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Recent Cases

CIVIL PROCEDURE—CLASS ACTIONS— CLOSING THE DOORS TO THE FEDERAL COURTS

*Zahn v. International Paper Co.*¹

The action was commenced by four named owners of property on Lake Champlain on behalf of themselves and some 200 other similarly situated riparian landowners and lessees. International Paper Company (hereinafter International) operated a pulp and paper manufacturing plant (now closed) in the Village of Ticonderoga, New York. Appellants' complaint alleged that International had discharged huge quantities of inadequately treated waste into Ticonderoga Creek. Purportedly, the creek carried the waste into Lake Champlain, where it formed a gigantic blanket of sludge on the bottom. Appellants' contended that masses of sludge periodically broke away and washed up onto the adjacent property, thus greatly diminishing the value and utility of the land. The class prayed for \$30,000,000 compensatory and \$10,000,000 punitive damages. Since the landowners were residents of Vermont and International was a New York corporation, the class sought to invoke federal jurisdiction on the basis of diversity of citizenship.²

The district court determined that all of the named representatives satisfied the jurisdictional amount requirement.³ However, the court held "with great reluctance"⁴ that this alone was insufficient to confer federal jurisdiction over the class action. Rather, it was additionally necessary that each unnamed member of the class independently satisfy the requirement of jurisdictional amount. Upon a determination that it was "not credible that every such owner [had] suffered pollution damage in excess of \$10,000"⁵ and that it could not ascertain which class members did have sufficient claims, the district court refused to permit the suit to proceed as a class action. The district court decision provoked vigorous dissents at two levels of appeal,⁶ but was nonetheless affirmed by the Supreme Court in a 6-3 decision.⁷

The precise issue that the Supreme Court decided in favor of respondent was that section 1332 of Title 28 of the United States Code required that each and every named and unnamed member of a rule 23 (b) (3)

1. — U.S. —, 94 S. Ct. 505 (1973).

2. Judicial Code and Judiciary Act, 28 U.S.C. § 1332 (1970) provides in part that:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

3. *Zahn v. Int'l Paper Co.*, 53 F.R.D. 430, 431 (D. Vt. 1971).

4. *Id.* at 433.

5. *Id.* at 431.

6. *Zahn v. Int'l Paper Co.*, 469 F.2d 1033, 1036 (2d Cir. 1972) (Timbers, J., dissenting); *Zahn v. Int'l Paper Co.*, — U.S. —, —, 94 S. Ct. 505, 512 (1973) (Brennan, J., dissenting).

7. — U.S. —, 94 S. Ct. 505 (1973).

class⁸ must meet the \$10,000 requirement to sustain an allegation of diversity jurisdiction. The Court reached this decision by relying on traditional notions that section 1332(a)⁹ requires that each litigant in a particular lawsuit have a \$10,000 claim, except in limited cases where several litigants may aggregate claims to achieve the jurisdictional amount if the claims represent an attempt to ". . . enforce a single title or right, in which they have a common and undivided interest . . ."¹⁰ which is greater than \$10,000.

The dissent found the logic of the majority to be unconvincing and conducive of unfortunate results.¹¹ The dissenters would have applied the concept of ancillary jurisdiction to confer federal jurisdiction over the unnamed class members.

The purpose of this casenote is to examine the application of both the "matter in controversy" phrase and the ancillary jurisdiction concept to class actions.

Historically, the Supreme Court's interpretation of the "matter in controversy" phrase has been unwavering. When plaintiffs with separate and distinct demands join in a single suit based on diversity jurisdiction, each must independently satisfy the requisite jurisdictional amount.¹² The majority in *Zahn* had no trouble finding numerous lower court decisions advancing the proposition that all members of a common-question or "spurious" class must satisfy jurisdictional requirements.¹³ These decisions, however, were rendered under the old version of federal rule 23.¹⁴ Under the rule as it stood prior to amendment in 1966, a common-question or "spurious" class member was bound by the judgment only if he took affirmative action to request inclusion.¹⁵ New federal rule 23 adopts the opposite position. Under the present rule all members of such a class are bound by the judgment, whether favorable or unfavorable, unless they take affirmative action to *exclude* themselves from the class.¹⁶ Realistically, the "matter

8. FED. R. CIV. P. 23 (b) (3). See rule quoted in note 46 *infra*.

9. 28 U.S.C. § 1332 (1970).

