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Case Comments

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CASE COMMENTS

CONFLICT OF LAWS — CIVIL PROCEDURE — CHOICE OF LAW — TORT LIABILITY — WORKINGMAN'S COMPENSATION — NEW YORK OVERTURNS LEX LOCI DELICTI IN OUT-OF-STATE DEATH OF NEW YORK DOMICILIARY.—Plaintiff's intestate, a resident of New York, died of asphyxiation in an oxygen-deficient chamber of a submarine in Newport News, Virginia, one month after commencing repair work on submarines under construction by Newport News Shipbuilding and Dry Dock Company [Newport]. Prior to death, decedent MacKendrick had resided with his family in Dunkirk, New York, for twenty-five years. During that time he worked as a welder for his employer, Alco, a Delaware corporation whose principal place of business is in New York state.

Defendant Newport had contracted with the United States Navy for the construction of submarines. The Navy had also contracted with Westinghouse, a Pennsylvania corporation, to install the air-conditioning systems. Westinghouse then contracted in Pennsylvania with Alco for the purchase of heat exchangers under an agreement providing that Alco would repair any defects in the exchangers. Alco's contract was exclusively with Westinghouse; it had no contract with defendant Newport.

Three months before MacKendrick's death, defects appeared in the heat exchanger equipment. Westinghouse, the Navy, and Newport executed a repair memo at Newport News requiring Alco personnel to arrive in Newport to make the necessary repairs. Westinghouse then brought decedent into Virginia under the repair provision of its contract with Alco. It was solely the inadequacy of the heat exchange system that necessitated the presence of Alco and its employee MacKendrick in Virginia.

For a month prior to death, decedent worked for Alco making the necessary repairs in the shipyard at Newport News. He lived in a motel nearby and returned periodically to visit his family in New York. There was no indication that he considered his presence in Virginia to be other than temporary.

Plaintiff argued that since decedent was a domiciliary of New York, regularly employed in New York by a New York firm, and only temporarily in Virginia, his death ought to be compensated under the Workingman's Compensation Act of New York state. Defendant, a Virginia corporation with only a sales office in New York City, argued that since decedent lived and worked in Virginia at the time of the accident, any recovery should come under the provisions of the Workingman's Compensation Act of Virginia, which precludes suit by the widow in such cases. In essence, defendent's appeal thus invoked the doctrine of *lex loci delicti*. The New York Supreme Court *held*: New York rather than Virginia law governs recovery because decedent had a greater "grouping of contacts" with the former state. *MacKendrick v. Newport News Shipbuilding & Dry Dock Co.*, 59 Misc. 2d 994, 302 N.Y.S.2d 124 (Sup. Ct. 1969).

In adopting New York law to govern recovery of a New York decedent whose death occurred out of state, the *MacKendrick* court explicitly overturned the blind application of the traditional *lex loci delicti* doctrine invoked by defendant.[1] This venerable choice-of-law rule, embodied in the original *Restatement*[2] and until recently generally followed by most states,[3] provides that substantive rights and liabilities arising from a tort be determined by the law of the place of the tort, rather than by the law of the forum in which the suit is brought — the *lex fori.*

Historically, the *lex loci* doctrine finds its conceptual foundation in the vested rights theory, which maintains that a right to recover for a foreign tort originates in the law of the jurisdiction where the injury occurred and depends for its existence and scope solely on that law.[4] In theory both right and liability originate at the time and place of the wrong and follow the parties into whatever other juridictions they enter.

Although espoused by judges such as Justice Holmes in *Slater v. Mexican R.R.*[5] and by authoritative scholars such as Professor Beale,[6] the vested rights doctrine recently has been accused with increasing tempo of failing to notice underlying policy considerations in the conflict between the *lex loci* and the *lex fori* doctrines.[7] The vice of the venerable vested rights theory allegedly lies in that "it affects to decide concrete cases upon generalities which do not state the practical considerations involved . . . ."[8] The mechanical rigor of *lex loci* precludes consideration of plaintiff's ties with his domiciliary state as well as of that state's interest in protecting its citizens from discrimination by laws of

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1 MacKendrick v. Newport News Shipbuilding and Dry Dock Co., 59 Misc. 2d 994, 302 N.Y.S.2d 124 (Sup. Ct. 1969). Literally, *lex loci delicti* means "the law of the place of the wrong," its import being that the law of the place of the wrong takes precedence over the law of the forum. Generally, the place where injury is sustained is the place of the wrong. RESTATEMENT, CONFLICT OF LAWS § 377 (1934). "The prevailing American view has been that the law of the place of the injurious effect of the defendant's conduct determines liability." G. STRUMBERG, PRINCIPLES OF CONFLICT OF LAWS 181 (3d ed. 1963). On the issue of measure of damages,

> [t]he law of the place of wrong governs the amount of recovery for wrongful death as well as the right to recover. Thus, any limitation upon the amount imposed by the law of the place of wrong will be applicable to determine the maximum amount recoverable elsewhere. RESTATEMENT, CONFLICT OF LAWS § 391, comment *d* at 480

(1934). For further discussion, see Annot., 95 A.L.R.2d 12 (1964).

2 RESTATEMENT, CONFLICT OF LAWS § 384 (1930).

3 Annot., 95 A.L.R.2d 12, 15 (1964).

4 Note, 21 VAND. L. REV. 266 (1968).

5 194 U.S. 120 (1904).

> The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio,* which, like other obligations, follows the person, and may be enforced wherever the person may be found. . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines not only merely the existence of the obligation . . . but equally determines its extent. *Id.* at 126.

The erosion of this doctrine has been recognized in subsequent decisions. *E.g.,* Richards v. United States, 369 U.S. 1 (1962). That case notes with approval the departures by some state courts from the *lex loci* practice. *Id.* at 15. *See* Note, 21 VAND. L. REV. 266 (1968).

6 2 J. BEALE, CONFLICT OF LAWS 1286-92 (1935).

7 Cavers, *A Critique of the Choice of Law Problem,* 47 HARV. L. REV. 173, 178 (1933); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility,* 58 HARV. L. REV. 361, 379-85 (1945); Cook, *The Logical and Legal Bases of the Conflict of Laws,* 33 YALE L.J. 457, 478 (1924); Hill, *Governmental Interest and the Conflict of Laws,* 27 U. CHI. L. REV. 463 (1960). On factors influencing the choice of conflicting laws, see Lorenzen, *Territoriality, Public Policy and the Conflict of Laws,* 33 YALE L.J. 736, 746-49 (1924); Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U.L. REV. 267 (1966).

8 Yntema, *The Hornbook Method and the Conflict of Laws,* 37 YALE L.J. 468, 482-83 (1928). For criticism of the vested rights theory, see Cavers, *supra* note 7; Cook, *supra* note 7; Comment, *The "Grouping of Contacts" Rule as a Basis for Resolving Conflicts of Law,* 20 RUTGERS L. REV. 572 (1966).

other states. While its advantages of uniform treatment and discouragement of forum shopping are worthwhile ideals, the *lex loci* rationale leads to uniform treatment only to the extent that none of the possible interested forums has a strong policy requiring a different result. The theory has also been criticized for ignoring the interests of jurisdictions other than that where the tort occurred.[9]

The recent attitude of New York reflects a rapidly growing and now acute distrust of the rigid application of *lex loci* and a preference for a more flexible approach centering on policy factors indicative of a "paramount interest" of one state over another.[10]

With minor exceptions, New York adhered faithfully to *lex loci* until *Kilberg v. Northeast Airlines*,[11] where the court made an effort to undermine that doctrine without condemning it. The *Kilberg* court declined to apply the law of the place of an airplane crash (Massachusetts) insofar as that law restricted the amount of recovery by a New York resident whose trip began in New York. Arguing that the crash in Massachusetts was "entirely fortuitous,"[12] the court reasoned that New York's policy of unrestricted recovery predominated over the Massachusetts statutory restriction on recovery. Although *Kilberg* made no mention of the terminology of "center of gravity" and made no explicit effort to overrule *lex loci*, the court's weighing of contacts in the two competing states signalled a readiness to abandon the rigidity of *lex loci* when the forum's citizen would appear to be unjustly treated by a foreign law.

The *Kilberg* court was not required to take a definitive position on the *lex loci* doctrine, for the issue of the applicability of the Massachusetts damage limitation was not even argued on appeal. The court deftly classed the measure of damages as procedural in order to achieve its result "without doing violence to the accepted pattern of conflict of laws rules."[13] The court's willingness to brand an issue procedural in order to promote the interests of its citizens indicated a manipulation of the *lex loci* doctrine not in accord with the rule's objectives of uniformity and predictability.[14] In essence, the dominant rationale in *Kilberg* appears to be that the recovery limitation of Massachusetts would not be enforced because it violated New York's strong public policy of unlimited recovery.

In 1963, the New York Court of Appeals explicitly departed from the *lex loci* doctrine in *Babcock v. Jackson*[15] by holding that New York law rather than that of Ontario would govern the liability of a New York driver for injuries suffered by his New York guest riding in his New York car in Ontario. Noting that both parties were citizens of the forum, that their trip was to begin and end

9 *See* Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 976-77 (1952).

10 MacKendrick v. Newport News Shipbuilding & Dry Dock Co., 59 Misc. 2d 994, 1000, 302 N.Y.S.2d 124, 129 (Sup. Ct. 1969).

11 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). For comments on *Kilberg* see 30 FORDHAM L. REV. 170 (1961); 12 SYRACUSE L. REV. 395 (1961); 10 U.C.L.A.L. REV. 670, 674 (1963); 15 VAND. L. REV. 271 (1961).

12 Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 39, 172 N.E.2d 526, 527, 211 N.Y.S.2d 133, 135 (1961).

13 *Id.*, 172 N.E.2d at 528, 211 N.Y.S.2d at 135.

14 *See id.* at 41-42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137.

15 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). For comments on *Babcock* see Cavers, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963); 32 FORDHAM L. REV. 158 (1963); 77 HARV. L. REV. 355 (1963); Note, 32 BROOKLYN L. REV. 143 (1965).

in New York, and that the car was licensed and garaged in that same state, the court reasoned that such contacts gave New York "the superior claim for the application of its law."[16] In a sweeping broadside against the vested rights theory underlying the *lex loci* doctrine, the court added that the rights and liabilities of the parties stemming from their guest-host relationship "should remain constant and not vary and shift as the automobile proceeds from place to place."[17]

The *Babcock* analysis resembles what has been generally termed the "governmental interest" approach to choice of law.[18] This approach recognizes that each jurisdiction may have policies concerning the occurrence in question, but that a jurisdiction ought not apply its law unless it has contacts with the occurrence that would cause its policies to be directly furthered.[19]

Babcock explicitly rejects the vested rights theory at the core of the *lex loci* doctrine. Furthermore, *Babcock*'s rationale differs in at least two respects from *lex loci*: first, it looks to more than the central "contact" of the injury in determining the governing law; and second, it looks to more than one jurisdiction to supply the governing law, thus admitting in principle that differing issues in a case may be governed by differing laws of differing jurisdictions. The determination of the proper law is made under the principle of "dominant contacts."[20]

Although the end result in *Babcock*'s fact pattern appears praiseworthy, the rationale of "dominant contacts" remains an unexplored catchall. The opinion gives little helpful advice for determining what contacts are "dominant" or "significant" when a number of states have competing policy interests. In its careful enumeration of the minute contacts of New York, the *Babcock* analysis suggests that "dominance" and "significance" are disclosed by a quantitative addition of contacts rather than by a qualitative appraisal of significantly differing contacts. *Babcock* leaves the impression not only that the car's New York license is equally as significant as the parties' New York domiciliary status but also that such quantitative tests will not solve the cases where true policy conflicts are at issue. The thinking in *Babock* blandly implies that the applicable law is determined by the greater number of contacts. Quantitatively,

> [a]s to [this] issue, it is New York, the place where the parties resided, and where their guest-host relationship arose and where the trip began and

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16 Babcock v. Jackson, 12 N.Y.2d 473, 483, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 751 (1963).

17 *Id.* at 483, 191 N.E.2d at 285, 240 N.Y.S.2d at 751.

18 *See* Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958). The court's comment is especially interesting:

> "[T]he best practical result" . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation. The merit of such a rule is that "it gives to the place 'having the most interest in the problem' paramount control over the legal issues . . ." and thereby allows the forum to apply "the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation.'" Babcock v. Jackson, 12 N.Y.2d

473, 481-82, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963).

