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I. MOOTNESS AND CLASS CERTIFICATION

A. INTRODUCTION

Article III of the Constitution conditions judicial power on the presence of a "case or controversy,"[1] which means that there must be an active dispute between adverse legal interests even during all stages of review.[2] After a plaintiff's claim has become moot, jurisdiction is no longer available.[3] In some cases, however, the action may be so short-lived that it will invariably become moot before complete appellate review is possible. In these cases continued jurisdiction may still be permissible—even though the initial injury to plaintiff has ceased—if it is found that the action challenged by the plaintiff is likely to recur and continually evade judicial review.[4] In effect, mootness is circumvented. In the con-

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1. U.S. Const. art. III, § 2, cl. 1 states in pertinent part:

> The judicial Power shall extend to all Cases, in Law and in Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States . . . .

2. DeFunis v. Odegaard, 416 U.S. 312, 319 (1974) (per curiam). In Flast v. Cohen, 392 U.S. 83 (1968), the Supreme Court found that a case or controversy required that a question be "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Id.* at 95. This definition itself encompasses a host of standards as to what is and is not a "case or controversy." An "adversary context" requires federal courts not to render advisory opinions. United States v. Fruehauf, 365 U.S. 146, 157 (1961); or to adjudicate a moot case, DeFunis v. Odegaard, 416 U.S. 312 (1974); or a hypothetical case, Aetna Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240 (1937); or a case where the plaintiff lacks standing. Flast v. Cohen, 392 U.S. 83 (1968). Likewise, certain types of cases are not capable of judicial resolution. The injury must be one for which the courts are capable of granting relief. It must be a "legally cognizable injury." Baker v. Carr, 369 U.S. 186, 208 (1962). The case or controversy doctrine also implicates the related issue of separation of powers. Article III limits judicial intrusion into the business of other branches of government when the questions are purely positical. Flast v. Cohen, 392 U.S. at 95.

3. The basis of the mootness requirement is "to assure that concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. at 204. *See also* Flast v. Cohen, 392 U.S. at 99. *See generally* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 375 n.12.

4. For a detailed analysis of the standards used in determining "capable of repetition, yet evading review" see *id.* at 386-95; Comment, *A Search for Principles of Mootness in*

text of class actions, the mootness issue is complicated by the requirement of Fed. R. Civ. P. 23 that the representative plaintiff be a member of the class.[5]

In *Vun Cannon v. Breed*[6] the Ninth Circuit addressed the question of whether a class action could be maintained when the plaintiff's claim had become moot before the class was certified. Under the circumstances involved, the court held that it would not. The plaintiff in *Vun Cannon* had brought suit challenging administrative transfers of wards of the California Youth Authority to a particular penal institution.[7] The complaint sought declaratory and injunctive relief, as well as certification of the suit as a class action.[8] The district court dismissed the claim on the grounds that the plaintiff's claim had become moot since he had been transferred out of the institution before his complaint was filed.[9] In upholding the district court's decision, the Ninth Circuit reasoned that if a class is not certified before mootness occurs, jurisdiction may be maintained only if the challenged action is (1) capable of repetition to the named plaintiff, and (2) would evade complete judicial review because of the inherently short duration of the action.[10] Since it was uncertain whether Vun Cannon would ever return to the custody of the Youth Authority, the court found the likelihood of repetition speculative and held that continued jurisdiction was improper.[11]

Federal Courts, part one, The Continuing Impact Doctrines, 54 TEXAS L. REV. 1289, 1296-1308.

5. FED. R. CIV. P. 23(a) Prerequisites to a Class Action. "One or more members of a class may sue or be sued as representative parties on behalf of all . . . ."

6. 565 F.2d 1096 (9th Cir. 1977) (per Koelsch, J.; the other panel members were Hufstedler, J. and McGovern, D.J.).

7. *Id.* at 1097. The plaintiff was challenging the authority of the Director of the California Youth Authority to transfer Youth Authority wards to the Deuel Vocational Institution (DVI) under CAL. PENAL CODE § 2037 (West 1970). DVI is an intermediate security institution for "young men, too mature to be benefited by the programs of institutions under the jurisdiction of the Youth Authority and too immature in crime for confinement in prisons." CAL. PENAL CODE § 2036 (West Supp. 1978). The suit was brought as a civil rights action under 42 U.S.C. § 1983 (1976) which states that "[e]very person who, under color of any statute, . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law . . . ."

8. FED. R. CIV. P. 23(B) provides that "[a]n action may be maintained as a class action if . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

9. The district court also dismissed the suit for failure to state a substantial federal question. 565 F.2d at 1097.

10. *Id.* at 1100-01.

11. The initial Ninth Circuit opinion in *Vun Cannon* went unpublished. On rehearing the Court stated that plaintiff was no longer in custody of the Youth Authority, although

B. Mootness and Class Certification: Supreme Court Precedent

The Supreme Court in *Sosna v. Iowa,*[12] while acknowledging that a named plaintiff must be a member of the class at the time of certification and throughout appeal,[13] held that the case or controversy requirement may be satisfied in spite of mootness as to the named plaintiff if there was certification of the class prior to the mootness. The Court reasoned that certification endows the class with "jurisprudential existence"[14] sufficient to allow it to succeed to the adversary position of the mooted plaintiff. However, there may be situations where the named plaintiff's claim has become moot before the district court could even reasonably be expected to certify the class. To prevent the issue from always evading review, the Supreme Court, in an historical footnote to *Sosna,*[15] introduced the doctrine of "relation back." This permits certification after mootness to become effective from the time of the filing of the complaint.[16] The legal fiction of relation back circumvents the requirement that the plaintiff be a class member at the time of certification.

Shortly after *Sosna* the Supreme Court applied the doctrine of relation back in *Gerstein v. Pugh.*[17] In a subsequent case, *Weinstein v. Bradford,*[18] the Supreme Court explained "capable

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he had been in such custody when the suit was commenced. As such, the Youth Authority's "unfettered discretion" to retransfer plaintiff to DVI "posed a threat of injury sufficiently real and immediate to provide him with a personal stake in the transfer procedure . . . thus satisfying the case or controversy requirement of Article III." *Id.* As to its reason for granting a rehearing, the court stated that "because of our own further research, we have now concluded that plaintiff . . . lacks standing to maintain the action." *Id.* at 1097-98. *See also* Preiser v. Newkirk, 422 U.S. 395, 403 (1975).

12. 419 U.S. 393 (1975).

13. *Id.* at 401.

14. 565 F.2d at 1099.

15. 419 U.S. 393, 402 n.11, quoted in *Vun Cannon,* 565 F.2d at 1098 n.2.

16. *Id.* The court stated:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Id.

17. 420 U.S. 103, 110 n.11 (1975).

18. 423 U.S. 147 (1975). Although Bradford brought his suit as a class action, the class was refused certification. But Bradford's claim did not become moot until after the court of appeals heard his case.

of repetition, yet evading review" in another context as requiring a reasonable expectation that the same named plaintiff be subject to the same action again.[19] In *Vun Cannon* the Ninth Circuit read *Gerstein* in the light of *Weinstein* and incorporated the latter's explanation of "capable of repetition, yet evading review" into the relation back exception.[20] The Ninth Circuit, therefore, did not ask whether the challenged action would evade review as to the unnamed class members, but rather limited the question to whether the issue would evade review as to the same *named* class representative: plaintiff Vun Cannon.[21]

C. THE VARIOUS TESTS

The doctrine of "capable of repetition, yet evading review" has varying meanings depending on how mootness affects certification of the class in the particular case.[22] Since the doctrine has

19. *Id.* at 149.

20. 565 F.2d at 1100. The Ninth Circuit's analysis is based on the somewhat confusing language of footnote 11 in *Gerstein*. In *Gerstein* the Court discussed "capable of repetition" twice, each time with different emphasis that is often overlooked. First the Court based its jurisdiction on the fact that the class was certified and therefore the mooting of the representative plaintiff's claim did not destroy jurisdiction. 420 U.S. at 110 n.11. This was based on its holding in Sosna v. Iowa, 419 U.S. 393 (1975). The Court found that the "individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review." *Id.* Next, the Court addressed the issue of plaintiffs' lack of membership in the class at the time of certification. "It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain." *Id.* Thus in its analysis of the application of relation back, the Court did not require that the action be capable of repetition to the individual plaintiff, but only that a live controversy exist as to the class.

21. Application of the *Weinstein* standard to the case was appropriate since no class had been designated by the trial court. But the Ninth Circuit also indicated that the relation back doctrine would be unavailable even when issues are "capable of repetition, yet evading review" if certification has been refused by the district court, as it impliedly was here. 565 F.2d at 1100 n.6. But the Ninth Circuit's finding that relation back is unavailable if the trial court refused certification is based on an incorrect distinction between *Gerstein* and *Weinstein*. The unavailability of relation back in *Weinstein* did not turn on the *refusal* but rather on the *lack* of certification, regardless of its cause. The result in *Weinstein* would have been no different if the district court had merely not ruled on the certification motion. Without a class and in the absence of a suitable situation for relation back, the determination of a live controversy requires repetition to the plaintiff and evading appellate review. In *Gerstein*, however, the Court was presented with a certified class, and thus, the existence of the class itself against whom the acts could be repeated and the fact that the issue would evade review, satisfied Article III. The purported distinction between *Weinstein* and *Gerstein* is only a difference in the standards used for determining appellate jurisdiction for a class which has been certified as opposed to a class which has not. The question of when relation back is appropriate is a separate inquiry.

22. FED. R. CIV. P. 23(a) provides that a class member may sue as a representative

virtually developed into a term of art, it is important to understand, and keep distinct, the various standards used in the class action context to determine mootness or satisfaction of the case or controversy requirement of Article III.

The Individual Plaintiff Test as Applied to Class Actions: Weinstein

When an action would evade review and the claim of the representative plaintiff becomes moot after trial and there has been no class certification the determination of the propriety of jurisdiction is based solely on the plaintiff's personal stake in the outcome of the litigation. The question is viewed as though the plaintiff brought suit in a purely individual capacity. This test for the repetition-evasion doctrine allows jurisdicion to continue only over the individual plaintiff and not over the class.[23] In *Weinstein v. Bradford,*[24] a prisoner was the named plaintiff in a class action challenging parole board procedures. The challenged action was not so brief so as to prevent the district court from ruling on the motion for certification. The court merely refused to certify the class. The plaintiff went to trial and continued to litigate his

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of the class "only if (1) the class is so numerous that joinder of all members is impracticable . . . ." Since a class action is essentially a joinder of individual claims, there may be persons in the class other than the named plaintiff with a live controversy to satisfy Article III. The concept of "capable of repetition, yet evading review" was developed in a nonclass action context. *See* Southern Pac. Terminal Co. v. I.C.C., 219 U.S. 498 (1911).

23. In many class actions where there is no certification of the class, it is not because there is express refusal of certification, but rather because the trial court makes no ruling at all on the motion. In determining whether such cases can be retained on appeal, the plaintiff rarely presents a demonstrated likelihood of repetition, a factor which is often not even examined. *See, e.g.,* Boyd v. Justices of the Special Term, 546 F.2d 1334 (9th Cir. 1977). When the district court defers a ruling on the class to make a determination on the merits, mootness often intervenes, Banks v. Multi-Family Mgmt., Inc., 554 F.2d 127 (4th Cir. 1977), or arises because of an adverse ruling against the plaintiff on the merits. Although courts have found that plaintiff's failure to prove his case is not determinative of the propriety of class actions, McGill v. Parsons, 1532 F.2d 484, 488-89 (5th Cir. 1976); Napier v. Gertrude, 542 F.2d 825 (10th Cir. 1976), *cert. denied,* 429 U.S. 1049 (1977), the effect is generally the same as if the district court had denied certification. *Cf.* East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977) (plaintiff's failure to prove his case has no effect on class status when the class has already been certified). In such cases the analysis of "capable of repetition, yet evading review" usually focuses on the evasion aspect and is generally found not to exist. Some courts also inappropriately try to apply the relation back doctrine, but uniformly reject it because they find the actions will not evade review. *See* Boyd v. Justices of the Special Term, 546 F.2d 1334 (9th Cir. 1977); Banks v. Multi-Family Mgmt., 554 F.2d 127 (4th Cir. 1977); and Napier v. Gertude, 542 F.2d 825 (10th Cir. 1976), *cert. denied,* 429 U.S. 1049 (1977). Only *Banks* notes that in relation back the concept of "evading review" requires that the action be so short that it not only evade full appellate review, but also that it terminate even before certification by the trial court is possible.

24. 423 U.S. 147 (1975) (per curiam).

personal claim so that on appeal he had to satisfy the jurisdictional requirement without the aid of the now non-existent class. The Supreme Court held the claim to be moot because plaintiff had been released from prison prior to High Court review and there was no demonstrated probability that he would be subjected to the same action again by becoming a prisoner a second time.[25]

Certification and Judicial Convenience: Sosna

A class may sustain jurisdiction even though the claim of the named plaintiff has become moot if certification preceded mootness. In *Sosna v. Iowa,*[26] by the time the case came before the Supreme Court the representative plaintiff's challenge to a durational residency requirement for a divorce action had become moot because the plaintiff had resided in the state for the requisite time.[27] But the trial court had certified the class before her claim became moot. The Supreme Court made clear that had Sosna sued only on her own behalf jurisdiction could not have been maintained. The situation was not capable of repetition as to her unless she were to leave Iowa, return to the state, and then sue for divorce before having satisfied the residency requirement. The issue would not evade review since her current satisfaction of the residency requirement allowed her to seek a remedy in the state courts.[28] But since Sosna had sued in a representative capacity, the subsequent mooting of her claim as the named plaintiff, did not automatically destroy jurisdiction over the class. Once the class had been certified by the district court, it had achieved "a legal status separate from the interests asserted" by Sosna.[29] Thus on appellate review the existence of a live controversy was determined with regard to the members of the class

25. *Weinstein* clarified the fact that although a suit is brought as a class, if it is not certified by the district court (and, impliedly, if relation back is inapplicable), the jurisdictional question is treated as though the plaintiff alone had brought suit; since the class has no legal existence, any repetition to members of the class is irrevelant for jurisdictional purposes. *Id.* at 149. Where, as here, the district court had time to rule on a certification motion and did so by refusing to certify, the relation back concept seems inappropriate, if the plaintiff's claim does not become moot until after the district court's final ruling. Nevertheless, courts often examine the possibility of applying a belated certification. *See, e.g.*, cases cited at note 23 *supra.*

26. 419 U.S. 393 (1975).

27. By the time of review Mrs. Sosna had lived in Iowa the required one year period and had also obtained a divorce in New York. *Id.* at 398 & n.7. For a detailed discussion of *Sosna* and divorce durational residency requirements, see *Constitutionality of Divorce Durational Residency Statutes,* 26 CASE. W. L. REV. 257 (1976).

28. 419 U.S. at 399-400.

