the many problems involved in the use of the tort system for medical injuries. They argue that the present system leads to

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[16] When surveyed, physicians indicated that their responses to increased professional liability risk include maintaining more detailed medical records (56.7%), referring more cases to specialists (44.8%), prescribing additional diagnostic tests (40.8%), and spending more time with their patients (35.9%). AMERICAN MEDICAL ASSOCIATION, CENTER FOR HEALTH POLICY RESEARCH (1983).

[17] *See* AMA REPORT 2, *supra* note 1; TORT POLICY WORKING GROUP, *supra* note 1. The most strongly recommended tort reforms include pretrial screening panels, elimination of the collateral source rule, attorney fee regulation, statute of limitation changes, limitations on liability, and periodic payments of damages. The elimination of joint and several liability has also been advocated.

[18] Professor Jeffrey O'Connell, the "father" of auto no-fault insurance, has written extensively on applying the no-fault approach to other injuries including those arising out of medical care. *See generally* Moore & O'Connell, *Foreclosing Medical Malpractice Claims By Prompt Tender Of Economic Loss*, 44 LA. L. REV. 1267 (1984). His proposal for a modified medical no-fault compensation system was recently presented to Congress as the Alternative Medical Liability Act. *See infra* note 213.

[19] *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS §§ 46-52 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS].

[20] "Changing tort law . . . to give special status to any specific professional group or groups would be both inappropriate and unjustified." Silas, *supra* note 1, at 20.

[21] "[T]he medical profession wreaks its damage largely unpoliced . . . ." Neubauer, *supra* note 1, at 69. *See also Weeding Out The Incompetents: The Medical Profession Acts To Discipline Dangerous Doctors*, TIME, May 26, 1986, at 57.

unfair and unreasonable results.[22] Furthermore, they cite the tort system as the cause for the current widespread insurance liability crisis,[23] of which medical professional liability is but one example.

What should a solution to the malpractice problem ideally accomplish? Consideration of the following four goals appears essential for any acceptable solution to the malpractice problem: (1) just compensation for avoidable injuries; (2) deterrence of bad medical practice; (3) maintenance of insurance affordability and reduction of transaction costs; and (4) preservation of the doctor-patient trust relationship.

A. *Just Compensation for Avoidable Injuries*

Just compensation can be defined as compensation that is fair, reasonable, and prompt.[24] Fairness requires that all truly injured patients be compensated. Compensation should be reasonably predictable for the patient and for the calculation of insurance rates, and it should be commensurate to the extent of loss. Economic losses, including lost wages and medical expenses, can be reasonably calculated, and should clearly be compensable. Noneconomic losses or general damages, on the other hand, are not as susceptible to simple calculation.[25] Frequently, the focus in litigation is to elicit the sympathy of the jury to generate high awards.[26] Punitive damages are meant to punish the tortfeasor and to deter future wrongdoers from gross negligence and intentional torts.[27] Such conduct is perhaps better deterred by licensing board sanctions,[28] which are more

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[22] *See supra* note 10.

[23] *See* TORT POLICY WORKING GROUP, *supra* note 1; AMA REPORT, *supra* note 1.

[24] *See generally* O'Connell, *supra* note 12; Havighurst, *supra* note 12.

[25] Professor O'Connell stated:

> [T]ranslating a noneconomic loss such as pain into dollars is an extremely uncertain process fraught with large transaction costs. Highly emotional evidence and arguments are at a premium as both sides try to win the sympathies of the jurors. Michael F. Colley, a leading plaintiffs' lawyer, admits that 'juries vote based on their impressions, their feelings, their biases, and their prejudices, not the facts of the case. . . .' The result is often very dissimilar awards for very similar injuries.

O'Connell, *supra* note 14, at 899-90.

[26] "Nowhere in all of insurance does violation of the principle of indemnity lead to such rampant waste as does payment for pain and suffering." O'Connell, *supra* note 14, at 900. "In making arguments for pain and suffering awards, both sides attempt to win the jurors' sympathies with highly emotional evidence. A blind plaintiff will receive careful instruction to come to court with his seeing-eye dog and to dab at his eyes with a handkerchief." O'Connell, *Offers That Can't Be Refused: Foreclosure Of Personal Injury Claims By Defendants' Prompt Tender Of Claimants' Net Economic Losses*, 77 NW. U.L. REV. 589, 591 (1982) [hereinafter, *Offers That Can't Be Refused*].

[27] Punitive damages have not been awarded for medical malpractice in Hawaii.

[28] In Hawaii, the Regulated Industries Complaints Office (RICO) investigates complaints

experienced at understanding the complexities involved in a medical malpractice suit. Finally, an effective system must compensate its victims efficiently and without prolonged delay.[29]

A key inquiry is whether the present fault-based tort system accurately distinguishes between injuries arising out of negligent care and those that result from judgmental errors or from unavoidable complications. Medical practice is as much an art as it is a science, and professional judgment is pervasive in the clinical care of patients.[30] To be sure, there are examples of substandard care such as failing to diagnose a clinically apparent malignancy, or surgically removing the wrong limb or organ.[31] In many instances, however, medical judgment is an educated guess. Only in retrospect can the decision be vindicated or attacked. For example, a patient with headaches may harbor a brain tumor, but she is far more likely to be suffering from tension headaches or migraine.[32] Should a CAT scan[33] be performed to detect the unlikely tumor, even though such a test is expensive and carries with it a small risk of complications including death?[34] There is no established community "standard" for this clinical situation.[35] Should the physician forego the test if the best clinical judgment so dictates, or is the doctor better off ordering the test anyway to protect against a

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against doctors and other professionals, and submits their recommendations to the Board of Medical Examiners for action. HAW. REV. STAT. § 453-7.5 (1985).

[29] *See supra* note 13.

[30] "In the practice of medicine, the physician employs a discipline which seeks to utilize scientific methods and principles in the solution of its problems, but it is one in which, in the end, both science and art are wedded." G. THORN, R. ADAMS, E. BRAUNWALD, K. ISSELBACHER & R. PETERSDORF, HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1 (8th ed. 1977).

[31] A jury recently awarded $5.2 million to a patient whose normal non-cancerous kidney was mistakenly removed, requiring life-long dialysis treatment. *The Malpractice Blues, supra* note 1, at 60. For a compendium of cancer malpractice cases, see Annotation, 79 A.L.R. 3D 915 (1977).

[32] "About 8 to 10 per cent of the headache patients seen by the generalist are suffering from some type of vascular headache. Two percent of these headache patients have an organic cause for their headache and the remaining 90 percent are diagnosed as having muscle contraction or tension headache." R. RAKEL, CONN'S CURRENT THERAPY 732 (1985).

[33] "CAT" stands for computerized axial tomography, an advanced X-Ray technique which reconstructs a three-dimensional view of the body's organs. In 1986, a CAT scan of the brain cost $427 at Hawaii's Kuakini Medical Center.

[34] Adverse reactions to CAT scans average 5%. Four deaths occurred in a survey of 302,083 patients receiving contrast media (used in CAT scans and other radiographic procedures). Shehadi, *Contrast Media Adverse Reactions: Occurrence, Recurrence, and Distribution Pattern*, 143 RADIOLOGY 11 (1982).

[35] Headache is an extremely common disorder, and the excessive application of expensive and highly technical laboratory procedures to the diagnosis and treatment of benign head pain has been a substantial cause of unnecessary medical costs. Set against this truism is the fact that in some instances a timely CAT scan . . . can give lifesaving information . . . .

J. WYNGAARDEN & L. SMITH, CECIL TEXTBOOK OF MEDICINE 2060 (1985).

malpractice suit in the event a tumor actually is present?

Unexpected complications from drug therapy is another area where the current tort system does not distinguish between medical judgment and negligent conduct. For example, agranulocytosis[36] is a known side-effect of propylthiouracil, a drug effective in the treatment of an overactive thyroid.[37] If the risk of this potentially lethal complication, which is less than 0.5%,[38] was not specifically discussed with the patient, does the patient have a cause of action? The doctrine of informed consent[39] requires the physician to inform the patient of any proposed treatment, as well as alternatives to and material risks associated with the treatment, before obtaining consent to treat.[40] However, physicians commonly do not discuss all remote risks with their patients, especially those patients who may be unduly alarmed by the information. In *Nishi v. Hartwell*,[41] the Hawaii Supreme Court explicitly recognized this exception to the informed consent doctrine, holding that a physician may withhold disclosure of information regarding any untoward consequences of a treatment where full disclosure will be detrimental to the patient's total care and best interest.[42] Yet, it is unclear what constitutes a detriment to the patient's best interest.

Finally, suppose a patient suffers a post-operative infection after bowel surgery, subsequently dying from the complication. Such complications are known to occur in a small percentage of cases despite observance of the highest standard of care.[43] Still, the issue remains whether deviation from due care was

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[36] Agranulocytosis is defined as "an acute disease characterized by marked leukopenia and neutropenia [decrease of white blood cells] and with ulcerative lesions of the throat and other mucous membranes, of the gastrointestinal tract, and of the skin." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 48 (1965).

[37] Hyperthyroidism is usually treated by propylthiouracil, radioactive iodine, or surgery. E. MAZZAFERRI, ENDOCRINOLOGY 144 (1980).

[38] *Id.* at 145.

[39] Generally, the informed consent doctrine requires the treating physician to inform the patient of the diagnosis and proposed treatment or diagnostic procedure, the alternatives available, and the material risks associated with the procedure. Hawaii's informed consent statute is codified in HAW. REV. STAT. § 671-3(b) (1985). *See also* Note, Leyson v. Steurmann: *Is There Plain Error in Hawaii's Doctrine of Informed Consent*, 8 U. HAW. L. REV. 569 (1986).

[40] Does a complication rate of less than 0.5% constitute a "material risk" and therefore required to be discussed with the patient? Or is the risk too remote? In Scott v. Wilson, 396 S.W.2d 532 (Tex. Civ. App. 1965), *aff'd*, 412 S.W.2d 299 (Tex. 1967), a 1% risk of hearing loss required disclosure. *Cf.* Yeates v. Harms, 193 Kan. 320, 393 P.2d 982 (1964), *aff'd in part, rev'd in part*, 194 Kan. 695, 401 P.2d 659 (1965) (court ruled that a 1.5% chance of visual los was insufficient to require disclosure).

[41] 52 Haw. 188, 473 P.2d 116 (1970). In *Nishi*, a stroke occurred as a complication following an invasive x-ray procedure. The plaintiff sued for medical malpractice on the grounds that he was not informed of the risk.

[42] *Id.* at 191, 473 P.2d at 119.

[43] "The majority of wound infections are caused by only a relatively few surgical procedures;

responsible for the complication, an issue easily raised, but not as easily resolved.

The present system of deferring to the community standard[44] does not always work in practice. Experts define the standard differently depending on whether they are testifying for the plaintiff or the defendant.[45] In the meantime, a drawn-out malpractice claim with potential adverse publicity stigmatizes the physician irrespective of the final outcome of the claim. Perhaps that explains why less than one case in twenty ends up in court.[46] Fear of publicity and jury sympathy make out-of-court settlements the preferred solution.

The ease of imputing bad medical results to negligent behavior is therefore apparent, especially if hindsight is used unfairly to penalize competent decision-making. This concern among physicians, however, may be exaggerated, because most claims are adjudicated in favor of the physician, either in pre-trial panels,[47] or when litigated to verdict.[48]

The problem is no less acute for the victim of true malpractice who does not press her claim for compensation. This injured patient recovers nothing from the negligent wrongdoer. Many more cases of negligent medical care occur than are pursued for legal redress.[49] The present system ignores these victims with

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these infections are likely to occur when operations are long or require extensive resection, or when contamination is unavoidable." HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 767 (1977).

[44] PROSSER & KEETON ON TORTS, *supra* note 19, § 32, at 187. "The formula under which this usually is put to the jury is that the doctor must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing." *Id.*

[45] *Id.* at 188-89. Medical "experts" widely advertise their availability in litigation journals, rendering obsolete the accusation of a "conspiracy of silence" among doctors. A recent issue of the ABA Journal contained no fewer than 13 separate such ads. *See, e.g.*, 72 A.B.A. J. 94, 117, 119 (1986). The expert is asked to state, as a matter of reasonable medical probability, whether the standard of care has been breached. Expert testimony is necessary to sustain the plaintiff's case. *See* Devine v. Queen's Medical Center, 59 Haw. 50, 574 P.2d 1352 (1970); Phillips v. Queen's Medical Center, 1 Haw. App. 17, 643 P.2d 365 (1980).

[46] In 1984, only four malpractice lawsuits were litigated in Hawaii courts. One hundred twenty-three complaints were filed with the Medical Claims Conciliation Panel during that year. J. MARDFIN, *supra* note 2, at 14, 18.

[47] In Hawaii, of 453 claims heard by the Medical Claims Conciliation Panel from 1979-84, respondents were found liable in 109 claims (24%). *Id.* at 17. The following 26 states have pre-trial screening panels for medical malpractice claims: Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Virginia, and Wisconsin. Four other states, Nevada, North Dakota, Rhode Island, and Tennessee, have repealed their provisions for such screening panels. AMA REPORT 2, *supra* note 1, at 20-21.

[48] Where cases end up in trial, defendant verdicts generally outnumber plaintiff verdicts by more than 2 to 1. "75% of physicians who go to trial in Cook County [Illinois] are vindicated." AMA REPORT 1, *supra* note 1, at 20.

[49] A 1974 California study suggested that 0.79% of all hospitalized patients suffer adverse

just claims. Even those who recover must bear the substantial costs of litigation including the financial and emotional costs.[50]

At the same time, some malpractice awards appear to be excessive.[51] A significant portion of the damage award is for noneconomic losses such as pain and suffering, which some have argued represents an unquantifiable and easily inflated measure of injury.[52] These large awards, however, are usually reserved for catastrophic injuries.[53] Furthermore, the awards help pay the plaintiff's attorney's fees, and insurance data suggest that the tort system under-compensates rather than over-compensates large losses.[54]

Even for those wrongfully injured, compensation comes, if at all, after a long and frustrating delay. The injury may not be noticed immediately,[55] suit may not be filed promptly, and preliminary hearings may be mandated by law.[56] The adversary system of dispute resolution typically proceeds at a snail's pace. In one study, the delay for compensation for medical torts averaged seven years.[57] Too little for too many, too much for some, and too late for all?

B. *Deterrence of Bad Medical Practice*

The malpractice solution must at the same time operate to effectively deter wrongful conduct. A properly designed system must effectively deter negligent conduct by medical care providers, because medical injury prevention eventually reduces the cost of medical accidents, thereby leading to optimal economic efficiency.[58]

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outcomes arising out of medical misconduct. Only a minority of these cases are ever litigated. Mills, *Medical Insurance Feasibility Study—A Technical Summary*, 128 W.J. MED. 360 (1978).

[50] Contingency fees typically extract a third of the injured's award. In addition, plaintiff pays expert medical witnesses and court costs. *See supra* notes 14-15.

[51] TORT POLICY WORKING GROUP, *supra* note 1, at 40. Million dollar jury awards for medical malpractice rose from three in 1975 to 71 in 1984.

[52] *See supra* notes 25-26 and accompanying text.

[53] A recent settlement in Hawaii involved a five year old child who suffered a cardiac arrest and subsequent brain damage as she was about to undergo cardiac surgery for an atrial septal defect. Total settlement amount: $4.8 million. Gutierrez v. Semenza, Civil No. 70794 (Haw. 1st Cir. 1982), *cited in* Medical Malpractice: Verdicts, Settlements & Experts, Apr. 1986, at 4.

[54] Danzon, *supra* note 11, at 40. The author reports that awards rise less than in proportion to economic loss. However, errors in statistical analysis made it impossible to determine whether large losses are truly undercompensated.

[55] Surgical injuries are particularly apt to be discovered late such as a foreign body left behind in a body cavity.

[56] Screening panels are mandated by law in many states. *See supra* note 46. Hawaii's Medical Claims Conciliation Panel (MCCP) was first created in 1976. *See* HAW. REV. STAT. § 671-5(b) (Supp. 1984).

[57] *See supra* note 13.

[58] G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (3d ed. 1986);

According to Dean Calabresi, an optimally efficient accident prevention policy minimizes the total costs of injuries, including the resource and utility costs of the injuries themselves, the preventive costs, and transaction or administrative costs.[59] Market or general deterrence allows individuals to consider accident costs in choosing among activities. This postulates that individuals are adequately informed about the alternatives, which is usually not the case in the choice and acceptance of medical services. Thus, specific deterrence is needed.[60] This can take the form of governmental regulation or the traditional tort action in negligence. With reference to medical malpractice, however, Calabresi believes that the current malpractice law is ineffective. Instead, Calabresi favors the establishment of a compensation fund to replace the malpractice suit.[61]

Society at large has generally rejected the notion that the medical profession can be trusted to discipline its members.[62] State-operated professional regulatory boards have therefore been entrusted with the job of overseeing physician licensure and discipline,[63] but their success in maintaining competency has been challenged.[64] For example, in 1982, 14 states reported less than one disciplinary action per 1,000 physicians.[65] Thus, many assert that the tort system serves as an additional and necessary mechanism to deter physician malpractice.

A medical malpractice suit, or even the threat of one, undoubtedly instils fear, or at least exasperation in the medical practitioner.[66] Even though most

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Posner, *A Theory Of Negligence*, 1 J. LEGAL STUD. 29 (1972). *See also* Schwartz, *Doctors, Damages and Deterrence*, 298 NEW ENG. J. MED. 1282 (1978).

[59] G. CALABRESI, *supra* note 58. *See also* P. DANZON, *supra* note 11, at 10.

[60] G. CALABRESI, *supra* note 58, at 560-65.

[61] Dean Calabresi professed an aversion to the current state of malpractice law because "it fails utterly to achieve what are its only sensible justifications: a) to induce better medical care, and b) to compensate efficiently those who suffer severe medical maloccurrences. . . ." He suggested establishment of a compensation fund that would take the place of the malpractice suit. "We can only get out of our mess by admitting what is hard to admit, that lots of errors and maloccurrences will occur, that as to all but the grossest, there isn't anything we can do, and that the best we can do is alleviate the suffering of those most severly injured."

Medicine vs. Law: A Deans' Dialogue, YALE ALUMNI MAG., 13 (Feb. 1986).

[62] Feinstein, *The Ethics Of Professional Regulation*, 312 NEW ENG. J. MED. 801 (1985). Dr. Feinstein underscores the prevailing societal view that the medical profession cannot be trusted to discipline itself. Although the overwhelming majority of physicians are competent, the few who are not should be identified and disciplined. Dr. Feinstein believes that medical disciplinary meetings should be held in public view to dispel myths about cover-up, and that non-physician members should serve on state medical boards to offer their perspective on the disciplinary process and to allay public anxiety.

[63] *Id. See also supra* note 28.

[64] Feinstein, *supra* note 62, at 802.

[65] *Id.* at 803.

[66] Physician fear of malpractice suits borders on paranoia:

Even the doctor who has never been sued is ever conscious of the sword of Damocles

cases are covered by malpractice insurance and the tortfeasor incurs no direct economic loss, there is nonetheless the matter of loss of self-esteem, adverse publicity, loss of practice time and income, guilt, depression and the threat of discipline by peers and licensure bodies.[67] In a few instances, there is actual exposure of personal assets, as where there is no insurance coverage, where the damages sought exceed the coverage, or where punitive damages are involved. Physician responses to increased professional liability risk typically include actions that can be construed as providing better medical care, such as spending more time with their patients and making more timely referrals to specialists.[68]

On the other hand, there are factors that detract from effective deterrence. First, the insurance burden of substandard practice is evenly shared by all doctors in a given specialty. Unlike auto insurance, there is usually no experience rating for medical professional liability insurance.[69] The careful doctor derives no financial rebate from her insurance carrier; the careless doctor pays no surcharge. Second, the stigma that attaches to a malpractice suit is attenuated by widespread physician belief that most malpractice claims are without merit.[70] Certain high-risk specialties such as obstetrics and orthopedics experience a disproportionate number of claims.[71] Furthermore, "one in five physicians now faces the prospect of a claim or suit today."[72] Such overinclusion may explain the cynical attitude of doctors toward the probative value of malpractice claims to establish medical incompetence. At the same time, many acts of mal-

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hanging over his head. . . . "As a physician, I live in an aura of fear—fear of suit. Fear contributes to hostility and rarely contributes to constructive action . . . ." [I]n my opinion, malpractice litigation is not the best incentive to improvement. It places medicine in an adversary position, and hostilities too often result . . . .

Sokol, *The Current Status Of Medical Malpractice Countersuits*, 10 AM. J.L. & MED. 439, 440-41 (1985) (quoting SECRETARY'S REPORT, *supra* note 1, at 20.)

[67] Significant psychic trauma results from a malpractice lawsuit. Serious symptoms include depression and suicide. *See* AMA REPORT 1, *supra* note 1, at 18-20; S. CHARLES & E. KENNEDY, DEFENDANT: A PSYCHIATRIST ON TRIAL FOR MEDICAL MALPRACTICE (1985). "Any suit, even though frivolous, costs the defendant money, time, reputation, and peace of mind. It's the fact that suit was threatened or brought, rather than the jury's decision or the amount of the settlement, that concerns us most." R. POLLACK, *supra* note 8, at XIII.

[68] *See supra* note 16.

[69] Schwartz, *supra* note 58, at 1287; SECRETARY'S REPORT *supra* note 1, at 42-44.

[70] In Hawaii, many malpractice claims are without merit. Hawaii's Medical Claims Conciliation Panel's (MCCP) found liability in only 24% of 453 claims filed during 1979-84. J. MARDFIN, *supra* note 2, at 17.

[71] *Id.* at iii.

[72] AMA REPORT 1, *supra* note 1, at 10. In 1985, 155 claims were filed with the MCCP in Hawaii which has about 2,000 physicians. Typically, multiple defendants are named in each claim. J. MARDFIN, *supra* note 2, at 13-16. These additional defendants include consulting specialists, nurses, and the hospitals.

feasance go unreported.[73] Because filing of suits and their disposition turn on factors other than physician negligence, errors of both overinclusion and underinclusion make malpractice claims a poor basis for professional discipline.

One also needs to consider the adverse effects of over-deterrence. Defensive medicine is one commonly cited example,[74] practiced not for proper medical reasons, but rather for medico-legal "protection."[75] Proponents of the present system contend that defensive medicine increases the quality of medical care. They assert that any test with the slightest utility should be carried out. This conclusion ignores patient cost, adverse complications of testing, and the need for proper medical judgment.[76]

Another undisputed byproduct of over-deterrence is physician frustration. Some retire early to escape the "malpractice roulette,"[77] while others switch to less risky specialties or limit high-risk practice.[78] A typical example is that of family practitioners who give up obstetric deliveries because of oppressive malpractice insurance premiums.[79] The loss to society may be substantial; in certain locales, especially rural areas, the net result may be the total loss of certain medical services.[80] Regrettably, the tort mechanism for controlling substandard medical practice has, instead, driven competent and experienced doctors away from geographic and medical specialty areas in need of their expertise.

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[73] Mills, *supra* note 49.

[74] *See supra* note 6.

[75] "A U.S. physician will order $500 worth of tests that will give 98 percent diagnostic certainty rather than $50 worth of tests that will yield 97 percent certainty." Neubauer, *supra* note 1, at 67. Some commentators argue that the estimated $15.1 billion cost of defensive medicine is grossly exaggerated. *See, e.g.*, Mills, *Information Please*, 6 J. LEGAL MED. 255, 257 (1985). *But see* Wertman, Sostrin, Pavlova & Lundberg, *Why Do Physicians Order Laboratory Tests?*, 243 J. A.M.A. 2080 (1980).

[76] All tests carry a finite risk of an adverse effect. Proper medical decisionmaking requires that a test or treatment be ordered when medically appropriate. Unfortunately, cost-benefit analysis and medico-legal considerations have crept into the definition of appropriateness. *See generally* AMA REPORT 1, *supra* note 1, at 16; Levey, *supra* note 7.

[77] Thirty-three percent of doctors thought about early retirement after being sued. AMA REPORT 1, *supra* note 1, at 20. A recent survey of Hawaii's physicians found 190 have taken or are considering taking early retirement, or are considering/have shifted practice specialty because of malpractice concerns. Haw. Med. Asso. Newsletter, Dec. 1985, at 2.

[78] Two hundred and seven physicians in Hawaii have limited or are considering limiting high risk practice. Haw. Med. Asso. Newsletter, Dec. 1985, at 2.

[79] Family practitioners on Molokai recently stopped delivering babies because their malpractice insurance premiums rose from $14,000 to $22,537 per year. Hawaii Medical Association, Legislative Roundup, Feb. 21, 1985 at 3.

[80] Molokai, for example, no longer has medical obstetric services. The high insurance cost has simply forced family practitioners to give up that part of their practice since there are only an average of 70 births per year on Molokai. A Honolulu obstetrician visits Molokai once a week, and many women are flying to Honolulu for their deliveries. *Id.*

C. *Maintenance of Insurance Affordability and Reduction of Transaction Costs*

Any solution to the malpractice problem should be affordable and should return to the injured the bulk of the insurance premium dollar with minimal transaction costs.

Premiums written for malpractice liability reached $1.57 billion in 1983.[81] Losses were $2.0 billion for that year, surging from $817 million in 1975, a 145% increase.[82] Malpractice insurance ultimately costs the patient $3-4 of each office visit, and $5 per hospital day.[83] The average insurance premium paid by doctors in 1984 was $8,400; this compares with $4,700 in 1976.[84] The premiums paid by a high risk provider such as an obstetrician or a neurosurgeon are particularly shocking; Massachusetts obstetricians, for example, face an average $51,800 bill this year.[85] The reinsurance bill is also staggering. For its 350 physicians, the Hawaii Physicians' Indemnity Plan is required to pay $2.25 million for $1 million of reinsurance with a $500,000 deductible.[86]

The malpractice crisis stems from a problem of injuries, rather than of claims.[87] According to a 1974 California study,[88] one in 126 hospital admissions resulted in an injury believed by medico-legal specialists to arise from medical negligence.[89] Statistical extrapolation from other data suggests that only one in ten of these incidents led to a claim.[90] These results indicate that the cost of injuries due to malpractice far exceeds the cost of claims.[91] Therefore, the problem may not be patient litigiousness or insurance company or lawyer greed.[92]

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[81] AMA REPORT 1, *supra* note 1, at 7.

[82] *Id.* at 8.

[83] S.B. 175, 98th Cong., 2d Sess., 175 CONG. REC. § 290-4 (1985). The bill was introduced into Congress by Senator Inouye under the Health Care Protection Act of 1985. In Hawaii, malpractice costs translate into an increase of nearly $10 per patient day. Testimony by Stan Snodgrass, President, Hospital Association of Hawaii, before the House Judiciary Committee, in Honolulu, Haw. (Feb. 26, 1986).

[84] *The Malpractice Blues*, *supra* note 1, at 60.

[85] *Id.* As a result of escalating premiums, 70% of Massachusetts obstetricians are planning to stop taking new patients. Haw. Med. Ass. Newsletter, Feb. 1986 at 3.

[86] Testimony of Norman Slaustas, Executive Vice President of Hawaii's Physicians' Indemnity Plan, before the Senate Committee on Health, in Honolulu, Haw. (Feb. 3, 1986) (Hawaii's Physicians' Indemnity Plan insures some 350 physicians).

[87] Danzon, *supra* note 11, at 18.

[88] *Id.* at 19. *See also* Mills, *supra* note 49.

[89] What constitutes malpractice is not always easy to define. A medico-legal "expert's" characterization of a maloccurrence as malpractice may prove erroneous. The majority of cases of alleged malpractice are decided otherwise by screening panels or at trial. *See supra* notes 48 & 49.

[90] Danzon, *supra* note 11, at 24.

[91] *Id.* at 25.

[92] *Id.* at 29.

Despite the high cost of malpractice insurance, the present system returns as little as 28 cents of every premium dollar to the injured victim.[93] The insurance carriers lament that underwriting medical liability insurance is unpredictable and unprofitable, and many have withdrawn from the market.[94] However, critics of the insurance industry suggest that the rate hikes resulted not from higher claims, but from poor premium investment return because of low prevailing interest rates.[95] Although some of the evidence may support this view, they fail to explain why many commercial carriers are getting out of the malpractice business, to be replaced by doctor-run nonprofit mutual companies, whose rates have also risen dramatically.[96]

Some defense and plaintiff attorneys reap handsome monetary rewards from malpractice cases. The defense bar charges by the hour, which may act as a disincentive to quick resolution of the dispute. Typically, malpractice suits are complex, requiring hundreds of hours of legal work.[97] The plaintiff's attorney operates on the contingency fee structure, usually accepting a third of the

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[93] Moore & O'Connell, *Foreclosing Medical Malpractice Claims By Prompt Tender Of Economic Loss*, 44 LA. L. REV. 1267, 1270 (1984). "It is estimated that the medical malpractice tort system returns at most only twenty-eight cents on the premium dollar to injured patients, of which only 12.5 cents reimburses the victim for pecuniary losses not compensated by other sources." Other estimates are slightly higher. *See* Schwartz, *supra* note 58, at 1282 (35 cents on the dollar); Danzon, *supra* note 11, at 16 (40 cents on the dollar).

[94] Hawaii, for example, no longer has a commercial carrier to underwrite individual physician malpractice liability. Argonaut Insurance Companies withdrew their services from the medical community in 1984. Hawaii's medical professional liability needs are being provided by the Medical Insurance Exchange Of California (MIEC) and the Hawaii Association Of Physicians For Indemnification (HAPI). Both are doctor-owned non-profit groups. Physicians at the Straub Clinic are still collectively insured by a commercial carrier.

[95] "What we are witnessing is a manufactured crisis intended to bloat insurer profits and reduce victims' rights." Perlman, *Don't Confuse Me With The Facts*, 22 TRIAL 5 (1986). "By manufacturing a malpractice 'crisis,' the medical and insurance industries have obfuscated their culpability for increased costs and at the same time have succeeded in setting back medical consumer tort remedies." Neubauer, *supra* note 1, at 68

[96] The National Insurance Consumer Organization, among others, blames the insurance industry for the liability crisis. Its calculations purport to show that the industry's 6% rate of return in 1985 was too low, and that this figure could have been boosted to 13% by a mere 3% increase in premiums—hardly a justification for its widespread policy cancellations and mammoth price increases. Testimony by Robert Hunter, President, National Insurance Consumer Organization, before the Hawaii State Legislature, in Honolulu, Haw. (Feb. 19, 1986).

Hawaii's internists paid $1041 in annual premiums in 1975; this figure increased by 469% to reach $5924 in 1985. Comparable figures for an obstetrician are $4498 and $42,783 respectively, a 851% increase. Most of Hawaii's physicians are insured by a non-profit doctor-owned mutual company, the Medical Insurance Exchange of California (MIEC), there being no commercial carrier underwriting malpractice insurance for private practitioners. *See supra* note 94.

[97] At $100—$150 per hour, defense attorneys' bills typically run in the tens of thousands per malpractice case. The costs easily double or triple if the case goes to trial.

award.[98] Both defense and plaintiff's attorneys are required to use expert medical witnesses to establish the standard of care alleged to have been breached.[99] These experts take opposing viewpoints regarding the defendant-physician's conduct, and are handsomely remunerated for their efforts. In many cases, several experts are employed by each party. Their individual bills run in the thousands of dollars, adding substantially to the cost of medical negligence litigation.[100]

D. Preservation of the Doctor-Patient Trust Relationship

It is well established that the patient must trust her doctor for maximum therapeutic benefit.[101] An adversarial relationship between a doctor and her patient is inimical to the healing process. Mutual trust is needed to elicit an accurate medical history and to perform a proper physical examination. Medical advice for testing and treatment has to be freely given and accepted in an atmosphere of confidence. Suspicion, hesitancy, or confrontation can poison the relationship irreversibly.[102]

A significant part of the doctor's healing powers comes from the faith of the patient she treats. Her power to reassure and convince is an integral part of her therapeutic armamentarium.[103] Suspicion destroys this doctor-patient relationship. The doctor must inform her patient of diagnostic and treatment plans; this is embodied in the doctrine of informed consent, and is codified in many

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[98] If the plaintiff does not prevail, the attorney gets nothing for her efforts. Part of the justification for the plaintiff's lawyer's large contingency fees is to offset these losses. *See generally* Comment, *Medical Malpractice And Contingency Fee Controls: Is The Prescription Curing The Crisis Or Killing The Patient?*, 19 LOY. L.A.L. REV. 623 (1985); Reames, *Contingency Fees: Victim Or Contributing Cause Of Medical Malpractice Reform Acts?*, 62 CHI.[-]KENT L. REV. 271 (1985).

[99] An expert witness is usually needed to establish the customary standard of care, except in cases where res ipsa loquitur is invoked. PROSSER & KEETON ON TORTS, *supra* note 19, § 39, at 256-57. In Hawaii, this proposition was enunciated in Lyu v. Shinn, 40 Haw. 198 (1953); Cozine v. Hawaii Catamaran Ltd., 49 Haw. 77, 412 P.2d 669 (1966); Winter v. Scherman, 57 Haw. 279, 554 P.2d 1137 (1976).

[100] Expert medical witnesses typically charge between $150—$300 per hour for time expended in reviewing records, travel, research, attorney discussions, and testifying at depositions and in court. Horsely, *supra* note 15.

[101] "In the absence of a sense of trust and confidence on the part of the patient, the effectiveness of therapeutic measures is diminished." HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, *supra* note 30, at 6.

[102] Unfortunately, adversariness is increasingly evident in doctor-patient encounters. "An atmosphere of distrust between the laity and the medical profession is symptomatic of the changing attitudes and expectations of today's society." R. POLLACK, *supra* note 8, at 3.

[103] "In many instances, when there is confidence in the physician, reassurance alone suffices and is all that is needed." HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, *supra* note 30, at 6.

jurisdictions.[104] The doctor should seek the patient's understanding and cooperation, and assuage the patient's fears.[105] While the treatment goals sought by both patient and doctor are usually identical, the doctor must be allowed her clinical judgment in decisionmaking. An ideal malpractice solution should jealously guard against the erosion of this implicit trust relationship which is essential for the effective delivery of medical care.[106]

The threat of litigation adversely affects physician satisfaction in their work. Physicians may feel hurt and betrayed when they are subjected to a law suit.[107] Their attitudes may change, and some may become less involved with and increasingly distant from their patients.[108] Professor Sara Charles, a psychiatrist who has studied the emotional effects of malpractice complaints on doctors,[109] has concluded that "for many physicians, one of the greatest sources of satisfaction in their work—the feeling that they are helping people—has been compromised by the present climate."[110]

The adversarial nature of the tort system is not well-suited to settling doctor-patient disputes. Because it may be impossible to evaluate and assess fault in certain instances, the physician commonly perceives herself as a victim of hindsight, unjustifiably exposed to adverse publicity.[111] Initial depression gives way to anger and disappointment over what she perceives as patient ingratitude and greed.[112] A doctor's attitude towards and rapport with subsequent patients may

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[104] *See supra* notes 39-42 and accompanying text.

[105] *See supra* note 103.

[106] Depersonalization of treatment is properly blamed for much of the loss of doctor-patient rapport.

> This development is in part due to the increased specialization of medicine and the decreased amount of time spent with patients. . . . How should this affect your treatment? It means being less greedy. You must make sure that you allot enough time to each patient. Many physicians today simply overload themselves. If a physician tells me that he sees forty patients a day, I know he is breeding a potential malpractice suit.

W. ALTON, MALPRACTICE: A TRIAL LAWYER'S ADVICE FOR PHYSICIANS 47 (1977).

[107] Charles, *Why Are Doctors So Upset?*, MED. MALPRACTICE PREVENTION 10 (July/Aug., 1986).

[108] *Id.*

[109] *See* S. CHARLES & E. KENNEDY, *supra* note 67.

[110] *See supra* note 107.

[111] "It may be hard to believe, but we are a frightened profession. The doctor feels put upon. He feels nude on the corner of the Main Street of life . . . ." SECRETARY'S REPORT, *supra* note 1, at 20 (quoting Dr. George Northup).

[112] One study noted:

> More than one-third [of 154 physicians surveyed] admitted to four or five symptoms suggestive of a possible major depressive disorder after the suit and 8% noted the onset of a physical illness. . . . 'It is the litigation process itself that is agonizing and stressful. . . . People have to realize that suing your doctor is not an event that has no repercussions.'

AMA REPORT 1, *supra* note 1, at 20.

suffer from such an unhappy encounter. This erosion of the doctor-patient trust relationship extends to those physicians not directly involved in litigation. Doctors, in general, are increasingly adopting a defensive posture towards their patients out of misplaced or exaggerated fear.[113] Irrespective of whether such behavior is justified, the fact remains that the present fault-based tort system threatens destruction of the traditional doctor-patient relationship.

III. TORT REFORMS: WILL THEY WORK?

Under the present tort system, the injured are compensated randomly and unfairly, prompting some commentators to characterize it as a "lottery."[114] Moreover, the lack of affordable medical malpractice insurance has reached crisis proportions.[115] The American Medical Association has taken the lead in a "crusade" for tort reform to correct the perceived inequities of the system,[116] and many states are currently considering the adoption of these reform proposals.[117] Recently, the Tort Policy Working Group established by the U.S. Attorney General has released its findings in strong support of tort reform.[118] It concluded that "while there are a number of factors underlying the insurance availability/affordability crisis, tort law is a major cause . . . ."[119] The Group recommended eight reforms that should significantly alleviate the crisis.[120]

This section analyzes the fairness and effectiveness of some of the more "popular" tort reforms. A measure of relief will probably result from these reforms, because they serve to restrict the size of the damage awards. These reforms, however, fail to address the fundamentally unjust manner in which victims of medical injuries are compensated. Restricting reforms only to medical torts may also be unjustified. The American Bar Association's Committee on Medical Professional Liability recently announced its opposition to tort reform, believing that "changing tort law rules and procedures to give special status to any spe-

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[113] Doctors "now have a new service to identify sue-happy plaintiffs. It is Physicians Alert . . . originally conceived by a lawyer . . . . The service enables doctors to learn if a potential patient has a history as a plaintiff in tort litigation." Blodgett, *supra* note 1, at 19.

[114] *See* Moore & O'Connell, *supra* note 93, at 1269.

[115] AMA REPORT 1, *supra* note 1.

[116] AMA REPORT 2, *supra* note 1.

[117] Hawaii is no exception. No fewer than 117 tort reform bills were introduced to the 1986 Hawaii Legislature, which went into Special Session to deal with the tort reform issue. *See infra* note 161.

[118] TORT POLICY WORKING GROUP, *supra* note 1.

[119] *Id.* at 5.

[120] *Id.* at 4. The eight reforms that were recommended were: (1) retain the fault-based standard, (2) base causation on credible evidence, (3) eliminate joint and several liability, (4) limit non-economic damages, (5) provide for periodic payments, (6) reduce payments from collateral sources, (7) limit contingency fees, and (8) encourage alternative dispute resolution.

cific professional group or groups would be both inappropriate and unjustified."[121]

A. Caps on Noneconomic Losses

This proposal limits the amount recoverable for noneconomic losses such as pain and suffering, but allows for full recovery of economic damages. In 1975, the California legislature enacted a $250,000 cap on noneconomic loss; this statute has withstood constitutional challenge.[122] The rationale behind this proposal is to provide some predictability to the amount of damages that can be awarded. Noneconomic damages are difficult to quantify, and jury sympathy may result in unrealistically high payments.[123] A 1977 study by the American Bar Association opposed limiting economic losses, but was neutral regarding limiting noneconomic damages.[124] In contrast, the Tort Policy Working Group recommends restricting noneconomic losses to $100,000.[125] Recent data indicate that this measure has been successful in reducing skyrocketing damage awards. A Rand Corporation study estimated that California's noneconomic loss cap reduced claim severity by 19% within two years.[126]

The plaintiffs' bar, however, opposes limiting economic damages. They argue, correctly, that such limits unfairly discriminate against the victim with severe injuries such as the quadriplegic. In the final analysis, it seems a matter of social policy whether pain and suffering is compensable and to what extent. It should also be noted that in the worker's compensation scheme, marked

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[121] Silas, *supra* note 1. The ABA's recommendations on medical professional liability were adopted by its House of Delegates on Feb. 11, 1986. *See* American Bar Association, Special Committee On Medical Professional Liability, Report to the House of Delegates. "Simply put, this committee believes that the medical profession, in seeking changes in the tort law system, has shown a willingness to trade away the rights of individuals in the hope of easing a perceived burden on itself." *Id.* at 43-44.

[122] Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *cert. denied*, 106 S. Ct. 214 (1985) (provisions of Medical Injury Compensation Reform Act which limit noneconomic damages in medical malpractice cases to $250,000 and which modified traditional collateral source rule in litigation are not unconstitutional); Roa v. Lodi Medical Group, 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985) (statute on restriction of attorney's fees held not unconsitutional as denial of due process or violation of equal protection).

[123] O'Connell, *supra* note 14. "Jurors will award substantially less for a seriously injured back or other injury they cannot see, than for a more visually striking injury such as extensive scarring." *Id.* at 900.

[124] AMERICAN BAR ASSOCIATION, LEGAL TOPICS RELATING TO MEDICAL MALPRACTICE, submitted to U.S. Department of Health, Education and Welfare, Jan. 1977, at iv [hereinafter ABA STUDY].

[125] TORT POLICY WORKING GROUP, *supra* note 1, at 66-69.

[126] *An Overview Of The First Five Program Years*, INST. FOR CIV. JUST., RAND CORP., Apr. 1980-Mar. 1985, at 45 [hereinafter RAND STUDY].

restriction of noneconomic payments exists without evoking widespread complaints of unfairness.[127]

B. *Abrogation of Joint and Several Liability*

Under the doctrine of joint and several liability, every defendant who is determined to be a legal cause of plaintiff's injury may be held responsible for the entire damage award in the event that other defendants cannot be joined or are unable to pay for their proportionate share of fault.[128] Opponents of this rule argue that it is unfair for a defendant to pay more than a proportionate share of the damages. They assert that the rule encourages the plaintiff to seek a "deep pocket" defendant irrespective of how minimal that defendant's liability may be.[129]

Supporters of the joint and several liability doctrine contend that it is fairer for the tortfeasor to fully compensate the innocent victim irrespective of the degree of fault than for the victim to be undercompensated.[130] They further emphasize that the minimally negligent tortfeasor is no less a but-for cause of the injury, and therefore the victim should be entitled to full compensation.[131]

The American Medical Association is silent on the issue of joint and several liability.[132] The Tort Policy Working Group, on the other hand, has recommended the doctrine's abrogation, except in the limited circumstance where the plaintiff can demonstrate that the defendants have actually acted in concert to cause plaintiff's injury.[133] Because of the inequities involved in the application

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[127] Worker's compensation benefits are awarded in accordance with predesignated schedules. The amounts allowed are considerably less than traditional tort recoveries. Hawaii's workers compensation laws are codified at HAW. REV. STAT. ch. 386 (1976).

[128] *See* Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413 (1937). *See also* Kendro, *The 1% Law*, 44 HAW. MED. ASSO. J. 248 (1985).

[129] In medical malpractice, the deep pocket is invariably the hospital, which explains why Hawaii hospitals have recently required physicians to carry liability insurance before granting hospital medical staff privileges.

[130] *See* American Motorcycle Asso. v. Superior Court, 20 Cal. 3d 589, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). The term "the 1% law" has been used to describe this phenomenon. Kendro, *supra* note 128. Previously, in Hawaii, a 1% liable co-defendant could have been responsible for the entire damage award. Indeed, even if the plaintiff was 50% liable, the 1% co-defendant was liable for the remaining 50% under Hawaii tort law of comparative negligence. Only if the agggregate negligence of all defendants fell below 50% was there no liability. HAW. REV. STAT. § 663-31 (1976). See *infra* text accompanying note 166 for Hawaii's recently enacted law on joint and several liability.

[131] *See* Comment, *Abrogation of Joint and Several Liability: Should Missouri Be Next in Line?*, 52 UMKC L. REV. 72 (1983).

[132] AMA REPORT 3, *supra* note 1.

[133] TORT POLICY WORKING GROUP, *supra* note 1, at 65. *But see* AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT OF THE TASK FORCE ON LITIGATION ISSUES 18 (1986).

of joint and several liability, a limitation on the common law doctrine is appropriate.[134] This would confer predictability and stability on the malpractice insurance industry, which in turn should lead to moderation of the premium spiral.[135]

C. Abolition of the Collateral Source Rule

Under this rule, if an injured person receives compensation for her injuries from a source wholly independent of the tortfeasor, the payment should not be deducted from the tortfeasor.[136] By making evidence of collateral payments inadmissible, the law creates the situation where the injured victim may be over-compensated.[137] Abolition of the rule would reduce the damages by an amount equal to collateral payments derived from health and disability insurance and other sources.

Proponents of the collateral source rule contend that a victim should not be penalized for prudence in buying insurance protection. Additionally, subrogation rights already require the victim to reimburse health insurers in the event of tort recovery.

Collateral payments should be subtracted from jury awards to prevent double dipping, because subrogation is not a significant consideration in many tort actions, especially medical malpractice cases.[138] To support dual insurance coverage for the same injury is to endorse an inefficient system with duplicative premiums.[139] Some commentators have proposed abolishing subrogation to avoid duplicative premium payments and to lower transaction costs.[140] Initial studies indicate that the elimination of the collateral source rule significantly reduces damage awards. In California, the Rand Corporation estimated that abolition of this rule reduced awards by as much as 50%.[141]

D. Regulation of Attorney Contingency Fees

The proposal to regulate attorney fees does not eliminate the contingency fee structure, but rather seeks to reduce, on a sliding scale basis, the amounts attor-

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[134] TORT POLICY WORKING GROUP, *supra* note 1, at 65.

[135] See *infra* text accompanying note 166 for the recent amendment to the application of joint and several liability in Hawaii.

[136] Helfend v. Southern California Rapid Transit Dist., 2 Cal. 3d 1, 465 P.2d 61, 84 Cal. Rptr. 173 (1970).

[137] "This procedure amounts to coining money!" O'Connell, *supra* note 14, at 901.

[138] TORT POLICY WORKING GROUP, *supra* note 1, at 71.

[139] O'Connell, *Offers That Cannot Be Refused*, *supra* note 26, at 593.

[140] *See supra* notes 138 & 139.

[141] RAND STUDY, *supra* note 126.

neys would collect.[142] This reform will return to the victim a larger portion of the damage award or reduce the actual total amount awarded.

The plaintiffs' bar argues that such regulation is unwarranted and intrusive, and deprives the poor man of his "key to the courthouse." They assert that removal of the contingency system is ill-advised, as it robs the poor of litigating a meritorious claim.[143] Furthermore, the plaintiffs' bar contends that regulation of contingency fees may make it unprofitable to sue, and therefore, jeopardizes the victim's chances of selecting and obtaining competent counsel.[144]

Is it reasonable for a plaintiff's attorney to regularly take a third or more of the victim's award as payment? If so, a $3 million award for a claimant wrongfully injured would net the lawyer $1 million in fees.[145] Under the present system, a jury that ignores the contingency fee system may inadequately compensate the injured victim. In most situations, the attorney's share is used by the jury to escalate the compensation amount. The inefficiency caused by the present system indicates that some regulation of contingency fees is required to curtail such windfall profits.

E. Other Tort Reforms

Other reform proposals include: (1) mandatory structured payments in which periodic rather than lump-sum payments are made; (2) penalties for the filing of frivolous suits; (3) modified statutes of limitations, reducing the time interval during which suit can be brought for injuries to infants and minors; (4) stricter standards for expert witnesses; and (5) affidavits of non-involvment where the physician can file an affidavit denying involvement, and the plaintiff must present evidence at a hearing that establishes a reasonable basis for instituting an action against the individual doctor.[146] One additional proposal, already in

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[142] *See* AMA REPORT 3, *supra* note 1, at 13; TORT POLICY WORKING GROUP, *supra* note 1, at 72. The following sliding scale contingency fee schedule was recommended by the Tort Policy Working Group: 25% for the first $100,000, 20% for the next $100,000, 15% for the next $100,000, and 10% for the remainder. Thus, for an award of $1,000,000, plaintiff's attorney would receive $130,000 rather than $333,333, assuming a one-third contingency fee.

[143] Perlman, *supra* note 95, at 5. The author debunks the myth that the contingency fee brings more non-meritorious suits into courtrooms and gives deserving plaintiffs less and lawyers more.

[144] Schwartz, *supra* note 58, at 1288.

[145] The Tort Policy Working Group believes that as the average plaintiff's verdict has increased in recent years, such high contingency percentages become difficult to justify. "Increasingly, there are indications of extraordinary abuses where attorneys receive fees in the hundreds of thousands of dollars for limited work." TORT POLICY WORKING GROUP, *supra* note 1, at 72.

[146] The AMA REPORT notes:

> Not infrequently, plaintiffs name everyone remotely connected with the defendant's allegedly negligent treatment when filing a lawsuit. . . . To eliminate this situation, any de-

place in many states, is the mandatory pre-trial screening panel.[147] The objective of such a panel is to weed out at an early stage nonmeritorious, frivolous or nuisance suits. Some of these panels have been found unconstitutional.[148] Although the panels are generally popular among physicians, at least in Hawaii,[149] critics contend that they merely prolong the litigation process, increasing costs without substantial corresponding benefit.[150]

F. California's Medical Injury Compensation Reform Act

Many of the above reforms were passed by the California legislature in 1975 under the Medical Injury Compensation Reform Act (MICRA).[151] MICRA limits noneconomic recovery in medical negligence cases to $250,000 and permits juries to be informed of collateral source payments. Attorney fees are placed on a sliding scale so that only a 10% contingency fee for awards over $200,000 is allowed. The California Supreme Court has recently ruled that these reforms are constitutional since they are rationally related to the legitimate legislative goal of reducing medical costs.[152]

The effect of MICRA is significant. California hospitals are due for a rebate

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fendant should be able to file an affidavit denying involvement in the allegedly negligent care. A hearing would be held shortly after the affidavit is filed, during which the plaintiff must present evidence that establishes a reasonable basis for the defendant being named. AMA REPORT 1, *supra* note 1, at 14.

[147] For the states which have such screening panels, see AMA REPORT, *supra* note 1. *See also* HAW. REV. STAT. § 671-5(b) (Supp. 1984).