19 Currie, *supra* note 18, at 964 and ff.

20 Babcock v. Jackson, 12 N.Y.2d 473, 483, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 751 (1963).

> was to end, rather than Ontario, the place of the fortuitous occurrence of the accident, which has the dominant contacts . . . .[21]

Instead of defining such important but vague terms, the *Babcock* decision goes on to invoke those otherwise laudable common-law ultimates: "justice," "fairness," and "the best practical result."[22] With these "Delphic phrases,"[23] *Babcock* added to the "conflict, crisis, and confusion in New York,"[24] which to some observers created a serious "crisis" in American conflict law.[25]

Babcock's undermining of the *lex loci* doctrine was short-lived. In *Dym v. Gordon*,[26] where the plaintiff-resident of New York was injured while riding in defendant-host's car in Colorado, the New York Court of Appeals applied the Colorado statute denying recovery and dismissed the complaint. The reason for seemingly retreating from *Babcock* in favor of the *lex loci* lay in the court's feeling that the accident arose out of the "Colorado-based activity"[27] of two New York students who met by chance and without plan in Colorado. Significantly, the *Dym* court refused the interpretation that *Babcock* suggested a "rule of domicile" or a "public policy" rationale,[28] preferring instead to limit its protective rationale to the place where the contact arose.[29]

Dym muddied the refreshing drift from the stagnancy of *lex loci*. Whereas in *Babcock* the trip commenced and was to end in New York, in *Dym* the parties met while taking the same golf course at the University of Colorado. Their trip was entirely Colorado-originated and Colorado-based. Furthermore, *Dym* determined that although the case involved a tort action, the disputed issue of rights and liabilities was contractual in nature. Consistent with this rationale the court concluded that the law of Colorado ought govern, since it was there that the "contractual relationship" arose. The pivotal factor was the "seat"

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21 *Id.*, 191 N.E.2d at 285, 240 N.Y.S.2d at 751. For critical analysis of the quantitative approach see Comment, 62 MICH. L. REV. 1358, 1372 (1964); Note, 20 RUTGERS L. REV. 572, 578 (1966).

22 Babcock v. Jackson, 12 N.Y.2d 473, 481, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963).

23 For a strong criticism of the ambiguity of such phrases see Rosenberg, *Two Views on Kell v. Henderson,* 67 COLUM. L. REV. 459, 460 (1967).

24 B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 690 (1963). "The courts are left with no satisfactory means of determining which contacts are more significant than others, regardless of whether the courts adopt a quantitative approach." Comment, 62 MICH. L. REV. 1358, 1373 (1964). Following *Babcock,* Professors Cavers, Cheatham, Currie, Ehrenzweig, Leflar, and Reese expressed their views on the case in *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212 (1963). Professor Cheatham gave great emphasis to the court's discussion of the concepts of center of gravity and grouping of contacts. *Id.* at 1229. Professor Currie believed that the court adopted his theory of governmental interest. *Id.* at 1234-35. Professor Ehrenzweig saw *Babcock* as an expression of his view that "the law of the state where the insured car is permanently kept" should prevail. *Id.* at 1246. Professors Cavers, Leflar, and Reese were unable to find in the opinion any means of agreeing with any of the above views.

25 Ehrenzweig, *Foreign Guest Statutes and Forum Accidents: Against the Desperanto of State "Interests,"* 68 COLUM. L. REV. 49 (1968); B. CURRIE, *supra* note 24; Kegel, *The Crisis of Conflict of Laws,* 112 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 91-268 (1964).

26 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

27 *Id.* at 121, 209 N.E.2d 792, 262 N.Y.S.2d at 463.

28 *Id.* at 123, 209 N.E.2d 794, 262 N.Y.S.2d at 466.

29 *Id.* at 125, 209 N.E.2d 795, 262 N.Y.S.2d at 467. "Thus it is that in this case, where Colorado has such significant contacts with the *relationship itself* and the *basis of its formation,* the application of its law and underlying policy are clearly warranted." *Id.,* 209 N.E.2d at 794, 262 N.Y.S.2d at 467.

or "nexus" of the relationship, which was to be determined solely from neither the physical situs nor from the place the contractual relationship arose, but rather from these two factors plus the *intent* of the parties.[30]

The difficulty in *Dym* appears most clearly in Judge Fuld's dissent:

> The mere fact that the guest-host relationship between the New York parties originated in Colorado has, in truth, as little relevance to the policy underlying that state's guest statute . . . as did the fact, in *Babcock*, of the occurrence of the accident in Ontario in relation to the similar policy embodied in its guest statute.[31]

Judge Fuld's analysis leads him to the conclusion that Colorado's contacts were numerically greater than Ontario's in *Babcock* but were still not significant to the policy issue of protecting New York citizens from foreign law.[32]

Suspended in a legal limbo between *Babcock* and *Dym*, the New York courts nevertheless next manifested a willingness to expand *lex fori* protection to noncitizens suing a New York defendant. In *Long v. Pan American World Airways*,[33] the court extended the *Babcock* rational of quantitative contacts to the wrongful death of a nonresident. Defendant's airplane, en route from Puerto Rico to Philadelphia, disintegrated and fell to the ground in Maryland. Decedents had resided in Pennsylvania where they had purchased their tickets for the round-trip flight from Philadelphia to San Juan. Both Pennsylvania and Maryland permitted recoveries for wrongful death, but the Maryland law, more restrictive than that of Pennsylvania, created a cause of action only for the surviving spouse, parent, or child of the deceased. Since decedents had no such survivors, Maryland law would preclude any recovery while Pennsylvania law would permit considerable compensation.

Enumerating in near-statistical fashion the decedents' various contacts with Pennsylvania and weighing these contacts against the one fatal contact with Maryland, the New York Court of Appeals held that Pennsylvania law ought govern because that state had "the most significant relationship."[34] While this result was seemingly the better alternative, the decision offered little clarification of the qualitative versus quantitative aspects of the contact theory.

In 1969, however, with *Tooker v. Lopez*,[35] the Court of Appeals realized an opportunity to resolve its admitted "inconsistencies."[36] By a resolute majority the court explicitly overruled *Dym* in holding that New York law, not that of

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30 *Id.*, 209 N.E.2d at 795, 262 N.Y.S.2d at 467.

31 *Id.* at 131-32, 207 N.E.2d at 799, 262 N.Y.S.2d at 472 (Fuld, J., dissenting). One author makes the interesting suggestion that in *Dym* the site of the injury was not fortuitous, the element ruling out fortuity being the dual facts that the relationship began in Colorado and continued there for six months. Two other elements proving nonfortuity are a long time spent in and intent to remain in the locus of jurisdiction.

> In analyzing the fact situation involved in a litigation, if the court finds that the place of the accident was any less than "entirely fortuitous," taking into consideration the factors underlying the fortuity concept . . . it should apply the *lex loci delicti*. Comment, 15 BUFFALO L. REV. 443, 451 (1966).

32 Dym v. Gordon, 16 N.Y.2d 120, 130-32, 207 N.E.2d 792, 797-99, 262 N.Y.S.2d 463, 470-72. (Fuld, J., dissenting).

33 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S. 2d 513 (1965).

34 *Id.* at 343, 213 N.E.2d at 799, 266 N.Y.S.2d at 517.

35 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

36 *Id.* at 572, 249 N.E.2d at 395, 301 N.Y.S.2d at 521.

Michigan, applied to the death of a New York guest in a New York-registered car driven by its New York owner in Michigan. *Tooker* explicitly invoked *Babcock* to justify its rejection of *lex loci*,[37] and once again the court stated that New York had "the only real interest" in the case.[38]

Concurring with the majority, Judge Fuld explicated three guidelines illustrative of the replacement of *lex loci*:

> 1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
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> 2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not . . . be permitted to interpose the law of his state as a defense.
>
> 3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normal applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.[39]

With the rest of the *Tooker* court immersed in the insurance problems of *Babcock* and *Tooker*, Judge Fuld's analysis of the rights of conflicting jurisdictions best presaged the argumentation in *MacKendrick*.

In *MacKendrick*, the court initially determined that Alco was an independent contractor because it had no contract with Newport.[40] The more difficult question confronting the court, however, arose from the fact that the *MacKendrick* fact pattern was only superficially similar to those of the preceding cases. Decedent's misfortune occurred neither in an auto nor in a plane; furthermore, it did not occur at the immediate instrumentality of another designated person. In effect, the court invoked three arguments to justify the replacement of the *lex loci* of Virginia by the *lexi fori* of New York.

The court's first and seemingly frailest argument lies in an analogy to the auto and plane fact patterns in the preceding cases. If decedent had been killed in a New York auto on his way to work in Newport, "New York law would surely apply."[41] Similarly, the court reasoned that if decedent had been killed in an air accident en route to Newport, "New York law would likewise surely apply."[42] Though decedent met death neither in a plane nor in an auto, the court felt that the transition to the *MacKendrick* situation was "logical":

37 *Id.* at 571, 249 N.E.2d at 395, 301 N.Y.S.2d at 521.
38 *Id.* at 576, 249 N.E.2d at 398, 301 N.Y.S.2d at 525.
39 *Id.* at 585, 249 N.E.2d at 404, 301 N.Y.S.2d at 532-33.
40 MacKendrick v. Newport News Shipbuilding & Dry Dock Co., 59 Misc. 2d 994, 998, 302 N.Y.S.2d 124, 128 (Sup. Ct. 1969).
41 *Id.* at 1010, 302 N.Y.S.2d at 139.
42 *Id.*

> There is no logical reason to deny to the deceased and to his family, New York domiciliaries, the protection and benefits of the New York law because he happened to meet his death in an industrial accident after his arrival in Newport News on a temporary work assignment from his home office in New York. It would be a mockery and contrary to the intent of the law to extend to him the protection afforded under New York law as a traveler in an auto or airplane, and then divest him of it the moment he disembarks from said vehicle of transportation.[43]

The difficulty, which the court does not dissipate, concerns the determination of the protected time period after arrival. Extending the protection of New York law to "the moment he disembarks" is neither problematic nor illustrative of the case. MacKendrick had not just disembarked; he had been living in a motel in Newport News on a daily basis for a month prior to his death. The court's discussion of the time element is most unhelpful, nor is it improved by the passing assurance that "[w]hen he is divested of New York's protective cloak would depend on the facts and circumstances of each case."[44]

A second approach used in *MacKendrick* stems from the "center of gravity" phraseology espoused in *Babcock* and *Tooker*.[45] Perhaps feeling that the vagueness of one such phrase could be dissipated by joining it with others of the same pattern, the court stated: "Since 'paramount interest,' 'center of gravity,' 'public policy' and 'grouping of contacts' are now applied in auto and airplane torts, as well as in contracts, contempt, property, and will cases . . . then why not here [*sic*]."[46] What this quantitative resort fails to determine is, once again, the yardstick for measuring *whose* contacts are superior. The contacts with Virginia, to which defendant Newport appealed and which the court did not discuss, could be made nearly as quantitative as those with New York. Indeed, Newport's argument was precisely that MacKendrick was living in a Virginia motel, working in a Virginia plant with no connection to New York, repairing material partially built and totally assembled in Virginia, and was working in this fashion not just as of the moment he "disembarked" but for over a month.[47] While the court showed awareness of these facts, it made no effort to weigh the competitive significance of these contacts over against those of New York.

The problem with the "center of contacts" doctrine, as with all its analogues, is that the contacts tend to be determined on the side of the aggrieved party in isolation from the contacts on the part of the other party. Newport's abortive due process complaint is precisely on this point, but the court shrinks from discussing it:

> Does this court thereby unlawfully deprive defendant the protection of its own laws? Is there a denial to defendant of due process and equal protection, which would do violence to the traditional and fundamental concepts of justice? The court's answer is in the negative.
>
> On the contrary, to deny plaintiff the protection of the laws of the

43 *Id.*
44 *Id.*
45 *Id.* at 1009-10, 302 N.Y.S.2d at 139.
46 *Id.* at 1010, 302 N.Y.S.2d at 139.
47 *Id.* at 996, 302 N.Y.S.2d at 126.