29. *Id.* at 399.

rather than the representative plaintiff. Moreover, this determination was not based on a careful scrutiny of the likelihood of future infliction of such actions against the members of the class. The Court merely presumed that "[the state of Iowa] will enforce [the statute] against those persons in the class that the District Court certified."[30] Subsequently the Court stated that if the class is certified before mootness arises,[31] the issue need not be of the type that would evade review;[32] a live controversy could be presumed from the judicial recognition of the class.[33] In these circumstances, therefore, jurisdiction on appeal is usually granted on the basis of prior certification[34] without any additional requirements.[35] However, if the action does not meet the stan-

30. *Id.* at 400.

31. As to certification after mootness, see text accompanying notes 36-41 *infra*.

32. The Court indicated that even where a duly certified class exists, the named plaintiff must continue to have a personal stake in the outcome at all stages of appeal, unless the action was of a temporary nature (as in the one year residency requirement) that would moot the claim before any plaintiff could pursue full appellate review. *Id.* at 401-02. This idea was reiterated in Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975). The Court later negated the suggestion that the named plaintiff must always retain a personal stake in the outcome unless the issue would evade review. In Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), the Court concluded that such a standard was not required so long as the class had been certified before mootness arose. On review the only inquiry was whether a live controversy existed in the class. *See* Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1971). *Accord,* Walker v. Hughes, 558 F.2d 1247, 1249 (6th Cir. 1977).

33. This principle was applied by the Third Circuit to a different fact situation in Mayberry v. Maroney, 558 F.2d 1159 (3d Cir. 1977) (attorney's continued representation of class after request by plaintiff to withdraw implied a live controversy).

34. Even if the class is certified before the named representative's claim is mooted, the court is not required to retain jurisdiction. In Kremens v. Bartley, 431 U.S. 119 (1977), changes in state law made after certification of the class had various effects on many class members, causing the Court to suggest that the class might no longer be properly certified.

35. Except, of course, there must be a live controversy as to a member of the class. Sosna v. Iowa, 419 U.S. 393, 402 (1975). The importance of the certification order cannot be overemphasized. In Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975) graduation mooted the claims of the student plaintiffs. The Court dismissed the action since the class was not "properly certified." Even though the trial court determined that the plaintiffs were proper representatives of the class, it apparently had not strictly complied with rule 23(c)(1) certification or 23(c)(3) identification of the class members in the judgment. *Id.* at 129-30. Mere treatment by the district court of the claim as a class suit is not sufficient. Without proper class certification mootness of the named representatives' claim terminates the action. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 429 (1976); Baxter v. Palmigiano, 425 U.S. 308, 310 n.1 (1976). *But see* Lasky v. Quinlan, 558 F.2d 1133, 1136 (2d Cir. 1977) (district court refused certification and the Court of Appeals held that the class could not be certified on appeal). *See* Cruz v. Hauck, 515 F.2d 322 (2d Cir. 1975), *cert. denied,* 424 U.S. 917 (1976) (trial court treated as class action and circuit court allowed relation back on appeal). Reliance on the act of certification as the touchstone for continuance of the class is based on the fact that certification "significantly affects the mootness determination." Sosna v. Iowa, 419 U.S. at 399 n.8.

Certification is more than a mere formality because it leads to important legal consequences. A judgment on the merits binds all class members. FED. R. CIV. P. 23(c)(3). A

dards of "capable of repetition, yet evading review" the court may still deny jurisdiction in order to avoid premature decisions on constitutional issues.

Certification After Mootness—Relation Back: Gerstein

A third test of repetition-evasion can be applied when mootness precedes certification. Here jurisdiction is appropriate *only* if the action would evade review because the action is so inherently brief that it would normally terminate before the district court could reasonably rule on the certification motion.[36] Although rule 23 requires that the plaintiff be a member of the class at the time of certification, under this test the certification order is allowed to "relate back" to the time of the filing of the complaint when the plaintiff was still a member of the class. This extends jurisdiction *only* to cases that otherwise could not even be litigated at the trial court level.

The Supreme Court applied this test in *Gerstein v. Pugh.*[37] Although mootness had disqualified the plaintiffs as members of the class, belated certification by the district court was permitted because the challenged action, pretrial detention, would invariably end before certification was possible no matter who brought the action, or when it was brought.[38] The test does not require that the action be likely to be repeated against the named plaintiff since the court recognized that the likelihood of repetition to the same plaintiff is often quite remote.[39] Thus, where the action is so short-lived that even the most diligent plaintiff could not obtain certification of the class,[40] the courts have discretion to

case cannot be settled or dismissed without court approval. FED. R. CIV. P. 23(e); Satterwhite v. City of Greenville, 557 F.2d 414, 416 (5th Cir. 1977). Certification not only benefits the class when the representative prevails, but precludes others from further litigating the issue when it is decided against them. Napier v. Giertrude, 542 F.2d 825, 828 (8th Cir. 1976), *cert. denied*, 429 U.S. 1049 (1977).

36. Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1975); Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); Zurak v. Regan, 550 F.2d 86, 91-92 (2d Cir.), *cert. denied*, 433 U.S. 914 (1977); McGill v. Parsons, 532 F.2d 484, 488 (5th Cir. 1976).

37. 420 U.S. 103 (1975).

38. Although the class had been certified, it was unclear from the record if the named plaintiffs, whose claims were now moot, were members of the class at the time of certification as required by *Sosna*.

39. The possibility of repetition to the plaintiff is really secondary to the question of whether the issue would evade review. In Ringgold v. United States, 553 F.2d 309 (2d Cir. 1977), the court found the action moot because the plaintiff's own action (protesting the U.S. Military Academy Honor Code and subsequently resigning from the Academy after the district court refused certification), and not the temporary nature of the challenged action, terminated the suit.

40. *See* Basel v. Knebel, 551 F.2d 395 (D.C. Cir. 1977), in which the court found that

apply the relation back test and allow a belated certification of the class.[41] It should be noted that in practice, application of the relation back test is quite uncommon.

D. Other Mootness Situations and The Applicability of Vun Cannon

The coverage of these tests is incomplete. Other important mootness situations exist where the lower courts lack guidance in deciding whether to grant or withhold jurisdiction: (1) the district court adjudicates the issue on the merits without making a determination of class certification;[42] (2) the lower court dismisses the suit on preliminary grounds without ruling on the class action motion;[43] (3) the district court refuses jurisdiction on the basis of mootness when it should have applied "relation back."[44]

The *Weinstein* test provides no guidance as to class jurisdiction in any of these situations because it is limited to questions

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where a redetermination of eligibility for food stamps mooted plaintiff's claim before certification, belated certification by the district court was proper since the action was capable of repetition to the plaintiff and would evade review. Moreover, the case fell within the relation back exception because "whether or not the challenged regulations raise a live controversy with regard to appellant's individual claim, it is clear that a live controversy exists with regard to class members who are currently being denied prior hearings as a result of the regulations." *Id.* at 397 n.1.

41. Circuit cases applying *Sosna* and *Gerstein* have not had the problem of uncertainty as to class membership at the time of certification that was present in *Gerstein*. In these situations the plaintiffs were clearly no longer members of the class by the time the district court ordered certification. *See, e.g.,* Ahrens v. Thomas, 570 F.2d 286 (8th Cir. 1978) (without discussing capability of repetition either to the individual or the class, the court merely noted that the action would evade review. The court also found competency of class counsel as additional justification for finding a live controversy); Zurak v. Regan, 550 F.2d 86 (2d Cir. 1977) (temporary nature of the action, likelihood of repetition to the class, and fact that plaintiff's counsel was representing other class members satisfied case or controversy requirement). *See also* McGill v. Parsons, 532 F.2d 484 (5th Cir. 1976) (court did not discuss the relation back concept but sustained jurisdiction on the basis of possibility of future injury to the individual and members of the class).

The conclusion one must draw from these cases is that once the class is certified even though the representative's individual claim is moot, the case or controversy requirement is satisfied if there is a personal stake in the litigation by members of the class. Although some cases do examine the possibility of repetition to the named plaintiff, such a finding is not necessary to appellate jurisdiction if the class has previously been certified.

42. *See e.g.,* Napier v. Gertude, 542 F.2d 825 (10th Cir. 1976), *cert. denied,* 429 U.S. 1049 (1977). A different situation is presented when the trial court, without ruling on the class motion, proceeds to the merits and determines that the plaintiff was never a member of the class. East Texas Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 400 (1977).

43. Banks v. Multi-Family Mgmt., Inc., 554 F.2d 127 (4th Cir. 1977); Kuahulu v. Employers Ins. of Wausau, 557 F.2d 1334 (9th Cir. 1977); Boyd v. Justices of Special Term, 546 F.2d 526 (2d Cir. 1976); Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975), *cert. denied,* 424 U.S. 917 (1976).

44. Bradley v. Housing Authority of Kansas City, 512 F.2d 626 (8th Cir. 1975).

of jurisdiction over the *individual* plaintiff.[45] Under *Weinstein,* the representative plaintiff may continue if the action will evade review and is capable of repetition to him, but this in no way furthers jurisdiction over the class. Likewise, the *Sosna* test is unavailable in these situations to sustain jurisdiction over either the plaintiff or the class because it requires that the class be previously certified.[46] The only situation in which jurisdiction over the class may be maintained is where the *Gerstein* relation—back test is appropriate. In order to apply relation back the challenged action must terminate "before the district court can reasonably be expected to rule on a certification motion."[47]

In the first and second situations if the action did not become moot until after the district court's final ruling, relation back would not be appropriate since the district court obviously had time to rule on the motion but failed to do so.[48] In these instances there is no way to maintain jurisdiction over the class and only the plaintiff may proceed under the *Weinstein* test.[49] In the last situation where the district court erroneously refuses relation back although the claim is already moot it is unclear if this error can be corrected on appeal since the doctrine states that it is the district court which can belatedly certify the class.[50] In addition,

45. *See* note 25 *supra.*

46. Board of Comm'rs v. Jacobs, 420 U.S. 128, 129 (1975).

47. Sosna v. Iowa, 419 U.S. 393, 401 n.11 (1975).

48. Another aspect of mootness arises as a hybrid category: where the plaintiff's claim is live when it reaches the district court but is mooted by intervening events before the district court can certify the class. In Frost v. Weinberger, 515 F.2d 57 (5th Cir. 1975), *cert. denied,* 424 U.S. 958 (1975), the Fifth Circuit found intervening mootness no hindrance when the district court subsequently certified the class. The plaintiff was challenging administrative procedures of the Social Security Administration on redetermination of eligibility for benefits. After the complaint was filed, but before certification, the trial court ordered the SSA to hold a hearing to determine the plaintiff's status. Although the hearing in effect mooted plaintiff's claim, the court ordered certification of the class. The court of appeal used a two-step approach to the jurisdiction question. First it determined that jurisdiction was proper since the certified class survived the mooting of the named plaintiff's claim. Secondly, it found that belated certification by the district court had been proper since the trial judge had been prepared to grant class action status all along, but ordered the hearing first to relieve the immediate financial hardship of the plaintiff. Relation back was appropriate since such cases would normally be mooted by the administrative agency before class determination, unless the plaintiff was willing to suffer the consequences of a delayed hearing in order to first obtain certification. Since the rationale for requiring that the plaintiff be a member of the class at the time of certification was to assure vigorous representation of the class, the court found that the "plaintiffs, or more realistically, their counsel," would adequately protect the interests of the class. *Id.* at 64.

49. *See* note 25 *supra.*

50. Some courts have found that a trial court's express refusal to certify cannot be corrected on appeal. Winokur v. Bell Federal Sav. and Loan Ass'n, 560 F.2d 271 (7th Cir.), *cert. denied,* 98 S. Ct. 1507 (1977); Lasky v. Quinlan, 558 F.2d 1133 (2d Cir. 1977). *But see,* Valentino v. Howlett, 528 F.2d 975 (7th Cir. 1976).

in the second situation, applicability of relation back is unclear where the action was moot on arrival at the trial court but was dismissed on preliminary grounds without a determination of class certification.[51]

The *Vun Cannon* panel made a perfunctory finding that relation back is not available if the district court refused certification of the class.[52] Since the normal appellate function is to review the trial court's holdings, this determination should have been reviewed. The Ninth Circuit's reason for abstaining in determinations of certification at the appellate level may be based on the traditional deference given to factual findings of the trial court, insofar as denial of certification may have been based on a factual finding of noncompliance with rule 23 independent of any mootness problem. However, the district court may have refused certification on nonfactual grounds without having stated its reason for refusal. In this case the court of appeals would be unnecessarily limiting its powers of review.

Even if the Ninth Circuit believes that class certification is exclusively a trial court perogative, it can always remand the action to the district court for reconsideration of the certification motion.[53] The Fifth Circuit has imposed less self restraint in this situation and has allowed relation back of certification on remand. In *Jones v. Diamond*[54] short-term pretrial detainees had been refused certification by the district court. Apparently, the refusal was based not on a misunderstanding of relation back but rather on a factual determination having nothing to do with mootness.[55] The Fifth Circuit found this case to be squarely within the *Gerstein* exception and, in obvious conflict with the Ninth Circuit, allowed remand to the trial court for determination of compliance with other rule 23 provisions.[56] The Ninth Circuit itself, in *Inmates of San Diego County Jail v. Duffy*,[57] where the plaintiffs' claim had become moot before it came to the district court and certification was refused on grounds unrelated to mootness, determined that a belated certification was warranted even at that late date and remanded to the trial court for

51. *See* note 43 *supra*.
52. 565 F.2d 1096, 1100 n.6, 1101. *See* note 21 *supra*.
53. *Contra*, Bradley v. Housing Auth. of Kansas City, 512 F.2d 626 (8th Cir. 1975).
54. 519 F.2d 1090 (5th Cir. 1975).
55. *Id.* at 1094.
56. *Id.* at 1097.
57. 528 F.2d 954 (9th Cir. 1975).

a determination of the issue.[58] The *Vun Cannon* court gave no explanation for this change of policy.

In *Vun Cannon* the Ninth Circuit intimated that it might grant jurisdiction when the district court dismisses an action and purposely avoids making a determination on class status.[59] Rule 23(c)(1) expressly mandates that a class determination be made by the district court as soon as practicable after commencement of the action.[60] Thus, after the plaintiff's claim becomes moot, the Ninth Circuit suggested that jurisdiction over the claim is not automatically precluded when absence of certification is not due to lack of diligence by the plaintiff in moving for certification but due to the trial court's failure to make a timely ruling on the certification motion.[61]

It would seem that the only means by which the appellate court could retain jurisdiction over the class would be by certifying the class at this stage. Even though lack of certification in such a case is due to district court error, a related back certification, while apparently equitable, would not seem consistent with Supreme Court precedent. Since the relation back doctrine is intended for cases where the challenged action terminates as to the plaintiff before the trial court has time to make a ruling, the doctrine would be inapplicable where the court did in fact have time to make such a finding but merely failed to do so and the action only became moot after the trial court's final ruling. The only theory consistent with such a position is that relation back is applicable in any mootness situation where, but for the district

58. *Id.* at 955-57.

59. 565 F.2d 1096, 1101 n.7.

