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Case Comments

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CASE COMMENTS

Federal Estate Taxation — Payment of Premiums by Insured in Contemplation of Death on a Policy He Does Not Own Is Not Grounds for Inclusion of the Death Proceeds in His Gross Estate — Revenue Ruling 67-463 Is Unfounded in Statute or Case Law. — In late May, 1957, James P. Cleary applied to Aetna Life Insurance Company [Aetna] for two insurance policies to be issued on his life.[1] He underwent two physical examinations by Aetna physicians and signed the necessary application forms. Upon receipt of the applications and medical reports, Aetna issued the two policies and delivered them to the insured's office on June 20, 1957. The policies were identical ($50,000 term policies) except for the name of the owner and beneficiary.[2] Cass City Manufacturing Company, of which Cleary was an officer and stockholder, was designated as the owner and beneficiary of Policy No. 1 954 720. Cleary's wife, Kathleen M. Gorman (Cleary) [plaintiff], was designated as the owner and beneficiary of Policy No. 1 954 721. As "owner," plaintiff and Cass City Manufacturing Company had the sole right to exercise any and all rights of ownership in their respective policies during the life of the insured. Cass City Manufacturing Company paid the first (and only) premium on its policy but the payer of the premium on plaintiff's policy was undetermined.

The insured died on March 25, 1958, less than a year after the policies were issued. Plaintiff, as executrix of the insured's estate, failed to include a number of items in the federal estate tax return that she filed for the insured's estate. One of the items not included was the proceeds from Aetna Policy No. 1 954 721 of which the plaintiff was owner and beneficiary. The District Director of Internal Revenue determined that the items should have been included in the gross estate and issued a deficiency assessment of $9,662.72. Plaintiff paid the extra assessment on September 10, 1962, and then filed a claim for refund of that portion of the deficiency assessment ($8,098.70) attributable to the death proceeds from Policy No. 1 954 721. After waiting the required six months, plaintiff filed suit in a federal district court in Michigan to recover the claimed amount plus interest from September 10, 1962.

Plaintiff moved for summary judgment and, for the purpose of the motion, the parties assumed that the insured had paid the premium on the policy in question. The Government asserted that the procurement of the policy by the insured and his payment of the only premium constituted a "transfer" in contemplation of death under section 2035[3] of the Internal Revenue Code of 1954. Therefore,

1 This summary of events is taken from the parties' Stipulation of Facts that is appended to the court's opinion. Gorman v. United States, 288 F. Supp. 225, 234 (E.D. Mich. 1968).

2 Copies of both policies are appended to the court's opinion. *Id.* at 237, 246.

3 Section 2035 of the Internal Revenue Code of 1954 provides

> § 2035. Transactions in contemplation of death
>
> (a) General rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.
>
> (b) Application of general rule.—If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate

it argued, the total proceeds should have been included in the insured's gross estate. The Government's authority for this position was the recently issued Revenue Ruling 67-463,[4] which states that the portion of death proceeds which is attributable to the premiums paid by the insured within three years of his death is includable in his gross estate under section 2035. In granting plaintiff's motion for summary judgment the court *held*: Revenue Ruling 67-463 has no foundation in either statute or case law, and thus the payment of insurance premiums in contemplation of death by an insured who has no ownership rights in the policy does not cause a pro rata amount of the policy proceeds to be included in the insured's gross estate for federal estate tax purposes. *Gorman v. United States*, 288 F.Supp. 225 (E.D. Mich. 1968).

The basic problem in the area of federal estate taxation involves the determination of which property is to be included in a decedent's gross estate and subjected to the estate tax. Basically, the Internal Revenue Code of 1954 provides that a decedent's gross estate is to include all property in which the decedent had an interest at the time of his death,[5] and all property in which the decedent had an interest that he transferred in contemplation of death.[6] Any transfer made by the decedent within three years of his death is presumed to have been made in contemplation of death unless proved otherwise.[7]

The issue in *Gorman* concerned the application of these estate tax provisions to Aetna Policy No. 1 954 721 issued on the life of the decedent, James P. Cleary, and owned by plaintiff. The peculiar nature of insurance policies has produced divergent views over the years as to how they should be treated with regard to estate taxation. Life insurance is different from most other types of property in that the ownership of the policy can be separated from that which keeps the policy in existence — the payment of the premiums. This was the situation in *Gorman*, where the plaintiff was the owner of Policy No. 1 954 721 (she had control of all the incidents of ownership)[8] but the insured paid the premium. The arguments and the opinion in *Gorman* reflect the apparent conflict between the positions taken by Congress and the Internal Revenue Service [Service] regarding the inclusion of the proceeds from life insurance policies in decedents' gross estates.

In her brief on the motion for summary judgment the plaintiff asserted the view that life insurance should be treated no differently than any other property subject to the estate tax. Under section 2035 a decedent has to transfer an

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and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

4 1967-2 CUM. BULL. 327.

5 INT. REV. CODE of 1954, § 2033.

6 *Id.* § 2035(a). This section is quoted in full at note 3 *supra.*

7 *Id.* § 2035(b).

8 Stipulation of Facts, ¶ 15, Gorman v. United States, 288 F. Supp. 225, 236 (E.D. Mich. 1968). The term "incidents of ownership" includes the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, and to obtain from the insurer a loan against the surrender value of the policy. Treas. Reg. § 20.2042-1(c)(2) (1954).

interest in some property in contemplation of death in order for the particular property to be included in his gross estate. The plaintiff argued that there is no property interest in a life insurance policy until the policy goes into effect. Once Aetna Policy No. 1 954 721 went into effect, the property interest was in the plaintiff as owner. Therefore, decedent never had an interest in the policy which he could have transferred, and the death proceeds from the policy should not have been included in his gross estate.[9]

The Government presented a two-pronged argument. Initially, it contended that the procurement of the policy by the decedent (he filled out the forms, signed the application, underwent two physicals and paid the first premium) was a "transfer" of the policy within the meaning of section 2035.[10] As an alternative, the Government took the position that life insurance is different from other property, particularly when, as in *Gorman,* the ownership of the policy and the payment of the premiums are separated. It argued that the payment of the premium by the decedent was a transfer of an asset under section 2035 — the asset being the proceeds value of the insurance policy — since the premium purchased the proceeds.[11]

These arguments were made in the parties' briefs, which were completed in mid-October, 1967. The interesting factor in the case is that Revenue Ruling 67-463[12] was not issued until the end of that year. However, when the oral arguments were made in April, 1968, the application of the Ruling to the situation in *Gorman* was acknowledged by both parties and its validity was argued before the court.[13]

Revenue Ruling 67-463 was addressed to situations in which the insured transferred ownership in a policy prior to three years before his death but continued to pay the premiums up until his death. Under these circumstances the transfer is not in contemplation of death but the premium payments are. The question as to what amount must be included in the decedent's gross estate in this situation was answered in the Ruling as follows:

> A premium payment under a contract of life insurance by other than the owner of the policy is analagous to a gift of specific property by the donor to the owner. Unlike the unrestricted gift of money, a premium payment is a gift of insurance protection, a transfer of an interest in the policy which is transmuted at death into the proceeds of the policy.[14]

Following this reasoning, the Ruling states that the payment of premiums within the presumptive contemplation of death period under section 2035 transfers an interest in the policy proceeds measured by the proportion which the premiums paid in contemplation of death bear to total premiums. Four cases

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9 Brief for Plaintiff at 5-6, Gorman v. United States, 288 F. Supp. 225 (E.D. Mich. 1968).
10 Brief for Defendant at 8, Gorman v. United States, 288 F. Supp. 225 (E.D. Mich. 1968).
11 *Id.* at 14.
12 1967-2 CUM. BULL. 327.
13 Simmons, *District Court Invalidates IRS' Three-Year Premium Payment Rule,* 29 J. TAXATION 338 (1968).
14 REV. RUL. 67-463, 1967-2 CUM. BULL. 327, 328.

were cited by the Service in support of this position.[15] It should be noted that the holding of the Ruling is quite similar to the alternate argument forwarded by the Government in its written brief.[16] The application of the Ruling to the situation in *Gorman* is based on the payment of the premium by the decedent in contemplation of death when he had no ownership rights in the policy.

In granting plaintiff's motion the court dealt principally with Revenue Ruling 67-463. The tone of the court's opinion is set by the following statement: "This ruling is startling in that it completely ignores the legislative history and intent relating to the elimination of the premium payment test from the Code."[17] The court discussed the history of estate tax treatment of life insurance policies, and demonstrated that the present position taken by the Service was incorrect even though it had been accepted in the past. The Internal Revenue Code of 1939[18] contained alternative tests for determining whether the proceeds of life insurance policies were to be included in a decedent's gross estate. An incidents of ownership or a premium payment test could be applied.[19] Thus, if an insured transferred the incidents of ownership in a policy in contemplation of death, the proceeds from the policy would be included in his gross estate.[20] Furthermore, even if the transfer were not in contemplation of death, the proceeds could still be included if the insured had continued to pay the premiums on the policy.[21]

When the Internal Revenue Code was revised in 1954, Congress indicated its dislike for the concept that a decedent's gross estate should include the proceeds from life insurance policies which the decedent neither owned at his death nor transferred in contemplation of death, simply because he had paid some or all of the premiums. Under section 2042 of the Internal Revenue Code of 1954, the proceeds of life insurance policies receivable by beneficiaries other than the estate of the insured would be included in the insured's gross estate only if the insured had possessed any of the incidents of ownership in the policy at his death. With regard to transfers in contemplation of death, the new Code provided that if the decedent transferred the incidents of ownership in a policy within three years of his death, the policy proceeds would be included in his gross estate under section 2035.[22] The premium payment test found in the 1939 Code[23] was thus apparently eliminated. Congress made this move in order to put life insurance on an equal footing with other property which is subject to no

15 See text accompanying notes 29-36 *infra* for a list of these cases and a discussion of the court's treatment of them.

16 See text accompanying note 11 *supra.*

17 Gorman v. United States 288 F. Supp. 225, 226 (E.D. Mich. 1968).

18 Ch. 3, § 811(g), 53 Stat. 122, *as amended,* Revenue Act of 1942, ch. 619, § 404, 56 Stat. 944 (1942). For a brief treatment of the earlier history of life insurance policies and the premium payment test, see Hill, *Living With Revenue Ruling 67-463,* 107 Trusts & Estates 621 (1968).

19 Int. Rev. Code of 1939, ch. 3, § 811(g), 53 Stat. 122, *as amended,* Revenue Act of 1942, ch. 619, § 404, 56 Stat. 944 (1942).