> State of New York, under all the facts and circumstances herein, would indeed be a gross miscarriage of justice and do violence to the principles of fair play.[48]

The third argument espoused in the *MacKendrick* decision, public policy,[49] undoubtedly transcends in simplicity the weakness of the preceding two. In effect, the New York courts have gone beyond *Babcock, Long,* and *Tooker* in now openly justifying the "paternalistic" policy of protecting New York domiciliaries.[50] In the court's own words: "Clearly, the public policy of our courts is to protect New York domiciliaries, wherever possible, from denial of recovery in another jurisdiction, and *Dym v. Gordon* [citation] was interred for all time and for all purposes."[51]

While this argument has its obvious paternal merits, it needs to be supported with some defense of the public policy of being "paternalistic" toward one party in a lawsuit. Indeed, the paternalism in *MacKendrick* repeatedly appears in the court's constant references to the "justice" of MacKendrick's complaint and the "injustice" of denying it.[52]

Significant in *MacKendrick* and its predecessors is the explicit use of the concepts of "paramount interest," "center of gravity," and "grouping of contacts."[53] In his vigorous dissent in *Babcock,* Judge Van Voorhis argued that such expressions are "catchwords" incapable of a definitional task, "inadequate to define a principle of law," and inapplicable "in the realm of torts."[54]

Much discussion has rightfully been directed at these concepts for their vagueness. One obvious reason for such vagueness is that the New York courts are forging a new beginning in conflict-of-law theory, and their operative terms have not yet had the benefit of tradition's penchant for increasing precision.[55] Still the problem remains. Whether a particular "contact" is significant is meaningless until significance is judged in terms of the policies and interests of the parties and states involved. Obviously, when there is no conflict, the law of the only interested state would be applied. When there is a conflict, the more significant "contacts" ought indicate which state has the "dominant" interest. Yet the decisions in *Babcock, Long, Tooker,* and *MacKendrick* repeatedly fail to get beyond a fruitless enumeration of the individual contacts or a self-conscious flirting with paternalism. Quantitative lists of contacts are no substitute for a policy yardstick of "significance." Until that yardstick is found, the New York courts may be able to achieve "just" results for its own citizens via a paternalistic policy decree, without, however, being able to answer defendant's charge that the court is thereby denying due process or at least being unresponsive, as in *MacKendrick,* to plaintiff's contacts with defendant's own state.

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48 *Id.* at 1011, 302 N.Y.S.2d at 140-41.
49 *Id.,* 302 N.Y.S.2d at 140.
50 *Id.*
51 *Id.*
52 *Id.* at 1000, 1002, 1011, 302 N.Y.S.2d at 130, 132, 140.
53 *Id.* at 1010, 302 N.Y.S.2d 139.
54 Babcock v. Jackson, 12 N.Y.2d 473, 486, 191 N.E.2d 279, 286, 240 N.Y.S.2d 743, 753 (1963) (dissenting opinion).
55 Cheatham, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212, 1231 (1963).

CORPORATIONS — FEDERAL PROCEDURE — JURIES — THE RIGHT TO A JURY TRIAL ATTACHES TO THOSE ISSUES IN STOCKHOLDER'S DERIVATIVE ACTIONS AS TO WHICH THE CORPORATION, HAD IT BEEN SUING IN ITS OWN RIGHT, WOULD HAVE BEEN ENTITLED TO A JURY TRIAL. — Corporate stockholders of the Lehman Corporation, a closed-end investment company, brought suit in federal court against Lehman's directors and the corporation's brokers, Lehman Brothers. The stockholders charged the directors with converting corporate assets and of "gross abuse of trust, gross misconduct, willful misfeasance, bad faith, gross negligence," and breach of fiduciary duty. Lehman Brothers was also accused of breach of fiduciary duty. The stockholders contended that the defendants were using an illegally large representation on the corporation's board of directors to extract excessive brokerage fees from the investment company in favor of the brokerage firm; and they demanded that defendants "account for and pay to the corporation for their profits and gains and its losses." In addition, the stockholders demanded a jury trial on the corporation's claims. The defendant's motion to strike the jury trial demand was denied by the district court.[1] To expedite the "ultimate termination to [the] litigation," the district court permitted an interlocutory appeal on the jury trial question. The United States Court of Appeals for the Second Circuit reversed, holding that a stockholder's derivative action is entirely equitable in nature and must be tried to the court.[2] Certiorari was sought and granted, and the United States Supreme Court reversed the court of appeals and *held*: In a stockholder's derivative action the right to a jury trial preserved by the seventh amendment "attaches to those issues as to which the corporation, had it been suing in its own right, would have been entitled to a jury." *Ross v. Bernhard*, 90 S. Ct. 733 (1970).

At common law the minority stockholder was without legal remedy when his corporation failed or refused to take appropriate action for its own protection. Concerned with the inadequate remedial avenues open to the abused stockholder, courts of equity fashioned and developed the stockholder's derivative action as "a corrective for managerial abuse."[3] *Taylor v. Miami Exporting Co.*[4] represents the first classic application of the stockholder's derivative action in American courts. In that case the court depicted the relationship between shareholders and directors as analogous to that of beneficiaries and their trustees, held that a breach of this trust relationship by directors vested equitable litigable rights in the shareholder, and accordingly permitted a shareholder suit brought to compel directors to restore corporate assets.

While early cases, following *Taylor's* lead, limited the right of the shareholder to recovery from officers and directors within the corporation, later cases extended this right to allow shareholders to recover from outsiders who had wronged the corporation.[5] The theoretical basis of the derivative action resulted

1 Ross v. Bernhard, 275 F. Supp. 569 (S.D.N.Y. 1967), *rev'd*, 403 F.2d 909 (2d Cir. 1968), *rev'd*, 90 S. Ct. 733 (1970).
2 Ross v. Bernhard, 403 F.2d 909 (2d Cir. 1968), *rev'g* 275 F. Supp. 569 (S.D.N.Y. 1967).
3 Prunty, *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U.L. REV. 980, 994 (1957).
4 5 Ohio 162, 22 Am. Dec. 785 (1831).
5 This progression is discussed in Prunty, *supra* note 3, at 985-92.

from the fusion of two equitable remedies. The stockholder's complaint rested on a breach of trust by directors to the shareholders. His standing to sue stemmed from the representative nature of his claim.[6] This evolution of the derivative suit in the equity side of the courts has been determinative of its treatment as a nonjury action.

The rationale underlying the judiciary's penchant for characterizing the derivative suit as equitable in nature is found deep in the bowels of American legal history.

The seventh amendment provides for trial by jury in suits at common law where the value in controversy exceeds twenty dollars.[7] Traditionally the courts have used a historical test to determine the right to a jury trial: Would the action have been cognizable in a court of law at the time of the adoption of the seventh amendment?[8] Although the shareholder's derivative action had not yet matured when the seventh amendment was adopted and hence cannot be categorized as either legal or equitable by resort to the traditional test,[9] every pre-*Ross* court save one[10] had held that being a creature of equity, the stockholder derivative suit could only be asserted in a court of equity.[11]

Partiality to this line of thought has not been confined to the federal judiciary. Judicial treatment of the derivative action in states having a constitutional[12] and procedural framework similar to the federal system has led to the same results.[13] Treatise writers have agreed with judicial treatment of the

6 *Id.* at 992.

7 U.S. CONST. amend. VII provides in pertinent part that: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

8 "The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted." Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935). For additional examples of the great favor shown this test by the Supreme Court, see Dimick v. Schiedt, 293 U.S. 474, 476 (1935); Patton v. United States, 281 U.S. 276, 288 (1930); Thomson v. Utah, 170 U.S. 343, 350 (1897).

9 See notes 49-52 *infra* and accompanying text.

10 The maverick case was DePinto v. Provident Sec. Life Ins. Co., 323 F. 2d 826 (9th Cir. 1963), *cert. denied,* 376 U.S. 950 (1964). The *De Pinto* decision set up the conflict between the circuits that led to the Supreme Court's decision in *Ross.*

11 In Richland v. Crandall, 259 F. Supp. 274, 279 (S.D.N.Y. 1966), the court did not follow *DePinto,* opting instead for the traditional view: "A derivative action could never be brought as a 'suit at common law.' Even though it asserts what would be legal claims if asserted by the corporation, it has always been exclusively in equity." In a parallel vein, the district court in Liken v. Shaffer, 64 F. Supp. 432, 441 (N.D. Iowa 1946) noted:

> A stockholder's derivative suit is an invention of the courts of equity and is recognizable only in equity and cannot be maintained at law. . . . Even if the claim, if sued directly by the corporation, would be an action at law, yet, if enforced by means of a stockholder's derivative suit, it is prosecuted by an action in equity.

Accord, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548 (1949); Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 522 (1947); Meyer v. Fleming, 327 U.S. 161, 167 (1946).

12 The seventh amendment is inapplicable to the states. Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 213 (1916) However most state constitutions have a provision similar to the seventh amendment. *See* James, *Right to a Jury Trial in Civil Actions,* 72 YALE L.J. 655 (1963).

13 Metcalf v. Shamel, 166 Cal. App. 2d 789, 333 P.2d 857 (Dist. Ct. App. 1959); Morton v. Morton Realty Co., 41 Idaho 729, 241 P. 1014 (1925); Rettinger v. Pierpont, 145 Neb. 161, 15 N.W.2d 393 (1944); Steinway v. Griffith Consol. Theatres, 273 P.2d 872 (Okla. 1954); McAleer v. Dawson, 119 Okla. 273, 248 P. 615 (1925); Isaac v. Marcus, 258 N.Y. 257, 179 N.E. 487 (1932); Brinckerhoff v. Bostwick, 105 N.Y. 567, 12 N.E. 58 (1887); Goetz v. Mfrs. Traders' Trust Co., 154 Misc. 733, 277 N.Y.S. 802 (Sup. Ct. 1935);

derivative action in holding it is a nonjury action.[14]

Against this formidable precedent, a divided Supreme Court held in *Ross v. Bernhard* that a stockholder's derivative action is triable to a jury if the claim that the corporation was entitled to assert would have been triable to a jury. In ruling as it did, the majority performed a two-step procedure in logic. The Court first analyzed the derivative action as consisting of two parts, the stockholder's standing to sue and the corporation's underlying claim against the wrongdoer.[15] The Court then applied this duality to the doctrine enunciated in *Beacon Theatres Inc. v. Westover*,[16] and *Dairy Queen Inc. v. Wood*[17] that when there are legal and equitable claims in a single action, the legal issues are triable to a jury before final determination of the equitable issues to the court. The dissent followed the traditional approach, holding that since the derivative action was born in equity it did not command a jury trial.[18]

In recognizing the dual nature of the derivative suit, the majority was by no means breaking new ground. Indeed, as early as 1882[19] the Supreme Court had conceptually labeled the derivative action as combining two parts: "[the] one against his [the shareholder's] own company, of which he is a corporator, for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation."[20] Subsequent cases have recognized and accepted the dual nature of the derivative action[21] while emphasizing the primary nature of the corporation's claim.[22]

Neff v. Barber, 165 Wis. 503, 162 N.W. 667 (1917); Harrington v. Gilchrist, 121 Wis. 127, 99 N.W. 909 (1904).

14 A derivative action is an invention of the courts of equity and may be brought only in equity whether the corporate cause of action be in law or not. As far as corporate rights and defenses available against it are in issue, these issues are decided exactly as if the corporation were the plaintiff except the matter of jury trial for the case being in equity there is no right to jury trial. N. LATTIN, THE LAW OF CORPORATIONS 350 (1959). *See* 4 W. COOK, CORPORATIONS § 734, at 3186-87 (1923); 13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5931, at 402 (perm. ed. rev. repl. 1961); 5 J. MOORE, FEDERAL PRACTICE ¶ 38.38[4], at 306 (1969).

15 "Thus the dual nature of the stockholders' action: first the plaintiff's right to sue on behalf of the corporation and second the merits of the corporation claim itself." Ross v. Bernhard, 90 S.Ct. 733, 736 (1970).

16 359 U.S. 500 (1959).

17 369 U.S. 469 (1962).

18 Ross v. Bernhard, 90 S.Ct. 733, 742 (1970) (Mr. Justice Stewart dissenting).

19 Hawes v. Oakland, 104 U.S. 450 (1882).

20 *Id.* at 452-53.

21 *See* Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 522-23 (1947); Ashwander v. TVA, 297 U.S. 288 (1936).

The dual nature of the action has not escaped the commentators. Ballantine refers to the stockholder's derivative action as combining two claims: "(1) to enforce in equity the corporate duty to the shareholder and (2) to enforce in the same proceedings the basic or underlying corporate right of action." H. BALLANTINE, CORPORATIONS § 151, at 359 (rev. ed. 1946). In another section he notes that the derivative action has been characterized by courts as "in effect a combination of two causes of action, a proceeding having a dual nature." *Id.* § 145, at 343.