[148] *See generally* Note, *Medical Malpractice Screening Panels: A Judicial Evaluation Of Their Practical Effect*, 42 U. PITT. L. REV. 939 (1981). In Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980), the Pennsylvania Supreme Court found an inefficiently run panel to be an undue burden upon the right to a jury trial.

[149] Ninety-three percent of doctors polled in Hawaii felt that a mandatory pre-suit hearing was helpful in resolving malpractice complaints. J. MARDFIN, *supra* note 2, at 33.

[150] Hawaii's panel findings are non-binding and inadmissible at trial. The statute allows up to 18 months for a hearing, and suit can only be filed after a panel decision has been rendered. HAW. REV. STAT. § 671-11-16 (1976).

[151] MICRA was the most comprehensive legislative package enacted into law during the 1975 malpractice crisis. Medical Injury Compensation Reform Act of 1975, Cal. A.B. LXX, 1975-76 2d Ex. Sess., ch. 1,2 Cal. Stat. 3949 (1975). Modification of the collateral source rule is codified under CAL. CIV. CODE § 3333.1 (West Supp. 1986), and noneconomic cap under CAL. CIV. CODE § 3333.2 (West Supp. 1986). Periodic payments are codified under CAL. CODE CIV. PRO. § 667.7 (West 1980), and attorney contingency fees under CAL. BUS. & PROF. CODE 6146 (West Supp. 1986). The joint tortfeasor rule was not modified under MICRA. However, California voters recently approved Proposition 51, a ballot initiative that eliminates "deep pocket" awards for noneconomic damages. Am. Med. News, June 13, 1986, at 1.

[152] Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *cert. denied*, 106 S. Ct. 214 (1985); Roa v. Lodi Medical Group, 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985).

on their liability premiums of $10 million.[153] A study commissioned by the California Medical Association concluded that MICRA has been effective in holding down claim costs, reducing the rate of increase from 15% in the pre-MICRA years to 7% post-MICRA.[154] The study concluded that repeal of MICRA would cause claim costs to soar.[155] At the present rate of increase, the average annual premium for a California doctor would rise to $9,000 by 1990; if MICRA had not been enacted, this figure would have been $25,000.[156]

Others have not been as impressed with MICRA's effectiveness.[157] Obstetricians in the Los Angeles area recently paid between $35,720 and $61,052 for malpractice insurance.[158] Moreover, the cost is apparently rising.[159] In addition, MICRA has failed to decrease the number of malpractice filings. In California, as in the rest of the nation, the number of claims has risen steadily—from 8 per 100 physicians in 1979, to 17 per 100 in 1983, and 22 per 100 in 1985.[160]

G. Hawaii's 1986 Tort Reform

The State of Hawaii recently convened a special legislative session to address the issue of tort reform, finding that "a solution to the current crisis in liability insurance has created an overpowering public necessity for a comprehensive combination of reforms to both the tort system and the insurance regulatory system."[161] Some of these reforms enacted into law directly impact medical professional liability.

1. *Premium Rollback:*[162] Reduction of commercial liability policy premiums by 12% is mandated for October 1987 with a further 15% for 1988. However, Hawaii's primary malpractice carrier, the Medical Insurance Exchange of California (MIEC), has expressed concern that it may not be able to obtain reinsurance under this mandated rollback law.[163]

2. *Collateral Source Rule:*[164] The reform protects liens and rights of subrogation

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[153] California Hospitals Split $10 Million in Refunds, 15 Modern Health Care 46 (1985).

[154] Actuarial Study of Professional Liabilty Insurance for the California Medical Association, (May 31, 1985) (Future Cost Analysts, Newport Beach, CA.) at 1.

[155] *Id.* at 2.

[156] *Id.*

[157] Rodarmor, *The Other Side Of Medical Malpractice*, 6 CAL. LAW. 38 (1986).

[158] *Id.* at 40.

[159] *Id.* at 39.

[160] National figures indicate an increase of 88.6% in claims frequency between 1979 and 1983. AMA REPORT 1, *supra* note 1, at 10.

[161] A Bill For An Act Relating To Liability, (Aug. 4, 1986) [hereinafter Hawaii Tort Reform].

[162] *Id.* § 3, at 3.

[163] Haw. Med. Asso. Newsletter, Aug. 1986, at 1.

[164] Hawaii Tort Reform, *supra* note 161, § 16, at 20-1.

by requiring payment out of the amount of judgment or settlement to the valid lienholder, less reasonable litigation costs incurred by the claimant. Thus, the new law prevents double dipping,[165] but it does not reduce the total amount of damages.

3. *Joint and Several Liability:*[166] This legal doctrine is preserved for the recovery of economic damages. However, a defendant must be at least 25% negligent to be jointly liable for noneconomic losses. Certain types of torts are specifically exempted under this new law.[167] The exclusion of strict liability and products liability torts results in the continued exposure of the nonnegligent physician to joint and several liability for damages resulting from iatrogenic reactions to drugs, vaccines and medical devices.[168]

4. *Limitation of Noneconomic Loss:*[169] The new law limits pain and suffering awards to $375,000. Pain and suffering is defined as "actual physical pain and suffering that is the proximate result of a physical injury sustained by a person."[170] There is, however, no cap imposed on other forms of noneconomic damages such as "mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, and all other non-pecuniary losses or claims."[171] Because of the Act's restriction to actual physical pain, this provision is unlikely to significantly reduce damage awards.

5. *Economic Loss:*[172] Under the new tort reform law, after-tax rather than gross income will be used in computing earnings loss for purposes of awarding economic damages. Thus, the law may be expected to reduce most damage awards without unfairly penalizing the claimant.

6. *Statute of Limitations:*[173] The statute has also shortened the statute of limitations for medical malpractice suits involving minors. Under the new law, they are to be commenced within six years of the injury or by the minor's tenth birthday, whichever is longer. This replaces the old law under which the statute of limitations did not run until the minor reached the age of majority.[174] This reform would provide particular relief to obstetricians and pediatricians.

7. *Mandatory Non-Binding Arbitration:*[175] The tort reform law further mandates arbitration of all civil tort actions having a judgment value up to

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[165] *See supra* notes 136-141 and accompanying text.

[166] Hawaii Tort Reform, *supra* note 161, § 17, at 21.

[167] *Id.* at 21-2.

[168] *See supra* note 163, at 2.

[169] Hawaii Tort Reform, *supra* note 161, § 19, at 24.

[170] *Id.*

[171] *Id.*

[172] *Id.* § 18, at 23.

[173] *Id.* § 15, at 19-20.

[174] HAW. REV. STAT. § 657-7.3 (Supp. 1984).

[175] Hawaii Tort Reform, *supra* note 161, § 21, at 24-26.

$150,000. Appeals for de novo trials may follow.[176] Medical torts will presumably continue to be presented before the Medical Claims Conciliation Panel (MCCP) prior to arbitration.[177] In other words, a malpractice claim must go through two separate non-binding adjudication processes before suit can be filed. Whether the additional time and effort expended will result in a fairer judgment or be cost-effective is uncertain.

8. *Subsidy for Obstetricians and Gynecologists:*[178] The new law provides for a one-time $100,000 subsidy towards obstetrics insurance premiums in areas of limited services. This provision is intended to attract obstetricians to Molokai where obstetrical services are in jeopardy.[179] This subsidy, however, is not extended to family practitioners, and they are the ones who have traditionally provided obstetrical care in Molokai.

9. *Attorneys' Fees:*[180] The Act provides that fees of both plaintiffs' and defense attorneys "shall be limited to a reasonable amount as approved by the court having jurisdiction of the action."[181] The contingency fee structure is preserved, with no sliding scale restrictions. Essentially, the new law works no change in the regulation of attorneys' fees.

10. *Periodic Payments:*[182] The legislation applies only to state and county governments for judgments in excess of $1,000,000, permitting payments to be structured over a five-year period.

Issues surrounding the liability crisis are complex, and no single tort reform package is likely to be embraced by all parties. Although 74% of those polled felt that the liability insurance situation is a significant problem in Hawaii,[183] more than half did not have a "pretty good understanding of the debate over liability insurance and liability lawsuits."[184] The Hawaii medical community has expressed reservations regarding the new law,[185] suggesting that the reform package "makes too many compromises to offer hope of effective relief from soaring insurance rates."[186]

In view of the above, Hawaii's tort reform package will fail to have a palpa-

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[176] HAW. ARB. R. 22.

[177] *See supra* note 147.

[178] Hawaii Tort Reform, *supra* note 161, § 23, at 26-27.

[179] *See supra* note 5.

[180] Hawaii Tort Reform, *supra* note 161, § 11, at 16.

[181] *Id.*

[182] Hawaii Tort Reform, *supra* note 161, § 14, at 18.

[183] Keir, *Tort Reform A Problem Hard To Fathom, Polls Find*, Honolulu Advertiser, Aug. 9, 1986, at A1, col. 3.

[184] *Id.*

[185] "[T]hese concepts will need to be refined and expanded in order to achieve the meaningful reform that is needed to alleviate the liability crisis and prevent its recurrence." Haw. Med. Asso. Newsletter, *supra* note 163, at 1.

[186] Honolulu Star-Bull., July 31, 1986, at A14, col. 1.

ble effect on the malpractice crisis. The reforms are modest at best, and are considerably less sweeping than those enacted in other states, including California.[187] Additionally, sections of the law relating to premium rollbacks, joint and several liability, and the cap on pain and suffering are scheduled to be repealed in three years.[188] This repeal may be premature, because the effectiveness, if any, of these provisions will take longer than three years to become apparent.[189] Most importantly, these reforms do not address the problem of inefficiency and unfairness in the way in which victims are compensated under the present tort system.[190] A fundamental change in the approach to compensating victims of medical care is needed; one which foregoes fault-finding and returns to the victims most of the insurance premium dollar by virtue of low transaction costs.[191]

IV. THE NO FAULT SOLUTION

It has been asserted by Professor O'Connell that if the present fault-based tort system is dysfunctional, it is because of the tremendous inefficiency, unfairness, and prohibitive costs which fault-proving engenders.[192] The injured victim is randomly and unjustly compensated. Additionally, the contentiousness and adversarial nature of the proceedings traumatize the physician and the doctor-patient relationship, with grave implications for the medical care system. In many instances, fault simply cannot be ascertained.[193]

Some of these same criticisms led to the introduction of the no-fault concept

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[187] Hawaii's largest physician malpractice carrier, the Medical Insurance Exchange of California (MIEC), has characterized Hawaii's newly enacted tort reforms as "no help." MIEC insists that a limitation of contingency fees and non-economic damage awards, and periodic payments, are the most positive and immediately effective legislative actions needed to reduce loss and premiums. *The View From Here*, MEDICAL INSURANCE EXCHANGE OF CALIFORNIA, Dec., 1986, at 1.

[188] Hawaii Tort Reform, *supra* note 161, at 29.

[189] "It will take many years before the effectiveness of this legislation can be measured. . . .[I]t often takes three or more years to bring a claim to resolution." Haw. Med. Asso. Newsletter, Aug. 1986, at 4.

[190] *See supra* notes 12, 93.

[191] *Id.*

[192] *See supra* notes 14, 26, 93. *See also* Havighurst, *supra* note 12; Halley, *Medical Malpractice—1985: Reflections Of A Health Care Provider*, 85 J. KAN. MED. SOC'Y. 323 (1984).

The feasibility of strict liability for compensating medical injuries was favorably explored by the Secretary's Commission on Medical Malpractice in 1973. Roth & Rosenthal, *Non Fault Based Medical Injury Compensation Systems*, SECRETARY'S REPORT app. at 450. However, the Department of Justice has recently condemned the movement of the tort system towards no-fault liability, decrying "compensation often awarded merely for the sake of compensation." TORT POLICY WORKING GROUP, *supra* note 1, at 30-33.

[193] *See supra* notes 30-45 and accompanying text.

for auto injuries and for injuries arising out of employment.[194] In general, the abolition of fault-finding has resulted in a more efficient system for auto injuries.[195] The no-fault approach does not appear to be associated with an increase in negligent conduct, nor has the cost been burdensome.[196] No one would seriously suggest a return to the traditional fault-based system for these injuries.[197]

No-fault patient injury compensation schemes are currently operating in Sweden[198] and New Zealand.[199] It is too early, however, to conclude how successful they have been.

A. *The Compensable Event*

Injuries arising out of medical care differ in one essential aspect from all other injuries—they may be a natural consequence of the underlying illness or an unavoidable result of medical treatment. To compensate without regard to fault cannot be taken to mean compensating *all* adverse medical events. Rather, medical no-fault must embrace in some fashion the concept of compensating *avoidable* injuries.[200] However, if complications arising out of medical care are

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[194] J. O'CONNELL & R. HENDERSON, TORT LAW: NO-FAULT AND BEYOND (1975). Hawaii's no-fault auto insurance law was enacted in 1973. *See* HAW. REV. STAT. § 294 (1973). Hawaii Workers' Compensation Law was enacted in 1963. *See* HAW. REV. STAT. § 386 (1963).

[195] O'Connell, *Operation Of No-Fault Auto Laws: A Survey Of The Surveys*, 56 NEB. L. REV. 23 (1977).

[196] "There seems to be considerable evidence that, all things considered, no-fault has not only not increased auto insurance costs, but has in fact decreased them, just as was originally promised, despite the inadequacy of the laws passed." *Id.* at 36.

[197] Hawaii's Workers' Compensation Law has come under recent attack because of its high cost. The problems and remedies are addressed in a recent study. Haldi, *Study Of The Workers' Compensation Program Of The State Of Hawaii, Final Report*, Dec., 1984 (presented to the Legislature of The State of Hawaii). However, no recommendation for a return to tort-based recovery was made.

[198] Cooper, *Sweden's No-Fault Patient-Injury Insurance*, 294 NEW ENG. J. MED. 1268 (1976).

[199] Smith, *Compensation For Medical Misadventure And Drug Injury In The New Zealand No-Fault System: Feeling The Way*, 284 BRIT. MED. J. 1457 (1982).

[200] If avoidable injuries can be predetermined, a list of compensable events can be drawn up. Such an approach under the rubric of medical adversity insurance (MAI) has been attempted. *See* Havighurst, *supra* note 12. While acknowledging the complexities of identifying compensable events, and the failure of physician groups to take up the project, Professor Havighurst has nonetheless compiled a list of such events in anesthesiology and general surgery. Examples of compensable events are permanent recurrent laryngeal nerve damage after parathyroid surgery or thyroidectomy, hemolytic reaction following a blood transfusion, and brain injury under anesthesia in patients between six months and sixty years of age undergoing relatively simple operations such as hysterectomy and cholecystectomy. *Id.* at 1257, 1259, and 1261.

MAI anticipates that:

> [C]ase-by-case adjudication of medical injuries and exposure to unmanageable costs could be avoided if a highly specified list of compensable injuries were developed in advance and

evaluated for avoidability, a standard approaching that of negligence would result, because an avoidable mishap occurs in the absence of due care. Therefore, the end result will be a return to the tort system.

If all complications of treatment are deemed compensable, including those which are arguably unavoidable, then a true comprehensive no-fault system would exist. This would require differentiating between treatment complications and treatment failures, which may not always be possible. The narrower approach of compensating only *avoidable* injuries is similar to the negligence standard, whereas the broader approach means compensating virtually *all* injuries. This inherent difficulty in assigning a medical event as "compensable" has frustrated efforts to fully develop a workable no-fault patient injury compensation system.[201] Preliminary and incomplete lists have been proposed,[202] but further development has not been forthcoming. The more realistic view is that this hurdle will prove insurmountable. This dilemma presently faces the New Zealand no-fault compensation system. In New Zealand, patients injured as a result of medical "misadventure," are compensated without need to prove fault.[203] Although negligence is not necessary, what constitutes a medical "misadventure" is not defined.[204] At the same time, "not all medical negligence come within the scope of medical misadventure," and common law tort actions for medical negligence remain available.[205] In short, both fault and no-fault mechanisms exist for compensating the medically injured, without being clearly defined. Therefore, any success of the New Zealand system cannot be solely attributed to the no-fault approach.

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incorporated in an insurance policy covering only those injuries, leaving other adverse outcomes to be handled under traditional doctrines and procedures, however they might be modified.

Id. at 1254.

[201] Professor O'Connell notes:

> We can say with some degree of certainty that an automobile accident occurs because the drivers were driving on the road, and not because of some other pre-existing or extrinsic cause. . . . In medical care, however, it is far less clear whether the lack of success from medical treatment is the result of improper medical care or merely from the natural workings of disease.

Moore & O'Connell, *supra* note 93, at 1277.

[202] *See* Havighurst, *supra* note 12.

[203] "What exactly constitutes medical misadventure is slowly being worked out as cases arise and the scheme develops, but the Accident Compensation Commission is quite definite that: 'It is not necessary to show that there has been negligence on the part of a medical practitioner before a claim will lie for medical misadventure.' " Smith, *supra* note 199, at 1457.

[204] *Id.*

[205] *Id.*

B. *Deterrence*

Advocates of the traditional tort system contend that a no-fault system will frustrate the objective of deterring wrongful conduct. They assert that a no-fault medical injury compensation system would abolish the independent check on physician quality.[206]

The tort system, however, does not always achieve its objective of deterrence.[207] Further, tort action is not the only mechanism to deter wrongful conduct. A no-fault system could ultimately be more effective than the present tort system in deterring negligent medical practice. Under the present system, only a minority of cases of negligent care result in a complaint.[208] Thus, in many instances, the tort system allows negligent conduct to escape detection. Under no-fault, many more events of patient injury will be identified. These adverse patient incidents could be uniformly reviewed by a medical care evaluation committee for the quality of care provided. This mechanism will enable the medical community to accurately assess the performance of its members, and to impose sanctions where appropriate.[209]

C. *Economic Cost*

The cost of a no-fault system would be prohibitive if compensation benefits parallel the present fault-based tort system. A 1977 study estimated the cost of a no-fault system for California to be $800 million, a figure considerably higher than the cost of the fault-based system at that time.[210] Paying for *all* medical injuries and deaths would be prohibitively expensive, but paying for all *avoidable* injuries may be feasible. Without a workable "compensable event" list, however, no accurate estimate of the economic cost can be constructed.

On the other hand, the savings derived from reduced litigation costs may

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[206] Present mechanisms for ensuring physician competence include expanded disciplinary procedures against health care providers, more or better post-graduate education, increased emphasis on hospital licensing, hospital staff regulation, and peer review. Halley, *supra* note 192.

[207] *See supra* notes 69-80 and accompanying text.

[208] Mills, *supra* note 49.

[209] Hospitals generally have medical care evaluation and peer review committees. These doctor groups evaluate peer activities in order to approve and renew hospital medical staff privileges. If all events of patient injury were reviewed, a more accurate profile of physician practice may well emerge. The question remains whether peer review will objectively and effectively weed out the careless and the incompetent. In 1985, the Board of Medical Examiners of Hawaii acted on every recommendation presented to it by RICO and the hearing officers, taking action on 6 licensees. Testimony by Dr. William Hindle, President, Hawaii Medical Association, before the 1986 Hawaii Legislature, in Honolulu, Hawaii (Feb. 1986). *See also supra* note 27.

[210] Mills, *supra* note 75, at 256.

offset the expected increase in claims frequency.[211] Payment could also be restricted to economic losses, and further cost reduction could be achieved by offsetting payments to the extent reimbursable from collateral sources.[212]

In summary, although "no-fault" would remove the adversarial approach to patient compensation, it suffers from the difficulty of defining the compensable event. A comprehensive no-fault system would result in compensating virtually all adverse outcomes, and would prove prohibitively expensive. Traditional no-fault insurance, which has worked well for auto injuries and in worker's compensation programs, is therefore, unlikely to be effective for dealing with injuries arising out of medical care.

V. The Alternative Medical Liability Act

The Alternative Medical Liability Act (AMLA) proposes a medical injury compensation system that circumvents the shortcomings of medical "no-fault."[213] Moreover, AMLA provides for compensation without invoking fault-finding.[214]

AMLA incorporates the following key features:[215] (1) the option of the medical provider to tender payment for economic loss within six months of injury; (2) Such tender forecloses future tort action by the injured victim; (3) Compensation benefits for net economic loss include 100% lost wages, replacement service loss, medical treatment expenses and reasonable attorney's fees; (4) Noneconomic losses are not reimbursable; (5) Payment is net of any benefits

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[211] O'Connell, *Offers That Can't Be Refused*, *supra* note 26, at 630.

[212] *Id.*

[213] *Alternative Medical Liability Act, 1984: Hearings on H.R. 5400 Before the Subcomm. on Health of the Senate/House Committee on Ways and Means*, 98th Cong., 2d Sess., June 28, 1984 [hereinafter cited as AMLA]. Bill H.R. 5400, which covers recipients of Medicare and other federal programs, was sponsored by Congressmen Richard Gephardt and Henson Moore. Testimony in support of the bill was provided by its architect, Professor Jeffrey O'Connell.

The bill was opposed by both the American Medical Association (which favors "tort reform," see AMA Report, *supra* note 1) and the Association of Trial Lawyers of America. Without specifically addressing the merits or demerits of AMLA, Mr. Thomas Bendorf, Executive Director and Director of Public Affairs of the Association of Trial Lawyers of America asserted: "Proposals such as we see here today which would make a mere broker of an injured victim, make a victim the simple means of merely subsidizing others for the cost of the wrong, will in the long run so offend the conscience of a nation of free men as to be refuted wherever it appears and this is justly so." AMLA, at 122. Sixty percent of lawyers polled opposed the bill. Reskin, *Lawyers Oppose Medical Malpractice Bill*, 71 A.B.A. J. 40 (1985).

The bill died in committee and was reintroduced in the 99th Congress (July 25, 1985) as the "Medical Offer and Recovery Act," H.R. 3084. This bill was referred to five committees, but no hearings were held.

[214] Reskin, *Lawyers Oppose Medical Malpractice Bill*, 71 A.B.A. J., at 40.

[215] *See* AMLA, *supra* note 213, at 45-48.

from collateral sources; (6) Civil action will not be precluded for compensation tendered for intentional torts and in wrongful death cases; (7) Compensation benefits would be payable not later than 30 days after submission of proof of economic loss; (8) Tort action remains available to any claimant absent provider tender.

The appeal of AMLA lies in its provision for prompt, fair and reasonable compensation benefits without the need to inquire whether the event is "compensable." The financial incentive to tender payment insures that many more injured patients can be expected to be compensated. This incentive derives from the exclusion of noneconomic claims, and the offset provided by collateral source payments. Furthermore, savings from expensive litigation costs will serve as an added incentive. In short, the proposal rids the present system of inefficiency and randomness, replacing it with efficiency and predictability.

By way of illustration of how AMLA might work, consider the case of a worker rendered paraplegic following spinal anesthesia.[216] The physician has the incentive to tender payment for all economic losses, including all future wage loss, because such tender will foreclose tort action, where the risk of a far larger award may be assessed. All parties further benefit by the non-adversarial nature of the transaction, and by the speedy resolution of the dispute. The patient, in turn, has the security of a prompt award equal to her economic loss, without incurring significant attorney or expert fees. In addition, the patient avoids the uncertainty of a long and costly claim, with potentially no recovery. The physician can return to caring for the sick and dying, and the injured patient can concentrate on rebuilding her future, confident that her economic needs will be promptly and fully met. Under AMLA, minimal disruption of the doctor-patient relationship should result due to the decrease in litigation.

Although AMLA's trade-off is for smaller compensation benefits, this is mitigated to the extent that claimants will no longer bear the burdensome price tag of attorney and expert fees. AMLA will hopefully achieve the goal of fairly compensating the largest number of those injured. Allowing the provider the option of tendering payment further avoids the need for identifying compensable events. In essence, the provider is asked to identify whether a given event is compensable or not. Her incentive for settling lies in the reduced award. Given this powerful incentive,[217] it can be expected that just compensation benefits

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[216] Kane, *Neurologic Deficits Following Epidural Or Spinal Anesthesia*, 60 ANESTHESIA ANALGESIA 150 (1981).

[217] Limitation of claimant's choice is believed to be essential for the success of this proposal. Professor O'Connell notes:

> The only way to prevent a rejection of a settlement for net economic loss, therefore, is to give one party the power to force the other party to accept the settlement. That party must be the defendant, for the same reason that the general no-fault insurance is not feasible: allowing the claimant to force the defendant to accept the *claimant's* offer of settlement for

under AMLA will reach most victims of avoidable medical injuries. In fact, some patients injured "unavoidably" may receive compensation as well through provider tender.

Furthermore, AMLA can be used as an effective vehicle for quality assurance and peer review.[218] Compensated injuries can trigger an automatic medical review, followed by appropriate educational, rehabilitative or disciplinary action. Data generated could also be used as the basis for experience rating in medical professional liability insurance underwriting.[219] Thus, an effective deterrence against substandard medical practice could be an important byproduct of AMLA. Physicians would not tender compensation for every adverse result since all such tenders will lead to automatic review for substandard care. One caveat: a careful balancing of proper deterrent force and unprincipled accusation needs to be struck lest the incentive to tender compensation is chilled, and the entire system aborted. This responsibility properly resides in the institutional medical care evaluation committee which should develop a fair and objective review process to decide whether the quality of care rendered was acceptable.

Finally, although estimates of the cost of AMLA have not been made, internalization of costs, with funding through insurance premiums paid by the medical provider, appears preferable.[220] Spreading the costs evenly among all patients would be another alternative, but such an approach would destroy the potential use of provider experience-rating to modify premium rates. The adoption of AMLA will not lead to an escalation of insurance premiums. Savings from equitable awards, combined with the abolition of litigation costs and duplicative payments should significantly decrease the cost of insurance. AMLA will also reduce defense costs further by allowing the hospital to tender payments.[221] This adoption of "corporate liability"[222] will rid the present situation

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the claimant's economic loss would force the defendant to bear losses that society cannot be confident belong on him.

O'Connell, *Offers That Can't Be Refused*, *supra* note 26, at 605.

[218] *See supra* note 209.

[219] An experience rating for medical malpractice insurance can be expected to be a powerful deterrence to substandard practice, and may indeed remove the habitual offender from the system altogether. For discussion why it is not in use presently, see *supra* notes 69-73 and accompanying text.

[220] Malpractice premiums are business expenses and are tax-deductible. However, not all of this tax-deductible cost paid for by medical care providers can be passed on to the patient because of governmental fee regulation. Fixed medical charges for hospital and outpatient services are now in effect for both medicare and medicaid patients. *See, e.g.*, Classen, *Medicare's Physician Fee Freeze: Shortsighted Reasons?*, 14 LEGAL ASPECTS MED. PRAC. 1 (1986).

[221] So long as any one member of the health provider team tenders payment for the injury at issue, tort action is foreclosed. Thus, by allowing the hospital as well as the physician to tender payments, AMLA provides an even greater opportunity to compensate the injured without resorting to litigation.

of the wasteful practice in which, for a single injury, multiple defendants are typically joined as parties, each requiring separate defense counsel. Mechanisms regarding contribution from physician tortfeasor(s) could be implemented, including the possible use of an objective review panel.

Restricting wage loss payments could additionally curtail costs. However, this should be carefully weighed against the impact on the injured.[223] Modifying wage loss payments from 100% to 80% is a reasonable solution that would encourage individuals to return to work.[224]

VI. CONCLUSION

As applied to medical professional liability, the present tort system is an inefficient and inequitable method of resolving medical disputes. The asserted objectives of compensation and deterrence are thwarted by skyrocketing costs and excessive awards. As a result, society pays more for its health care. The present system extracts an additional toll on the health profession by frontally attacking its credibility and injuring its essential doctor-patient trust relationship.

Despite positive reform, recently enacted tort legislation is not expected to result in substantial improvement over the long term. These reforms, however, may be useful as temporary remedies, providing a measure of predictability and stability that is needed for continued function of the system.

A broad no-fault compensation scheme for medical injuries would remove inefficiency, adversariness and unpredictability, but at prohibitive costs. Moreover, the threshold question of compensable events is impossible to define, except in a few narrow areas. Thus, a true no-fault approach to medical injuries is impractical.

The Alternative Medical Liability Act provides a workable solution to correct the inequities of the present system. This proposal invites tender by medical care providers for economic loss in return for foreclosure of tort action. The proposal has the appeal of simplicity and efficiency, avoiding the need of pre-

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[223] Curran, *A Further Solution To The Malpractice Problem: Corporate Liability And Risk Management In Hospitals*, 310 N. ENG. J. MED. 704 (1984). "There has developed in the United States a quiet revolution in malpractice liability. . . . It is the movement to assign responsibility for all types of professional malpractice, including acts of independently practicing physicians, to the hospital corporation itself." *Id.* at 704.

[223] Professor O'Connell suggests that the more affluent can cover their wage losses above $2000 per month through insurance. O'Connell, *Offers That Can't Be Refused*, *supra* note 26, at 621.

[224] Hawaii's Worker's Compensation Program was recently evaluated. *See* Haldi, *supra* note 197. Among the recommended changes was the use of *after-tax* earnings as the basis for benefit payments. The amount of wage loss was pegged at 80% of after-tax earnings. *Id.* at 70.

identifying the compensable event, yet achieving the goal of just compensation in a non-adversarial setting. A non-statutory alternative where the parties contract for this mode of injury compensation might also be effective.[225] By identifying many more cases of maloccurence, AMLA presents the unique opportunity to fashion an effective peer review process and to identify areas for risk management and loss prevention activities. Improved patient care would ultimately result. Whether the system can operate economically remains to be seen. At the very least, AMLA represents a viable and powerful alternative which deserves close study.

S. Y. Tan*

[225] O'Connell, *supra* note 14.

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Kaeo v. Davis: Informing Juries of the Effects of Their Special Verdicts Under the Law of Joint and Several Liability

I. INTRODUCTION

In *Kaeo v. Davis*,[1] the Hawaii Supreme Court held that, when a jury is charged with apportioning negligence among multiple tortfeasors under a special verdict, the trial court may allow a jury instruction regarding the operation of joint and several liability.[2] With this holding, the court appears to have carved out an exception to the common law 'blindfold' rule against informing juries of the effects of their special verdict findings on the rights of the parties to recover.[3]

This note discusses the blindfold rule generally, and the Hawaii Supreme Court's treatment of it in *Kaeo*. Section III outlines the blindfold rule's historical application and rationale. Sections IV and V discuss and analyze the Hawaii

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[1] 68 Haw. ____, 719 P.2d 387 (1986).

[2] *Id.* at ____, 719 P.2d at 396.

[3] A primary purpose behind the use of special verdicts, or special interrogatories charged in conjunction with a general verdict, is to limit the jury to factfinding, and leave to the court the task of determining the relevant law and applying it to the facts. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2503, at 488 (1971) [hereinafter FEDERAL PRACTICE AND PROCEDURE]. *See* Smith, *Comparative Negligence Problems with the Special Verdict: Informing the Jury of the Legal Effects of Their Answers*, 10 LAND AND WATER L. REV. 199, 201 (1975); Note, *Informing the Jury of the Effect of Its Answers to Special Verdict Questions—The Minnesota Experience*, 58 MINN. L. REV. 903, 905 (1974) [hereinafter Note, *The Minnesota Experience*]. *See also* Skidmore v. Baltimore & O.R.R., 167 F.2d 54 (2d Cir. 1948) (exhaustive discussion of history and merits of special verdicts as compared with general verdicts). More specifically, the goal is to "obtain to the greatest extent possible the decision of the jury without reflection of the [jury's] . . . bias or prejudice." Annotation, 90 A.L.R.2D 1040, 1041 (1963). To achieve this goal and insure that the jury answers fact questions as objectively as possible, several early courts recognized the necessity of withholding from jurors information about the effects which their answers might have on the ultimate rights or liabilities of the parties. *See infra* notes 22-27 and accompanying text. Certain exceptions to the rule have been recognized, but informing juries of the effects of their findings under joint and several liability has not been among them. *See infra* note 31 and accompanying text.

Supreme Court's reasons for rejecting the rule under certain circumstances. Section VI considers the possible implications of the *Kaeo* decision.

II. FACTS

Lurline Kido was seriously injured when an automobile in which she was a passenger failed to negotiate a curve and crashed into a roadside utility pole.[4] Edith Kaeo, the guardian of Miss Kido's estate, brought suit on Kido's behalf against several defendants.[5] By the trial date, the number of defendants had been reduced by settlement or attrition.[6] Among those remaining were Alfred K. Davis (Davis), the driver of the car in which Kido was a passenger, and the City and County of Honolulu (City). Kaeo alleged that both Davis and the City had been negligent and that the negligence of each was a proximate cause of the accident.[7]

At trial, the City submitted a number of jury instructions. Instruction No. 18[8] would have informed the jury of the legal results of finding both the City and Davis negligent, in the event that Davis were unable to pay his apportioned share of the judgment. The judge refused to give this instruction to the

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[4] 68 Haw. at ____, 719 P.2d at 389.

[5] *Id.* at ____, 719 P.2d at 390. The defendants initially named in the pleading were the driver of the vehicle (Davis) and the owners of the vehicle (Davis' parents). Defendants subsequently identified were the manufacturer of the car (Ford Motor Company), the owner of the utility pole that was struck (Hawaiian Electric Company), the owner of a drinking establishment in which the plaintiff, Davis, and another passenger in the vehicle had spent several hours prior to the accident, and the City and County of Honolulu, which was the governmental body responsible for maintaining the road upon which the accident occurred. *Id.*

[6] *Id.* at ____, 719 P.2d at 390. Prior to trial, Hawaiian Electric Company settled for $99,316, and Ford Motor Company settled for $5,000.

[7] Evidence was offered that Davis had been speeding at the time of the accident, and that he had taken his eyes off the road while attempting to round a curve. *Id.* at ____, 719 P.2d at 391. Evidence was also offered of Davis' drinking prior to the accident, but that evidence was not admitted by the trial judge on the grounds that its prejudicial effect outweighed its probative value. *Id.* at ____, 719 P.2d at 390. Evidence was offered that the City had knowledge that the road on which the accident took place was unsafe, and that the City had failed to render it safe. Evidence was also offered of prior accidents at or near the site of the present accident, but this evidence was not admitted at trial. *Id.* at ____, 719 P.2d at 389. *See infra* note 16.

[8] The City's Instruction No. 18 stated:

> You are instructed that if you find Defendant Davis liable for any degree of liability and find the City liable for *any* degree of liability, under Hawaii law, the City is compelled to pay Defendant Davis' share of the entire judgment if he is unable to pay, less whatever degree or percentage of liability you assess against the Plaintiff or any of the other Defendants.

Id. at ____ n.9, 719 P.2d at 394 n.9 (emphasis original).

jury.[9]

At the close of evidence, the court submitted the case to the jury on special interrogatories.[10] The jury found that both Davis and the City negligently caused the accident and attributed ninety-nine percent of the negligence to Davis, and one percent to the City.[11] The jury also set damages at $725,000.[12]

The circuit court entered a judgment holding Davis and the City jointly and severally liable for the damages. Because Davis could not be located, this judgment required the City to pay a disproportionate share of the damages.[13] The City appealed on two grounds, claiming that the trial court erred 1) in excluding evidence of Davis' consumption of alcohol before the accident[14] and 2) in refusing to submit the City's Instruction No. 18 to the jury.[15] Kaeo cross-

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[9] *Id.* at ____, 719 P.2d at 394.

[10] *Id.* at ____, 719 P.2d at 390.

[11] *Id.*

[12] *Id. See infra* note 13.

[13] 68 Haw. at ____, 719 P.2d at 390. Because of the pre-trial settlements by Hawaiian Electric and Ford, the actual amount for which Davis and the City were held jointly and severally liable was $620,684. *See supra* note 6. Davis was absent from the trial but represented by counsel. His whereabouts since the accident were unknown at the time the case went to trial. 68 Haw. at ____, 719 P.2d at 390.

[14] *Id.* at ____, 719 P.2d at 389. The trial court had excluded testimony, whether live or by deposition, and all other evidence from any source which would have indicated that Davis had consumed alcohol prior to the accident. *Id.* at ____, 719 P.2d at 390. The trial court's oral ruling on the inadmissibility of this evidence included the following statement:

> I feel that in today's society, any indication of drinking, no matter what the amount, and driving can raise undue prejudice against that person who has been said to be quote drinking and driving end quote. And so at least in this case I will not permit evidence to come in on the consumption of alcohol . . . .

Id. at ____ n.2, 719 P.2d at 391 n.2.

Part of the City's argument on appeal was that by excluding evidence of Davis' drinking prior to the accident, the trial court "deprived the jury of the critical factor it may have needed to find Davis 100 percent—rather than 99 percent—negligent. With that crucial evidence the jury could well have concluded that nothing the City did or didn't do . . . would have contributed to or prevented the accident." Answering Brief for Appellant/Cross-Appellee City and County of Honolulu at 10, Kaeo v. Davis, 68 Haw. ____, 719 P.2d 387 (1986).

[15] 68 Haw. at ____, 719 P.2d at 389. The trial court's reasons for refusing the City's instruction were not discussed in *Kaeo* nor in the appellate briefs. The City's argument on appeal was essentially that (1) it is doubtful that blindfolding the jury from the effects of its findings eliminates bias, sympathy and prejudice from jury deliberations, Opening Brief for Appellant/Cross-Appellee City and County of Honolulu at 19, Kaeo v. Davis, 68 Haw. ____, 719 P.2d 387 (1986), (2) jurors are concerned about the effect of their verdicts on the outcome of the case and the use of special verdicts does not eliminate this concern, *id.*, (3) an informed jury is better able to fulfill its factfinding function, *id.* at 20, and (4) informing the jury facilitates a more rational decision than one made on the basis of ignorance and possible speculation, *id.* at 21. See *Kaeo*, 68 Haw. at ____, 719 P.2d at 394-96 where the court relied upon similar reasons. See also *infra* text accompanying notes 58-102, where the court's reasoning is discussed and critically analyzed.

appealed, claiming that the trial court erred in excluding evidence of allegedly similar prior accidents at or near the site of the Kido accident.[16]

The Hawaii Supreme Court vacated the circuit court's judgment and remanded the case for a new trial.[17] The supreme court held that the trial court had committed reversible error in excluding evidence of Davis' drinking,[18] in excluding evidence of prior accidents at or near the site of the present accident,[19] and in refusing to grant the City's request to inform the jury of the legal effect of its special verdict.[20]

III. History and Rationale of the Blindfold Rule

According to the blindfold rule, it is reversible error for a jury to be informed of the legal effects of its answers to special questions on the ultimate rights of the parties to an action.[21] As early as the late nineteenth century,[22] appellate

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[16] 68 Haw. at ____, 719 P.2d at 389. The court noted that Kaeo's cross-appeal was an exercise of "an abundance of caution . . . ." *Id.* The cross-appeal was filed on the condition that, if the case were not remanded for a new trial on the basis of the City's appeal, the plaintiff's cross-appeal would be dismissed. Reply Brief for Plaintiff/Cross-Appellant at 1, Kaeo v. Davis, 68 Haw. ____, 719 P.2d 387 (1986). On retrial, the plaintiff intended to argue that evidence of prior accidents at the site of the present accident was admissible in order to demonstrate the extent to which the City had notice of the dangerous condition of the road, and essentially the same argument was put forth on appeal. *Id.* The plaintiff also argued on cross-appeal that the trial court had properly refused to give the jury the City's Instruction No. 18. Answering Brief for Plaintiff/Cross-Appellant at 15-23, Kaeo v. Davis, 68 Haw. ____, 719 P.2d 387 (1986). Finally, the plaintiff asserted that the trial court had correctly denied the City's motion for directed verdict and judgment notwithstanding the verdict. *Id.* at 23-34.

[17] 68 Haw. at ____, 719 P.2d at 396.

[18] *Id.* at ____, 719 P.2d at 392.

[19] *Id.* at ____, 719 P.2d at 394.

[20] *Id.* at ____, 719 P.2d at 396.

[21] This statement is a paraphrase of what has been called the Wisconsin rule: "[I]t is reversible error for court or counsel, expressly or by necessary implication, to inform the jury of the legal effects of their answers to special issues regarding the ultimate right of either party to the action to recover." Smith, *supra* note 3, at 202. *See infra* note 28 and accompanying text. While this note discusses the blindfold rule only as applied to instructions or charges made from the bench, it is worth noting that some courts have found reversible error on similar grounds in remarks made by counsel in closing arguments. For examples of such remarks and citations of relevant cases, see Smith, *supra* note 3, at 206-07.

[22] It has been suggested that Ryan v. Rockford Ins. Co., 77 Wis. 611, 46 N.W. 885 (1890), is the earliest case on record to find reversible error in informing the jury of the legal consequences of its answers to special questions. Smith, *supra* note 3, at 204. However, as early as 1881, the Michigan Supreme Court held that it was reversible error when the trial court instructed the jury to answer special questions in a way that would be consistent with its general verdict. Cole v. Boyd, 47 Mich. 98, 10 N.W. 124 (1881).

In *Cole*, the jurors had returned with a general verdict for plaintiffs, but reported that they

courts in the United States frequently reversed judgments of trial courts for failure to invoke the rule in at least two situations.

In the first instance, several courts found reversible error when a trial court had informed the jury which party would be favored by affirmative or negative answers to various special questions.[23] In such cases, the appellate courts often noted that giving the jury this information, either directly or indirectly, undermined the very purpose of special verdicts or special interrogatories posed in

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could not agree upon answers to several special questions. The trial court then told the jurors to answer the questions in whatever way would be in accord with their general verdict. The Michigan Supreme Court held that this was reversible error because the trial court, and not the jury, had in effect answered the questions. The rationale for this holding was apparently that the trial court's instructions had turned the jury's answers into mere formal affirmations of a result which the jury had reached independently of any consideration of the special issues posed.

In *Ryan*, the situation was almost identical to that in *Cole*. The trial court had presented separate fact issues to the jury, along with a charge for a general verdict. When presenting the special questions, however, the court informed the jury that an affirmative answer to each question would be in accordance with a general verdict for the plaintiff, whereas a negative answer would favor the defendant. On appeal, the Wisconsin Supreme Court held that it was error to inform the jurors of what effect their answers would have on the general verdict. The court noted that:

> [T]he non-expert juryman is more liable than the experienced lawyer or judge to be led away from the material issues of fact involved by some collateral circumstance of little or no significance, or by sympathy, bias, or prejudice; and hence it is common practice for courts, in the submission of such particular questions and special verdicts, to charge the jury, in effect, that they have nothing to do with, and must not consider the effect which their answers may have upon, the controversy or the parties.

77 Wis. at ____, 46 N.W. at 886.

[23] *See supra* note 22. In Coats v. Town of Stanton, 90 Wis. 130, 62 N.W. 619 (1895), the Wisconsin Supreme Court found reversible error when the trial court informed the jury that its general verdict for the plaintiff would not stand unless the answers to two special questions were in the negative. In explaining its holding, the court found:

> The jury had no right to be informed how any particular answer to a special question would affect the case, or what judgment would follow in consequence of it, for to impart such information would almost necessarily defeat the object intended to be secured by the special verdict. . . . The object of the law is to secure fair and impartial answers to such questions, free from bias or prejudice in favor of either party or in favor of or against a particular result, and to guard against the danger of the result being affected or controlled by favor or sympathy, or by immaterial considerations.

Id. at 136, 62 N.W. at 621. *Cf.* Taylor v. Davam, 191 Mich. 243, 157 N.W. 572 (1916) (error when jury advised how to answer special question consistently with general verdict); Mechanics' Bank v. Barnes, 86 Mich. 632, 49 N.W. 475 (1891) (error when trial court informed jury that special questions must be answered in way that agrees with general verdict); Beecher v. Galvin, 71 Mich. 391, 39 N.W. 469 (1888) (error when trial court instructed jury which answers to make, depending upon which party the jury found for in general verdict); McCourtie v. United States Steel Corp., 253 Minn. 501, 93 N.W.2d 552 (1958) (error when trial court explained to jury conditions under which plaintiff could maintain personal injury action, thereby indicating effect of possible answers to special questions).

conjunction with a charge of a general verdict.[24]

Further, several courts also found reversible error when a trial court had instructed the jury not to answer certain special questions unless other questions were answered in a particular way.[25] Reversals on these grounds were especially common when a court gave an instruction regarding an answer which would have determined the outcome of the case.[26]

The error of the instructions in both of these situations was essentially the same. The appellate courts held the instructions to be in error because the instructions arguably defeated the purpose of special questions and, in effect, put the jury in a position to manipulate the outcome of the case.[27]

The leading case for the most common statement of the blindfold rule is *Banderob v. Wisconsin Central Railway Co.*[28] Although in *Banderob* the Wisconsin Supreme Court found no error on appeal, the court nevertheless took the opportunity to discuss the propriety of informing juries of the legal effects of their answers to special questions. The court first noted that it is not error to give the jury general rules of law appropriate to an understanding of particular questions in a special verdict.[29] The court stressed, however, that it is reversible error for the trial court to inform the jury "expressly or by necessary implication" of the effect of an answer to a special question upon the ultimate rights of

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[24] Beecher v. Galvin, 71 Mich. 391, 39 N.W. 469 (1888); Morrison v. Lee, 13 N.D. 591, 102 N.W. 223 (1904); Coats v. Town of Stanton, 90 Wis. 130, 62 N.W. 619 (1895).

[25] In Grasso v. Cannon Ball Motor Freight Lines, 125 Tex. 154, 81 S.W.2d 482 (1935), the Texas Supreme Court held that it was reversible error for the trial court to have instructed the jury to fix damages only if special questions regarding the negligence of the defendant and contributory negligence of the plaintiff were answered in a certain way. The Texas court noted that it is not always reversible error to instruct that an affirmative or negative answer to a question makes it unnecessary to answer another question. *See infra* notes 29 & 31 and accompanying text.

It is error, however, when an instruction informs the jury of the ultimate effect of its answers in a case submitted on special issues. The instruction in *Grasso* made it clear that the plaintiff would recover only if the jury found the defendant negligent and the plaintiff not contributorily negligent. *Cf.* Texas & P.R. Co. v. Heathington, 115 S.W.2d 495 (Tex Civ. App. 1938) (error to instruct jury to fix damages only if jurors believed defendant was negligent and proximate cause of damage to plaintiff's property); Schroeder v. Rainboldt, 128 Tex. 269, 97 S.W.2d 679 (1936) (error to instruct jury not to answer subsequent question if question whether automobile accident was unavoidable was answered in the negative).

[26] *See, e.g.*, cases cited *supra* note 25.

[27] *See infra* note 101 and accompanying text.

[28] 133 Wis. 249, 113 N.W. 738 (1907). The rule, as set forth in *Banderob*, is that:

> It is reversible error for the trial court by instruction to the jury to inform the jury expressly or by necessary implication of the effect of an answer or answers to a question or questions of the special verdict upon the ultimate right of either party litigant to recover or upon the ultimate liability of either party litigant.

Id. at ____, 113 N.W. at 751.

[29] *Id.*

either party to recover.[30]

Banderob also set out the major exception to the blindfold rule. Stated generally, the exception is that it is not error to inform juries of matters which they have become acquainted with during the course of the trial.[31]

A significant number of courts have invoked the blindfold rule in cases involving comparative negligence.[32] In part, the reason for this is that the blindfold rule only applies in cases involving special verdicts or special questions,[33] and comparative negligence cases most often require special verdicts or questions.[34] Moreover, comparative negligence statutes in most jurisdictions bar a

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[30] *Id.*

[31] *See* Annotation, 90 A.L.R.2D 1040, 1052 (1963). In both Texas and Wisconsin, courts are allowed to inform juries of matters which a juror of ordinary intelligence already knows (either through the ordinary course of a trial or, presumably, through independent sources), or matters which are otherwise obvious. *See* Grieger v. Vega, 153 Tex. 498, 271 S.W.2d 85 (1958); Kobelinski v. Milwaukee & Suburban Transp. Corp., 56 Wis. 2d 504, 202 N.W.2d 415 (1972). *Cf.* Wright v. Covey, 233 Ark. 798, 349 S.W.2d 344 (1961) (not error to inform jurors of anything they could deduce from reading special interrogatories); Welsh v. Fleming, 42 S.D. 193, 173 N.W. 836 (1919) (not prejudicial error to inform jurors of what they could have inferred from all the evidence presented at trial); Faville v. Robinson, 201 S.W. 1061 (Tex. Civ. App. 1918) (not prejudicial error to inform jury of what a person of ordinary intelligence could not fail to discover during course of trial). *See also* Note, *Informing the Jury of the Legal Effect of its Answers to Special Verdict Questions Under Kansas Comparative Negligence Law—A Reply to the Masses; A Case for the Minority View*, 16 WASHBURN L.J. 114, 118 (1976) [hereinafter Note, *A Reply to the Masses*].

[32] *See, e.g.*, Argo v. Blackshear, 242 Ark. 817, 416 S.W.2d 314 (1967); Avery v. Wadlington, 186 Colo. 158, 526 P.2d 295 (1974); McGinn v. Utah Power and Light Co., 529 P.2d 423 (Utah 1974); McGowan v. Story, 70 Wis. 2d 189, 234 N.W.2d 325 (1975).

[33] *See supra* note 3.

[34] *See* Note, *A Reply to the Masses*, *supra* note 31, at 116. *Cf.* Smith, *supra* note 3, at 200:

> Since inherent in any comparative negligence scheme is some type of comparison of the plaintiff's negligence with that of the defendant, most states with comparative negligence legislation have provided for the submission of separate fact issues to the jury in lieu of the more familiar general verdict as a means of facilitating the mechanical apportionment of fault.

Current law in Hawaii is that the use of special verdicts is mandatory in jury trials of comparative negligence cases:

> (a) Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.
>
> (b) In any action to which subsection (a) of this section applies, the court, in a nonjury trial, shall make findings of fact or, in a jury trial, *the jury shall return a special verdict* which shall state:
>
> (1) The amount of the damages which would have been recoverable if there had

plaintiff from all recovery if the plaintiff is found to have been either fifty or fifty-one percent negligent in causing her own injuries.[35] Thus, the question naturally arises whether a jury should be informed of the applicable statute before making its special findings attributing relative percentages of negligence to the parties involved.[36] Several courts have concluded that juries should not

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been no contributory negligence; and

(2) The degree of negligence of each party, expressed as a percentage.

HAW. REV. STAT. § 663-31 (Supp. 1973) (emphasis added).