60. In Bradley v. Housing Auth. of Kansas City, 512 F.2d 626 (8th Cir. 1975), the court found that defendant had deliberately mooted plaintiff's claims and the district court had erred in not ruling on the class certification motion as soon as practicable. Even though the court felt such circumstances militated against a finding of mootness (particularly since the issue would evade review as to the class), the court dismissed the claims as moot, finding relation back inapplicable except by the district court in the first instance. *Id.* at 627-29. For authority that the trial court must make a ruling on the class action motion as soon as practicable after the commencement of the action, *see, e.g.*, Zurak v. Regan, 550 F.2d 86, 92 (2d Cir. 1977).

61. The Ninth Circuit had previously suggested this proposition in Kuahulu v. Employers Ins. of Wausau, 557 F.2d 1334 (9th Cir. 1977). In *Kuahulu*, where the plaintiff expressly refused to move for certification even though it was apparent that the plaintiff's claim might soon become moot, the court of appeals refused jurisdiction, and noted the importance of plaintiff's awareness that the claim might become moot before full adjudication was possible. *Id.* at 1337. In *East Texas Motor Freight v. Rodriguez*, the Supreme Court found that plaintiff's failure to move for certification of the class was an indication that he could not "fairly and adequately protect the interest of the class." 431 U.S. at 404-05.

court error, certification would have preceded mootness. Since on the basis of *Vun Cannon* this is obviously not the position of the Ninth Circuit, it is doubtful the court will allow a belated certification in this situation.

Moreover, this position is at odds with the court's abstention from jurisdiction when the district court refused certification of the class. If the district court has indeed erred in both cases the error should no more be curable when the district court was merely lax than when it misapplied the law.

If the Ninth Circuit is willing to apply relation back in spite of district court inaction where the case does not become moot until after district court adjudication, the court should likewise be willing to belatedly certify when such a case was already moot by the time it reached the district court. In these circumstances relation back seems particularly appropriate since the action was so brief that it ceased even before certification was possible. *Vun Cannon* involved this situation because the plaintiff's claim had already been mooted before reaching the trial court. Yet the only explanation by the circuit court as to why relation back was inappropriate was a reference to the fact that the plaintiff was not diligent in moving for certification.[62]

E. Conclusion

Although the original impetus of the relation back doctrine was to avoid the harshness of defeating jurisdiction when actions are so temporary that they would prevent even certification, the *Vun Cannon* analysis did not raise this question.[63] Instead the court based its holding on a determination that the action was not capable of repetition to the plaintiff.

Although *Vun Cannon* does not provide any clear standards for mootness issues that are not encompassed by the traditional Supreme Court tests, the case brings out some of the complicated variables that interact in the jurisdictional determination.[64] Since

62. 565 F.2d at 1101 n.7.

63. *Id.* at 1101.

64. Perhaps the greatest variable in the mootness determination is the element of judicial discretion that is encompassed by the case or controversy requirement. Although the Supreme Court has delineated the standards for "capable of repetition, yet evading review," under this doctrine it has retained jurisdiction in an number of cases without even considering the possibility of repetition to the plaintiff. American Party v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Moore v. Ogilvie, 394 U.S. 814 (1969). *See generally* Clark v. Valeo, 559 F.2d 642, 690 n.21 (D.C. Cir. 1977)(MacKinnon,

there are so many fact situations in which mootness may arise and many courses of action open to the trial court and the parties, it is difficult to formulate a rule that is at once comprehensive, certain, and consistent with the rationale of other mootness tests.

In this situation the practitioner is best advised not to rely on the relation back doctrine in hopes of obtaining certification, but to diligently pursue certification at the trial court level as soon as possible after filing the complaint. He or she should not only make a timely motion, but should impress upon the court the need for an immediate ruling, especially when the court is dismissing the suit.

Frances K. Wisch

II. ATTORNEY-CLIENT PRIVILEGE: NO WAIVER OCCURS WHERE CONFIDENTIALITY BREACHED UNDER COURT ORDER

A. INTRODUCTION

In *Transamerica Computer Company v. International Business Machines Corporation*[1] plaintiff sought discovery of 6,000 pages of documents claimed to be privileged by the defendant. During discovery in a previous unrelated antitrust suit,[2] International Business Corporation (IBM) inadvertantly produced documents which might have been withheld either as attorney-client communications or attorney work-product.[3] The present plaintiff, Transamerica Computer Company (TCC), sought discovery of those same documents.[4]

J., dissenting). *Cf.* Dunn v. Blumstein, 405 U.S. 330 (1972)(although certified as a class action, the Court did not rely on certification as the basis for its jurisdiction following mootness of the named plaintiff's claim). The parameters of judicial discretion are broad enough to apply the case or controversy standards loosely in order to retain jurisdiction over a mooted claim or narrowly in order to avoid decisions on constitutional issues. Flast v. Cohen, 392 U.S. 83, 97-100 (1968).

1. 573 F.2d 646 (9th Cir. Apr., 1978) (per Waterman, J.; the other panel members were Carter and Kennedy, JJ.). This was one of seven suits consolidated for trial by the Judicial Panel on Multidistrict Litigation.

2. *See* Control Data Corp. v. International Business Machines Corp., No. 3-68-312 (D. Minn.) (settled before trial).

3. The Ninth Circuit opinion did not distinguish between the two privileges because a voluntary disclosure to an opposing party would result in a waiver of either. 573 F.2d at 647 n.1.

4. *Id.* at 647. Similar arguments were unsuccessful when the government sought discovery of the same documents in its massive antitrust suit against IBM. *See* Interna-

The Ninth Circuit affirmed the denial of TCC's discovery motions, ruling that a waiver of privilege may not be indirectly compelled.[5] Applying this rule to the extraordinary circumstances precipitated by the discovery orders in the previous litigation, the court held that indirect compulsion had been present.[6]

B. Background

The question of waiver presented to the Ninth Circuit arose out of the monumental logistical problems confronting IBM under the pretrial order in the prior suit in the United States District Court for the District of Minnesota. The order required IBM to produce 17 million pages of documents for inspection and copying within a three month period.[7] In order to prevent disclosure of privileged documents, IBM instituted a multi-level document screening procedure.[8] IBM concurrently moved for an order "determining that under the unique circumstances there, any inadvertent production by IBM of certain allegedly privileged documents did not constitute a waiver of privilege."[9] The ruling on the motion in the previous suit expressly preserved claims of privilege, so long as reasonable screening practices were maintained.[10]

TCC argued that the objective test of waiver should be applied to the facts of the case.[11] IBM cited cases supporting the view that the presence or absence of the subjective intent to waive privilges is determinative.[12] The Ninth Circuit rested its decision

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tional Business Machines Corp. v. United States, 480 F.2d 293 (2d cir. 1973), *rev'g on other grounds*, 471 F.2d 507 (2d Cir. 1972) (rehearing en banc).

5. 573 F.2d at 652.

6. *Id.* at 651.

7. *Id.* at 648. The documents erroneously disclosed to Control Data Corp. (CDC) totalled less than 6,000 pages. The screening practices resulted in withholding an additional 491,000 pages under a claim of privilege. *Id.* at 650. *See also* note 8 *infra*.

8. The court quoted at length from an affidavit describing the mechanics of IBM's screening program. *Id.* at 649. As the final step, IBM placed an attorney in the room where CDC inspected the pre-screened documents. CDC moved for the "interceptor" attorney's removal, which precipitated the Minnesota District Court's ruling preserving claims of privilege. *Id.* at 649. *See also* Judge Timbers' dissent in International Business Machines Corp. v. United States, 493 F.2d 112, 120 (2d Cir. 1973).

9. 573 F.2d at 649.

10. *Id.* at 650. It should be emphasized that neither the District Court in Minnesota nor the Ninth Circuit ruled on the question of whether the documents actually met the requirements for privileged status. The CDC litigation was settled before trial. The present case involved an interlocutory appeal. The District Court in California will now have to rule on the status of each document for which the claim of privilege has been preserved. *Id.*

11. *Id.*

12. *Id.*

upon a principle of law agreed to by both parties: no waiver results from compelled production of documents.[13] While agreeing on the point of law, TCC argued that the previous production was inadvertent and therefore voluntary, not compelled. IBM argued that the production was compelled by the circumstances.

C. The Ninth Circuit Decision

Judge Waterman, writing for the Ninth Circuit, turned to proposed rules 511 and 512 of the Federal Rules of Evidence[14] for guidance.[15] The parties acknowledged that although the rules were not adopted, the United States Supreme Court's approval of the rules did, at least, indicate the federal attitude toward privileges.[16] Rule 511 would have made voluntary disclosure of confidential information by the holder of any privilege act as a waiver of that privilege.[17] Rule 512 would have excluded from evidence privileged information disclosed under compulsion or without opportunity to claim the privilege.[18]

The court stated that the accellerated discovery order in the prior lawsuit "imposed such incredible burdens on IBM that it would be disingenuous for us to say that IBM was not, in a very practical way, 'compelled' to produce privileged documents . . . ."[19] The court also concluded from its own examination of the facts[20] that "IBM did not waive its claim to its privilege

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13. *Id.* at 650-51.

14. 56 F.R.D. 183, 258 (1973). For the text of the rules *see* notes 17 & 18 *infra* and accompanying text.

15. 537 F.2d at 651.

16. *Id.*

17. Proposed Fed. R. Evid., 511 (Not Enacted):

> Rule 511: Waiver of Privilege By Voluntary Disclosure
> A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

56 F.R.D. 183, 258 (1972).

18. Proposed Fed. R. Evid., 512 (Not Enacted):

> Rule 512: Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege
> Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

56 F.R.D. 183, 259 (1972).

19. 573 F.2d at 651.

20. *See* note 8 *supra* and accompanying text.

because IBM did not have an adequate enough opportunity to claim it . . . ."[21]

D. The Court's Misplaced Reliance

The court's reliance on proposed rule 512 is misplaced. Judge Waterman paraphrased[22] the rule to read: "This proposed rule would have prohibited *the use* of any privileged matter if its disclosure had been 'compelled erroneously' or had been made 'without the opportunity to claim the privilege.' "[23] As the Advisory Committee Notes accompanying the rule point out, the rule is merely remedial, forbidding the use of the disclosed material *at trial,* rather than restoring confidentiality.[24] The rule does not discuss the status of the disclosed confidential material during *pretrial discovery,* which was the subject of the appeal in this case.

Under the provisions of The Federal Rules of Civil Procedure, rule 26, documents need not themselves be admissible at trial to be discoverable, they need only be "not privileged . . . relevant . . . [and] reasonably calculated to lead to the discovery of admissible evidence."[25] Even if the documents were inadmissible

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21. 573 F.2d at 652. The court also finds support for its holding in the Minnesota court's ruling in the CDC case on IBM's motion, stating:

> As the judicial officer directly in charge of supervising the discovery proceedings in that litigation, he was in an ideal position to determine whether the timetable he himself had imposed was so stringent that, as a practical matter, it effectively denied IBM the opportunity to claim the attorney-client privilege for documents it was producing for inspection by CDC. TCC acknowledges that waiver cannot be directly compelled, and Judge Neville's rulings recognize and we so hold, that neither can it be indirectly compelled.

Id. at 652.

22. For the text of rule 512 see note 18 *supra.*

23. *See* 573 F.2d at 651 (emphasis added).

24. Proposed Fed. R. Evid., 512 (Not Enacted):

> Advisory Committee Note
>
> Confidentiality, once destroyed, is not susceptible of restoration, yet some measure of repair may be accomplished by preventing use of the evidence against the holder of the privilege. The remedy of exclusion is therefore made available when the earlier disclosure was compelled erroneously or without opportunity to claim the privilege.

56 F.R.D. 132, 259 (1972).

25. Fed. R. Civ. P. 26, General Provisions Governing Discovery

> (b) Scope of Discovery . . . . (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved . . . . It is not ground for objection that the information sought will be inadmissible at

under rule 512, they would not be characterized as "privileged," within the meaning of rule 26.

The terms of the Advisory Committee Note accompanying the rule correctly state that "[c]onfidentiality, once destroyed, is not susceptible of restoration . . . ."[26] To preserve claims of privilege necessarily restores the element of confidentiality required in all judicial tests of claims of privilege.[27] Had the court not expanded the purpose of rule 512 by the paraphrasing "prohibited *the use,*" the privilege claims could not be sustained under that rule, and the disputed documents would have been subject to discovery under rule 26. The court's reliance and broadening of rule 512 does not diminish the fairness or utility of the result, however, since the decision may be justified in light of earlier cases dealing with waiver.

E. The Objective and Subjective Tests for Waiver

The so-called subjective test determines from the circumstances whether actual intent to waive privilege claims existed prior to the disclosure of the documents.[28] The nominal objective test does not inquire beyond the fact of disclosure.[29] Cases cited by the court and the present litigants point out the divergent results obtained when claims of privilege are put forth after disclosure to a litigation adversary of documents held in general corporate files.[30] The results of these cases, and others purporting

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the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

26. *See* note 24 *supra* and accompanying text.

27. *See* Proposed Fed. R. Evid. 503(b), 56 F.R.D. 183, (1972); United States v. United Shoe Machinery Corp., 89 F. Supp. 349, 354 (D. Mass. 1950); McCormick, Evidence § 91 (2d Ed. 1972), 8 Wigmore, Evidence § 2292 (McNaughton, rev. 1961).

28. The subjective theory of waiver takes into account that the attorney-client privilege is held by the client, and that only an intentional relinquishment or abandonment of a known right constitutes a waiver. This view of privilege and waiver gives maximum effect to the policy reason for the privilege—promoting complete disclosure of facts by the client to his or her counsel.

29. The objective theory of waiver is based upon the obstructions to investigation of the truth which results from any evidentiary exclusion and a preference for full disclosure which is facilitated by narrowly construing privileges. *See* 8 Wigmore, Evidence § 2292 (McNaughton, rev. 1961). *See* the distinction drawn in Ranney-Brown Distributors, Inc. v. E.T. Barwick Indus., Inc., 75 F.R.D. 3 (S.D. Ohio 1977). Therein the court states that the objective result is reached where the contents, rather than the mere existence of documents are known to the party claiming that waiver occurred. This distinction is inconsistent with the rulings in Control Data Corp. v. International Business Corp. No. 3-68-312 (D. Minn.) and cases cited at notes 30 & 31 *infra*.

30. *See* Schaffer v. Below, 278 F.2d 619, 628 (3d Cir. 1960) (upholding the claim of privilege using the subjective intent approach). *See* United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1954) (holding that privilege claims were waived under

to apply the two tests, can be harmonized by examining the circumstances surrounding the disclosures and applying the "indirect compulsion test" used by the Ninth Circuit in the case at bar. For example, where compliance with court orders[31] or subpoenas[32] directly precipitated disclosure, claims of privilege have been preserved in decisions relying on the lack of subjective intent to waive claims. Where confidentiality was breached through carelessness of client or counsel[33] or independent of litigation processes,[34] decisions have relied upon the objective fact of disclosure in holding privilege claims implicitly waived.