Fletcher is in agreement with Ballantine, noting that

> the stockholder's suit . . . is a suit having a double aspect. The stockholders have a right in equity to compel the assertion of a corporate right of action against the directors or other wrongdoers when the corporation wrongfully refuses to sue.

13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5941.1, at 414 (perm. ed. rev. repl. 1961).

22 The remedy sought is for wrong done to the corporation; the primary cause of action belongs to the corporation; recovery must enure to the benefit of the corporation. The stockholder brings the action in behalf of others similarly situated to

The stockholder is allowed to sue to protect the corporation only after it has refused to assert its claim. He sues in a representative capacity, the primary cause of action belonging to the corporation. It is the real party in interest and the remedy inures to its benefit.[23]

Once this duality is recognized, it is obvious that the underlying corporate claim against the wrongdoers might be equitable or legal in nature. If the underlying corporate claim would be cognizable at common law were the corporation suing alone, the question arises why courts have denied jury trials in such instances. This query demands an analysis of the procedural devices through which claims were drawn into court.

Prior to the adoption of the Federal Rules of Civil Procedure, the federal judicial system administered two sets of procedures. Claims cognizable at common law were triable to a jury in a law court, while traditionally equitable claims were decided in a court of equity without a jury. The boundary marking the distinction between actions at law and suits in equity was not always clear. In general, actions for money damages were cognizable at common law. Accordingly, claims seeking damages for personal injuries, breach of contract, libel, or slander, for example, were traditionally legal,[24] while bills seeking injunctive relief, specific performance, or restitution were considered equitable in nature.[25]

In some instances a claim for equitable relief would contain incidental legal issues. In other situations, a legal remedy would become available to resolve a claim subsequent to equity's jurisdiction over the suit. To avoid confusion, delay, and injustice, it was a well established principle that once a court of equity had jurisdiction over a suit it would retain jurisdiction for all purposes, disposing of all the litigation in the case even if that involved a determination of legal issues and the granting of legal remedies.[26] Thus, in certain cases, under this "clean-up" power an equity court would dispose of legal issues.

In general, the nature of the remedy sought was determinative of the right of jury trial.[27] In some instances, however, the separation of law and equity itself determined the rights of parties. In *Fleitmann v. Welsbach St. Lighting Co.*,[28]

vindicate the corporate rights, and a judgment on the merits is a binding adjudication of those rights. Isaacs v. Marcus, 258 N.Y. 257, 264, 179 N.E. 487, 489 (1932).

23 The cause of action which [the plaintiff in a stockholder's derivative suit] brings before the court is not his own but that of the corporation's. It is the real party in interest and he is allowed to act in protection of its interest somewhat as a "next of friend" might do for an individual, because it is disabled from protecting itself. Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 522-23 (1947).

In Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), the Court noted:

> Equity came to the relief of the stockholder who had no standing to bring civil action at law against faithless directors. Equity . . . allowed him to step into the corporation's shoes and seek in its right the restitution he could not demand on his own. It required him first to demand that the corporation vindicate its own rights but when as was usual, those who perpetrated the wrong also were able to obstruct any remedy, equity would hear and adjudge the corporation's cause through its shareholders with the corporation as a defendant, albeit a rather nominal one. *Id.* at 548.

24 2B W. Barron & A. Holtzoff, Federal Practice and Procedure § 872, at 25-26 (rev. ed. C. Wright 1961).

25 *Id.* at 21-24.

26 *See generally* 1. J. Pomeroy, Equity Jurisprudence §§ 181-82, at 257-61, § 237, at 429-31 (5th ed. S. Simons 1941).

27 2B W. Barron & A. Holtzoff, Federal Practice and Procedure § 872, at 21-26 (rev. ed. C. Wright 1961).

28 240 U.S. 27 (1916).

for example, stockholders sued derivatively in a court of equity for treble damages under the antitrust laws. The Court recognized that the underlying claim set up by the plea for treble damages was "that of the corporation alone," and as such was a legal claim entitling the defendants to a jury trial on the question of penal damages. This conclusion, however, was fatal to the stockholders' action in that case. The court of equity could not conduct a jury trial on the corporation's underlying antitrust claim, and hence the derivative action was dismissed by the court. In *Fleitmann,* procedural impediments resulting from separate law and equity courts thus worked to deny trial on the legal claim to a jury.

The anomaly of this situation is obvious. If the defendant was sued by the corporation, he was entitled to a jury trial; but when sued derivatively under the corporation's claim, he either lost his right to a jury trial entirely, or by insisting on it he defeated the action.[29]

The merger of law and equity in 1938 facilitated the creation of more complex and sophisticated actions than had previously existed. The Federal Rules of Procedure[30] permitted the blending of legal and equitable claims[31] into one "civil action,"[32] as where equitable and legal issues were joined, a legal counterclaim was interposed in an equitable action, or an equitable defense or counterclaim was interposed in a legal action.[33] In this "civil action" equitable issues would be decided by the court and legal issues would be determined by a jury. Because these more complex actions had no precise analogue in 1791, the seventh amendment historical test has been difficult to apply under the streamlined procedure of the federal rules.[34]

One dilemma confronting the courts has arisen where a common factual issue embodied both a legal and an equitable claim. Thus, *A* sues *B* in equity for an injunction preventing *B* from bringing an antitrust action against him. *B* counterclaims at law for the antitrust violation. Both *A*'s equitable claim and *B*'s legal claim stem from the same factual controversy.

Applying pre-merger concepts to this hypothetical, *A*'s legal issue would be decided without a jury under the clean-up power of the equity court. The operation of this procedure would thus deny *B*'s right to a jury trial on the legal issue. But under the merged system of rules, legal and equitable issues could be joined in the same action and tried side by side. The sequence of trial order

29 *See* Brief for Appellant at 10, Ross v. Bernhard, 90 S. Ct. 733 (1970).

30 The Federal Rules of Civil Procedure preserved intact the constitutional right to trial by jury. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." FED. R. CIV. P. 38(a). It should be understood that this Comment deals with the constitutional right to trial by jury on the corporation's claim in derivative suits. Though there is no statute giving such a right in antitrust cases, the demand for treble damages, by its penal nature, has been construed as conferring a statutory right. Fleitmann v. Welsbach St. Lighting Co., 240 U.S. 27 (1916).

31 FED. R. CIV. P. 18(a) in pertinent part provides that:

> The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party.

32 FED. R. CIV. P. 2: "There shall be one form of action to be known as a 'civil action.'"

33 J. MOORE, FEDERAL PRACTICE ¶ 38.07[1], at 39 (2d ed. 1969).

34 2B W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 872, at 20 (rev. ed. C. Wright 1961).

thus became important since prior disposition of the equitable claim might collaterally estop jury determination of the legal issue.[35] Several tests were devised to resolve this problem. Some courts applied the traditional clean-up rule that legal issues would be determined subsequent to equitable issues.[36] Other courts held the sequence of issue determination was a matter for the judge's discretion.[37] A third test looked to the basic nature of the entire issue.[38] Other courts ruled that legal issues must be tried before equitable issues.[39]

In 1959 the Supreme Court ended this controversy, strongly reaffirming that all legal issues are jury actions and cannot be denied a jury hearing by the manner in which they come into court.[40] To the above factual pattern, the *Beacon Theatres* Court held that where both a legal and an equitable issue spring from the same controversy, the legal issue is entitled to jury determination prior to a ruling by the court on the equitable claim. In *Beacon* the Court noted that the federal rules neither enlarged nor abridged seventh amendment rights.[41] However the Court also noted that the federal rules introduced procedural remedies that, had they existed under the pre-merger system, would have made the clean-up doctrine unnecessary. To the extent that these reforms

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35 Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 505 (1959).

36 *E.g.,* North Am. Philips Co. v. Brownshield, 9 F.R.D. 132 (S.D.N.Y. 1949); Bendix Aviation Corp. v. Glass, 81 F. Supp. 645 (E.D. Pa. 1948); U.S. Fidelity Guar. Co. v. Janich, 3 F.R.D. 16 (S.D. Cal. 1943); Mather v. Ford Motor Co., 40 F. Supp. 589 (E.D. Mich. 1941); Fitzpatrick v. Sun Life Assurance Co., 1 F.R.D. 713 (D.N.J. 1941); Union Cent. Life Ins. Co. v. Burger, 27 F. Supp. 554 (S.D.N.Y. 1939). The district courts applying this test had handsome pre-merger Supreme Court precedent to draw from. *See* American Life Ins. Co. v. Stewart, 300 U.S. 203 (1937); Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235 (1922).

37 FED. R. CIV. P. 42(b) as it read prior to *Beacon* provided that:

> The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

This trend has been manifested in decisions dealing with the joinder of legal and equitable claims. *See* Tanimura v. United States, 191 F.2d 184 (1st Cir. 1951); Russel v. Laurel Music Corp., 104 F. Supp. 815 (S.D.N.Y. 1952) (dictum). Counterclaims or cross-claims, have given rise to similar holdings. *See* Black v. Boyd, 251 F.2d 843 (6th Cir. 1958); Prudential Ins. Co. v. Saxe, 134 F.2d 16 (D.C. Cir.), *cert. denied*, 319 U.S. 745 (1943); Institutional Drug Distribs., Inc. v. Yankwich, 249 F.2d 566 (9th Cir. 1957) (dictum).

38 Under this test, if the issues are found to be basically equitable the equitable claim is tried prior to the legal claim. Beaunit Mills, Inc. v. Eday Fabric Sales Corp., 124 F.2d 563 (2d Cir. 1942); Bellavance v. Plastic-Craft Novelty Co., 30 F. Supp. 37 (D. Mass. 1939); Fitzpatrick v. Sun Life Assurance Co., 1 F.R.D. 713 (D.N.J. 1941). If the issues appear basically legal, then the legal claim is determined prior to the equitable claim. Ring v. Spina, 166 F.2d 546 (2nd Cir. 1948); United States Process Corp. v. Fort Pitt Brewing Co., 29 F. Supp. 37 (W.D. Pa. 1939). *See* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.16, at 148-58 (2d ed. 1969); Comment, 35 N.Y.U.L. REV. 289, 290-91 nn.10&11 (1960).

39 The basis for this test is FED. R. CIV. P. 38(a). The text of this provision is set forth in note 30 *supra*. *See* Bruckman v. Hollzer, 152 F.2d 730, 733 (9th Cir. 1946):

> We regard the rules enlarging the powers of the single tribunal to hear and determine equitable and legal transactions in which the pre-existing right to jury trial is to be preserved, as a long forward step in our judicial procedure. We consider one of its major purposes is to remove the expensive and time-losing requirement of two separate suits to give to the litigant his jury as well as his equitable relief. We are not in accord with the extreme judicial conservatism which instinctively clings to out-moded intricate processes and would seek to nullify or minimize every attempt for their simplification.

See also Comment, 35 N.Y.U.L. REV. 289, 290 n.13 (1960).

40 *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

41 *See id.* at 508-09.

corrected previous procedural obstacles to jury trials, the scope of equity was reduced:

> Since in the federal courts equity has always acted only when legal remedies were inadequate, the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity. Thus, the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because subsequently a legal remedy becomes available, must be re-evaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action.[42] (Footnotes omitted.)

Three years later, in *Dairy Queen*,[43] the Supreme Court reemphasized its holding in *Beacon Theatres*. The complaint in question alleged that the defendant was infringing the plaintiff's trademark and had breached a licensing agreement between the parties; it sought an injunction and an accounting. These were traditionally equitable remedies (much as the stockholder's derivative action was traditionally equitable). The Court held that since money damages were sought, the right to a jury trial was not destroyed:

> The holding in *Beacon Theatres* was that where both legal and equitable issues are presented in a single case, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as "incidental" to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such "imperative circumstances," *Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury.[44] (Footnotes omitted.)

Beacon and *Dairy Queen* modified the historical test governing the right to a jury trial. The new test enunciated in these cases is whether an action would have been triable as a common-law suit in 1791 had certain procedural impediments then existing been corrected. In pre-merger *Fleitmann*, the derivative action for antitrust damages was dismissed because equity could not conduct a jury trial. Under the merged system, however, the trial of legal and equitable issues side by side has led to a different result. In *Fanchon & Marco, Inc. v Paramount Pictures*,[45] the Second Circuit noted the absence of procedural obstacles under the federal rules and allowed recovery on a stockholder's derivative action for antitrust damages saying:

> The *Fleitmann* case does hold specifically that a party is entitled to a verdict of a jury against him before he can be forced to pay trebel damages . . . . This perfectly reasonable view of the policy of the statutory remedy can be enforced without any difficulty in the merged procedure

42 *Id.* at 509.
43 Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).
44 *Id.* at 472-73.
45 202 F.2d 731 (2d Cir. 1953).