10. *Troy Bank v. G. A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911).

11. — U.S. at —, 94 S. Ct. at 514 (Brennan, J., dissenting).

12. *Scott v. Frazier*, 253 U.S. 243 (1920); *Pinel v. Pinel*, 240 U.S. 594 (1916); *Troy Bank v. G. A. Whitehead & Co.*, 222 U.S. 39 (1911); *Walter v. Northeastern R.R.*, 147 U.S. 370 (1893); *Bernards Township v. Stebbins*, 109 U.S. 341 (1883); *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143 (1832).

13. — U.S. at —, 94 S. Ct. at 510. See, e.g., *Alfonso v. Hillsborough County Aviation Authority*, 308 F.2d 724 (5th Cir. 1962); *Matlaw Corp. v. War Damage Corp.*, 164 F.2d 281 (7th Cir. 1947); *Stevenson v. Bluefield*, 39 F. Supp. 462 (S.D. W. Va. 1941).

14. FED. R. CIV. P. 23 (1938). Former rule 23 provided for three types of class suits: "true", "hybrid", and "spurious." The distinctions were based on jural relations; i.e., suits fit a particular class based on the character of the right to be enforced. A "true" class suit was permitted if the right was "joint" or "common." Where the right to be enforced was several, but the object of the suit was adjudication of claims which might affect specific property involved in the suit, the action was called "hybrid". A "spurious" action was a suit to enforce a several right where there existed a common question of law or fact and a common type of relief was sought. See *Pennsylvania Co. for Insurances on Lives & Granting Annuities v. Deckert*, 123 F.2d 979, 983 (3d Cir. 1941), for a further explanation of the difference between hybrid and spurious class actions.

15. FED. R. CIV. P. 23 (a) (1) (1938).

16. FED. R. CIV. P. 23 (c) (2) (B). See rule quoted note 46 *infra*.

in controversy" should now be that amount sought on behalf of the entire class.¹⁷

Zahn placed extensive reliance on the rationale of the Court's post-amendment decision in *Snyder v. Harris*.¹⁸ In *Snyder* the Court for the first time¹⁹ applied an interpretation of "matter in controversy" to a diversity jurisdiction class action. In *Snyder* none of the members of the class, named or unnamed, had a claim of sufficient size to satisfy the jurisdictional amount requirement. The Court held that as to aggregation of claims for jurisdictional amount purposes, the new class action provisions were the same as the old. Thus, the claims of individual class members could not be aggregated for the purpose of exceeding the \$10,000 jurisdictional requirement.²⁰

In both *Snyder*²¹ and *Zahn*²² the Court placed great emphasis on congressional reenactment of section 1332 without modification of the "matter in controversy" phrase, pointing out that Congress had reenacted the statute in the face of numerous court decisions strictly construing the phrase. The Court in *Zahn* felt that congressional silence was a result of congressional approval. The Court has not always found congressional silence so significant. In *Helvering v. Hallock*²³ the Court stated:

It would require very persuasive circumstances enveloping congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.²⁴

It is significant that there appears to have been no congressional consideration of the "matter in controversy" phrase when the jurisdictional minimum

17. See 394 U.S. 332, 353 (1969) (Fortas, J., dissenting); C. WRIGHT, FEDERAL COURTS, § 72, at 315 (2d ed. 1970); Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C. IND. & COM. L. REV. 601, 613-14 (1969).

18. 394 U.S. 332 (1969). The decision was occasioned by a division in the courts of appeals. *Gas Serv. Co. v. Coburn*, 389 F.2d 831 (10th Cir. 1968) held that aggregation of small claims was permissible for the purpose of exceeding the \$10,000 requirement. *Snyder v. Harris*, 390 F.2d 204 (8th Cir. 1968) took the opposite position.