F. Conclusion

Avoiding the subjective-objective language of previous opinions, the Ninth Circuit has focused on the element of compulsion.[35] A review of circumstances surrounding disclosure of confidential documents in prior decisions tends to divide the results in those cases into two groups: those where indirect compulsion existed and privilege claims were sustained based upon a lack of subjective intent to waive confidentiality; and those cases lacking an element of compulsion where the objective fact of disclosure

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an objective test when government agents asked permission to inspect files during antitrust investigation). *See* United States v. New Wrinkle, Inc., 1954 Trade Cas. ¶ 67,883 (S.D. Ohio 1954), *quoted* at note 35 *infra*. *See also* text accompanying notes 31-34 *infra*.

31. *See* Connecticut Mut. Life Ins. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1955); Duplan Corp. v. Deering Millikin Corp., 397 F. Supp. 1146, 1163 (S.D. Cal. 1974).

32. *See* Schaffer v. Below, 278 F.2d 619 (3d Cir. 1960); Dunn Chem. Corp. v. Sybron Corp., 1975-2 Trade Cas. ¶ 60,561 (S.D.N.Y. 1975).

33. *See* Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546 (D.D.C. 1970) (client provided documents to counsel, who in turn delivered them to adversary without inspection). *See also* United States v. Grammer, 513 F.2d 673 (9th Cir. 1975) (denying claim of prejudice where prosecutor introduced evidence of the existence of a report prepared by defendant's expert and furnished to prosecutor by defense attorney).

34. *See* United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1954) (attorney-client privilege was ruled lost because documents had circulated outside the "corporate control group"). *See also* In Re Penn Central Commercial Paper Litigation, 61 F.R.D. 453, 462-64 (S.D.N.Y. 1973) (holding that client's permitting attorney to testify at S.E.C. hearing concerning privileged matters waived any claim to privilege).

35. The issue of compulsion was recognized in an early case:

> In the absence of such testimony [as to how U.S. agents came into possession] the court cannot accept the claim Waiver of Privilege. If Government agents come into a place of business and ask or demand to see files and records, and in a spirit of cooperation, the files and records are turned over . . . by the business, it does not, in the opinion of this court, constitute a voluntary turning over of records which can be claimed by the government as a waiver. There is at least an implied coercion in a request or demand by government agents.

United States v. New Wrinkle, Inc., 1954 Trade Cas. ¶¶ 67,883, 69,856 (S.D. Ohio 1954).

was held to be an implicit waiver of confidentiality claims. The Ninth Circuit's "indirect compulsion" approach is, at least, incisive. Coupled with the judicial familiarity with the concept of "compelling circumstances," the Ninth Circuit approach may lead to a more predictable result in litigating belated claims of privilege when documents have been inadvertently disclosed during discovery.

Thomas J. Kristof

III. ATTORNEY-CLIENT PRIVILEGE SINCE FISHER V. UNITED STATES

A. INTRODUCTION

Two recent Ninth Circuit opinions[1] exhibit different modes of applying the Supreme Court's decision in *Fisher v. United States*[2] to the attorney-client and fifth amendment privileges as they pertain to documents. This note briefly reviews the applicable portions of the *Fisher*[3] opinion and examines the manner in which the Ninth Circuit has applied *Fisher* to claims of attorney-client privilege. The opinions in this area hinge upon the testimonial nature of the documents sought,[4] the communicative aspects of production,[5] and the interrelationship between the fifth amendment and the attorney-client confidentiality privileges.[6] The Ninth Circuit's review of the nature of the documents and its analysis of the interrelated privileges are the focal points of this note.

B. BACKGROUND: FISHER V. UNITED STATES

In the *Fisher* decision, the client-counsel relationship was formed *after* the commencement of an Internal Revenue Service investigation into the taxpayer's prior returns.[7] The attorney re-

1. In Re Fishel, 557 F.2d 209 (9th Cir. July, 1977) (per Sneed, J., the other panel members were Koelsch and Trask, JJ.). United States v. Osborn, 561 F.2d 1334 (9th Cir. Sept., 1977) (per Sweigert, D.J.; the other panel members were Hufstedler and Trask, JJ.).

2. 425 U.S. 391 (1976), *aff'g* United States v. Fisher, 500 F.2d 683 (3d Cir. 1974), and *rev'g* United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974).

3. *See generally* Note, *Fifth Amendment Protection of Private Papers*, 90 HARV. L. REV. 76 (1976); Comment, *Fifth Amendment Interpretation in Recent Tax Record Cases*, 46 CINN. L. REV. 232 (1977); Note, *Fifth Amendment Protection Against Self-Incrimination in Tax Records: Fisher v. United States*, 30 SW. L.J. 788 (1976).

4. 425 U.S. at 408-10.

5. *Id.* at 410-13.

6. *Id.* at 402-05.

7. *Id.* at 394.

fused to comply with a subpoena demanding an accountant's workpapers, which had been transferred to the attorney by the taxpayer-client.[8] The Supreme Court, after rejecting an attorney's standing to assert his client's fifth amendment privilege,[9] stated:

> The difficulty is that the taxpayers have erroneously relied on the Fifth Amendment without urging the attorney-client privilege in so many words. They have nevertheless invoked the relevant body of law and policies that govern the attorney-client privilege. In this posture of the case, we feel obliged to inquire whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment.[10]

After concluding that the attorney-client privilege *would protect* against compelled disclosure in such circumstances,[11] the Court examined the application of the fifth amendment privilege to documents in existence prior to formation of the client-counsel relationship.[12]

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8. *Id.* at 395.

9. Id. at 397. The Court emphasized the personal nature of the fifth amendment's protection against being compelled to be a witness against oneself. Id. at 398. The Court found that the framers of the Constitution included a general privacy protection in the fourth amendment and did not redundantly include privacy protection in the fifth amendment. *Id.* at 400.

10. *Id.* at 402.

11. *Id.* at 403. After reviewing the policy and purposes underlying the attorney-client privilege, the Court summarized:

> Where the transfer [of documents from client to counsel] is made for the purpose of obtaining legal advice, the purpose of the attorney-client privilege would be defeated unless the privilege is applicable. "It follows, then, that *when the client himself would be privileged* from production of the documents, either as a party at common-law . . . or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce." 8 Wigmore § 2307 . . . Lower courts have so held.

Id. at 404.

12. *Id.* at 405-13. The Court noted that the accountant's workpapers had been prepared prior to formation of the attorney-client relationship. The Court stated:

> This Court and the lower courts have thus uniformly held that pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice.

Id. at 403-04.

Noting that the fifth amendment does not forbid compelled production of incriminating evidence unless the accused is compelled to make an incriminating *testimonial* communication[13] and conceding that the testimonial nature of document production varies with the factual circumstances,[14] the Supreme Court examined the testimonial nature of the accountant's workpapers.[15] On the record before the Court, the workpapers appeared to have been voluntarily prepared and contained no testimonial statements by the taxpayer.[16] Further, the Court concluded that although production implicitly admits the existence and possession of the pre-existing documents, this did not rise to the level of testimony protected by the fifth amendment[17] because it is not incriminating to admit professional help in preparing tax returns[18] or to admit the existence of documents known by the government to exist.[19]

On the facts before it, the Court concluded that since the accountant's workpapers were not the client's "private papers,"[20] the act of producing the documents did not rise to the level of a compelled testimonial averment in violation of the fifth amend-

13. *Id.* at 408. *See* Comment, *Fifth Amendment Interpretation in Recent Tax Record Production Cases,* 46 CINN. L. REV. 232, 236 (1977) (questioning the Court's reliance on previous "physical characteristics" decisions concerning blood tests and voice or handwriting exemplars to justify the conclusion that documents are nontestimonial).

14. *Id.* at 410.

15. *Id.* at 409.

16. *Id.* at 409-10. The Court found additional protection against self-incrimination in the fact that the accountant prepared the workpapers. The taxpayer could neither authenticate the workpapers, nor vouch for their accuracy. Since the workpapers could not be introduced into evidence without authentication, the mere act of production would not amount to testimony, nor be self-incriminating. *Id.* at 413.

17. *Id.* at 411.

18. *Id.* at 412.

19. *Id.* at 411. The majority reasoned that: "The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." *Id.*

In his concurring opinion, Justice Brennan remarked: "I know of no Fifth Amendment principle which makes the testimonial nature of evidence and, therefore, one's protection against incriminating himself, turn on the strength of the Government's case against him." 425 U.S. at 429 (Brennan, J., concurring).

Justice Marshall, commenting on the "technical and somewhat esoteric focus on the testimonial elements of production rather than on the content of the evidence," holds promise for protecting against compelled disclosure of personal papers through the Court's recognition of the kinds of testimony inherent in production. "Indeed, there would appear to be a precise inverse relationship between the private nature of the document and the permissibility of assuming its existence." *Id.* at 431-32, (Marshall, J. concurring).

20. The language is taken from a line of cases beginning with Boyd v. United States, 116 U.S. 616 (1886). *See generally* Note, *Fifth Amendment Protection Against Self-Incrimination in Tax Records: Fisher v. United States.* 30 SW. L.J. 788 (1976).

ment.[21] Without this fifth amendment underpinning, there was no basis upon which the attorney-client privilege could be claimed to protect pre-existing documents from disclosure under subpoena.[22] Specifically reserved was the question of "whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession."[23] Also reserved were the more general "[s]pecial problems of privacy which might be presented by subpoena of a personal diary."[24]

C. The Ninth Circuit Application of Fisher in In Re Fischel

In *In re Fischel*,[25] Ms. Fischel, an attorney,[26] was cited for contempt for refusing to turn over financial summaries she had prepared.[27] These were sought in connection with the criminal tax fraud prosecution of Fischel's partners[28] and contained information concerning clients' transactions with the entities created by her partners.[29] Fischel refused to surrender the summaries, asserting her clients' fifth amendment and attorney-client privileges, and the attorney work-product immunity.[30]

In a three part opinion, the Ninth Circuit first considered the attorney-client privilege.[31] The court decided that the documents from which the summaries were prepared were not privileged since they were apparently non-confidential records of public transactions.[32] The court concluded that the necessary showing had not been made. The defendant had to show that disclosure of the summaries or any entry thereon would irresistibly lead to the disclosure of communications made in confidence by the client.[33] In the second part of the opinion, the court summarily

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21. 425 U.S. at 414.

22. *See* notes 11 & 12 *supra*, and accompanying text.

23. 425 U.S. at 414.

24. *Id.* at 401 n.7.

25. 557 F.2d 209 (9th Cir. 1977).

26. Ms. Fischel's status as an attorney acting in a legal capacity was accepted by the Ninth Circuit. *Id.* at 210. The District Court for the Northern District of California did not view Ms. Fischel as a legal advisor, and declined to sustain the attorney-client privilege claim partly on that basis. *Id.* at 210-11.

27. *Id.* at 210.

28. Harry Margolis and Quentin Breen were partners in the firm of Margolis, Fischel and Breen. They were charged with tax fraud and conspiracy, 26 USC § 7206 (2) and 18 USC § 371, based upon transactions between controlled entities. Both defendants were acquitted.

29. 557 F.2d at 210.

30. *Id.*

31. *Id.* at 211.

32. *Id.* at 212.

33. *Id.*

dismissed the work-product immunity claim, stating that the summaries had not been prepared in anticipation of litigation.[34] The court then rejected the fifth amendment claim with the following language:

> The recent Supreme Court decision in *Fisher v. United States, supra,* controls appellant's case. In Fisher, the Court held that the client's Fifth Amendment privilege would not excuse his attorney from production of documents in the possession of the attorney. This is true because a summons directed at the attorney does not compel the client to be a witness against himself. . . . Absent this compulsion, no Fifth Amendment privilege exists.[35]

The Ninth Circuit disposition of Fishel's appeal has several disquieting aspects, all related to the court's review of the nature of the *sources* of the information used to prepare the summaries. First, the Ninth Circuit majority embraced the government's characterization of the documents from which the summaries were drawn as records of "publicly transacted" business.[36] The government's position is inconsistent with its indictment charging defendants with fraudulent transactions among controlled offshore entities which were not subject to United States reporting requirements.[37] Judge Koelsch in dissent, characterized the sources of information used to prepare the summaries more broadly, and concluded that the summaries could disclose confidential client communications.[38] Second, the majority used the unprivileged nature of factual information an attorney receives from third parties as the basis for denying privileged status to the summaries themselves.[39] The majority reasoned that the summa-

34. *Id.* at 212-13. The court's abrupt treatment of the work product immunity ignores the defensive nature of tax counseling. Where compliance with myriad technicalities, and good faith differences in interpretations of the tax code are subject to after the fact Internal Revenue Service challenges (as in the presént case), it is at least arguable that the summaries were prepared in anticipation of litigation. *See* FED. R. CIV. P. 26(b)(3) *See also,* Brief for Appellant. In Re Fischel 557 F.2d 209.

35. *Id.* at 213.

36. *Id.* at 210.

37. Appellant's brief, at 15. *See* note 19 *supra* and accompanying text.

38. 557 F.2d at 214. Judge Koelsch, dissenting, characterized the *sources* of the information reflected in the summaries more broadly than the majority, and concluded that at least part of the information used to prepare the summaries was confidential client communication. Judge Koelsch felt that tax advice is usually based upon specific information, and that disclosure of the summaries would tend to reveal those communications by the client. *See also* Appellee's brief, p.16.

39. 557 F.2d 212.

ries would not "irresistably" lead to disclosure of communications of client to counsel.[40]

Finally, the court's independent consideration of the client's fifth amendment protection precluded consideration of the intertwined relationship of the privileges.[41] Characterizing the summaries as prepared exclusively from nonprivileged sources avoided the necessity of analyzing the fifth amendment claim with the rigor the Supreme Court used in *Fisher.* If other potential sources had been recognized, each source would have required inquiry into its privileged status while in the hands of the client.[42]

A further observation concerning the Ninth Circuit's review of the *Fischel* case is appropriate. The *Fisher* opinion dealt with subpoena of documents in existence prior to the formation of the client-counsel relationship.[43] Justice Marshall's concurrence points out that the case may be viewed as harmonizing the previous applications of the pre-existing document exception to the federal attorney-client privilege.[44] Assuming that the summaries were prepared solely from unprivileged documents, the Ninth Circuit *Fischel* majority misused the pre-existing document exception in applying it to the attorney prepared summaries. The summaries were *not* in existence prior to the formation of the attorney-client relationship. Further, the clients were never custodians of the summaries and did not transfer them to Ms. Fischel. The pre-existing document exception, central to the ultimate result in *Fisher,* is therefore inapplicable to the facts in *Fischel.*

The majority's reliance on its characterization of the sources of information reflected in the summaries as unprivileged facts received by counsel from third parites, and the conclusion that disclosure of those facts did not constitute disclosure of protected communications of the client to counsel, lead quite appropriately to subpoena of the *documents* from which the summaries were drawn.[45] If the underlying documents had been subpoenaed, the

40. *Id. See* note 38 *supra* and accompanying text.