20 *Id.*

21 *Id.*

22 This is set out in the regulations promulgated under section 2042 of the Internal Revenue Code of 1954. Treas. Reg. § 20.2042-1(a)(2)(1954).

23 Int. Rev. Code of 1939, ch. 3, § 811(g), 53 Stat. 122, *as amended,* Revenue Act of 1942, ch. 619, § 404, 56 Stat. 944 (1942).

estate tax if the decedent parts with it completely before the contemplation of death period.[24]

Despite this rather definite congressional elimination of the premium payment test in the Internal Revenue Code of 1954, the court noted that the Service has not adhered to the position mandated by the 1954 Code. As soon as the Code went into effect commentators began to fear that the Service would attempt to continue to include all or part of the death proceeds from a policy in a decedent's gross estate in situations where the decedent had transferred the policy three years before his death but had continued to pay the premiums.[25] This fear was justified and the Service succeeded in some situations in unofficially reintroducing the premium payment test.[26] Normally, if the insured transferred the incidents of ownership in a policy more than three years before his death, it would appear that the policy could not be included in his gross estate under the incidents of ownership test of section 2042. However, the Service was unofficially contending that the continued payment of premiums by the insured up until death constituted a transfer of an asset to the new owner of the policy under section 2035. The value of the transferred asset was considered to be that portion of the policy proceeds which was attributable to the premium payments, rather than merely the total amount of the premium payments themselves.[27] This was the theory officially promulgated by the Service in Revenue Ruling 67-463.[28]

Having noted the conflict of the Service's position (as finally stated formally in the Ruling) with the congressional intent to remove the premium payment test in the 1954 Code, the court moved on to attack the foundation underlying the Ruling. Four cases appear in the text of the Ruling to support the position taken therein. However, the court felt that these cases were distinguishable and failed to sanction the conclusion of the Ruling permitting the use of a premium payment test. *Chase National Bank v. United States*,[29] decided in 1929, involved the constitutionality of the federal estate tax on life insurance policies. In distinguishing this case the court noted that it made no mention of the relationship of premium payments to policy proceeds, the main point of the Ruling. *Lehman v. Commissioner*[30] was another case arising prior to the enactment of the 1954 Code, and it did not involve insurance policies. On this basis the court felt that it was "seemingly without connection to the substance of the Ruling."[31] *Scott v. Commissioner*[32] did involve a situation somewhat similar to the Ruling. The question in *Scott* concerned the degree to which a policy was owned by the in-

24 S. REP. No. 1622, 83d Cong., 2d Sess. 124 (1954); H. R. REP. No. 1337, 83d Cong., 2d Sess. A316, A317 (1954).
25 Dicus, *Some Implications of the 1954 Code for Estate Planning,* 32 TAXES 938, 941 (1954); Schlesinger, *Gifts of Life Insurance,* 103 TRUSTS & ESTATES 813 (1964).
26 Brown and Sherman, *Transfers in Contemplation of Death,* 101 TRUSTS & ESTATES 790 (1962); Simmons, *Contemplation of Death and the New Premium Payment Test,* 53 A.B.A.J. 475 (1967).
27 Simmons, *supra* note 26.
28 1967-2 CUM. BULL. 327.
29 278 U.S. 327 (1929).
30 109 F.2d 99 (2d Cir.), *cert. denied,* 310 U.S. 637 (1940).
31 Gorman v. United States, 288 F. Supp. 225, 229 (E.D. Mich. 1968).
32 374 F.2d 154 (9th Cir. 1967).

sured at his death, and the Ninth Circuit concluded that the degree of ownership was to be determined by the premiums the insured had paid. The court in *Gorman* distinguished this case on the grounds that it involved the application of California law which, unlike section 2042 of the Internal Revenue Code of 1954, determined ownership of life insurance policies by means of the premium payment test.[33] The cited case which best supported the position of the Ruling was *Liebmann v. Hassett*.[34] There the insured transferred a policy to his wife in contemplation of death and she paid the last two premiums on it prior to his death. It was held that the total proceeds less an amount proportionate to the premiums paid by the wife were includable in the insured's gross estate. Since payment of the premium by someone other than the insured in *Liebmann* kept a pro rata amount of the policy proceeds out of the insured's gross estate, the Service reasoned in Revenue Ruling 67-463 that a similar premium payment by the insured should make a pro rata amount of the policy proceeds includable in his gross estate. The *Gorman* court rejected this contention on the ground that *Liebmann* had been decided under section 302(g) of the Revenue Act of 1926,[35] which had made life insurance includable in an insured's gross estate to the extent that it was "taken out" by the insured. The amount "taken out" was that portion of the proceeds equal to the ratio of premiums paid by the insured to total premiums.[36] At the time *Liebmann* was decided the law provided for a premium payment test, but since this test was rejected in the 1954 Code the court felt the case was not support for the Ruling.

The court continued its criticism of the Service's reliance on the premium payment by attacking the theory behind the Ruling, and the rationale of the premium payment test in general. In its written brief in *Gorman*, the Government had argued that the payment of the premium by the insured in contemplation of death was a purchase of an asset for the plaintiff as owner of the policy, this asset being Aetna's promise to pay her $50,000 on the death of the insured. Since the asset transferred was the promise to pay the $50,000, that amount should be included in the gross estate.[37] The court considered this rationale fallacious in that it ignored the real nature of the insurance policy. Life insurance is essentially a contract between the owner of the policy and the issuing company. Once the policy goes into effect the owner has a contractual right, conditioned on the insured's death, to receive the proceeds, and this right is not transferred as each premium is paid. Since the plaintiff in *Gorman* owned the policy from the beginning, she had the contractual right to the proceeds. The Government's con-

33 Gorman v. United States, 288 F. Supp. 225, 230 (E.D. Mich. 1968).
34 148 F.2d 247 (1st Cir. 1945).
35 Ch. 27, § 302(g), 44 Stat. 71 (1926).
36 T.D. 5032, 1949-1 Cum. Bull. 427, 428.
37 Brief for Defendant at 15, Gorman v. United States, 288 F. Supp. 225 (E.D. Mich. 1968). A minority of the House Ways and Means Committee expressed feelings similar to those of the Service on life insurance policies when the 1954 Code was enacted:

> But life insurance is not like other property. It is inherently testamentary in nature. It is designed, in effect, to serve as a will, regardless of its investment features. Where the insured has paid the premiums on life insurance for the purpose of adding to what he leaves behind at his death for his beneficiaries, the insurance proceeds should certainly be included in his taxable estate. H.R. Rep. No. 1337,

83d Cong., 2d Sess. B14 (1954).

tention that this right was transferred to her by the insured's payment of the premium was deemed invalid.[38]

The position taken in the Ruling is also inconsistent with the gift tax treatment of life insurance policies. The court noted that the regulations promulgated under section 2511 of the Internal Revenue Code of 1954 (a gift tax section) provide that when a premium is paid on a policy by someone other than the owner, it is the dollar amount of the premium that is considered transferred from the payer to the owner for gift tax purposes.[39]

The *Gorman* court failed to mention another district court case that is contradictory to the Service's position. In *Lamade v. Brownell*,[40] a fact situation arose that was similar to the one which occasioned Revenue Ruling 67-463. An insured paid two premiums in contemplation of death on a policy which he had earlier transferred to his wife. The federal district court in Pennsylvania held that the policy proceeds were not includable in the insured's gross estate since the premium payment by the insured was only a gift of the premium amount to the owner.[41] This case appears to be a direct rebuttal of the Service position that the payment of the premium is a transfer of the death proceeds of the policy.

In concluding its remarks on Revenue Ruling 67-463, the *Gorman* court reiterated that no reliance could be placed on the Ruling in view of its conflict with the 1954 Code provisions, the lack of support for it in the case law, and its inconsistency with the gift tax regulations. In the court's words:

> Payment of premium test being specifically deleted may not be incorporated through administrative tactics. This court will not legislate, nor shall the service, in an area specifically reserved to Congress. The fact that a tax break in estate planning may arise from the deletion of the premium payment test is no reason to argue that the benefit should not inure to the taxpayer.[42]

The discussion and conclusion of the court make it clear that the Service's use of the premium payment test will not be tolerated. In fact, nearly all of the court's opinion was a direct attack on this test, as embodied in Revenue Ruling 67-463. However, by focusing specifically on this aspect of the case, the court passed over the original argument made in the parties' briefs.

In the first part of its written argument, the Government had contended that the acts performed by the insured in procuring the policy for the plaintiff amounted to a transfer of the policy within the scope of section 2035, so as to make the proceeds of the policy subject to the estate tax.[43] The emphasis here was not on the premium payment test. In essence, the Government was claim-

38 Gorman v. United States, 288 F. Supp. 225, 233 (E.D. Mich. 1968).

39 Treas. Reg. § 25.2511-1(h)(8) reads in pertinent part:

> (8) If the insured purchases a life insurance policy, *or pays a premium on a previously issued policy*, the proceeds of which are payable to a beneficiary or beneficiaries other than his estate, and with respect to which the insured retains no [incidents of ownership] the insured has made a gift of the value of the policy, *or to the extent of the premium paid* . . . . (Emphasis added.)

40 245 F. Supp. 691 (M.D. Pa. 1965).

41 *Id.* at 697.

42 Gorman v. United States, 288 F. Supp. 225, 230 (E.D. Mich. 1968).

43 Brief for Defendant at 8, Gorman v. United States, 288 F. Supp. 225 (E.D. Mich. 1968).

ing that but for the acts of the insured (forms, applications, physicals, etc.), the plaintiff would never have owned the policy. Therefore, those acts amounted to a transfer of the policy. The plaintiff's original contention was the same one she used throughout the proceedings. A reading of section 2035 indicates that an insured's gross estate only includes that property in which the insured had an interest that he transferred in contemplation of death. Since the insured never had any interest in the policy (plaintiff was the sole owner when it went into effect), he could not have transferred an interest within the meaning of section 2035.[44] This argument was somewhat reinforced by the fact that the District Director of Internal Revenue in Michigan never attempted to have the proceeds from the policy issued to Cass City Manufacturing Company included in the insured's gross estate. The insured took the same steps with regard to "procuring" that policy as he did for plaintiff's policy. Despite the fact that the court limited its discussion primarily to the Ruling and the premium payment test, it can be inferred that by granting the plaintiff's motion for summary judgment, the court felt that the insured's acts did not amount to a transfer under section 2035. However, as one commentator suggests,[45] a specific holding on the point might have been better since the issue could easily arise again in the future. This is especially so in view of the fact that most life insurance purchasers will probably take the same steps that Cleary did in *Gorman* (place ownership in the beneficiary) if they want to avoid the estate tax completely. In view of the strong arguments against Revenue Ruling 67-463 and the premium payment test, the "procurement" argument is probably the only one that the Service could use to get unowned policies into an insured's gross estate. It may well be the Government's argument when *Gorman* goes to the court of appeals.[46] Nevertheless, for the present, *Gorman* stands out as a strong reassertion of the congressional elimination of the premium payment test as a ground for including life insurance policy proceeds in an insured's gross estate for estate tax purposes.