[35] Flynn, *Comparative Negligence: The Debate*, 8 TRIAL 49 (May/June 1972); Heck, *Civil Procedure: Informing Comparative Negligence Juries What Legal Consequences Their Special Verdicts Effect*, 18 WASHBURN L.J. 606 (1979); Schaffer, *Informing the Jury of the Legal Effect of Special Verdict Answers in Comparative Negligence Actions*, 1981 DUKE L.J. 824 (1981).

There are basically three types of comparative negligence systems. The least common type is a "pure" comparative negligence system in which a negligent plaintiff can recover damages from a negligent defendant regardless of the plaintiff's degree of causal responsibility for his injuries. *Id.* at 826. For example, under a pure system, a ninety-nine percent negligent plaintiff will still be able to recover one percent of the total awarded damages. Advocates of the pure form of comparative negligence maintain that it is the most fair of all the systems because "the amount of recovery is derived directly from the defendant's relative fault." *Id. See* Kirby v. Larson, 400 Mich. 585, 642-44, 256 N.W.2d 400, 428-29 (1977).

The more common comparative negligence systems impose a barrier to the plaintiff's recovery depending upon whether the plaintiff is either forty-nine percent or fifty percent negligent. Under a forty-nine percent system, the plaintiff cannot recover damages if his negligence is as great as or greater than that of the defendant(s). Under a fifty percent system, the plaintiff is barred from recovery only if his negligence is greater than that of the defendant(s). Hawaii has adopted a fifty percent comparative negligence system. See *supra* note 34 for text of Hawaii's comparative negligence statute.

[36] The question is especially pressing in jurisdictions with comparative negligence systems of the forty-nine percent type because there is some evidence that juries presented with close cases favor a fifty/fifty finding: "When jurymen become polarized in their deliberations, with some favoring the plaintiff and some the defendant, the instinctive compromise (human nature being involved at this point) is to assign 50% fault to each party." Flynn, *supra* note 35, at 50-51. *See also* Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 343, 353-54 (1980) (juries in close cases divide the negligence down the middle). The difficulty is that in a forty-nine percent jurisdiction, a fifty/fifty finding will mean that the plaintiff will recover nothing. Thus, jurors unaware of how the applicable comparative negligence law works might insure a result which differs significantly from what they had intended. Informed jurors, on the other hand, might adjust their findings slightly so that the plaintiff will still be able to recover. *See* Schaffer, *supra* note 35, at 829.

The propriety of putting juries in a position to manipulate the outcome of the case in this way is debatable. *Id.* Nevertheless, more than a few courts have opted to abolish the blindfold rule in an effort to minimize the chance of juries speculating incorrectly about the law, and making factual findings which insure results which the jury did not intend. *See* Smith, *supra* note 3, at 210-11.

An alternative way of addressing the problems involved in juries' propensity to apportion negligence equally in close cases is to adopt a fifty percent comparative negligence system. Under such a system, a fifty/fifty finding would not prevent the plaintiff from recovering, although a finding

be so informed.[37]

Courts that apply the blindfold rule frequently have emphasized the special and limited role of the jury in special verdict situations. In *McGowan v. Story*,[38] for example, the Wisconsin Supreme Court affirmed the application of the blindfold rule in cases employing special verdicts. The court explained that

> [t]he sole purpose of a special verdict is to get the jury to answer each question according to the evidence, regardless of the effect or supposed effect of the answer upon the rights of the parties as to recovery. To inform them of the effect of their answer in this respect is to frustrate that purpose.[39]

The *McGowan* court stressed that the jury is the finder of facts and that it has no function in determining how the law should be applied to the facts found. In particular, the court noted that it is improper for the jury to "attempt to manipulate the apportionment of negligence to achieve a result that may seem socially desirable to a single juror or to a group of jurors."[40] Although *McGowan* was a comparative negligence case, the court's rationale for invoking the blindfold rule would apply equally well in cases where the plaintiff's fault is not an issue.

Despite the considerable authority in support of the blindfold rule,[41] not all courts agree that the rule should be applied in comparative negligence cases, or in cases requiring the jury to apportion negligence among joint tortfeasors.[42] Those who favor informing juries of the effects of their findings often rely upon

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of more than fifty percent negligence on the plaintiff's part would. New Hampshire pioneered the fifty percent form of comparative negligence, and it has since been adopted in several other states, including Colorado, Hawaii, Massachusetts, Oregon, and Wisconsin. Pearson, *supra* note 36, at 353. Wisconsin adopted the fifty percent system in response to the perceived unfairness of the forty-nine percent system, and only after considering and rejecting the alternative of abolishing the blindfold rule. Schaffer, *supra* note 35, at 831.

[37] *See* Argo v. Blackshear, 242 Ark. 817, 416 S.W.2d 314 (1967); Simpson v. Anderson, 186 Colo. 163, 526 P.2d 298 (1974); Avery v. Wadlington, 186 Colo. 158, 526 P.2d 295 (1974); Holland v. Peterson, 95 Idaho 728, 518 P.2d 1190 (1974); McGinn v. Utah Power & Light Co., 529 P.2d 423 (Utah 1974); Woodward v. Haney, 564 P.2d 844 (Wyo. 1977).

[38] 70 Wis. 2d 189, 234 N.W.2d 325 (1975).

[39] *Id.* at 197, 234 N.W.2d at 329 (quoting Anderson v. Seelow, 224 Wis. 230, 271 N.W. 844 (1937)).

[40] 70 Wis. 2d at 197-98, 234 N.W. 2d at 329.

[41] *See supra* notes 22-28, 32, 37-39 and accompanying text.

[42] *See* Appelgren v. Agri-Chem., Inc., 562 P.2d 766 (Colo. App. 1977); Seppi v. Betty, 99 Idaho 186, 579 P.2d 683 (1978); Thomas v. Board of Township Trustees, 582 P.2d 271 (Kan. 1978); Wing v. Morse, 300 A.2d 491 (Me. 1973); Roman v. Mitchell, 82 N.J. 336, 413 A.2d 322 (1980); Smith v. Gizzi, 564 P.2d 1009 (Okl. 1977); Peair v. Home Assn. of Enola Legion No. 751, 430 A.2d 665 (Pa. Super. 1981); Adkins v. Whitten, 297 S.E.2d 881 (W.Va. 1982).

one or more of three basic arguments.[43]

The first argument is that whether or not the blindfold rule is invoked, jurors often have a good idea of how their answers to special questions will affect the outcome of the case. Thus, an attempt to blindfold the jury is often pointless and a waste of judicial effort.[44]

The second argument asserts that, even if jurors do not know the possible effects of their answers, they will inevitably speculate about those effects. If the jury is blindfolded, jurors' speculation will be uninformed, and possibly mistaken. Therefore, blindfolding the jury creates the risk that jurors will answer questions based on incorrect assumptions about the effects of their answers. A possible consequence is that they might insure an outcome which is inconsistent with their intentions.[45]

The third argument is that blindfolding jurors prevents them from tempering harsh law with a common sense of justice. Advocates of this argument maintain that it is proper and traditional for jurors to temper the law with their own sense of what justice requires in a given case.[46]

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[43] *See* Smith, *supra* note 3, at 208-14; Note, *A Reply to the Masses*, *supra* note 31, at 130-33.

[44] *See* Smith, *supra* note 3, at 208-10. *See infra* text accompanying notes 70-77.

[45] *See* Smith, *supra* note 3, at 210-12. *See infra* text accompanying notes 78-102.

[46] *See* Smith, *supra* note 3, at 212-14. It has been suggested that "[i]n the final analysis, the debate over informing the jury of the legal consequences of its factual findings reflects a more fundamental dispute as to the proper role of the jury in a civil action." *Id.* at 212. Ever since the inception of special verdicts, and especially since the 1963 amendment of rule 49 of the Federal Rules of Civil Procedure, the use of special verdicts has met with criticism. For example, it has been argued that rule 49 should be repealed because special verdicts are "but another means utilized by courts to weaken the constitutional power of juries and to vest judges with more power to decide cases according to their own judgments." Statement of United States Supreme Court Justices Black and Douglas, issued in connection with the 1963 amendment of Rule 49, 374 U.S. 865, 867-68 (1963). *See also* FEDERAL PRACTICE AND PROCEDURE, *supra* note 3, § 2505.

Critics of special verdicts often express a preference for general verdicts:

> [T]he general verdict, at times, achieves a triumph of justice over law. The jury is not, nor should it become, a scientific fact finding body. Its chief value is that it applies the "law," . . . in an earthy fashion that comports with "justice" as conceived by the masses. . . . The general verdict is the answer from the man in the street.

5 J. MOORE, FEDERAL PRACTICE ¶ 49.05, at 2217 (2d ed. 1985). A main presumption behind this position is that the jury is the "great corrective of the law in its actual administration," Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910), and that the jury's "popular prejudice keeps the law in accord with the wishes of the community." O.W. HOLMES, COLLECTED LEGAL PAPERS 237-38 (1927).

Because a primary function of special verdicts is to prevent jury prejudice from influencing factual findings, *see supra* note 3, it has been argued that "to the extent that the special verdict is successful, it is a barrier to the corrective role of the jury." Note, *The Minnesota Experience*, *supra* note 3, at 909. Because applying the blindfold rule has essentially the same purpose as charging a jury with a special verdict, the same criticisms would apply to the blindfold rule with equal force. *See supra* note 3. It is clear that a court which admitted a preference for the so-called "corrective"

IV. THE HAWAII SUPREME COURT'S REASONING

According to the Hawaii Supreme Court, the primary issue in *Kaeo* was whether the trial court had followed the directive of Hawaii Rules of Civil Procedure 49(a).[47] Rule 49(a) provides that when a special verdict has been charged, "[t]he court shall give to the jury such explanation and instruction concerning the matter . . . submitted as may be necessary to enable the jury to make its findings upon each issue."[48] The supreme court acknowledged that

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role of the jury could reject the blindfold rule without any inconsistency. But it is not clear that a court which accepts the value of special verdicts and the rationale behind their use can reject the blindfold rule without facing an implicit contradiction.

[47] 68 Haw. at ____, 719 P.2d at 394. The City had framed the issue differently. Relying upon McKeague v. Talbert, 3 Haw. App. 646, 658 P.2d 898 (1983), the City argued that the trial court in *Kaeo* had erred by not informing the jury as to the law of the case in such a way that the jury would not be misled. 68 Haw. at ____, 719 P.2d at 394. In *McKeague*, the defendant requested an instruction which would have informed the jurors that they were not permitted to consider or make any award for attorney's fees. 3 Haw. App. at 657, 658 P.2d at 906. Although the Intermediate Court of Appeals agreed that the instruction was "unquestionably a correct statement of the law," the instruction was refused because it "had nothing to do with any of the issues or evidence in the case," and because it "assumed an issue not in controversy." *Id.*

In *Kaeo*, the Hawaii Supreme Court found that *McKeague* "did not treat the issue at hand" for reasons that the court did not explain. 68 Haw. at ____, 719 P.2d at 394. Arguably, the City's requested Instruction No. 18 in *Kaeo* also had nothing to do with any of the issues or evidence in the case. See *supra* note 8 for text of the City's instruction. *See infra* text accompanying notes 58-69. The relevant issues in *Kaeo* were whether the defendants were or were not negligent and proximate causes of the plaintiff's injuries, and what degree of negligence should be attributed to each defendant. The City's instruction would simply have informed the jurors what would happen, under joint and several liability, if they found the City negligent and a proximate cause of the plaintiff's injuries, and if the City were the only solvent defendant. Though the instruction was a correct statement of the doctrine of joint and several liability, it is difficult to see how the operation of joint and several liability could be construed as an issue in controversy in *Kaeo*. Given this, it is also difficult to see why the Hawaii Supreme Court found that *McKeague* was not on point.

[48] 68 Haw. at ____, 719 P.2d at 394. Hawaii Rules of Civil Procedure 49(a) reads:

> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. ***The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue.*** If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on

when a special verdict has been charged, the jury makes findings of fact and the court applies the law to those findings.[49] Despite this, however, the court maintained that the question whether juries should be informed of the legal effects of their factual findings remained open.[50] In addressing this question, the court considered three lines of reasoning.

First, the court expressed doubt that special verdicts are able to eliminate the effects of bias, sympathy, and prejudice from jury deliberations.[51] The court recognized that jurors are concerned about the effect of their verdict, and tend to adjust their verdict to accord with their notions of justice.[52] Moreover, the court asserted that in most cases, the jury will know which party is favored by a particular answer to a specific question.[53] On these grounds, the court concluded that " 'an attempt to keep the jury in the dark as to the [legal] effect of its answers is likely to be unavailing . . . .' "[54]

Second, the court acknowledged the "danger" that uninformed jurors will speculate about the law and the ultimate effect of their answers on the outcome of the case. The court expressed concern that, in at least some cases, the jury will speculate incorrectly and answer questions in a way that insures a result which the jury did not intend. It would be better, the court concluded, for courts to explain the operation of the law.[55]

Finally, the court asserted that a rule which allows juries to be informed of the operation of joint and several liability in cases involving joint tortfeasors would be "consistent" with the directive of Hawaii Rules of Civil Procedure 49(a).[56] On the basis of these considerations, the court held that "the trial court, if requested and when appropriate, should inform the jury of the possible legal consequence of a verdict apportioning negligence among joint tortfeasors."[57]

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the special verdict.

HAW. R. CIV. P. 49(a) (emphasis added).

[49] 68 Haw. at ____, 719 P.2d at 395. *See* FEDERAL PRACTICE AND PROCEDURE, *supra* note 3, § 2503.

[50] 68 Haw. at ____, 719 P.2d at 395.

[51] *Id.* at ____, 719 P.2d at 396.

[52] *Id.*

[53] *Id.*

[54] *Id.* (quoting FEDERAL PRACTICE AND PROCEDURE, *supra* note 3, § 2503, at 513). *See* Smith, *supra* note 3, at 210. *See infra* text accompanying notes 70-77.

[55] 68 Haw. at ____, 719 P.2d at 396. *See infra* text accompanying notes 78-102.

[56] 68 Haw. at ____, 719 P.2d at 396. *See infra* text accompanying notes 58-69.

[57] 68 Haw. at ____, 719 P.2d at 396.

V. ANALYSIS

A. *The View that Informing Juries of the Effects of Their Findings is Consistent with Hawaii Rules of Civil Procedure 49(a)*

The Hawaii Supreme Court did not explain why an instruction regarding the operation of joint and several liability would be consistent with the directive of Hawaii Rules of Civil Procedure 49(a). Apparently, the court concluded that an explanation of joint and several liability was in some sense "necessary" to enable the *Kaeo* jury to make its findings as to the relative degrees of negligence of the defendants.[58]

Arguably, informing a jury regarding a rule of liability in a special verdict situation would be necessary only if the information were in some way relevant to the jury's fact finding task.[59] Thus, the threshold question in the context of *Kaeo* is whether understanding the law of joint and several liability is relevant to apportionments of negligence. Understanding joint and several liability would be relevant if it related to the jury's apportionments in either of two ways.

First, information regarding joint and several liability would be relevant if the information improved the jury's understanding of the legal criteria according to which findings and apportionments of negligence are to be made. The information would be relevant and necessary because jurors could not apportion negligence properly unless they understood the law of negligence in the first place.[60]

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[58] The court did not expressly assert that an explanation of joint and several liability is "necessary" in order for a jury to apportion negligence. Rather, the court held that such an instruction would be "consistent with our directive in [Hawaii Rules of Civil Procedure] 49(a)." 68 Haw. at ____, 719 P.2d at 396. However, by framing the issue in terms of whether the "command" of rule 49(a) had been followed below, the court was implicitly asking whether the City's Instruction No. 18 was necessary in order for the jury to make its findings. The only relevant "command" of rule 49(a) is that the court provide the jury with "necessary" information. Thus, by holding that the trial court had not followed the command of rule 49(a) in denying the City's instruction, the court was implicitly asserting that the instruction was, indeed, necessary.

[59] The Hawaii Supreme Court's position regarding the scope of the jury's task is clear:

> Under our system of jurisprudence, the jury is the finder of fact and it has no function in determining how the law should be applied to the facts found. It is not the function of a jury in a case between private parties . . . to be influenced by sympathy for either party, nor should it attempt to manipulate the apportionment of negligence to achieve a result that may seem socially desirable to a single juror or to a group of jurors.

68 Haw. at ____, 719 P.2d at 395 (quoting McGowan v. Story, 70 Wis. 2d at 197, 234 N.W.2d at 329).

[60] If information regarding joint and several liability provided jurors with necessary information regarding the law of negligence, the blindfold rule would not apply. Even the Wisconsin Supreme Court in *Banderob* allowed that it was not error to give the jury general rules of law appropriate to an understanding of particular questions in a special verdict. 133 Wis. ____, 133 N.W. at 751. *See supra* text accompanying note 29.

Second, information regarding joint and several liability would be relevant if it provided the jury with factual information which tended to prove or establish the relative degrees of negligence of the defendants. The information would arguably be necessary not because the jury could not apportion negligence without it, but because the information would provide additional grounds upon which jurors could logically base their inferences.[61]

A joint and several liability instruction, however, would not have either of these effects. First, the doctrines of negligence and liability are distinct.[62] Deter-

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[61] Compare the definition of "relevance" in Hawaii Rules of Evidence: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." HAW. R. EVID. 401. *See also* State v. Smith, 59 Haw. 565, 583 P.2d 347 (1978): "Evidence is relevant if it tends to prove a fact in controversy or renders a matter in issue more or less probable." *Id.* at 567, 583 P.2d at 349. This is not to suggest that information regarding joint and several liability would have any evidentiary value. It is only to note one sense in which an instruction regarding joint and several liability could be "relevant" to a jury's apportionment of negligence.

[62] Negligence and liability are distinct in several respects. First, except when strict liability is involved, determinations of negligence are made prior to and independently of determinations of liability. When a special verdict has been charged, determinations of negligence are made by the jury, while determinations of liability are made by the court. Under Hawaii's comparative negligence statute, for example, the jury is required to return a special verdict in which it sets the total amount of damages suffered by the plaintiff, and states the degree of negligence of each party, expressed as a percentage. HAW. REV. STAT. § 663-31 (1984). However, the jury is not charged with determining the degree or extent of liability of each party. That function is reserved for the court, after the jury has returned its special verdict. *Id.* Roman v. Mitchell, 82 N.J. 336, 413 A.2d 322 (1980): "the jury . . . has a precisely limited function: to determine, on the basis of answers to specific questions, the extent of fault of the parties, *not* the extent of defendant's liability for damages." *Id.* at ____, 413 A.2d at 332 (Clifford, J., dissenting in part) (emphasis original).

Second, negligence and liability are distinct in that the ultimate degree of a defendant's liability will sometimes differ from the degree of negligence attributed to him by the jury. In a jurisdiction which retains joint and several liability, for example, a defendant found one percent negligent can be held 100 percent liable, while in a jurisdiction where joint and several liability has been abolished, the same defendant's liability will not exceed one percent.

Third, determinations of negligence and liability involve different considerations. Findings and apportionments of negligence require an assessment of conduct. *See* UNIFORM COMPARATIVE FAULT ACT § 2(b): "In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed." Determinations of liability, on the other hand, require application of the appropriate liability law to an assessment of conduct that has already been made. Rules which establish that one defendant owed a higher degree of care than another (as with common carriers) or a lesser degree (as with host drivers in states with automobile guest statutes) are relevant in establishing whether a defendant can be liable, as a matter of law. But once potential liability is established, the rule(s) which govern liability play no part in determining the relative proportion of negligence or fault of any party relative to the others. *Id.* at Commissioner's Note to § 2(4). Determinations of actual liability often depend upon prior findings and appor-

minations and apportionments of negligence require an assessment of conduct, while determinations of liability require an assessment of the applicable law, and applying that law to the facts as found. In order to find and apportion negligence, the jury must understand certain legal concepts, in particular the concepts of duty, breach, causation, and damages.[63] But an understanding of the law governing a defendant's liability would tell a jury nothing about these concepts, or about how to apply them in an assessment of the defendant's conduct.[64]

Second, an explanation of joint and several liability would not provide jurors with any factual information from which they could logically infer the relative degree of negligence of each defendant. The facts from which the jury could infer relative degrees of negligence are only those which have to do with the defendants' conduct in the given circumstances. An explanation of the legal doctrine of joint and several liability, however, would tell the jury nothing about

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tionments of negligence in that those findings provide the "raw data" to which the appropriate law of liability can be applied. Findings and apportionments of negligence, however, do not depend upon any particular law of liability. Whether a defendant is one or 100 percent negligent has nothing to do with whether the doctrine of joint and several liability applies in the jurisdiction, or with whether the plaintiff was contributorily or comparatively negligent to any particular degree, or with any number of other possible legal doctrines, defenses, or excuses which might affect a negligent tortfeasor's ultimate liability.

[63] *See generally* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984). Determinations of whether a duty existed between an injured plaintiff and an alleged tortfeasor are generally made by the court, although the jury is responsible for settling disputed fact issues regarding the nature of the relationship between the parties. *Id.* at 320-21. When facts about the parties' relationship are in dispute, the court instructs the jury regarding what duty exists as a matter of law for each of the possible relationships. *Id.* The standard of care to be applied in order to determine whether there has been a breach of duty is also determined by the court. However, "if reasonable persons might differ, either because relevant facts are in dispute or because application of the legal standard is an evaluative determination as to which reasonable persons might differ," the question of breach is submitted to the jury with appropriate explanation of the legal standard. *Id.* Likewise, if reasonable persons might differ regarding causation because relevant facts are in dispute, or because application of a legal concept (such as a "substantial factor" formulation) is an evaluative determination as to which reasonable persons might differ, the issue of causation is submitted to the jury with appropriate instructions on the law. Finally, questions regarding the amount of damages and apportionment of damages are submitted to the jury with appropriate instructions, if relevant facts are in dispute. *Id.*

[64] *See supra* note 62. *Cf.* Roman v. Mitchell, 82 N.J. 336, 413 A.2d 322 (1980):

> The only law which the jury members need to understand is the law which enables them to answer the specific questions asked of them in the special verdict form. . . . [I]t is unnecessary for the jury to concern itself with how much the plaintiff receives or whether the plaintiff receives anything.

Id. at ____, 413 A.2d at 333 (Clifford, J., dissenting in part).

the defendants' conduct or the circumstances in which the conduct occurred.[65]

The only facts which an explanation of joint and several liability would convey are facts about the legal effects which various assessments of the defendants' conduct might produce. Knowing such facts might, indeed, influence how jurors assess the defendants' conduct in the first place.[66] The Hawaii Supreme Court has long recognized, however, that not all potentially influential information is relevant or necessary to a jury's fact finding task.[67]

Given these considerations, it is unclear on what basis the supreme court concluded that an instruction informing the jury of the operation of joint and several liability is necessary in order for the jury to apportion negligence. The court's position cannot logically be based on the assumption that an explanation of joint and several liability would improve the jury's understanding of the legal concepts that must be applied in order to find and apportion negligence.[68] Nor can the court reasonably maintain that understanding joint and several liability provides the jury with relevant factual information from which inferences of negligence or relative degrees of negligence can logically be drawn.[69]

B. The View that Special Verdicts and the Blindfold Rule are Ineffective

The court's doubt regarding the effectiveness of the blindfold rule was based upon the assumption that jurors often know the legal effect of their answers to special questions in advance.[70] The commentarial literature provides some support for this assumption.[71] At the same time, however, there are cases which

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[65] More specifically, an explanation of joint and several liability would tell the jury nothing about the relationship between the parties, whether a legal duty had been breached, whether the conduct involved caused the plaintiff's injuries, or whether one defendant was more or less negligent than another. Nevertheless, the Hawaii Supreme Court noted that other courts have concluded that " 'a jury informed of the legal effects of its findings as to percentages of negligence . . . is better able to fulfill its fact finding function.' " 68 Haw. at ____, 719 P.2d at 395 (quoting Roman v. Mitchell, 82 N.J. at 346, 413 A.2d at 327).

[66] One conclusion of the University of Chicago Jury Project was that if jurors know what they must do in order to insure that a certain party will recover, they will use that knowledge to grant recovery. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 98 (1966). *See* Note, *A Reply to the Masses*, *supra* note 31, at 128. *See also infra* note 101.

[67] *See, e.g.*, Carr v. Kinney, 41 Haw. 166 (1955) (information regarding whether party to an action carries liability insurance is not permissible because of risk that the information might influence jurors to make decision on irrelevant and improper grounds). *Accord* Gilliam v. Gerhard, 34 Haw. 466 (1938). Under the Hawaii Rules of Evidence, even relevant evidence may be withheld from the jury "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." HAW. R. EVID. 403.

[68] *See supra* text accompanying notes 62-64.

[69] *See supra* note 65 and accompanying text.

[70] 68 Haw. at ____, 719 P.2d at 396.

[71] *See* Smith, *supra* note 3, at 208:

indicate that jurors often answer questions regarding assumption of risk[72] and apportionments of negligence[73] without understanding what legal effects their answers will have. Thus, the evidence that jurors know the effects of their answers to special questions is, at best, inconclusive.[74]

But even if the evidence showed conclusively that most jurors know the effects of their answers, it would still be true that some do not. Thus, informing juries would create the risk that in a certain number of cases, some jurors would be put into a position to allow bias and sympathy to influence their factual findings when refusing to inform them would have prevented this.[75]

If the advantages of informing juries outweighed the risk that some jury findings would be based on bias and sympathy, informing juries clearly would be reasonable. The difficulty, however, is that there are no significant benefits to be gained by informing jurors who already know the effects of their answers. As the court recognized, it would be pointless to attempt to keep a knowledgeable jury in the dark by invoking the blindfold rule.[76] But it would be equally pointless to inform such a jury.[77]

Indeed, the only jurors who would be affected by being informed would be those who did not know the effects that their answers would produce. Given this, it can be argued that informing juries is both unnecessary and unwise, at least with regard to two classes of jurors. It is unnecessary with regard to those jurors who already know the effects of their answers, and it is unwise regarding those jurors whose biases and sympathies would be kept in check by keeping them uninformed.

> Indeed, only an extremely unsophisticated juror could sit through an entire trial and not have some indication of what the legal effects of his factual findings are, particularly since he is likely to receive and consider most of the evidence in terms of whether it favors one party or the other.

See Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 341 (1968); Green, *Blindfolding the Jury*, 33 TEXAS L. REV. 275, 282 (1955); FEDERAL PRACTICE AND PROCEDURE, *supra* note 3, § 2503, at 512-13; Note, *A Reply to the Masses*, *supra* note 31, at 131.

[72] *See, e.g.*, Harris v. Hercules, Inc., 368 F. Supp. 360 (E.D. Ark. 1971).

[73] *See, e.g.*, Argo v. Blackshear, 242 Ark. 817, 416 S.W.2d 314 (1967).

[74] Some critics of the blindfold rule have tried to have it both ways, arguing that the rule should be abolished because jurors are likely to know the effects of their answers, while also arguing that the rule should be abolished because jurors often do not know the effects of their answers. *See* Smith, *supra* note 3, at 208-12. The Hawaii Supreme Court advanced both views in *Kaeo*. 68 Haw. at ____, 719 P.2d at 396.

[75] Whether the blindfold rule is effective in eliminating the effects of jury bias and sympathy is a complex question. The answer depends upon much more than evidence as to whether juries know the effects of their answers in advance. Nevertheless, the possibility that most jurors know the effects of their answers provides insufficient reason to reject the blindfold rule.

[76] 68 Haw. at ____, 719 P.2d at 396.

[77] It would be pointless because to inform knowlegeable jurors would be to tell them what they already know.

C. The View that Juries Will Inevitably Speculate About the Effects of Their Answers

The court's concern with speculation focused on a third class of jurors: those who do not know the effects of their answers, but who will speculate and manipulate their factual findings in order to achieve a certain result. The danger in this, the court noted, is that uninformed jurors might "guess wrong about the law" and shape their answers in a way that leads to a result they did not intend.[78]

In *Kaeo*, for example, the jury might have based its apportionment of negligence partly on the mistaken belief that a finding of one percent negligence on the City's part would result in the City's being liable for only one percent of the total damages. If the jury's mistake had influenced its findings, the actual outcome produced by those findings would not have been what the jury intended.[79]

If the jury had been instructed regarding joint and several liability, however, it might have found differently.[80] In order to avoid the apparently harsh result of the minimally negligent City having to pay the entire damage award, the jury might have found that the City was either not negligent or not a proximate cause of the plaintiff's injuries.[81] In this way, the jury would have insured an

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[78] 68 Haw. ____, 719 P.2d at 396. The court was unable to "discount 'the danger that [jurors] will guess wrong about the law, and may shape [their] answers to the special verdicts, contrary to [their] actual beliefs, in a mistaken attempt to ensure the result [they] deem[] desirable.'" *Id.* (quoting FEDERAL PRACTICE AND PROCEDURE, *supra* note 3, § 2509, at 512).

[79] There is some evidence that the *Kaeo* jurors did mistakenly assume that their verdict would result in the City's being liable for only one percent of the damages: "The [*Kaeo*] jury wasn't told about the effect of its verdict. [City deputy corporation counsel] Francis Nakamoto said jurors were 'upset' because they thought the city would only have to pay 1 percent or $7,250." Honolulu Advertiser, Sept. 14, 1984, at A1, col. 4. However, the *Kaeo* jurors were also reported to have told an attorney representing the plaintiff that it was "fine with them" that the City would have to pay the entire damages if defendant Davis could not pay his share. *Id.*

[80] *See supra* note 66. One commentator has noted that "[i]t is anomalous . . . to provide . . . jurors with information on the legal effect of their answers and at the same time . . . expect them not to inject bias into the process by manipulating the findings of fact in accordance with a prearranged result." Schaffer, *supra* note 35, at 843 n.97. Regarding the propensity of jurors to "shape the special verdict answers to accomplish desired results when they are informed of the legal effects of the findings," see *id.* at 830 n.25.

[81] Jurors informed of the operation of joint and several liability would realize that they had only two options insofar as the City's ultimate liability were concerned: (1) to expose the City to liability for 100 percent of the damages, or (2) to insure that the City would have to pay nothing. Even if the jurors were convinced that the City had in fact been one percent negligent, the apparent inequity of a minimally negligent defendant having to pay 100 percent of the damages might have governed their actual findings.

outcome consistent with its intentions.[82]

Although the court did not explain why this result would have been preferable to the result which the blindfolded jury actually reached, the court may have been considering certain policy factors. During the 1985-1986 session of the Hawaii State Legislature, government and large corporations expressed serious concerns about the rapidly escalating cost of liability insurance.[83] In an apparent effort to reduce the costs, at least one bill was introduced which would have required courts to inform juries of the operation of joint and several liability.[84] That bill failed to pass, however, and it is possible that the court in *Kaeo* decided to accomplish what the legislature had not done, namely make it somewhat less lucrative to join minimally negligent "deep pockets" in tort actions.[85]

The *Kaeo* exception to the blindfold rule may help to alleviate the insurance problem to some degree.[86] At the same time, however, there are several other important policies that may well be undermined by informing juries of the effects of their apportionments of negligence under the law of joint and several

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[82] This is not to suggest that the jury intended the City to pay nothing. The jury might well have intended the City to pay one percent of the damages. *See supra* note 79. However, under joint and several liability, it would have been impossible for the jury to insure that the City would have to pay only one percent of the total damages. *See supra* note 81.

[83] Honolulu Advertiser, Mar. 3, 1986, at A8, col. 1.; Honolulu Star-Bull., Mar. 4, 1986, at A3, col. 1.

[84] Honolulu Advertiser, Mar. 3, 1986, at A8, col. 1. The bill would also have required courts to inform juries of plaintiffs' collateral sources of benefits. Honolulu Star-Bull., Mar. 4, 1986, at A3, col. 1. According to Wayne Metcalf, vice chairman of the House Judiciary Committee, the rationale behind the proposed change in Hawaii's tort law was to provide juries with a "clear picture of the economic consequences of a decision. Basically, it's full disclosure and let the jury make an informed decision." Honolulu Advertiser, Mar. 3, 1986, at A8, col. 1.

[85] Two aspects of the *Kaeo* opinion support the hypothesis that the court may have created an exception to the blindfold rule for reasons other than those stated in the opinion itself. First, the court did not have to address the blindfold rule at all. The supreme court found three reversible errors in the trial court's ruling, any one of which was sufficient to vacate the ruling and order a new trial. 68 Haw. ____, 719 P.2d at 392-96. This raises the possibility that the court wanted to address the blindfold rule, and may have wanted in advance to create an exception to the rule where instructions regarding joint and several liability are concerned. Second, the court's discussion of the blindfold rule seemed incomplete. For example, the court did not explain why a joint and several liability instruction was necessary to enable the jury to make its findings. *See supra* text accompanying notes 58-69. Moreover, the court did not discuss several risks that would be created by informing juries regarding joint and several liability. *See supra* text accompanying notes 75-77. *See also infra* text accompanying notes 87-101.

[86] Juries informed regarding joint and several liability may refuse to expose minimally negligent "deep pockets" to entire liability in certain cases. If the *Kaeo* rule has this effect, the number of liability insurance claims against deep pockets who otherwise would have been held jointly and severally liable will be reduced. If the number of insurance claims is reduced, the total amount paid out by insurers may also be reduced, and the savings to insurers may be passed on to those who carry liability insurance.

liability.

First, it is a well-accepted policy of tort law that an innocent[87] injured person should be able to obtain full recovery for her injuries,[88] even when one or more of the parties responsible for causing the injuries does not have the resources to cover the damages.[89] The rule of joint and several liability reflects this policy. Where each tortfeasor's conduct was negligent and a proximate cause of the plaintiff's indivisible injuries, the rule requires that the plaintiff should be able to recover fully from any one of them.[90] If degrees of negligence can be apportioned, the rule requires that "[t]he wrongdoers should be left to work out between themselves any apportionment."[91]

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[87] One commentator who favors abolishing joint and several liability in comparative negligence cases where the plaintiff is negligent argues that, when the plaintiff is not negligent

> joint and several liability should be fully retained . . . .To abrogate joint and several liability in the case of the non-negligent plaintiff would be to make such persons worse off under comparative negligence than they were under contributory negligence.

Pearson, *supra* note 36, at 366.

[88] *See* Nobriga v. Raybestos-Manhattan, Inc., 67 Haw. 157, 683 P.2d 389 (1984) (goal in joint tortfeasor action is to insure that plaintiff will recover his full damages); Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970) (general rule in measuring damages is to give a sum of money to person wronged which as nearly as possible will restore him to the position he would be in if the wrong had not been committed); Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 588 P.2d 1308 (1978) (cornerstone of tort law is the assurance of full compensation to the injured party).

[89] *See* American Motorcycle Ass'n v. Superior Court of Los Angeles County, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978) (fact that one joint tortfeasor is insolvent or otherwise immune from suit does not relieve another tortfeasor of his liability for damage which he proximately caused). *See also* Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 588 P.2d 1308 (1978): "[I]f [joint and several liability were abandoned,] a completely faultless plaintiff could be forced to bear a portion of the loss if any tort-feasor should prove financially unable to satisfy his proportionate share of the damages. This is incompatible with the compensatory purpose of tort law." *Id.* at ____, 588 P.2d at 1313-14.

[90] In *Seattle First Nat'l Bank*, the court noted "each multiple tort-feasor is personally liable for any injury for which his tortious act is *a* proximate cause." 91 Wash. at ____, 588 P.2d at 1312 (emphasis original). *Accord American Motorcycle Ass'n*, 20 Cal. 3d at 586, 578 P.2d at 904, 146 Cal. Rptr. at 187.

[91] Summers v. Tice, 33 Cal. 2d 80, 88, 199 P.2d 1, 5 (1948). In *Seattle First Nat'l Bank* the court observed:

> What may be equitable *between multiple tortfeasors* is an issue totally divorced from what is fair to the injured party. . . . That it may be possible to assign a percentage figure to the relative culpability of multiple tort-feasors does not detract from the preliminary fact that *each* tort-feasor's conduct was *a* proximate cause of an entire indivisible injury.

91 Wash. 2d at ____, 588 P.2d at 1313 (emphasis original). *See also* Petersen v. City and County of Honolulu, 51 Haw. 484, 462 P.2d 1007 (1969) (Uniform Contribution Among Joint Tortfeasors Act as adopted in Hawaii provides for apportionment of common liability of joint tortfeasors as among themselves, but does not affect the joint and several liability of each defendant toward the plaintiff).

The Hawaii Supreme Court has never directly or indirectly rejected joint and several liability or the equitable principle upon which the doctrine is based. But, by adopting a rule which allows juries to be informed of the effect of joint and several liability, the court has created the risk that the equitable purpose of that doctrine will not be met. If, for example, the *Kaeo* jurors had adjusted their findings so as to avoid exposing the City to liability for 100 percent of Kido's damages, they would effectively have insured that an innocent injured plaintiff would be left with an inadequate recovery, and perhaps with no recovery at all.[92]

Second, there is the policy that juries should not be allowed to usurp the function of legislators by manipulating results which are inconsistent with principles embedded in existing statutes.[93] The Hawaii State Legislature has recently enacted a bill which defines and limits the applicability of joint and several liability.[94] Under the new law, however, joint and several liability is retained regarding both economic and non-economic damages in motor vehicle accident actions, under certain conditions.[95] The conditions are such that the plaintiff in *Kaeo* may well have been able to have recovered 100 percent of her damages from the City even on a finding of one percent negligence.[96] Thus, if the *Kaeo* jurors had adjusted their findings so as to avoid the effects of joint and several liability, they would have defeated the legislature's intent.

Finally, there is a broad, general policy against allowing juries' factual find-

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[92] In *Kaeo*, out of a total adjusted award of $620,684, plaintiff Kido would have been able to collect only the $25,000 provided by defendant Davis' insurance policy. *See* Honolulu Advertiser, Sept. 14, 1984, at A1, col. 1. *See also supra* note 13.

[93] See Skidmore v. Baltimore & O.R.R., 167 F.2d 54 (2d Cir. 1948) for discussion of the general dangers of allowing juries to function as "ad hoc ephemeral (un-elected) legislatures." *Id.* at 58-59.

[94] HAW. REV. STAT. § 663-10.9 (Supp. 1986). See *infra* note 95 for explanation of relevant part of the new law.

[95] Joint and several liability for joint tortfeasors was retained for the recovery of economic damages in actions involving, *inter alia*, torts relating to motor vehicle accidents. HAW. REV. STAT. § 663-10.9 (Supp. 1986). If non-economic damages are sought in motor vehicle accident actions involving torts relating to maintenance and design of highways, joint and several liability is retained upon a showing that the affected joint tortfeasor was given reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort claim is based. *Id.* § 663-10.9(4).

[96] The plaintiff in *Kaeo* had offered evidence of prior accidents at the scene of the Kido accident. *See supra* notes 7 and 16. The Hawaii Supreme Court held that it was error for the trial court not to have allowed such evidence for the purpose of establishing that the accidents should have "attracted the City's attention to a potentially dangerous condition." 68 Haw. at ____, 719 P.2d at 394. Thus, if it were shown on retrial that the City had prior notice of a dangerous condition, a finding of even one percent negligence on the City's part would have rendered it jointly and severally liable under Hawaii's new law.

ings to be influenced by their biases, prejudices, and sympathies.[97] The separation of functions between the court and jury in special verdict situations is intended to implement this policy, as is the blindfold rule.[98] Although the Hawaii Supreme Court has expressed doubt as to the effectiveness of special verdicts and the blindfold rule,[99] the court nevertheless acknowledged the impropriety of jury manipulation of the facts so as to reach a certain result.[100] Whether or not special verdicts are effective, however, informing juries of the effects of their findings encourages manipulation of the facts and enables jurors to give free rein to their biases, prejudices, and sympathies.[101] Informed jurors might hold such biases in check, but the risk that they will not is greater when they are informed.

The Hawaii Supreme Court might not have intended to establish a rule which will produce results inconsistent with the above policies.[102] Nevertheless, these policies may well be undermined by application of the *Kaeo* rule.

VI. IMPACT

On the authority of *Kaeo*, courts in Hawaii are now required to grant requests for jury instructions regarding the effects of apportionments of negligence among joint tortfeasors "when appropriate."[103] The court did not explain the criteria for appropriateness that will be applied, but the decision in *Kaeo* indicates at least that instructions regarding joint and several liability will be appro-

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[97] *See supra* text accompanying notes 21-40. The Hawaii Supreme Court seems to have endorsed this policy in *Kaeo*. *See* 68 Haw. at ____, 719 P.2d at 395.

[98] *See supra* note 3.

[99] 68 Haw. at ____, 719 P.2d at 396.

[100] *Id.* at ____, 719 P.2d at 395.

[101] *See* Note, *A Reply to the Masses*, *supra* note 31, at 116-17: "[T]o inform the jury of which party will be favored by a certain answer gives rise to all the prejudicial shortcomings the special verdict was designed to alleviate." Indeed, there is very little difference, in terms of outcomes, between charging jurors with a general verdict and charging them instead with a special verdict, but informing them of the legal effect of their answers to special questions. In both cases, there is a good chance that the outcome will reflect the jurors' intentions and desires as to who should prevail. And in neither case is there any safeguard against jurors allowing their biases and sympathies to influence their factual findings.

[102] On the basis of the court's reasoning in *Kaeo*, it can be inferred that the court intended, at least, (1) to abandon under certain circumstances a procedural rule that the court judged to be of doubtful value, (2) to adopt a rule which wards against a presumed danger of jury speculation, and which (3) puts juries in a better position to perform their functions in certain types of cases. However, because the court did not discuss the full range of consequences implicated by its holding, it is impossible to know whether the court considered that the presumed advantages of the *Kaeo* rule outweighed the disadvantages.

[103] The *Kaeo* holding was that the court "should," not "may," give the requested instruction under appropriate circumstances. 68 Haw. at ____, 719 P.2d at 396.

priate in cases involving apportionments of negligence among multiple tortfeasors.[104] In addition, because of Hawaii's recent statute limiting the operation of joint and several liability, it is possible that courts will allow juries to be informed of the new law as well.[105]

Those most likely to request an instruction on joint and several liability are defendants who have reasons to believe that the jury will find them negligent to a relatively slight degree. An instruction regarding joint and several liability could be to their advantage because an informed jury may be reluctant to require a minimally negligent defendant to pay a disproportionate share of the damages. Even if the jury were not reluctant to impose entire liability upon a minimally negligent defendant, however, there would be no harm in the instruction. In that case, the jury would simply ignore the instruction and base its findings exclusively on the facts. Thus, a minimally negligent defendant has much to gain and nothing to lose by requesting an instruction regarding the operation of joint and several liability.

Conversely, a defendant with reason to believe that his degree of negligence will be relatively high if the jury is not informed will probably challenge the instruction. Here, the defendant would have nothing to gain by having the jury informed regarding joint and several liability, regardless of how the jury might respond to the information. At the same time, the instruction would create the risk that the jurors might find the defendant negligent to a greater degree than they would have if they had not been informed.[106]

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[104] The fact that the court qualified its holding with the words "when appropriate" suggests that trial courts will retain some measure of discretion when instructions regarding the effects of apportionments of negligence are requested. However, the court also noted that "[a]n explanation of the operation of joint and several liability *in that situation* would be consistent with our directive in HRCP 49(a)." 68 Haw. at ____, 719 P.2d at 396 (emphasis added). Apparently, "in that situation" refers to a situation in which a jury has been charged to apportion negligence among joint tortfeasors, and in which a party has requested an instruction regarding joint and several liability. The difficulty is that if allowing the instruction would be consistent with Hawaii Rules of Civil Procedure 49(a), then the instruction would arguably be mandatory, whether any party had requested it or not. Rule 49(a) provides that the court "shall" give to the jury such explanation and instruction as is necessary to enable the jury to make its findings. *See supra* note 48. Thus, an instruction relevantly "consistent" with the rule would be one which conveyed "necessary" information. Given this, a doubt remains as to the meaning of "when appropriate" in the *Kaeo* holding, and also as to how much discretion trial judges will actually have when instructions regarding joint and several liability are requested in cases involving apportionments of negligence among joint tortfeasors.

[105] *See supra* note 95. It is difficult to imagine a situation in which an instruction regarding joint and several liability would be "appropriate" and "consistent" with Hawaii Rules of Civil Procedure 49(a), but in which an instruction informing the jury of the intricacies of the new tort law would not.

[106] When juries apportion negligence, the sum of the percentages should equal 100. Thus, if a jury adjusted its apportionment so as to insure that a minimally negligent defendant would not be

If an instruction regarding joint and several liability is given, a defendant who feels the instruction would be to his disadvantage might request that the jury also be informed of the right of contribution under Hawaii law.[107] This instruction could counterbalance the effect of the joint and several liability instruction by explaining to the jury that a minimally negligent defendant has a legal remedy against an insolvent co-defendant, even when the solvent defendant is held entirely liable. Thus, an instruction regarding contribution might make application of the doctrine of joint and several liability appear less harsh to a jury.[108]

The greatest impact from application of the *Kaeo* rule is likely to be felt by plaintiffs. Because the rule may influence juries to find no negligence on the part of a defendant who would otherwise have been found to have been only slightly negligent, plaintiffs' chances of being fully compensated for their injuries may be reduced. In cases where only a minimally negligent defendant is solvent, plaintiffs might be left without any remedy at all.[109]

Moreover, application of the *Kaeo* rule might indirectly increase the number of injuries received by reducing the incentive to act with care which the blindfold rule arguably fostered. The blindfold rule can act as a deterrent to even minimal negligence in jurisdictions that have retained joint and several liability,

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exposed to entire liability, the percentage of negligence that would otherwise have been ascribed to the minimally negligent defendant would have to be divided among the other parties.

[107] The right of contribution exists among joint tortfeasors.

> A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.
>
> A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liabiltiy to the injured person is not extinguished by the settlement.
>
> When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares . . . .

HAW. REV STAT. § 663-12 (1984).

[108] In a case involving joint tortfeasors, there are two sets of relationships, each involving different equitable considerations. On the one hand, there is the relationship between the injured plaintiff and each individual joint tortfeasor. On the other, there are the relationships among the tortfeasors themselves. While the operation of joint and several liability might appear to a jury to create an inequity, an instruction regarding the right of contribution might help a jury realize that the apparent inequity is only with regard to what is fair among the tortfeasors. Such an instruction would focus the jury's attention on the fact that the law recognizes that "[w]hat may be equitable *between multiple tort-feasors* is an issue totally divorced from what is fair to the injured party." *Seattle First Nat'l Bank*, 91 Wash. 2d at ____, 588 P.2d at 1313 (1978) (emphasis original).

[109] For example, a plaintiff would be left with no remedy if the entire liability were placed upon an insolvent defendant who had no insurance.

since a finding of even one percent negligence can result in 100 percent liability.[110] Thus, when the blindfold rule is in effect, there is a significant risk involved in acting negligently to any degree.[111]

When juries are instructed regarding joint and several liability, however, tortfeasors face the possibility that they will not be held liable for minimal negligence.[112] Considering the expense and effort of avoiding even minimal negligence, it may appear more economical to relax standards of conduct slightly. The risk would be the possibility of facing jurors who are more sympathetic to plaintiffs than to minimally negligent defendants. This risk is significant, but arguably less than the risk involved when findings of negligence are made on the basis of the facts alone and not on the basis of considerations of ultimate liability.

Invoking the *Kaeo* rule will also have an impact on jurors themselves. In some cases, being informed of the operation of joint and several liability may burden jurors with the added responsibility of choosing between two undesirable results: denying an injured plaintiff a full recovery, on the one hand, and requiring a minimally negligent defendant to pay the entire damages, on the other. Uninformed jurors would not be faced with this difficult choice between competing values and interests.[113] Thus, rather than making the task of finding and apportioning negligence easier, knowing the effects of various findings may make the jury's task more difficult.[114]

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[110] It has been argued that "the joint-and-several rule acts as a deterrent—forcing cities, for instance, to trim trees that could obscure a motorist's vision and lead to an accident . . . ." Granelli, *The Attack on Joint and Several Liability*, 71 A.B.A. J. 61 (July 1985) (expressing the view of two members of the California Trial Lawyers Association).

[111] The risk would arise from the fact that a jury uninformed regarding joint and several liability would have no reason to want to avoid finding a joint tortfeasor negligent to a relatively slight degree.

[112] *See supra* note 81.

[113] Uninformed juries may still be concerned about the effects of their findings, and they might speculate about how their findings will affect the ultimate outcome of the case. Nevertheless, an uninformed jury charged with answering special questions has the option of concentrating exclusively on issues of fact and trusting in the law to determine an outcome that reflects centuries of balancing equities on the part of the courts and legislatures. An informed jury, however, does not have that option to the same degree. Once informed, it would be difficult for a jury to ignore what it has learned and concentrate on the facts alone. *See* Note, *A Reply to the Masses*, *supra* note 31, at 127.

[114] An admonishment to the jury to apportion negligence without regard to how the apportionment will affect the outcome would be of doubtful value once a joint and several liability instruction were given. *See supra* note 113. In addition, such an admonishment would be prima facie inconsistent with the Hawaii Supreme Court's view that a joint and several liability instruction is in some sense necessary in order to enable a jury to perform its fact finding tasks. *See supra* note 58. As a simple matter of logic, if an instruction is necessary, then it should not be ignored; and if it should be ignored, then clearly it cannot be necessary.

Whether courts in other jurisdictions decide to follow Hawaii's example will probably depend largely upon how they evaluate the competing risks and policies involved.[116] On the one hand, courts which believe minimally negligent deep pocket defendants should not be easy prey in cases involving multiple tortfeasors may follow Hawaii's example. On the other hand, courts which give greater weight to the policies of insuring that plaintiffs are able to receive full compensation for their losses, and of reducing the effects of bias and sympathy in juries' verdicts, will probably not adopt *Kaeo*.

VII. CONCLUSION

In *Kaeo v. Davis*, the Hawaii Supreme Court created an exception to the common law blindfold rule against informing juries of the legal effects of their answers to special verdict questions. The court held that trial courts should allow jury instructions regarding the operation of joint and several liability, when the instructions are requested and appropriate.

Two possible consequences of the *Kaeo* decision are, first, that some defendants who would have been found minimally negligent if the blindfold rule were invoked may be found not negligent when juries are informed of the operation of joint and several liability. Second, some innocent injured plaintiffs may be denied the full recovery which they would have received if the blindfold rule were in effect.