41. *See* text accompanying note 10 *supra.* (quoting the Supreme Court in *Fisher* concerning the interrelationship of the privileges).

42. *See* text accompanying note 10, *supra; see* also note 11 and accompanying text.

43. 425 U.S. at 403. *See* note 12 *supra* and accompanying text.

44. *Id.* at 432. (Marshall, J. concurring).

45. Ms. Fischel's brief on appeal agrees that the documents themselves were subject to production. Appellant's Brief.

court's analysis is but a paraphrase of the policy reasons for the pre-existing document exception.[46] As applied to the summaries, however, the analysis exceeds the limit of the exception since generally "the knowledge of the terms . . . of the documents which the lawyer gains . . . are privileged from dislosure . . . ."[47] Exceeding this limit disembowles the policy supporting the historical development of the attorney-client privilege: full disclosure to the attorney fostered by the client's security in the knowledge that what the attorney learns thereby will not be disclosed.[48] Wide application of the reasoning in *Fischel* conceivably could lead to the attorney-client privilege, as it pertains to written materials generally, being consumed by the pre-existing document exception.[49] This possibility lends credence to Justice Brennan's concurrence in *Fisher*: "[T]he Court is laying the groundwork for future decisions which will tell us that the question [of shielding the taxpayer from production of his own records] here formally reserved was actually answered against the availability of the [fifth amendment] privilege."[50]

D. United States v. Osborn—Before and After Fisher

In *United States v. Osborn*,[51] decided prior to *Fisher*, the defendant was served with administrative summonses seeking testimony and documents concerning the client's tax liabilities as part of an Internal Revenue Service investigation of the attorney's clients.[52] The attorney-client privilege and the clients' fifth amendment privilege were asserted by Osborn as grounds for refusing to produce the records and testify.[53] The United States District Court for the District of Oregon refused to enforce some of the summonses as to certain documents reviewed *in camera* on

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46. 425 U.S. at 402-04.

47. McCormick, Evidence § 89 (2d. ed. 1972). *See also* 8 Wigmore, Evidence § 2307 (McNaughton rev. 1961).

48. 425 U.S. at 403.

49. This may be precisely the intent of the *Fischel* majority. They stated: "We note that the Supreme Court has taken a restrictive view of the reach of the attorney-client privilege." 557 F.2d at 212, n.4.

50. 425 U.S. at 415. (Brennan, J., concurring).

51. 561 F.2d 1334 (9th Cir. Sept., 1977) *aff'g in part and rev'g in part and remanding* 409 F.Supp 406 (D.C. Or. 1975). Issues raised in Osborn's cross-appeal of the denial of attorney-client privilege as to some documents, and as to decedent testator's communication are outside the scope of this note.

52. *Id.* at 1336.

53. *Id.* Although the clients were permitted to intervene in the contempt proceedings and personally claimed their fifth amendment protections since the summons was not directed to them, they were not facing any personal compulsion. Their intervention is ignored for the purpose of this note.

the basis of the clients' fifth amendment rights as asserted by counsel.[54] The district court expressly rejected the Third Circuit's holding in *United States v. Fisher,*[55] and relied on the contrary holdings of *United States v. Kasmir*[56] and *United States v. Judson.*[57] The government appealed the district court decision on the authority of the Supreme Court's affirmance of *Fisher.*[58] The Ninth Circuit reversed that portion of the district court's order upholding the attorney's assertion of his clients' fifth amendment rights.[59]

The Ninth Circuit decision in *Osborn* followed the analytic approach used by the Supreme Court in *Fisher.* Rather than merely repeating the *Fisher* holding that fifth amendment rights are personal and cannot be claimed by an attorney on behalf of his clients,[60] the Ninth Circuit pointed out that the client could have relied on the attorney-client privilege as it applies to "private papers".[61] The court then proceeded to the central question: "whether the documents could not have been obtained from the clients, because of some privilege of the clients, while the documents were still in their possession."[62] An *in camera* review of the documents was conducted by the Ninth Circuit panel.[63] The court concluded from its examination that the financial statements, records, billings and letters had been prepared voluntarily by persons other than the clients and contained no testimonial declarations made by the clients.[64] The court held that the documents would not have been protected by the fifth amendment in the hands of the clients, and therefore could not be protected from disclosure by the attorney client privilege.[65] The court noted that the "private papers" question left open in *Fisher* need not be addressed in the present case.[66]

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54. *Id.* at 1337.
55. 500 F.2d 683 (3d Cir. 1974) (*en banc*).
56. 499 F.2d 444 (5th Cir. 1974).
57. 322 F.2d 460 (9th Cir. 1963).
58. 561 F.2d at 1337.
59. *Id.* at 1338.
60. 425 U.S. at 398.
61. 561 F.2d at 1338 n.7.
62. *Id.* at 1338.
63. *Id.* at 1338.
64. *Id.* at 1339.
65. *Id.*
66. *Id.* n.9.

E. Conclusion

The *Fischel* and *Osborn* decisions demonstrate the divergent approaches the Ninth Circuit panels used in applying the Supreme Court's teachings in *Fisher*. In *Fischel*, the fifth amendment and attorney-client privilege claims were examined independently, as if unconnected in law or policy. The *Osborn* panel was clearly sensitive to the fifth amendment underpinnings of the attorney-client privilege and the pre-existing document exception. Read as a whole, the Supreme Court's majority and concurring opinions focus on the sources and content of the documents sought under court process. Both the district and appellate decisions in *Fisher* acknowledge that the characterization of the documents will determine the validity of a fifth amendment claim and follow to the attorney-client privilege claims. One major difference between the *Fischel* and *Osborn* decisions is the difference between a rote application of the *Fisher* result and a faithful application of the *Fisher* opinion's lessons.

The other significant difference, which follows from the critical nature of document classification, is the use of an *in camera* review of the subpoenaed materials at the district court level. Where the nature of documents is hotly contested, and where disclosures could infringe upon constitutional protections, a prophylactic examination of the documents prior to ruling upon attorney-client privilege claims adds an element of certainty at a low cost to judicial efficiency. The Ninth Circuit, through its supervisory power over the district courts, should require an *in camera* review of documents subpoenaed from attorney when a real dispute over the nature and sources of the documents is apparent.

Thomas J. Kristof

IV. MEDICAL MALPRACTICE AND THE MISREPRESENTATION EXCLUSION UNDER THE FEDERAL TORT CLAIMS ACT

A. Introduction

In *Ramirez v. United States*[1] the Ninth Circuit Court of Appeals extended governmental liability under the Federal Tort

1. 567 F.2d 854 (9th Cir. Dec., 1977) (en banc) (per Kennedy, J.).

Claims Act (FTCA)[2] to the failure of a government employed physician to warn a patient of the risks attendant to a surgical procedure.[3] After the physician performed ear surgery on the plaintiff, complications resulted in further hearing loss. The patient then brought suit under the FTCA alleging that he had not been informed of the significant probability of such complications.[4] The district court decided that a dismissal was mandated by two recent Ninth Circuit decisions[5] which held incorrect diagnoses to be misrepresentations specifically excluded from the FTCA.[6] The court of appeals *en banc* unanimously held that a physician's failure to warn of the risks of surgery *does not* constitute misrepresentation so as to bar recovery against the United States under the FTCA.[7]

B. Common Law and Legislative Intent

The FTCA makes the United States liable for torts committed by its employees[8] with the exception of intentional torts, and in particular, misrepresentation.[9] However, this exclusion has also been interpreted to apply to certain cases of merely negligent misrepresentation. Thus in *United States v. Neustadt*[10] the Supreme Court held that a negligent appraisal of a home by an employee of the Federal Housing Administration constituted a

2. 28 U.S.C. § 1346(b) (1970) provides that the federal courts shall have jurisdiction in

> [C]ivil actions on claims against the United States, for money damages . . . for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

3. 567 F.2d at 855.

4. *Id.*

5. Delange v. United States, 372 F.2d 134 (9th Cir. 1967); Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962).

6. 567 F.2d at 855.

7. *Id.*

8. *See generally* Johnson, *Federal Tort Claims Act—A Substantive Survey*, 6 U. Rich. L. Rev. 65 (1971); Gottlieb, *Federal Tort Claims Act—A Statutory Interpretation*, 14 Vand. L. Rev. 653 (1961).

9. 28 U.S.C. § 2680 (1976) provides that

> [S]ection 1346(b) of the title shall not apply to . . . 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. . . . (emphasis added)

10. 366 U.S. 696 (1961). *See* 50 Kentucky L.J. 244 (1961) for a detailed discussion of *Neustadt*.

misrepresentation excluded by the Act.[11] The Ninth Circuit followed *Neustadt* in *Hungerford v. United States*[12] and *De Lange v. United States*[13] held that a negligent medical diagnosis constitutes a misrepresentation excluded from liability.[14]

Ramirez overruled *Hungerford* and *De Lange* and removed misrepresentation involved in medical malpractice from the exclusion.[15] The court first examined the meaning of the word misrepresentation as interpreted by the Supreme Court in *Neustadt*.[16] It found that the Supreme Court intended the exclusion to apply primarily to the traditional tort of misrepresentation in which a purely economic detriment results from reliance on the advice of a government official.[17] The court drew support from the common law treatment of misrepresentation as largely limited to the invasion of business and financial interests.[18]

The court then considered the legislative history of the FTCA and found that congressional intent disapproved of governmental immunity.[19] The court noted that Congress specifically rejected an amendment to the act which proposed to exclude torts arising from surgical and medical procedures performed in government hospitals.[20]

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11. *Id.* at 711.

12. 307 F.2d 99, 102-03 (9th Cir. 1962) (court held the misdiagnosis was a misrepresentation but the negligent examination took the cause of action outside of the exception, leaving the government liable).

13. 372 F.2d 134 (9th Cir. 1967).

14. *See* Note, *Physical Injury and the Misrepresentation Exception of the Federal Tort Claims Act* § 2680(h), 42 WASH. L. REV. 1128 (1967), for a discussion of this exception in cases involving injuries other than medical malpractice.

15. 567 F.2d at 857.

16. *Id.* at 855.

17. *Id.* at 856.

18. *Id. quoting* United States v. Neustadt, 366 U.S. at 711 n.26, *citing* PROSSER, TORTS, § 55, at 702, 703 (1941), the court observed:

> [M]any familiar forms of negligent conduct may be said to involve an element of "misrepresentation," in the generic sense of that word, but "so far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings."

Id.

19. *Id.*

20. *Id. citing* S. 211, 72d Cong., 1st Sess. (1931) and H.R. 5065, 72d Cong., 1st Sess. (1932).

C. Conclusion

The court concluded that recovery under the FTCA for medical malpractice should not be barred by a distinction between ordinary malpractice and those types of malpractice which contain an element of misrepresentation. The court rejected distinctions based on the language of the statute, legislative intent, or its interpretation under *Neustadt*.[21]

The court's decision in *Ramirez* provides a logical limitation on the scope of the exclusionary provision of the FTCA and clarifies a previously ambiguous aspect of the Act. With this decision the Ninth Circuit clears the way for future tort suits based on the failure of government physicians to properly inform patients of the risks of medical procedures.

Robert Dennis

V. STANDARDS FOR SUMMARY JUDGMENT AND INJUNCTIONS IN SECURITIES VIOLATIONS

A. Introduction

In *Securities and Exchange Commission v. Koracorp Industries, Inc.*[1] the Ninth Circuit clarified the standards for issuance of injunctions against future securities violations. In particular, the court held that due to the subjective nature of determining the intention of future illegal conduct, summary judgment for defendants is rarely warranted in cases involving willful misconduct.[2] The court does, however, have the discretion to grant summary judgment for defendants involved in merely negligent violations.[3]

When a public accounting firm audited the defendant corporation, it discovered a number of fraudulent activities: manipula-

21. *Id.* at 857. The court concluded: "The patient who suffers harm from a surgical complication that should have been described as a possible consequence . . . is the victim of negligent conduct, not of an esoteric form of misrepresentation." *Id.*

1. 575 F.2d 692 (9th Cir. Feb., 1978), *cert. denied*, ___ U.S. ___ (1978) (per Hufstedler, J.; the other panel members were Carter, J. and Smith, D.J.).

2. *Id.* at 699.

3. *Id.* at 701. The court states here that no trial is necessary before denying discretionary relief. "[T]he court always is free to direct the entry of summary judgment for defendant where there are no genuine issues of material fact and the court is unwilling to grant plaintiff discretionary relief." *Quoting* 10 C. Wright & A. Miller, Federal Practice and Procedure, § 2731, at 605 (1973).

tions of corporate accounts, kickbacks, and related coverups.[4] This was brought to the attention of the Securities and Exchange Commission (SEC) which sought an injunction to prevent future violations by the corporation and several of its officers. The SEC also sought an injunction against the accounting firm, alleging that it had been negligent in not discovering the fraudulent activities in previous audits. All parties filed motions for summary judgment and stipulated that the fraudulent activities in question constituted serious violations of securities regulations. It was also agreed that these violations had ceased after they were discovered by the audit and reported to the SEC.[5]

The defendants argued that granting an injunction could not properly be based on violations which had ceased eighteen months earlier. The district court agreed and allocated the burden of proving a reasonable likelihood of repetitions of the violations to the SEC.[6] Finding that as a matter of law the SEC had not met this burden of proof, the court granted summary judgment in favor of the defendants.[7] On appeal the Ninth Circuit held that the district court had erroneously shifted the burden of proof regarding the likelihood of future violations and had incorrectly excluded evidence on the issue of the nature and extent of the defendants' culpability in past violations.[8] Since this issue was hotly contested, the court concluded that the summary judgment was unwarranted with respect to the corporate defendants.[9] The court, however, also found that the district court had not abused its discretion in granting judgment for the accountants.[10]

4. *Id.* at 695-96. The primary fraud involved a subsidiary of Koracorp called Koretec Communications, Inc. The president of the subsidiary, in collusion with some of its customers, overstated the accounts receivable from its operation of an advertising magazine, in order to increase the amount of his compensation, which was based on the advertising revenue. The highly inflated accounts caused an erroneously large profit to be reported. Thus the 1972 financial statement of the parent corporation showed a net profit of $0.27 per share, although it was later determined that there had been a loss of $1.02 per share. The roles of the officers of the parent corporation in abetting and covering up this fraud are the primary issues of fact.

5. *Id.* at 697.

6. *Id.* at 697-98. The defendants also offered evidence of reformation and changed circumstances tending to make future violations unlikely.

7. *Id.* at 698. The district court was quoted: "In attempting to meet its burden of showing a reasonable expectation of further violations, the SEC seemed more concerned with creating a factual pattern which would thwart the motion for summary judgment than establishing hard facts on which such an expectation could be asserted."

8. *Id.* at 697-98.

9. *Id.* at 697.

10. *Id.* at 701. The circuit court viewed the accountant firm separately from the other defendants. The opinion discusses this defendant in a separate section, based apparently on the greatly different degree of involvement.