John G. Bambrick, Jr.

NEGLIGENCE — EMOTIONAL DISTRESS — CALIFORNIA SUPREME COURT ALLOWS MOTHER, NOT IN PHYSICAL DANGER, TO RECOVER FOR EMOTIONAL SHOCK, WITH RESULTING PHYSICAL CONSEQUENCES, SUFFERED WHEN SHE WITNESSED THE DEATH OF HER CHILD CAUSED BY NEGLIGENT MOTORIST.— On September 27, 1964, Margery Dillon's infant daughter was killed while crossing a street, through the negligence of the defendant motorist. Another of Mrs. Dillon's infant daughters and Mrs. Dillon herself were in close proximity to the accident. Besides seeking recovery for the wrongful death of the one infant, both the mother and surviving sister sought damages for emotional disturbance which they suffered from witnessing the accident. The defendant motorist

44 Brief for Plaintiff at 5-6, Gorman v. United States, 288 F. Supp. 225 (E.D. Mich. 1968).
45 Simmons, *supra* note 13, at 340.
46 Letter from Nathan B. Driggers, counsel for the plaintiff in *Gorman*, to John G. Bambrick, November 25, 1968, on file with the *Notre Dame Lawyer*.

moved for a summary judgment, contending that neither the mother nor the sister was within the zone of physical danger. The trial court sustained the motion as to the mother's cause of action because she was admittedly not within the zone, but denied it as to the sister's because of the possibility that she had been close enough to the accident to suffer physical injuries of her own. On an appeal by the mother the California Supreme Court reversed the dismissal of her cause of action and, with three justices dissenting, ***held***: a mother is allowed recovery for emotional disturbance, resulting in physical injuries, suffered from witnessing the negligent infliction of death or injury to her child even though she was in no physical danger herself. *Dillon v. Legg*, — Cal. 2d —, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

Recovery for negligently inflicted emotional distress has never found great favor with the courts. Although the courts have spoken in terms of "lack of foreseeability" and "absence of duty" when denying recovery in emotional distress cases, the usual policy considerations advanced to limit recovery have been summed up by the Wisconsin Supreme Court as follows:

> Such consequences are so unusual and extraordinary, viewed after the event, that a user of the highway may be said not to subject others to an unreasonable risk of them by the careless management of his vehicle. Furthermore, the liability imposed is wholly out of proportion to the culpability of the negligent tort-feasor, would put an unreasonable burden upon users of the highway, open the way to fraudulent claims and enter a field that has no sensible or just stopping point.[1]

While most jurisdictions now allow recovery for emotional distress in at least some situations,[2] various restrictions have been judicially evolved[3] so as to overcome the thrust of the above objections. Thus, in order to lessen the likelihood of fraud, the almost universal rule is that the emotional distress must result in some visible, physical harm.[4] Also, both in England[5] and the United States,[6] the courts initially applied the "impact" rule to establish another guarantee that the mental disturbance was genuine. This rule allows recovery only if the defendant's negligence has resulted in some physical impact with the plaintiff.[7] The impact rule is now on the decline in most jurisdictions[8] and is being replaced by the "zone of danger" rule, which allows recovery for emotional distress suffered by the plaintiff through fear for his own safety if he was in an area of

1 Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935).
2 W. PROSSER, LAW OF TORTS 349-50 (3d. ed. 1964).
3 For a detailed history of this evolution, see Goodhart, *The Shock Cases and Area of Risk*, 16 MOD. L. REV. 14 (1953); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Smith, *Relations of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921).
4 W. PROSSER, *supra* note 2, at 348-49.
5 Victorian Ry. Comm'r v. Coultas, 13 App. Cas. 222 (1888).
6 Lehman v. Brooklyn City R.R., 47 Hun 355 (N.Y. 1888).
7 This impact need not result in physical harm to the plaintiff, and the slightest contact with the person of the plaintiff seems to satisfy this requirement. W. PROSSER, *supra* note 2, at 350-51.
8 *Id.* at 351-52. However, some states continue to rigidly adhere to the impact rule. For example, Pennsylvania as late as 1966, in *Knaub v. Gotwalt*, 442 Pa. 267, 220 A.2d 646 (1966), reaffirmed the impact rule.

exposure to possible physical harm as a result of the defendant's negligence.[9] A variation of this rule is evidenced in a decision allowing recovery based on fear for the safety of another, as long as the plaintiff was himself within the zone of danger.[10]

There was disagreement between the majority and the dissent in the instant case as to whether California had previously followed the zone of danger rule or this variation.[11] However, regardless of what the old position in California might have been, the majority's holding in *Dillon* clearly extended the limit of liability for emotional distress beyond any previous American rule.[12]

Having no American precedents to rely on, the majority faced a difficult task in reaching its conclusion. This was especially true in view of the fact that the California Supreme Court, as late as 1963, had denied recovery in a case on all fours with the *Dillon* fact situation.[13] The majority in *Dillon* succeeded in overruling this precedent by first illustrating the artificiality of the zone of danger rule, and then demonstrating that some of the objections given to limit expansion of the rule could be overcome or were not applicable.

The majority initially reasoned that the zone of danger rule was illogical because of the fact that in the instant situation the sister could recover for emotional distress caused by her fear for the safety of another, but the mother could not although she experienced the same fear, solely because of their relative position.[14] However, the majority's assumption that the sister could recover for this type of injury might not have been valid. It is true that she could have recovered for mental distress caused by fear for her own safety, but, as the dissent points out, it was not clear that one inside the zone could recover for shock as a result of fear for another.[15] If in fact the sister would not have been allowed recovery for the distress caused by fear for her sister, then the "hopeless artificiality" of the zone of danger rule is not quite so evident.

The majority also made a point of specifically examining two of the objections that have often been raised in the past to limit the liability for emotional distress. These objections are 1) fear of fraudulent claims and 2) fear of undefinable limits of liability. In attempting to refute the first charge, the majority asserted that, considering the circumstances, the possibility of fraudulent claims in this type of case is rather slim: "[W]e certainly cannot doubt that a mother who sees her child killed will suffer physical injury from shock."[16] Although this is a valid assumption, the majority has not limited its holding to the specific fact pattern at issue in *Dillon*.[17] Whether the certainty of physical injury from

9 *E.g.*, Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).
10 Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933).
11 Dillon v. Legg, — Cal.2d —, 441 P.2d 912, 927 n.4, 69 Cal. Rptr. 72, 87 n.4 (1968).
12 *Spearman v. McCary*, 4 Ala. App. 473, 58 So. 927 (1912) had allowed a mother to recover for emotional distress suffered when the horses pulling the wagon from which she had just alighted but which still contained her children were frightened by the negligence of the defendant. However the court in that case focused on overcoming the impact rule, and the exact question that was to be presented in *Dillon* years later never came up. It is uncertain whether the mother in *Spearman* was fearful for her own safety.
13 Amaya v. Home Ice, Fuel & Supply Co., 59 Cal.2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).
14 Dillon v. Legg, — Cal.2d — 441 P.2d 912, 915-16, 69 Cal. Rptr. 72, 75-76 (1968).
15 *Id.* at —, 441 P.2d at 927 n.4, 69 Cal. Rptr. at 87 n.4.
16 *Id.* at —, 441 P.2d at 917, 69 Cal. Rptr. at 77.
17 *Id.* at —, 441 P.2d at 921, 69 Cal. Rptr. at 81.

shock will be present in all other cases which this new rule will cover is, of course, more debatable. The second reason given by the majority for rejection of the "fraudulent claims" objection seems to be more substantial. It asserts that the danger of fraudulent recovery in some cases "does not justify the wholesale rejection of the entire class of claims in which that potentiality arises."[18] Also, it makes reference to various other classes of cases in which this same danger exists but where the courts have nevertheless entertained the action.[19] In fact, the fraudulent claims objection has been used repeatedly in many situations where recovery has been denied, but in the final analysis the possibility of fraud appears in all cases, and it is ultimately the job of the courts and juries to ascertain the legitimacy of claims by the substantiality of proof.

The second objection attacked by the majority seems to be more fundamental, and permeates the whole negligence area of tort law. The danger of unlimited liability has traditionally been restricted by the imposition of a foreseeability test. After a discussion of the foreseeability concept, the majority concluded that emotional distress could be a foreseeable injury in some situations. The majority then proceeded to set down guidelines to aid in determining when this type of injury could be considered reasonably foreseeable. The following factors were enunciated:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[20]

However, it is important to note that the majority did not limit recovery to only those cases where all these factors are present. Apparently, then, emotional distress can be reasonably foreseeable although one, or perhaps even more, of the factors are absent.[21] The majority is thus willing to allow the limits of liability to be defined in future cases. This confidence in the ability of courts to define these limits is based on the observation that in analogous situations the courts have been competent in drawing the limits of liability.[22]

The majority relied heavily on the development of the English cases dealing with the negligent infliction of emotional distress to illustrate its point. As early as 1925, in *Hambrook v. Stokes Brothers,*[23] the English court granted recovery for injury suffered by a mother as a result of her fear for the safety of her children. In that case, the plaintiff had suffered a miscarriage and died as a result of the shock received when she heard a runaway lorry crash in the area

18 *Id.* at —, 441 P.2d at 917-18, 69 Cal. Rptr. at 77-78.
19 *Id.* at —, 441 P.2d at 918-19, 69 Cal. Rptr. at 78-79.
20 *Id.* at —, 441 P.2d at 920, 69 Cal. Rptr. at 80.
21 *Id.* at —, 441 P. 2d at 921, 69 Cal. Rptr. at 81.
22 The majority felt that the ability of the courts to limit liability had been demonstrated in the area of the "open car" cases, cases involving negligent drafting of a legal instrument, intentional infliction of emotional distress, and the English treatment of the instant problem. *Id.* at —, 441 P.2d at 221-24, 69 Cal. Rptr. at 81-84.
23 [1925] 1 K.B. 141.

where she had just left her two children. Whether the mother herself was in danger is a divided question,[24] but the court in *Dillon* took the position that she was not.[25] By then showing the development of the English law from the *Hambrook* case, the majority attempted to demonstrate that courts are able to establish viable guidelines so that the danger of infinite liability can be avoided.