The full range of consequences of *Kaeo* is difficult to predict because the decision leaves several crucial issues unresolved. The decision created a conflict of policies which the Hawaii Supreme Court did not address in *Kaeo*. Whether this conflict will be resolved in future decisions, and what the impact of the conflict will be in the meanwhile, remains to be seen.

Jeffrey D. Watts

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[116] *See supra* text accompanying notes 83-101.

Wolsk v. State: A Limitation of Governmental Premises Liability

I. INTRODUCTION

In *Wolsk v. State*,[1] the Hawaii Supreme Court refused to extend liability to the State of Hawaii for injuries suffered by two State park campers arising from the criminal conduct of unknown third parties.[2] The Hawaii Supreme Court held that absent a special relationship between the State and the injured parties, the State could not be held liable since it had no duty to warn or protect the public from criminal conduct.[3] Unfortunately, the court's application of the special relationship test has made a plaintiff's chances of recovery very difficult even in situations involving a clear and obvious special relationship duty.

This note will initially examine the historical development of premises liability in Hawaii as it pertains to governmental agents. Next, this note will present an outline and critique of the *Wolsk* court's analysis. The remainder of this note will examine the impact that the *Wolsk* decision will have on premises liability in Hawaii, focusing primarily on two cases that have been decided since *Wolsk*. This section will also attempt to gauge the likely effect that *Wolsk* will have on Hawaii's theories of premises and tort liability in general.

II. FACTS

On April 23, 1980, Philip Wolsk and Judith Panko were camping at MacKenzie State Park on the island of Hawaii.[4] They were unaware that the park had a history of violent crimes.[5] That night, Wolsk and Panko were brutally attacked:[6] Wolsk was killed, and Panko was severely injured.[7]

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[1] 68 Haw. ____, 711 P.2d 1300 (1986).
[2] *Id.* at ____, 711 P.2d at 1301.
[3] *Id.* at ____, ____, 711 P.2d at 1301, 1303.
[4] *Id.* at ____, 711 P.2d at 1301.
[5] *Id.* at ____ n.1, 711 P.2d at 1301 n.1.
[6] *Id.* at ____, 711 P.2d at 1301.
[7] *Id.*

The plaintiffs[8] brought suit against the State of Hawaii claiming that the State was guilty of negligent failure to warn or provide protection for Wolsk and Panko.[9] The State moved for summary judgment on the grounds that it was not liable to the plaintiffs for the criminal conduct of unknown third persons.[10] The trial court granted the State's motion, holding that the State had no duty to warn or protect the plaintiffs from criminal conduct.[11] The plaintiffs subsequently appealed to the Hawaii Supreme Court.[12]

III. THE DEVELOPMENT OF GOVERNMENTAL LIABILITY IN HAWAII

A. The Erosion of Sovereign Immunity

The traditional doctrine of sovereign immunity was developed from the ancient maxim *rex non potest peccare* ("the King can do no wrong"),[13] and effectively prevented citizens from bringing an action in tort against the government or governmental entities.[14] Courts in the United States adopted this doctrine soon after its introduction in this country in 1812.[15] In 1855, the Hawaii Supreme Court followed the traditional doctrine of sovereign immunity in *Cuthbert v. Hawaiian Government*.[16] In *Cuthbert*, the court held that a suit could not be maintained against the Hawaiian Monarchy without the permission of the King.[17]

Strict adherence to the doctrine of sovereign immunity often led to harsh results since victims of clear negligence by governmental agents were left without a remedy. In an attempt to alleviate some of the injustice or inequity, courts

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[8] Plaintiffs included Marvin Wolsk, Frieda Wolsk, Richard Nelson as Special Administrator of the Estate of Philip Wolsk, and Judith Panko. *Id.*

[9] The plaintiffs sought recovery for the death of Wolsk and for the injuries suffered by Panko. *Id.*

[10] *Id.*

[11] The trial court ruled that, as a matter of law, the State owed no duty to warn and/or protect Wolsk and Panko from the criminal conduct of third persons. *Id.*

[12] *Id.*

[13] Comment, *Municipal Tort Liability For Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537, 538 (1983) [hereinafter Comment, *Municipal Tort Liability*] (citing 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.01, at 436 (1958) (quoting W. BLACKSTONE, COMMENTARIES (10th ed. 1887))).

[14] Comment, *Municipal Tort Liability*, *supra* note 13, at 538 n.7.

[15] *Id.* at 538.

[16] 1 Haw. 266 (1855).

[17] *Id.* The court in *Cuthbert* stated that as a general rule, no government could be sued, such being the law in other countries. Also, Hawaii statutes specifically provided that no suit could be instituted against the Government, unless by permission of the King in Privy Council. *Id.*

created several exceptions to the doctrine.[18] The most common of these exceptions was the governmental/proprietary dichotomy, which became recognized in many jurisdictions.[19] This exception provided that in the exercise of governmental or public functions, a municipality acted as an agent of the State and was exempt from liability for any negligence which may have occurred.[20] However, when a municipality was exercising a private or proprietary function it was treated the same as an individual or private corporation.[21]

The supreme court dispensed with this dichotomy in the landmark decision of *Kamau v. Hawaii County*.[22] The *Kamau* court held that the duty to use ordinary care was required of municipal agents without regard to whether their actions fell under the definitions of either governmental or proprietary functions.[23]

Following the *Kamau* decision, the Hawaii Legislature enacted a waiver of the State's immunity to liability for the tortious conduct of its employees.[24] However, the present version of this waiver has been subjected to seven excep-

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[18] Comment, *Municipal Tort Liability*, *supra* note 13, at 539.

[19] *Id. See also* Kamau v. Hawaii County, 41 Haw. 527 (1957) (recognizing the almost universal acceptance of the public/private functions dichotomy, but refusing to adopt this rule). See *infra* notes 22-23 and accompanying text for a discussion of *Kamau*.

[20] *Kamau*, 41 Haw. at 530.

[21] *Id.*

[22] 41 Haw. 527 (1957). The *Kamau* opinion was actually a consolidation of two cases. In *Kamau v. County of Hawaii*, plaintiff's decedent was given a blood transfusion while undergoing a caesarean section at a hospital operated by the County of Hawaii. The wrong type of blood was administered, causing anaphylactic shock and the death of the patient. *Id.* at 528. In *Cushnie v. County of Hawaii*, a two year old child was badly burned by hot coals left on a beach controlled by the County of Hawaii. Bonfires on the beach were illegal, and the plaintiffs alleged that the County-employed caretaker was negligent in allowing the fire to be built. *Id.* at 528-29. The court went on to hold that a duty to use ordinary care was required of the County of Hawaii in administering either a park or a hospital, without regard to whether these were classified as public or private functions. *Id.* at 552-53.

[23] In *Kamau*, the Hawaii Supreme Court articulated:

> We are of the opinion that the narrow rule heretofore followed as to so-called "governmental" or public functions and "proprietary" or private functions should not control the question of municipal liability for its torts; that where its agents are negligent in the performance of their duties so that damage results to an individual, it is immaterial that the duty being performed is a public one from which the municipality derives no profit or that it is a duty imposed upon it by the legislature.

Id. at 552.

[24] The State waiver of immunity provided:

> The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

HAW. REV. STAT. § 662-2 (1976).

tions,[25] most notably the exception from liability when the function being performed is a discretionary function.[26] A discretionary function is often characterized as a planning level function, and the State is exempt from liability when employees are acting in this capacity.[27]

The State will remain liable for negligence in its operational level functions which do not come within the discretionary function exception.[28] The discretionary function exception is further narrowed by a policy of construing the waiver of immunity liberally in favor of the plaintiff in order to effectuate the waiver's purpose of compensating injured parties for the negligence of the State.[29]

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[25] The exceptions to the State waiver of immunity are listed in the Hawaii Revised Statutes as follows:

(1) Any claim based upon an act or omission of an employee of the State, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved has been abused;

(2) Any claim arising in respect of the assessment or collection of any tax, or the detention of any goods or merchandise by law enforcement officers;

(3) Any claim for which a remedy is provided elsewhere in the laws of the State;

(4) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(5) Any claim arising out of the combatant activities of the Hawaii national guard and Hawaii state guard during time of war;

(6) Any claim arising in a foreign country;

(7) Any claim arising out of the acts or omissions of any boating enforcement officer appointed under section 267-6.

HAW. REV. STAT. § 662-15 (1976 & Supp. 1984).

[26] For a complete treatment of the discretionary function exception in Hawaii, see Green, *Mending a Deep Pocket Hole: The Discretionary Function Exception to the State Tort Liability Act*, 20 HAW. B.J. 37 (1986).

[27] *See* Rogers v. State, 51 Haw. 293, 459 P.2d 378 (1969) (recognizing that *planning* level functions constitute discretionary functions, but holding that *operational* level functions do not constitute discretionary functions).

[28] The *Rogers* court, in response to the State's argument that the placement of road signs and restriping of pavements constituted planning level functions, held that such actions constituted day-to-day operational level functions. Therefore, the court concluded that the State was not protected by the discretionary function exception. The court reasoned:

> To sanction the State's position is to emasculate the State Tort Liability Act, for as stated in Swanson v. United States, "In a strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some degree of discretion."

51 Haw. at 296, 459 P.2d at 381 (citation omitted).

[29] The *Rogers* court further noted that the State Tort Liability Act was modeled after the Federal Tort Claims Act, and that the federal act is to be liberally construed to effectuate its purpose. The *Rogers* court relied on the Supreme Court's ruling in Indian Towing Co. v. United

B. *The Duty of the Government or Municipality as a Landowner*

With a waiver of immunity, the State is to be treated as a private individual for the purposes of establishing liability,[30] and is generally required to exercise the same standard of care as a private party.[31] Consequently, the State, in its capacity as a landowner, has a duty towards members of the public which is *at least* equal to that of a private landowner, and in some cases this duty may even *exceed* that of a private landowner.[32]

1. *Rejection of the common law invitee/licensee distinction*

At common law, the duty of a landowner could vary, depending on whether the person making use of the landowner's premises was characterized either as an invitee or a licensee.[33] An invitee, or business guest, was usually entitled to a higher standard of care than a licensee. The landowner was required to use reasonable care to make the premises safe,[34] since the invitee entered the land upon an implied representation or assurance that the land had been prepared and made ready for his reception, and since the landowner derived some benefit from the invitee's presence.[35]

A licensee, as a mere social guest, could only expect the landowner to use ordinary care in warning about possible dangers not evident to a reasonable

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States, 350 U.S. 61, 68 (1955), which held that the purpose of the Act is "to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws."

[30] HAW. REV. STAT. § 662-2 (1976); see *supra* note 24 for the text of the statute.

[31] In Upchurch v. State, 51 Haw. 150, 152, 454 P.2d 112, 114 (1969), the court noted: "When the State fails to exercise ordinary care, a standard of care required of a reasonably prudent person, it becomes liable under the State Tort Liability Act unless exempted."

[32] The government, in its capacity as an owner of public lands, may have a greater responsibility to members of the public than would an ordinary landowner:

> Members of the public making use of the land of the government or a governmental agency which is held open for the use of the public . . . such a public utility, government, or governmental agency may have special reason to anticipate that one who so enters will proceed to encounter known or obvious dangers; and such a defendant may therefore be subject to liability in some cases where the ordinary possessor of land would not.

RESTATEMENT (SECOND) OF TORTS § 343A(1), comment (a), at 218 (1965).

[33] There is a different standard in the duty owed to a social guest, or licensee, and a "business" guest, or invitee. "One who holds his land open for the reception of invitees is under a greater duty in respect to its physical condition than one who permits the visit of a mere licensee." *Id.*, comment (b), at 216.

[34] *Id.*, comments (b), (d), at 216-17.

[35] *Id.*, comments (b), (d), (e), at 216-17.

person of ordinary intelligence.[36] The landowner had no duty to the licensee to make the premises safe, as in the case of an invitee.[37] Thus, it was often necessary for the plaintiff to characterize himself as an invitee in order to show that the landowner had a legal duty towards him.

However, in the 1969 case of *Pickard v. City & County of Honolulu*,[38] the Hawaii Supreme Court abolished the common law distinction between invitees and licensees.[39] In *Pickard*, the court decided:

> We believe that the common law distinctions between classes of persons have no logical relationship to the exercise of reasonable care for the safety of others. We therefore hold that an occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be upon the premises, regardless of the legal status of the individual.[40]

Pickard has effectively eliminated the importance of the common law invitee/licensee distinction in Hawaii.[41]

2. *The foreseeability requirement*

Although the Hawaii Supreme Court's decision in *Pickard* alluded to the landowner's duty extending to those persons reasonably anticipated to be on the

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[36] *Id.*, § 342, at 210; *see also id.* comment (b)-(d), at 210-11.

[37] *Id.*, § 342, comment (d), at 211.

[38] 51 Haw. 134, 452 P.2d 445 (1969). In *Pickard*, the plaintiff entered a courthouse for the purpose of using the restroom. The light switch was broken and the plaintiff fell through a hole in the floor. The trial judge ruled that the plaintiff was a licensee as a matter of law, and that the defendant's only duty was "not to harm him wilfully or wantonly, or to expose him to danger by active negligence." *Id.* at 135, 452 P.2d at 445. This decision was reversed by the Hawaii Supreme Court, and the case remanded for a new trial.

[39] *Id.* at 135, 452 P.2d at 446. *See also* Geremia v. State, 58 Haw. 502, 573 P.2d 107 (1977) (court followed *Pickard* by not allowing the scope of landowner's liability to be determined by the old common law distinctions of licensee and invitee).

[40] 51 Haw. at 135, 452 P.2d at 446. In support of its conclusion, the *Pickard* court relied on Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). In *Rowland*, the court held:

> A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

Id. at ____, 443 P.2d at 568, 70 Cal. Rptr. at 104.

[41] *See Geremia*, 58 Haw. at 506, 573 P.2d at 111.

premises, the importance of this foreseeability requirement was emphasized by later decisions. In *Kaczmarczyk v. City & County of Honolulu*,[42] the supreme court reaffirmed the rule of *Pickard*, and held that although the municipality is not an insurer of the safety of those who make use of its parks and recreational facilities, it must exercise reasonable care in the maintenance of those facilities.[43] This duty as an occupier of land extended to all persons reasonably anticipated to be on the premises.[44]

Additionally, in *Harris v. State*,[45] the Hawaii Intermediate Court of Appeals held that in order to support recovery for a negligence action, the plaintiff must show that the landowner knew or should have known of the hazard which caused the *injury*.[46] In other words, no liability could be imposed unless the landowner had either actual or constructive notice of the unsafe condition. In order for a premises owner to be liable, not only did the plaintiff have to be a reasonably foreseeable user of the premises, but the unsafe condition or risk of harm must have been reasonably foreseeable as well.[47]

3. *A duty created by affirmative conduct*

A landowner can actually *create* an independent duty towards members of the public where the public responds to an invitation or other such affirmative conduct on the part of the landowner to make use of the premises.[48] In the

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[42] 65 Haw. 612, 656 P.2d 89 (1982). In *Kaczmarczyk*, the plaintiff's decedent drowned at Ehukai Beach Park, which was controlled and administered by the City and County of Honolulu. *Id.* at 617, 656 P.2d at 91. The court found that the City and County had a duty to warn park visitors of dangerous conditions, not known or obvious to persons of ordinary intelligence. *Id.* at 620, 656 P.2d at 92.

[43] *Id.* at 615, 656 P.2d at 91.

[44] *Id.* at 615, 656 P.2d at 92.

[45] 1 Haw. App. 554, 623 P.2d 446 (1981). In *Harris*, the plaintiff was injured twice in slip and fall accidents, allegedly due to the State's negligence in administering an alcoholic treatment ward at Kaneohe State Hospital. The court held that the record failed to show that the State had notice of the dangerous conditions and affirmed summary judgment for the State. *Id.* at 557-59, 623 P.2d at 448-49.

[46] The landowner, however, is not the insurer against all accidents that occur on the premises since no liability is incurred for every "trivial departure from perfection." *Id.* at 557, 623 P.2d at 448. Also, the occupier of land is not required to eliminate known or obvious hazards which are not extreme and which appellant would reasonably be expected to avoid. Freidrich v. Department of Transp., 60 Haw. 32, 586 P.2d 1037 (1978).

[47] *See also* Geremia v. State, 58 Haw. 502, 573 P.2d 107 (1977) (discussion of liability to occupiers of land under general principles of tort law). *See also* RESTATEMENT (SECOND) OF TORTS § 343 (1965) (duty of possessor of land to correct dangerous conditions known or discoverable in anticipation of invitees' presence on the premises).

[48] Judge Cardozo stated in Glanzer v. Shepard, 233 N.Y. 236, ____, 135 N.E. 275, 276 (1922): "It is ancient learning that one who assumes to act, even though gratuitously, may

decisions of *Littleton v. City & County of Honolulu*,[49] and *Geremia v. State*,[50] the Hawaii Supreme Court emphasized "that a party will be liable in tort where he voluntarily undertakes a course of affirmative conduct intended to induce another to engage in an action, and creates a false appearance of safety upon which the other relies to his detriment."[51]

Evidence of affirmative conduct may include tourist brochures or advertisements which would show that an invitation has been made to the public.[52] Affirmative conduct may also be implied by improvements made to facilitate access to the premises,[53] or even from a continued and general custom in using the premises by the patrons of the business.[54] Therefore, a landowner who might not ordinarily have a specific duty towards certain members of the public might become liable if the plaintiff can show that this affirmative conduct existed at the time of the injury.

4. A special relationship duty to control the actions of third parties

It is well established that a defendant has no duty to control the actions of a third party unless there is a "special relationship," either between the defendant

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thereby become subject to the duty of acting carefully, if he acts at all."

[49] 66 Haw. 55, 656 P.2d 1336 (1982). In *Littleton*, the plaintiff was struck by a floating telephone pole while using beach facilities under the control of the City and County of Honolulu. Both the State and the City were held to owe a duty towards the plaintiff. Although the City's duty was primarily statutory, the court recognized that if the City was found by the trier of fact to have invited the plaintiff to use the premises, then the City would have to exercise reasonable care for her safety. *Id.* at 68-69, 656 P.2d at 1345.

[50] 58 Haw. 502, 573 P.2d 107 (1977). In *Geremia*, three boys drowned when using the Waipahee Slide on the island of Kauai. The court found that the State owed no duty towards the decedents since the State did not own the land, and evidence of affirmative conduct on the part of the State in extending an invitation to the decedents had been given a fair hearing by the trier of fact at the trial level. *Id.* at 508-11, 573 P.2d at 112-13.

[51] 66 Haw. at 68, 656 P.2d at 1345.

[52] The Hawaii Supreme Court in *Geremia* noted:

> We may assume, without expressing an opinion, that the acts of the State in improving the parking area and trail, erecting signs and including the slide on official information maps and brochures were sufficient to have enabled the court to find a course of conduct which constituted an invitation to use the slide.

Id. at 509, 573 P.2d at 112.

[53] *Id.*

[54] The court in *Littleton* recognized:

> An invitation may be implied from a continued and general custom in using the premises by the patrons of the business. The nature of the use and the extent of the premises covered by the implied invitation to use may be determined by the continued and general custom of the patrons.

66 Haw. at 68 n.4, 656 P.2d at 1345 n.4 (quoting McKinney v. Adams, 68 Fla. 208, 225-26, 66 So. 988, 992 (1914)).

and the third party, or the defendant and the party to be protected.[55] Special relationships include the duties of common carriers, innkeepers, and landowners.[56] These parties have a duty to protect others against unreasonable risks of physical harm by third parties, and are required to render aid if others are injured.[57]

The special relationship doctrine was adopted by Hawaii courts in *Seibel v. City & County of Honolulu*,[58] and in *King v. Ilikai Properties, Inc.*[59] In *Seibel*, the Hawaii Supreme Court held that a court order granting a criminal defendant a conditional release did not place a duty upon the City and County of Honolulu or the Prosecuting Attorney's Office to control the behavior of the defendant since there was no *special relationship* in existence between the City and the defendant.[60] Therefore, the City was not liable for the murder of plaintiff's decedent by the defendant.[61]

In *King*, the plaintiffs rented an apartment from the defendant landlord, and were attacked and robbed by unidentified third parties.[62] The plaintiffs then sued the Ilikai Hotel for failing to warn them of the danger.[63] The Hawaii Intermediate Court of Appeals held that there was no special relationship in existence as defined by the Restatement (Second) of Torts. Consequently, the

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[55] The Restatement view reads as follows:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, *or* (b) a special relation exists between the actor and the other which gives to the other a right to protection.

RESTATEMENT (SECOND) OF TORTS § 315, at 122 (1965) (emphasis added).

[56] The Restatement (Second) of Torts specifically provides:

> A possessor of land who holds it open to the public is under a similar duty [as a common carrier or innkeeper, to protect from unreasonable risk of harm] to members of the public who enter in response to his invitation.

Id. § 314A(3), at 118. However, these classifications are not necessarily exclusive. *See id.*, "Caveat," at 119. "This duty extends to acts of third persons, whether they be innocent, negligent, intentional, *or even criminal.*" *Id.*, comment (d), at 119 (emphasis added). "However, the duty in each case is only one to exercise reasonable care under the circumstances . . . . He is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate." *Id.*, comment (e), at 120.

[57] RESTATEMENT (SECOND) OF TORTS § 314A(1)(b), at 118 (1965).

[58] 61 Haw. 253, 602 P.2d 532 (1979). In *Seibel*, a sex offender was granted a conditional release from his criminal trial for the purpose of undergoing psychiatric treatment. While on release he murdered plaintiff's decedent. The trial court dismissed the plaintiff's claim against the City and County of Honolulu. *Id.* at 253-56, 602 P.2d at 534-35.

[59] 2 Haw. App. 359, 632 P.2d 657 (1981).

[60] 61 Haw. at 258, 602 P.2d at 538.

[61] *Id.* at 258-61, 602 P.2d at 538.

[62] 2 Haw. App. at 360, 632 P.2d at 659.

[63] *Id.*

court concluded, the hotel had no duty to warn the plaintiffs.[64]

5. Duty as a balancing of competing policies

Hawaii courts have decided that the imposition of a duty is not necessarily dependent on doctrinal components or any such strictly defined requirements. Instead, "it should be recognized that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[65] The test is to weigh the considerations supporting recovery against those considerations favoring a limitation of governmental liability, for example, in order to determine whether there was in fact a duty owed.[66] As the *King* court noted: "Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk and the public interest in the proposed solution."[67]

In summary, a court presented with the issue of whether a governmental or municipal landowner owed a duty to any particular individual should consider the following: (1) the reasonable foreseeability of the victim's presence on the premises by the landowner; (2) the actual or constructive notice of the unsafe condition to the landowner (reasonable foreseeability of the risk of injury); (3) the existence of invitations or other such affirmative conduct on the part of the landowner that could have created a duty towards the victim; (4) a duty created by some special relationship between the landowner and the victim or between the landowner and the third party; and, (5) the public interest in compensating injured parties and deterring the negligence of tortfeasors balanced with the need to limit the liability of government agencies.

IV. ANALYSIS

In *Wolsk v. State*, the Hawaii Supreme Court addressed the issue of "whether [the] State owed a duty to warn or protect Wolsk and Panko from the criminal actions of unidentified third persons."[68] The trial court had found

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[64] *Id.* at 364, 632 P.2d at 662.

[65] First Ins. Co. of Hawaii, Ltd. v. International Harvester Co., 66 Haw. 185, 189, 659 P.2d 64, 67 (1983) (city not immune from liability for negligence in improperly certifying motor vehicle operator's license).

[66] *Id. See also* Kelley v. Kokua Sales & Supply, Ltd., 56 Haw. 204, 207, 532 P.2d 673, 675 (1975) (court refused to extend liability for negligent infliction of emotional distress to persons located in "any part of the world").

[67] 2 Haw. App. at 363, 632 P.2d at 661 (citing Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 581, 186 A.2d 291, 293 (1962)).

[68] 68 Haw. at ____, 711 P.2d at 1301.

that: (1) Plaintiff's claim was barred by the discretionary function of the State Tort Liability Act, (2) the injuries to Wolsk and Panko were not reasonably foreseeable, and, (3) the State's conduct was not the proximate cause of harm.[69] The supreme court elected to rule only on the issue of duty,[70] since the question of duty, is "fundamental in any determination of liability for negligence."[71]

The supreme court initially acknowledged that the State, as a park owner, owes a duty to exercise reasonable care and must warn park users about dangerous conditions unknown to ordinary persons.[72] The court, however, noted that the State was not liable for dangerous conditions not under its control.[73] The court further recognized that the State was not the insurer of lives.[74]

The court then considered whether or not there was a "special relationship" in existence.[75] The court ruled that "in the absence of a special relationship, the State is not liable to plaintiffs harmed by the criminal conduct of unknown third persons on State property."[76] To determine whether a special relationship exists, a "two-prong" test must be satisfied. The first prong involves a determination of whether there is a special relationship between the State landowner and the third persons.[77] The second prong considers whether there is a special relationship between the State and the victim.[78]

In addressing the first prong of the test, whether there was a special relationship between the State and the third party criminals,[79] the court recognized that absent some form of custody or control by the State over the third party, a special relationship could not exist.[80] Since custody or control over the unknown

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[69] *Id.* at ____ n.2, 711 P.2d at 1301 n.2.

[70] *Id.*

[71] *First Ins. Co.*, 66 Haw. at 189, 659 P.2d at 67.

[72] 68 Haw. at ____, 711 P.2d at 1301. *See Kaczmarczyk*, 65 Haw. 612, 656 P.2d 89 (1982) (municipality operating beach park must warn members of the public of dangerous ocean conditions); Lara v. City & County of Honolulu, 41 Haw. 600 (1957) (municipality operating park should not have maintained a water sprinkler head in an exposed unsafe condition and must use ordinary care to keep facility in reasonably safe condition).

[73] 68 Haw. at ____, 711 P.2d at 1302.

[74] *Id.* (citing Carreira v. Territory, 40 Haw. 513 (1954) (Territory of Hawaii held not liable for drowning of plaintiff's decedent in facility run by Territory, when duty to use ordinary care satisfied by providing lifeguards to supervise swimmers)).

[75] *Id.* at ____, 711 P.2d at 1302. *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965) (quoted *supra* at note 55).

[76] *Id.* at ____, 711 P.2d at 1302.

[77] RESTATEMENT (SECOND) OF TORTS § 315(a) (1965).

[78] *Id.*, § 315(b).

[79] 68 Haw. at ____, 711 P.2d at 1302.

[80] *Id. See* Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 647 P.2d 713 (1982) (convicted felon told state probation officer at interview that felon had a gun, probation officer does nothing, and felon later shoots plaintiff); Namauu v. City & County of Honolulu, 62 Haw. 358, 614 P.2d 943 (1980) (escaped state hospital mental patient kills victim, and victim's parents sue state

assailants was obviously lacking in *Wolsk*, the court concluded that there was no relationship between the State and the third party criminals.[81]

The court, however, did not directly address the second prong of the special relationship analysis: whether there was a special relationship between the State and the victims.[82] Instead, the court discussed briefly the Intermediate Court of Appeals' opinion in *King v. Ilikai Properties, Inc.*,[83] which found that there was no special relationship between the defendant hotel and the plaintiffs, since the plaintiffs were not guests of the hotel at the time of the attack.[84] The *Wolsk* court suggested that there was no special relationship between the State and Wolsk for the same reasons as in *King*, even though the facts of the two cases were dissimilar.[85]

Surprisingly, the *Wolsk* court did not focus on the special relationship analysis of *King*, but unexpectedly emphasized the lack of foreseeability of the dangerous condition in *King*, thereby concluding that it would be unreasonable to

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officials and city police for not apprehending patient); Ajirogi v. State, 59 Haw. 515, 583 P.2d 980 (1978) (State hospital mental patient who had twice escaped and stolen cars, escaped again, stole another car, and collided with plaintiff's vehicle).

However, none of these cases involved a landowner's relationship, except for the *Hulsman* case. In *Hulsman*, the hotel owner was not joined in the appeal, so the court did not rule on whether there was a special relationship between the hotel and the third party who acted criminally. 65 Haw. at 59 n.1, 647 P.2d at 533 n.1 (1982).

The *Wolsk* court did not necessarily have to confine its analysis of a special relationship duty to that of a landowner. In fact, the plaintiff at trial level repeatedly asserted that the State also owed Wolsk a duty as an *innkeeper* since MacKenzie State Park was a tent-camping park.

[81] 68 Haw. at ____, 711 P.2d at 1302-03. Although the court did not actually articulate that there was no special relationship between the State and the third party specifically, the court's use of citations imply that this was the point being made. Each case the court cited involved an inquiry into the relationship between the State or municipality and the criminal third party since the victim in each case was a member of the public and unrelated to the governmental agent involved. *See, e.g.*, Seibel v. City & County of Honolulu, 61 Haw. 253, 602 P.2d 532 (1970) (City and County of Honolulu did not have custody over a sex offender on conditional release and consequently had no duty to warn or protect plaintiff's decedent).

[82] The court, in the entirety of its analysis, failed to make any clear distinction between the possibility of a special relationship between the State and the third party (first prong), and the State and the injured party (second prong). The existence of either relationship would have given rise to a duty on the part of the State, and the court should have discussed *both* prongs of § 315 in order to satisfy the Restatement test that the court had adopted. *See supra* notes 55-64 and accompanying text.

[83] 2 Haw. App. 359, 632 P.2d 657 (1981).

[84] The *King* court declined to impose a special relationship duty on the hotel because the plaintiffs were lessees of the hotel and a landlord-tenant relationship is not one which is proscribed as a special relationship under the Restatement. *See King*, 2 Haw. App. at 362-63, 632 P.2d at 661.

[85] 68 Haw. at ____, 711 P.2d at 1303. The *King* case involved a private, landlord-tenant relationship, while *Wolsk* involves a possessor of land and members of the public, a relationship which is defined in the Restatement as a "special" one.

require the State to notify persons of the potential for victimization, just because there was a tendency of the premises to attract dangerous persons.[86] Consequently, the *Wolsk* court found that the trial court properly granted summary judgment, and held that the State owed no duty to warn or protect the plaintiffs from the criminal conduct of unidentified third persons.[87]

The *Wolsk* decision was based on the lack of a special relationship as defined by the Restatement (Second) of Torts.[88] Absent from the court's analysis was the well-established concept that a duty can be created by voluntary affirmative conduct, such as *an invitation to use the premises.*[89] Since MacKenzie State Park was open to the public and had been advertised by the State in tourist leaflets and brochures, an invitation similar to the type recognized by the supreme court in *Geremia* and *Littleton* could have been found in *Wolsk.*[90]

The *Wolsk* court failed to fully discuss the issue of whether the hazard or risk of injury was one in which the State had notice, or if the risk was at least reasonably foreseeable. The opinion only mentioned foreseeability in the context of the *King* decision, even though *King* involved a private hotel's premises in a landlord-tenant relationship, which was a very different situation from that confronting the *Wolsk* court.[91] The court apparently ignored the reputation of MacKenzie State Park for being an area dangerous to tourists due to the frequency of violent crimes.[92]

The court could have strengthened its position of declining to impose a duty on the State in *Wolsk* by including a competing policy analysis of government interests versus victims' rights to compensation. This is the "fairness" issue, which had been emphasized in *King* by the Intermediate Court of Appeals.[93] A clear showing of a prevailing governmental interest would have been the easiest

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[86] *Id.* This "tendency" was characterized in the *King* case as a general propensity that hotels have of attracting dangerous persons, and arguably lacked the particularity of MacKenzie State Park's reputation for violence.

[87] *Id.*

[88] Although the court did not specifically state the reason for its conclusion that the State owed Wolsk no duty, the special relationship doctrine was the only theory of liability that was really discussed in the opinion, although foreseeability was mentioned.

[89] *See supra* notes 48-54 and accompanying text.

[90] *See supra* notes 51-54 and accompanying text.

[91] In *King*, there was no mention of previous specific instances of violent conduct on the premises, which might have given the defendant hotel actual or constructive notice of an unsafe condition. The *Wolsk* court thus concluded that "[s]imply because MacKenzie Park *may* have had a tendency to attract dangerous persons is no reason to impose a duty on the State to warn or protect park users from those dangerous persons." 68 Haw. at ____, 711 P.2d at 1303 (emphasis original).

[92] This reputation is well-known by local residents. It is an area where tourists and "haoles" (caucasians) have frequently been the victims of violent crimes.

[93] 2 Haw. App. at 363, 632 P.2d at 661. *See supra* note 67 and accompanying text.

way to justify what appears to have been a result-oriented decision.

Under the test adopted by the supreme court in *Wolsk* to determine whether a special relationship exists, the court should have found a special relationship that would have imposed a duty on the State. Although there was no special relationship between the State and the third parties, there was virtually no discussion on whether the State as a landowner had a special relationship with the *victims*. Here, the State was the possessor of land being held open to the public, and Wolsk apparently entered the premises in response to the State's invitation.[94] Thus, under the test set forth in the Restatement (Second) of Torts and adopted by the court, a special relationship between the State and Wolsk should have been found.

Consequently, a duty to warn or protect Wolsk should have been imposed on the State since "[t]he duty to protect the other against unreasonable risk of harm . . . extends also to risks arising from . . . the acts of third persons, whether they be innocent, negligent, intentional, or even criminal."[95] The *Wolsk* opinion never expressly offered an explanation for the conclusion that there was no special relationship between the State and Wolsk. The court only opined that "the reasoning of the Intermediate Court of Appeals [in *King*] is directly applicable to the facts of the instant case."[96]

V. In the Aftermath of *Wolsk*

Shortly after the *Wolsk* decision, the Intermediate Court of Appeals (ICA) was presented with two similar cases involving premises liability; one involving a public agency and the other a private agency. Both decisions were greatly influenced by *Wolsk* and the *Wolsk* interpretation of *King*.

A. Moody v. Cawdrey & Associates, Inc.

In *Moody v. Cawdrey & Associates, Inc.*,[97] the ICA held in favor of the plaintiffs who sued their landlord for injuries suffered from the criminal acts of third persons. The court ruled that when such criminal acts were foreseeable, condominium owners associations and managers *owed a duty of protection* to occupants

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[94] This description of the relationship between the State and Wolsk meets the definition of a special relationship duty under "possessor of land." Restatement (Second) of Torts § 314A (3) (1965).

[95] *Id.*, § 314A comment (d) at 119.

[96] 68 Haw. at ____, 711 P.2d at 1303.

[97] 6 Haw. App. ____, 721 P.2d 708, *rev'd per curiam*, ____ Haw. ____, 721 P.2d 707 (1986).

and their guests.[98]

Particularly noteworthy in *Moody* was the court's finding of a special relationship between the owners and the victims, despite *King*'s rejection of imposing the duty of a special relationship based on a mere landlord-tenant relationship.[99] The ICA maintained that the relations listed in the Restatement were "not intended to be exclusive,"[100] and that the "law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence."[101] The ICA in *Moody* distinguished its earlier holding in *King* by finding that "[a] relationship of 'mutual dependence,' absent in *King*, is . . . evident here."[102]

Chief Judge Burns, in a concurring opinion, noted that although he agreed with the result in *Moody*,[103] he disagreed with the majority's interpretation of *King*, noting that "[i]n my view, the majority's opinion reverses this court's holding in that case."[104] *Wolsk* was cited in support of this proposition.[105] Chief Judge Burns went on to reason that the duty mandated by the majority should not be imposed on all condominium owners.[106] Rather,. "[h]aving undertaken at the apartment owners' expense to provide the security service, the Association is liable if it performed negligently and its negligence was a substantial factor cause of damage to the Moodys."[107]

On appeal, the supreme court reversed the ICA's decision.[108] Similar to Chief Judge Burns' concurring opinion, the court held that pursuant to *King v. Ilikai Properties, Inc.*, the judgment must be reversed.[109]

B. Kau v. City & County of Honolulu

Kau v. City & County of Honolulu[110] was decided by the ICA subsequent to the supreme court's decision in *Moody*. In *Kau*, three men were in the clubhouse of a City maintained golf course, waiting to obtain an early tee-off time, when three burglars armed with knives assaulted and robbed them.[111] Since the

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[98] *Id.* at ____, ____, 721 P.2d at 710, 713.
[99] *Id.* at ____, 721 P.2d at 713-14.
[100] *Id.* at ____, 721 P.2d at 712.
[101] *Id.*
[102] *Id.* at ____, 721 P.2d at 714.
[103] *Id.* at ____, 721 P.2d at 716 (Burns, C.J., concurring).
[104] *Id.*
[105] *Id.*
[106] *Id.* at ____, 721 P.2d at 717.
[107] *Id.* at ____, 721 P.2d at 716.
[108] ____ Haw. ____, 721 P.2d 707 (1986).
[109] *Id.*
[110] ____ Haw. App. ____, 722 P.2d 1043 (1986).
[111] *Id.* at ____, 722 P.2d at 1044.

facts in *Kau* were very similar to those in *Wolsk*, the court relied heavily on the *Wolsk* decision[112] to affirm summary judgment for the City. The court held that, "[p]laintiffs never alleged that the three perpetrators of the criminal acts on the City's golf course were under the control of the City. Consequently, as in *Wolsk*, the City had no special relationship duty to protect Plaintiffs from the criminal acts of third persons."[113]

The analysis of the court in *Kau* was confined, almost exclusively, to a reiteration of the supreme court's analysis in *Wolsk*.[114] The ICA's interpretation of *Wolsk* recognized that:

> Despite Restatement (Second) of Torts § 314(A)(3) which specifies the relationship between "[a] possessor of land who holds it open to the public" and "members of the public who enter in response to his invitation" as a special one, the court found "no special relationship duty" under the facts in *Wolsk* . . . [t]he basis of the court's reluctance to find a special relationship duty under the facts in *Wolsk* was that "the third persons who harmed [the two campers] . . . were never alleged to be under [the] State's control[.]"[115]

Chief Judge Burns again wrote a separate concurring opinion.[116] He found, as did the majority, that a special relationship existed whenever members of the public who were reasonably foreseeable responded to an invitation of a possessor of land.[117] In attempting to clarify the holding of *Wolsk*, Chief Judge Burns offered a four part test designed to determine whether a duty exists.[118] After applying the four part test, he found that the possessor of land could not be liable when he did not know, nor should have known of the dangerous condition in ample time to avert the *unreasonable risk* of physical harm.[119] According

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[112] The court stated that "[t]he recent case of Wolsk v. State compels our affirmance. As an inferior tribunal, this court is obligated 'to adhere to the decision' of the 'court of the last resort . . . .'" *Id.* at ____, 722 P.2d at 1046 (citation omitted).

[113] *Id.* at ____, 722 P.2d at 1047.

[114] *See id.* at ____, 722 P.2d at 1046-47.

[115] *Id.*

[116] *Id.* at ____, 722 P.2d at 1047 (Burns, C.J., concurring).

[117] *Id.*

[118] Chief Judge Burns noted:

> In my view, the question of the existence of a duty involves four elements:
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> 1. Is defendant a possessor of the premises upon which plaintiff was injured?
> 2. Is plaintiff a person reasonably anticipated to be on the premises?
> 3. Did defendant foresee or anticipate or should defendant have foreseen or anticipated in ample time to avert injury that there was an *unreasonable risk* of that kind of physical harm to the victim?
> 4. Is it in the public interest to impose a duty?

Id. (emphasis original).

[119] *Id.* at ____, 722 P.2d at 1048.

to Chief Judge Burns, a non-anticipated risk of harm could not logically be prevented even when a special relationship existed. However, it appears conceptually difficult to characterize MacKenzie State Park's well-known history of violent crime as a non-anticipated risk of harm.

C. Impact

As evidenced by both the *Moody* and *Kau* decisions, *Wolsk* is having a substantial effect on limiting liability in both the public and the *private* sectors. Although *Wolsk* never specifically dealt with private entities, the ICA's reliance on both *King* and *Wolsk*'s interpretation of *King* has broadened the implications of *Wolsk*'s holding. This is clearly evident in *Moody*.[120] *Kau* simply expanded the *Wolsk* opinion to include facilities controlled by municipalities.[121]

Wolsk has also had an important effect on the special relationship doctrine. Because of the supreme court's application of the doctrine, it has become very difficult, in cases involving third party misconduct, to use the definition of special relationship as a viable means of determining whether circumstances dictate the finding of a duty. This difficulty is illustrated by the manner in which the ICA struggled to apply the modified doctrine in both *Kau* and *Moody*. Under the decision in *Wolsk*, only the the first prong of the test, which requires that the government have control or custody of the third party in order to assume a duty towards any member of the public, is adopted. Whether this doctrine is one which is consistent and can be used effectively is a question that may need to be answered by future appellate decisions.

Although no policy concerns were voiced specifically in the *Wolsk* opinion, it

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[120] Other jurisdictions have extended liability to landlords and condominium associations in cases involving criminal attacks by third persons. *See, e.g.*, Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (duty placed on landlord to minimize "predictable risk" to his tenants of criminal assaults on the portion of the premises in which he has exclusive control); Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985) (foreseeability of criminal attacks necessary to impose duty on landlord does not require prior similar incidents; foreseeability is based on the totality of the circumstances on a case by case approach); Kwaitkowski v. Superior Trading Co., 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981) (landlord has a special relationship duty to tenant when criminal attacks are foreseeable); White v. Cox, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971) (condominium association liable for common areas).

[121] California has extended liability to State agents in situations involving criminal attacks by third parties. *See* Duarte v. State, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979) (state university can be sued when student is raped and murdered in a residence hall owned and operated by the university); Hayes v. State, 11 Cal. 3d 469, 521 P.2d 855, 113 Cal. Rptr. 599 (1974) (liability can be extended to landowner when combination of physical defect of property and criminal conduct exists, and in some cases without defect; recognition that uninformed tourists could benefit from warnings that certain areas are frequent sites of muggings).

is likely that policy played a major role in its outcome. By holding the State liable, the *Wolsk* court would have undoubtedly caused the State to assume a great financial burden. For example, state-run facilities such as MacKenzie State Park would likely require much renovation before they would be in an acceptable condition to satisfy insurance underwriters. In the meantime these facilities would undoubtedly have to be closed, preventing any public use. Security would probably have to be increased, either by hiring private security guards or possibly by increasing the size of existing law enforcement departments. State parks and recreational centers that up to now have been run relatively inexpensively, could suddenly be extremely costly to operate. The decision in *Wolsk* will effectively save the State from making these costly changes to its facilities, which would likely involve diverting funds from other programs or increasing revenues through taxation. Conceivably, *Wolsk* could also be helpful in keeping insurance premiums from accelerating, at least in the area of premises liability.

The benefits of *Wolsk* are straightforward, but the costs are more subtle. *Wolsk* has placed the burden of self-defense solely on the individual, whenever he is using State or municipal facilities. But the individual may not be the party which is better equipped to bear the burden of protecting himself from third party criminals. When a person is in his own home, he is much better equipped to defend himself. Not only does he have the protection of four walls and a roof to restrict entry, he is also allowed to own a watchdog, employ various security devices, and even own a registered firearm. When making use of a public facility, a person has little more than his own hands on which he can rely on for self-defense purposes, since the use of dog and gun, are denied him. Undoubtedly, the State is better equipped to warn or protect members of the public who are using State controlled facilities.[122]

By eliminating any possibility of recovery from negligent municipal actors in situations involving third party criminals, *Wolsk* places members of the public at the mercy of poor security without adequate information about the facilities that they are being invited to use. For a state that depends on a steady stream of tourism for its livelihood, *Wolsk* could prove to be a costly decision.

VI. CONCLUSION

In *Wolsk v. State*, the Hawaii Supreme Court held that absent a special relationship between the State and the plaintiffs, there was no duty on the part of the State to warn or protect the plaintiffs from the criminal actions of un-

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[122] RESTATEMENT (SECOND) OF TORTS § 314A (4) (1965), reasons similarly, imposing a special relationship duty on "[o]ne who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection . . . ."

known third parties outside State control. However, the court in *Wolsk* did not complete the special relationship analysis of the Restatement (Second) of Torts. Completion of the analysis would have undoubtedly required a decision very different from that rendered. What has developed, instead, is a modified version of the special relationship doctrine that is quite different from the one originally adopted by *Seibel v. City & County of Honolulu*.[123] To be entitled to the benefits of a special relationship duty, an individual will now be required to show that the government had control or custody over the third party.

The court's decision was likely based on broad policy goals. But balancing the benefit of saving the State money against the burden now facing members of the public, who must protect themselves from wrongdoers without any minimum security or information requirement, would also seem to give a different result.

Nevertheless, this limitation of governmental premises liability may represent the beginning of a new trend for the Hawaii Supreme Court.[124] This trend may be a reaction to the pressures of rising insurance premiums and the general outcry for tort reform effectively halting Hawaii's historic policy of liability expansion.[125] Future decisions may very well reflect this change in Hawaii's legal climate.

Randall Louis Ka'imina'auao Meyer Rosenberg

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[123] 61 Haw. 253, 603 P.2d 532 (1979). For a discussion of *Seibel*, see *supra* notes 58-61 and accompanying text.

[124] *Cf.* Kaeo v. Davis, 68 Haw. ____, 719 P.2d 387 (1986) (jury instruction on the consequences of finding fractional liability in a joint and several liability jurisdiction may serve to limit state and municipal liability since these defendants are often the "deep pockets").

[125] In the past, the Hawaii Supreme Court has rendered progressive decisions, especially in the area of torts: Campbell v. Animal Quarantine Station, 63 Haw. 557, 632 P.2d 1066 (1981) (recovery for mental distress where family pet died due to defendant's negligent act); Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974) (recovery for mental distress where boy saw stepgrandmother struck and killed despite no physical injury to him); Rodrigues v. State, 52 Haw. 156, 472 P.2d 758 (1974) (recovery for serious mental harm caused by property damage).

Rana v. Bishop Insurance of Hawaii, Inc.,: The Death of Basic No-Fault Stacking in Hawaii

I. INTRODUCTION

In *Rana v. Bishop Insurance of Hawaii, Inc.*,[1] the Hawaii Intermediate Court of Appeals (ICA) precluded the "stacking"[2] of monthly earnings loss benefits under Hawaii's No-Fault Law, Chapter 294 of the Hawaii Revised Statutes. Having determined that the statutory language was plain and unambiguous, the ICA could have applied the plain meaning of relevant provisions in the no-fault law. Prior cases, however, had allowed stacking under Hawaii law. Faced with this uncertainty, the *Rana* court examined the legislative intent behind the statute. Distinguishing the policies underlying Hawaii's No-Fault Law from Hawaii's Uninsured Motorist Law was integral to the court's analysis.

This note will examine the history and evolution of stacking of benefits under Hawaii's No-Fault Law. An analysis of the reasoning behind *Rana* will be followed by a discussion of its possible impact on future no-fault litigation.

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[1] 6 Haw. App. ____, 713 P.2d 1363 (1985). The Hawaii Supreme Court affirmed the Intermediate Court of Appeals' decision and adopted their reasoning in Rana v. Bishop Ins. of Hawaii, Inc., 68 Haw. ____, 713 P.2d 1363 (1985). For this reason, this note will focus on the Intermediate Court opinion.

[2] "Stacking" means to aggregate benefits from more than one policy limit for the same accident or injury. One commentator defines stacking as:

> The stacking or pyramiding of coverages usually denotes the availability of more than one policy to the same insured. The effect of allowing dual [uninsured motorist] recovery is to permit stacking. "Stacking," where permitted, makes more than one policy fully available to the injured party without proration between the companies held liable. The word "stacking" as used in the argot of the insurance industry, implies and is intended to be used when one policy's limit is "stacked" on top of another and possibly a third is "stacked" on top of the second. The claim is not paid by slicing through the stack like a piece of wedding cake but is paid by first using one layer, then another, and so on.

Comment, *When Enough Isn't Enough: Supplementing Uninsured Motorist Coverage in Pennsylvania*, 54 TEMP. L.Q. 281, 282-83, n.5 (1981) (quoting P. PRETZEL, UNINSURED MOTORISTS 87-88 (1982)), *quoted in Rana*, 6 Haw. App. at ____ n.3, 713 P.2d at 1367 n.3.

II. FACTS

The plaintiff, Yash Rana, operated a taxicab business. In 1982, he purchased a "Business Auto Policy" from defendant Bishop Insurance of Hawaii, Inc.[3] that covered seven automobiles used in Rana's business.[4] On December 6, 1982, Rana was injured in an automobile accident[5] while operating one of the insured automobiles. Rana brought a claim against Bishop asserting an actual monthly earnings loss of $2,000.[6] Rana sought $2,000 a month under the theory that the coverage for all seven of the automobiles under his policy could be aggregated, or "stacked," notwithstanding the policy's and statutory limit of $800. Relying on this argument, he sought an aggregate limit of $105,000, or seven times $15,000.[7] In accordance with the provisions of its policy and Hawaii Revised Statutes chapter 294,[8] Bishop paid Rana $800 a month for his monthly earnings loss and terminated his payments when the $15,000 limit was reached.[9]

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[3] *Rana*, 6 Haw. App. at ____, 713 P.2d at 1365-66.

[4] 6 Haw. App. at ____, 713 P.2d at 1365-66. The ICA found that Rana had apparently not paid for the privilege of aggregating his no-fault coverage for all seven vehicles: "There is no evidence in the record that the premium for no-fault coverage for one car included a charge to cover the cost of stacking its coverage for no-fault benefits payable for accidental harm involving any of the other six cars." *Id.* at ____ n.1, 713 P.2d at 1366 n.1.

[5] The record was unclear whether Rana was involved in a one-car or multi-car collision. *Id.* at ____ n.2, 713 P.2d at 1366 n.2.

[6] *Id.* at ____, 713 P.2d at 1366.

[7] 6 Haw. App. at ____, 713 P.2d at 1366.

[8] The applicable provisions from the no-fault law provided that:

> As used in this Chapter:
>
> . . . .
>
> (10) "No-fault benefits" with respect to any accidental harm shall be subject to an aggregate limit of $15,000 per person or his survivor and means . . .
>
> (C) Monthly earnings loss measured by an amount equal to the lesser of:
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> (i) $800 per month, or
>
> (ii) The monthly earnings for the period during which the accidental harm results in the inability to engage in available and appropriate gainful activity, or
>
> (iii) A monthly amount equal to the amount, if any, by which the lesser of (i) or (ii) exceeds any lower monthly earnings of the person sustaining injury at the time he resumes gainful activity.

HAW. REV. STAT. § 294-2(10)(C) (1976).