> of the present rules. The two major issues of right of the shareholders to sue and of violation of anti-trust laws causing damage to the corporation can be tried side by side or otherwise as may be convenient; that one may go to the jury while the other does not causes no difficulty.[46]

Beacon and *Dairy Queen* thus symbolize two propositions. When legal and equitable issues arise from the same factual dispute, the legal issue remains a jury action and must be resolved prior to the equitable action. The second proposition is that the traditional test governing the seventh amendment right to a jury trial has been modified. The merged procedure of the federal rules is now projected into a historical reference: Would the substantive action have been a jury action at common law in 1791 were procedural remedies effectuated by the federal rules available in that period?

The *Ross* court applied this test to the stockholder's derivative action. Writing for the majority, Mr. Justice White noted the dual aspect of the derivative suit; "first, the plaintiff's right to sue on behalf of the corporation and second the merits of the corporation claim itself."[47] Connecting *Beacon* with this analysis, he arrived at the proposition that when there are two issues, one legal and the other equitable, the legal issue is entitled to jury determination.

The Court reasoned that historically the corporation's claim was tied to the shareholder's equitable right to sue. The legal issue thus followed the shareholder's claim into a court of equity where it would be disposed of by the court under equity's clean-up power. Such procedure denied any exercise of the right to jury trial. The majority then looked to the procedural reforms ushered in by the federal rules allowing legal and equitable issues to be tried side by side, the one to the jury, the other to the court. Mr. Justice White noted that by virtue of the federal rules "[p]urely procedural impediments to the presentation of any issue by any party, based on the difference between law and equity, were destroyed."[48]

The dissent objected to the projecting of the merged procedures into the historical conditions prevailing at the time the seventh amendment was adopted.[49]

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46 *Id.* at 735.

47 Ross v. Bernhard, 90 S. Ct. 733, 736 (1970).

48 *Id.* at 739. Mr. Justice White later observed:

> The historical rule preventing a court of law from entertaining a shareholder's suit on behalf of the corporation is obsolete; it is no longer tenable for a district court, administering both law and equity in the same action, to deny legal remedies to a corporation, merely because the corporation's spokesmen are its shareholders rather than its directors. Under the rules, law and equity are procedurally combined; nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court. The "expansion of adequate legal remedies provided by * * * the Federal Rules necessarily affects the scope of equity." Beacon Theatres, Inc. v. Westover, 359 U.S., at 509, 79 S.Ct., at 956. *Id.*

49 Said Mr. Justice Stewart in the dissent:

> The Seventh Amendment, by its terms, does not extend, but merely *preserves* the right to a jury trial "in suits at common law." All agree that this means the reach of the Amendment is limited to those actions which were tried to the jury in 1791 when the Amendment was adopted. Suits in equity, which were historically tried to the court, were therefore unaffected by it. Similarly, Rule 38 of the Federal Rules has no bearing on the right to a jury trial in suits in equity, for it simply preserves inviolate "the right of trial by jury as declared by the Seventh Amendment." Thus this Rule, like the Amendment itself, neither restricts nor enlarges the right to jury trial. Indeed nothing in the Federal Rules can rightly

Mr. Justice Stewart applied a static historic test: Would the shareholders have been entitled to a jury trial on the corporate claim in 1791? This test, in effect, isolates and then freezes the right to a jury absolutely as it was in 1791, and for that reason lends itself to criticism. First, the derivative action was still in its formative stage when the seventh amendment was adopted[50] — shareholders rights had not yet been crystalized; in fact they were still expanding. Second, the line between law and equity was never fixed or static.[51] Rather, it was continually shifting while each jurisdiction borrowed from the other; and there was a considerable overlap of facts that could have been presented and decided at both equity and law. This has led one critic to suggest that "the historic test . . . is probably not well-adapted to the merged or united procedures of the present day," because it does not accommodate for the extensions or contractions of jury trial prior to 1791.[52] *Fanchon & Marco, Beacon,* and *Dairy Queen* confirm this notion and suggest a more flexible test. Whether it is said that these cases "enlarge" or "preserve" the right to trial by jury, they do allow jury trials in situations where they had been denied prior to the federal rules.

Ross finds its strength in this line of cases. Furthermore, the Court analogized the stockholder's derivative action to recent developments in other traditionally equitable actions. The Court noted that class actions, interpleader actions, and intervener actions have all been traditionally equitable.[53] In these actions, issues that may have been jury submissible have been traditionally tried to the court because the parties came into court through equity. Recent judicial treatment of these actions, however, illustrates that jury trials are being more liberally granted to the legal issues in those actions. The majority opinion lends much weight to the continuation of this trend.

Ross v. Bernhard is a logical extension of *Beacon* and *Dairy Queen.* It is meritorious on several grounds. It emphatically reaffirms the proposition that the right to a jury trial depends solely on the substance of the issue in question not upon the procedure under which the issue finds its way into court. Under pre-merger concepts, if the defendants were sued by the corporation alone, they would have been entitled to a jury trial, but where sued derivatively, they were "cheated" of a jury trial. *Ross* resolves this anomaly. It restores to the parties

be construed to enlarge the right of jury trial, for in the legislation authorizing the Rules, Congress expressly provided that they "shall neither abridge, enlarge, nor modify the substantive rights of any litigant." 48 Stat. 1064. See 28 U.S.C. § 2072. I take this plain, simple, and straightforward language to mean that after the promulgation of the Federal Rules, as before, the constitutional right to a jury trial attaches only to suits at common law. So, apparently, has every federal court that has discussed the issue. Since, as the Court concedes, a shareholder's derivative suit could be brought only in equity, it would seem to me to follow by the most elementary logic that in such suits there is no constitutional right to a trial by jury. Today the Court tosses aside history, logic and over 100 years of firm precedent to hold that the plaintiff in a shareholder's derivative suit does indeed have a constitutional right to a trial by jury. This holding has a questionable basis in policy and no basis whatever in the Constitution.

. . . If the corporation would have been entitled to a jury trial on such a claim, then it is said, so is the shareholder. This conceptualization is without any historical basis. *Id.* at 741-42.

50 *See* Prunty, *supra* note 3, at 980-92.
51 James, *Right to a Jury Trial in Civil Actions,* 72 YALE L. J. 655, 657-59 (1963).
52 *Id.* at 657, 664.
53 Ross v. Bernhard, 90 S. Ct. 733, 739-40 (1970).

in a stockholder's derivative suit "the same right to a jury trial which historically belonged to the corporation and to those against whom the corporation pressed its legal claims."[54]

If any criticism could be levelled at the holding in *Ross*, it would likely be founded on the practical consideration that the many complex and highly technical issues arising in such suits which, until *Ross*, were tried to the court, have now become subject to the whim of a relatively unsophisticated group of laymen. Thus, continues the argument, "correct" decisions in derivative suits may be harder to come by after *Ross*. In answer, it may be observed that this line of thinking possibly gives more credit to the judiciary and less to the jury than is warranted. Moreover, through rule 53 a court has the power to appoint a master to assist the jury when exceptional conditions arise.[55]

J. Robert McMenamin

TORTS — STRICT LIABILITY — LAND DEVELOPERS ARE STRICTLY LIABLE FOR DEFECTIVE CONSTRUCTION OF MASS-PRODUCED REAL ESTATE LOTS WHERE THE DEFECT RESULTS IN PROPERTY DAMAGE. — Longridge Estates developed hillside property in Los Angeles County into a tract of residential lots which it then offered for sale. D. S. Hammer did the general engineering, and the Donald R. Warren Company performed the soils engineering for the tract. In early 1960, a lot in the tract was purchased and a house built thereon. On June 15, 1960, Thomas and Carol Ann Avner purchased the lot and house from the original buyer, their predecessor in interest. In February, 1962, a portion of the rear slope of the lot failed.[1] Again in November, 1965, the rear slope of the lot failed in a different location. These slides were allegedly caused by inadequate drainage and improper compaction of fill on the rear slope. Also, the house itself was damaged when the entire lot pad settled because of insufficient compaction and decomposition of organic matter used as fill.

On July 1, 1960, the Avners filed their complaint in the Superior Court of Los Angeles County against defendants Longridge Estates, D. S. Hammer, and Donald R. Warren Company to recover damages for the defective construction in the mass-production and sale of the lots. This complaint was, in part, based on the doctrine of strict liability in tort. The trial court sustained the defendants' demurrers, holding that there was no doctrine of strict liability as to the manufacture of residential lots. The California Court of Appeal, Second Appellate District, reversed and *held*: the manufacturer of a lot may be held strictly liable in tort for damages suffered by the owner as a proximate result of any defects in the lot. *Avner v. Longridge Estates*, 272 Cal. App. 2d —, 77 Cal. Rptr. 633 (Ct. App. 1969).

The origin of modern products liability theory can be traced to the land-

54 *Id.* at 740.
55 FED. R. CIV. P. 53.

1 The damages resulting from this failure were not included in the plaintiff's cause of action as they were admittedly barred by California's three-year period of limitations. CAL. CIV. PRO. CODE § 338 (2) (West 1954).

mark decision of *MacPherson v. Buick Motor Co.*[2] In that case, Judge Cardozo sustained a cause of action in negligence on behalf of an ultimate consumer injured by a defectively produced automobile. An action was allowed against the manufacturer, Buick Motors, despite the absence of a buyer-seller privity relationship. The issue, of course, was whether the manufacturer owed a duty of care, sufficient to support a negligence action, to anyone but the original purchaser. Following *MacPherson*, an orderly progression began in the field of products liability with the imposition of liability for harm caused by defective food[3] and products intended for bodily use.[4] The second landmark decision in the area of products liability, *Henningsen v. Bloomfield Motors, Inc.*,[5] was handed down in 1960 by the New Jersey Supreme Court. Chrysler Corporation manufactured an automobile, and its authorized dealer, Bloomfield Motors, Inc., sold it to the consumer, Mr. Henningsen. While Mrs. Henningsen was driving, the steering mechanism failed without explanation, and the car veered sharply to the right into a wall. Mrs. Henningsen brought an action against both the manufacturer and the dealer. Both Chrysler and Bloomfield were held liable, without any showing of negligence or privity, for the personal injuries sustained by Mrs. Henningsen on the theory that an implied warranty of merchantability guaranteed the automobile fit for its general purpose.[6] Thus, *MacPherson* destroyed the privity requirement in an action for negligence, and *Henningsen* solidly established the doctrine of the implied warranty liability of a manufacturer for a defect in its product which renders it unsafe for its intended purpose.[7]

Therefore, in order to hold manufacturers liable, the courts utilized these first two traditional products liability theories of negligence and implied warranties. The doctrine of strict liability in tort had yet to be developed to overcome these more involved and cumbersome approaches. Then, in 1963, the case of *Greenman v. Yuba Power Products, Inc.*,[8] came before the California Supreme Court. The plaintiff was injured when a piece of wood flew loose from a defective power tool that his wife had purchased. He brought his action against the manufacturer, Yuba Power Products, Inc., who defended on the ground that notice of breach of warranty had not been given as required by the Uniform Sales Act.[9] Justice Traynor discarded the warranty and the notice requirement and clearly took the approach of strict liability in tort when he stated:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.[10]

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2 217 N.Y. 382, 111 N.E. 1050 (1916).
3 *E.g.*, Coca Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).
4 *E.g.*, Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).
5 32 N.J. 358, 161 A.2d 69 (1960).
6 *Id.* at 384, 161 A.2d 84.
7 For the most authoritative and complete study of this development, see Prosser, *The Assault upon the Citadel,* 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel,* 50 MINN. L. REV. 791 (1966).
8 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).
9 CAL. CIV. PRO. CODE § 1769 (West 1954).
10 Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, —, 27 Cal. Rptr. 697, 700, 377 P.2d 897, 900 (1963).