In reaching this result, the Ninth Circuit had to review the standards for both summary judgments in federal practice as well as the substantive law regarding the issuance of injunctions to enforce the provisions of the Securities and Exchange Acts.[11]

B. Standards for Summary Judgment

In analyzing the standards for summary judgment, the Ninth Circuit noted that the moving party has the burden of proving that there is no genuine issue of fact material to a judgment in that party's favor.[12] The moving party has this burden for purposes of summary judgment even though it might not have this burden under the substantive law at trial.[13] The reason for this, the court noted, is that all inferences are to be made in favor of the party opposing summary judgment.[14] Since the dispute on matters of facts was limited to the issue of individual responsibility for the violations, only if that issue were not material would a grant of summary judgment be appropriate.[15] With respect to the accounting firm, the court found that there was only evidence of negligence and no indication of participation in the coverup of the violations.[16] In the absence of a genuine issue of fact, the district court did not abuse its power in denying a discretionary remedy, such as an injunction.[17] With respect to the other defendants, however, the court determined that enough evidence was recorded of intentional violations to require the court to also determine the materiality of the prior violations by the substantive law.[18]

C. Standards for Injunctions

The court first acknowledged that the primary[19] purpose of

11. 15 U.S.C. §§ 77-78 (1970).

12. 6.2 J. Moore, Federal Practice § 56.15(4), at 56-511 (1976).

13. *Id.* at § 56.15(8).

14. The district court had apparently applied its interpretation of the burden of proof at trial to the matter of summary judgment.

15. The court noted that a genuine dispute on a material issue mandates a reversal of summary judgment. 575 F.2d 697.

16. *Id.* at 701. The court here agrees with the district court's opinion that the SEC had no plausible evidence of any intentional violations on the part of the accounting firm. The SEC alleged that the firm failed to publicize the fraudulent nature of the violations vigorously enough, following its notification to the SEC.

17. *Id.* at 701-02.

18. *Id.* at 699.

19. Securities and Exchange Act of 1934, § 21(e), 15 U.S.C. § 78(e) (1970) provides for the granting of injunctive relief:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which

injunctions is to deter future violations, and not to punish violators.[20] The standard to judge the necessity of this deterence was found to be whether or not there was a "significant threat of future violations."[21] The court reasoned that the fact of past violations was sufficient to warrant an inference that future violations might occur,[22] and the mere fact that violations had ceased did not preclude the granting of injunctive relief.[23] Because the violations had not been discontinued until discovered by the SEC and involved the element of fraud, the court found that the inference of a reasonable probability of a repetition of the violations was especially strong.[24] The court concluded that the state of mind of the defendant at the time of the violations and the sincerity of vows of reformation were material facts to be established,[25] and that this determination required a careful consideration of the conduct of the individual defendant at trial.[26] Giving full weight to the inference created by past violations, particularly where credibility is in issue, as is required by the standards for summary judgment, the court held that the district court had exceeded its discretionary limits in denying injunctive relief without a full trial on the merits of these issues.[27]

The Ninth Circuit in *Koracorp* followed the general trend in applying the test of whether there "is a reasonable likelihood of

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> constitute . . . a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices, and *upon a proper showing* a permanent or temporary injunction or restraining order shall be granted without bond.

(emphasis added)

20. The punitive effect of an injunction, however, may be considerable, and gives rise to much of the controversy surrounding the use of injunctions by the SEC. *See, e.g.*, A. Mathews, *S.E.C. Civil Injunction Actions*, 30 BUS. LAW. 1303 (1974).

21. 575 F.2d at 697, *citing* United States v. W.T. Grant Co., 345 U.S. 629, 635 (1953).

22. *Id.* at 698. For a discussion of this inference see A. Mathews, *S.E.C. Civil Injunction Actions*, *supra* note 20 at 1306.

23. *See* United States v. W.T. Grant Co., 345 U.S. at 633. Even promises of future compliance and acts of contrition are not conclusive or necessarily persuasive in predicting the likelihood of future violations. *See* United States v. Parke, Davis & Co., 362 U.S. 29, 48 (1960). *Cf.* Albrecht v. Herold Co., 390 U.S. 145, 155 (1968) (Douglas, J. concurring) (Justice Douglas felt good intent should be considered by the court to help "interpret facts and to predict consequences").

24. 575 F.2d at 699.

25. *Id.*

26. *Id.*

27. *Id.* In his brief concurring opinion, Carter, J. disagreed with the necessity of full evidentiary hearing. *See id.* at 702.

future violations,"[28] in determining the justification for injunctions. The Securities Exchange Act conditions the granting of an injunction on a "proper showing,"[29] but fails to specify what must be shown, and who has the burden of making that showing. Courts have generally allowed the SEC a special position as a representative of the public interest, and do not apply the same burdens upon the moving party required under common law.[30] What little congressional guidance there is, indicates that the provision for injunctions in the statute was intended to be a flexible measure to provide for unanticipated enforcement needs. The courts have generally interpreted this to place the burden of proof upon the defendant (at least in intentional violations) to show that future violations will be unlikely.[31]

D. Conclusion

The practical effect of placing the burden of proof on the defendant to defeat an injunction is that the SEC will be successful in obtaining the great majority of the injunctions it seeks. Even though there can be far reaching effects of the injunction on the defendant's securities dealings, many defendants consent to injunctions rather than contest the issue of their state of mind during the period of past violations.[32] The decision in *Koracorp* establishes that a past violation raises a strong inference of the likelihood of future violations, and that summary judgment will be rarely appropriate in such cases. The Ninth Circuit also established that the courts do have the discretion to summarily deny injunctive relief where the only substantial evidence of the likelihood of repetition of violations is past negligent conduct.

Robert Dennis

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28. *See, e.g.*, W. Rogers, *Securities Law—Standard of Proof Necessary to SEC Injunctive Relief Actions Brought Under the Antifraud provisions*, 18 How. L.J. 854 (1975).

29. *See* note 20 *supra*.

30. *See* F. Bemporad, *Injunctive Relief in SEC Civil Actions—the Scope of Judicial Discretion*, 10 Colum. J.L. & Soc. Prob. 328, 336 (1973).

31. *See, e.g.*, United States v. Concentrated Phos. Exp. Ass'n, 393 U.S. 199, 203 (1968); United States v. W.T. Grant Co., 345 U.S. 629, 663 (1953); SEC v. Culpepper, 270 F.2d 241, 249 (2d Cir. 1959); Commodity Futures Trading v. J.S. Love & Assoc., 422 F. Supp. 652, 661 (S.D.N.Y. 1976).

32. *See* note 21 *supra*.

VI. Reversible Error—Improper Judge-Jury Communications in Civil Trials

A. Introduction

In *Dixon v. Southern Pacific Transportation Co.*,[1] the court joined the Seventh Circuit[2] in adopting the harmless error rule of Fed. R. Civ. P. 61[3] as the proper test to determine whether reversal should be granted for the error of improper communication between judge and jury in civil trials.[4] During deliberations in this wrongful death action, the jury asked the magistrate to clarify the effect their findings would have on plaintiff's recovery under Oregon's comparative negligence statute.[5] The magistrate's reply to the jury constituted error since it was made off the record and without notice to counsel.

The jury found for plaintiff and on appeal defendant sought a reversal on the basis of this error.[6] Although the court held the error of improper judge-jury communications to be potentially reversible in civil cases,[7] it found actual reversal unwarranted in the particular circumstances of this case.[8]

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1. 579 F.2d 511 (9th Cir. July, 1978) (per Wallace, J.; the other panel members were Browning, J. and Renfrew, D.J.).

2. *See* Charm Promotions, Ltd. v. Travelers Indem. Co., 489 F.2d 1092 (7th Cir. 1973), *cert. denied*, 416 U.S. 986 (1974). In this case plaintiff sued to recover under a fidelity bond written by defendant covering plaintiff's employees. During jury deliberations, the jury sent a note to the judge asking whether a criminal judgment could be brought against certain officers of plaintiff corporation. Without notifying counsel or the parties, the judge wrote back "No". On appeal the court held this was not reversible error per se, but was subject to the test of rule 61 to determine whether reversal was warranted. The court denied a reversal here. *Id.* at 1096.

3. Fed. R. Civ. P. 61 provides:

> No error in either the admission or exclusion of evidence and no error in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding *must disregard any error or defect which does not affect the substantial rights of the parties.* (emphasis added)

4. 579 F.2d at 513.

5. Or. Rev. Stat. § 18.470 (1975).

6. 579 F.2d at 513.

7. *Id.*

8. *Id.* In support of its denial of a reversal in *Dixon*, the court mentioned the following factors: the magistrate's answer was correct; the answer to the jury's question was apparent from the face of the verdict form itself; the jury had been clearly instructed before it retired regarding the effect their findings would have on plaintiff's recovery; the wording of the supplemental instruction was incapable of misunderstanding and could not have

B. The Precedent of Fillippon and Modern Trends

The Supreme Court faced the issue of whether reversal is justified for the error of improper judge-jury communications in civil trials in the leading case of *Fillippon v. Albion Vein Slate Co.*[9] There it was held that when such communications occur during jury deliberations, in the absence of counsel, and off the record, the error is reversible because it violates the due process rights of a party to be present and to have an opportunity to be heard during every stage of trial.[10] The Court did grant a reversal in *Fillippon,* but it failed to make clear the basis for reversal because, in addition to the general impropriety of the communication, the supplemental instruction was misleading.[11] As a result, appellate courts were divided in their treatment of the error.[12] Many courts automatically reversed whenever the error of improper judge-jury communications occurred, reasoning that *Fillippon* had mandated a *per se* rule of reversal.[13] Other courts reversed only when the absence of prejudice could not be affirmatively shown from the record.[14]

In recent cases involving the error of improper communication between judge and jury in both civil and criminal trials a trend has developed away from automatic reversal in favor of a more flexible approach which takes into account the effect of the error on the case.[15] This is part of a broader trend against auto-

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been materially improved; there was no reason to believe that the jury had been unduly influenced by the supplemental instruction.

9. 250 U.S. 76 (1919). In *Fillippon,* plaintiff sued for personal injuries sustained while employed by defendant corporation. During jury deliberations, the judge replied to a question from the jury concerning plaintiff's alleged contributory negligence, but without notifying counsel. When the jury found for defendant, plaintiff appealed, charging that this was error requiring reversal.

10. *Id.* at 81. The Court stated that "the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction."

11. *Id.* at 82. According to the *Fillippon* Court, the supplementary instruction "was erroneous and calculated to mislead the jury . . . ."

12. *See* 32 A.L.R. Fed. 392 (1977) for a comprehensive discussion of the history and present treatment of the error of improper judge-jury communications.

13. *See, e.g.,* Arrington v. Robertson, 114 F.2d 821 (3d Cir. 1940) (the court held this error to be a denial of due process requiring reversal regardless of the nature of propriety of the instructions); Parfet v. Kansas City Life Insurance Co., 128 F.2d 361 (10th Cir.), *cert. denied,* 317 U.S. 654 (1942) (the court held that this error required reversal whether prejudice could be shown or not).

14. *See, e.g.,* Sandusky Cement Co. v. A.R. Hamilton & Co., 287 F. 609 (6th Cir. 1922), *cert. denied,* 262 U.S. 759 (1923) (the court found the error to be a "dangerous practice," but not grounds for reversal where the instruction properly stated the law and was only a repetition in substance of instructions given prior to jury deliberations).

15. *See, e.g.,* Charm Promotions, Ltd., 489 F.2d at 1095; United States v. Compagna,

matic reversal for errors historically considered constitutional.[16] Errors classified as non-constitutional have always been reviewed according to their effect on the individual case to determine whether reversal is required.[17] Because the error of improper judge-jury communications had been increasingly treated as a non-constitutional error, the time was ripe for the *Dixon* court to actually classify it as non-constitutional.

C. The Rule 61 Standard and the Error of Improper Judge-Jury Communications

Before *Dixon,* the Ninth Circuit had not reviewed a civil case involving the error of improper communication between judge and jury. However, in a criminal case it had adopted a presumption-of-prejudice approach.[18] With *Dixon,* the court rejected this approach in civil cases and also declined to apply the automatic reversal rule. Instead, the court adopted rule 61 as the test for whether reversal is warranted for the error of improper judge-jury communications in civil trials. Rule 61 directs the court to disregard any error that does not affect the substantial rights of the parties. This new approach faces the issue of whether a party's rights have been prejudiced without creating a presumption of prejudice, and without requiring that lack of prejudice be demonstrable from the record.

To reach its holding that the error of improper judge-jury communications in a civil trial is a potential reversible error, but that it might be harmless error in some circumstances, the court relied on dicta in *Rogers v. United States,* a recent Supreme Court criminal case.[19] In *Rogers,* the Court pointed out that Fed.

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146 F.2d 524, 528 (2d Cir. 1944), *cert. denied,* 324 U.S. 867 (1945); Walker v. United States, 322 F.2d 434, 435 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 976 (1964).

16. R. Traynor, The Riddle of Harmless Error (1970). According to Traynor, "[T]here was long a widespread belief that all constitutionally based error required automatic reversal." *Id.* at 55. While this is no longer the case, some constitutional errors still require automatic reversal, as where defendant was denied adequate notice of the charges against him. *Id.* at 57.

17. Saltzburg, *The Harm of Harmless Error,* 59 Va. L. Rev. 999, 1002 (1973). In this article, Saltzburg says that in dealing with non-constitutional errors, "courts made little effort to identify and clarify the rules governing their decisions, [so] it is virtually impossible to enumerate the precise standards employed." *Id.*

18. Ah Fook Chang v. United States, 91 F.2d 805 (9th Cir. 1937). In this case the Ninth Circuit granted a reversal where the judge's communication to the jury foreman after jury deliberations had begun was made off the record and in the absence of counsel. However, the court stated "if the record shows affirmatively that appellant was not prejudiced, then the error does not require reversal." *Id.* at 810.

19. 422 U.S. 35 (1975). In *Rogers,* the jury asked the judge by note whether he would

R. Crim. P. 43 guarantees to a defendant in a criminal trial the right to be present at every stage of his trial.[20] However, the Court also stated that violation of rule 43 might be harmless error in some circumstances.[21] The *Dixon* court recognized a "fundamental distinction" between the occurrence of this error in a criminal trial and in a civil trial; while a criminal defendant has a constitutional right to counsel and to be represented at each stage of his trial, a civil trial does not involve "these constitutional considerations."[22] The court reasoned that if this error could be harmless in a criminal trial, it could certainly be harmless in a civil trial.[23]

Next, the court paved the way for using rule 61 as the test for reversal by declaring that the error of improper judge-jury communications in civil trials should be treated similarly to other types of non-constitutional errors.[24] Since the Ninth Circuit had previously used rule 61 as the test for reversal for other non-constitutional errors,[25] this facilitated the court's holding that the error of improper judge-jury communications is subject to the test of rule 61.[26]

D. Conclusion

The significance of *Dixon* is two-fold: it shows that the Ninth Circuit will not automatically reverse when the error of improper communication between judge and jury occurs and it provides a test for reversal in rule 61. However, this test is not as helpful as it first appears. To apply it, the court must make three separate

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accept a verdict of "guilty as charged with extreme mercy of the Court." *Id.* at 36. The judge replied affirmatively through the marshal, but without notifying defendant or his counsel. *Id.* Although the Court stated that this error might be harmless in some circumstances, the Court found it was not harmless in this case and granted a reversal. *Id.* at 40.