Section 294-3(c) provides:

> The total no-fault benefits payable per person or on his death to his survivor on account of accidental harm sustained by him in any one motor vehicle accident shall be $15,000, regardless of the number of motor vehicles involved or policies applicable.

HAW. REV. STAT. § 294-3(c) (1976).

[9] 6 Haw. App. at ____, 713 P.2d at 1366.

Dissatisfied with Bishop's treatment of his claim, Rana brought suit seeking a declaration that he was entitled to stack the coverages and limits of all seven vehicles under the single policy.[10] Both parties filed cross motions for summary judgment on the issue of coverage, and on July 2, 1984, the circuit court granted Bishop's motion.[11] Rana subsequently appealed.[12]

III. HISTORY

In order to understand more clearly the legal context in which *Rana* evolved, a basic understanding of Hawaii's No-Fault Law and its underlying principles is important. This section will discuss the concept of stacking as it relates to Hawaii's No-Fault Law and the comparable no-fault laws of other jurisdictions.

A. *The Hawaii No-Fault Law*

The 1970's saw a rapid growth in the area of no-fault automobile statutes with twenty-four states adopting such statutes in the early part of the decade.[13] This reform came about as a response to rising insurance premiums, delays in compensation, and other deficiencies in the traditional tort system.[14] No-fault plans sought to provide quick, informal compensation without regard to fault.[15]

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[10] Rana also sought a money judgment for his actual earnings loss, punitive damages, and attorney's fees, interest, and costs. *Id.* at ____, 713 P.2d at 1366.

[11] *Id.*

[12] Rana filed a timely notice of appeal on July 31, 1984. On August 12, 1984, the court denied Rana's motion for attorney's fees, and Rana filed an amended notice of appeal on August 20, 1984. *Id.*

[13] *See generally* W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 83 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS].

[14] *Id.* Among the deficiencies cited were the presence of uncompensated plaintiffs, inadequate coverage, liability based only on fault, extensive and costly litigation, and delays in compensation. Also, for a discussion and evaluation of the present tort system and an enumeration of certain problems with the present system, see generally, M. WOODROOF, J. FONSECA & A. SQUILLANTE, AUTOMOBILE INSURANCE AND NO-FAULT LAW §§ 1:1-1:70, 16:2-16:10 (1985).

[15] Providing compensation without regard to fault is one of the major purposes of the Hawaii No-Fault Law. The purposes of the Hawaii No-Fault Law are outlined in HAW. REV. STAT. § 294-1 (1976). Some of the major goals relating to the no-fault law were specified in the conference committee report:

(1) Provide for a speedy, adequate and equitable reparation for those injured or otherwise victimized;

(2) Provide for the stabilization and reduction of motor vehicle liability insurance premium rates;

(3) Provide for insurance coverage for all who require it, at a cost within the reach of every licensed driver;

(4) Provide for a compulsory insurance system;

The objective was to secure the rapid payment of claims by eliminating the fault controversy, thus obviating the need for litigation.[16] In 1973, Hawaii enacted a version of the no-fault law.[17]

The Hawaii no-fault statute requires all owners of automobiles to carry a minimum amount of insurance. The basic no-fault requirements are: minimum "no-fault benefits" of $15,000,[18] liability coverage of $25,000, and property damage coverage of $10,000.[19] In addition, insurers are required to offer optional additional insurance coverage for property damage and personal injuries.[20]

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(5) Provide for adequate regulatory control.

H.R. CONF. COMM. REP. NO. 13, 7th Hawaii Leg., Reg. Sess., 1973 HOUSE J. 1219.

See generally 12A G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 664 (2d ed. 1981 and Supp. 1986) for a discussion of the goals and purposes underlying no-fault statutes in general.

[16] 8D J. APPLEMAN, INSURANCE LAW AND PRACTICE § 5162, at 441 (1981 and Supp. 1983).

[17] The Hawaii No-Fault Law was enacted Act of May 11, 1973, ch. 203, 1973 Haw. Sess. Laws 381.

[18] HAW. REV. STAT. § 294-2(10) (1976). See supra note 8 for the full text of the statute.

[19] Hawaii's no-fault law provides:

(a) In order to be a no-fault policy, an insurance policy covering a motor vehicle shall provide. . .

(1) Liability coverage of not less than $25,000 for all damages arising out of accidental harm sustained by any one person as a result of any one accident applicable to each person sustaining accidental harm arising out of ownership, maintenance, use, loading, or unloading, of the insured vehicle;

(2) Liability coverage of not less than $10,000 for all damages arising out of injury to or destruction of property including motor vehicles and including the loss of use thereof, but not including property owned by, being transported by, or in the charge of the insured, as a result of any one accident arising out of ownership, maintenance, use, loading, or unloading, of the insured vehicle.

HAW. REV. STAT. § 294-10 (1976).

In 1985, the legislature raised the liability limit to $35,000 for damages arising out of accidental harm. HAW. REV. STAT. § 294-10(1) (1985).

[20] The optional additional provisions of the Hawaii No-Fault Law provide:

(a) In addition to the no-fault coverages described in section 294-10 every insurer issuing a no-fault policy shall make available to the insured the following optional insurance under the following conditions:

(1) At the option of the insured, every insurer shall offer provisions covering loss resulting from damage to the insured's motor vehicle with such deductibles including $250, as the commissioner, by regulation, shall provide.

(2) At the option of the insured, every insurer shall offer to compensate for damage, not covered by no-fault benefits, to the insured, his spouse, any dependents, or any occupants of the insured's vehicle.

(3) Additional coverages and benefits with respect to any injury, death, or any other loss from motor vehicle accidents or loss from operation of a motor vehicle . . . .

HAW. REV. STAT. § 294-11(a)(1)-(3) (1976).

B. *The Concept of Stacking*

The demand to stack insurance coverages arises when a claimant has suffered damages exceeding the limits provided by an insurance policy.[21] This would occur, for example, in a situation where a claimant's monthly earnings loss exceeds his policy's monthly limit.[22]A distinction should be made between *intrapolicy* stacking and *interpolicy* stacking. Intrapolicy stacking applies when the insured owns more than one motor vehicle, and one insurance policy covers all the motor vehicles.[23] If the insured is injured while occupying one of the vehicles, he may attempt to aggregate the coverages applicable to each vehicle covered. Interpolicy stacking occurs when multiple policies appear to provide coverage to a single vehicle.[24] The benefits from the different policies are aggregated to afford greater compensation to the injured party.[25] *Rana*, for instance, involved intrapolicy stacking, because a single multi-vehicle policy was involved.[26]

C. *Treatment of Uninsured Motorist Stacking in Hawaii*

Rana relied on several prior cases that addressed the stacking issue under Hawaii's insurance law. The Hawaii Supreme Court first allowed stacking of uninsured motorist policies in the case of *Walton v. State Farm Mutual Automobile Insurance Co.*[27] In *Walton*, the plaintiff was a passenger who suffered serious

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[21] Note, *Insurance-Statutes-Stacking of Uninsured Motorist and No-Fault Coverages as Determined by Legislative Intent*, 59 N.D.L. REV. 251, 255 (1983). *See also supra* note 2 (definition of stacking). Also, *see generally* 12A G. COUCH *supra* note 15, at § 670 (coordination of benefits and double recovery).

[22] For example, in *Rana*, the plaintiff's actual monthly loss of $2,000 exceeded the $800 policy limit. 6 Haw. App. at ____, 713 P.2d at 1366.

[23] A. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 13.9 (2d ed. 1985).

[24] *Id.*

[25] Comment, *Intra-Policy Stacking of Uninsured Motorist and Medical Payments Coverages: To Be or Not To Be*, 22 S.D.L. REV. 349, 350 (1977).

[26] 6 Haw. App. at ____, 713 P.2d at 1365-66.

[27] 55 Haw. 326, 518 P.2d 1399 (1974), *cited in Rana*, 6 Haw. App. at ____, 713 P.2d at 1370. Hawaii's uninsured motorist statute provides coverage to insureds who are injured by motorists that lack motor vehicle insurance coverage. When *Walton* was decided, the statute set a minimum requirement of $10,000 coverage for bodily injury to or death of one person involved in any one accident. HAW. REV. STAT. § 431-448 (1976) provides:

> No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle, shall be delivered, issued for delivery, or renewed in this State, with respect to any motor vehicle registered or principally garaged in this State, unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in section 287-7, under provisions filed with and approved by the insurance commissioner, for the protection of persons insured thereunder

injuries in an automobile owned and operated by Gary Seto.[28] The tortfeasor was an uninsured motorist.[29] Walton's actual damages amounted to $25,000, but he was unable to collect any of this sum from the uninsured motorist.[30] Walton was separately insured under his own policy covering a vehicle not involved in the accident, and both Seto and Walton carried the minimum uninsured motor vehicle coverage as named insureds under their separate policies.[31] Walton collected $10,000 from Seto's uninsured motorist policy and attempted to collect an additional $10,000 from his own uninsured motorist policy.[32]

State Farm, Walton's insurer, denied Walton's claim based on a restrictive clause in his insurance policy that attempted to limit benefits to the excess by which his policy limit exceeded the limits of other (Seto's) applicable insurance.[33] Because the policy limits were identical, there was no excess, and State Farm denied Walton's claim.

The Hawaii Supreme Court held that this clause was void.[34] In essence, the court permitted Walton to stack uninsured motorist benefits under two separate

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who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . .

Section 287-7 states the minimum statutory limits of liability as follows: "[E]very such [automobile liability] policy . . . is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than $10,000 because of bodily injury to or death of one person in any one accident . . . ." HAW. REV. STAT. § 287-7 (1976).

Section 287-7 no longer contains express language setting a dollar amount on the statutory minimum, but rather cites to § 294-10 for the applicable amounts. HAW. REV. STAT. § 287-7 (1985). For the full text of § 294-10, see *supra* note 19.

For a discussion on decisions from other jurisdictions that have permitted stacking of uninsured motorist coverage, see 8C J. APPLEMAN, *supra* note 16, § 5107 at 545-49 (1981) ("The factor which has been most determinative in the minds of jurists passing upon this issue has been the fact that separate premium charges are made for the UM coverage for each vehicle. . .they reason, the insurer derives a windfall from a payment in duplicate or triplicate . . . .").

[28] *Walton*, 55 Haw. at 326, 518 P.2d at 1399.

[29] *Id.*

[30] 55 Haw. at 327, 518 P.2d at 1400. The uninsured motorist filed for bankruptcy after Walton obtained judgment against him. *Id.*

[31] *Id.* at 326-27, 518 P.2d at 1400. Both insureds carried the statutory minimum of $10,000. *Id. See supra* note 27.

[32] 55 Haw. at 326-27, 518 P.2d at 1400.

[33] The restrictive clause in Walton's policy read:

> Under coverage U [uninsured motorists provisions] with respect to *bodily injury* to an *insured* while *occupying* a motor vehicle not owned by a named insured under this coverage, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this coverage exceeds the sum of the applicable limits of liability of all such other insurance.

Id. at 327 n.1, 518 P.2d at 1400 n.1 (emphasis original).

[34] *Id.* at 332-33, 518 P.2d at 1403.

policies, provided he did not collect more than the amount of his actual damages.[35]

Rana also relied on *Allstate Insurance Co. v. Morgan*.[36] In *Morgan*, the plaintiff owned three motor vehicles insured under a multi-vehicle policy issued by the Allstate Insurance Company.[37] The plaintiff's daughter was injured while operating a fourth, independently owned and insured motor vehicle that was struck by an uninsured motorist.[38] The court determined that benefit stacking of uninsured motorist coverage was permissible since Hawaii's uninsured motorist law required separate coverage for each vehicle insured.[39] Thus, the court permitted the plaintiff to stack the basic minimum coverages for each of the three vehicles, resulting in an aggregate recovery award of $30,000.[40] Furthermore, the supreme court recognized that an injured insured was entitled to recovery whether or not injured in a vehicle covered under the policy.[41]

A third case cited by Rana was *Yamamoto v. Premier Insurance Co.*[42] In *Yamamoto*, Mitsuo Yamamoto was seriously injured when his vehicle collided with a vehicle operated by George Makuaole.[43] Mr. and Mrs. Yamamoto filed a personal injury suit against Makuaole in which Mrs. Yamamoto claimed a loss of consortium. The Yamamotos also filed a suit against their insurer, claiming wrongful denial of benefits under their uninsured motorist policy.[44] Specifically, the Yamamotos sought $25,000 for each of three vehicles insured under their

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[35] 55 Haw. at 326, 518 P.2d at 1399. In discussing the uninsured motorist "stacking" situation the Hawaii Supreme Court observed:

> *Compensation for the injured party* is the more important focus of inquiry. Therefore, there would be inequity only if insured tried to "pyramid" or "stack" several policy provisions to build up to a sum beyond his damage, and thus gain a windfall. But where the "pyramiding" or "stacking" would result in a sum equal to or less than insured's damage, to refuse to permit pyramiding would award the *insurer* the windfall, based on the none too compelling assumption that the uninsured would have only been insured to the statutory minimum.

Id. at 332, 518 P.2d at 1403 (emphasis original).

[36] 59 Haw. 44, 575 P.2d 477 (1978) (cited in *Rana*, 6 Haw. App. at ____, 713 P.2d at 1370).

[37] *Id.* at 45, 575 P.2d at 478.

[38] *Id.* at 45-46, 575 P.2d at 478.

[39] *Id.* at 49, 515 P.2d at 480. For the full text of Hawaii's uninsured motorist law, see *supra* note 27.

[40] *Id.*

[41] *Id.*

[42] 4 Haw. App. 429, 668 P.2d 42 (1983), *ov'd on other grounds*, Doi v. Hawaiian Ins. & Guar. Co., ____ Haw. App. ____, 727 P.2d 884 (1986). Rana cited *Yamamoto* for the proposition that uninsured motorist stacking was permissible in Hawaii. *See also* Recent Development, *Motor Vehicle Liability Insurance: Uncertainty in the Hawaii Uninsured Motorist Law*—Yamamoto v. Premier Insurance Company, 6 U. HAW. L. REV. 733 (1984).

[43] 4 Haw. App. at 430, 668 P.2d at 45.

[44] *Id.*

single multi-vehicle policy for a maximum recovery of $75,000.[45]

The ICA allowed plaintiffs to collect $75,000 on their claim, less any amount recovered from Makuaole's insurer.[46] In reaching this result, the ICA reasoned that a motorist is considered "uninsured" where his insurance is inadequate to cover the injured party's damages to at least the minimum amount required by the financial responsibility law.[47] Although Makuaole's $25,000 policy satisfied the minimum statutory requirement, it was not adequate to cover the individual claims of Mr. and Mrs. Yamamoto.[48] Makuaole was therefore deemed an "uninsured" motorist, allowing the Yamamotos to collect from the uninsured motorist provisions of their policy.[49]

American Insurance Co. v. Takahashi[50] also permitted stacking of uninsured motorist coverages. In *Takahashi*, two family members were injured and a third was killed in an automobile accident involving an uninsured motorist.[51] Recovery was sought under a single policy covering two vehicles owned by the injured

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[45] *Id.*

[46] *Id.* at 433, 668 P.2d at 47.

[47] *Id.* at 433, 668 P.2d at 46-47. The court cited Palisbo v. Hawaiian Ins. Co., 57 Haw. 10, 15, 547 P.2d 1350, 1354-55 (1976), (cited in *Yamamoto*, 4 Haw. App. at 433, 668 P.2d at 46-47. (injured insured allowed to recover the difference between his uninsured motorist coverage and the amount received by the tort-feasor's insurance company), as authority for this proposition. At the time of *Yamamoto*, the minimum amount required by §§ 287-7 and 294-10(a)(1) was $25,000. In 1985, this amount was changed to $35,000. HAW. REV. STAT. § 294-10(a)(1) (1985). *See supra* note 27. See generally WOODROOF, *supra* note 14, § 3:1-3:47 for an in-depth examination of financial responsibility laws.

[48] *Id.* at 436, 668 P.2d at 48. The ICA noted that Mr. Yamamoto incurred hospital expenses of $6,491.50, lost wages of approximately $20,000 per year, and suffered a permanent disability that precluded him from returning to work. The ICA determined that the Yamamotos' recovery would have exceeded the $25,000 limit of the tortfeasor's insurance policy. *Id.*

[49] *Id.* at 437-38, 668 P.2d at 49. But see Doi v. Hawaiian Ins. and Guar. Co., ___ Haw. App. ___, 727 P.2d 884 (1986), which overruled *Yamamoto* on the ground that loss of consortium as a derivative claim was not an independent claim. In *Yamamoto*, loss of consortium was held to be an independent claim giving rise to a separate and independent action for damages. 4 Haw. App. at 435, 668 P.2d at 48. *Doi* held that where a tortfeasor's automobile insurance policy meets the minimum requirements set in HAW. REV. STAT. § 294-10(a)(1):

> [T]he tortfeasor is not an uninsured motorist, notwithstanding the fact that the spouse of a person injured in an automobile accident is unable to recover his or her loss of consortium damages from the tortfeasor's policy because the injured spouse's damages exceed the limits of the tortfeasor's policy. In such circumstances, the injured parties' automobile insurer is not liable to compensate them under their uninsured motorist coverage.

Doi, ___ Haw. App. at ___, 727 P.2d at 891-892. The *Doi* case, therefore, narrowed the scope of stacking of uninsured motorist coverage by narrowing the definition of "uninsured motorists."

[50] 59 Haw. 59, 575 P.2d 881, *reh'g denied per curiam*, 59 Haw. 102, 577 P.2d 780 (1978).

[51] 59 Haw. at 60, 575 P.2d at 882. The Takahashi family was traveling in a vehicle insured under a separate policy not involved in this suit. *Id.*

parties.[52] Neither of these vehicles were involved in the accident. The Takahashis sought $40,000,[53] which represented the maximum recovery of $20,000 on each insured vehicle.[54] Relying on its earlier decision in *Morgan*, the supreme court held that the Hawaii uninsured motorist statute required at least the minimum statutorily required coverage for each motor vehicle insured under a single multi-vehicle policy.[55] Accordingly, the court permitted the claimant to stack the separate coverages of the two insured vehicles for a total recovery of $40,000. The court further held that an insurance clause attempting to limit uninsured motorist liability was void.[56]

D. Treatment of No-Fault Stacking in Hawaii

In *Rana*, the plaintiff argued that Hawaii courts have allowed stacking of no-fault earnings loss benefits.[57] In *Mizoguchi v. State Farm Mutual Insurance Co.*,[58] the Hawaii Supreme Court allowed the combination of optional additional no-fault earnings loss benefits with basic no-fault benefits, up to the aggregate limit of any additional coverage, as provided under Hawaii Revised Statutes section 294-11.[59] Tsutomu Mizoguchi died in a two-car automobile accident.[60] Mizoguchi's vehicle was insured under a policy issued by State Farm Mutual Automobile Insurance Company[61] that included both basic no-fault coverage and additional coverage, thus raising the maximum aggregate coverage to $50,000.[62] Mizoguchi's surviving spouse filed suit after State Farm refused to pay more than $15,000, contending that the maximum amount allowable under the Hawaii No-Fault Law was $15,000 notwithstanding any additional coverage.[63] The *Mizoguchi* court noted a legislative intent behind the no-fault law to allow this type of stacking.[64] The court held that the no-fault law set

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[52] *Id.* at 60-61, 575 P.2d at 882.

[53] *Id.*

[54] Hawaii's uninsured motorist statute raised the required minimum coverage from $10,000 to $20,000 when two or more people are injured in the same accident by an uninsured motorist. *See supra* note 27.

[55] 59 Haw. at 63, 575 P.2d at 884.

[56] *Id.* at 64, 575 P.2d at 884.

[57] *Rana*, 6 Haw. App. at ____, 713 P.2d at 1370.

[58] 66 Haw. 373, 663 P.2d 1071 (1983).

[59] See *supra* note 20 for the full text of HAW. REV. STAT. § 294-11.

[60] 66 Haw. at 374, 663 P.2d at 1072.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 378-79, 663 P.2d at 1075. The supreme court in *Mizoguchi* recognized that "[w]here the insured has purchased additional coverage, provable earning losses may extend beyond the standard $15,000 aggregate limit, up to the maximum limit of the additional cover-

minimum limits on basic no-fault benefits that may be exceeded up to the maximum limit of additional coverage.[65]

In 1983, the United States Court of Appeals for the Ninth Circuit considered a similar issue in *Yamaguchi v. State Farm Mutual Automobile Insurance Co.*[66] *Yamaguchi*, similar to the Hawaii Supreme Court's holding in *Mizoguchi*,[67] declared the practice of aggregating basic and optional additional no-fault earnings loss benefits valid under the Hawaii No-Fault Law.[68] In *Yamaguchi*, the plaintiff's decedent, Stanley Yamaguchi, died from injuries sustained in an automobile accident.[69] The automobile in which Yamaguchi was a passenger was insured under a policy issued by National Union Fire Insurance Company at the basic no-fault coverage of $15,000.[70] Yamaguchi also owned two automobiles covered by two separate no-fault policies issued by State Farm, endorsed to bring the limit on each to $50,000.[71] The Ninth Circuit allowed the plaintiffs to "stack" the coverages and recover more than the $15,000 limit.[72]

In the case of *In re Maldonado*,[73] the ICA observed that " '[s]tacking' of no-fault policies is permitted under the No-Fault Act,"[74] but refused to allow the aggregation of no-fault and workers' compensation benefits.[75] The supreme court reversed the ICA's decision and held that an injured bus driver could

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age." *Id.*

[65] *Id.* at 377-78, 663 P.2d at 1074. The *Mizoguchi* court quoted the *Yamaguchi* decision in support of their holding: "[P]arties cannot contract for less protection than that afforded by statute, but can contract for more extensive protection." *Id.*

[66] 706 F.2d 940 (9th Cir. 1983).

[67] For a discussion of the *Mizoguchi* case, see *supra* notes 57-65 and accompanying text.

[68] *Yamaguchi*, 706 F.2d at 952. The *Yamaguchi* court, however, allowed recovery of only one basic coverage and optional additional coverage up to the limits of one policy. *Id.* at 956. At least in a conceptual sense, the *Yamaguchi* result is thus contrary to the recovery of more than one basic coverage benefit limit. *Compare* Yamaguchi v. State Farm Mut. Auto. Ins. Co., 515 F. Supp. 186 (D. Haw. 1980) (federal district court decision allowing combination of three basic no-fault coverages and two optional additional coverages) *with* Yamaguchi v. State Farm Mut. Auto. Ins. Co., 706 F.2d 940 (9th Cir. 1983) (Ninth Circuit decision affirming district court in part and reversing in part).

[69] 706 F.2d at 944.

[70] *Id.*

[71] *Id.* at 944-45.

[72] *Id.* at 948-949. The Ninth Circuit limited this recovery, however, to a total of $50,000 based upon the policy provisions that placed a limit on optional additional coverage recoverable for a single vehicle. *Id.*

[73] 5 Haw. App. 185, 683 P.2d 394, *rev'd on other grounds*, 67 Haw. 347, 687 P.2d 1 (1984). *See also* Note, *In re* Maldonado, *Stacking of No-Fault Benefits on Workers' Compensation For the Same Loss*, 8 U. HAW. L. REV. 619, 637-40 (1986) [hereinafter Note, *Stacking No-Fault*] (casenote discussing *Maldonado*).

[74] 5 Haw. App. at 192, 683 P.2d at 399-400.

[75] 5 Haw. App. 185, 683 P.2d 394 (1984).

recover both workers' compensation benefits and monthly earnings loss benefits from his employer's no-fault policy.[76] This stacking of benefits gave the employee more than he would have earned, because taxes were not deducted from the judgment.

E. Stacking in Other Jurisdictions

There have been several jurisdictions that pursue a pro-stacking approach. For example, in *Peterson v. Iowa Mutual Insurance Co.*,[77] the Minnesota Supreme Court allowed an injured insured to stack the $200 ceiling on weekly income loss benefits applicable to each of four motor vehicles covered under his policy.[78] The court looked to the Minnesota no-fault statute and noted that

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[76] 67 Haw. 347, 687 P.2d 1 (1984). However, in 1985, the Hawaii legislature effectively superceded *Maldonado* by amending the no-fault statute. The applicable section of the amended statute provides:

> All no-fault benefits shall be paid secondarily and net of any benefits a person is entitled to receive because of the accidental harm from workers' compensation laws; provided that the total amount a person is entitled to receive for monthly earnings loss under this chapter shall be limited to the amount set out in section 294-2(10)(C) or the amount of any applicable coverage under section 294-11, without any deduction of any amount received as compensation for lost earnings under any workers' compensation law; provided that the aggregate of the payments from both sources shall not exceed eighty per cent of the person's monthly earnings as monthly earnings are defined in section 294-2(7); provided further that this section shall be inapplicable to benefits payable to a surviving spouse and any surviving dependent as provided under section 294-4. If the person does not collect such benefits under the workers' compensation laws by reason of the contest of the person's right to so collect by the person or organization responsible for payment thereof, the injured person, if otherwise eligible, shall, nevertheless, be entitled to receive no-fault benefits and upon payment thereof the no-fault insurer shall be subrogated to the injured person's rights to collect such benefits.

HAW. REV. STAT. § 294-5(b) (1985). Thus, the amended statute limited the amount recoverable between no-fault and workers' compensation benefits to not more than eighty percent of a claimant's monthly earnings. *See* Note, *Stacking No-Fault*, *supra* note 73, at 637-40.

[77] 315 N.W.2d 601 (Minn. 1982). For other pro-stacking cases, see Holman v. All Nation Ins. Co., 288 N.W.2d 244 (Minn. 1980) (stacking of basic economic loss coverages for two vehicles owned by plaintiffs allowed); Travelers Ins. Co. v. Lopez, 93 Nev. 463, 567 P.2d 471 (1977) (Nevada's Motor Vehicle Insurance Act did not preclude the stacking of basic reparations benefits from two insurance policies covering the same vehicle). *See also* Helmly v. Gulf Ins. Co., 159 Ga. App. 339, 283 S.E.2d 370 (1981) (injured insured allowed to stack medical coverage benefits for two vehicles covered under the same policy, expanding on earlier decisions allowing interpolicy stacking). *Helmly*, however, is distinguished from other Georgia anti-stacking cases in that the medical coverage sought to be stacked did not exceed the statutory limit of $5,000 for basic benefits. *See infra* notes 85-87 and accompanying text.

[78] *Peterson*, 315 N.W.2d at 601. But see Yeager v. Auto-owners Ins. Co., 335 N.W.2d 733 (Minn. 1983), where the same court denied stacking, distinguishing *Holman* and *Peterson* on the ground that multiple coverages were not involved. The key distinction was that *Yeager* involved a

such stacking was not contrary to the legislative goals of prompt compensation and prevention of duplicate recovery. The stacking was consistent with the notion that policyholders should recover the full benefit of their contracts.[79] Similar policy considerations have been the underlying rationale behind other pro-stacking decisions.[80]

Pennsylvania leads anti-stacking jurisdictions by having the strongest anti-stacking approach. In *Kirsch v. Nationwide Insurance Co.*,[81] the District Court for the Western District of Pennsylvania interpreted Pennsylvania's No-Fault Act to prohibit the stacking of no-fault benefits for two vehicles covered under a single policy.[82] Furthermore, the Pennsylvania Superior Court case of *Antanovich v. Allstate Insurance Co.*[83] examined legislative history and held that basic no-fault benefits cannot be stacked. The court determined that "[t]o permit stacking of basic loss benefits would permit some victims to circumvent the system of compensation that the General Assembly has provided."[84]

Interpretation of Georgia's no-fault statute has led to a similar result. The Georgia Supreme Court, in *Georgia Casualty & Surety Co. v. Waters*,[85] noted that the statutory no-fault limit indicated legislative intent to prevent stacking. Furthermore, both a 1981 Georgia Supreme Court case[86] and a 1985 Eleventh Circuit case[87] have interpreted Georgia's no-fault statute to preclude stacking of benefits beyond the statutory limit.

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commercial policy deemed to have no separate coverages for each vehicle with a separate premium for each vehicle, and thus, nothing to stack. *Id.* at 736-37.

[79] In *Peterson*, the Minnesota Supreme Court noted the rationale behind the Minnesota No-Fault statute:

> Minn. Stat. § 65B.42(1) (1980) expresses the intent to "relieve the severe economic distress of uncompensated victims of automobile accidents" through insurance policies "which will provide prompt payment of specified basic economic loss benefits." A further objective is to prevent overcompensation and duplicate recovery. Neither of these goals is impeded by permitting an injured insured to collect income loss benefits simultaneously under separate policies up to 85% of his or her gross wage loss. Indeed, the theme of our stacking opinions has been to ensure that policyholders receive the full benefit of their contracts and, should there be a "windfall," it should fall to the insured who has paid a premium.

315 N.W.2d at 602.

[80] *See generally* 8D J. APPLEMAN, *supra* note 16, at § 5192 (1981).

[81] 532 F. Supp. 766 (W.D. Pa. 1982) (interpreting Pennsylvania law).

[82] The more recent federal case of Williams v. Nationwide Ins. Co., 571 F. Supp. 414 (M.D. Pa. 1983), followed the same line of reasoning.

[83] 370 Pa. Super. 322, 467 A.2d 345 (1983).

[84] *Id.* at 331, 467 A.2d at 351.

[85] 146 Ga. App. 149, 246 S.E.2d 202 (1978).

[86] General Accident Fire & Life Assurance Corp. v. Kelch, 158 Ga. App. 555, 281 S.E.2d 258 (1981).

[87] Bowers v. Continental Ins. Co., 753 F.2d 1574 (11th Cir. 1985) (interpreting Georgia law).

Other jurisdictions have supported a strong anti-stacking policy, particularly when basic earnings loss benefits are involved. For example, the North Dakota Supreme Court precluded stacking,[88] and the New Jersey Superior Court, in 1985, also precluded both intra- and interpolicy stacking.[89]

IV. ANALYSIS

The major issue before the ICA in *Rana* was whether the Hawaii No-Fault Law precluded stacking of no-fault basic insurance coverages on a single multi-vehicle insurance policy.[90] The ICA answered this question in the affirmative by using a statutory construction analysis.

A. *The Plain Language of Hawaii's No-Fault Law*

The ICA in *Rana* first identified sections of Hawaii Revised Statutes chapter 294 that were relevant to the stacking issue. The sections cited were: 294-2(10)(c),[91] 294-3(c),[92] 294-5(c) and (d),[93] and 294-11.[94] Of primary impor-

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[88] St. Paul Mercury Ins. Co. v. Andrews, 321 N.W.2d 483 (N.D. 1982) In this case, the plaintiff was prohibited from stacking both no-fault and uninsured motorist coverages. The North Dakota Supreme Court determined that although stacking of uninsured motorist coverage was not prohibited by statute, an insurance policy limitation barring stacking of uninsured motorist coverage was enforceable. The court also noted that North Dakota law prohibited stacking of basic no-fault benefits. *Id.* at 489.

[89] Gaskill v. Selected Risks Ins. Co., 202 N.J. Super. 138, 493 A.2d 1331 (1985). The New Jersey Superior Court determined that both inter- and intrapolicy stacking of personal injury protection benefits was precluded by statute. The court applied New Jersey Statutes § 39:6A-4.2: "No person shall recovery personal injury protection benefits under more than one automobile insurance policy for injuries sustained in any one accident." N. J. STAT. ANN. § 39:6A-4.2 (1983), *quoted in Gaskill*, 202 N.J. Super. at ____, 493 A.2d at 1333.

[90] *Rana*, 6 Haw. App. at ____, 713 P.2d at 1365. The issue, as phrased by the court, read, "[w]hether the Hawaii no-fault law, Hawaii Revised Statutes (HRS) Chapter 294 (1976, as amended) (No-Fault Law), precludes 'stacking' of no-fault basic insurance coverages where the injured named insured has a single insurance policy covering seven vehicles." *Id.*

[91] For the full text of § 294-2(10)(c), see *supra* note 8.

[92] For the full text § 294-3(c), see *supra* note 8.

[93] The relevant sections of Chapter 294 cited were HAW. REV. STAT. §§ 294-5(c) and (d) (1976):

> (c) No payment of no-fault benefits may be made to the occupants of a motor vehicle other than the insured motor vehicle or to the operator or user of a motor vehicle engaging in criminal conduct which causes any loss.
>
> (d) The no-fault insurance applicable on a primary basis to accidental harm to which this chapter applies is the insurance on the vehicle occupied by the injured person at the time of the accident, or, if the injured person is a pedestrian, the insurance on the vehicle which caused accidental harm to such pedestrian.

tance to the court were sections 294-2(10) and 3(c),[95] which set dollar limits on basic no-fault recovery.

Based on the plain language of these provisions the ICA discerned a clear legislative intent to prohibit stacking of basic no-fault coverages.[96] The ICA followed a standard rule of statutory interpretation that "where the language of the law in question is plain and unambiguous, . . . our duty is only to give effect to the law according to its plain and obvious meaning."[97]

The ICA found that these sections were "plain and unambiguous . . . evincing a legislative intent to preclude stacking."[98] However, the earlier Ninth Circuit decision in *Yamaguchi*[99] indicated a possible ambiguity in the language, prompting the ICA's review of legislative history to determine legislative intent.

B. Legislative History and Relevant Caselaw

The ICA then addressed possible uncertainties presented by prior precedent, in particular the *Yamaguchi* decision. The court reviewed legislative history to infer legislative intent and dealt with prior cases from Hawaii and other jurisdictions.[100]

The ICA focused on two of the five major objectives of a basic no-fault policy, (1) to "provide adequate and equitable reparation for those injured or otherwise victimized," and (2) to provide coverage "at a cost within the reach of every licensed driver."[101] These two objectives were not consistent with one

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> If there is no such insurance on such vehicle, any other no-fault insurance applicable to the injured person shall apply.
>
> No person shall recover no-fault benefits from more than one insurer for accidental harm as a result of the same accident.

[94] For the full text of HAW. REV. STAT. § 294-11, see *supra* note 20.

[95] *Rana*, 6 Haw. App. at ____, 713 P.2d at 1367. For the full text of §§ 294-10(C) and 294-3(c), see *supra* note 8.

[96] 6 Haw. App. at ____, 713 P.2d at 1368. For a discussion of the ICA's interpretation of the legislative intent to prohibit stacking, see *infra* notes 101-103 and accompanying text.

[97] 6 Haw. App. at ____, 713 P.2d at 1367. *See* Puchert v. Agsalud, 67 Haw. 25, 677 P.2d 449 (1984) (construction of HAW. REV. STAT. § 378-33(b), regarding labor complaints of unlawful discharge); *In re* Hawaiian Tel. Co., 61 Haw. 572, 577-78, 608 P.2d 383, 387 (1980) (dispute regarding definition of "gross income" in Hawaii's revenue statute, HAW. REV. STAT. ch. 239, as it applied to public utility). *See generally* 2A SUTHERLAND, STATUTORY CONSTRUCTION § 45.02 (N. Singer 4th ed. 1984 & 1986).

[98] 6 Haw. App. at ____, 713 P.2d at 1367.

[99] 706 F.2d 940 (9th Cir. 1983). *See supra* notes 66-72 and accompanying text.

[100] *Rana*, 6 Haw. App. at ____, 713 P.2d at 1368. The court was following the rule of statutory construction that where statutory language is ambiguous, the court may interpret the language through the use of legislative history. *See generally* 2A SUTHERLAND, *supra* note 97, § 48.01-48.20.

[101] 6 Haw. App. at ____, 713 P.2d at 1368. The ICA identified these objectives through use

another, because to ensure adequate levels of compensation, a corresponding increase in insurance costs was required. To accomodate both objectives, the legislature had to strike a balance. That balance was seen as the setting of the "maximum [basic] no-fault limit" at $15,000 in Hawaii Revised Statutes section 294-2(10),[102] ensuring swift compensation to the injured while preventing large compensatory awards that lead to increased premiums.

With these policy considerations in mind, the ICA concluded that there was a strong legislative intent to prohibit stacking and thus prevent higher premiums for no-fault coverage.[103] The court further reasoned that Hawaii Revised Statutes sections 294-2(10) and 294-3(c) precluded the stacking of no-fault premiums and coverages. The ICA, however, had yet to reconcile satisfactorily this decision with earlier cases that allowed stacking of no-fault coverage.

Rana asserted that the ICA's opinion in *Maldonado* established the policy that "[s]tacking of no-fault policies is permitted under the No-Fault Act."[104] The ICA addressed *Maldonado* by distinguishing the use of the term "stacking" in the two cases. In *Maldonado*, the plaintiff was permitted to stack no-fault and workers' compensation policies, whereas in *Rana*, stacking of more than one basic no-fault coverage was sought.[105] Moreover, the ICA recognized their error in *Maldonado*, characterizing their use of the term "stacking" as "loose and indiscriminate."[106]

The ICA then dealt with the Ninth Circuit decision of *Yamaguchi*,[107] which construed the Hawaii No-Fault Law to permit stacking. Relying on the United States Supreme Court's ruling that "[T]he [state] courts are the final arbiters of the State's own law,"[108] the ICA rejected *Yamaguchi*. The ICA observed that

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of the legislative record. *Id.* See *supra* note 15 for the specific legislative language cited in *Rana*.

[102] 6 Haw. App. at ____, 713 P.2d at 1368-69.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] The ICA's admission to its mistake in *Maldonado* was discussed in *Rana*:

> Unfortunately, our use of the term "stacking" in *Maldonado* was loose and indiscriminate. There, the construction of HRS [section] 294-5(b) was involved, and we and the parties involved in the appeal characterized the issue as being whether the "stacking" of no-fault and workers' compensation insurance policies was permissible. We looked at the results achieved in *Yamaguchi* and *Mizoguchi*, which permitted the "stacking" of optional additional no-fault policy or coverage upon a no-fault basic policy or coverage, and improvidently made a general statement that our No-Fault Law permitted "stacking" of no-fault policies in *Maldonado*. Since stacking of two or more no-fault basic policies or coverages was not involved in *Maldonado*, that statement is *obiter dictum* and not binding.

Id. at ____, 713 P.2d at 1369.

[107] 706 F.2d 940 (9th Cir. 1983). See *supra* notes 66-72 and accompanying text for a discussion of the *Yamaguchi* case.

[108] Wardius v. Oregon, 412 U.S. 470, 477 (1972), *quoted in Rana*, 6 Haw. App. at ____, 713 P.2d at 1369.

"[state courts] are not bound by the federal . . . court's interpretation of our statutes."[109]

The ICA also distinguished *Yamaguchi* on the basis of the applicable statutory provisions involved.[110] In *Yamaguchi*, the resolution of the issue depended upon interpretation of sections 294-5(c) and (d).[111] In *Rana*, the ICA focused upon sections 294-2(10) and 3(c).[112]

The Ninth Circuit in *Yamaguchi* concluded that "Hawaii law places no limitation either on the number of policies . . . or on the total dollar recovery available under all applicable policies."[113] In *Rana*, the ICA did not agree with the Ninth Circuit's interpretation.[114] As a result, the ICA rejected *Yamaguchi* as not binding. In doing so, the ICA followed jurisdictions that reflected an anti-stacking viewpoint.[115]

The court characterized Rana's reliance on the *Mizoguchi* case as "misplaced."[116] The ICA distinguished *Mizoguchi* in a manner similar to that of *Maldonado*. *Mizoguchi* dealt with stacking of optional additional no-fault benefits onto the basic earnings loss coverage,[117] while *Rana* only dealt with stacking of basic coverages.

Rana relied heavily on prior uninsured motorist cases in an attempt to persuade the court to allow stacking of no-fault coverage.[118] Rana's argument centered upon the proposition that Hawaii's No-Fault and Uninsured Motorist laws were analogous.[119] Since stacking was permissible under the uninsured motorist law, Rana argued for similar treatment under the no-fault law.[120]

Rana also asserted that *Morgan* and previous Hawaii cases permitted stacking of uninsured motorist coverages, and argued that there was no "reasonable basis" for distinguishing the two types of stacking.[121] The ICA disagreed,[122] find-

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[109] Lewis v. Midway Lumber, Inc., 114 Ariz. App. 426, 430, 561 P.2d 750, 754 (1977), *quoted in Rana*, 6 Haw. App. at ____, 713 P.2d at 1369.

[110] 6 Haw. App. at ____, 713 P.2d at 1369-70.

[111] *Id.* at ____, 713 P.2d at 1369.

[112] *Id.* at ____, 713 P.2d at 1368. HAW. REV. STAT. §§ 5(c) and (d) identify the applicable insurer making no-fault payments in an accident. In contrast, § 294-2(10) and 3(c) set aggregate limits on recovery in any one accident. For the full text of HAW. REV. STAT. §§ 294-3(c) and 294-2(10), see *supra* note 8.

[113] 706 F.2d at 956.

[114] 6 Haw. App. at ____, 713 P.2d at 1369. *See supra* notes 107-110 and accompanying text.

[115] See *supra* note 77 for a summary of the pro-stacking cases cited by Rana.

[116] 5 Haw. App. at ____, 713 P.2d at 1370.

[117] For a discussion of the type of stacking involved in *Mizoguchi*, see *supra* notes 57-65 and accompanying text.

[118] *See supra* notes 27-56 and accompanying text.

[119] *See Rana*, 6 Haw. App. at ____, 713 P.2d at 1370.

[120] *Id.*

[121] *Id.*

ing that the purposes behind the no-fault and uninsured motorist statutes significantly differed. Thus, the ICA concluded that the analogy between the two statutes was faulty.[123]

Next, the ICA reviewed pro-stacking cases from other jurisdictions.[124] The ICA noted that there was no majority rule and decided to follow the anti-stacking approach.[125] This was the last step in the ICA's analysis of the primary issue on appeal.[126]

The dissent argued that the Hawaii No-Fault Law was "highly ambiguous"

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[122] The *Rana* court relied on Kirsch v. Nationwide Ins. Co., 532 F. Supp. 766 (W.D. Pa. 1982), *cited in Rana*, 6 Haw. App. at ____, 713 P.2d at 1370-71.

[123] The ICA in *Rana* adopted the rationale stated in *Kirsch* that explained the different purposes of the uninsured motorist and no-fault acts:

> The Uninsured Motorist Act was enacted specifically to provide coverage to innocent victims of negligent acts of uninsured third parties. The Act was not intended to limit causes of action against tortfeasors, but to assure recovery where tortfeasors are financially unable to pay any judgment awarded. The Act does not place any statutory maximum on the amount of coverage any individual insured can obtain, only the minimum amount of coverage each insurance policy must provide.
>
> The No-Fault Act, on the other hand, has an entirely different purpose. The No-Fault Act provides for a specific amount of possible recovery to be awarded to victims of motor vehicle accidents, *regardless of fault* . . . . Furthermore, the very fact that, unlike the Uninsured Motorist Act, the No-Fault Act does contain statutory ceilings in the amount of recovery indicates an intent to limit the amount of no-fault recovery under the statute.

Kirsch, 532 F. Supp. at 768, *quoted in Rana*, 6 Haw. App. at ____, 713 P.2d at 1371.

[124] *Id.* at ____, 713 P.2d at 1371. For a discussion of the pro-stacking cases relied on by Rana, see *supra* notes 77-80 and accompanying text.

[125] *Id.*

[126] A secondary issue before the ICA was Rana's claim for attorney's fees as provided for under HAW. REV. STAT. § 294-30. This section allows an award of a reasonable sum for attorney's fees to a no-fault claimant who successfully brings suit against the insurer to enforce a previously denied no-fault claim. At the time of Rana's accident, the full text of HAW. REV. STAT. § 294-30(a) read:

> A person making a claim for no-fault benefits may be allowed an award of a reasonable sum for attorney's fee, based upon actual time expended, which shall be treated separately from such claim and be paid directly by the insurer to the attorney, and all reasonable costs of suit in an action brought against an insurer who denies all or part of a claim for benefits under such policy unless the court determines that the claim was fraudulent, excessive, or frivolous.

HAW. REV. STAT. § 294-30(a) (Supp. 1977).

The trial court disallowed Rana's claim for attorney's fees, characterizing it as "excessive." Under HAW. REV. STAT. § 294-30, trial court judges have discretion to award attorney's fees, unless the trial court judge determines that the claim filed is fraudulent, frivolous, or excessive. See Kawaihae v. Hawaiian Ins. Co., 1 Haw. App. 355, 619 P.2d 1086 (1980), where the ICA laid out guidelines for determining whether a claim for no-fault benefits is "fraudulent, frivolous, or excessive." *Id.* at 358-59, 619 P.2d at 1090. The ICA disagreed with the trial court's characterization, and reversed on the attorney's fee issue. *Rana*, 6 Haw. App. at ____, 713 P.2d at 1372.

and open to interpretation.[127] The dissent agreed with the reasoning in *Yamaguchi* that the uninsured motorist stacking cases were analogous to the no-fault cases.[128] The dissent's strongest criticism was that Bishop Insurance was allowed to collect Rana's premium and avoid liability.[129] The dissent termed this "unconscionable," particularly since Rana's insurance coverage was statutorily required.[130] Since Rana paid for no-fault coverage on each of his seven vehicles, the dissent asserted that Bishop should not be allowed to refuse liability, thereby creating a windfall.[131]

C. *Commentary on the* Rana *Decision*

Rana represents a clarification of the judicial stance on the issue of no-fault benefits under Hawaii Revised Statutes chapter 294. Previous case law interpreted the provisions of chapter 294 to allow stacking in various contexts.[132] In *Rana*, however, the ICA precluded stacking of basic no-fault earnings loss benefits for several vehicles covered under the same policy. Although *Rana* was a well-reasoned anti-stacking statement, questions concerning the court's reasoning arise upon closer analysis.

First, although the ICA clarified its anti-stacking position and gave further validity to its *Maldonado* holding, it could have made an even stronger anti-stacking statement. On appeal, Rana contended that the ICA's earlier decision of *In re Maldonado*[133] held that stacking of no-fault policies was allowed under the no-fault law.[134] The ICA recognized that its use of the term "stacking" in *Maldonado* was inaccurate,[135] and observed that they had "improvidently" made a general statement on no-fault stacking.[136]

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[127] *Rana*, 6 Haw. App. at ____, 713 P.2d at 1372 (Heen, J., dissenting).

[128] *Id.* at ____, 713 P.2d at 1373 (Heen, J., dissenting). For a discussion of uninsured motorist stacking, see *supra* notes 27-56 and accompanying text.

[129] *Id.*

[130] *Id.*

[131] In the dissent Judge Heen quoted from a 1967 Arizona appellate court case: "More pithily stated: '[insurer] charged a premium for the coverage; it cannot be permitted to vanish as the pea in the shell game' " *Id.* at ____, 713 P.2d at 1373, *quoting* Kraft v. Allstate Ins. Co., 6 Ariz. App. 276, 431 P.2d 917 (1967). Judge Heen continued, "[i]n the case of no-fault insurance, not only is the insurer obligated by statute to provide it, but the automobile owner is required to maintain it. Where is the pea now?" *Rana*, 6 Haw. App. at ____, 713 P.2d at 1373.

[132] For a discussion of the Hawaii cases that had previously allowed stacking, see *supra* notes 27-76 and accompanying text.

[133] 5 Haw. App. 185, 683 P.2d 394, *rev'd*, 67 Haw. ____, 687 P.2d 1 (1984).

[134] 6 Haw. App. at ____, 713 P.2d at 1369. For a summary of the ICA's treatment of *Maldonado*, see *supra* notes 73-75 and accompanying text.

[135] *See supra* note 106 and accompanying text.

[136] 6 Haw. App. at ____, 713 P.2d at 1369.

Since the ICA decision in *Maldonado* was subsequently reversed by the Hawaii Supreme Court,[137] use of it as authority for propositions of law could easily have been dismissed as not binding. Further, Rana's use of *Maldonado* was contrary to the court's holding in that case, and could have been questioned. The ICA's opinion in *Maldonado* denied stacking of no-fault benefits onto workers' compensation benefits despite noting the general rule that no-fault stacking was allowed.[138]

Second, rather than refuting the Ninth Circuit's reasoning in *Yamaguchi*, the ICA merely dismissed the federal court's ruling as not binding.[139] In *Yamaguchi*, the Ninth Circuit determined that the combination of optional additional and basic no-fault benefits from separate policies was not prohibited under Hawaii law.[140] The Ninth Circuit reasoned that Hawaii Revised Statutes section 294-11, requiring an insurer to offer coverage above the mandatory no-fault basic coverage of $15,000, evinced a legislative intent against establishing any dollar limitation on recovery of no-fault benefits by any one person in any one accident.[141] According to the court's analysis, the only limitation on the amount recoverable is when no optional additional coverage has been procured.[142]

To the extent that *Rana* dealt only with the attempted stacking of no-fault basic policy coverage, it is consistent with *Yamaguchi*, because in the latter case the insured had more than the basic coverage.[143] The ICA's discussion of

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[137] *See supra* notes 73-76 and accompanying text. *See generally* Note, *Stacking No-Fault*, *supra* note 73.

[138] Rana quoted *Maldonado* for the proposition that " '[s]tacking' of no-fault policies is permitted under the No-Fault Act." 6 Haw. App. at ____, 713 P.2d at 1369 (quoting *Maldonado*, 5 Haw. App. at ____, 683 P.2d at 400). In the ICA opinion of *Maldonado*, however, stacking was not permitted. The ICA in *Rana* admitted making a mistake in their of the term "stacking" in *Maldonado*. See *supra* notes 104-106 and accompanying text for the ICA's treatment of *Maldonado* in *Rana*.

[139] *See supra* notes 107-109 and accompanying text.

[140] *Yamaguchi*, 706 F.2d at 949 n.13.

[141] *Id.* at 952.

[142] *Id.* at 946 n.7. In analyzing the relevant Hawaii no-fault statute, the Ninth Circuit observed:

> Section 294-3(c), as we read it, however, limits only the maximum dollar amount of no-fault recovery for any one accident where no optional additional coverage has been procured and not the number of policies from which one may recover in obtaining that maximum amount. In fact, use of the phrase "regardless of the number of policies applicable" in [section] 294-3(c) is telling proof that the Hawaii legislature intended that more than one no-fault insurance policy could properly be applicable to any one person in any one accident.

Id.

[143] The policies involved in *Yamaguchi* were endorsed beyond the $15,000 basic coverage to $50,000. 706 F.2d at 945.

Yamaguchi, however, still leaves the issue of stacking optional additional no-fault coverage unresolved.