The dissent by Justice Burke contains a three-pronged assault upon the majority's reasoning. First, the dissenters do not indulge in the confidence that the guidelines set forth by the majority will provide any rational limit to this new type of liability. They feel that the guidelines leave many questions unanswered. For example, what if there is an honest mistake that the third party is in danger or injured when in truth he is not? How close must the relationship be? How near must the plaintiff be to the scene of the accident?[26] While it is true that some of these questions are left unanswered by the majority, it must be remembered that many rules of law, especially in the tort area, evolve slowly, and it is seldom that one case is able to provide the answers to all the situations which may arise. It is only through the resolution of a number of cases that any rule of law begins to assume a definable shape.

The dissent also finds fault with the majority's assertion that the prior rule was incongruous. As stated above, the dissenters concluded that California decisions had never allowed a recovery based on the plaintiff's fear for another, even when the plaintiff was himself in the zone of danger.[27] Allowing a person recovery when he has been placed in danger of actual physical impact is one thing, the dissenting opinion asserts, but

> [i]t is quite another thing to say that those who are out of the field of physical danger through impact shall have a legally protected right to be free from emotional distress occasioned by the peril of others, when that distress results in physical impairment.[28]

The third criticism by the dissenters centers on the majority's failure to overcome all the objections which have been put forth in rejection of this type of liability. Relying upon the reasons given in *Waube v. Warrington*,[29] Justice Burke concluded that the objections of liability out of proportion to culpability and unreasonable burden upon the users of the highway were valid, and should have been answered before any extension of liability. The dissent reasoned that extending the liability of motorists in this manner represents an injustice to them and that the "answer must be reached by balancing the social interests involved in order to ascertain how far defendant's duty and plaintiff's right may justly and expediently be extended."[30] However, this fear that the liability would be

24 *Compare* Goodhart, *supra* note 3, at 18-19 and Smith, *supra* note 3, at 237 *with* Magruder, *supra* note 3, at 1038.
25 Dillon v. Legg, — Cal.2d —, 441 P.2d 912, 923, 69 Cal. Rptr. 72, 83 (1968).
26 *Id.* at —, 441 P.2d at 926, 69 Cal. Rptr. at 86.
27 *Id.* at —, 441 P.2d at 927 n.4, 69 Cal. Rptr. at 86; see note 15, *supra*, and accompanying text.
28 *Id.* at —, 441 P.2d at 927, 69 Cal. Rptr. at 87, *quoting from* Waube v. Warrington, 216 Wis. 603, 612-13, 258 N.W. 497, 500-01 (1935).
29 216 Wis. 603, 258 N.W. 497 (1935); see text and quote accompanying note 1, *supra.*
30 Dillon v. Legg, — Cal.2d —, 441 P.2d 912-927, 69 Cal. Rptr. 2d 72, 87 (1968), *quoting from* Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935).

out of proportion to the culpability of the negligent tortfeasor fails to take into account the fact that a tortfeasor's liability is often not in proportion to his degree of negligence. In actual fact, the quantitative extent of liability usually depends upon the characteristics of the victim.[31] Thus the liability of a defendant who kills a young, promising executive with a wife and five children will be much greater than that of a defendant who, with the same degree of negligence, kills an eighty year old derelict.

The dissent also expressed concern with the problem of contributory negligence. The majority had stated that any contributory negligence on the part of the deceased child would defeat recovery by the mother.[32] The dissent takes exception to this assertion: "The familiar and heretofore unquestioned principle is that the relationships of parent and child or of husband and wife *in themselves furnish no basis* for imputation of contributory negligence."[33] The majority's acceptance of contributory negligence of the child as a complete bar to recovery can therefore mean either of two things: that this "unquestioned principle" has been abrogated as the dissent fears, or that in the instant situation there will be an exception. It is suggested that the latter alternative is more likely since the majority gives no justification for a ruling that would extend "far beyond the confines of the particular issue before us."[34] Thus, even though the majority speaks of a breach of duty toward the bystanders, it seems to be unwilling to permit this action to stand on its own, but will only allow recovery on a sort of parasitic basis. The majority's apparent reluctance to allow the mother's recovery to stand on its own merit may provide an insight into the manner in which this court will solve some of the problems feared by the dissenters. If the court will insist that primary liability be established first, then it appears that if the child has assumed the risk of injury there would be no primary liability, and hence no liability to the witness. Again, if the child were in no danger but the plaintiff was honestly mistaken that he was in danger, there would be no liability to the plaintiff because, again, primary liability to the child is lacking. Carrying this reasoning further, it could be argued that if the child were placed in danger, but was not aware of his peril or suffered no emotional distress and no physical injury, then even if the plaintiff suffered emotional distress from witnessing the danger there would still be no primary liability to the child to which the plaintiff's action could be attached.

It may be possible to ascertain the answers to some of the other questions that the dissent considered inadequately treated by an examination of the English cases referred to by the *Dillon* court. First, it would seem that the onlooker would not necessarily have to be a female nor would that party's observation of the accident be necessary. This was the case in *Boardman v. Sanderson*,[35] where the English court allowed a father to recover for mental shock suffered when he heard the screams of his son, whose foot had been caught under the defendant's car. However, it seems that the court will require some relationship between the

31 Tort Symposium, 19 OKLA. L. REV. 307, 340 (1966).
32 Dillon v. Legg, — Cal.2d —, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968).
33 *Id.* at —, 441 P.2d at 928, 69 Cal. Rptr. at 88.
34 *Id.*
35 [1964] 1 W.L.R. 1317 (C.A.).

plaintiff and the third party, since reference is made by the majority to *Bourhill (Hay) v. Young*[36] as being an example of the sort of case that would not be included in the scope of liability. There the court denied recovery to a casual bystander who suffered shock from witnessing an accident.

While it is true that the fear of an unreasonable burden on the users of the highway is legitimate, this danger would probably present itself only if the courts relax the degree to which the requirements expressed in the majority's guidelines must be met. Allowing casual bystanders or even close relatives not present to recover would certainly substantiate the fear of unreasonable burden, but an intelligent use of the guidelines will keep liability within reasonable limits.

The majority believed that its decision had been reached by using the general principles of tort law.[37] However, the guidelines used to resolve the issue have been characterized as illogical and arbitrary by no less an authority than Dean Prosser, who originally enunciated them.[38] Nevertheless, even admitting this arbitrariness, the decision must be applauded. Whether the courts will be able to cope with the situation using the guidelines provided remains to be seen, but in rendering its decision the *Dillon* majority did not succumb to what has been termed the "wedge" argument:

> The Principle of the Wedge is that you should not act justly now for fear of raising expectations that you may act still more justly in the future—expectations which you are afraid you will not have the courage to satisfy.[39]

Because of the esteem enjoyed by the California Supreme Court and its leadership in other areas of the law,[40] the *Dillon* case takes on added importance throughout the country. Other courts are bound to watch the California development in this area; if none of the fears of the dissent are realized, the zone of danger rule appears destined for nationwide collapse.

Paul E. Pollock

FEDERAL PROCEDURE — JURISDICTION — APPOINTMENT OF AN OUT-OF-STATE FIDUCIARY FOR THE PURPOSE OF CREATING DIVERSITY JURISDICTION IS COLLUSIVE AND PROHIBITED BY 28 U.S.C. § 1359.—On November 27, 1966, Richard R. Riegner, a minor, was injured when the automobile in which he was a passenger collided with a vehicle operated by one Russell Millard. The accident occurred in Berks County, Pennsylvania, where Riegner lived with his mother, Martha M. Fritzinger. In January, 1967, Riegner, with the consent of his mother, petitioned the Orphans' Court of Berks County to appoint a guardian for his estate for the purpose of pursuing his tort action. On February 6, 1967 the Orphans' Court appointed Stella McSparran, a New Jersey citizen, as Riegner's guardian. This appointment created diversity of citizenship since all

36 [1943] A.C. 92.
37 Dillon v. Legg, — Cal.2d —, 441 P.2d 912, 924, 69 Cal. Rptr. 72, 84 (1968).
38 W. PROSSER, *supra* note 2, at 354.
39 Goodhart, *supra* note 3, at 14.
40 *See, e.g., Greenman v. Yuba Power Products, Inc.* 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (products liability).

parties to the accident were Pennsylvania citizens.[1] Several weeks later Stella McSparran instituted a suit in the United States District Court for the Eastern District of Pennsylvania to recover damages incurred as a result of the accident. Riegner's mother joined in the suit in her own right seeking out-of-pocket medical expenses.

Chief Judge Clary of the district court dismissed the action for lack of jurisdiction, holding that a parent who lacks diversity may not join "as a matter of right" in the created diversity suit of his minor child.[2] However, this issue of pendent jurisdiction was never reached on appeal. Instead, the Third Circuit focused on the question of whether the primary claim between the defendant and the out-of-state guardian was in itself sufficient to satisfy diversity jurisdiction. Reargued before the court en banc with *Esposito v. Emery*,[3] another personal injury action where an out-of-state guardian was appointed to create diversity, the United States Court of Appeals for the Third Circuit, with three judges dissenting, overruled *Corabi v. Auto Racing, Inc.*[4] and *Jaffe v. Philadelphia & Western Railroad Co.*[5] and *held*: the appointment of an out-of-state fiduciary in order to create diversity jurisdiction is collusive and thereby violative of section 1359, title 28 of the United States Code. *McSparran v. Weist*, 402 F.2d 867 (3rd Cir. 1968).