20. *Id.* at 39.

21. *Id.* at 40.

22. 579 F.2d at 513 n.1.

23. The court said that since *Rogers* indicated that the error of improper judge-jury communications could be harmless even in a criminal trial, "we believe a fortiori that it may be harmless in a civil trial." *Id.* at 513.

24. *Id.*

25. *See, e.g.*, Rudeen v. Lilly, 196 F.2d 300 (9th Cir. 1952) (the court held that according to the test of rule 61, reversal was not required where lower court had inadvertently misstated the amount of personal property taxes due and owing because the amount had been previously stipulated); Eckis v. Graver Tank and Mfg. Co., 289 F.2d 335 (9th Cir. 1961) (the Ninth Circuit held that according to the test of rule 61, no reversal was required where lower court erroneously admitted a police officer's opinion as to the point of impact of truck and automobile).

26. 579 F.2d at 513.

determinations: whether a right is substantial, whether that right has been affected, and whether the error had an effect on the judgment.[27] Neither rule 61 nor the *Dixon* court have provided explicit criteria to assist in making these determinations. This makes the test more difficult to apply and its results more difficult to predict.

Sally Marshall

VII. THE NINTH CIRCUIT ADOPTS STRICT PRODUCTS LIABILITY IN ADMIRALTY

A. INTRODUCTION

In *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*,[1] the Ninth Circuit held that a claim for property damage based on strict products liability will lie in admiralty[2] and that comparative negligence may apply as a partial defense.[3] This decision significantly extends admiralty law's coverage of products liability by expanding its use of strict liability in tort. In addition, by relying on liberal California case law on products liability, the court suggested that such case law is now part of Ninth Circuit admiralty law.

B. THE SINKING OF THE ENTERPRISE

Sailing on its maiden voyage after a major rebuilding, the fishing boat Enterprise caught fire and sank. The fire was caused by a defective fuel filter mounted on the newly installed marine engine. It ruptured, spraying diesel oil onto the hot engine parts where it ignited. For loss of the Enterprise, the owner sued the seller, the distributor and the manufacturer of the marine engine.[4]

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27. TRAYNOR, *supra* note 16, at 16. Traynor argues the need for guidelines in appellate evaluations of error, but says that such guidelines are not contained in the broad directive of rule 61. *Id.* at 15.

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1. 565 F.2d 1129 (9th Cir. Dec., 1977) (per Anderson, J.; the other panel members were Kilkenny, J. and Craig, D.J.).

2. *Id.* at 1134. The court held that strict products liability is applicable to suits in admiralty, but the holding actually went much further.

3. *Id.* at 1137.

4. Originally, plaintiff sued only the seller and the distributor. When the distributor added the manufacturer as a third party defendant, plaintiff filed an amended complaint adding the manufacturer as a defendant. *Id.* at 1132.

The lower court found only the distributor liable for negligence and held that strict products liability did not apply. The court found the seller was not liable because he lacked knowledge of the fuel filter's defective condition.[5] Likewise, the manufacturer escaped liability because the court found he had acted reasonably and with due care by warning the distributor about the defective filters and advising their replacement.[6] In addition, the lower court determined that plaintiff was contributorily negligent, mainly for the crew's failure to contain the fire,[7] and found him two-thirds responsible for the loss of the Enterprise.[8] Plaintiff appealed.

C. The Development of Admiralty Law

The Constitution,[9] together with 28 U.S.C. § 1333,[10] confers

5. *See id.* at 1133-34. Nine days before the Enterprise's engine was delivered to the seller by the distributor, the manufacturer sent a letter to the distributor which warned of possible hazards in connection with the filters and instructed him to change them as soon as possible. The distributor did not change the filters, nor did he warn the seller to change them. Since the manufacturer did not contact the seller directly, the seller was unaware of the danger until the loss occurred. *Id.* at 1131.

6. *Id.* at 1132. Although the manufacturer had received reports of engine room fires caused by failure of the filters, he did not determine whether the distributor had complied with the instructions contained in the warning letter.

7. The trial court gave the following reasons for its finding that plaintiff and the Enterprise's crew were contributorily negligent:

> (1) Plaintiff had not equipped the Enterprise with a means to shut off the engine from outside the engine room.
> (2) Plaintiff had not trained the crew in firefighting techniques.
> (3) The crew did not know that a switch outside the engine room controlled the blower, which was forcing air into the engine room, nor did the crew cut the wires leading to the blower.
> (4) The crew did not stuff the air ducts to stop the engine and the flow of air into the fire.
> (5) The crew's engineer changed one of the filters, but left the engine room before observing the engine on full speed, when he knew or should have known that the fuel supply was contaminated.

565 F.2d at 1133.

8. The trial court had awarded plaintiff one-half the cost of the Enterprise, according to the admiralty rule of equally divided damages. On appeal, the Ninth Circuit remanded the case for reconsideration in light of United States v. Reliable Transfer Co., 421 U.S. 397 (1975), which replaced the equally divided damages rule with pure comparative fault. On remand, the trial court determined that plaintiff was responsible for two-thirds of the loss of the Enterprise. 402 F. Supp. 1187 (W.D. Wash. 1975).

9. U.S. Const. art. III § 2 states "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ."

10. 28 U.S.C. § 1333 provides that federal district courts shall have original jurisdiction "exclusive of the courts of the states, of (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise

exclusive admiralty and maritime jurisdiction upon the federal courts. An action is within admiralty jurisdiction when it is founded upon a maritime tort[11] or a maritime contract.[12] Although the Constitution is silent as to the substantive law to be applied to admiralty cases, it has been established by case law that if applicable maritime law exists, it must be applied. If none is available, the court may either apply state law or introduce a new rule of maritime law.[13] These guidelines have enabled admiralty law to gradually incorporate state law developments in products liability.[14]

State court development of products liability began with negligence as the theory of recovery,[15] and admiralty has followed this lead[16] in claims for personal injury or death. In negligence claims for property damage alone, however, admiralty has been reluctant to apply theories of products liability.[17] As state courts

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entitled." The "saving to suitors" clause allows a plaintiff with an *in personam* claim to also bring a civil action in a state court, or on the law side of a federal court, given diversity and the requisite amount in controversy. Gilmore & Black, The Law of Admiralty 37 (2d ed. 1975).

11. A tort is maritime when it occurs upon navigable waters. *See* The Plymouth, 70 U.S. 20 (1865) (3 Wall.), where the court stated "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *Id.* at 36. For a discussion of maritime torts *see,* Note, *Admiralty-Tests of Maritime Tort Jurisdiction,* 44 TULANE L. REV. 166 (1969).

12. A maritime contract is one that "relates to a matter, transaction, or service that depends on, assists, or furthers transportation on navigable waters . . . ." 7 A.L.R. Fed. 502 (1971).

13. *See,* McCune, *Maritime Products Liability,* 18 HASTINGS L.J. 831 (1967) [hereinafter McCune]. *See also* 33 U.S.C. § 905a-b which provides the exclusive remedy for longshoremen injury claims.

14. *See,* Schaeffer v. Michigan-Ohio Navigation Co., 416 F.2d 217, 221 (6th Cir. 1969) where the court stated "admiralty law (albeit slowly) draws upon and incorporates the law prevailing on land when there is no historic (or statutory) principle to the contrary."

15. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) is regarded as the first products liability case.

16. Negligence was the basis of plaintiff's claim in Sieracki v. Seas Shipping Co., 149 F.2d (3rd Cir. 1945), *aff'd,* 328 U.S. 85 (1946), *reh. denied,* 328 U.S. 878 (1946), the earliest authority for admiralty jurisdiction over products liability claims. *Sieracki* held, inter alia, that longshoremen could recover from the *vessel* for injuries caused by defective equipment. Since *Sieracki,* admiralty courts have uniformly permitted products liability claims based on negligence in personal injury or death actions. *See* 7 A.L.R. Fed. 502 (1971). However, 33 U.S.C. § 905(b) (1976), which provides the exclusive remedy for longshoremen injury claims, eliminates negligence, as a basis for a claim by a longshoremen against the vessel, but does not affect other products liability claims in admiralty against the manufacturer.

17. In admiralty, claims for property damage have generally been treated as contract actions. Because they require privity, such contract claims have not been allowed against remote parties. *But see,* Todd Shipyards Corp. v. United States, 69 F. Supp. 609 (D. Me. 1947).

developed strict liability theories, a few admiralty courts applied them in personal injury cases,[18] but their most frequent use has been in wrongful death actions.[19] With *Pan-Alaska,* the Ninth Circuit became the first court of appeals to apply strict products liability to a property damage case not involving personal injury or death.[20]

D. California State Law Favored in Products Liability

The *Pan-Alaska* court was careful to anticipate potential difficulties in the application of strict products liability law arising from differences in state law. The court's solution was to rely on California case law, which strongly implies that district courts should also use California law to resolve problems in future applications of strict products liability to admiralty.

The *Pan-Alaska* court began its analysis by holding that strict products liability actions were "sufficiently well-established" on land to justify their incorporation into admiralty.[21] The court then adopted section 402-A of the Restatement of Torts[22] as the law of products liability for the Ninth Circuit and rejected the seller's contention that he should not be considered a "seller" of marine engines within the meaning of section 402-A.[23] The court also rejected the manufacturer's claim that he should escape liability because he had warned the distributor

18. *See, e.g.,* Schaeffer, 416 F.2d 217 (6th Cir. 1969). Most cases allowing recovery for personal injuries based on strict products liability have used breach of implied warranty. *See* McCune, *supra* note 14, at 857.

19. *See, e.g.,* Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972). The Death on High Seas Act, 46 U.S.C. §§ 761-68, created a cause of action in admiralty for wrongful death occurring more than a marine league from the shore of any state.

20. A few lower courts have permitted recovery for property damage based on strict products liability. Soileau v. Nicklos Drilling Co., 302 F. Supp. 119 (D. La. 1969) (court allowed recovery for a crane and drilling supplies lost when they fell off a drilling platform—this case also involved a wrongful death claim under the Death on High Seas Act); Re Alamo Chemical Transp. Co., 320 F. Supp. 631 (D. Tex. 1970) (court held that a claim for damage to a barge could be based on strict liability—this case also involved a wrongful death action); Ohio Barge Line, Inc. v. Dravo Corp., 326 F. Supp. 863 (D. Pa. 1971) (court stated that strict liability in tort could be imposed for property damage caused by a defective filter in the clutch control system of a tow-boat).

21. 565 F.2d at 1134.

22. *See* Restatement of Torts (1965).

23. 565 F.2d at 1135. To avoid liability under strict products liability, the seller claimed that he did not sell the marine engine to plaintiff, and that he was not in the business of selling marine engines. Based on the trial court findings, the court dismissed the idea that there was no sale. As to the seller's second claim, the court held that he was a seller for strict liability purposes under Comment "f" of section 402-A of the Restatement of Torts.

about the defective filters.[24] Relying exclusively on landmark California products liability cases,[25] the court concluded that a manufacturer's duty to warn the consumer is non-delegable.[26]

Lastly, the court anticipated that on remand the lower court would be faced with the issue of whether plaintiff's comparative negligence properly applies as a partial defense in apportioning liability. The court ruled it does apply,[27] explaining that, although the defendants were strictly liable for the harm caused by the defective product, the damages should be reduced in proportion to plaintiff's contribution to his own loss.[28]

E. Conclusion

This decision provides several advantages for plaintiffs' attorneys. First, although *Pan-Alaska* involved only property damage, plaintiffs' attorneys may be able to now use strict products liability in personal injury cases as well. Second, a plaintiff's problems of proof are easier in an action founded upon strict products liability rather than negligence or breach of warranty. Third, plaintiff will benefit because admiralty products liability law is now liberal and up-to-date. Finally, all attorneys, plaintiffs' and defendants', should welcome the replacement of unfamiliar and specialized admiralty products liability law with standard products liability law.

Sally Marshall

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24. *Id.* at 1136. Having found that the manufacturer's warning letter to the distributor did not relieve him of liability, the court said that to hold otherwise "would defeat the policy and purpose of strict products liability which is to protect the consumer . . . and to place the liability on those who are responsible for the harm and best able to absorb the loss." *Id.* at 1137.

25. The court cited the following landmark California cases concerning a manufacturer's duty to warn the ultimate consumer: Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Ford Motor Co. v. Robert J. Poeschl, Inc., 21 Cal. App. 3d 694, 98 Cal. Rptr. 702 (3d Dist. 1971).

26. 565 F.2d at 1136.

27. *Id.* at 1137.

28. Deciding that plaintiff's comparative negligence could apply as a partial defense in a strict products liability claim, the court explained: "There is no reason why other consumers and society in general should bear that portion of the burden attributable to the plaintiff's own blameworthy conduct." *Id.* at 1140.

VIII. BANKRUPTCY EXEMPTIONS—DOUBLE ADOPTION

A. INTRODUCTION

In *In re Brissette*[1] the Ninth Circuit considered the interaction of a state garnishment exemption[2] with the federal Consumer Credit Protection Act[3] and the federal Bankruptcy Act[4] in order to determine what exemption a California bankrupt can claim under the Bankruptcy Act.[5]

Appellants, involved in bankruptcy proceedings in California, appealed from an order of the district court which affirmed the bankruptcy trustee's determination that the bankrupts were only entitled to a garnishment exemption of fifty percent of their earnings, as provided by state statutes. The bankrupts had claimed a garnishment exemption of seventy five percent, as provided in the federal Consumer Credit Protection Act (CCPA). The Ninth Circuit held that appellants were entitled to the seventy five percent exemption on a theory of "double adoption,"[6] that is, the federal CCPA had been adopted by the California garnishment exemption statute and the California statute had been adopted by the Bankruptcy Act. The court also held that the federal CCPA itself was not adopted by the Bankruptcy Act.[7]

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1. 561 F.2d 779 (Sept.), *modified*, 568 F.2d 473 (9th Cir. Nov., 1977) (per Hufstedler, J.; the other panel members were Goodwin and Anderson, JJ.).

2. CAL. CIV. PROC. CODE § 690.6 (West 1970).

3. Pub. L. No. 90-321, 15 §§ U.S.C. 1601-1692o, 18 §§ U.S.C. 891-96 (1974). This note is primarily concerned with 15 U.S.C. § 1673. See note 17 *infra* for relevant portions of this section.