The ICA's treatment of *Yamaguchi* is probably a result of a desire to firmly establish the concept that basic no-fault earnings loss benefits cannot be stacked. Disregarding *Yamaguchi* strengthened the ICA's holding by making it almost impossible for future challenges to the anti-stacking decision to rely on *Yamaguchi* for support. The ICA, however, could have made an even clearer anti-stacking statement had it further distinguished *Yamaguchi* from *Rana*.

The ICA could have distinguished *Yamaguchi* on the basis of interpolicy stacking. *Rana* involved the benefits accruing to seven different vehicles under a single policy and thus was a question of intrapolicy stacking.[144] Rather than making the technical distinction,[145] the *Rana* court decided to dismiss the *Yamaguchi* case entirely.[146]

The ICA's distinction between the uninsured motorist and no-fault statutes clearly illustrated the different purposes underlying each law.[147] The purpose of the uninsured motorist statute was to provide innocent victims with coverage when the tortfeasors are financially unable to pay any judgment award. The statute does not provide a statutory maximum, but does provide a statutory minimum.[148] Uninsured motorist coverage is not mandatory,[149] but insureds

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[144] 6 Haw. App. at ____, 713 P.2d at 1366.

[145] For a discussion of the intra- interpolicy stacking distinction as it relates to uninsured motorist coverage, see A. WIDISS, *supra* note 23, § 13.9 (1985).

[146] 6 Haw. App. at ____, 713 P.2d at 1370.

[147] The ICA adopted the argument presented in *Kirsch*, see *supra* notes 81-82 and accompanying text, for distinguishing between the intent of uninsured motorist and no-fault law:

> [T]he analogy to the Uninsured Motorist Act is faulty. The Uninsured Motorist Act was enacted specifically to provide coverage to innocent victims of negligent acts of uninsured third parties. The Act was not intended to limit causes of action against tortfeasors, but to assure recovery where tortfeasors are financially unable to pay any judgment award. The Act does not place any statutory maximum on the amount of coverage any individual insured can obtain, only the minimum amount of coverage each insurance policy must provide.
>
> The No-Fault Act, on the other hand, has an entirely different purpose. The No-Fault Act provides for a specific amount of possible recovery to be awarded to victims of motor vehicle accidents, *regardless of fault*. This arrangement allows for prompt compensation to victims. However, once the statutory ceilings are exceeded, the negligent party is still liable for any further damages caused by his actions. The cause of action against the faulty driver is not limited at this point. Furthermore, the very fact that, unlike the Uninsured Motorist Act, the No-Fault Act does contain statutory ceilings in the amount of recovery indicates an intent to limit the amount of no-fault recovery under the statute.

Kirsch, 532 F. Supp. at 768, *quoted in Rana*, 6 Haw. App. at ____, 713 P.2d at 1371 (emphasis added).

[148] *See supra* note 27.

[149] Uninsured motorist coverage is not mandatory in that insureds may reject the coverage by writing to the State Insurance Commissioner. HAW. REV. STAT. § 431-448(a) (1985) provides,

are encouraged to obtain such coverage, which is considered personal to each insured.[150] Purchasers of this type of insurance expect to be able to cumulate their coverage should it be needed. Courts are, therefore, inclined to allow an injured insured to collect from more than one uninsured motorist policy.

The no-fault law, however, provides a specific amount of recovery possible to an injured victim regardless of fault.[151] Therefore, there is a statutory limit on the amount recoverable under the no-fault law.[152] A public policy argument against stacking no-fault basic coverage is that premiums should be kept to a minimum because it is mandatory insurance.[153]

The ICA's distinction between the No-Fault act and Uninsured Motorist act is well founded. Legislatures enact no-fault laws in order to provide speedy recovery, regardless of fault, and to stabilize or reduce insurance premium rates.[154] If insureds are permitted to stack no-fault coverage, a major goal of the act would be defeated, because higher award amounts resulting from benefit stacking would likely result in increased premiums.

The scope of the *Rana* decision is well defined: intrapolicy stacking of basic no-fault insurance coverages is not allowed under the Hawaii no-fault law. Under *Rana*, interpolicy stacking of the same benefits might also be precluded, in light of the similar principles involved. However, the answer to that question and other ramifications of *Rana* remain to be seen.

"[T]he coverage required under this section shall not apply where any insured named in the policy shall reject the coverage in writing."

[150] *See* Palisbo v. Hawaiian Ins. & Guar. Co., 57 Haw. 10, 547 P.2d 1350 (1976). The Hawaii Supreme Court noted:

> [U]ninsured motorist insurance is for individuals who have the foresight to protect themselves against the financial (sic) irresponsible motorist. The statute was clearly designed to enable the purchaser of the latter type of insurance to assure himself and members of his household of not less than the minimum protection provided for the general public in the financial responsibility law. The uninsured motorist policy is personal to the insured. This is what he bargained for, and one which he was encouraged to purchase by the legislature.

Id. at 15, 547 P.2d at 1354.

[151] No-fault laws alleviate the problems associated with attaching liability only to fault.

> The result [of a fault-based system] is a substantial number of cases, known to exist by all trial lawyers, but impossible to number with any accuracy, in which legal fault either does not exist, or if it exists cannot be proved, or if proved can still be defeated. In all such cases the insurance, even if carried with full coverage, affords no protection to the victim.

PROSSER AND KEETON ON TORTS, *supra* note 13, § 83, at 598.

[152] *Rana*, 6 Haw. App. at ____, 713 P.2d at 1371.

[153] *See generally*, 8D J. APPLEMAN, *supra* note 16, at §§ 5151-5155.

[154] See *supra* note 15 and accompanying text for an explanation of major goals underlying the Hawaii No-Fault law.

V. IMPACT

The impact of *Rana* on future no-fault litigation depends upon on its treatment by subsequent courts. If narrowly interpreted, *Rana* will stand only for a prohibition against the stacking of no-fault basic benefits. If *Rana* is interpreted broadly, courts may prohibit all combination of benefits, even when optional additional coverage is purchased. This ambiguity will probably be resolved in favor of a narrow interpretation, because optional additional coverage is similar to uninsured motorist coverage: both are non-mandatory.

Uninsured motorist coverage apparently may still be stacked validly under Hawaii law.[155] The *Rana* decision did not adjudicate the issue of uninsured motorist benefit stacking, and in light of prior caselaw, the presumption is that such stacking will continue to be upheld in Hawaii's courts.[156]

The combination of basic no-fault benefits and optional additional coverages pursuant to Hawaii Revised Statutes section 294-11 also appears permissible in Hawaii. *Rana* distinguished the *Mizoguchi* decision allowing such stacking, and did not criticize the underlying rationale.[157]

The ICA's decision in *Rana* weakens the viability of interpolicy stacking of basic no-fault benefits. Any future claimant attempting to stack coverages of separate policies will undoubtedly attempt to distinguish *Rana* on the ground that *Rana* involved stacking under a single policy. Since *Rana* focused upon the nature of the benefits, rather than the distinction between intra- and interpolicy stacking, the intra/interpolicy distinction will probably not be dispositive in a case involving interpolicy stacking of basic no-fault benefits.[158]

The *Rana* decision will likely have two effects upon the consumers of no-fault insurance policies. First, the *Rana* holding will probably encourage purchasers of no-fault insurance to obtain additional coverage under Hawaii Revised Statutes section 294-11, because the combination of benefits under basic and optional additional coverages is still permitted. This effect will depend upon the level of sophistication and education the individual consumer has on the subject of no-fault insurance law. Second, the clarity of the *Rana* holding will probably mean that future litigation on the no-fault stacking issue will be

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[155] For a discussion of the uninsured motorist insurance stacking cases, see *supra* notes 27-56 and accompanying text. Indeed, the *Rana* opinion appears to reaffirm the legitimacy of uninsured motorist benefit stacking. 6 Haw. App. at ____, 713 P.2d at 1370-71.

[156] *But see* Doi v. Hawaiian Ins. & Guar. Co., ____ Haw. App. ____, 727 P.2d 884 (1984).

[157] *See supra* notes 116-117 and accompanying text.

[158] *Cf.* HAW. REV. STAT. § 294-5(d) (1985). The statute reads in pertinent part, "No person shall recover no-fault benefits from more than one insurer for accidental harm as a result of the same accident." This provision provides statutory language against interpolicy stacking.

reduced, if not eliminated, when it relates to basic no-fault coverage.[159]

VI. CONCLUSION

In *Rana v. Bishop Insurance of Hawaii, Inc.*,[160] the ICA held that intrapolicy stacking of basic no-fault insurance benefits will not be permitted under Hawaii's No-Fault law. The *Rana* opinion provides a comprehensive discussion of the status of the stacking issue under Hawaii law. *Rana* is a useful vantage point from which to approach related stacking problems.

The Intermediate Court of Appeals used evidence of legislative intent and prior case law to fortify its holding. The strength of *Rana* will likely be shown in the course of future no-fault litigation. Questions regarding aggregation of insurance benefits will undoubtedly appear again in Hawaii courts. *Rana* will likely be an important part of future decisionmaking in this area.

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[159] Following *Rana*, no-fault insurers may develop ways to prevent stacking in other areas as well. Insurers may be encouraged to put express anti-stacking provisions into the terms of their insurance contracts. The clause upheld in St. Paul Mercury Ins. Co. v. Andrews, 321 N.W.2d 483 (N.D. 1982), provides an example. See discussion *supra* note 88. Other state courts have upheld such provisions as valid. *See* Davis v. Hughes, 229 Kan. 91, ____, 622 P.2d 641, 649 (1981) (construing KAN. STAT. ANN. § 40-3108(a) (1981) to permit insurance carriers to insert provisions in policies preventing "stacking" of personal injury protection benefits); Wakefield v. Federated Mut. Ins. Co., 344 N.W.2d 849, 854 (Minn. 1984) (Minnesota Supreme Court found an anti-stacking clause to be compatible with both public policy and the no-fault act); Wright v. National Grange Mut. Ins. Co., 323 Pa. Super. 559, ____, 471 A.2d 86, 88 (1984) (limits of liability clause upheld in insurance policy, precluding stacking).

Finally, if the stacking issue continues to be a cause of excessive litigation, the legislature may respond in the form of an anti-stacking statute. *See, e.g.*, FLA. STAT. § 627.4132 (1977), which reads:

> If an insured or named insured is protected by any type of motor vehicle insurance policy for liability, uninsured motorist, personal injury protection, or any other coverage, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. However, if none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with applicable coverage. Coverage on any other vehicles shall not be added to or stacked upon that coverage. This section shall not apply to reduce the coverage available by reason of insurance policies insuring different named insureds.

In Gillette v. State Farm Mut. Ins. Co., 374 So. 2d 525 (Fla. 1979), the Florida Supreme Court upheld the constitutionality of § 627.4132.

[160] 6 Haw. App. ____, 713 P.2d 1363 (1985).

Fortune v. Wong and *Hawaiian Insurance & Guaranty Co. v. Chief Clerk*: Exclusion of Automobile Related Liability Under a Homeowner's Insurance Policy

I. INTRODUCTION

In two recent decisions, the Hawaii Supreme Court construed exclusions for automobile related liability under a homeowner's insurance policy. First, in *Fortune v. Wong*,[1] the court considered the applicability of a standard motor vehicle exclusion clause[2] to an insureds' statutory vicarious liability for the negligent driving of the insureds' minor child.[3] The court held[4] that the plain meaning of the motor vehicle exclusion clause precluded coverage of vicarious liability arising from an automobile accident.[5] Next, in *Hawaiian Insurance & Guaranty Co. v. Chief Clerk*,[6] the court considered the issue not addressed in *Fortune*: whether a homeowner's policy excluded liability resulting from the negligent entrustment of an automobile. The court held that an insurer was not under a duty to defend an insured against a claim for negligent entrustment because the

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[1] 68 Haw. 1, 702 P.2d 299 (1985).

[2] The clause provided that the "policy did not apply to 'bodily injury or property damage arising out of the ownership, maintenance, operation, use . . . of . . . any motor vehicle owned or operated by . . . any [i]nsured.' " *Id.* at ____, 702 P.2d at 302.

[3] The vicarious liability statute provided in pertinent part that: "The father and mother of unmarried minor children shall jointly and severally be liable in damages for tortious acts committed by their children, and shall be jointly and severally entitled to prosecute and defend all actions in which the children or their individual property may be concerned." *Id.* at ____ n.7, 702 P.2d at 305 n.7 (quoting HAW. REV. STAT. § 577-3 (1976)).

[4] The court considered seven appeals which were consolidated for its review. The appeals arose from a personal injury action and plaintiffs' attempts to recover the awarded damages from the insurer. The *Fortune* court focused on the appeal arising from the declaratory judgment action, brought by First Insurance, for a decision on the merits. *Id.* at ____ n.6, 702 P.2d at 304-05 n.6.

[5] *Id.* at ____, 702 P.2d at 302.

[6] 68 Haw. ____, 713 P.2d 427 (1986).

plain meaning of a standard motor vehicle exclusion clause[7] precluded coverage for any resulting liability.[8]

This note examines the court's construction of the motor vehicle exclusion clause of a homeowner's policy. Part II presents the facts in *Fortune* and *Chief Clerk*. Part III outlines the general history of liability insurance and homeowner's insurance in particular. Additionally, Part III surveys the conflicting case law in other jurisdictions and the rules of insurance policy construction in Hawaii. Part IV analyzes and comments on the *Fortune* and *Chief Clerk* opinions. Part V sets forth the possible impact of the two decisions on Hawaii case law. Finally, Part VI states the authors' conclusions about *Fortune* and *Chief Clerk*.

II. Facts of the Cases

A. Fortune v. Wong

On August 25, 1978, Ronald Wong, then sixteen years old, was driving a motor vehicle on a public street in Honolulu when it struck and severely injured seven year old Derek Fortune who was riding a bicycle on the same street.[9] A corporation controlled by Wong's parents, Mr. and Mrs. Kelvin Wong, owned the motor vehicle.[10]

At the time of the accident, Mr. and Mrs. Wong were personally insured under an automobile liability policy[11] and a homeowner's policy.[12] The Wongs'

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[7] The exclusion read:

This policy does not apply:

1. Under Coverage E—Personal Liability and Coverage F—Medical Payments to Others:

a. to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of:

(1) any aircraft; or

(2) any motor vehicle owned or operated by, or rented or loaned to any Insured; but this subdivision (2) does not apply to bodily injury or property damage occur[r]ing on the residence premises if the motor vehicle is not subject to motor vehicle registration because it is used exclusively on the residence premises; or

(3) any recreational motor vehicle owned by an Insured, if the bodily injury or property damage occurs away from the residence premises; but this subdivision (3) does not apply to golf carts while used for golfing purposes.

Id. at ____ n.1, 713 P.2d at 429 n.1.

[8] *See id.* at ____, 713 P.2d at 431.

[9] 68 Haw. at ____, 702 P.2d at 302.

[10] *Id.*

[11] Island Insurance provided coverage up to $300,000 for Mr. and Mrs. Wongs' automobile

corporation was insured under a separate automobile liability policy,[13] and Mr. Wong was insured under an excess indemnity policy.[14]

John Fortune, Derek's father, brought a personal injury action against Ronald Wong and his parents.[15] Fortune alleged that Ronald Wong negligently operated an automobile and that Wong's parents were vicariously liable for damages flowing from the negligence of their minor child.[16]

All of the insurers, except the homeowner's insurer, First Insurance Company of Hawaii, acknowledged their obligation to defend the Wongs and participated in the action.[17] First Insurance refused to defend the Wongs, claiming that "its policy afforded no protection against liability stemming from a motor vehicle accident."[18] First Insurance subsequently brought a declaratory judgment action seeking a determination of non-coverage or alternatively that it was secondarily liable to the other insurers.[19]

While the declaratory judgment action was still pending, the parties settled the personal injury action by stipulating to judgment in favor of the plaintiff for two million five hundred thousand dollars. Thereafter, the plaintiff immediately attempted to enforce the settlement.[20] The parties agreed that the judgment would not be personally enforced against the insureds.[21] In the declaratory judgment action, another division of the trial court ruled that the homeowner's policy did not exclude coverage in the instant case and the homeowner's insurer was primarily liable.[22] The insurer appealed to the Hawaii Supreme Court.[23]

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liability. *Id.* at ____ n.2, 702 P.2d at 302 n.2.

[13] First Insurance of Hawaii provided coverage up to $400,000 for Mr. and Mrs. Wongs' homeowner's liability. *Id.*

[14] Fireman's Fund Insurance Co. provided coverage up to $100,000 for the Wongs' corporation's automobile liability. *Id.*

[15] Pacific Insurance Co., Ltd. provided coverage up to $1,000,000 for Mr. Wong's excess indemnity. *Id.* at ____ n.2, 702 P.2d at 302-03 n.2.

[16] In the amended complaint, Fortune also included "the owner of the residential property abutting the accident scene and the City and County of Honolulu as defendants." *Id.* at ____, 702 P.2d at 302.

[16] *Id.*

[17] *Id.* at ____, 702 P.2d at 302-03.

[18] *Id.* at ____, 702 P.2d at 303.

[19] *Id.*

[20] *Id.* Furthermore, the Wongs assigned any rights they had against First Insurance, the homeowner's insurer, to Fortune. *Id.*

[21] *Id.*

[22] *Id.* The circuit court found both First Insurance, the homeowner's insurer, and Fireman's Fund, the corporation's automobile liability insurer, primarily liable. Pacific Insurance, the excess indemnity insurer was found to be secondarily liable. *Id.*

[23] The Hawaii Supreme Court gave a summary of the facts outlining the seven appeals, but the dispositive issue on appeal before the court was the appeal of the declaratory judgment action. *Id.* at ____, 702 P.2d at 303-05.

B. Hawaiian Insurance & Guaranty Co. v. Chief Clerk

On November 29, 1979, Gerald August Lapenes[24] permitted Mervonie Kaio, an unlicensed driver, to drive a car owned by his mother, Mrs. Lapenes.[25] The car, driven by Kaio, collided with two other cars, killing five minors including Gerald Lapenes and Kaio, in addition to seriously injuring another minor.[26]

Several suits brought on behalf of the estates of the deceased minors and the minor who survived the crash alleged that Gerald Lapenes negligently entrusted Mervonie Kaio with the car.[27] Hawaiian Insurance & Guaranty Company, Ltd. (HIG), the insurer of Mrs. Lapenes's homeowner's policy, refused to defend the case on the grounds that the policy excluded damage claims based on the negligent entrustment.[28] In a subsequent declaratory judgment action, the trial court held that HIG was obligated to defend Mrs. Lapenes.[29] HIG appealed to the Hawaii Supreme Court.[30]

III. History of the Law

A. Liability Insurance in General

Liability insurance policies are contracts which customarily provide that the insurer will cover its insured for "all sums the insured shall become legally obligated to pay as damages because of harms or injuries within the scope of the coverage."[31] The payments to the insured are predicated upon the insured becoming legally liable to a third party. The insurance policy is a contractual matter between the insurer and the insured "to which in the first instance the third party is not a party (unless treated in law as a 'third-party beneficiary')."[32]

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[24] *Chief Clerk*, 68 Haw. at ____, 713 P.2d at 429. Gerald August Lapenes, Mrs. Lapenes's son, was insured by the homeowner's policy issued by Hawaiian Insurance & Guaranty Co., Ltd. (HIG) as a member of her household. *Id.* at ____ n.2, 713 P.2d at 429 n.2.

[25] *Id.* at ____, 713 P.2d at 429.

[26] *Id.*

[27] *Id.* at ____, 713 P.2d at 429-30.

[28] *Id.* at ____, 713 P.2d at 430. See *supra* note 7 for the language of the exclusion.

[29] *Id.* at ____, 713 P.2d at 430.

[30] *Id.*

[31] W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts § 82, at 584 (5th ed. 1984) [hereinafter Prosser and Keeton on Torts]. *See also* R. Keeton, Basic Text on Insurance Law § 4.8, at 232-37 (1971); W. Vance, Handbook on Insurance Law § 196, at 999-1006 (B. Anderson 3rd ed. 1951); 7A A. Appleman, Insurance Law and Practice § 4491 (Berdal ed. 1979); 11 G. Couch, Cyclopedia of Insurance Law § 44.1 (rev. ed. 1982).

[32] Prosser and Keeton on Torts, *supra* note 31, § 82, at 585.

Therefore, liability insurance can be distinguished from accident insurance, since in the latter the insurer's obligation is direct to the injured party.[33]

The earliest kind of liability insurance was employer's liability insurance.[34] These policies indemnified the employer against the liability imposed by the common law for injuries caused to his or her employees.[35] Liability insurance expanded to provide protection against risks in the professions of medicine, law, and accounting; the use of motor vehicular transportation;[36] and the use of publicly or privately used premises.[37]

B. *Homeowner's Insurance Policy*

A homeowner's insurance policy generally provides coverage for liability that may arise out of occurrences on the premises of the insured or on the abutting property.[38] However, this general liability coverage is often subject to an exclusionary clause,[39] which applies to motor vehicle-related injuries and property

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[33] *Id.*

[34] W. VANCE, *supra* note 31, § 196, at 1000.

[35] *Id. See also* PROSSER AND KEETON ON TORTS, *supra* note 31, § 82, at 585.

[36] Commentators have noted that a great amount of the current liability insurance covers the risks associated with automobile use. *See* W. VANCE, *supra* note 31, § 196, at 1000 ("The rapid increase in the volume of liability insurance written in recent years has been due not only to the remarkable growth of manufacturing and industry, but also to the constantly increasing use of automobiles, resulting in the loss of life and property that is appalling in its aggregate."); PROSSER AND KEETON ON TORTS, *supra* note 31, § 82, at 585 ("By far the greatest amount of liability insurance today, however, covers the risks arising from automobile accidents.").

[37] PROSSER AND KEETON ON TORTS, *supra* note 31, § 82, at 585; *see also* W. VANCE, *supra* note 31, § 196, at 1000.

[38] In *Fortune*, the court noted that, "[g]enerally speaking, the personal liability provisions of a homeowner's policy bind the insurer to pay damages for which the insured shall become liable as a result of accidents in and around his home." 68 Haw. at ____, 702 P.2d at 306 (quoting Herzog v. National Am. Ins. Co., 2 Cal. 3d 192, 197, 465 P.2d 841, 843, 84 Cal. Rptr. 705, 706 (1970)). *See also* Hurston v. Dufour, 292 So. 2d 733, 739 (La. Ct. App. 1974) ("To hold otherwise is to create an automobile insurance contract out of a homeowner's policy designed primarily to cover liability resulting from incidents occurring on the premises of the insured."); Westchester Fire Ins. Co. v. Continental Ins. Co., 126 N.J. Super. 29, ____, 312 A.2d 664, 671 (1973) ("Although the homeowner's policy is not confined to protection for risks arising strictly out of the use of residential premises, it is, as the name suggests, home oriented."). *See generally* 7A A. APPLEMAN, *supra* note 31, § 4501.02, at 255.

[39] 7A A. APPLEMAN, *supra* note 31, § 4500.04, at 209 (Liability insurance is generally written for a specific risk that enables the underwriter to calculate premiums based on equity and predictability. Therefore, "unless the automobile hazard is included in a general liability policy, use of automobiles is excluded, or only covered within a narrow limit such as on premises."). *See, e.g.*, LaBonte v. Federal Mut. Ins. Co., 159 Conn. 252, ____, 268 A.2d 663, 666 (1970) (The court, while holding that the exclusionary clause was applicable to the instant case, noted that to hold otherwise would subject insureds under homeowner's policies to higher premiums for a broad-

damage. This exclusion generally states that the homeowner's policy does not apply to the use or operation of motor vehicles, or that the policy excludes coverage for personal injuries or property damage arising from the ownership, maintenance, use, or operation of motor vehicles.[40]

Courts have recognized that there must be some causal connection between a motor vehicle and the injury or property damage, for which coverage is sought, for a particular injury or property damage to fall within the motor vehicle exclusion clause.[41] Where such a causal connection is lacking, courts may find that the exclusionary clause does not apply.[42] The issue of whether the motor vehicle

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based risk which would only duplicate coverage found in most automobile liability policies.); Aetna Casualty & Sur. Co. v. American Mfrs. Mut. Ins. Co., 261 Ark. 326, ____, 547 S.W.2d 757, 758 (1977) (In dicta, the court noted that the "vehicle accident, off the premises, is best covered by general liability insurance or motor vehicle insurance available for a premium that considers the primary risk involved.").

[40] *See, e.g.*, Bankert v. Threshermen's Mut. Ins. Co., 110 Wis. 2d 469, ____, 329 N.W.2d 150, 154 (1983) (The policy " 'does not apply . . . to the ownership, operation, maintenance or use, including loading and unloading of . . . automobiles while away from the premises . . . .' "); *Aetna Casualty*, 261 Ark. at ____, 547 S.W.2d at 758 (" '[T]here is no coverage for an accident arising out of the ownership, maintenance, operation, use, loading or unloading of: any recreational motor vehicle owned by any insured, if the bodily injury or property damage occurs away from the residence premises . . . .' ").

[41] However, courts have not been uniform in determining the exact nature of the required causal connection. For example, in State Farm Mut. Auto. Ins. Co. v. Partridge, 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973), the California Supreme Court denied applicability of the automobile exclusion clause in the homeowner's policy for an accident resulting from the "concurrence of a non-auto related cause and an auto-related cause." The insured was afforded coverage for liability "[w]henever such a non-auto risk is a proximate cause of an injury . . . ." *Id.* at 97, 514 P.2d at 125, 109 Cal. Rptr. at 813. In *Partridge*, a passenger was injured by the insured when a gun he was holding discharged when the vehicle hit a bump. *Id.* at 98, 514 P.2d at 125, 109 Cal. Rptr. at 813. Even though the tort occurred in a vehicle, the court held that the insured's prior filing of the gun's trigger was independent of the use and operation of a motor vehicle. *Id.* at 103, 514 P.2d at 129, 109 Cal. Rptr. at 817. *See also* Glens Falls Ins. Co. v. Rich, 49 Cal. App. 3d 390, 122 Cal. Rptr. 696 (1975) (A homeowner's policy exclusion for injuries arising from the use and operation of a motor vehicle did not preclude coverage of liability for insured's accidental shooting of a passenger when he reached under his seat to grab his shotgun to shoot a squirrel.); Eichelberger v. Warner, 290 Pa. Super. 269, ____, 434 A.2d 747, 752 (1981) (Having found the required causal connection between the automobile use and any bodily injuries in a homeowner's exclusionary clause ambiguous, the court declared that the exclusionary clause excludes "only those injuries which are proximately caused by the automobile."). *Cf.* Brenner v. Aetna Ins. Co., 8 Ariz. App. 272, ____, 445 P.2d 474, 479 (1968) (notwithstanding the lack of an "arising out of" provision, "there is necessarily implied a causation *nexus*.") (emphasis original); Johns v. State Farm Fire & Casualty Co., 349 So. 2d 481 (La. Ct. App. 1977) (The court noted the test to be applied in determining whether the negligent act, which caused the injury or damage, was a reasonable consequence of the motor vehicle use for the purpose of the motor vehicle exclusion clause was whether the vehicle was being used during the accident and the use was directly connected with or a cause of the accident.).

[42] For example, in a negligent entrustment context some courts have reasoned that the separate

exclusion of a homeowner's policy applies to a particular injury or property damage has arisen in numerous factual contexts such as: the accidental discharge of firearms within the proximity of a motor vehicle; throwing or dropping of some object or substance from a motor vehicle; and activities of animals within a motor vehicle.[43]

C. *Treatment of Issues in Other Jurisdictions*

1. *Vicarious liability under a homeowner's insurance policy*

There is a split in authority on the issue of whether a motor vehicle exclusion bars coverage for the insured's liability where the insured was vicariously liable[44] for another individual who drove negligently.

In *Shelby Mutual Insurance Co. v. United States Fire Insurance Co.*,[45] the

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negligent act of the entrustor, apart from the entrustee's negligent motor vehicle use, is outside the scope of the exclusionary clause. *See infra* note 55 and accompanying text.

[43] *See, e.g.*, Home Indem. Co. v. Lively, 353 F. Supp. 1191 (W.D. Okla. 1972) (The court, apparently applying Oklahoma law, held the throwing of an object, a pop bottle, by an insured who was riding as a passenger in an automobile arose out of the use of the car. This precluded coverage by the homeowner's insurance policy.); Morari v. Atlantic Mut. Fire Ins. Co., 105 Ariz. 537, 468 P.2d 564 (1970) (No coverage for an accident in which a motor vehicle passenger was injured as a result of a gun firing when the driver attempted to move the gun from behind the vehicle's seat where the vehicle was being used for hunting and the unloading of the gun was part of the use of the vehicle.); Hogle v. Hogle, 167 Conn. 572, 356 A.2d 172 (1975) (No coverage for an accident which occurred when a dog owned by the insured driver jumped from the car's rear seat to the driver's window.). *But see* St. Paul Fire & Marine Ins. Co. v. Thomas, 273 So. 2d 117 (Fla. Dist. Ct. App. 1973) (The court held the throwing of a pop bottle by the insured while riding in a moving vehicle did not preclude coverage by the homeowner's insurance policy.); Aetna Casualty & Sur. Co. v. Safeco Ins. Co., 103 Cal. App. 3d 694, 163 Cal. Rptr. 219 (1980) (Exclusion clause did not bar coverage for a passenger's injuries caused by a rifle accidentally discharging when the driver stopped the vehicle and grabbed the rifle as the parties were headed for a target-shooting site at the time of the accident.).

[44] Vicarious liability is sometimes called imputed negligence:

> A is negligent, B is not. "Imputed negligence" means that, by reason of some relation existing between A and B, the negligence of A is to be charged against B, although B has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it . . . . This is sometimes called imputed negligence. More often it is called vicarious liability, or the principle is given the Latin name of *respondeat superior.*

PROSSER AND KEETON ON TORTS, *supra* note 31, § 69, at 499.

[45] 12 Mich. App. 145, 162 N.W.2d 676 (1968). In *Shelby*, a minor child stole a motor vehicle from a third party and damaged it through his reckless use. *Id.* at ____, 162 N.W.2d at 677-78. The subsequent judgment against the child's parents was in an amount of $472. *Id.* at ____, 162 N.W.2d at 678. The state statute rendered the parents liable to the extent of $500. *Id.*

Michigan Court of Appeals held that a homeowner's policy provided coverage to insureds who were statutorily liable for their minor child's willful conduct in stealing and then damaging an automobile through the child's reckless operation. The court used the rule of construction of an insurance policy that an exclusionary clause is strictly construed in favor of coverage.[46] The liability statute rendered the parents liable for the malicious, destructive acts of their child, independent of the means that the child used to cause the damage.[47] Given the statutory source of the liability, the *Shelby* court reasoned that to extend the motor vehicle exclusion to bar coverage to the insureds would have violated the general rule of construction of insurance policies.[48]

However, in *LaBonte v. Federal Mutual Insurance Co.*,[49] the Connecticut Supreme Court held that the insured parents of a minor child were not provided coverage under their homeowner's insurance policy for a negligence action against the minor and a statutory vicarious liability action against the parents. The court reasoned that the plain meaning of the motor vehicle exclusion provided that any liability, regardless of the theory of recovery, which arose out of an automobile accident off the insured premises was outside the scope of the insurance contract.[50] The court further noted that the insureds' vicarious liability was not severable from their minor child's negligence.[51] In *LaBonte*, the court found that it was not the insureds' personal acts which were excluded, but the subject matter of the accident without regard to the insureds' involvement.[52]

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[46] *Id.*

[47] *Id.*

[48] *Id. See also* Dofflemeyer v. Gilley, 395 So. 2d 403 (La. Ct. App. 1981) (Coverage under both homeowner's and automobile policies for an insured who was vicariously liable under a statute for his unemancipated minor's negligent driving since the minor child, who was not a member of the insured's household, was not considered an insured under the homeowner's policy.). *Cf.* McDonald v. Home Ins. Co., 97 N.J. Super. 501, 235 A.2d 480 (1967) (Homeowner's insurer had a duty to defend insureds against a claim for common law negligent supervision on the theory that such liability was not based upon the ownership, maintenance, operation, use, loading or unloading of automobiles.).

[49] 159 Conn. 252, 268 A.2d 663 (1970). In *LaBonte*, a minor child took a third party's motor vehicle without his permission and subsequently became involved in an accident which resulted in $425 of damages to the vehicle. *Id.* at ____, 268 A.2d at 664.

[50] *Id.* at ____, 268 A.2d at 666.

[51] *Id.* at ____, 268 A.2d at 666-67.

[52] *Id.* at ____, 268 A.2d at 667. In accord with *LaBonte*, a California court, in Los Angeles Ins. Co. v. Fireman's Ins. Co., 30 Cal. App. 3d 669, 106 Cal. Rptr. 540 (1973), held that the exclusionary clause applied to deny coverage to an insured's vicarious liability based on the insured's minor child's negligent driving. The court noted that the insured's vicarious liability was contingent upon the underlying negligence of the minor child which arose from the ownership, maintenance, or use of the automobile. *Id.* at 673-74, 106 Cal. Rptr. at 543. Furthermore, even though the California courts have found that the statutory vicarious liability is not covered by an

2. *Negligent entrustment under a homeowner's insurance policy*

As in vicarious liability, the courts disagree whether the vehicle exclusion clause in the homeowner's policy covers the negligent entrustment[53] of automobiles.[54] Two theories support coverage[55] and two theories deny

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automobile policy, the court found that the reasonable expectations of the parties to the homeowner's policy did not include coverage for the statutory vicarious liability. *Id.* at 672-73, 106 Cal. Rptr. at 542. In a footnote the court observed that the parents' statutory liability is independent of the parents' general liability for the torts of a minor child. *Id.* at 673 n.4, 106 Cal. Rptr. at 543 n.4.

Similarly, a number of other courts have held that a standard motor vehicle exclusion clause unambiguously applies to claims based on the insured's vicarious liability for a negligent driver. *See, e.g.*, Hurston v. Dufour, 292 So. 2d 733, 739 (La. Ct. App. 1974) (Insured's vicarious liability stemmed directly from minor child's liability which was based on negligent driving.); Hill v. Liberty Mut. Ins. Co., 357 So. 2d 61 (La. Ct. App. 1978) (No coverage provided under homeowner's policy to insured who was vicariously liable under statute for a minor child's negligent operation of a motorbike.); Lamos v. Consolidated Mut. Ins. Co., 274 So. 2d 552 (Fla. 1973) (No coverage for insured who was vicariously liable under state statute imputing minor child's negligent driving to person signing minor's driver's permit.).

[53] As a theory of liability, negligent entrustment is derived from the principle that:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activitiy in such a manner as to create an unreasonable risk of harm to others.

Chief Clerk, 68 Haw. at ____ n.4, 713 P.2d at 430 n.4 (quoting RESTATEMENT (SECOND) OF TORTS § 308 (1965)).

Negligent entrustment has three elements: (1) a person relinquishes control of a dangerous instrumentality to another; (2) the first person knows or should have known that the entrustee is likely to use the instrumentality involving an unreasonable risk of harm to others; and (3) the injury must be caused by the entrustor and entrustee. *See generally* PROSSER AND KEETON ON TORTS, *supra* note 31, § 33, at 197-203; Leitner, *Negligent Entrustment of a Motor Vehicle and the Homeowner's Policy*, 35 FED'N OF INS. COUNS. Q. 335, 336 (1985).

[54] One author concluded:

> Of those jurisdictions which have spoken, ten states have concluded that coverage for claims of negligent entrustment or supervision of an automobile and its driver are excluded. They are Alabama, Arizona, Arkansas, Delaware, Florida, Massachusetts, New Hampshire, South Dakota, Texas, and Wisconsin. Not including Indiana, four jurisdictions have held that coverage is not excluded. They are Colorado, Kansas, Minnesota, and New York. Five jurisdictions—Illinois, Louisiana, Michigan, California, and New Jersey—appear to have conflicting decisions on the issue.

Milliken, *Coverage Under a Homeowner's Policy for Third-Party Claims Arising Out of an Automobile Accident*, 53 INS. COUNS. J. 146, 146-47 (1983) (footnotes omitted).

[55] The following jurisdictions have held that negligent entrustment of a motor vehicle was covered by the homeowner's policy and/or the insurer had a duty to defend: *Colorado*: United Fire & Casualty Co. v. Day, 657 P.2d 981 (Colo. Ct. App. 1982) (mother's alleged negligent entrustment of car to son); Douglas v. Hartford Ins. Co., 602 F.2d 934 (10th Cir. 1979) (applied Colorado law and held that the homeowner's policy exclusion for recreational vehicles did

coverage.[56] Although these decisions cannot be harmonized on their facts, they

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not apply to the negligent entrustment of a minibike, operated by the insureds' 10 year old, which collided with a truck and injured the passenger riding on the minibike); *Kansas*: Upland Mut. Ins. v. Noel, 214 Kan. 145, 519 P.2d 737 (1974) (parents' alleged negligent entrustment); *Minnesota*: Republic Vanguard Ins. Co. v. Buehl, 295 Minn. 327, 204 N.W.2d 426 (1973) (16 year old on a motorcycle); *New York*: Lalomia v. Bankers & Shippers Ins. Co., 35 A.D.2d 114, 312 N.Y.S.2d 1018, *appeal dismissed*, 27 N.Y.2d 796, 264 N.E.2d 349, 315 N.Y.S.2d 856 (1970), *aff'd*, 31 N.Y.2d 830, 291 N.E.2d 724, 339 N.Y.S.2d 680 (1972) (holding that the homeowner's policy exclusion for motor vehicles did not apply to the negligent entrustment of a motorized bicycle, operated by the insured's 12 year old son, which collided with a car and killed the driver); Heritage Mut. Ins. Co. v. Hunter, 63 A.D.2d 200, 406 N.Y.S.2d 625 (1978) (holding that the exclusion in the homeowner's policy for motor vehicles did not apply to the negligent entrustment of a motorcycle to the insured's minor son who permitted another minor to use the motorcycle); Allstate Ins. Co. v. Reliance Ins. Co, 85 Misc. 2d 734, 380 N.Y.S.2d 923 (1976) (mother's alleged negligent entrustment to minor daughter without a license); Government Employees Ins. Co. v. Chahalis, 72 Misc. 2d 207, 338 N.Y.S.2d 348 (1972) (exclusion did not apply to alleged negligent entrustment of car to son); *North Dakota*: Aberle v. Kam, 316 N.W.2d 779 (N.D. 1982) (duty to defend under a farm policy); *West Virginia*: Huggins v. Tri-County Bonding Co., 337 S.E.2d 12 (W. Va. 1985) (duty to defend in alleged negligent entrustment).

In essence, the rationale in favor of coverage in these cases is that negligent entrustment is an independent tort and thus severable from the ownership, maintenance, operation and use of a motor vehicle. Jurisdictions that insist on the separation of the primary negligence of the entrustor from the negligence of driving a vehicle are drawing a distinction similar to the cases involving persons injured by a gun while riding in a vehicle. In those cases, the courts have held that the negligent conduct existed independently from the use of the car. *See supra* note 41.

[56] The following jurisdictions have denied homeowner's coverage for negligent entrustment of a motor vehicle, and/or have held that there is no duty for the insurer to defend: *Alabama*: Cooter v. State Farm Fire & Casualty Co., 344 So. 2d 496 (Ala. 1977) (holding that negligent entrustment was derived from the maintenance, ownership, and use of a motor vehicle); *Arizona*: Lumbermens Mut. Casualty Co. v. Kosies, 124 Ariz. 136, 602 P.2d 517 (Ct. App. 1979) (negligent entrustment of a car); *Arkansas*: Aetna Casualty & Sur. Co. v. American Mfrs. Mut. Ins. Co., 261 Ark. 326, ____, 547 S.W.2d 757, 758 (1977) (entrusting minibike to a minor child); *California*: Safeco Ins. Co. v. Gilstrap, 141 Cal. App. 3d 524, 190 Cal. Rptr. 425 (1983) (14 year old operating a motorcycle); *Delaware*: Insurance Co. of N. Am. v. Waterhouse, 242 A.2d 675 (Del. Super. Ct. 1980) (denying coverage to a doctor who had homeowner's policy, automobile policy, and comprehensive catastrophic policy); *Florida*: Gargano v. Liberty Mut. Ins. Co., 384 So. 2d 220 (Fla. Dist. Ct. App. 1980) (parents' negligent entrustment to minor son); *Illinois*: State Farm Fire & Casualty Co. v. McGlawn, 84 Ill. App. 3d 107, 404 N.E.2d 1122 (1980) (father's negligent entrustment of motorcycle to son); *Maine*: American Universal Ins. Co. v. Cummings, 475 A.2d 1136 (Me. 1984) (decided on narrower grounds than in *Cooter* by holding no coverage because vehicle was owned by the insured); *Massachusetts*: Barnstable County Mut. Fire Ins. Co. v. Lally, 374 Mass. 602, 373 N.E.2d 966 (1978) (minor's operation of recreational motor vehicle); Whitney v. Continental Ins. Co., 595 F. Supp. 939 (D. Mass. 1984) (court applied Massachusetts law and held that there was no coverage where insured had homeowner's policy and automobile policy); *Michigan*: Michigan Mut. Ins. Co. v. Sunstrum, 111 Mich. App. 98, 315 N.W.2d 154 (1981) (negligent entrustment of truck to son); *Minnesota*: Fillmore v. Iowa Nat'l Mut. Ins. Co., 344 N.W.2d 875 (Minn. Ct. App. 1984) (distinguishing

do illustrate two competing jurisprudential perspectives.[57]

In granting coverage, courts rely upon one or more of the following rationales: (1) negligent entrustment is an independent tort separate from the ownership and operation of a motor vehicle; and (2) coverage is interpreted broadly for the insured while exclusions are construed narrowly against the insurer.[58]

In *Upland Mutual Insurance Co. v. Noel*,[59] the leading case applying these rationales, the Kansas Supreme Court held that the insurer must defend the insureds for their alleged negligent entrustment of an automobile to their son on the theory that negligent entrustment was an independent act separate from the ownership, maintenance, use, and operation of a motor vehicle.[60] Favoring policy coverage, the court rejected the insurer's argument that the purpose of the vehicle exclusion clause was to bar all claims arising from an off-premises automobile accident.[61]

BUEHL); *Missouri*: Shelter Mut. Ins. Co. v. Politte, 663 S.W.2d 777 (Mo. Ct. App. 1983) (no coverage for negligent entrustment of vehicle to son); *New Hampshire*: Hanover Ins. Co. v. Grondin, 119 N.H. 394, 402 A.2d 174 (1979) (involving a watercraft); *New Jersey*: Williamson v. Continental Casualty Co., 201 N.J. Super. 95, 492 A.2d 1028 (1985) (distinguishing itself from *McDonald*); *Pennsylvania:* Erie Ins. Exch. v. Transamerican Ins. Co., 352 Pa. Super. 78, 507 A.2d 389 (1986) (no coverage for a three year old that set a vehicle in motion); *South Dakota*: Great Cent. Ins. Co. v. Roemmich, 291 N.W.2d 772 (S.D. 1980) (parents' negligent entrustment of vehicle to son); *Texas*: Fidelity & Guar. Ins. Underwriters v. McManus, 615 S.W.2d 877 (Tex. Civ. App. 1981), *rev'd*, 633 S.W.2d 787 (Tex. 1982) (trail bike entrusted to minor son who negligently entrusted it to another minor); *Washington*: Farmers Ins. Group v. Johnson, 43 Wash. App. 39, 715 P.2d 144 (1986) (watercraft exclusion in homeowner's policy); *Wisconsin:* Bankert v. Threshermen's Mut. Ins. Co., 110 Wis. 2d 469, ____, 329 N.W.2d 150, 154 (1983) (15 year old operated an unlicensed motorcycle without lights).

[57] Cases supporting coverage characterize negligent entrustment as an act separate from the ownership, maintenance, use, and operation of an automobile. The negligent entrustment and the negligence of the driver are two concurring proximate causes resulting in the injury. As long as one of the causes of injury is not auto-related, coverage is provided. *See supra* note 41. Those cases denying coverage rely upon an instrumentality argument. If the car caused the injury, the specific risk that the homeowner's policy intended to exclude, regardless of other proximate causes causing the injury, coverage is barred under the homeowner's policy. *See infra* notes 71-72 and accompanying text.

[58] Milliken, *supra* note 54, at 150.

[59] 214 Kan. 145, 519 P.2d 737 (1974).

[60] *Id.* at ____, 519 P.2d at 741. The insurer promised to defend the insured even if suits were groundless or based upon fraudulent claims. The court expressly limited its holding to the obligation to defend without addressing the merits of the coverage question. *Id.* at ____, 519 P.2d at 742.

[61] *Id.* at ____, 519 P.2d at 741. The court reasoned that: "In this case the action filed by the Forresters against the Noels was not based upon the 'ownership, maintenance, operation, use, loading or unloading of . . . automobiles' even though the immediate cause of the injury and death was Steve's operation of the automobile." *Id.* The court implied that the motor vehicle exclusion did not apply because the negligence of the entrustor and the entrustee (the insureds' son who was known to be a reckless driver) were concurrent causes of the injury. As long as both

In addition, the *Noel* court preferred an alternative rationale based on the general rule that courts will construe the policy language broadly in favor of the insured and the policy exclusions narrowly against the drafter.[62] The court apparently interpreted the homeowner's policy as a general liability policy when the court noted that through the broad promises of coverage the insurer assumed a duty to specifically exclude any limitations in clear and explicit terms.[63]

Two implicit policies may explain the *Noel* court's holding. First, insurance policies are contracts of adhesion offered to consumers on a "take it or leave it basis."[64] In the absence of real bargaining, the courts will strive to redress the inequality of bargaining power between individual consumers and insurance companies.[65] Second, it has been observed that policyholders often do not read their policies since these policies are long and complicated.[66] Even if consumers desired to study their policy, insurance contracts are made before the detailed policy terms are in the hands of the policyholder.[67]

On the other hand, a number of jurisdictions adopting the opposite view have criticized the *Noel* reasoning.[68] These courts regard the automobile exclu-

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causes were not auto-related, the thrust of the decision implied that the homeowner's policy covered the injury. *Id. See also supra* note 57.

[62] 214 Kan. at ____, 519 P.2d at 740-41. Embedded in the decision is a notion of "reasonable expectations." The court interpreted "reasonable expectations" to mean the objective intent of the policy as understood by a layman. *See infra* note 65 for a discussion of the reasonable expectations doctrine. In United Fire & Casualty Co. v. Day, 657 P.2d 981 (Colo. Ct. App. 1982), the court held a homeowner's insurer had a duty to defend the insured against a claim for negligent entrustment: "We find the phrase 'arising out of' to be ambiguous in the context of this policy. The policy purports to provide expansive coverage to insureds for any claim alleging bodily injury." *Id.* at 983. Colorado courts adhere to the rule that ambiguities in the exclusion clause will be interpreted in favor of the insured. *Id.* at 984.

[63] *Noel*, 214 Kan. at ____, 519 P.2d at 741. The *Noel* court noted that the insurer through its homeowner's policy agreed with the named insured to pay on behalf of the insured all sums which the insured would become legally liable to pay because of bodily injury and property damage. *Id.* There was nothing in the broad insuring clause which restricted coverage to accidents or injuries occurring on the premises of the homeowner. *Id.* In fact, it was clear that the insuring clause covered a wide variety of accidents which might occur off the premises. *Id.*

[64] Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 966 (1970) [hereinafter Keeton, *Insurance Law Rights*].

[65] *Id.* at 967. Courts have redressed the balance by interpreting policy language of insurance contracts as a layman would understand it and not according to the interpretation of the sophisticated underwriters. What is reasonable from the layman's view extends even into cases where after a "painstaking study" the layman would have understood the policy exclusion to defeat any expectation of coverage. *Id.*

[66] *Id.* at 968.

[67] *Id.*

[68] Two cases have openly questioned the *Noel* reasoning. First, in Lumbermens Mut. Casualty Co. v. Kosies, 124 Ariz. 136, 602 P.2d 517 (Ct. App. 1979), the Arizona Court of Appeals

sion to be clear and unambiguous. For example, *Safeco Insurance Co. v. Gilstrap*,[69] is a landmark case rejecting the *Noel* rationale. *Gilstrap* posed two of the three arguments which courts have used to deny homeowner's policy coverage in negligent entrustment cases: (1) derivative theory, and (2) reasonable expectations.[70]

Applying the derivative theory, the *Gilstrap* court held that the insurer did not have a duty to defend the insureds for the insureds' alleged negligent entrustment of a motorcycle to their fourteen year old son.[71] *Gilstrap* reached its holding by reasoning that negligent entrustment cannot be disassociated from

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noted that the cases holding negligent entrustment as a separate and distinct tort were based upon "faulty reasoning." It would be illogical to conclude that the exclusionary clause did not apply. *Id.* at ____, 602 P.2d at 519. The *Kosies* court noted: "Actually there can be a situation in which there is negligent entrustment but no negligence on the part of the driver. However, in such a situation the driver's operation or use of the vehicle is necessary before the tort or negligent entrustment arises." *Id.* at ____ n.1, 602 P.2d at 519 n.1. Second, in Bankert v. Threshermen's Mut. Ins. Co., 110 Wis. 2d 469, 329 N.W.2d 150 (1983), the court reasoned that if *Noel* were followed, the place of the negligent act would control, not the place of the accident. *Id.* at ____, 329 N.W.2d at 154. In the case of negligently maintained tires or brakes, the negligence would have occurred at the farm premises where the vehicle was garaged. *Id.* Regardless of where the accident occurred, splitting the negligent act apart from use, maintenance or operation of a motor vehicle would convert a farm land liability policy into an automobile policy. *Id.* ____, 329 N.W.2d at 154.

California courts have exhibited a similar dichotomy with respect to the coverage of other types of automobile-related negligence under a homeowner's policy. In Gonzales v. St. Paul Mercury Ins. Co., 60 Cal. App. 3d 675, 131 Cal. Rptr. 626 (1976), the court held that the negligent repair of brakes was independent from the vehicle exclusion clause in the homeowner's policy. *Gonzales* was criticized in State Farm Fire & Casualty Co. v. Camara, 63 Cal. App. 3d 48, 133 Cal. Rptr. 600 (1976). The *Camara* court noted: "Today the defendant negligently repairs the brakes; tomorrow he carelessly leaves worn tires on the vehicle. . . . The [*Gonzales* court] has in effect rendered the exclusion nugatory and converted every homeowner's liability policy into an automobile policy . . . ." *Id.* at 55-56, 133 Cal. Rptr. at 604.