A unanimous California Supreme Court reiterated and strengthened the position it had taken in *Greenman* when it handed down *Vandermark v. Ford Motor Co.*[11] It followed the precedent relative to manufacturers and extended the strict liability theory to retailers. Today in California, the law is established that in an action based on strict liability the issue is simply whether the product was defective and whether such defect was the proximate cause of the injury.[12] As expressed by one authority:

> [T]he California Supreme Court has placed the law of defective products on a new highway. It is one which is unfamiliar, true, but one which is free from the twists and turns of the old and rejected warranty and negligence concepts, and one which can be traveled with much greater assurance and in a much straighter direction toward the desired goal of proper imposition of liability for defective and dangerous chattels.[13]

In *Avner*, to accomplish the most far-reaching extension of strict liability yet, the court had to establish a theory that would permit the plaintiff to recover for property damages[14] caused by a construction contractor's defective manufacture of real estate lots. Previously, the remedy was used against an industrial manufacturer, but further development was obviously the trend.[15] In order to hold developers of lots within the strict liability doctrine, *Avner* relied heavily upon the recent decision of *Kriegler v. Eichler Homes*[16] handed down by its sister tribunal, the Court of Appeal for the First District. Eichler Homes, Inc., was a mass producer of homes in the Palo Alto area. These homes were equipped with steel tubing radiant heating systems.[17] One such house, originally purchased from defendant Eichler, was resold to the plaintiff. In November of 1959, the radiant heating system in the Kriegler home failed as a result of corrosion of the steel tubing. The plaintiff brought an action against Eichler for damages sustained due to the breakdown, based on strict liability in tort.

The *Kriegler* court was immediately willing to apply strict liability in tort as

11 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964).

12 This California position was adopted by the RESTATEMENT (SECOND) OF TORTS § 402A (1965):

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of the product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

13 Lascher, *Strict Liability in Tort for Defective Products: The Road to and past Vandermark*, 38 S. CAL. L. REV. 30, 45 (1965).

14 It is established law in California that the doctrine of strict liability in tort applies to harm to property. Ghenna v. Ford Motor Co., 246 Cal. App. 2d 639, 649, 55 Cal. Rptr. 94, 101 (Ct. App. 1966).

15 As mentioned, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964) imposed liability on retailers to spearhead this trend.

16 269 Cal. App. 2d —, 74 Cal. Rptr. 749 (Ct. App. 1969).

17 Arro Company, a subcontractor of Eichler Homes, Inc., had purchased the steel tubing from General Motors and had done the actual installation of the system in the Kriegler Home. Eichler cross-complained against Arro and General Motors, but the court denied recovery. *Id.* at —, 74 Cal. Rptr. at 754.

set forth by *Greenman* and *Vandermark*; the plaintiff had only to show that while using the instrument as intended he was injured as a proximate result of the defect in it. Previously, the doctrine had been applied only to manufacturers, retailers, and suppliers of personal property. Its application in the sale of real estate had been rejected earlier in *Conolley v. Bull.*[18] In order to impose strict liability upon construction contractors, therefore, *Kriegler* overlooked *Conolley* and directed its attention to the second New Jersey landmark in the field of strict liability, *Schipper v. Levitt & Sons, Inc.*[19] The facts in *Schipper* were very similar to those in *Kriegler.*[20] Levitt, a mass-producer of homes, built and sold a house which the plaintiff subsequently leased from defendant's vendee. Plaintiff's minor son was injured by excessively hot water drawn from the house's heater. The defendant had failed to place on the heater a mixing valve which would regulate the temperature of the water. Plaintiff sued for injuries suffered as a result of the defective condition of the heater.

To sustain recovery, *Schipper* reviewed *Henningsen v. Bloomfield Motors, Inc.*, where the New Jersey Supreme Court had stated: "We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile."[21] The same court which, in *Henningsen*, had been willing to extend liability to other products did not hesitate in *Schipper* to move ahead again, this time in the construction field:

> Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected as they were step by step in *Henningsen* . . . . *We consider that there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles* and that the pertinent overriding policy considerations are the same. That being so the warranty or strict liability principles of *Henningsen* . . . should be carried over into the realty field . . . .[22] (Emphasis added.)

In California, *Kriegler* reached this same conclusion by paraphrasing the words of the New Jersey court: "there are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles . . . ."[23] Both *Schipper* and *Kriegler* heavily relied on the fact that the defendants were mass-producers dealing in a very large volume. The question was one of size, where both courts could easily equate construction contractors with large-scale manufacturers. The buyer relied on the work of the contractor just as the consumer relies on the manufacturer's product. *Avner* accepted the *Schipper* doctrine and readily adopted the state precedent set by *Kriegler*. The similarities were apparent:

18 258 Cal. App. 2d 183, 65 Cal. Rptr. 689 (Ct. App. 1968).
19 44 N.J. 70, 207 A.2d 314 (1965).
20 It is to be noted that the damages in *Schipper* were personal while in *Kriegler* they were property damages, but this issue had already been disposed of in California with the case of Ghenna v. Ford Motor Co., 246 Cal. App. 2d 639, 649, 55 Cal. Rptr. 94, 101 (Ct. App. 1966); see note 14 *supra*. It does, however, serve as another example of the continuing extension of the strict liability doctrine.
21 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 383, 161 A.2d 69, 83 (1960).
22 Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965).
23 Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d —, —, 74 Cal. Rptr. 749, 752 (Ct. App. 1969).

Longridge Estates was the mass-producer of the tract of lots just as Eichler and Levitt were the mass-producers of homes.

The importance of *Kriegler* to *Avner* is obvious.[24] The doctrine of strict liability in tort for defective manufacture was once again extended to include not only manufacturers and retailers, but also construction contractors. In both *Kriegler* and *Schipper*, however, defective materials were the proximate cause of injury, while in *Avner* the damages were caused by defective construction of real estate lots. Thus, to apply strict liability, the court had to extend the theory beyond encompassing defects in material or equipment so as to also include soil defects in mass-developed real property.

Previously, the law in California was voiced by the 1968 case of *Conolley v. Bull*:

> The laws governing sales of real property, like those regulating landlord and tenant relationships, have developed along different lines from those laws governing sales of commercial goods . . . . The property cases which had developed the relevant governing principles for this area of the law state no doctrine of strict liability in tort for sales of defective real estate.[25]

Conolley relied on the case of *Halliday v. Green*,[26] which noted three distinctions between products liability and construction cases. The first difference mentioned by *Halliday* was that a builder was not in a position to limit his liability by express warranties and disclaimers.[27] With this argument, defendant Longridge submitted additionally that section 1113, California Civil Code,[28] provides for certain warranties, and these do not include any in respect to the condition of the soil.[29] *Avner* clearly rejected these arguments by citing the California Supreme Court's decision in *Greenman* refusing "to permit the manufacturer to define the scope of its own responsibility for defective products [citations] make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort."[30]

Halliday's second distinction is that it is considerably less difficult for an occupant of a building to trace the source of a defect to the contractor than it is for a consumer to reach a manufacturer.[31] Thus, the court indicates that negligence should be the basis of relief since the defect should be easily traceable to the contractor. *Avner* rejects this argument by equating the mass-production of automobiles to homes or tracts of land and, therefore, logically destroying any pretext that one type of mass-producer is more difficult to reach than another.

24 The California Supreme Court denied hearing in *Kriegler* and thus established the holding as a law of the state.

25 Conolley v. Bull, 258 Cal. App. 2d 183, 196-97, 65 Cal. Rptr. 689, 696 (Ct. App. 1968).

26 244 Cal. App. 2d 482, 53 Cal. Rptr. 267 (Ct. App. 1966).

27 *Id.* at 486, 53 Cal. Rptr. at 271.

28 CAL. CIV. CODE § 1113 (West 1954).

29 *See* Gustafson v. Dunnan, Inc., 204 Cal. App. 2d 10, 22 Cal. Rptr. 161 (Ct. App. 1962); Liberty Bldg. Co. v. Royal Inden. Co., 177 Cal. App. 2d 583, 2 Cal. Rptr. 329 (Ct. App. 1960). But the *Avner* court correctly points out that in neither of these cases was the doctrine of strict liability in tort pleaded or discussed.

30 Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1963); Avner v. Longridge Estates, 272 Cal. App. 2d —, —, 77 Cal. Rptr. 633, 639 (Ct. App. 1969).

31 Halliday v. Greene, 244 Cal. App. 2d 482, 486-87, 53 Cal. Rptr. 267, 271 (Ct. App. 1966).

Halliday's final distinction is that the owner of a building has a better opportunity to make a meaningful inspection than the purchaser of a retailed product.[32] *Conolley* adds to this argument by stating that real estate transactions normally take a considerable time and thus afford prospective purchasers ample time to inspect the property.[33] *Avner* rejects this argument by detailing the intricacies involved in the development of the tract. A meaningful inspection cannot be made and considerable amounts of time are of no value when the defects which cause the damage are below the surface and not apparent to the layman purchaser's eye.[34] In order to discover the defect in the lot, costly soils tests would have to be made, and *Avner* refused to impose this obligation on purchasers of mass-produced lots.[35]

Having rejected *Conolley's* reasoning, which was based on *Halliday's* three distinctions,[36] the way was clear for *Avner* to extend the doctrine of strict liability to defects in real estate lots. The court was unmoved by Longridge's contention that the equation between the mass-production of houses and automobiles to the development of lots is not valid. It stated that it is common knowledge that modern techniques in the soil and grading area have disposed of the uncertainties in the finished product. Various dangerous natural and latent conditions which in the past could exist undetected are no longer considered a threat, since the soils engineers are able to determine the stability of the soil from the tests of the surface and subsurface.[37] *Avner* decided that with the mass-production of lots, "the overriding policy considerations are the same"[38] and the court was

> unable to distinguish the obligation of a builder to a purchaser for a defective radiant heating system installed in a cement floor (*Kriegler, supra*) from the obligation of a manufacturer of a lot to a purchaser for defective subsurface conditions resulting from improper filling and grading that cause instability.[39]

The policy considerations which may have influenced the court's holding in *Avner* are noteworthy. The court was aware that by placing the extra burden of strict liability on the builder, simple economic operation would pass the added cost to the consumer. The reasoning behind this risk distribution theory is that the mass-producer is initially in a better position to absorb large losses. Damages sustained due to a defective product would ruin the average consumer. Thus, the added cost is an insurance paid by all to protect a few.[40] This theory was first

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32 *Id.*

33 Conolley v. Bull, 258 Cal. App. 2d 183, 196-97, 65 Cal. Rptr. 689, 696-97 (Ct. App. 1968).

34 Avner v. Longridge Estates, 272 Cal. App. 2d —, —, 77 Cal. Rptr. 633, 639 (Ct. App. 1969).

35 *Id.*

36 It is interesting to note that the courts in both *Halliday* and *Conolley* allowed recovery on other grounds.

37 Avner v. Longridge Estates, 272 Cal. App. 2d —, —, 77 Cal. Rptr. 633, 639 (Ct. App. 1969).

38 Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d —, —, 74 Cal. Rptr. 749, 752 (Ct. App. 1969).

39 Avner v. Longridge Estates, 272 Cal. App. 2d —, —, 77 Cal. Rptr. 633, 639 (Ct. App. 1969).

40 Prosser, *The Fall of the Citadel*, 69 YALE L.J. 1099, 1120 (1966); Prosser, *Strict Liability to the Consumer in California*, 18 HAST. L.J. 9, 19-20, (1967).

given attention by Justice Traynor, concurring in *Escola v. Coca Cola Bottling Co.*[41] The risk distribution theory, however, was to lie dormant for almost twenty years. Then in 1963 California took its giant step into strict liability with the *Greenman* decision.

Justice Traynor there said:

> The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.[42]

This view is strongly reechoed by the courts in *Schipper*, *Kriegler*, and finally *Avner*, which states:

> "The public interest dictates that if such injury does result from a defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party . . . ."[43]

The emphasis in risk distribution once again is the inequality between the giant mass-producer and the small consumer. The modern trend is for the continued growth of industry and construction. This gives added strength and justification to the risk distribution theory and serves notice of increased acceptance and expansion of strict liability by the courts.

As the demand for houses increases, their mass-production continues to increase and become more profitable. Figures released by the President's Committee on Urban Houses revealed that the largest domestic merchant builder, Levitt & Sons, Inc., the defendant in *Schipper*, produced 5,100 homes in 1967.[44] The largest developer of prefabricated homes, National Homes, manufactured 11,500 units in the same year.[45] The figures projected for the 1970s are staggering.[46] The majority of the purchasers of these homes will be lower- to middle-income families[47] who need the protection or insurance of the strict liability in tort doctrine. Just as the courts extended strict liability to such products as automobiles when they became more readily available to those in the lower income bracket, they will do likewise in regard to the *Avner* doctrine.

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41 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944).

42 Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1963).