4. Ch. 541, 30 Stat. 544 (1898) (current version at 11 U.S.C. §§ 1-700 (1966)).

5. The Court also resolved a threshold question as to appellate jurisdiction because appeal from interlocutory orders of a Bankruptcy Court can only be taken if they arise in "proceedings" in bankruptcy and not if they arise in "controversies" in bankruptcy proceedings. *See* 561 F.2d at 781, *citing* Young Properties Corp. v. United Equity Corp., 534 F.2d 847, 849-51 (9th Cir. 1976); In re Durensky, 519 F.2d 1024, 1027-28 (5th Cir. 1975); United Kingdom Mutual Steamship Assurance Assoc. v. Liman, 418 F.2d 9, 9-10 (2d Cir. 1969). *See generally* 9 MOORE'S FEDERAL PRACTICE Vol. 2, ¶ 110.19 [5], at 222-71 (2d ed. 1975); 2 COLLIER ON BANKRUPTCY ¶ 24.11-39, at 733-7 (14th ed. 1976). Although noting that distinction between "proceedings" and "controversies" is "obscure and indefensibly confusing," 561 F.2d at 781, the court held "that exemption disputes are proceedings in bankruptcy from which interlocutory appeals may be taken pursuant to Section 24(a) . . . ." *Id.* at 783.

6. "Double adoption", as discussed in *Brissette*, occurs when a federal law adopts a state law, which has adopted a different federal law. For example, assuming that federal statutes A and B operate independently, but B adopts a state statute as a part of B. If the state statute adopts A, the result is the same as if B adopts A directly. *See* text accompanying notes 26-29 *infra*.

7. 561 F.2d at 784-85.

B. Bankruptcy Exemptions—The CCPA, California Garnishment Exemption Statute and The Federal Bankruptcy Act

The Bankruptcy Act

To understand *Brissette,* it is important to identify the source of bankruptcy exemptions and the relationship between the federal CCPA and the California garnishment exemption statute. The Bankruptcy Act provides that title to a bankrupt's property vests in the trustee at the time the petition of bankruptcy is filed.[8] However, the Bankruptcy Act also allows the bankrupt to claim exemptions in order to retain title to certain types of property.[9] The Act does not create exemptions, but it does adopt certain federal and state exemptions[10] which protect a debtor's property against creditors' demands in non-bankruptcy proceedings.[11] Typical examples are the federal exemption of federal Old-Age, Survivors Disability Insurance Benefits[12] and state homestead exemptions, which protect a family's interest in the land and the buildings where they reside.[13] However, the Bankruptcy Act does not adopt every federal and state exemption. A federal exemption is not adopted unless Congress intended it to be adopted.[14] A state exemption is not adopted if the state legislature intended to create only a bankruptcy exemp-

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8. 11 U.S.C. § 110 (1966) provides, in part:

> a. The trustee of the estate of a bankrupt . . . shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property . . . .

9. 11 U.S.C. Rules of Bankruptcy Procedure 403(a) (1976).

10. 11 U.S.C. § 24 (1966) provides, in part:

> This title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State . . . .

11. Non-bankruptcy proceedings may be brought in either a state court or a federal district court. Bankruptcy proceedings must be brought in a federal district court for bankruptcy. *See,* 11 U.S.C. § 11 (1966).

12. 42 U.S.C. §§ 401, 407 (1970).

13. *See, e.g.,* Browne v. San Luis Obispo Nat. Bank, 462 F.2d 129, 132 (9th Cir. 1972) (Bankruptcy Act incorporated the homestead exemption created by Cal. Civ. Code § 1260 (West 1976)); In re Neale, 274 F. Supp. 969, 970 (D. Tex. 1967) (Bankruptcy Act incorporated the homestead exemption created by Tex. Const. of 1876 art. 16, section 50).

14. *See,* Kokoszka v. Belford, 417 U.S. 642 (1974).

tion and not an exemption in state proceedings.[15] However, once a state exemption is adopted by the Bankruptcy Act, the state courts' interpretation of the exemption is binding upon bankruptcy courts.[16]

The Consumer Credit Protection Act

Although the federal CCPA provides for a garnishment exemption of at least seventy five percent of a debtor's aggregate disposable earnings,[17] it has never been considered a bankruptcy exemption. The United States Supreme Court in *Kokoszka v. Belford*[18] stated that Congress intended the CCPA to set a maximum limit on the amount of earnings that a creditor may garnish in non-bankruptcy proceedings. The *Kokoszka* Court quoted the

15. *See,* In re Kanter, 505 F.2d 228, 230-31 (9th Cir. 1974).

16. Holden v. Stratten, 198 U.S. 202, 207-08 (1905); Williams v. Wirt, 423 F.2d 761, 763 (5th Cir. 1970), later app., 441 F.2d 1150.

17. 15 U.S.C. § 1673 (1974) provides in part:

> (a) Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment may not exceed
>
> (1) 25 per centum of his disposable earnings for that week, or
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> (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed in section 206(a) (1) of Title 29 in effect at the time the earnings are payable,
>
> whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).
>
> (b)(1) The restrictions of subsection (a) of this section do not apply in the case of
>
> (A) any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process and which is subject to judicial review.
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> (B) any order of any court of bankruptcy under chapter XIII of the Bankruptcy Act.
>
> (C) any debt due for any State or Federal tax.
>
> . . . .
>
> (c) No court of the United States or any State, and no State (or officer of agency thereof) may make, execute, or enforce any order or process in violation of this section.

In this discussion, the level of the garnishment exemption provided in section 1673 will be assumed to be 75%, as provided in subsection (a)(1). The level of the garnishment exemption provided in subsection (a)(2) is more difficult to compute, but does not alter the analysis.

18. 417 U.S. 642 (1974).

statement in the House Report that the CCPA was designed to prevent debtors from declaring bankruptcy, while allowing the orderly collection of debts and guaranteeing debtors and their families a minimum means of support.[19] The Court found no congressional intent to affect the administration of a bankrupt's estate by creating a bankruptcy exemption.[20] Nevertheless, the *Kokoszka* Court did not decide whether the Federal CCPA was a bankruptcy exemption. Rather, it found that because the funds involved, a tax refund, were not "earnings" within the meaning of the CCPA, the CCPA was not applicable.[21]

The State Exemption Statute

Since 1968, when the federal CCPA was enacted, most states have amended their garnishment exemption statutes to conform to its provisions.[22] Some of these states have adopted the CCPA almost word for word.[23] But California, in its garhishment exemption statute, Code of Civil Procedure section 690.6, adopted only the level of exemption provided by the otherwise undefined term, "federal statute."[24] In *Raigoza v. Sperl*,[25] the California Court of Appeals held that the reference in section 690.6 to "federal statute[s]" was an adoption of the CCPA's seventy five percent garnishment exemption level.[26]

C. DOUBLE ADOPTION

The court in *Brissette* faced two questions: (1) whether the federal CCPA, by itself, created an exemption which was adopted by the Bankruptcy Act and (2) whether the federal CCPA's seventy five percent exemption level was a part of California's garnishment exemption law and, if so, whether that seventy five percent exemption level was adopted by the Bankruptcy Act.

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19. *Id.* at 651, *quoting* H.R. REP. No. 1040, 90th Cong., 1st Sess. 21.
20. *Id.* at 650.
21. *Id.* at 651.
22. ALASKA STAT. § 09.35.080(b); IDAHO CODE § 11-207; NEV. REV. STAT. § 21.090(h); OR. REV. STAT. §§ 23.175, 23.185; WASH. REV. CODE § 7.33.280.
23. IDAHO CODE § 11-207; OR. REV. STAT. §§ 23.175, 23.185.
24. CAL. CIV. PROC. CODE § 690.6(a) provides in part:
> (a)One-half or such greater portion as is allowed by statute of the United States, of the earnings of the debtor received for his or her personal services rendered at any time within 30 days next proceeding the date of a withholding by the employer under Section 682.3, shall be exempt from execution without filing a claim for exemption as provided in Section 690.50.
25. 34 Cal. App. 3d 560, 563 n.4, 110 Cal. Rptr. 296, 297 n.4 (1973).
26. *Id.* at 563, 110 Cal. Rptr. at 298.

The court first recognized that the question of whether the federal CCPA had been adopted by the Bankruptcy Act was squarely before it, because the funds involved were earnings within the meaning of the CCPA.[27] This contrasted with the facts in *Kokoszka.* The court nevertheless relied upon *Kokoszka's* discussion of congressional intent and its conclusion that Congress had not intended the CCPA to affect the administration of a bankrupt's estate. On the basis of this conclusion, the *Brissette* court held that the CCPA, by itself, was not adopted by the Bankruptcy Act.[28]

The court then ruled that the Bankruptcy Act adopted section 690.6. The court said that section 690.6 exempts debtors' earnings from creditors' demands and that the United States Supreme Court had treated section 690.6 as a state exemption for the purposes of the Bankruptcy Act.[29] The court then acknowledged that it was bound by the California court's decision in *Raigoza v. Sperl,* which held that section 690.6 had adopted the seventy five percent level of garnishment exemption provided in the federal CCPA. Consequently, the court ruled that the Bankruptcy Act adopted section 690.6, including the seventy five percent garnishment exemption level provided in the CCPA.

D. The Problem of Preemption

It was also observed that had the federal CCPA preempted section 690.6, a California bankrupt would be stripped of his state garnishment exemption. The court omitted the reasons for this conclusion, but it may have reasoned that the federal CCPA's preemption of California's section 690.6 would extinguish the state statute for all purposes. If so, the federal CCPA would be the only garnishment exemption statute in effect in California. As discussed above,[30] however, Congress intended the CCPA to be a garnishment exemption only in non-bankruptcy proceedings. Thus the Bankruptcy Act would have no California garnishment exemption statute to adopt and the Bankruptcy Act could not adopt the federal CCPA. Consequently, a California bankrupt would have no garnishment exemption at all. Whatever its reasoning, the court characterized this result as "unacceptable."

27. The funds involved were wages. 15 U.S.C. § 1672(a) (1978) defines earnings as "compensation . . . payable for personal services whether denominated as wages, salary, commission, bonus, or otherwise . . . ."

28. 561 F.2d at 785.

29. *See* Lines v. Fredrick, 400 U.S. 18 (1970).

30. *See* text accompanying notes 13-22 *supra.*

The court stated that stripping a California bankrupt of his state garnishment exemption would be inconsistent not only with Congress's intent in enacting the CCPA, but also with its intent that the Bankruptcy Act should adopt state exemption laws. However, the court failed to explain these inconsistencies or to state whether they were sufficiently important to warrant a result other than stripping bankrupts of their state garnishment exemptions.

The court reserved the question of preemption in states within the Ninth Circuit which have not amended their garnishment exemption statutes to conform to the federal CCPA's seventy five percent exemption level.[31] Arizona, for example, permits garnishment of fifty percent of a debtor's earnings.[32] Hawaii permits monthly garnishment of five percent of the debtor's first $100.00, ten percent of the second $100.00, and twenty percent of all earnings of $200.00 or more.[33] Montana permits garnishment of fifty percent of earnings, where the garnishment is levied to satisfy a debt incurred for the common necessaries of life.[34] Clearly, the federal CCPA preempts each of these statutes.[35] But does preemption of these statutes strip the bankrupt in these states of all garnishment exemptions?

The answer should be no because a contrary result would be inconsistent with the theory of preemption. Federal law preempts state law only if Congress has demonstrated an intent to do so.[36]

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31. The court probably realized the problems that would result if the CCPA was held to preempt other states' garnishment exemptions which are different from the CCPA since two months after the decision was rendered the panel issued an order which stated

> We had no occasion to [in our prior opinion] and we did not reach the question of the effect of the Consumer Credit Protection Act (15 U.S.C. §§ 1671 et seq. (1971)) in states with wage earner exemption schemes different from California's, nor do we express any opinion upon the preemptive effect, if any, of the Consumer Credit Protection Act, on such other state laws which Section 6 of the Bankruptcy Act adopts.

568 F.2d at 473.

32. ARIZ. REV. STAT. § 12-1594.

33. HAW. REV. STAT. § 652-1(b).

34. MONT. REV. CODES ANN. § 93-5816.

35. The only exceptions to the CCPA's garnishment exemption are found in subsection (b). Subsection (c) provides: "No court of . . . any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section." *See* footnote 11 *supra* and accompanying text.

36. "[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const. art. VI, cl. 2.); Deveau v. Braisted, 174 N.Y.S.2d 596, 5 A.D.2d 603 (1958), *aff'd*, 183 N.Y.S.2d 793, 5 N.Y.2d 236, 157 N.E.2d 165, *aff'd*, 363 U.S. 144 (The preemption of state law by federal law turns on

Such intent may be express or implied.[37] The federal CCPA expressly preempts state law on the level of garnishment permitted, but contains no express intent to strip debtors of any state garnishment exemption the moment they declare bankruptcy. To preempt a state law on the basis of implied intent, a federal law must be frustrated by the state law.[38] But *Kokoszka* makes it clear that Congress intended the CCPA's impact to be limited to non-bankruptcy proceedings, while providing the debtor with a minimum means of support.[39] Permitting state exemption statutes which do not conform to the CCPA to continue in effect in bankruptcy proceedings does not frustrate the purposes of the CCPA. In short, a conclusion that the CCPA's preemption of state garnishment exemption statutes should strip bankrupts of those exemptions is unwarranted.

The better view is that Congress intended the CCPA to preempt state law only for non-bankruptcy purposes. If so, the preempted state garnishment exemption statutes would retain their vitality in bankruptcy proceedings until the state legislatures amend the statutes to conform with the CCPA. Thus, seventy five percent of an Arizona debtor's earnings would be protected by the CCPA prior to bankruptcy. If the debtor declared bankruptcy in spite of the CCPA's protection, the Bankruptcy Act would adopt the Arizona garnishment exemption statute and 50% of the debtor's earnings would be exempted from vesting in the bankruptcy trustee. Moreover, retaining the preempted state exemptions for the purposes of bankruptcy proceedings will assure bankrupts of a protection which neither Congress nor the *Brissette* court sought to deny them.

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whether the court may fairly infer a congressional purpose incompatible with the state law.)

37. *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973). The court, *quoting* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), stated "[Preemption may be found, where] [t]he scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement . . . . Or [preemption may be found, where] State policy . . . produce[s] a result inconsistent with the objective of the federal statute." *But see,* Hodgeson v. Cleveland Municipal Court, 326 F. Supp. 419, 435-36 (N.D. Ohio 1971). (The Ohio garnishment exemption statute permitted garnishment of more than 25% if the debtor was paid more often than once per month, and permitted garnishment of less than 25% of earnings, if the debtor was paid monthly. Held, even though garnishment of less than 25% of the earnings did not violate the CCPA, the CCPA preempted both of these terms, because of the need for uniformity).

38. *Id.*

39. *See* Kokoszka v. Belford, *supra,* 417 U.S. at 650-51.

E. Conclusion

Brissette is only noteworthy in its establishment of a seventy-five percent bankruptcy exemption for California bankrupts. However, in arriving at this conclusion, the court left open the possibility that residents of states whose statutes do not conform to the CCPA may have no garnishment exemption for bankruptcy proceedings. This possibility may not be followed since congressional intent behind the CCPA and the Bankruptcy Act indicates that the CCPA works only a partial preemption as to state law. Under this view, the bankrupt resident of a state whose garnishment exemption is inconsistent with the federal garnishment exemption should enjoy the degree of protection provided by the state exemption.

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