[69] 141 Cal. App. 3d 524, 190 Cal. Rptr. 425 (1983).

[70] One commentator included the "dovetail theory" as a third rationale that courts have adopted to deny homeowner's coverage for negligent entrustment. Since the automobile liability policy confers coverage upon the insured for claims "arising from the use of a motor vehicle," the equivalent language used in the exclusion of the homeowner's policy should deny coverage. The insured must look to the homeowner's policy and the automobile insurance to cover separate kinds of risks. Milliken, *supra* note 54, at 148. See *infra* note 135 for a general discussion of the differences between homeowner's insurance and automobile insurance. The discussion of the "dovetail theory," however, is somewhat superfluous since it could be subsumed under the reasonable expectations rationale. *See infra* note 73.

[71] *Gilstrap*, 141 Cal. App. 3d at 533, 190 Cal. Rptr. at 431. In *Cooter*, 344 So. 2d at 499, the court applied the plain meaning rule of policy construction to deny coverage and noted that the exclusion for "bodily injury arising out of the ownership and use of an automobile owned or operated by the insured" clearly and unambiguously excluded coverage. *Id.* Negligent entrustment was the very condition that the policy sought to exclude from coverage. *Id.* at 498.

injury caused by the entrusted vehicle in the sense that both must be proved or the plaintiff will not recover.[72]

An alternative reasoning put forth by the court denied coverage on the grounds of reasonable expectations. Instead of allowing the subjective intent of the layman to control, the court applied a more restrictive test whereby the reasonableness of the insured's expectations is determined by an objective standard.[73]

D. Rules of Insurance Policy Construction in Hawaii

Hawaii courts have held that insurance policies are contracts of adhesion because the policies are based on standard forms prepared by the insurers' attorneys.[74] Accordingly, Hawaii courts have followed the general rule that policies

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[72] *Gilstrap*, 141 Cal. App. 3d at 531, 190 Cal. Rptr. at 430. Courts applying the derivative theory argue that since no tort arises unless the negligently entrusted vehicle causes injury, negligent entrustment cannot be separated from the instrumentality of harm that excludes coverage. The *Gilstrap* court noted that negligent entrustment was separate only in the sense that it preceded the collision. *Id.* at 527-28, 190 Cal. Rptr. at 427.

[73] The *Gilstrap* court noted that neither the reasonable expectations of the insurer nor the insured contemplate homeowner coverage for automobile accidents away from home. Furthermore, the relatively low premiums coupled with the fact that homeowners customarily acquire other policies such as automobile insurance and excess indemnity policies, where premiums reflect commensurable risks, corroborate that neither the insured nor the insurer expected overlapping coverage from the homeowner's policy and their automobile insurance. *Id.* at 533, 190 Cal. Rptr. at 431. *Cf.* Keeton, *Insurance Law Rights*, *supra* note 64, at 967.

[74] For example, in Masaki v. Columbia Casualty Co., 48 Haw. 136, 395 P.2d 927 (1964), the insured was covered under an automobile policy which provided coverage for medical expenses caused by an automobile accident and which limited liability for medical payments " 'for all expenses incurred by or on behalf of each person who sustains bodily injury . . . .' " *Id.* at 137, 395 P.2d at 928. Insured was also a pre-paying member of a health plan at the hospital at which he was treated and the health plan paid for the insured's medical and hospital expenses. *Id.* at 138, 395 P.2d at 928. The Hawaii Supreme Court found ambiguity in the coverage for medical expenses in the automobile insurance policy because it did not "state by whom the expenses have to be incurred . . . and . . . by failing to directly state to whom the payment due for incurred expenses is to be made." *Id.* at 140, 395 P.2d at 929. The court held that the insured was entitled to recover the reasonable value of the medical and hospital expenses rendered by the hospital since the insurer did not limit its liability to such medical expenses " 'as the insured should become legally liable to pay' " as it did under the language of its bodily injury and property damage coverage. *Id.* at 145, 395 P.2d at 931 (quoting Feit v. St. Paul Fire & Marine Ins. Co., 209 Cal. App. 2d 825, ____, 27 Cal. Rptr. 870, 872 (1962)). Furthermore, the court found that the insurance industry knew of the existence of pre-paid medical and hospital plans, and if the insurer wished to exclude such claims based on such plans, it should have specifically excluded them. Therefore, an insured with such additional coverage would have known that he or she will be getting less benefits for their premium dollar than another insured who lacked such concurrent benefits. *Id.* at 145, 395 P.2d at 931-32.

"must be construed liberally in favor of the insured and the ambiguities resolved against the insurer."[75] Policies have been "construed in accord with the reasonable expectations of a layperson."[76] But, mere disagreement over the policy terms and an assertion of ambiguity have not invoked the application of this rule.[77] Similarly, the policy's mere complexity has not created ambiguity either.[78] Instead, Hawaii courts have found ambiguity and invoked the rule of construction against the insurer "only when the contract taken as a whole is reasonably subject to differing interpretation."[79]

IV. ANALYSIS

The issues presented in *Fortune v. Wong*[80] and *Hawaiian Insurance & Guaranty Co. v. Chief Clerk*[81] were questions of first impression for the Hawaii Su-

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[75] *Masaki*, 48 Haw. at 140-41, 395 P.2d at 929 (citing Alexander v. Home Ins. Co., 27 Haw. 326, 328 (1923)).

[76] Sturla v. Fireman's Fund Ins. Co., 67 Haw. 203, 209, 684 P.2d 960, 964 (1984).

[77] *Id.*

[78] *Id.* In State Farm Mut. Auto. Ins. Co. v. Bailey, 58 Haw. 284, 568 P.2d 1185 (1977), an insured sought coverage under an automobile insurance policy which "insured against liability for injuries arising from the operation of a newly acquired automobile." *Id.* at 284, 568 P.2d at 1185-86. The court found that a "reasonably literate person who [took] the trouble to read [the policy], with respect to the coverage of a newly acquired automobile" would conclude that the definition of an automobile only included a four-wheel vehicle and clearly excluded the insured's operation of a newly acquired motorcycle. *Id.* at 290, 568 P.2d at 1188-89.

[79] *Sturla*, 67 Haw. at 209-210, 684 P.2d at 964 (quoting United States Fire Ins. Co. v. Colver, 600 P.2d 1, 3 (Alaska 1979) (quoting Modern Constr., Inc. v. Barce, Inc., 556 P.2d 528, 529 (Alaska 1979))). The *Sturla* court found the contract, read as a whole, was not reasonably subject to differing interpretation about the scope of the coverage under the business risk exclusions of the insured's general liability policy. *Sturla*, 67 Haw. at 210, 684 P.2d at 964. The court found that the exception which removed an implied warranty of fitness from one of the exclusion clauses did not apply to all of the exclusion clauses. "For an expansion of protection on such a basis would run 'directly counter to the basic principle that exclusion clauses *subtract* from coverage rather than grant it.' " *Id.* at 211, 684 P.2d at 965 (quoting Vernon Williams & Son Constr., Inc. v. Continental Ins. Co., 591 S.W.2d 760, 764 (Tenn. 1979)) (emphasis original).

[80] However, there have been trial court cases dealing with vicarious liability under a homeowner's policy. In Grain Dealers Mut. Ins. Co. v. Tasaka, Civ. No. 49410 (Haw. 1st Cir., Aug. 8, 1978), 78-2 HAW. LEGAL REP. 1253 (1978), a minor child's negligent driving resulted in parents being vicariously liable. The circuit court found that the exclusionary clause did not apply as the vicarious liability statute was the source of the parents' liability, not the negligent automobile use.). *See also* First Ins. Co. v. Yoshimoto, Civ. No. 5110 (Haw. 2d Cir., July 20, 1981), 81-1 HAW. LEGAL REP. 81-0561 (1981); Island Ins. Co. v. Hawaiian Ins. & Guar. Co., Civ. No. 5239 (Haw. 3d Cir., May 9, 1978), 78-2 HAW. LEGAL REP. 1223 (1978).

[81] However, there has been at least one other trial court case dealing with negligent entrustment under a homeowner's policy. In State Farm Fire & Casualty Co. v. Bras, Civ. No. 77421 (Haw. 1st Cir., Feb. 14, 1984), 84-1 HAW. LEGAL REP. 84-0551 (1984), the circuit court held

preme Court. This section will analyze the supreme court's decisions and present a commentary of the court's reasoning.

A. Fortune v. Wong

On appeal to the Hawaii Supreme Court, the homeowner's insurer argued that the motor vehicle exclusion clause " 'clearly and unambiguously void[ed] coverage for bodily injury arising out of the operation of a motor vehicle by any insured.' "[82] Since Fortune's injuries " 'arose out of the operation of a motor vehicle by Ronald Wong, an insured,' "[83] the insurer argued that the exclusion clearly denied coverage. The plaintiff, Fortune's father, countered that the coverage provision in an insurance policy must be construed broadly for the insured, and an exclusionary clause must be construed narrowly against the insurer.[84]

In *Fortune*, the Hawaii Supreme Court noted that the case presented the issue of interpreting an insurance contract, and the interpretation required analyzing the policy's relevant provisions.[85] The court acknowledged the general rule that insurance policies are contracts of adhesion which are construed liberally in favor of the insured, while ambiguities are resolved against the insurer.[86] But, the court has followed this rule only when the " 'contract taken as a whole is reasonably subject to differing interpretation.' "[87]

The court held that the homeowner's insurer was not liable for coverage to the insureds because the policy language unambiguously excluded coverage to such bodily injuries which arose from the negligent operation of the motor vehicle by the insureds' minor child.[88] Furthermore, the court noted that the insureds could not have reasonably expected their homeowner's policy to cover the risk of the negligent driving of their minor child.[89]

Since the court framed the dispositive issue as one involving the interpretation of the parties' contract, the general rule that a court may not re-write such a contract guided the decision.[90] But, in insurance cases, the courts have generally prescribed rights against insurers which, while outside the provisions of an insurance contract, gave effect to an insured's reasonable expectations.[91] The

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that a standard homeowner's policy provided coverage for claims of negligent entrustment.

[82] *Fortune*, 68 Haw. at ____, 702 P.2d at 305.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at ____, 702 P.2d at 306.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] An author suggested three principles that account for the "deviant decisions" in the judicial

Hawaii Supreme Court had previously adopted the reasonable expectations doctrine.[92] Therefore, the court's assertion that it would not re-write an insurance contract was tempered by the court's commitment to enforce "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts."[93]

The court noted that the contractual language unambiguously excluded coverage for bodily injury arising from an insured's operation of a motor vehicle.[94] Furthermore, the court observed that the complaint in the personal injury action charged that the insureds were liable for damages caused by their son's negligent driving.[95] Therefore, the court could not find that coverage of the insureds' liability was within the intent of the parties.[96]

Although the supreme court found no ambiguity in the pertinent exclusionary clause, there are other jurisdictions that have found ambiguity in similar exclusionary language.[97] While finding no ambiguity, the *Fortune* court also did not approach the question of the causal connection required from the policy's "arising out of" language. Other jurisdictions have questioned the absence of any required causal connection within the language of the motor vehicle exclusion.[98]

In holding that the exclusionary clause should apply, the *Fortune* court noted there were no grounds for inferring that the insureds reasonably expected their homeowner's policy to cover their minor child's negligent driving.[99] The court found that a homeowner's policy generally covers liability which results from

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administration of insurance cases: an insurer will be denied any unconscionable advantage in insurance transactions, "the reasonable expectations of applicants and intended beneficiaries will be honored," and redress will be granted for detrimental reliance. Keeton, *Insurance Law Rights*, *supra* note 64, at 961-62.

[92] *See, e.g.*, *Sturla*, 67 Haw. 203, 684 P.2d 960.

[93] *Fortune*, 68 Haw. at ____, 702 P.2d at 306 (quoting *Sturla*, 67 Haw. at 210, 684 P.2d at 964 (quoting Keeton, *Insurance Law Rights*, *supra* note 64, at 967)).

[94] *Fortune*, 68 Haw. at ____, 702 P.2d at 306.

[95] *Id.*

[96] *Id.*

[97] *Cf.* Eichelberger v. Warner, 290 Pa. Super. 269, 434 A.2d 747 (1981) (Court fo. Eichelberger v. Warner, 290 Pa. Super. 269, 434 A.2d 747 (1981) (Court found "arising out of" phrase to be ambiguous as the policy did not state what would be the required causal nexus.); United Fire & Casualty Co. v. Day, 657 P.2d 981 (Colo. Ct. App. 1982) (in a negligent entrustment case, the court found the phrase "arising out of" to be ambiguous).

[98] For example, in *Eichelberger*, 290 Pa. Super. at ____, 434 A.2d at 752, the court reasoned that the motor vehicle exclusion "does not state whether such injury must be proximately caused by the auto or simply causally connected with the auto." The court then held that since it was an exclusionary clause, the words "arising out of" meant that the injury must be proximately caused by the auto to be excluded. *Id.*

[99] 68 Haw. at ____, 702 P.2d at 306.

accidents in and around an insured's home.[100] Furthermore, the court reasoned that the hazards associated with automobile use are generally not associated with the home and are covered by separate insurance.[101] This proposition was illustrated in *Fortune* by the insureds' purchase of "two policies specifically written to insure the risks" of automobile use.[102] The court concluded that this purchase disproved any claims that the insureds reasonably expected their homeowner's policy to cover their child's negligent driving.[103]

In *Fortune*, the court did not expressly raise the economic argument to support its "reasonable expectations" conclusion. Although not addressed by the court in *Fortune*, the cost-benefit relationship would have some significant impact on the reasonable expectations of both the insurer and the insured. Other jurisdictions have used an economic analysis in supporting the similar conclusion about an insured's reasonable expectations.[104]

Finally, the supreme court rejected the insureds' argument that the statutory nature of their liability mandated coverage.[105] The court did not question the conclusion that the insureds were liable for the negligence of their minor child.[106] But, the court also noted that the insurer was not responsible for the resulting damage because vicarious liability was based on the negligence "of the one actually at fault."[107] The *Fortune* court did join the majority of jurisdictions that have decided similar cases of vicarious liability in determining that the exclusion should apply.[108]

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[100] *Id.* (quoting Herzog v. National Am. Ins. Co., 2 Cal. 3d 192, 197, 495 P.2d 841, 843, 84 Cal. Rptr. 705, 707 (1970)).

[101] *Id.* In *Herzog*, the California Supreme Court further supported this proposition by noting the relatively small premiums charged for a homeowner's policy. 2 Cal. 3d at 197, 464 P.2d at 843, 84 Cal. Rptr. at 707.

[102] 68 Haw. at ____, 702 P.2d at 306.

[103] *Id.*

[104] For example, in an action based on the insured's vicarious liability the Connecticut Supreme Court held that there was no coverage under a homeowner's policy. *LaBonte*, 159 Conn. at ____, 268 A.2d at 666. The court noted that to hold otherwise would subject the public to higher premium rates for a broad-based risk which would duplicate coverage available in automobile insurance policies. *Id. See also* Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W.2d 104, 113 (Iowa 1981), where the Iowa Supreme Court found that a farm liability policy afforded no coverage as it was not reasonable for the insured to expect coverage for a vehicular accident off the premises. The court further noted that while coverage cannot be related in direct proportion to a policy's premiums, "[m]otor vehicle usage greatly expands the exposure to liability, and it is not reasonable to expect insurance on motor vehicles as an appendage to a premises liability policy at a premium much lower than that for comparable limits in a motor vehicle policy." *Id.*

[105] *Fortune*, 68 Haw. at ____, 702 P.2d at 306-07.

[106] *Id.* at ____, 702 P.2d at 307.

[107] *Id.* at ____, 702 P.2d at 306-07.

[108] *See supra* notes 49-52 and accompanying text. But see *supra* notes 45-46 and accompanying text for cases that found coverage for vicarious liability.

B. Hawaiian Insurance & Guaranty Co. v. Chief Clerk

Hawaiian Insurance & Guaranty Co. v. Chief Clerk[109] extended the motor vehicle exclusion clause in a homeowner's policy to damage claims arising from the negligent entrustment of a motor vehicle.[110] While the court also treated *Chief Clerk* as a case of policy construction,[111] *Chief Clerk* addressed the issue of whether an insurer had a duty to defend[112] an insured via a coverage analysis.[113]

The court's analysis began with an examination of the language of the policy regarding the insurer's duty to defend. This duty was purely contractual and depended upon the language of the particular policy.[114] After establishing the foundation of the duty to defend, the court then interpreted the vehicle exclu-

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[109] 68 Haw. at ____, 702 P.2d at 427 (1986). Since negligent entrustment had not been pleaded in *Fortune*, the *Fortune*, court expressly disclaimed any resolution of whether a homeowner's policy affords coverage when negligent entrustment of an automobile is alleged. *Id.* at ____ n.1, 702 P.2d at 302 n.1.

[110] *Chief Clerk*, 68 Haw. at ____, 713 P.2d at 429. The court noted that *Chief Clerk* addressed an issue not reached in *Fortune*. *Id.* Thus, *Chief Clerk* may be viewed as a corollary to *Fortune*.

[111] 68 Haw. at ____, 713 P.2d at 430.

[112] Determining whether the insurer has a duty to defend depends upon a contractual analysis of the particular policy. *Id.* Yet, the duty to defend is defined by its relation to coverage: "The fact that the pleadings state a cause of action that is not covered by the policy does not excuse insurer if another ground for recovery is stated that is covered because the duty to defend has broader aspects than the duty to indemnify. . . . Accordingly, the insurer is obligated to provide a defense against the allegations of covered as well as noncovered claims." First Ins. Co. v. State, 66 Haw. 413, 417-18, 665 P.2d 648, 652 (1983) (quoting 7C A. APPLEMAN, INSURANCE LAW & PRACTICE § 4684.01, at 102, 106 (Berdal 1979)).

"The duty 'arises whenever there is a potential for indemnification liability of insurer to insured under the terms of the policy.' " *Chief Clerk*, 68 Haw. at ____, 713 P.2d at 430 (quoting Standard Oil Co. v. Hawaiian Ins. & Guar. Co., 65 Haw. 521, 527, 654 P.2d 1345, 1349 (1982)). On a conceptual level, the duty to defend is broader in scope than the duty to indemnify the insured:

> [A]n insurer must look beyond the effect of the pleadings and must consider any facts brought to its attention or any facts which it could reasonably discover in determining whether it has a duty to defend. . . . [T]he duty to defend rests primarily on the possibility that coverage exists. This possibility may be remote, but if it exists the company owes the insured a defense.

Standard Oil Co. v. Hawaiian Ins. & Guar. Co., 65 Haw. 521, 527, 654 P.2d 1345, 1349 (1982) (quoting Spruill Motors, Inc. v. Universal Underwriters Ins. Co., 212 Kan. 681, 686, 512 P.2d 403, 407 (1973)).

[113] Significantly, the court held that there was no duty for HIG to defend the insured because coverage of a negligent entrustment claim was so remote that there was not even a potential for indemnification liability. *Chief Clerk*, 68 Haw. at ____, 713 P.2d at 431.

[114] *Id.* at ____, 713 P.2d at 430-31.

sion clause for the possibility of coverage.[115] In reaching the result that HIG had no duty to defend and thus no duty to indemnify the insured, the court reasoned that the tort of negligent entrustment was not distinct, but derived from the ownership, operation, and use of a motor vehicle.[116]

An interesting aspect of the decision in *Chief Clerk* was the brief cognizance given to the insured's argument. Citing three negligent entrustment cases, *Safeco Insurance Co. v. Gilstrap*,[117] *Bankert v. Threshermen's Mutual Insurance Co.*,[118] and *Barnstable County Mutual Fire Insurance Co. v. Lally*,[119] that denied coverage, the court did not explore the arguments raised by *Noel* and its progeny.[120]

Although explicit references to *Noel* were omitted, the Hawaii Supreme Court addressed the plaintiff's arguments indirectly by choosing between the two rules of insurance policy construction. First, if there was an ambiguity, such ambiguity must be construed against the insurer. However, ambiguity was not created simply because the parties disagreed over the terms of the policy. Ambi-

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[115] While the determination of the duty to defend is separate from the question of coverage, the duty to defend intimately relates to the coverage question. *See supra* notes 112-13.

[116] The insured's assertion that "the claim of negligent entrustment was a separate and independent cause of action not related to the use of the automobile," did not persuade the court. *Chief Clerk*, 68 Haw. at ____, 713 P.2d at 430. Noting the RESTATEMENT (SECOND) OF TORTS § 308 definition of negligent entrustment, the court reasoned that negligent entrustment could not be separated from the instrumentality of harm (the motor vehicle). See *supra* note 53 for the text of the definition. Negligent entrustment and the injury caused by the entrusted vehicle had to be proven if the plaintiff was to recover. The court conceded that negligent entrustment was separate from the use and operation of a motor vehicle only in the sense that it preceded the collision. *Id.* at ____, 713 P.2d at 430-31.

[117] 141 Cal. App. 3d 524, 190 Cal. Rptr. 425 (1983).

[118] 110 Wis. 2d 469, 329 N.W.2d 150 (1983).

[119] 374 Mass. 602, 373 N.E.2d 966 (1978).

[120] *Chief Clerk*, 68 Haw. at ____, 713 P.2d at 430-31. Although not mentioned in the opinion, the insured argued that the phrase "arising out of" in the motor vehicle exclusion was ambiguous. *See id.* at ____, 713 P.2d at 431. The insured argued that since an equivalent phrase was held to be ambiguous in extending coverage under a general liability policy, this ambiguity should be construed in favor of the insured, following the *Noel* and *Day* reasoning. *See id.* For a discussion of the *Noel* rationale, see *supra* notes 59-68 and accompanying text.

See also Hawaiian Ins. & Guar. Co. v. Chief Clerk, Civ. No. 80951 (Haw. 1st Cir., Sept. 17, 1984), 84-2 HAW. LEGAL REP. 84-1371, 84-1377-78 (1984). In a prior case, the Hawaii Supreme Court held that the phrase "with respect to" was ambiguous in the context of an exception to an exclusion. Retherford v. Kama, 52 Haw. 91, 470 P.2d 517 (1970). The court applied the rule of cases holding that the phrases "arising from" and "arising out of" were ambiguous: "We fail to see any distinction in substance between the phrase 'arising from' . . . and . . . 'with respect to.' Neither do we see any such distinction on the phrase 'arising out of' . . . with the phrase 'with respect to . . . .' " *Id.* at 95-96, 470 P.2d at 519. Given that the *Retherford* court relied on a perceived ambiguity in "arising out of," *Fortune* and *Chief Clerk* arguably overruled *Retherford* on this issue.

guity would be found when the policy as a whole was reasonably subject to differing interpretation.[121] Second, absent an ambiguity, the terms of the policy should be interpreted according to their plain, ordinary, and accepted sense in common speech.[122]

Once determining that there was no ambiguity, the court also rejected the insured's argument that coverage must be construed broadly in favor of the insured and the exclusion provision must be construed narrowly against the insurer.[123] The court's conclusion that the plain and ordinary meaning of the exclusionary clause barred any potential for recovery has a profound implication for homeowner's coverage in Hawaii.[124]

C. *Commentary*

Even though both decisions precluded coverage, *Fortune* presents a stronger case for giving effect to a standard motor vehicle exclusion. Under statutory vicarious liability, the insured parents need not be negligent to be found liable.[125] In contrast, negligent entrustment arguably involves a separate negligent act, that of entrusting a motor vehicle. Although the Hawaii Supreme Court dismissed the relevancy of the separate negligent act to the issue of insurance coverage, other jurisdictions have found the separate negligent act to be dispositive.[126]

While the Hawaii Supreme Court adopted the contractual analysis in determining its results and implicitly rejected consideration of any tort-related analysis,[127] a question remains whether tort concepts should not be considered in

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[121] *Chief Clerk*, 68 Haw. at ____, 713 P.2d at 431.

[122] *Id.* See *supra* notes 74-79 for Hawaii rules for insurance policy construction.

[123] 68 Haw. at ____, 713 P.2d at 431.

[124] *Id.* From the facts, it is not clear whether the insured had automobile insurance. This might explain why the court decided the case under the derivative rationale instead of emphasizing the "reasonable expectations" theory articulated in *Fortune*.

[125] See *supra* note 3 for the pertinent statutory language.

[126] See *supra* text accompanying note 55 for homeowner's insurance coverage of negligent entrustment.

[127] *See* PROSSER AND KEETON ON TORTS, *supra* note 31, § 1, at 5-6. The authors note that tort law is "directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one interest only, where the law considers that compensation is required." *Id.* Furthermore, while the need for compensation "is not alone decisive, it nevertheless lends weight and cogency to an argument for liability that is supported also by an array of other factors." *Id.* at § 4, at 20. *Cf.* A. CORBIN, CORBIN ON CONTRACTS §§ 1-2, at 2-4 (1952). The author notes the main underlying purpose of contract law is the realization of the parties' "reasonable expectations that have been induced by the making of a promise." *Id.* at § 1, at 2. The author further noted the legal obligation required in a contract involves a legal relation between the parties that "are merely

future cases. As the Pennsylvania court in *Eichelberger v. Warner* observed in support of its holding that coverage be allowed, it is "consistent with the general rule that insurance policies are read to effect the policy's dominant purpose of indemnity or payment to the insured."[128]

Possibly, the question of compensation need not have been addressed in *Fortune*. The insureds, in addition to their homeowner's policy, had an excess indemnity insurance policy with a ceiling of one million dollars and automobile liability coverage of four hundred thousand dollars.[129] But, in a case involving a minimally insured motorist[130] with a homeowner's policy who severely injures a third party, the court may find it more difficult to hold steadfast to a strict contractual analysis. If an insurance policy's dominant purpose is to indemnify the insured, and the insurer may with relative ease change the pertinent exclusionary language to deny coverage on the instant theories of liability, vicarious liability and negligent entrustment, then it is questionable whether a court should give effect to the exclusionary clause. The injured party will still require compensation for his or her injuries regardless of whether liability is based on the theory of vicarious liability or negligent entrustment.[131] At issue, then, is whether a court should give preeminence to the general contract goal of giving effect to the parties' intentions over the third party's need for compensation of his or her injuries.

In *Fortune* and *Chief Clerk*, the Hawaii Supreme Court did not specifically address the issue of what causal connection was required between the ownership, maintenance, operation, use, loading, or unloading of a motor vehicle and the resulting injury or property damage. Although in *Fortune* and *Chief Clerk*, the negligent driving of the insureds' minor child and the entrustee were the proximate causes of the injuries, an absence of any explicit discussion of the causation requirement within the exclusionary clause brings into question the breadth of the cases' applicability.

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existing facts of life viewed in the light of a past uniformity of societal action, that enables us to predict similar action in the future with respect to two or more persons." *Id.* at § 2, at 3-4.

[128] *Eichelberger*, 290 Pa. Super at ____, 434 A.2d at 752.

[129] *Fortune*, 68 Haw. at ____ n.2, 702 P.2d at 302-03 n.2. But, the settlement in the declaratory judgment action was for $2,500,000. *Id.* at ____, 702 P.2d at 303.

[130] Hawaii's No-Fault Law requires motorists to carry automobile liability coverage of not less than $35,000 for all damages arising out of accidental harm and $10,000 for all damages arising out of injury or destruction of property. HAW. REV. STAT. § 294-10(a) (1985). If a plaintiff is injured by a tortfeasor with the required statutory coverage, he or she may be precluded from enforcing a claim for uninsured motorist benefits from his or her insurer. *See* Doi v. Hawaiian Ins. & Guar. Co., 6 Haw. App. ____, 727 P.2d 884 (1986).

[131] *See generally* PROSSER AND KEETON ON TORTS, *supra* note 31, § 83, at 597-600. The authors discuss the deficiencies in the current system of compensating for personal injuries, for example, where there is inadequate coverage by liability insurance.

V. IMPACT

In a factual situation where the injury is the result of two concurring proximate causes, one of which is auto-related and the other is not auto-related, it is questionable whether the Hawaii Supreme Court would adopt the rule from *State Farm Mutual Automobile Insurance Co. v. Partridge*.[132] In *Partridge*, the California Supreme Court held that both the insured's homeowner and automobile insurance policies were required to provide coverage.[133] The court reasoned that where there were concurrent proximate causes, one of which was not auto-related and existed independently of the auto use, then the homeowner's policy would also provide coverage.[134] Furthermore, the court noted that the automobile and homeowner's policies were not mutually exclusive and overlapping insurance was valid.[135]

The rules of construction that apply to insurance contracts that the Hawaii Supreme Court used in its analysis do not provide a resolution to this question of causation that must be addressed in the *Partridge* factual situation.[136] However, in a prior Hawaii case, the court specifically addressed the lack of a causation factor within an exclusionary clause of an insurance contract.[137] In

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[132] 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973). In *Partridge*, the insured negligently filed down the trigger on his handgun, which he used for hunting. During a hunting episode, he negligently drove off the paved road onto rough terrain which resulted in the handgun discharging and injuring the driver's passenger.

[133] *Id.* at 106-07, 514 P.2d at 132, 109 Cal. Rptr. at 820.

[134] *Id.* at 106, 514 P.2d at 129, 109 Cal. Rptr. at 820.

[135] *Id.* One author has noted that the coverage provisions of an automobile and homeowner's policy differ. 7A A. APPLEMAN, *supra* note 31, § 4500, at 177. In the former, the insuring agreement focuses on the use of an automobile, whereas in the latter, the agreement focuses on an occurrence. Noting that they are not mutually exclusive, the author stated that the courts must determine if the automobile use was the occurrence which produced the liability. *Id.* If the use was merely incidental to the occurrence, then the author argues that it should not be an excluded event under the homeowner's policy. *Id. Cf.* Royal Hawaiian Sales Co. v. Home Ins. Co., 27 Haw. 333 (1923) (The court held that where two concurrent causes of the automobile loss occurred—one was not within the collision coverage of the automobile insurance and the other was within the fire damage coverage—then if the damage attributable to each cause could be determined, it would be borne proportionately by the insurer.).

[136] *Cf.* Eichelberger v. Warner, 290 Pa. Super. 269, ____, 434 A.2d 747, 752 (1981) (The court held the required causation would be proximate cause and found that the insured's negligent act as a pedestrian was the proximate cause of the resulting injuries.).

[137] Retherford v. Kama, 52 Haw. 91, 470 P.2d 517 (1970). The insured company had insurance covering injuries sustained by any person, and there was an exception to the exclusionary clause which stated "except with respect to operations performed by independent contractors . . . ." *Id.* at 92-93, 470 P.2d at 518. The court saw no difference between the various policy phrases "arising out of," "arising from," or "restricted to," and the instant phrase "with respect to." *Id.* at 95-96, 470 P.2d at 519. Furthermore, the court found that the phrase "except with respect to" was ambiguous. *Id.* at 97, 470 P.2d at 520. But, the dissent noted that the

Retherford v. Kama,[138] the Hawaii Supreme Court, in accordance with the majority of other jurisdictions,[139] rejected the need for a causation factor. The court found the insurer liable for injuries suffered by an independent contractor while working for the insured.[140]

Undoubtedly, the factual situation in the *Retherford* case is distinguishable from the instant cases. The critical factor is that the *Retherford* court specifically noted and addressed the causal connection that may or may not be required within an exclusionary clause.[141] In *Fortune* and *Chief Clerk*, the court has left open the causation issue for a future factual situation where the issue would be critical in the determination of a case.[142]

Further litigation will be required in order to ascertain whether the Hawaii courts will absolutely deny homeowner's policy coverage, regardless of the theory of liability and the causal connection between the use of a motor vehicle and the resulting injury or damage, as long as the injury or damage "arises out of" the ownership, maintenance, operation, use, loading, or unloading of any motor vehicle.[143]

In broadly construing the motor vehicle exclusion in a homeowner's policy, the Hawaii Supreme Court suggested that overlapping coverages are impermissible under Hawaii law. In *Fortune* and *Chief Clerk*, the court drew a bright line between homeowner's and automobile liability insurance policies. The court's treatment of homeowner's insurance and automobile insurance as covering mutually exclusive risks has particular significance. *Fortune* foreclosed the possibility

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majority's focus on the phrase "with respect to" was misplaced, and the case should have turned on the evaluation of the risk covered by the policy. *Id.* at 99, 470 P.2d at 521 (Levinson, J., dissenting).

[138] 52 Haw. 91, 470 P.2d 517 (1970).

[139] *See, e.g.*, Aetna Casualty & Sur. Co. v. Ocean Accident & Guarantee Corp., 386 F.2d 413 (3d Cir. 1967); Continental Casualty Co. v. General Accident Fire & Life Assurance Corp., 175 F. Supp. 713 (D. Or. 1959), *aff'd*, 287 F.2d 464 (9th Cir. 1961); Duke Power Co. v. Indemnity Ins. Co., 128 F. Supp. 262 (D.N.C. 1955), *rev'd*, 229 F.2d 588 (4th Cir. 1956); Standard Oil Co. v. Fidelity & Casualty Co., 66 F. Supp. 603 (W.D. Ky. 1946), *aff'd*, 162 F.2d 715 (6th Cir. 1947); United States Fidelity & Guar. Co. v. National Paving & Contracting Co., 228 Md. 40, 178 A.2d 872 (1962); Ocean Accident & Guarantee Corp. v. Northern Tex. Traction Co., 224 S.W. 212 (Tex. Civ. App. 1920).

[140] *Retherford*, 52 Haw. at 97, 470 P.2d at 520.

[141] *Id.* at 96, 470 P.2d at 520 ("The exception proviso in [the exclusionary clause] does not contain language which either expressly or by implication injects a causation factor.").

[142] The *Retherford* court rejected the need for causation in relation to the phrase "with respect to" and found that "with respect to" was equivalent to the phrase "arising out of." *Id.* at 95-96, 470 P.2d at 519.

[143] *Cf. LaBonte*, 159 Conn. at ____, 268 A.2d at 666 (motor vehicle exclusion in effect meant "that any liability under any theory of recovery, whether personal negligence, master-servant, agency or other theory of vicarious liability, which arises from an automobile accident off the premises, is outside the scope of the contract").

of overlapping benefits from a homeowner's policy and automobile policy to cover vicarious liability,[144] whereas *Chief Clerk* seemed to foreclose overlapping benefits for negligent entrustment.

The court's approach presupposes the coverage of negligent entrustment and vicarious liability under an automobile liability insurance policy. The court's prior treatment of statutory parental vicarious liability supports this assumption.[145] However, it is less clear whether negligent entrustment is covered under an automobile policy.[146] To the extent that some jurisdictions deny coverage of negligent entrustment under an automobile policy, it is possible that a negligent entrustment defendant would be left without coverage, or even worse, without a defense to an allegation of liability.

Nevertheless, the court's holdings that negligent entrustment and vicarious liability "arise out of" the ownership or use of a motor vehicle suggest that such liability should be covered under an automobile liability policy.[147] Given

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[144] In *Fortune*, the automobile liability insurers acknowledged that they had a duty to defend their insureds for statutory vicarious liability and participated in the underlying action. *See Fortune*, 68 Haw. at ____, 702 P.2d at 302-03. *See also* Government Employees Ins. Co. v. Franklin, 66 Haw. 384, 662 P.2d 1117 (1983) (an auto insurance policy covered parents of a minor who negligently operated a vehicle in a common enterprise).

[145] In Government Employees Ins. Co. v. Franklin, 66 Haw. 384, 662 P.2d 1117 (1983), insured parents were found vicariously liable for their minor daughter's negligent participation in a common enterprise. *Id.* at 385, 662 P.2d at 1118. The court found that an ambiguity existed as to applicability of a permissive use provision. *Id.* at 387, 662 P.2d at 1119. Resolving the ambiguity in favor of the insureds, the court held that the insured parents were covered under an automobile insurance policy for their statutory vicarious liability. *Id. See also* Dofflemeyer v. Gilley, 395 So. 2d 403 (La. Ct. App. 1981) (overlapping coverages for vicarious liability).

[146] It is unclear whether the insureds in *Chief Clerk* were covered under an automobile liability policy. There exists a split in authority on the question of coverage of negligent entrustment under automobile policies. *Compare* Nehrbass v. Home Indem. Co., 37 F. Supp. 123 (W.D. La. 1941) (automobile insurance coverage for claim sounding of negligent entrustment) *and* Camatsos v. Aetna Casualty & Sur. Co., 428 So. 2d 1320 (La. Ct. App. 1983) (tractor trailer liability policy coverage for negligent entrustment) *with* Samuels v. American Auto Ins. Co., 150 F.2d 221 (10th Cir. 1945) (applied Louisiana law and denied automobile insurance coverage for negligent entrustment because the entrustor did not benefit from the use of vehicle).

Interestingly, in Dutton v. State Farm Mut. Auto. Ins. Co., 383 So. 2d 519 (Ala. 1980), the Alabama Supreme Court held that the automobile insurer had no duty to defend a driver of the family car, who entrusted it to a 14 year old on the ground that the insured was not using the car because the minor was using the car for her own purposes without any benefit to the entrustor. *Id.* at 522. This decision is quite surprising given that the same court decided *Cooter*, which denied homeowner's coverage for negligent entrustment based on a derivative theory. See *supra* notes 66-67 and accompanying text for a discussion of *Cooter*.

[147] In *Fortune*, the court relied in part upon the insureds' purchase of automobile insurance as negating an objectively reasonable expectation of coverage under a homeowner's policy. 68 Haw. at ____, 702 P.2d at 306. Similarly, in *Chief Clerk* the court expressly held that the insured's negligent entrustment liability "arose out of the ownership or use" of the insured's motor vehicle. 68 Haw. at ____, 713 P.2d at 431.

that such insurance is typically based on the ownership, operation, and/or use of a motor vehicle, a fair reading of *Fortune* and *Chief Clerk* would indicate that absent a controlling exclusion, coverage of both vicarious liability and negligent entrustment under automobile policies would be consistent with Hawaii law.[148] Once a court rejects a homeowner's policy as a comprehensive umbrella policy, automobile insurance is the next logical choice to compensate the plaintiff.[149]

VI. CONCLUSION

In both *Fortune v. Wong* and *Hawaiian Insurance & Guaranty Co. v. Chief Clerk*, the Hawaii Supreme Court found, reading the insurance contract as a whole, that there was no ambiguity as to the exclusionary clause in the homeowner's policy, and it was not contrary to the parties' reasonable expectations that the exclusion should apply to the instant facts. The court was consistent in following the established rules of construction for interpreting an insurance contract, and established that such rules would be the means to effectuate the end sought by Hawaii courts. The objective, as in any other contract case, is to realize the intentions and expectations of the contracting parties. This objective contrasts with other jurisdictions that implicitly seek to realize the purpose of liability insurance, to indemnify or pay the insured for the insured against occurrences, even to the point of using questionable judicial construction of insurance contracts.

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[148] In BATS, Inc. v. Shikuma, 1 Haw. App. 231, 617 P.2d 575 (1980) (per curiam), the Hawaii Intermediate Court of Appeals held that an insured exercising sufficient supervision and control over his van was in "use" of a motor vehicle for purposes of automobile collision coverage even though the insured was neither a driver nor a passenger in the van at the time of the accident.

[149] Dean Calabresi notes that the "cost of accidents" may be reduced by spreading the risks throughout society. In other words, it may be more desirable to have losses shifted to society as a whole through insurance, rather than single individuals bearing the whole loss. *See generally* G. CALABRESI, THE COSTS OF ACCIDENTS 24-29, 68-75 (1970).

State v. Smith: The Standard of Effectiveness of Counsel in Hawaii Following *Strickland v. Washington*

I. INTRODUCTION

In *State v. Smith*,[1] the Hawaii Supreme Court held that where a claim of ineffective assistance of counsel[2] is raised by a criminal defendant under the auspices of the Hawaii Constitution, the controlling test is the one previously set forth by the Hawaii Supreme Court in *State v. Antone*.[3] Under the prevailing *Antone* test, a defendant bringing a claim of ineffective assistance is required to show: (1) specific errors or omissions by defense counsel reflecting counsel's lack of skill, judgment or diligence; and (2) that the errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.[4] The decision to retain the *Antone* test for cases brought under the Hawaii Constitution was the Hawaii court's response to the recent articulation by the United States Supreme Court, in *Strickland v. Washington*,[5] of the federal test for judging ineffective assistance cases.

In *Smith*, the Hawaii Supreme Court held that defendant Michael Smith was deprived of his right to assistance of counsel as guaranteed by article I, section 14 of the Hawaii Constitution.[6] Although the Hawaii court acknowledged the

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[1] 68 Haw. ____, 712 P.2d 496 (1986).

[2] This note addresses ineffective assistance claims arising as a result of some deficiency in the actual performance of defense attorneys at trial. This note makes no attempt to address ineffective assistance claims that arise where defense counsel is alleged to have been burdened by a conflict of interest. In such a case, prejudice is presumed once defendant demonstrates that counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980). Neither does this note address cases involving the actual or constructive denial of counsel.

[3] 62 Haw. 346, 615 P.2d 101 (1980).

[4] *Id.* at 348-49, 615 P.2d at 104.

[5] 466 U.S. 668 (1984).

[6] Article I, § 14 of the Hawaii Constitution states, in pertinent part, that: "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for the accused's defense." HAW. CONST. art. I, § 14.

ineffective assistance test formulated in *Strickland*, it nevertheless elected to adhere to the *Antone* test for cases brought under the Hawaii Constitution.[7]

II. FACTS

Defendant Michael Smith was convicted in the Third Circuit Court of the State of Hawaii of attempted sodomy in the second degree.[8] He appealed from the judgment of conviction entered against him, arguing that he had been deprived of his right to assistance of counsel as guaranteed by the sixth amendment of the United States Constitution, and article I, section 14 of the Hawaii Constitution.[9]

Prior to his trial, Smith's public defender (pretrial counsel) succeeded in excluding evidence of Smith's prior criminal history.[10] Subsequently, it was discovered that Smith's pretrial counsel had a possible conflict of interest because the public defender's office represented a witness which the State intended to call in the case.[11] Consequently, Smith's pretrial counsel was allowed to with-

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Article I, § 14 of the Hawaii Constitution was modeled after the sixth amendment of the United States Constitution, in order to give the state the benefit of federal decisions construing the same language. *See* State v. Wong, 47 Haw. 361, 385, 389 P.2d 439, 452 (1964). The sixth amendment provides in pertinent part that: "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

[7] State v. Smith, 68 Haw. at ____, n.7, 712 P.2d at 500 n.7.

[8] *Id.* at ____, 712 P.2d at 497-98. Specifically, Smith was convicted of violating HAW. REV. STAT. §§ 705-500(1)(b) and 707-734(1)(b) (1985). The relevant portions of the criminal attempt statute provide:

> (1) A person is guilty of an attempt to commit a crime if he:
>
> . . .
>
> (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.

HAW. REV. STAT. § 705-500(1)(b) (1985). The relevant portions of the sodomy statute provide:

> (1) A person commits the offense of sodomy in the second degree if:
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> . . .
>
> (b) The person intentionally engages in deviate sexual intercourse with another person who is less than fourteen years old.

HAW. REV. STAT. § 707-734(1)(b) (1985).

[9] Opening Brief at 15, State v. Smith, 68 Haw. ____, 712 P.2d 496 (1986).

[10] *Smith*, 68 Haw. at ____, 712 P.2d at 498. In granting Smith's motion in limine, the trial court essentially prohibited the introduction of evidence relating to: (1) any crime for which Smith was arrested but which did not result in a conviction; (2) any crime for which Smith was convicted, but which did not implicate "fraud, deceit, or other forms of dishonesty;" (3) any reference to the fact that Smith had spent time in prison for prior criminal offenses; and (4) any reference to possible pending criminal charges involving open lewdness or other sexually motivated conduct. *Id.* at ____, 712 P.2d at 498.

[11] *Id.* at ____ n.4, 712 P.2d at 498 n.4. For a discussion of conflict of interest problems

draw and new counsel (trial counsel) was appointed to represent Smith at trial.[12]

At the outset of the trial proceedings, Smith's trial counsel announced his strategy of "putting everything out on the table."[13] Consistent with this, he opened his argument by characterizing Smith as a "fantasizer [sic]," a "pervert," and an "exhibitionist" who had served five years in Oahu Prison for burglary convictions.[14] Additionally, during his direct examination of Smith, trial counsel elicited testimony from Smith relating to his prior criminal history, and led Smith to reveal to the jury that he was a thief who had been convicted of second degree burglary.[15] By so doing, Smith's trial counsel effectively negated the progress attained by Smith's pretrial attorney in excluding evidence of Smith's prior criminal history from the trial.

The evidence adduced at trial established that Smith lured a five-year-old girl into the laundry room of a Hilo hotel, where he attempted to induce her to commit an act of fellatio.[16] Before the act could be completed, however, the owner of a bar located above the laundry room entered the room.[17] The bar owner testified that when he entered the room, Smith was in a crouched position over the girl, who was kneeling in a corner with her back to the wall.[18] He further testified that as he approached the two, he observed defendant's exposed and erect penis above the child's face, and that she appeared to be extremely frightened.[19] When the bar owner intervened, defendant attempted to cover himself up and then fled the premises. Smith was subsequently apprehended by the police and identified by the bar owner.[20]

Smith testified that he had intended only to expose himself to the victim, and that it had not been his object to attempt sodomy.[21] The jury returned a guilty verdict,[22] and Smith appealed his conviction to the Hawaii Supreme Court.

Smith's main contention on appeal was that he suffered effective deprivation of the right to have assistance of counsel as guaranteed by article I, section 14 of

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facing public defenders in similar contexts, see Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L.J. 1 (1983).

[12] *Smith*, 68 Haw. at ____, 712 P.2d at 498.

[13] *Id.* at ____ n.5, 712 P.2d at 499 n.5.

[14] *Id.*

[15] Transcript of Feb. 16, 1984, at 166 (appended to Opening Brief, State v. Smith, 68 Haw. ____, 712 P.2d 496 (1986)).

[16] *Smith*, 68 Haw. at ____, 712 P.2d at 498-99.

[17] *Id.* at ____, 712 P.2d at 499.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

the Hawaii Constitution, because of his attorney's conduct at trial.[23] The Hawaii Supreme Court agreed, vacating Smith's conviction and remanding the case for a new trial.[24]

III. History

A. *Generally: The Scope and Source of the Right to Effective Assistance of Counsel*

Both the United States and the Hawaii Constitutions unconditionally guarantee the right of criminal defendants to have assistance of counsel.[25] This right extends to all serious criminal proceedings whether on the federal or state levels,[26] and it requires that counsel be appointed to represent indigent defendants both in federal and state criminal proceedings.[27]

The right to assistance of counsel contained in both the United States and Hawaii Constitutions, however, is not satisfied unless the assistance rendered is "effective,"[28] and thus the mere formal appointment of a defense attorney will not by itself operate to satisfy the right to counsel.[29] Although a criminal de-

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[23] *Id.*

[24] *Id.* at ____, 712 P.2d at 500-01.

[25] *See supra* note 6.

[26] Scott v. Illinois, 440 U.S. 367 (1979) (counsel must be provided for indigent defendants in all cases where incarceration is ultimately imposed); Argersinger v. Hamlin, 407 U.S. 25 (1972) (no person may be imprisoned for any criminal offense without having been represented by counsel at trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel is applicable to the states through the fourteenth amendment).

[27] *See Gideon*, 372 U.S. at 343 (sixth and fourteenth amendments require the appointment of counsel for indigent defendants in state criminal proceedings); Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (sixth amendment requires the appointment of counsel for indigent defendants in federal court).

[28] *See* United States v. Cronic, 466 U.S. 648 (1984) (if the defendant is not provided with actual assistance, the sixth amendment guarantee of assistance of counsel has been violated); McMann v. Richardson, 397 U.S. 759, 772 (1970) (defendants facing felony charges are entitled to the effective assistance of counsel); Reece v. Georgia, 350 U.S. 85, 90 (1955) (due process is denied where defense counsel is assigned under circumstances which preclude the giving of effective aid to defendant in preparing and trying his case); Avery v. Alabama, 308 U.S. 444 (1970) (right to counsel is not satisfied by mere formal appointment).

For cases construing the right to counsel as guaranteed by article I, § 14 of the Hawaii Constitution, see, e.g., State v. Morishige, 65 Haw. 354, 369, 652 P.2d 1119, 1130 (1982) (right to assistance of counsel in a criminal case guaranteed by the United States and Hawaii Constitutions is satisfied only when such assistance is "effective"); State v. Kahalewai, 54 Haw. 28, 30, 501 P.2d 977, 979 (1972) (constitutional right to the assistance of counsel in a criminal case is satisfied only when such assistance is effective).

[29] *See, e.g., Cuyler*, 446 U.S. at 344 (inadequate assistance does not satisfy the sixth amendment right to counsel made applicable to the states through the fourteenth amendment); *Avery*,

fendant is entitled to counsel who will provide effective assistance, however, there is no requirement that the assistance rendered be errorless,[30] and the general rule is that counsel will not be judged ineffective solely on the basis of hindsight.[31] Additionally, in cases alleging ineffective assistance of counsel, the burden of proof is borne by the defendant.[32]

B. *The* Strickland *and* Antone *Tests*

Both the United States and Hawaii Constitutions demand that the assistance rendered by an attorney fall "within the range of competence demanded of attorneys in criminal cases"[33] in order to be deemed "effective" for purposes of satisfying the guaranteed right to counsel. Notwithstanding the fact that a similar "range of competence" standard is applied in determining effectiveness of counsel questions under both the United States and Hawaii Constitutions, the actual test used in deciding whether an attorney's conduct is within the required range of competence varies significantly, depending upon whether it is the United States sixth amendment guarantee or the Hawaii article I, section 14 guarantee that is being construed.

Both the federal and the Hawaii tests for determining whether an attorney's conduct is within the range of competence demanded of attorneys in criminal cases require the defendant asserting ineffective assistance to make a showing (1) of his attorney's incompetence or ineffectiveness; and (2) that his attorney's conduct prejudiced the defendant in some specific manner.[34] Despite this gen-

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308 U.S. at 446 (constitutional guarantee of assistance of counsel is not satisfied by "mere formal appointment").