43 Avner v. Longridge Estates, 272 Cal. App. 2d —, —, 77 Cal. Rptr. 633, 636 (Ct. App. 1969).

44 President's Committee on Urban Housing, A Decent Home 150 (1968).

45 *Id.*

46 The President's Committee on Urban Housing estimated that to provide standard housing for the entire population, the American economy by 1978 will need to:

1. Build 13.4 million units for new, young families forming during the decade ahead.
2. Replace or rehabilitate 8.7 million units that will deteriorate into substandard conditions.
3. Replace 3 million standard units that will be either accidentally destroyed or purposefully demolished for nonresidential land users.
4. Build 1.6 million units to allow for enough vacancies for our increasing mobile population. President's Committee on Urban Housing, A Decent Home 8 (1968).

47 *See generally*, President's Committee on Urban Housing, A Decent Home (1968).

Objection will naturally be made to such a far-reaching decision as *Avner*. One contention will undoubtedly be that it imposes too harsh a doctrine upon the construction contractor. The answer that his own good work will insure against harsh imposition of the doctrine is unsatisfactory. The court in *Kriegler*, paraphrasing *Schipper* and repeated by *Avner*, provided the only acceptable answer:

> [T]he imposition of strict liability principles on builders and developers would not make them insurers of the safety of all who thereafter came on the premises. In determining whether the house was defective, the test would be one of *reasonableness* rather than *perfection*.[48] (Emphasis added.)

By using the term "reasonableness," the precedent cases may well have introduced an element of confusion because its connotation almost automatically leads one to think in terms of a failure to exercise a proper standard of care. Technically speaking, reasonableness, of course, is unnecessary in strict liability, and all that is required is a *defect* which causes injury. What the courts are saying, however, is that they are going to be reasonable in designating what conditions are and are not defects. The importance, then, is not whether the contractor is reasonable in building or developing his project, but if a condition which can reasonably be termed a defect caused the injury.

A final question is raised. *Avner* neither specifically mentions the number of lots produced by Longridge Estates nor designates it a mass-producer. Has *Avner* extended the strict liability doctrine to include something less than a mass-producer? Two factors indicate that it has not.

First, even though *Avner* never specifically labels Longridge Estates a mass-producer, it relies upon *Schipper* and *Eichler* as precedents. Both of those cases predicated liability solely upon the fact that the defendants were mass-producers. The court relates the *Avner* facts to these two cases based on the policy considerations mentioned previously.

Secondly, the risk distribution theory, which was a primary reason for the initial imposition of strict liability on mass-producers, does not apply to the individual contractor who produces only one or two houses per year. Such contractors are usually in no better financial position than the buyer to absorb a loss. Although they will enjoy higher prices for their houses as the risk theory drives the market prices up throughout the industry, only mass-producers will sell enough to offset any possible loss in strict liability. Thus, if the primary reason for imposing the doctrine does not apply to smaller contractors, logically strict liability should not be imposed. As one New Jersey case stated: "*Schipper* is not applicable to an isolated sale of a house — *Schipper* should be applied only to sellers engaged in the mass production and sale of houses . . . ."[49]

Despite the above reasoning, *Avner*'s failure to label Longridge Estates a mass-producer has at least opened the door to strict liability recovery in a real property case to something less than a mass-production situation. This is true

48 Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d —, —, 74 Cal. Rptr. 749, 753 (Ct. App. 1969).

49 Hut v. Antonio, 95 N.J. Super. 62, 67-68, 229 A.2d 823, 826 (1967).

because *Avner* has been accepted[50] and the trend in strict liability is certainly toward continued extention. However, any attempt to draw the line as to what should be sufficient production to apply to the doctrine is futile, and each "in between" case will have to be examined on an individual basis. Thus, while it is desirable to impose equal responsibility on all mass-producers, if the defendant is too small the reasons for finding recovery in *Avner* are simply not present and no relief should be granted under its principles.

James F. Rittinger

LABOR LAW — ATTORNEYS WHO ENGAGE IN AND RECEIVE PAYMENTS FOR "PERSUADER" ACTIVITIES MUST INCLUDE IN THEIR ANNUAL REPORTS STATEMENTS OF RECEIPTS AND DISBURSEMENTS FOR SERVICES TO ALL THEIR LABOR RELATIONS CLIENTS.—John Edward Price, John Bernard Nelson, and Franklin R. Sears were attorneys specializing in the practice of labor relations law. On behalf of a small number of their clients, they engaged in activities within the scope of "persuader" or "information securing" activities as set forth in section 203(b) of the Labor Management Reporting and Disclosure Act[1] [LMRDA], thereby subjecting themselves to the reporting requirements of that section. Within thirty days after each persuader agreement, the attorneys filed reports setting forth in detail the names of the parties to and the terms and conditions of the agreement. In their annual reports, however, they disclosed only the amounts of receipts and disbursements pursuant to such persuader agreements. The Secretary of Labor insisted that the attorneys had failed to comply with LMRDA and ruled administratively that their annual reports must include statements of receipts and disbursements on behalf of not only "persuader" clients, but also all their labor relations clients. The attorneys sued in the United States District Court for the Northern District of Texas for a declaratory judgment that they were not required to include in their reports receipts and disbursements on behalf of their "nonpersuader" clients. The district court, however, refused to grant declaratory judgment and accepted the Secretary's ruling.[2] The attorney-litigants appealed to the United States Court of Appeals for the Fifth Circuit. The court of appeals, sitting en banc, affirmed and *held*: attorneys or labor relations consultants who during the course of the year receive payments pursuant to engaging in persuader or information securing activities, as defined in section 203(b) of the LMRDA, must include in their annual reports a statement of receipts and disbursements in connection with all labor relations work for all their clients. *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969).

Sections 203(b),[3] 203(c),[4] and 204[5] were included in the Labor Manage-

50 The California Supreme Court has denied Longridge Estates' request for hearing and thus *Avner* is solid precedent within the state.

1 29 U.S.C. §§ 401-531 (1964).

2 Price v. Wirtz, No. CA 4-63-84 (N.D. Tex., Feb. 8, 1965), *aff'd*, 412 F.2d 647 (5th Cir. 1969).

3 29 U.S.C. § 433(b) (1964). This section provides:

> Every person who pursuant to any agreement or arrangement with an employer

ment Reporting and Disclosure Act of 1959 as part of an attempt to remedy abuses and questionable practices involving employers and their "labor relations consultants." Many abuses had been uncovered by the McClellan Committee hearings.

Section 203(b) requires any person, including an attorney or consultant, who undertakes pursuant to an agreement with the employer-client: (1) to persuade employees as to the exercise of their organizational or collective bargaining rights, or (2) to secure information for the employer concerning the activities of employees or of a labor organization in reference to a labor dispute involving the employer, to file two types of reports. The first type of report must be filed with the Secretary of Labor within thirty days after the attorney or consultant enters into each "persuader" agreement. It must specify the parties to, and the terms and provisions of, the agreement. The second type of report must be filed annually with respect to each fiscal year during which payments are received by the consultant in connection with the performance of persuader agreements and must contain a statement: (A) of the reporting party's "receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the purposes thereof."[6]

The provisions of section 203(b), however, must be construed harmoniously with the provisions of sections 203(c) and 204. Section 203(c) provides that nothing in section 203 may be construed to require any person to file a report

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undertakes activities where an object thereof is, directly or indirectly —

(1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; or

(2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;

shall file within thirty days after entering into such agreement or arrangement a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and '(B) of its disbursements of any kind, in connection with such services and the purposes thereof. In each case such information shall be set forth in such categories as the Secretary may prescribe.

4 *Id.* § 433(c). This section provides:

Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

5 *Id.* § 434. This section provides:

Nothing contained in this chapter shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of the chapter any information communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

6 *Id.* § 433(b).

"by reason of" his giving advice to the employer or representing the employer in judicial, administrative, or collective bargaining proceedings. Section 204 exempts an attorney from including in any report required to be filed any information communicated by the client to the attorney in the course of a legitimate attorney-client relationship. Thus, the issue arises as to whether the provisions of sections 203(c) and 204 exempt the attorney engaged in persuader activity from reporting receipts and disbursements in connection with labor relations work for his nonpersuader clients.

Price is the most recent development in a series of three cases dealing with the proper interpretation of sections 203(b), 203(c), and 204 of the LMRDA. The other two cases are *Douglas v. Wirtz*[7] and *Wirtz v. Fowler*.[8] In *Douglas* the attorney-plaintiff, a specialist in labor law, on three separate occasions spoke directly to the assembled employees of one of his clients. His activities on those occasions fell within the scope of the definition of persuader activities reportable under section 203(b). He filed the requisite thirty-day reports, but in his annual report he set forth only those receipts and disbursements connected with his activities on behalf of persuader clients. He refused to comply with the demand of the Secretary of Labor that he amend his annual reports to show his receipts and disbursements from all his labor law clients and sought in the district court a declaratory judgment holding erroneous the Secretary's interpretation of sections 203(b), 203(c), and 204 of the LMRDA. The Secretary contended that once a person engages in activities reportable under section 203(b), a full annual disclosure of receipts and disbursements is required with regard to all labor law practice of that person and that no exemption is provided by section 203(c) or section 204. In granting declaratory judgment for the plaintiff, the district court observed that Congress, in passing the LMRDA, was not striking at the services listed in section 203(c) (nonpersuader activities).[9] Rather, the purpose of section 203 was to focus attention, through reporting and disclosure, on activities such as those listed in section 203(b), which, if unpublicized, might give rise to unsavory undercover deals in the labor-management field.[10] The district court concluded that

> the annual report regarding receipts and disbursements was intended to effect and be a supplementary report regarding activities covered in the thirty day report, that is show what money came in by reason of the arrangement and where the money went.[11]

Furthermore, no report, thirty-day or annual, was required with reference to regular, open, and recognized labor law practice of the type described in section 203(c), irrespective of whether or not the attorney engaged in reportable activities under section 203(b).[12] The United States Court of Appeals for the Fourth Circuit, however, adhered to the government's interpretation and reversed. The Fourth Circuit relied heavily on the word "advice" in section 203(b)(A),

7 353 F.2d 30 (4th Cir. 1965), *rev'g* 232 F. Supp. 348 (M.D.N.C. 1964).
8 372 F.2d 315 (5th Cir. 1966), *rev'g* 236 F. Supp. 22 (S.D. Fla. 1964).
9 232 F. Supp. 348, 352 (M.D.N.C. 1964), *rev'd* 353 F.2d 30 (4th Cir. 1965).
10 *Id.*
11 *Id.* at 353-54.
12 *Id.* at 354.

which requires a statement by the attorney of receipts from employers on account of labor relations *advice* or services.[13] The court pointed out that there is no reference to advice in section 203(b)(1) or (2), the "persuasion" and "information securing" clauses. Consequently, the language of section 203(b) literally requires a report of payments for independent advice not connected with persuader activity unless the requirement of the annual report is narrowed by section 203(c).[14] Section 203(c), of course, appears literally to exempt the attorney from filing a report by reason of his giving advice to the employer-client. The court, therefore, held that the exemption provided by section 203(c) is

> an excusal of any filing whatsoever "be reason of [the attorney's] giving or agreeing to give advice" . . . . [T]he quoted phrase is to be understood to declare that advice in itself and alone does not create an obligation to report. But the two sections together declare that when persuasion services or receipts therefor and independent advice occur in the same fiscal year, all of them must be reported.[15]

Wirtz v. Fowler directly controverted the Fourth Circuit's holding in *Douglas*. In *Fowler*, the attorney-litigants and their associates spoke to assembled groups of employees of several of their clients in reference to upcoming union representation elections. The Secretary of Labor claimed that they had engaged in persuader activities on behalf of these clients and demanded that the attorneys file the required reports under section 203(b), including in their annual reports a statement of receipts and disbursements in connection with work for all their labor relations clients during the fiscal year. The attorneys brought suit against the Secretary for declaratory judgment contending initially that they were not required to report any of their activities since, at the time, they were acting openly as attorneys and were exempted from the reporting requirements by section 203(b)(2), 203(c), and 204. In the alternative, they contended that reporting and disclosing financial transactions with all their labor clients would transgress upon both their nonpersuader clients' rights and upon plaintiffs' own rights as attorneys. In granting the declaratory judgment, the district court accepted the plaintiffs' initial contention.[16] Consequently, the issue raised in plaintiffs' alternative contention was left unresolved. The district judge did, however, observe that the Secretary's

> interpretation plays havoc with the obvious purpose of Section 203(c) . . . to protect the attorney-client relationship from disclosure within the enumerated categories. . . .
>
> This interpretation of the Defendant Secretary reduces Section 203(c) of the Act to a mere truism — that nonreportable undertakings do not give rise to a duty to report.[17]

On appeal a three judge panel of the United States Court of Appeals for the

13 353 F.2d at 32.
14 *Id.*
15 *Id.*
16 236 F. Supp. 22, 34 (S.D. Fla. 1964), *rev'd*, 372 F.2d 315 (5th Cir. 1966).
17 *Id.* at 34 n.4.