After noting that the present controversy was not whether the infant or fiduciary's citizenship was to be controlling,[6] the court articulated as its fundamental problem "the effect of the artificial creation or manufacture of diversity [jurisdiction]."[7] The statute upon which the court relied in determining this issue was section 1359 of the Judicial Code.[8] Section 1359 is a combination, in simplified form, of the old anti-assignment statute[9] and section 37 of the Judicial Code of 1911.[10] The anti-assignment statute provided that in diversity suits brought by assignees, the citizenship of both the assignor and assignee had to be diverse from that of the defendant.[11] Section 37 of the Judicial Code commanded the dismissal or remand of an original or removed action when

> such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties

1 McSparran v. Weist, 270 F. Supp. 421 (E.D. Pa. 1967), *rev'd*, 402 F.2d 867 (3rd Cir. 1968).
2 *Id.*
3 402 F.2d 878 (3rd Cir. 1968).
4 264 F.2d 784 (3rd Cir. 1959).
5 180 F.2d 1010 (3rd Cir. 1950).
6 McSparran v. Weist, 402 F.2d 867, 871 (3rd Cir. 1968). It is well established that the citizenship of the fiduciary rather than the beneficiary is controlling in the determination of diversity of citizenship. *See generally* Childress v. Emory, 21 U.S. (8 Wheat.) 642 (1823); Rice v. Houston, 80 U.S. (13 Wall.) 66 (1871) (executors and administrators); Coal Company v. Blatchford, 78 U.S. (11 Wall.) 172 (1870) (trustees); Mexican Central Ry. v. Eckman, 187 U.S. 429 (1903) (general guardians).
7 McSparran v. Weist, 402 F.2d 867, 871 (3rd Cir. 1968).
8 28 U.S.C. § 1359 (1964) provides: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."
9 Act of March 3, 1911, ch. 231, § 24(1), 36 Stat. 1091 (formerly codified at 28 U.S.C. § 41(1) (1940)).
10 Act of March 3, 1875, ch. 137, 18 Stat. 472 (formerly codified at 28 U.S.C. § 80 (1940)).
11 3A J. MOORE, FEDERAL PRACTICE ¶ 17.05, at 151 (2d ed. 1968).

> to said suit have been improperly or collusively joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable.[12]

The Reviser's Notes indicate two primary purposes for condensing the above sections.[13] First, as noted by the court in *McSparran,*

> Provisions . . . for dismissal of an action not really and substantially involving a dispute or controversy within the jurisdiction of a district court were omitted as unnecessary [because] any court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion.[14]

Second, the condensed section 1359 eliminates confusing and unnecessary exceptions to the assignee clause and eliminates the effect of that clause on bona fide assignees.[15] As explained by the Fifth Circuit in *Caribbean Mills, Inc. v. Kramer:*[16]

> Under the original clause, a bona fide assignee could not sue in federal court unless his assignor could have; under section 1359, any assignee can sue in federal court so long as he was not improperly or collusively made a party in order to invoke federal jurisdiction.[17]

"Improperly or collusively made a party in order to invoke federal jurisdiction" are the key words in interpreting section 1359. Since section 80 of the 1940 Judicial Code[18] contained similar words, the cases under that section have laid the foundation for assessing whether an assignment or other device was "improperly or collusively made." One familiar rule developed under section 80, and relating to the incorporation of an entity in a particular state, was that if the corporate transfer was merely a sham, the device would not confer diversity jurisdiction on the federal courts. However, if the incorporation were actual—not feigned or merely colorable—the motives would not be inquired into and diversity jurisdiction would be sustained. The Supreme Court decisions of *Lehigh Mining and Manufacturing Co. v. Kelly*[19] and *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*[20] best illustrate this point. In *Lehigh Mining,* a Virginia corporation organized a separate corporation in the state of Pennsylvania in order to bring suit in federal court against a Virginia citizen. In examining the issue, Justice Harlan stated for the Court:

> The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express pur-

12 *Id.*
13 28 U.S.C. § 1359 (1964), *Reviser's Note,* at 5973.
14 *Id.* at 5974, *cited in* McSparran v. Weist, 402 F.2d 867, 873 (3rd Cir. 1968).
15 28 U.S.C. § 1359 (1964), *Reviser's Note,* at 5974.
16 392 F.2d 387 (5th Cir. 1968).
17 *Id.* at 389.
18 Act of March 3, 1911, ch. 231, § 37, 36 Stat. 1098.
19 160 U.S. 327 (1895).
20 276 U.S. 518 (1928).

> pose—no other purpose is stated or suggested—of creating a case for the federal court, must be regarded as a mere device to give jurisdiction . . . and as being, in law, a fraud . . . . Such a device cannot receive our sanction.[21]

The thrust of Justice Harlan's rejection of the Virginia corporation transfer is rooted in his acknowledgement that there still exists "the right and power" of the grantor to compel the Pennsylvania corporation to convey the legal title of its lands to the grantor without any valuable consideration.[22] However, in *Black and White Taxicab,* a Tennessee corporation was organized to succeed a Kentucky corporation for the purpose of creating diversity of citizenship. In this case no violation of section 80 was found, since the Kentucky corporation completely liquidated its business. The Court concluded:

> The motives which induced the creation of respondent to become successor to its Kentucky grantor and take a transfer of its property have no influence on the validity of the transactions which are the subject of the suit. *The succession and transfer were actual, not feigned or merely colorable* . . . . It is enough that respondent is the real party in interest.[23] (Emphasis added.)

Thus, regardless of motive, collusion was interpreted under section 80 in terms of actual control and power.

The Third Circuit utilized this same rationale in cases in which diversity was created by the appointment of an out-of-state fiduciary. For example, in *Corabi v. Auto Racing, Inc.,*[24] the mother of a deceased minor resigned as administratrix of the estate to permit the appointment of a nonresident so that suit could be brought in federal court. In a unanimous opinion by Chief Judge Biggs, the court, relying strongly on *Black and White Taxicab,* held that the nonresident administrator had capacity to sue, and that his citizenship, and not that of the decedent or the beneficiaries, was determinative of diversity for purposes of federal jurisdiction.[25] Despite the obvious intent of appointing an out-of-state administrator solely to create diversity, the *Corabi* court found

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21 Lehigh Mining and Manufacturing Co. v. Kelly, 160 U.S. 327, 339 (1895).

22 *Id.* at 337.

23 Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U.S. 518, 524 (1928).

24 264 F.2d (3rd Cir. 1959). Prior to the *Corabi* decision the Third Circuit had encountered the manufactured diversity problem in *Jaffe v. Philadelphia & Western R.R.,* 180 F.2d 1010 (3rd Cir. 1950). In *Jaffe,* decedent was killed by defendant's high-speed trolley car in the state of Pennsylvania. The decedent, the widow and her children, and the defendant were all citizens of Pennsylvania. An action under the Pennsylvania wrongful death statute and the Pennsylvania survival law, brought by the administratrix ad prosequendum who was a New Jersey citizen and a stenographer for the widow's attorney, was sustained. The Third Circuit held that the diversity requirement for federal jurisdiction was satisfied despite the admission that the appointment of the out-of-state representative was made primarily because plaintiff's counsel desired to bring the action in the federal court. In so holding, the court relied principally on dicta from *Mecom v. Fitzsimmons Drilling Co.,* 284 U.S. 183 (1931), in which the Supreme Court upheld the *destruction* of diversity through the appointment of an administrator who was a citizen of defendant's state. The faulty and insufficient reasoning of *Jaffe* is examined in Comment, 73 YALE L.J. 873, 874 n.11 (1964).

25 264 F.2d 784, 786 (1959).

> that § 1359 did not bar the action, because there was involved no collusion between plaintiff and defendant in fraud of the court, and the action was not improperly brought since there was no impropriety or irregularity involved in the perfectly valid proceeding in the state court for the appointment of an out-of-state fiduciary.[26]

Corabi has been followed by other courts on this question of "manufactured" diversity jurisdiction.[27]

Since 1959, the year of the *Corabi* decision, several new factors have arisen which persuaded the Third Circuit to overturn its own precedent.[28] One of these factors was the American Law Institute's [ALI] study of the diversity cases filed in the Eastern District of Pennsylvania during 1958 and 1959.[29] This detailed study revealed that slightly over twenty percent of all diversity cases were brought by out-of-state personal representatives of Pennsylvania citizens against Pennsylvania defendants.[30] Such statistics clearly demonstrate that the interpretation of section 1359 expressed in *Corabi* has resulted in an expansion of federal diversity jurisdiction. This result is contrary to the judicial attitude espoused in the federal question area, where the predominant tendency has been to restrict the scope of federal jurisdiction.[31]

The *McSparran* court was also strongly influenced by the newly proposed amendments to the Judicial Code,[32] which are themselves largely a result of the ALI's careful study of diversity jurisdiction. Under proposed section 1301(b) (4),[33] the present problem of an appointment of an out-of-state guardian would

26 This concise statement of the *Corabi* holding is found in *McSparran v. Weist,* 402 F.2d 867, 872 (3rd Cir. 1968).

27 Lang v. Elm City Constr. Co., 324 F.2d 235 (2d Cir.) *aff'g per curiam* 217 F. Supp. 873 (D. Conn. 1963); Stephan v. Marlin Firearms Co., 325 F.2d 238 (2d Cir.) *aff'g per curiam* 217 F. Supp. 880 (D. Conn. 1963); DiStefano v. Lehigh Valley R.R., 258 F. Supp. 721 (E.D. Pa. 1966); *In Re* City of Bethlehem, 181 F. Supp. 875 (E.D. Pa. 1960). Several district court cases since *Corabi* have followed the rationale of that opinion without relying specifically upon it. Berkowitz v. Philadelphia Chewing Gum Corp., 317 F.2d 192 (3rd Cir. 1962) *aff'g per curiam* 217 F. Supp. 80 (E.D. Pa. 1962); Ashley v. Read Constr. Co., 195 F. Supp. 727 (D. Wyo. 1961); Meehan v. Central R.R. of New Jersey, 181 F. Supp. 594 (S.D.N.Y. 1960). For cases prior to *Corabi* but following the reasoning that it expressed, *see* Fallat v. Gouran, 220 F.2d 325 (3rd Cir. 1955); Jaffe v. Philadelphia & Western R.R., 180 F.2d 1010 (3rd Cir. 1950); Johnstone v. O'Connor & Co., 164 F. Supp. 66 (E.D. Pa. 1958); Morris v. Bradley, 139 F. Supp. 519 (E.D. Pa. 1956). The Eighth Circuit has taken the same position as that of the Third Circuit in *Corabi.* County of Todd v. Loegering, 297 F.2d 470 (8th Cir. 1961), *aff'g* 185 F. Supp. 134 (D. Minn. 1960); McCoy v. Blakely, 217 F.2d 227 (8th Cir. 1954); Curb and Gutter District No. 37 v. Parrish, 110 F.2d 902 (8th Cir. 1940). *Contra,* Martineau v. City of St. Paul, 172 F.2d 777 (8th Cir. 1949).

28 Even before the *Corabi* decision, the practice of appointing out-of-state representatives to create diversity was strongly criticized. *See* Cohan & Tate, *Manufacturing Federal Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety,* 1 VILL. L. REV. 201 (1956).