[30] *See* State v. Antone, 62 Haw. 346, 348, 615 P.2d 101, 104 (1980) (counsel's assistance need not be errorless); *Kahalewai*, 54 Haw. at 30, 501 P.2d at 979 ("effective" counsel does not mean errorless counsel).

[31] *See Antone*, 62 Haw. at 348, 615 P.2d at 104 (counsel's assistance will not be judged ineffective solely by hindsight); State v. Rivera, 62 Haw. 120, 129, 612 P.2d 526, 532-33 (1980) (right to counsel does not mean counsel judged ineffective by hindsight).

[32] *Cronic*, 466 U.S. at 658 ("the burden rests on the accused to demonstrate a constitutional violation") (footnote omitted); *Morishige*, 65 Haw. at 369, 652 P.2d at 1130 (onus of proving ineffectiveness rests with the defendant); *Antone*, 62 Haw. at 348, 615 P.2d at 104 (burden of establishing ineffective assistance of counsel rests upon appellant).

[33] *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms"); *Antone*, 62 Haw. at 348, 615 P.2d at 104 (standard for determining the adequacy of counsel's representation is whether, viewed as a whole, the assistance provided is "within the range of competence demanded of attorneys in criminal cases"); State v. Tyrell, 60 Haw. 17, 30, 586 P.2d 1028, 1036 (1978) (effective counsel is counsel whose assistance is within the range of competence demanded of attorneys in criminal cases).

[34] Effectiveness of counsel tests which incorporate the dual elements of (1) attorney incompetence; and (2) resulting prejudice have been generally termed as "prejudicial incompetence" ap-

eral elemental similarity between the federal and the Hawaii tests, however, the two tests are quite dissimilar in the amount or level of prejudice that they require the defendant to demonstrate in order to make a showing of ineffective assistance of counsel.

1. *The federal test:* Strickland v. Washington

In *Strickland v. Washington*,[35] the United States Supreme Court enunciated the federal standard for determining whether the assistance rendered by an attorney falls within the requisite range of conduct. The Court's decision in *Strickland* represented its first attempt at addressing "a claim of 'actual ineffectiveness' of counsel's assistance in a case going to trial."[36]

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proaches. *See generally* Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380, 1386-99 (1983) [hereinafter Comment, *Fair Trial Guarantee*].

The majority of states have adopted the *Strickland* analysis for judging ineffective assistance claims. *See infra* note 44. Most of the remaining states, while declining to adopt the rigorous *Strickland* prejudice requirement, have nevertheless adopted some formulation of the prejudicial incompetence approach. *See, e.g.*, Wilson v. Alaska, 711 P.2d 547 (Alaska 1985) (stating that the prejudice standard in Alaska is whether counsel's lack of competency contributed to the conviction, but stating that the court might in the future reconsider the prejudice element in light of *Strickland*); Connecticut v. Vitale, 197 Conn. 396, 497 A.2d 956 (1985) (ineffectiveness is demonstrated where trial counsel's lack of competence contributed to defendant's conviction); Massachusetts v. Fuller, 394 Mass. 251, 475 N.E.2d 381 (1985) (counsel is ineffective where his conduct falls measurably below that of an ordinary, fallible lawyer, and where defendant is thereby deprived of an otherwise available, substantial ground of defense).

However, at least one state has declined to require defendants to make a showing of prejudice in order to prevail on ineffective assistance claims. *See* Munden v. Wyoming, 698 P.2d 621 (Wyo. 1985). *Munden* reaffirmed, in light of *Strickland*, the test set forth in Hoskovek v. Wyoming, 629 P.2d 1366, 1367 (Wyo. 1981) ("Is the assistance rendered by counsel that which would reasonably be rendered by a reasonably competent attorney under the facts and circumstances of the case? If it is, it is effective. If it is not, it is ineffective.").

[35] 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court granted certiorari and reversed the judgment of the United States Court of Appeals for the Eleventh Circuit, which had granted a new trial to defendant Washington after he had been sentenced to death at a capital sentencing hearing at the trial level. Defendant Washington's contention upon appeal was that he had been deprived of effective assistance of counsel at his sentencing hearing, and he specifically alleged that:

> counsel was ineffective because he failed to move for a continuance to prepare for sentencing to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts.

466 U.S. at 675.

[36] *Id.* at 683. Although the specific issue in *Strickland* involved defense counsel's performance at a capital sentencing hearing rather than at trial, Justice O'Connor, writing for the Court, opined that a:

In *Strickland*, the Court stated that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[37] In support of this proposition, the Court posited that "the purpose of the effective assistance guarantee of the Sixth Amendment is . . . simply to ensure that criminal defendants receive a fair trial."[38]

Bearing this in mind, the *Strickland* majority held that, in order to demonstrate deprivation of effective assistance of counsel, a defendant must show (1) "that counsel's representation fell below an objective standard of reasonableness;"[39] and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[40] Elaborating on the second element of the test, the Court stated that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."[41]

Finally, the *Strickland* Court instructed that, when reviewing an ineffective assistance claim, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,"[42] and in this connection, defendants "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' "[43]

The standard enunciated in *Strickland* has been adopted by a majority of states,[44] and is also binding on the federal courts. As applied on the federal

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> capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision [citations omitted] . . . that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

Id. at 686-87.

Despite Justice O'Connor's likening of the capital sentencing proceeding in *Strickland* to an actual trial for purposes of establishing attorney performance standards, evaluations of counsel's performance at capital sentencing proceedings clearly present special problems. For a discussion of the application of *Strickland* in capital sentencing proceedings, see Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461 (1987).

[37] 466 U.S. at 686.

[38] *Id.* at 689.

[39] *Id.* at 688.

[40] *Id.* at 694.

[41] *Id.*

[42] *Id.* at 689.

[43] *Id.* (citation omitted).

[44] Thirty-three jurisdictions (including the District of Columbia) have adopted the *Strickland* test at this writing. *See* Daniel v. Alabama, 459 So. 2d 948 (Ala. 1984), *cert. denied*, 471 U.S. 1009 (1985); Arizona v. Lee, 142 Ariz. 210, 689 P.2d 153 (1984); Orsini v. Arkansas, 287

level, the *Strickland* test has thus far proved to be a formidable obstacle for defendants to overcome. Indeed, counsel has been deemed effective under the *Strickland* test in cases where defense counsel failed to object to jury instructions allowing for conviction of an uncharged offense,[45] allegedly fell asleep during the trial,[46] was ignorant of state law relevant to the issues at trial,[47] and even where counsel elected not to make any pretrial motions, opening statement, or undertake any cross-examination of adverse witnesses.[48]

The standard for determining effectiveness of counsel on the federal level imposes an extremely heavy burden on the defendant, who must show not only that counsel's performance fell below an "objective standard of reasonableness," but also that the errors committed by counsel were "reasonably probable" to

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Ark. 456, 701 S.W.2d 114 (1985); White v. United States, 484 A.2d 553 (D.C. 1984); Downs v. Florida, 453 So. 2d 1102 (Fla. 1984); Davenport v. Georgia, 172 Ga. App. 848, 325 S.E.2d 173 (1984); Illinois v. Cohen, 142 Ill. App. 3d 900, 492 N.E.2d 569 (1986); Lawrence v. Indiana, 464 N.E.2d 1291 (Ind. 1984); Iowa v. Jackson, 387 N.W.2d 623 (Iowa App. 1986); Chamberlain v. Kansas, 236 Kan. 650, 694 P.2d 468 (1985); Gall v. Kentucky, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 106 S.Ct. 3311 (1986); Louisiana v. Mistretta, 490 So. 2d 462 (La. App. 1986); Harris v. Maryland, 303 Md. 685, 496 A.2d 1074 (1985); Minnesota v. Race, 383 N.W.2d 656 (Minn. 1986); Gilliard v. Mississippi, 462 So. 2d 710 (Miss. 1985); Smith v. Missouri, 674 S.W.2d 638 (Mo. App. 1984); *In re* Gillham, 707 P.2d 1100 (Mont. 1985); Nebraska v. Robinson, 218 Neb. 156, 352 N.W.2d 879 (1984); Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984); New Hampshire v. Dennehy, 127 N.H. 425, 503 A.2d 769 (1985); New Jersey v. Childs, 204 N.J. Super. 639, 499 A.2d 1041 (1985), *cert. denied*, 104 N.J. 430, 517 A.2d 423 (1986); North Carolina v. Braswell, 312 N.C. 553, 324 S.E.2d 241 (1985); North Dakota v. Patten, 353 N.W.2d 30 (N.D. 1984); Foster v. Oklahoma, 714 P.2d 1031 (Okla. Crim.), *cert. denied*, 107 S. Ct. 249 (1986); Watson v. South Carolina, 287 S.C. 356, 338 S.E.2d 636 (1985); South Dakota v. Dornbusch, 384 N.W.2d 682 (S.D. 1986); Best v. Tennessee, 708 S.W.2d 421 (Tenn. Crim. App. 1985); Cooper v. Texas, 707 S.W.2d 686 (Tex. App. 1986); Utah v. Geary, 707 P.2d 645 (Utah 1985); *In re* Pernicka, 513 A.2d 616 (Vt. 1986); Virgina Dep't of Corrections, 227 Va. 525, 318 S.E.2d 399 (1984); Washington v. Sardinia, 42 Wash. App. 533, 713 P.2d 122 (1986); West Virginia *ex rel.* Levitt v. Bordenkitcher, 342 S.E.2d 127 (W. Va. 1986).

[45] Ricalday v. Procunier, 736 F.2d 203 (5th Cir. 1984) (holding that counsel's failure to object to or appeal a jury instruction allowing conviction on an unindicted offense did not prejudice defendant to the extent required by *Strickland*).

[46] United States v. Petersen, 777 F.2d 482 (9th Cir. 1985) (Even assuming that defense counsel fell asleep at trial, the fact that he had not slept through a substantial portion of the proceedings was held to constitute effective assistance under *Strickland*.).

[47] McKinney v. Israel, 740 F.2d 491 (7th Cir. 1984) (counsel's unfamiliarity with state law regarding admissibility of psychiatric testimony on the issue of intent to kill held not reasonably probable to have altered the outcome of the trial).

[48] Warner v. Ford, 752 F.2d 622 (11th Cir. 1985) (Defense counsel's strategy of silence in which he made no pretrial motions or opening statement, failed to ask a single question on cross-examination, and failed to challenge the defense strategy of two codefendants who blamed his client for the crime charged was held to constitute effective assistance where the evidence was overwhelming against appellant.).

have been outcome determinative. In contrast to the particularly heavy burden imposed on defendants under *Strickland*, however, Hawaii has elected to maintain its own less burdensome test for judging effectiveness of counsel under the Hawaii Constitution.

2. *The Hawaii test:* State v. Antone

The standard for determining effectiveness of counsel under the Hawaii Constitution was announced by the Hawaii Supreme Court in *State v. Kahalewai*.[49] Citing the United States Supreme Court's decision in *McMann v. Richardson*,[50] Chief Justice Richardson, writing for the Hawaii Supreme Court, stated that effective counsel is rendered where the assistance falls " 'within the range of competence demanded of attorneys in criminal cases.' "[51]

Eight years later, in *State v. Antone*,[52] the court further defined its criteria for judging effectiveness of counsel. In *Antone*, the court affirmed the rape conviction of a defendant who claimed that his attorney's ineffectiveness had led to his conviction.[53] In holding that defense counsel's performance was not deficient, the court articulated a two-part test, apparently based on the California Supreme Court's decision in *California v. Pope*,[54] for determining whether the assistance rendered fell below the level of competence demanded of criminal lawyers:

> First, the appellant must establish specific errors or omissions of defense counsel reflecting counsel's lack of skill, judgment or diligence. Second, the appellant must establish that these errors or omissions resulted in either the withdrawal or

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[49] 54 Haw. 28, 501 P.2d 977 (1972).

[50] 397 U.S. 759 (1970).

[51] 54 Haw. at 30, 501 P.2d at 979.

[52] 62 Haw. 346, 615 P.2d 101 (1980).

[53] In *Antone*, the defendant, a city bus driver, was convicted of the offenses of rape and sodomy following a jury-waived trial. Defendant picked up the fourteen year-old victim at a bus stop and drove the bus to an area off the bus route, where he parked and offered the victim money and marijuana in return for permission to touch her body. When the victim refused, defendant forcibly raped and sodomized her, after which he dropped the victim off at her bus stop.

On appeal, defendant asserted that he had been deprived of effective assistance of counsel at his trial. In support of his contention defendant pointed to six specific alleged errors committed by his attorney, including counsel's failure to challenge the victim's competence to testify at trial, his failure to object to prosecution testimony regarding defendant's previous arrest on a different rape charge, and his elicitation of otherwise inadmissible testimony on cross-examination showing that defendant had failed three separate polygraph tests concerning the rape and sodomy charges. 62 Haw. at 347-48, 615 P.2d at 105-06.

[54] 23 Cal. 3d 412, 152 Cal. Rptr. 732, 590 P.2d 859 (1979). Although the *Antone* court did not actually discuss *Pope* in its opinion, its enunciation of the test in *Antone* cited back to *Pope*.

> substantial impairment of a potentially meritorious defense. Where an appellant successfully meets these burdens, he will have proven the denial of assistance "within the range of competence demanded of attorneys in criminal cases."[55]

The court concluded that once a defendant satisfies the requirements of the *Antone* test, his conviction must be reversed.[56]

IV. ANALYSIS

The Hawaii Supreme Court's consideration of Smith's ineffective assistance claim in *State v. Smith* was made subsequent to the United States Supreme Court's enunciation of the *Strickland* test.[57] The question before the Hawaii Supreme Court in *Smith* was whether Smith had been deprived of effective assistance of counsel under the United States and Hawaii Constitutions.[58] The appellate briefs on both sides set forth the *Antone* test as the prevailing standard under which the question was to be decided, and interestingly, neither party made reference to the United States Supreme Court's then recent holding in *Strickland v. Washington*.[59]

Despite the fact that neither party raised the possibility of *Strickland*'s applicability in their briefs, the court nevertheless elected, *sua sponte*, to recognize and discuss *Strickland*.[60] Although its discussion of *Strickland* was limited to a

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[55] 62 Haw. at 348-49, 615 P.2d at 104 (footnote and citations omitted). In affirming, the Hawaii Supreme Court, after applying its newly enunciated test to the facts in *Antone*, held that defendant's six allegations of ineffective assistance failed to pass the *Antone* test. It stated that "[t]he first three alleged errors fail to reflect counsel's lack of skill, judgment or diligence. The remaining three fail to indicate the substantial impairment or withdrawal of a potential defense." *Id.* at 350, 615 P.2d at 105.

[56] *Id.* at 349, 615 P.2d at 105.

[57] The United States Supreme Court decided *Strickland* on May 14, 1984. *Smith* was decided by the Hawaii Supreme Court on January 14, 1986.

[58] Opening Brief at 15, State v. Smith, 68 Haw. ____, 712 P.2d 496 (1986); *Smith*, 68 Haw. at ____ n.7, 712 P.2d at 500 n.7.

[59] *Strickland* was decided on May 14, 1984, and the appellate briefs in *Smith* were filed in the Hawaii Supreme Court in the summer of 1985.

[60] Although neither brief made reference to *Strickland* in its argument, the Hawaii Supreme Court apparently felt it appropriate to mention *Strickland* in its *Smith* decision so as to clarify its position that the *Antone* test was to remain the standard for construing the Hawaii constitutional right to counsel. The court wrote:

> [F]or purposes of judging claims of inadequate representation brought under article I, section 14 of the Hawaii Constitution, we shall continue to apply the standard enunciated in *State v. Antone*. Inasmuch as the defendant avers he was denied his right to the effective assistance of counsel under the Hawaii, as well as the federal, Constitution, we follow *State v. Antone* here.

Smith, 68 Haw. at ____ n.7, 712 P.2d at 50 n.7. For a discussion of the states' ability to

footnote,[61] the Hawaii Supreme Court noted the criticism that *Strickland* has received for the heavy burden it places on defendants, and that the *Strickland* test differs from the one set forth in *Antone*.[62] Without saying more, however, the Hawaii Supreme Court stated that it would adhere to the *Antone* test in judging ineffective assistance claims raised under article I, section 14 of the Hawaii Constitution.[63] Because defendant Smith had averred a deprivation of effective assistance under the Hawaii Constitution as well as under the United States Constitution, the court proceeded to analyze the case under the *Antone* test.

A. *The Holding in* State v. Smith

Defendant Smith's main contentions on appeal were: (1) that he had been deprived of his constitutional right to effective assistance of counsel and that he should be afforded a new trial; and (2) that he had been deprived of his right to a fair trial through his attorney's prejudicial references during the trial to Smith's prior criminal history and conduct.[64] The Hawaii Supreme Court agreed that the conduct of Smith's attorney at trial "was not within the range of competence demanded of attorneys in criminal cases and [that] there were errors or omissions reflecting a lack of skill or judgment that substantially impaired a potentially meritorious defense,"[65] and that Smith was deprived of his constitutional right to the effective assistance of counsel.

In so holding, the court examined the conduct of Smith's trial counsel for specific errors or omissions reflecting counsel's lack of skill or judgment. It began its analysis by noting that "counsel's judgment ought not to be subjected to judicial hindsight,"[66] and that defense attorneys are granted broad latitude in making strategic and tactical decisions during the course of trial, which normally will not be questioned by reviewing courts.[67]

Bearing these restrictive tenets in mind, the court pointed to several specific

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construe state constitutional provisions more liberally than corresponding federal constitutional provisions are construed, see Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985).

[61] *Smith*, 68 Haw. at ____ n.7, 712 P.2d at 500 n.7.

[62] *Id.*

[63] *Id.*

[64] Opening Brief at 15, 20, State v. Smith, 68 Haw. ____, 712 P.2d 496 (1986). Smith also argued that the prosecution had failed to demonstrate the element of intent to commit sodomy, but the Hawaii Supreme Court found this contention to be without merit. 68 Haw. at ____ n.6, 712 P.2d at 499 n.6.

[65] 68 Haw. at ____, 712 P.2d at 501.

[66] *Id.*

[67] *Id.*

errors committed by Smith's trial counsel reflecting his lack of skill or judgment. The court examined the opening argument presented by Smith's trial counsel, as well as his decision to elicit testimony from Smith regarding both Smith's prior criminal history and Smith's "quirk" for exhibitionism.[68] Because the success or failure of Smith's defense revolved around his credibility in convincing the jury that he lacked the requisite intent to attempt sodomy,[69] the court reasoned that Smith suffered inescapable prejudice in the eyes of the jury as a result of the conduct of Smith's trial counsel.[70]

In addition to trial counsel's damaging opening statement and direct examination of Smith, the Hawaii Supreme Court cited other examples of trial counsel's conduct in order to illustrate trial counsel's lack of skill and judgment in handling Smith's defense. Specifically, the court noted that trial counsel offered a lollipop to the victim in order "to open things up a little bit more" during his cross-examination of her, and that he later proposed that he be allowed to sit in the witness chair with the victim in his lap during his cross-examination.[71]

Taking these occurrences as a whole, the court concluded that the conduct of Smith's trial counsel "was not within the range of competence expected of Hawaii lawyers in criminal cases,"[72] and that he committed errors reflecting his lack of skill or judgment which substantially impaired a potentially meritorious defense.[73] In view of its finding that Smith was denied effective assistance of counsel, the court reversed Smith's conviction and remanded the case for a new trial.[74]

B. Smith*'s Rejection of the* Strickland *Test*

State v. Smith provided the Hawaii Supreme Court with an opportunity to re-evaluate the Hawaii test for determining effectiveness of counsel in light of the United States Supreme Court's recent enunciation of the federal test in *Strickland*. The Hawaii Supreme Court's decision to retain the *Antone* standard

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[68] *Id.*

[69] *Id.*

[70] *Id.* Although the trial court apparently instructed the jury as to the proper weight it could accord to the damaging testimony revealed by trial counsel's direct examination of Smith, the Hawaii Supreme Court felt that it would be "hard put to say instructions from the court probably had the desired curative effect, particularly when the damaging information of prior convictions and incarceration was conveyed to the jury by defense counsel and again by the defendant at the urging of counsel." *Id.* (citations omitted).

[71] *Id.* at ____ n.10, 712 P.2d at 502 n.10.

[72] *Id.* at ____, 712 P.2d at 502.

[73] *Id.*

[74] *Id.* at ____, 712 P.2d at 503.

in cases brought under the article I, section 14 Hawaii constitutional guarantee of effective assistance of counsel operated implicitly to reject the *Strickland* test.

The *Strickland* decision is based on the premise that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."[75] Flowing from this premise, it is logical to conclude that no harm has accrued to the defendant unless the challenged conduct has had some effect on the reliability of the trial process.[76] Finally, given this proposition, it is not offensive to require a defendant alleging ineffectiveness of counsel to make a showing of resulting prejudice. Absent such a showing of prejudice, any alleged violation of defendant's right to effective assistance of counsel may be disposed of as harmless error.

Under conventional harmless error analysis, the defendant is required to point to the specific error underlying his appeal. Once such a showing is made, the burden normally shifts to the state, which must show, beyond a reasonable doubt, that the error was harmless. If the state meets its burden in this respect, the question is dismissed as harmless error.[77]

In contrast, defendants in ineffective assistance cases have traditionally borne the burden of showing both (1) that defense counsel's actions were in some way incompetent, and (2) that this incompetence was prejudicial to defendant.[78] Thus, the traditional harmless error analysis has been virtually abandoned in right to counsel cases, as the state generally bears no affirmative obligation to show that the alleged errors were harmless to the defendant.

Both the *Strickland* and *Antone* tests follow this traditional approach by their respective requirements that the defendant show prejudice stemming from defense counsel's alleged incompetence in order to gain relief. The central difference between the *Strickland* and *Antone* tests lies in the extent of prejudice that

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[75] United States v. Cronic, 466 U.S. 648, 658 (1984). Some criticism has been directed at the notion that the sixth amendment right to counsel exists only to ensure the integrity of the fifth amendment fair trial guarantee. *See, e.g.*, Comment, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259 (1986).

[76] *Cronic*, 466 U.S. at 658.

[77] *See* Comment, *Fair Trial Guarantee*, *supra* note 34, at 1400 n.87 (analyzing the harmless error doctrine as it had been applied by the minority of courts in the right to counsel context prior to *Strickland*).

[78] Both the *Strickland* and *Antone* tests allocate this dual burden to the defendant. *See generally* Comment, *Fair Trial Guarantee*, *supra* note 34, at 1386-99 (analyzing the dual burden placed on the defendant); Annotation, *Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client*, 2 A.L.R. 4TH 27, 83-157 (1980) (surveying the various tests applied by the state courts prior to *Strickland*); Annotation, *Modern Status of Rule as to Test in Federal Court of Effective Representation by Counsel*, 26 A.L.R. FED. 218, 239-57 (1976) (surveying the particular tests applied by the federal courts of appeal prior to *Strickland*).

the defendant is required to show.

While *Strickland* requires the defendant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,"[79] *Antone* requires the defendant to show only that counsel's errors or omissions "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense."[80] This difference in the prejudice requirement apparently lies at the heart of the Hawaii Supreme Court's decision not to adopt the *Strickland* test in construing article I, section 14 of the Hawaii Constitution.

Indeed, the Hawaii Supreme Court specifically noted in *Smith* that the *Strickland* test "has been criticized as being unduly difficult for a defendant to meet,"[81] and in this connection, the court cited the following passage from an article criticizing the prejudice element required by *Strickland*:

> One need not be a lawyer to appreciate the difficulty of meeting the prejudice requirement established by the [United States Supreme] Court. Given the inherent subjectivity of determining whether past results probably would have been different, defendants will successfully prove clear cases of prejudice only where there is evidence that they should not have been convicted.[82]

The Hawaii Supreme Court's citation of the preceding passage in *Smith* suggests that article I, section 14 of the Hawaii Constitution affords greater protection to the right of criminal defendants to have effective assistance of counsel than does its federal counterpart in the sixth amendment.[83]

Despite the fact that the *Antone* test is less stringent than the one articulated in *Strickland*, the Hawaii test nevertheless places a considerable burden on the defendant claiming ineffectiveness of counsel.[84] As previously stated, *Antone* requires the defendant to show (1) "specific errors or omissions of defense counsel reflecting counsel's lack of skill, judgment or diligence," and (2) that the errors or omissions "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense."[85]

Although the Hawaii appellate decisions applying the *Antone* test have done

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[79] 466 U.S. at 694.

[80] 62 Haw. at 348-49, 615 P.2d at 104 (footnote and citations omitted).

[81] 68 Haw. at ____ n.7, 712 P.2d at 500 n.7.

[82] *Id.* (quoting Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 199 (1984)).

[83] *See infra* note 84.

[84] *Morishige*, 65 Haw. at 369, 652 P.2d at 1130 ("the defendant's burden is obviously a heavy one; he ought not to be denied the opportunity to meet it"); Bryant v. State, 6 Haw. App. ____, ____, 720 P.2d 1015, 1020 (1986) (*Strickland* establishes a more difficult burden for the defendant to meet than is required under *Antone*).

[85] *Antone*, 62 Haw. at 348-49, 615 P.2d at 104 (footnote and citations omitted).

little in the way of defining the particular kinds of conduct which generally will be taken to reflect "a lack of skill, judgment or diligence," a few general guidelines may nevertheless be discerned from the cases. The Hawaii courts have shown a tendency to find counsel's conduct to be "within the range of conduct required of attorneys in criminal cases" where the cited errors may be justified as legitimate tactical or strategic decisions.[86]

From the defense attorney's standpoint, however, it may not be easy to predict when or why his tactical decisions may be viewed on appeal as either legitimate or unreasonable. In this connection, the Hawaii Supreme Court has indicated that a defense attorney's tactical decisions may be upheld when "based upon his knowledge of the facts and law of the case."[87] The obvious implication of this is that a defense counsel's decisions will be deemed effective as long as they are based on an informed judgment by counsel.[88]

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[86] *See, e.g.*, State v. Onishi, 64 Haw. 62, 636 P.2d 742 (1981) (per curiam) (defense counsel's tactical decision in a jury trial to refrain from impeaching the testimony of prosecution witnesses constituted effective assistance where such impeachment would have required the introduction of potentially prejudicial information about defendant); State v. El'Ayache, 62 Haw. 646, 618 P.2d 1142 (1980) (per curiam) (trial counsel's strategic decision to concentrate on proving that defendant had committed a misdemeanor instead of a felony was within the range of required competence, where counsel hoped to spare defendant from a felony conviction); State v. Casipe, 5 Haw. App. 210, 686 P.2d 28 (1984) (counsel's decision in murder trial to pursue defense of justification rather than self-defense constituted a legitimate tactical choice, where none of the witnesses corroborated defendant's self-defense testimony); State v. Rapozo, 1 Haw. App. 660, 617 P.2d 1235 (1980) (per curiam) (counsel's decision to focus on accident defense rather than on defense that defendant lacked the requisite intent to commit murder was a valid tactical decision, where defendant's own testimony "clearly negated" the latter defense).

[87] *El'Ayache*, 62 Haw. at 649, 618 P.2d at 1144 ("one of the legitimate interests in the criminal trial process is the right of defense counsel to make an appropriate judgment on the trial tactics and procedure to be employed in defense of his client based on his knowledge of the facts and law of the case") *See also* Stough v. State, 62 Haw. 620, 622, 618 P.2d 301, 304 (1980) ("[If] defenses crucial to defendant's case should have been, but were not raised, . . . the case will be examined further to determine whether counsel's actions were the result of informed judgment or constitutionally inadequate preparation. The issue of informed judgment . . . is only relevant where the actions or inactions resulting from that judgment seem unreasonable.") (quoting *Tyrell*, 60 Haw. at 30, 586 P.2d at 1036); *Kahalewai*, 54 Haw. at 30, 501 P.2d at 979 ("[a] primary requirement is that counsel must 'conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf.' ").

[88] This thesis is shared by at least two members of the Honolulu defense bar. During the course of separate conversations with Michael Weight and Brook Hart, each expressed a belief that in determining whether defense counsel's errors or omissions reflected a lack of skill, judgment, or diligence, the Hawaii courts would examine the degree to which defense counsel's actions were based on an informed judgment.

Mr. Weight commented that the courts would examine whether defense counsel had "formulated a calculated plan in presenting his theory of defense," and that the courts would "recognize that every attorney will try a particular case in a different way." Interview with Michael A.

This would be consistent with the criteria set forth by the California Supreme Court in *California v. Pope*[89] for judging whether an attorney's conduct was consistent with that of a "conscientious and diligent advocate."[90] In *Pope*, Justice Byrd, writing for the majority, indicated that if the record showed the challenged conduct to be the result of "an informed tactical choice"[91] by defense counsel, then the conviction must be affirmed. Conversely, "where the record shows that counsel has failed to research the law or investigate the facts in the manner of a diligent and conscientious advocate, the conviction should be reversed."[92] Justice Byrd continued, stating that where the record is silent as to defense counsel's reason for acting in the manner alleged to be ineffective, the challenged conviction should be affirmed.[93]

In determining when an attorney's errors or omissions have resulted in the withdrawal or substantial impairment of a potentially meritorious defense, the Hawaii Supreme Court has made clear that counsel is not required to "assert every novel, albeit plausible, legal theory in the defense of an accused . . . ."[94] It is equally clear that where there is no likelihood that a particular defense will succeed, a failure to raise that defense will not constitute the withdrawal of a potentially meritorious defense."[95] Finally, the court has indicated that the

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Weight (Jan. 1987).

Similarly, Mr. Hart expressed the view that "an experienced attorney's informed judgment would pass muster to the extent that it is based on his or her experience and a through and careful analysis of the facts and law of the case." Interview with Brook Hart (Jan. 1987).

[89] 23 Cal. 3d 412, 152 Cal. Rptr. 732, 590 P.2d 859 (1979).

[90] In *Pope*, the California Supreme Court formulated the California test for determining effectiveness of counsel. The California court stated that "appellant must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. In addition, appellant must establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense." *Id.* at 426, 152 Cal. Rptr. at 739, 590 P.2d at 866. The language of the test enunciated in *Pope* apparently became the basis for the Hawaii Supreme Court's articulation one year later of the *Antone* test.

[91] *Id.* at 426, 152 Cal. Rptr. at 739, 590 P.2d at 866.

[92] *Id.*, 152 Cal. Rptr. at 739-40, 590 P.2d at 866-67. *But cf. Stough*, 62 Haw. at 624-26, 618 P.2d 301, 303-05 (The court held that counsel's failure to file a motion to suppress before advising defendant to plead guilty constituted effective assistance of counsel, despite the trial judge's finding that "most experienced criminal attorneys would have filed such a motion," and despite defendant's allegations that counsel's omission was not the result of informed judgment, but rather the result of counsel's failure to research the law.).

[93] 23 Cal. 3d at 426, 152 Cal. Rptr. at 740, 590 P.2d at 867 (footnote omitted). Justice Byrd reasoned that where the record fails to illuminate defense counsel's reasons for the challenged acts or omissions, the more appropriate vehicle for an ineffective assistance claim would be a petition for writ of habeas corpus, because of the opportunity to have defense counsel testify as to his reasons in an evidentiary hearing. *Id.*

[94] *Stough*, 62 Haw. at 623, 618 P.2d at 304.

[95] *Casipe*, 5 Haw. App. at 220, 686 P.2d at 36 (defendant was not deprived of a potentially meritorious defense where the particular defense in question had no likelihood of success).

question of whether a potentially meritorious defense has been withdrawn or substantially impaired may vary depending upon whether the trier of fact is a judge or a jury.[96]

C. *Hawaii Supreme Court Rule 13*

Hawaii Supreme Court Rule 13[97] provides for sanctions against attorneys

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[96] *Antone*, 62 Haw. at 355, 615 P.2d at 108 (Defendant's sole defense of mistaken identity was not substantially impaired by counsel's failure to object to improper testimony in a jury-waived trial, because a presiding judge is presumed to have disregarded incompetent evidence in favor of competent evidence.). The implication here is that defense counsel's unreasonable acts or omissions are more likely substantially to impair a potentially meritorious defense in a jury trial than in a bench trial.

[97] Hawaii Supreme Court Rule 13 is a recent addition to the Hawaii Supreme Court Rules, having become effective on July 15, 1985.

Hawaii Supreme Court Rule 13 provides as follows:

> Whenever the conviction of a criminal defendant has been overturned and a new trial ordered because of a finding that the defendant had ineffective assistance of counsel in the proceedings against him or her, and the order has become final, either because it was not appealed, or because it has been finally affirmed on appeal, it shall be the duty of the prosecutor and the counsel for the individual defendant each within five days of the finality of such order to file a certificate in the title of the cause with the Supreme Court of Hawaii noting that such an order has been entered and attaching a copy of that order to the certificate.
>
> Within five days of the first receipt of such certificate by the supreme court, the chief justice shall appoint a special master to determine whether action against the counsel alleged to have been incompetent is warranted.
>
> Within five days from his appointment, the special master shall mail a notice of his appointment together with a copy of the order of his appointment, the certificate or certificates, and the order reversing the conviction to the respondent attorney at his last known address as shown in the records of the clerk of the Supreme Court of Hawaii.
>
> Within 45 days from mailing, the respondent attorney shall file with the clerk of the supreme court an answer showing cause why corrective action as provided herein should not be taken by the supreme court. If the respondent attorney wishes to disqualify the special master, he shall file with his return a motion therefore supported by an affidavit made upon personal knowledge and showing facts sufficient to establish the personal bias and prejudice of the special master toward him.
>
> If a motion for disqualification is filed, the master shall rule on the same within five days from the date of filing. That ruling shall be appealable only after an order in the proceedings as hereinbelow set forth has been entered.
>
> The master shall within five days after receipt of the answer of the respondent appoint an attorney to further prosecute the proceedings and shall give notice of the appointment to the respondent attorney in the same manner as provided above.
>
> The respondent attorney may represent himself or may designate an attorney to represent him. The respondent or his attorney and the attorney appointed by the master shall have 45 days from the appointment of the attorney by the master to conduct any discovery proceedings in accordance with the discovery chapter of the Hawaii Rules of

found to have rendered ineffective assistance of counsel. Recognizing the possibility that defense lawyers could be tempted to elicit constitutionally impermissible testimony from their clients during the course of trial in order to lay the groundwork for future reversal in the event of a conviction, the Hawaii Supreme Court noted in its *Smith* opinion that Rule 13 "stands as a disincentive" for such conduct.[98]

Civil Procedure. On the expiration of the 45 days, the master shall set the matter for hearing within 30 days, take such evidence in accordance with the Hawaii Rules of Evidence as may be proffered by the parties, and within 10 days of the conclusion of the hearing, render a decision and an order either dismissing the proceedings or recommending corrective action against the respondent attorney.

Corrective action which may be recommended by the master and/or adjudicated by the supreme court may consist of any one or more of the following:

(1) Requiring the respondent attorney to take a prescribed course or courses of remedial education and to produce satisfactory evidence of his or her passing such courses;

(2) Suspending the respondent's license to practice law until (1) has been complied with.

(3) In cases where the master finds that ineffective assistance of counsel may have resulted from a violation of DR 6-101 or DR 7-101, the master shall, in addition to (1) and (2), refer the matter to the Office of Disciplinary Counsel for investigation under Rule 2 of these rules. In the event of a reference under this subparagraph, the master's finding and the reference shall be deemed confidential and shall not be disclosed except pursuant to the provisions of Rule 2.22 of these rules.

Within 20 days from the rendering of the master's decision and proposed order, respondent or his attorney and the attorney appointed by the master to prosecute the proceedings may file exceptions with the Supreme Court of Hawaii supported by a memorandum in support thereof.

Within 40 days of the rendering of the decision and proposed order by the master, the supreme court shall enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth above.

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[98] 68 Haw. at ____, 712 P.2d at 502. It appears that defense counsel's conduct in *Smith* was actually intended to accomplish this improper purpose. The attorney appointed to prosecute the Rule 13 proceeding noted in his recommendations to the Special Master following the Rule 13 hearing that:

[i]n response to questions by both the Special Master and I, RESPONDENT [defense counsel] admitted that upon the suggestion of his client, he agreed to conduct himself during the course of the trial in such a manner as to cause an appellate court to conclude that his conduct was incompetent and that he afforded ineffective counsel therefore a defense to the criminal proceeding.

. . . .

RESPONDENT candidly stated that the plan between he and his client was if there were a conviction, which they both believed there would be, that they would obtain a vacation of the judgment of conviction because of ineffective assistance of counsel, and that upon remand the case would be assigned to a more lenient prosecutor who would allow a plea to a lesser included offense which would allow the Defendant to avoid jail. RESPONDENT

Rule 13 provides for the chief justice of the Hawaii Supreme Court to appoint a special master to determine whether corrective action against the attorney found to have been incompetent is warranted.[99] The attorney must then appear at a hearing, where he is given an opportunity to show why corrective action may be unwarranted.[100] Within ten days after the hearing, the master is obliged to render a decision and an order either dismissing the proceedings or recommending corrective action against the attorney.[101]

The potential sanctions that may be imposed pursuant to Rule 13 against attorneys found to have rendered ineffective assistance of counsel include: (1) requiring the attorney to pass prescribed remedial education courses; (2) suspension of the attorney's license to practice law pending his passing of the prescribed remedial course or courses; and/or (3) reference of the attorney to the Office of Disciplinary Counsel.[102]

Because Rule 13 has only recently been implemented and because the results of the proceedings involving the defense counsel in *Smith* are presently pending,[103] it is unclear whether Rule 13 will have any substantial impact on the practice of the defense bar in Hawaii. Notwithstanding the present unavailability of data regarding the results of Rule 13 proceedings, however, there are indications that the Hawaii Supreme Court perceives Rule 13 as an important device in encouraging competent performances by defense attorneys.[104]

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went on to state that in fact that is exactly what happened in this case. A different prosecutor was assigned, Defendant pleaded to a lesser charge, and the Defendant was ultimately sentenced to no jail time. Thus, the purpose of the conspiracy was accomplished.

Written Argument and Recommendations of Attorney Appointed to Further Prosecute Proceedings Under Supreme Court Rule 13 at 7-9, State v. Smith, 68 Haw. ____, 712 P.2d 496 (1986).

[99] HAW. SUP. CT. R. 13.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] As of this writing, only three proceedings had been set in motion pursuant to Supreme Court Rule 13. These ongoing proceedings involve the defense counsel who were found to have rendered ineffective assistance in *Smith*. State v. Lessary, No. 11113, slip. op. (Haw. Jan. 21, 1987) (mem.); and State v. Clark, No. 10041, slip. op. (Haw. Dec. 29, 1985); and State v. Clarke, No. 10041, slip. op. (Haw. Dec. 29, 1985) (mem.).

Additionally, Rule 13 is presently the subject of a constitutional challenge in federal court, posed by the counsel involved in *Clarke*. The challenge seeks "to block any disciplinary measures stemming from [counsel's] handling of the [*Clarke*] case." Honolulu Star-Bull., Mar. 11, 1987, at A-12, col. 1. The primary bases of the challenge are that Rule 13 violates the equal protection and due process clauses of the United States Constitution. Complaint for Damages and Declarative and Injunctive Relief, Partington v. Gedan, No. 87-172 at 7 (filed Mar. 9, 1987).

[104] The Hawaii Supreme Court has made reference to Hawaii Supreme Court Rule 13 in two of its recent opinions ordering remand for failure of defense counsel to provide effective assistance of counsel. *See Lessary*, No. 11113, slip. op. at 3 n.1 (footnoting the applicability of Rule 13); *Smith*, 68 Haw. at ____, 712 P.2d at 502-04 (discussing Rule 13 in its opinion and reprinting

V. IMPACT

The Hawaii Supreme Court's decision in *State v. Smith* to retain the *Antone* test for determining effectiveness of counsel under the Hawaii Constitution signifies the court's deep commitment to the preservation of defendants' rights. Although the test for determining effectiveness of counsel in Hawaii did not change after *Smith*, the opinion is nevertheless significant for its implicit rejection of the federal effectiveness of counsel test articulated by the United States Supreme Court in *Strickland v. Washington*.

A. *The Practical Effect of* Smith

In the broadest sense, the Hawaii Supreme Court's decision to retain *Antone* as the standard for adjudging ineffective assistance claims in Hawaii will have little practical impact on the criminal defense practice in this state. This is because *Antone* continues to be the prevailing standard for determining ineffective assistance claims under article I, section 14 of the Hawaii Constitution.[105]

In a narrower sense, however, it appears that, following *Smith*, the *Strickland* test will never be applied in Hawaii state courts. As long as the complaining defendant alleges a denial of effective assistance under article I, section 14 of the Hawaii Constitution instead of, or in addition to, the sixth amendment of the United States Constitution, it appears likely that the Hawaii courts will decide the Hawaii Constitutional argument under the controlling *Antone* test, thereby bypassing any *Strickland* analysis.[106]

Indeed, for all practical purposes, the performance of an attorney in a Hawaii case will only be subject to the *Strickland* test where a defendant petitions for a writ of habeas corpus on the federal level. In such a proceeding, the defendant would necessarily be alleging a denial of effective assistance under the United States Constitution, and so *Strickland* would be applicable. Because a defendant

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the entire text of Rule 13 as an appendix to the *Smith* opinion).

[105] *Smith*, 68 Haw. at ____ n.7, 712 P.2d at 500 n.7.

[106] The Hawaii appellate courts have indicated a willingness to bypass the *Strickland* test in favor of applying the *Antone* test whenever possible. *See Lessary*, No. 11113, slip. op. at 2-3 (applying *Antone* to find that defense counsel rendered ineffective assistance of counsel under the Hawaii Constitution); *Smith*, 68 Haw. at ____ n.7, 712 P.2d at 500 n.7 ("[i]nasmuch as defendant avers he was denied his right to the effective assistance of counsel under the Hawaii, as well as the federal, Constitution, we follow *State v. Antone* here"); *Bryant*, 6 Haw. App. at ____, 720 P.2d at 1020 (noting that the Hawaii Supreme Court has in the past applied the *Antone* test where defendant asserted a violation of his right to effective assistance of counsel under both the United States and Hawaii constitutions). If for some reason, however, a defendant neglects to allege a Hawaii constitutional denial of effective assistance and only alleges a deprivation under the United States Constitution, it appears that the Hawaii appellate courts will then be bound to apply *Strickland*.

must exhaust his state remedies prior to petitioning for federal habeas relief, however, it is probable that the state courts will already have tested and rejected the defendant's ineffective assistance claim under the more favorable *Antone* standard prior to the habeas petition.

In such a case, defendant's petition for federal habeas relief would seem futile; if his ineffectiveness of counsel claim was inadequate to satisfy the *Antone* test on the state level, then neither is it likely to meet the more demanding requirements imposed by *Strickland* under the federal standard. This reality may have the effect of discouraging state defendants from pursuing federal habeas petitions based solely on ineffective assistance claims because of the doubtful success of such a petition.[107]

Notwithstanding that the *Antone* test is less demanding for defendants than the *Strickland* test, defendants nevertheless face a meaningful burden of proof in showing prejudice under *Antone*. This is to say that *Antone* strikes a superior balance between the right of criminal defendants to have effective assistance of counsel and the necessity of granting broad latitude to defense attorneys to plan their particular defense strategies and tactics.

As a result of the balance between the above competing interests which *Antone* brings to Hawaii's ineffective assistance analysis, *Antone* is likely to recognize the validity of many ineffectiveness claims which would otherwise go uncorrected under *Strickland*. Defense counsel may apparently avoid being adjudged incompetent under *Antone* by basing their tactical decisions on an informed judgment, taking into account the current law and particular facts of the case.[108]

B. The Prospective Impact of Hawaii Supreme Court Rule 13

Hawaii Supreme Court Rule 13 has the potential to make the risk of rendering ineffective representation a costly proposition for defense counsel in Hawaii. Although the sanctions available under Rule 13 appear insufficient to pose a material threat to the actual practice of defense attorneys,[109] they are serious enough to make defense attorneys mindful of their obligation to provide effec-

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[107] Defendants wishing to petition for habeas corpus relief may of course do so on the state rather than the federal level. This would allow defendants the opportunity to have a full evidentiary hearing, including the possibility of calling the defense counsel to testify, while at the same time retaining the protections of the less stringent *Antone* test.

[108] *See supra* notes 86-93 and accompanying text.

[109] Rule 13 does not provide for harsh punitive sanctions such as disbarment, monetary fines, or mandatory suspension, for example. However, an attorney who is found incompetent may be subject to suspension from practice pending satisfactory completion of prescribed remedial courses, and may be referred to the Office of Disciplinary Counsel for further investigation under certain circumstances. *See supra* note 97.

tive assistance of counsel to their clients.[110] However, because Rule 13 has only recently been promulgated and placed into effect,[111] it is not possible to gauge the actual effect that it will have on the practice of defense work in Hawaii.

Rule 13 properly allocates the burden posed by ineffective counsel to the incompetent attorney. Once a defendant shows a deprivation of effective assistance of counsel under *Antone*, Rule 13 proceedings involving the attorney are automatically triggered. The essence of Rule 13 is that attorneys found to have rendered ineffective assistance of counsel will be subject to corrective action, including the possibility of taking remedial coursework. Although the utility of such sanctions is not clear at this early juncture, it is presumable that the prospect of such action is likely to prompt defense attorneys to ensure that the level of their representation does not fall below a reasonable standard of competence.

The overall effect of such a scenario undoubtedly would be to engender a qualitative improvement of criminal defense representation in Hawaii. This would in turn further the goal of seeking to assure that criminal defendants in Hawaii are not deprived of fair trials by reason of ineffective assistance of counsel.

In order for Rule 13 to have this affirmative impact, however, its provisions must be administered uniformly, and corrective action must be prescribed whenever necessary. If the Rule 13 apparatus is not uniformly administered, the underlying purpose of the rule will be undermined, thus detracting from its potentially positive effect.

C. Recommendations

Following *State v. Smith*, the importance that the Hawaii Supreme Court attaches to the effective assistance guarantee is clear. In this connection, the court's recent promulgation of Hawaii Supreme Court Rule 13 provides additional evidence that the court views the problem of ineffective assistance of counsel as a serious matter.

Coupled with its decision to retain *Antone* as the standard for judging effectiveness of counsel under the Hawaii Constitution, the court's adoption of Rule 13 signals the court's desire to assure at least a minimum qualitative level of criminal defense representation in Hawaii. The effect of this is to heighten the probability that criminal defendants will receive adequate assistance of counsel in proceedings against them.

In order to provide attorneys with guidance as to what constitutes competent representation, however, the criteria used in applying the *Antone* test should be further defined. Specifically, the *Antone* test could withstand further definition

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[110] *See supra* note 102 and accompanying text.

[111] *See supra* note 97.

by the court as to what constitutes a "potentially meritorious defense." Clarification by the court on this issue would enhance the utility of the *Antone* test both in its actual operation and in its guiding effect upon criminal defense lawyers in Hawaii.

Under Hawaii Supreme Court Rule 13, proceedings against an attorney found to have rendered ineffective assistance are automatically triggered.[112] This assures that remedial or other action will be taken, if necessary, against attorneys adjudged to have acted incompetently. However, the rule makes no provision allowing an attorney to explain the possible reasons for his challenged acts or omissions *prior* to the actual finding of ineffective assistance.

Although the Hawaii Supreme Court has stated that where defense counsel's acts or omissions appear unreasonable, a further examination will be made "to determine whether counsel's actions were the result of informed judgment or constitutionally inadequate preparation,"[113] there is no specific mechanism by which such an inquiry may be made. Because a finding of ineffective assistance of counsel may have a significant adverse impact on the attorney involved, the demands of due process seem to require that he be afforded an opportunity to explain the reasonableness of his challenged conduct prior to such a finding.

The Hawaii Supreme Court could address this concern in two ways. First, the court could adopt the policy announced by the California Supreme Court in *California v. Pope*. Under this alternative, a finding of ineffective assistance may not be made by a reviewing court unless the record affirmatively shows that counsel's errors or omissions resulted from counsel's failure to research the law or facts of the case.[114]

A better alternative would be for the Hawaii Supreme Court to implement a mechanism allowing defense counsel to explain the reasons underlying the acts or omissions allegedly constituting ineffectiveness of counsel prior to its determination of the effectiveness of counsel issue. This would formalize the necessary inquiry into the reasonableness of counsel's actions under the particular facts and circumstances of the case, and would help assure that defense counsel will not be adjudged incompetent solely on the basis of hindsight. In addition to facilitating the *Antone* analysis by shedding light on whether counsel acted reasonably under the circumstances, such a mechanism would ensure that counsel subject to Rule 13 proceedings will have had the opportunity to explain the propriety of his or her challenged acts or omissions before any determination of ineffectiveness of counsel is made.

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[112] *See supra* note 97.

[113] *Stough*, 62 Haw. at 622, 618 P.2d at 304 (quoting *Tyrell*, 60 Haw. at 30, 586 P.2d at 1036).

[114] *See supra* notes 89-93 and accompanying text.

VI. CONCLUSION

State v. Smith represents the Hawaii Supreme Court's response to the enunciation of the federal standard in *Strickland v. Washington* for judging effectiveness of counsel cases. In *Smith*, the court held that, where such a claim is raised under article I, section 14 of the Hawaii Constitution, the analysis will be made according to the *Antone* test instead of the *Strickland* test.

The Hawaii Supreme Court's adherence to the *Antone* test is praiseworthy because it more adequately safeguards the right of criminal defendants to have effective assistance of counsel than is possible under the *Strickland* test. Furthermore, despite the fact that the court's rejection of *Strickland* places Hawaii among a minority of the state jurisdictions, its decision to do so underscores the court's commitment to preserving the integrity of defendants' rights as guaranteed by the Hawaii Constitution.[115]

Steven J. Kim

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[115] The special master appointed in the *Smith* Rule 13 proceedings released his recommendations after this note was sent for publication. See *supra* notes 97-104 and accompanying text for the text and a discussion of Hawaii Supreme Court Rule 13.

As reported in the *Honolulu Advertiser*, the master "recommended that the Hawaii Supreme Court suspend the license of [Smith's trial counsel] until he returns to law school and completes all the basic first-year courses, including 'legal ethics.' " The master also recommended that the case be referred to the Office of Disciplinary Counsel for further action. Honolulu Advertiser, April 15, 1987 at A1. Additionally, the master found that Smith's trial counsel did not have the " 'experience, training, nor judgment' required to represent" Smith, who was accused of attempted sodomy in the second degree. *Id.*