Fifth Circuit reversed the holding of the district court. The Fifth Circuit, therefore, directly confronted the question regarding the scope of the annual report. The court, one judge dissenting, held that while the attorney-plaintiffs must file reports in connection with all persuader activities under section 203(b), regardless of whether such activities were performed openly, they could not be required to file in their annual reports statements as to receipts and disbursements in connection with labor relations services to clients for whom they had performed no persuader activities.[18] The Fifth Circuit argued:

> A contrary conclusion would mean that when an employer retains an attorney solely to perform nonpersuader activity (e.g., giving advice or representation in court proceedings) and when that attorney subsequently engages in persuader activities on behalf of another employer, the attorney's nonpersuader arrangement with the first employer would be subject to complete disclosure. In the Court's view the purposes of the reporting requirements, as revealed in the legislative history, do not justify such a harsh result.[19]

Price v. Wirtz, therefore, was decided in the light of a direct controversy between the holdings of the only two appellate courts that had construed the reporting requirements of section 203(b) with reference to sections 203(c) and 204. The majority resolved this conflict by accepting the contentions of the Secretary of Labor and rejecting the previous ruling of the Fifth Circuit panel in *Fowler*. In so doing, the majority rested almost entirely on the Fourth Circuit's opinion in *Douglas*. The court first noted that the annual report in 203(b) must include a statement of receipts from employers "on account of labor relations advice or services."[20] It then viewed the meaning of "advice" as used in 203(c) and concurred with the Fourth Circuit that the word referred to "advice apart from the statutory persuader activities."[21] The court, therefore, reasoned:

> When that same meaning is needed to give sense or purpose to its use in § 203(b), it leads to the conclusion that disclosure for all labor relation clients is the price the Attorney-persuader must pay if he wishes to engage in those [persuader] activities.[22]

The majority argued further that it was consistent with the main purpose of section 203 and its principal sanction of public disclosure "to turn the spotlight on the lawyer who wanted not only to serve clients in labor relations matters encompassed within § 203(c), but who wanted also to wander into the legislatively suspect field of a persuader."[23] The court stated:

> It boils down to this. As long as the attorney limits himself to the activities set forth in § 203(c), he need not report. Engaging in such

18 372 F.2d at 333.
19 *Id.* at 333-34.
20 412 F.2d at 649.
21 *Id.* at 649-50. The Fourth Circuit's reasoning for its interpretation of "advice" is discussed in the text accompanying notes 13-15 *supra*.
22 412 F.2d at 650.
23 *Id.*

> advice or collective bargaining does not give rise to a duty to report. No report is set in motion "by reason of" his doing those things. What sets the reporting in motion is performing persuader activities. Once that duty arises, § 203(c) does not insulate from reporting the matters in § 203(b) from non-persuader clients.[24]

The majority's decision to overrule *Fowler* and accept the Fourth Circuit's holding in *Douglas* was premised upon the belief that the grammatical interpretation and legislative history of section 203 demanded such a holding. While the court's conclusion appears logical, the premises used to reach it are somewhat tenuous. The statutory language can be interpreted just as easily to support the attorney-litigants' position. Furthermore, the legislative history of section 203 does not clearly reveal a Congressional intent in favor of the court's holding.

The statute does not require the grammatical construction adopted by the court in *Price*. The majority in *Price*, following *Douglas*, based its interpretation of 203(b) and (c) on the assumption that the word "advice" in 203(b)(A) referred to independent advice, unconnected with persuader activities. Section 203(b), however, requires a thirty-day report specifying all the terms of an employer-consultant agreement when *an* object (not *the* object) of the agreement is persuasion.[25] If the agreement involves in its terms both advice and persuasion, receipts on account of that advice are clearly reportable. Consequently, section 203(b) may be properly construed as requiring receipts and disbursements connected with section 203(c) activities performed on behalf of a persuader client to be reported in the annual report.[26] This requirement, however, does not necessarily extend to receipts and disbursements for services and advice to clients for whom no persuader activity has been performed. Section 203(c) provides the exemption for those agreements that do not involve persuader activity.[27]

Moreover, as Judge Dyer asserts in his dissent, the majority in *Price* has extended the scope of the statute beyond Congressional intent. The purpose of section 203 of the LMRDA, Judge Dyer feels, is to publicize persuader activity, not nonpersuader activity.[28] Congress was concerned in the wake of the McClellan Committee hearings with the activities of "management middlemen." These consultants frequently engaged in what the Act now classifies persuader activities pursuant to a secret agreement with the employer, while

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24 *Id.* at 651.

25 Note, *Labor Law: Two Views of a Labor Relations Consultant's Duty to Report under Section 203 of the LMRDA,* 65 MICH. L. REV. 752, 756 (1967).

26 This was the position taken in Wirtz v. Fowler, 372 F.2d 315, 332 n.35 (5th Cir. 1966).

27 This point was stressed in the Senate Committee Report on S. 1555:

> Under section 103(b) [the predecessor of 203(b)] every person who enters into an agreement with an employer to persuade employees as regards the exercise of their right to organize and bargain collectively, or to supply an employer with information concerning the activity of the employees or labor organizations in connection with a labor dispute would be required to file a detailed report. An attorney or consultant who confines himself to giving legal advice, taking part in collective bargaining, and appearing in court or administrative proceedings would not be included among those required to file reports under this subsection [§ 103(b)]. *Specific exemption for persons giving this type of advice is contained in subsection (c) of section 103* [now 203(c) of the LMRDA]. S. REP. No. 187, 86th Cong., 1st Sess.

(1959) in 2 U.S. CODE CONG. & AD. NEWS 2328 (1959) (emphasis added).

28 412 F.2d at 652 (dissenting opinion).

pretending to represent the best interest of the employees. As a result, section 203(b) was enacted to enable employees to determine the true identities of these middlemen and the nature of their activities. Neither the legislative history of the relevant sections of the LMRDA nor the policy statement of the Act[29] makes any clear suggestion that Congress intended public disclosure to reach nonpersuader activities performed by attorneys for nonpersuader clients. The Senate bill[30] required only an annual report pursuant to persuader agreements.[31] That report was to contain: (1) the name of the persuader, (2) receipts of any kind on account of labor relations advice or services, (3) disbursements of any kind in connection with such services, and (4) a detailed statement of the terms of the persuader agreement.[32] In the course of debate, S. 1555 was amended to require a thirty-day, rather than an annual, report and later again amended to include both a thirty-day and an annual report.[33] The Senate Committee gave no indication, however, that it was concerned with anything but the timing and practicality of the reports or that it intended the separate annual report to include any transactions not covered by the previous combined report. Furthermore, as the dissent observes, Congress took great care to insert in the Act a "multiplicity of exemptions and protections,"[34] most notably sections 203(c) and 204.[35] The purpose of these exemptions was to prevent the spotlight of publicity from being focused on areas that Congress felt improper and unnecessary to explore, specifically advisory or representative activities carried on by an attorney or consultant on behalf of his client.[36] It is somewhat difficult to reconcile this cautious approach of Congress in enacting the reporting requirements of section 203 with the majority's decision in *Price*.

Since neither the statutory language nor the legislative history of sections

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29 The policy considerations that influenced Congress in passing the LMRDA are set forth in 29 U.S.C. § 401 (1964), which states in pertinent part:

> The Congress further finds, from recent investigations in the labor and management fields that there have been a number of instances of breaches of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants and their officers and representatives.

30 S. 1555, 86th Cong., 1st Sess. (1959). The legislative history of the LMRDA is quite complicated. For a discussion of the legislative history of the Act, see Note, *supra* note 25, at 752 n.1.

31 *See* Wirtz v. Fowler, 372 F.2d 315, 334 (5th Cir. 1966).

32 *Id.*

33 Senator McClellan in proposing an amendment to require a thirty-day report said:

> I think that if the employer is to be permitted to employ consultants — and he certainly should be permitted to employ them — *when he employs them for the purposes set forth in section 103 of the bill,* knowledge of such employment should come to public attention at the time or shortly thereafter — within thirty days thereafter — rather than a year afterwards, or longer. 105 Cong. Rec. 6517 (1959) (emphasis

added). It is clear that Senator McClellan was not concerned with disclosure of activities other than persuader activities and that his main concern was the *timing* of the reports.

34 412 F.2d at 652 (dissenting opinion).

35 Senator Goldwater, who introduced section 204 of the Act as an amendment to S. 1555, was particularly concerned with safeguarding the attorney-client relationship:

> As a layman, I believe there should be a perpetuation of the sanctity of relations between attorney and client. I know that if I were involved in a situation in which an attorney was representing me, and a report had to be made, I would not want all of the intimate details of communications between the attorney and me to become public property. 105 Cong. Rec. 6558 (1959).

36 *Id.*

203 and 204 provides compelling support for either the position taken by the Secretary or the position of the attorney-litigants, the major consideration in evaluating the decision is the effect it will have on the rights of labor relations consultants and their clients. The decision in *Price* represents an encroachment upon the rights of labor relations attorneys and their employer-clients and upon the confidential nature of the attorney-client relationship. Both the attorney and the employer are faced with a dilemma as a result of *Price*. The attorney is confronted with the choice of refusing to represent any persuader clients or being compelled to report regarding all his labor relations work. He may, thus, lose clients who desire that their affairs be kept strictly confidential. Since reported persuader activities are often neither illegal nor unfair, there seems to be no real justification for placing a burden of this nature on the attorney.[37] With regard to the employer-client, as long as he does not make payments reportable under section 203(a),[38] he has a right to privacy in his business affairs. Under *Price*, however, if a client retains an attorney to perform nonreportable but confidential labor relations services and, subsequently, during the fiscal year, the attorney engages in a single persuader activity, the attorney in his annual report must disclose the receipts and disbursements and services to that nonpersuader client.[39] It is alien to the concept of mutuality of reporting in the Act,[40] as well as somewhat illogical, that information which the nonpersuader client cannot be compelled to disclose — and which may provide a starting point for investigations into areas such as taxes and labor practices — can be discovered from his attorney.[41] Judge Dyer's strongest argument in his dissent characterizes the majority opinion's impact on the rights of those involved in the labor relations field:

> That labor relations employers have the right to speak to attorneys regarding their business labor relations, to associate with attorneys for lawful legal advice and to have private affairs of a lawful nature protected from governmental intrusion is beyond dispute. That the attorneys as well as the employers enjoy the same rights seems also beyond dispute. That the particular matters, financial affairs, including the amounts and sources of receipts and the amounts and purposes of disbursements, are of a con-

37 The Senate Committee reported as regards the nature of "persuader" activities:

> All of the activities required to be reported by this section [203] are not illegal nor are they unfair labor practices. However, since most of them are disruptive of harmonious labor relations and fall into a gray area, the committee believes that if an employer or consultant indulges in them, they should be reported. S. REP. No. 187, 86th

Cong., 1st Sess. (1959) in 2 U.S. CODE CONG. & AD. NEWS 2328 (1959).

38 29 U.S.C. § 433(a) (1964). This section of the LMRDA requires an employer to report his payments to an attorney or consultant for persuader or information securing activities.

39 412 F.2d at 652 (dissenting opinion).

40 The LMRDA contemplates reports from those on both ends of a reportable transaction. Section 203(d) of the Act is illustrative:

> Nothing contained in this section shall be construed to require an employer to file a report under subsection (a) of this section unless he has made an expenditure, payment, loan, agreement, or arrangement of the kind described therein. Nothing contained in this section shall be construed to require any other person to file a report under subsection (b) of this section unless he was a party to an agreement or arrangement of the kind described therein. 29 U.S.C. § 433(d) (1964).

41 412 F.2d at 653 (dissenting opinion).

> fidential nature should be equally clear. And that disclosure by the attorney must necessarily expose and affect the client-employer is just as certain.[42]

By disregarding this rationale, the majority in *Price v. Wirtz* reached an undesirable result.

John J. Dawson

42 *Id.* at 654.

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