29 This study is discussed in *McSparran v. Weist,* 402 F.2d 867, 871 (3rd Cir. 1968).

30 THE AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Part I) 175 & n.7 (1965) (*Official Draft*).

31 For further explanation of this apparent incongruence, see Comment, *supra* note 24, at 877-78 & nn.22-24 (1964).

32 THE AMERICAN LAW INSTITUTE, *supra* note 30, at 7-46. For an assessment of the ALI proposed legislation, see Currie, *The Federal Courts and the American Law Institute,* 36 U. CHI. L. REV. 1 (1968); Marden, *Reshaping Diversity Jurisdiction: A Plea for Study by the Bar,* 54 A.B.A.J. 453 (1968).

33 Proposed Section 1301(b)(4) reads:

> An executor, or an administrator, or any person representing the estate of a decedent or appointed pursuant to statute with authority to bring an action because of the death of a decedent shall be deemed to be a citizen only of the same State as the

be directly solved. This section provides that the executor, administrator or guardian would be treated as a citizen of the same state as the decedent or ward. Another ALI proposed revision, section 1307, obviously is intended to replace section 1359.[34] As the ALI commentary relates,[35] there still exist differing factors between the state and federal court structures[36] that—despite *Erie Railroad Co. v. Tompkins*[37]—make forum shopping a reality. The purpose of the new section 1307 is to minimize the opportunities for maneuvering from one court to the other.[38] The ultimate result in *McSparran* can be viewed as a judicial adoption of the ALI proposed legislation even before such legislation has been effectuated by Congress.

The *McSparran* majority might also have been impressed by the recently expressed judicial discontent over *Corabi's* literal interpretation of section 1359. As noted in Judge Thornberry's comment in *Caribbean Mills, Inc. v. Kramer*,[39] the Third Circuit in deciding *Corabi* "defined 'improper or collusive' so that the statute would have very narrow application, if any application at all . . . . By focusing on the literal meanings of the two words, the court virtually emasculated the statute . . . ."[40] Furthermore, the majority in *McSparran* concluded that the cases involving the appointment of an out-of-state representative do not really fall within the accepted general purpose of diversity jurisdiction—preven-

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> decedent; and a guardian, committee, or other like representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the person represented. THE AMERICAN LAW INSTITUTE, *supra* note 30, at 9.

34 Section 1307, entitled "Parties joined or made with a purpose of invoking or defeating federal jurisdiction," reads as follows:

> (a) A district court shall not have jurisdiction of a civil action in which any party has been made or joined improperly, or collusively, or pursuant to agreement or understanding between opposing parties, in order to invoke the jurisdiction of such court.
>
> (b) Whenever an object of a sale, assignment, or other transfer of the whole or any part of any interest in a claim or any other property has been to enable or to prevent the invoking of federal jurisdiction under this chapter or chapter 158 of this title, jurisdiction of a civil action shall be determined as if such sale, assignment or other transfer had not occurred. The word "transfer" as used in this section includes the appointment of a trustee, receiver, or other fiduciary, or any other person to hold or receive interests of any kind, whether made by private persons or by a court or any other official body. *Id.* at 21-22.

35 *Id.* at 100-01.

36 One such difference is in the size of verdicts. In *Kaufmann Estate*, 87 Pa. D. & C. 401 (Orphans' Ct. 1954), the appointment of an out-of-state guardian, which had up to that time been refused by the Orphans' Court of Philadelphia County except in special circumstances, was permitted on the basis of the findings of Dean Benjamin F. Boyer of Temple University School of Law. Dean Boyer was directed by a decree of the court

> To conduct an investigation in order to determine whether there is, generally, a wide disparity in the amounts of awards of damages in trespass between cases tried in the Federal courts and those tried in the State courts sitting in Philadelphia . . . . *Id.* at 403.

The results of Dean Boyer's study showed "that there is a better chance of obtaining and sustaining a higher verdict in the Federal courts than in the State courts." *Id.* at 404.

37 304 U.S. 64 (1938). The primary reason that the Supreme Court in *Erie Railroad* overruled the time-honored *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) was to abolish the lack of uniformity in decisions within a state between the state and the federal court. The application of different law by the federal and state courts within the same state made available federal forum shopping to the out-of-state litigant.

38 THE AMERICAN LAW INSTITUTE, *supra* note 30, at 100-01.

39 392 F.2d 387 (5th Cir. 1968).

40 *Id.* at 393.

tion of prejudice to out-of-state litigants—because the controversy is "essentially local."[41]

The *McSparran* court's interpretation of section 1359 also took into consideration the preliminary words of section 37 of the Judicial Code of 1911, even though not a part of the present statute, on the ground that these words "give content to its [section 1359's] otherwise indefinite and ambiguous words 'improperly or collusively'."[42] The court translated section 37[43] to say in effect "that a nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest in the dispute or controversy, is improperly or collusively named."[44] This interpretation goes beyond the superficial explanation in *Corabi* that there can be nothing collusive or improper in openly going before a state court on a petition, which is a public record, to have an out-of-state fiduciary appointed, whether it be for the purpose of obtaining a larger judgment or of avoiding delay in the state courts. Rather, it recognizes that the fraud involved is not upon the deciding judges or the defendant, but upon the federal judicial structure. Diversity jurisdiction was created primarily to combat a bias element in state litigations against out-of-staters.[45] However, in the *Corabi-McSparran* type of case, the controversy is clearly of a purely local nature and continues to remain so regardless of the appointment of an out-of-state fiduciary. Thus, the potential for bias, so fundamental to the concept of diversity, is completely lacking. In *McSparran*, the nominal or formal party—or, in the words of the court, "the straw party"—was Stella McSparran, the out-of-state guardian. The court concluded that as a guardian of only that money which would be obtained as a result of the tort claim, McSparran in fact performed no real function except to contribute her citizenship for the maintenance of the diversity action.[46]

As another basis for concluding that the out-of-state fiduciary was merely a "straw party," the *McSparran* majority attacked heretofore sacred ground by looking to the intent and motive of the plaintiff.[47] The cases are legion that confirm the proposition that motive will not be investigated when considering the jurisdiction of the court.[48] Nevertheless, the *McSparran* court agreed with a recent Vermont district court opinion[49] and concluded that the wording of section 1359 indicates that motive is a material ingredient in determining whether the joining of a party to invoke federal jurisdiction is improper or collusive.[50] In the instant case no difficulty was encountered with the subjective element of investigating the motives of the party since the "manufactured" diversity had

41 McSparran v. Weist, 402 F.2d 867, 876 (3rd Cir. 1968).
42 *Id.* at 873.
43 The pertinent provision of section 37 is quoted in the text accompanying note 12 *supra.*
44 McSparran v. Weist, 402 F.2d 867, 873 (3rd Cir. 1968).
45 C. Wright, Federal Courts § 23, at 64 (1963).
46 McSparran v. Weist, 402 F.2d 867, 873 (3rd Cir. 1968).
47 *Id.* at 874-75.
48 *See, e.g.*, Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 189 (1931); Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U.S. 518, 524 (1928); Dickerman v. Northern Trust Co., 176 U.S. 181, 191-92 (1900); McDonald v. Smalley, 26 U.S. (1 Pet.) 620, 623-24 (1828).
49 Ferrara v. Philadelphia Laboratories, Inc., 272 F. Supp. 1000 (D. Vt. 1967).
50 McSparran v. Weist, 402 F.2d 867, 874 (3rd Cir. 1968).

been freely conceded by the parties.[51] In future cases, however, such concessions will be lacking, and it is conceivable that the investigation of subjective motive may produce an uncertainty that will haunt many a district court.[52] The majority in *McSparran* distinguished *Black and White Taxicab* on its operative facts.[53] However, the dissenting judges found it difficult to comprehend how the transfer of a single asset by the operation of law to the guardian of the estate of a minor was collusive in *McSparran,* while the transfer of all the assets of one corporation to another by its Board of Directors was not considered collusive in *Black and White Taxicab*.[54]

McSparran's breakthrough in attacking motive could have unparalleled ramifications. For example, in the change of domicile situation, despite a party's motive of creating diversity jurisdiction, if he actually moves into another state with the intention of making it his home, his action is not considered fraudulent and confers jurisdiction upon the federal court.[55] The *McSparran* interpretation of section 1359 may call for a reevaluation of this result, even though the Supreme Court has endorsed the practice. An analogous problem is found in the area of assignments. The rule to date is that "peppercorn" consideration will suffice to render the assignment non-collusive for diversity purposes.[56] Under *McSparran* the motive behind the assignment, and not merely its legal effect, would be controlling. Finally, it appears well-settled by such cases as *Mecom v. Fitzsimmons Drilling Co.*[57] that diversity can be intentionally destroyed by the appointment of a fiduciary who is a citizen of the other party's state. By its apparent judicial adoption of the proposed ALI legislation, which would prevent the intentional creation and destruction of diversity jurisdiction, the *McSparran* court may have opened the result in *Mecom* to reexamination.

The unarticulated goal of the majority in *McSparran* was the restriction of diversity jurisdiction to controversies that involved a true out-of-state litigant, so that the congestion on the federal dockets would be reduced. In itself this purpose is laudable. However, the means by which it is achieved — examination of subjective motivation — has traditionally been considered beyond the boundaries of judicial investigation in the area of federal diversity jurisdiction.

Thomas J. DeLuca

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51 *Id.* at 876.

52 *See* Judge Biggs' dissent in *Esposito v. Emery,* 402 F.2d 878, 882-83 (3rd Cir. 1968).

53 McSparran v. Weist, 402 F.2d 867, 875 (3rd Cir. 1968).

54 Esposito v. Emery, 402 F.2d 878, 882 (3rd Cir. 1968).

55 *See, e.g.,* Robertson v. Carson, 86 U.S. (19 Wall.) 94, 106 (1873); Janzen v. Goos, 302 F.2d 421, 425 (8th Cir. 1962).

56 City of Eufala v. Pappas, 213 F. Supp. 749 (M.D. Ala. 1963). In *City of Eufala,* a conveyance of condemned land to an out-of-state citizen for consideration of one dollar was not considered collusive under section 1359, even though several of the grantors testified in court that "the reason for the transfer . . . was to create diversity and thus confer jurisdiction on this court." *Id.* at 750.

57 284 U.S. 183 (1931).

ADMIRALTY — LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT — LONGSHOREMEN'S ACT STATUS NOT SITUS ORIENTED — ADMIRALTY EXTENSION ACT OF 1948 IMPLIEDLY EXPANDED JURISDICTION OF LONGSHOREMEN'S ACT — INJURY ON DOCK EXTENDING OVER NAVIGABLE WATERS IS WITHIN JURISDICTION OF LONGSHOREMEN'S ACT.—*Marine Stevedoring Corporation v. Oosting*[1] [hereinafter referred to as *Marine Stevedoring*] is a consolidation for appeal of three district court cases. In *Johnson v. Traynor,*[2] plaintiff Johnson and another longshoreman were working in a gondola car on a pier when the ship's crane used in the loading operation went out of control. As a result, Johnson was severely injured and the other man was killed. The Maryland district court held that since the injuries were sustained on a dock, which is an extension of the land, they did not occur "upon navigable waters" and were therefore outside the jurisdiction of the Longshoremen's and Harbor Workers Compensation Act[3] [hereinafter referred to as the Longshoremen's Act].

In *Marine Stevedoring Corporation v. Oosting,*[4] plaintiff's deceased husband Vann was working on a pier over navigable waters. He was drowned when a cable that he was lifting straightened and threw him into the river. The Virginia district court held that the fatal injury occurred "upon navigable waters" and, therefore, fell within the jurisdiction of the Longshoremen's Act.

The longshoreman in *East v. Oosting,*[5] the third case consolidated for appeal, was also injured on a pier. As in *Johnson v. Traynor* the ship's crane went out of control and the load which it was lifting struck the plaintiff. The Virginia federal district court held in this case that the Longshoremen's Act did not apply because the injury had not been sustained "upon navigible waters."

The United States Court of Appeals for the Fourth Circuit, in reversing *Johnson v. Traynor* and *East v. Oosting* and affirming *Marine Stevedoring Corporation v. Oosting,* held: (1) Since the Longshoremen's Act is status and not situs oriented, it covers all longshoremen working under the same contract regardless of where the injury occurred; (2) the Admiralty Extension Act,[6] in extending the admiralty tort jurisdiction to cover injuries occurring on the land which are caused by a vessel on navigable waters, impliedly extended coverage of the Longshoremen's Act to the same extent; and (3) an injury occurring on a pier which extends over navigable waters is an injury occurring "upon navigable waters" and thus within the coverage of the Longshoremen's Act: *Marine Stevedoring Corporation v. Oosting,* 398 F.2d 900 (4th Cir. 1968).

To understand the issues confronting the court in *Marine Stevedoring,* an acquaintance with the events giving rise to the adoption of the Longshoremen's Act is necessary. In 1914, Christen Jensen, a longshoreman, was fatally injured while working on a gangway between a ship and a wharf. Jensen's widow was awarded a claim against the employer, Southern Pacific Company, by the Workmen's Compensation Commission of New York. The award was affirmed by

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1 398 F.2d 900 (4th Cir. 1968).
2 243 F. Supp. 184 (D. Md. 1965).
3 44 Stat. 1424 (1927), 33 U.S.C. §§901-50 (1964).
4 238 F. Supp. 78 (E.D. Va. 1965)
5 245 F. Supp. 51 (E.D. Va. 1965).
6 62 Stat. 496 (1948), 46 U.S.C. § 740 (1964).

the New York Court of Appeals.[7] In 1917, the United States Supreme Court, in the landmark decision of *Southern Pacific Company v. Jensen*,[8] reversed the state court decision, and held that state workmen's compensation laws were inapplicable to injuries occurring within the federal maritime jurisdiction.[9] The Court noted that, by virtue of article III, section 2 and article I, section 8 of the Constitution, the power to fix and determine maritime law was vested in Congress. The Court reasoned further that since Congress had not in fact acted, the general maritime law as accepted by the federal courts constituted a "national law" of admiralty and maritime jurisdiction.[10]

Therefore, the court concluded, state legislation would be invalid

> if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.[11]

Within six months after the *Jensen* decision, Congress passed a federal statute attempting to authorize the application of state workmen's compensation laws to injuries occurring within the federal maritime jurisdiction.[12] The statute was struck down by the Supreme Court as an improper delegation to the states of the legislative powers of Congress.[13] A subsequent attempt by Congress to authorize state compensation[14] was likewise struck down in *Washington v. W. C. Dawson & Company*.[15] The Court, in its opinion in *Dawson*, suggested that Congress pass a federal workmen's compensation statute.[16]

Since, subsequent to *Jensen*, longshoremen injured on territory within the federal maritime jurisdiction were not entitled to relief under state workmen's compensation laws and no applicable federal workmen's compensation act had yet been adopted, they were afforded relief only if it could be shown that the injury occurred through the negligence of the employer. Perhaps realizing the harsh effect of the *Jensen* decision upon longshoremen, the Court began to conjure exceptions to the rule. The "maritime but local" doctrine was developed, under which state compensation and wrongful death acts could validly extend to maritime activities which were of "local" as opposed to "national" concern. The Court reasoned that the application of state law in such cases would "not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."[17] The second important exception was created in *Industrial Commission v. Nordenholt Corporation*[18] and expanded

7 Jensen v. Southern Pacific Co., 215 N.Y. 514, 109 N.E. 600 (1915).
8 244 U.S. 205 (1917).
9 *Id.* at 218.
10 *Id.* at 215.
11 *Id.* at 216.
12 Act of October 6, 1917, ch. 97, 40 Stat. 395.
13 Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1920).
14 Act of June 10, 1922, ch. 216, 42 Stat. 634.
15 264 U.S. 219, 222-23 (1924).
16 *Id.* at 227.
17 Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921).
18 259 U.S. 263 (1922).

by subsequent decisions.[19] In those decisions, the Supreme Court made it clear that state workmen's compensation laws were applicable to injuries occurring on land or on docks, piers and similar structures permanently affixed to the shore, but extending over navigable waters, which are considered extensions of the land. The Court rationalized that the state compensation law was declared inapplicable in *Jensen* because it would interfere with the already existing federal general maritime law. However, since admiralty tort jurisdiction does not encompass injuries occurring on land or extensions thereof, there is no federal law with which the state law would conflict. Injuries on land or docks would therefore fall within the jurisdiction of the local common law of torts, with the result that state compensation statutes would supersede only state common law and not general maritime law.[20] Thus, while a longshoreman was within the broader maritime contract jurisdiction by virture of the status of his employment, he was nevertheless within the domain of the state law if the situs of his injury occurred upon the land or an extension thereof.

Congress finally realized that enactment of a federal statute was necessary to provide coverage for longshoremen injured within the admiralty tort jurisdiction. The problem confronting Congress was the extent to which it should exercise its admiralty jurisdiction authority in extending coverage. One alternative was to extend coverage only to those injuries for which the states could not constitutionally provide. The second alternative was to provide coverage which would be co-extensive with the broader maritime contract jurisdiction, thus basing recovery on the status of the employee rather than the situs of the injury. Two considerations indicate that it was the intention of Congress to adopt the first approach and thus leave as much coverage as possible with the states. First, both past attempts of Congress had utilized this approach. Indeed, these attempts had failed because the authority delegated to the states was so broad that it was deemed unconstitutional.[21]

Second, an earlier version of the bill which eventually became the Longshoremen's Act had provided coverage for injuries "on a place within the admiralty jurisdiction of the United States, except employment of local concern and no direct relation to navigation or commerce."[22] This language was thought to exclude both the "maritime but local" and "extensions of the land" doctrines, thus allowing those areas to remain exclusively within state coverage.[23] However, this version was later deleted for want of clarity.[24] The relevant part of the bill as finally passed reads as follows:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, *but only* if the disability or death results from an injury *occurring upon the navigable waters* of the United States (including any dry dock) and if recovery for the disability or death through workmen's

19 *See, e.g.*, Swanson v. Marra Bros., 328 U.S. 1 (1946); T. Smith & Son v. Taylor, 276 U.S. 179 (1928).
20 *See* Industrial Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922).
21 See text accompanying notes 12-15 *supra.*
22 S. 3170, 69th Cong., 1st Sess. § 3 (1927).
23 See the discussion of the legislative history of the Longshoremen's Act in *Calbeck v. Travelers Insurance Company,* 370 U.S. 114, 120-24 (1962).
24 *Id.*

> compensation proceedings may not validly be provided by State law.[25] (Emphasis added.)

The issue in *Marine Stevedoring* as framed by Judge Sobeloff, author of the majority opinion, was "whether an injury on a pier falls within the jurisdictional provision 'upon the navigable waters,' and thus within the coverage of the Act."[26] The court, using a three-pronged approach, answered this question in the affirmative.

The first approach was that the Longshoremen's Act was intended by Congress to cover injuries to longshoremen by virtue of their employment, regardless of the situs of the injury. The court pointed out that Congress constitutionally could have grounded jurisdiction solely on the status of the employees — the only question was whether Congress had so utilized its authority. As support for its conclusion that Congress intended coverage to be based on status, the court quoted from the opinion in the recent Supreme Court decision of *Calbeck v. Travelers Insurance Company*.[27] Referring to the Longshoremen's Act, the Supreme Court had there stated that no room exists to doubt " 'that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter.' "[28] The Court then concluded that "Congress intended the compensation act to have a coverage co-extensive with the limits of its authority."[29] From this the Fourth Circuit in *Marine Stevedoring* reasoned that coverage under the Longshoremen's Act was grounded on the broader admiralty contract jurisdiction. Such interpretation, the court decided, would comply with the Supreme Court's mandate in *Voris v. Eikel*[30] that the Act be liberally construed. This mandate, the court continued, was reiterated in *Reed v. The Yaka*,[31] where the Supreme Court stated that the Act must be liberally construed to avoid harsh and incongruous results. Judge Sobeloff stated his belief that since a longshoreman injured by a rotating crane while in the ship's hold would be covered by the Act, it would be "harsh and incongruous to deny the same benefits to a longshoreman injured while performing the same task on an adjoining pier."[32]

This very argument that the "navigable waters" concept should be expanded in light of the *Calbeck* rationale to make coverage under the Act co-extensive with the broader limits of admiralty contract jurisdiction was specifically rejected by the United States Court of Appeals for the Ninth Circuit in the case of *Houser v. O'Leary*.[33] There the court held that:

> To read this language [the same language quoted from *Calbeck* in *Oosting*] as applying to the problem before us is to read it out of context. Neither *Calbeck* nor *De Bardeleben* was concerned with the meaning of the "nav-

25 Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424 (1927), 33 U.S.C. § 903(a) (1964).
26 Marine Stevedoring Corp. v. Oosting, 398 F.2d 900, 902 (4th Cir. 1968).
27 370 U.S. 114 (1962).
28 *Id.* at 130, *quoting from* De Bardeleben Coal Corp. v. Henderson, 142 F.2d 481, 483-84 (5th Cir. 1944).
29 Calbeck v. Travelers Ins. Co., 370 U.S. 114, 130 (1962).
30 346 U.S. 328, 333 (1953).
31 373 U.S. 410, 415 (1963).
32 Marine Stevedoring Corp. v. Oosting, 398 F.2d 900, 907 (4th Cir. 1968).
33 383 F.2d 730 (9th Cir. 1967).

> igable water" requirement of § 903 (a). The problem in those cases was how to construe the *second* requirement of § 903(a): whether the Act provided compensation for injuries sustained by employees on navigable waters "whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law."[34]

Indeed, the Supreme Court itself in *Calbeck* implicitly accepted the validity of applying the situs test to initially determine whether an employee is covered by the Longshoremen's Act.[35]

Recognizing the Ninth Circuit's argument, the *Marine Stevedoring* court attempted to answer it by pointing to Judge Palmieri's observation in the case of *Michigan Mutual Liability Company v. Arrien*[36] that what was just as important as the actual holding in *Calbeck* was the general approach to the Longshoremen's Act taken by the Court. Judge Palmieri felt the Act is now to be viewed as an affirmative exercise of admiralty jurisdiction. He stated that "it thus appears that 'upon navigable waters' is to be equated with 'admiralty jurisdiction.' "[37] It should be pointed out that Judge Palmieri did not hold that the plaintiff was covered by the Longshoremen's Act by virtue of his employment, regardless of where the injury occurred. On the contrary, he based his finding that the plaintiff was covered by the Act on the grounds that the injury occurred "upon navigable waters" as that phrase was impliedly expanded by the Admiralty Extension Act of 1948.[38] Thus, in reaching its conclusion that the Longshoremen's Act was in fact status oriented, the court in *Marine Stevedoring* in effect held that the statute had been unanimously interpreted incorrectly for the past sixty-one years.

The second approach taken by the majority in *Marine Stevedoring* was that the Admiralty Extension Act of 1948, in extending admiralty tort jurisdiction to include all injuries caused by a vessel notwithstanding that such injury is consummated on land, likewise impliedly expanded coverage of the Longshoremen's Act.[39] This argument was exhaustively explored in the lower court decision of *Johnson v. Traynor*[40] [hereinafter referred to as *Johnson*] and rejected. The thrust of the *Johnson* decision was that in order for such an argument to prevail, it is necessary to be able to point to an actual amendment to the Longshoremen's Act. An amendment is required because it was clear to the *Johnson* court that when the Longshoremen's Act was passed in 1927, Congress did not intend to extend coverage to injuries occurring on the land or an extension thereof. The *Johnson* court felt that the legislative history of both statutes, the express language of the Extension Act, and administrative interpretations clearly negate any impression that the Extension Act was capable of serving the purpose of

34 *Id.* at 731.
35 *See* Calbeck v. Travelers Ins. Co., 370 U.S. 114, 115-17, 119, 124-27 (1962).
36 233 F. Supp. 496 (S.D.N.Y., 1964), *aff'd*, 344 F.2d 640 (2d Cir. 1965).
37 *Id.* at 501.
38 *Id.* at 502.
39 Liability under the Admiralty Extension Act of 1948 is, of course, predicated on negligence, whereas the Longshoremen's Act is basically a compensation statute, under which recovery can be secured without regard to fault.
40 243 F. Supp. 184 (D. Md. 1965).

providing the necessary amendment.[41] The language of a 1958 House Report adds further support to the *Johnson* position:

> [The Longshoremen's Act] provides compensation for injuries suffered by longshoremen . . . when they are working . . . within the Federal maritime jurisdiction on the navigable waters of the United States, including drydocks. These employees are subject to the protection of state safety standards when performing work on docks and in other shore areas.[42]

The *Johnson* court concluded that to construe the Admiralty Extension Act as amending the Longshoremen's Act would be "the grossest type of judicial legislation."[43] Several courts confronted with this same argument have agreed with the *Johnson* court that the Extension Act could not be construed as an amendment.[44] The court in *Marine Stevedoring,* however, refused to adopt the *Johnson* view, but instead accepted the position taken by Judge Palmieri in *Michigan Mutual* that in light of *Calbeck,*

> the phrase "upon navigable waters" in this remedial legislation was not limited to the tort jurisdiction as it was thought to have existed in 1927, but must be construed to include the full range of the legislatively and judically expanded concept of maritime jurisdiction.[45]

Thus, the passage of the Admiralty Extension Act impliedly expanded the jurisdiction of the Longshoremen's Act.

In its third approach, the *Marine Stevedoring* court reasoned that by virtue of *D'Aleman v. Pan American Airways,*[46] "the jurisdictional scope of the phrase 'upon navigable waters' extends to injuries occurring 'above' such waters."[47] In *D'Aleman,* the alleged negligence had occurred on board a plane flying over the high seas. The Second Circuit held that the cause of action was one in admiralty and within the jurisdiction of the Federal Death on the High Seas Act. It reasoned:

> The purpose of the Act was to create a uniform cause of action where none existed before and which arose *beyond the territorial limits* of the United States *or any State thereof.* . . . The means of transportation into the area is of no importance.[48] (Emphasis added.)

It would seem, therefore, that the reasoning utilized for extending the phrase "on the high seas" to encompass a cause of action arising above the high seas for the purpose of the Federal Death on the High Seas Act has no application for extending "upon navigable waters" to include injuries occurring on a dock above

41 *Id.* at 188.
42 H.R. REP. No. 2287, 85th Cong., 2d Sess. 16 (1958).
43 243 F. Supp. at 192.
44 *E.g.,* Houser v. O'Leary, 383 F.2d 730 (9th Cir. 1967); Atlantic Stevedoring Co. v. O'Keefe, 220 F. Supp. 881 (S.D. Ga. 1963), *rev'd on other grounds,* 354 F.2d 48 (5th Cir. 1965); Revel v. American Export Lines, Inc., 162 F. Supp. 279 (E.D. Va. 1958); *aff'd,* 266 F.2d 82 (4th Cir. 1959).
45 398 F.2d at 906.
46 259 F.2d 493 (2d Cir. 1958).
47 Marine Stevedoring Corp. v. Oosting, 398 F.2d 900, 908 (4th Cir. 1968).
48 259 F.2d at 495.

navigable waters for the purpose of the Longshoremen's Act. In the latter situation the cause of action is presently within the jurisdiction of the state courts. Furthermore, as Chief Judge Haynsworth points out in his dissenting opinion, such a view taken by the majority "flies in the face" of the well-settled doctrine that a dock is an extension of the land.[49] Also, the majority's position in *Marine Stevedoring* is completely opposite to that taken by the same court nine years earlier in *American Export Lines Incorporated v. Revel.*[50] In that case Judge Sobeloff, writing for the majority, stated:

> Since Revel was injured while standing on the dock, (an extension of the land) his remedies are restricted to those afforded by the local law. . . . This is true even though Congress has embraced such cases within the maritime jurisdiction of the United States. Extension of Admiralty Act, 46 U. S. C. A. § 740.[51]

This position was reiterated by the same court in a 1965 case involving admiralty tort jurisdiction, in which *Revel* was cited with approval.[52] In the present case, the majority dismissed *Revel* by stating in a footnote that it was of the view that *Revel* had been overruled by *Calbeck.*[53]

The court's assertions that the Longshoremen's Act is status and not situs oriented, and that an injury sustained on a dock or pier occurs "upon navigable waters," seem to be wholly unsubstantiated by sound judicial precedent. In the sixty-one years that the Longshoremen's Act has been in effect, every court which has considered these two arguments has rejected them.[54] On the other hand, the position that the jurisdiction of the Longshoremen's Act was extended by the Admiralty Extension Act has found acceptance in a few other courts.[55] However, the majority of the courts faced with this argument have also rejected it.[56]

One author, in commenting on the current judicial trend toward the landward extension of the coverage of the Longshoremen's Act, has offered two possible explanations for such expansion.[57] These reasons may have been the prime movers in the Fourth Circuit's decision in *Marine Stevedoring.* They are:

> First, the courts may have simply recognized that a navigable-waters jurisdictional requirement in a workmen's compensation law ostensibly designed to afford relief to employees whose duties require them to divide their time between activities on land and on water is both illogical and impractical. . . . Second, and probably more important, the courts are

49 Marine Stevedoring Corp. v. Oosting, 398 F.2d 900, 912-13 (4th Cir. 1968) (dissenting opinion).
50 266 F.2d 82 (4th Cir. 1959).
51 *Id.* at 84.
52 Hastings v. Mann, 340 F.2d 910, 91 (4th Cir.), *cert. denied,* 380 U.S. 963 (1965).
53 Marine Stevedoring Corp. v. Oosting, 398 F.2d 900, 906n.11 (4th Cir. 1968).
54 As to rejection of status argument *see, e.g.,* Travelers Ins. Co. v. Shue, 382 F.2d 344, 346 (1967); as to rejection of the argument that an injury sustained on a dock extending over navigable waters occurs "upon navigable waters," *see generally,* Johnson v. Traynor, 243 F. Supp. 184, 187-88 (D. Md. 1965).
55 *See, e.g.,* Interlake S.S. Co. v. Nielsen, 338 F.2d 879 (6th Cir. 1964); Michigan Mutual Liability Co. v. Arrien, 233 F. Supp. 496 (S.D.N.Y. 1964), *aff'd on other grounds,* 344 F.2d 640 (2d Cir. 1965).
56 These cases are collected at Comment, 18 HASTINGS L.J. 891, 923 (1967).
57 Comment, 64 Mich. L. Rev. 1553, 1563 (1966).

> doubtless aware that Longshoremen's Act compensation awards can be more generous than the recoveries available under state legislation for comparable injuries.[58]

While the ends ultimately attained by the *Marine Stevedoring* decision are more desirable from a humanitarian viewpoint, the means utilized still amount to "the grossest type of judicial legislation." Judging from the firm positions taken by the various circuits on the issue of extending coverage of the Longshoremen's Act to injuries on a dock, it seems obvious that the courts will remain divided on this point. The Supreme Court has not ruled on this precise issue in recent years. However, judicial legislation or not, in light of its recent trend to interpret away provisions of the Act to provide a broader federal coverage to longshoremen,[59] the Supreme Court may well accept one of the three approaches offered in the *Marine Stevedoring* opinion. The avenue of least resistance, in terms of judicial precedent, would be acceptance of the position that the Admiralty Extension Act expanded the jurisdictional coverage of the Longshoremen's Act.

Richard F. Battagline

58 *Id.*
59 *See, e.g.,* Reed v. The Yaka, 373 U.S. 410 (1963); Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962).