19. The majority in both *Snyder* and *Zahn* cite *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), for the proposition that the Court long ago applied the "matter in controversy" interpretation to class actions. *Snyder* explicitly refers to *Clark* as a class action. 394 U.S. at 336-37. Such analysis appears to be incorrect. In reality, *Clark* was nothing more than a permissive joinder case. See *Zahn v. Int'l Paper Co.*, 469 F.2d 1033, 1039 (2d Cir. 1972) (Timbers, J., dissenting); *Zahn v. Int'l Paper Co.*, 53 F.R.D. 430, 431 (D. Vt. 1971). *Clark* is further distinguishable from *Zahn* on the basis that only one plaintiff met the jurisdictional amount requirement. All of the named plaintiffs in *Zahn* had claims of sufficient size.

20. 394 U.S. at 336. The *Snyder* decision has been the subject of much criticism. See, e.g., C. WRIGHT, *supra* note 17 at 315-16; *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 202-12 (1969); 21 SYRACUSE L. REV. 326 (1969); 37 TENN. L. REV. 103 (1969); 24 U. MIAMI L. REV. 173 (1969). But see 22 U. FLA. L. REV. 154 (1969).

21. 394 U.S. at 339.

22. — U.S. at —, 94 S. Ct. at 512.

23. 309 U.S. 106 (1940).

24. *Id.* at 119-20. For language of similar import, see *James v. United States*, 366 U.S. 213, 220 (1961); *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955); *Girouard v. United States*, 328 U.S. 61, 69-70 (1946).

was raised in 1958.²⁵ Indeed, the only recent suggestion of congressional purpose with respect to the jurisdictional amount is found in the legislative history of the 1958 amendment:

The recommendations of the Judicial Conference [of the United States] regarding the amount in controversy, which this committee approves, is based on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in *all substantial controversies* where other elements of federal jurisdiction are present.²⁶

The difficulty in reconciling this statement with the result in *Zahn* is apparent. The class in *Zahn* prayed for monetary relief in the amount of \$40,000,000. It can hardly be claimed that *Zahn* did not involve a "substantial" controversy.

Mr. Justice Brennan, writing for the dissent, demurred to the majority position on the ground that ancillary jurisdiction should have been utilized to confer adjudicatory power in the federal courts.²⁷ Under the ancillary jurisdiction concept, a district court, as an incident to disposition of any matter properly before it, possesses the power to decide other facets of the case of which it could not take cognizance were they independently presented.²⁸ For example, the Supreme Court has held ancillary jurisdiction applicable to the assertion of a compulsory counterclaim²⁹ and to a party intervening of right.³⁰ Following this lead, the lower courts have employed the concept to obtain jurisdiction over impleaded third party defendants,³¹ cross-claims,³² and interpleader actions.³³ Prior to *Zahn*, it appeared that ancillary jurisdiction was an expanding concept.³⁴

25. See *Hearing on H.R. 2516 and H.R. 4497 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 85th Cong., 1st Sess., ser. 5 (1957); H.R. REP. No. 1706, 85th Cong., 2d Sess. (1958); S. REP. No. 1830, 85th Cong., 2d Sess. (1958).

26. S. REP. No. 1830, *supra* note 25 (emphasis added).

27. — U.S. at —, 94 S. Ct. at 514 (Brennan, J., dissenting).

28. See generally Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27 (1963); H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 1074-81 (2d ed. 1973); C. WRIGHT, *supra* note 12, at 39.

29. *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348 (1961); *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926).

30. *Phelps v. Oaks*, 117 U.S. 236 (1886).

31. See, e.g., *Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709 (5th Cir. 1970); *Sheppard v. Atlantic States Gas Co.*, 167 F.2d 841 (3d Cir. 1948). See also 6 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1444 (1971).

32. See, e.g., *LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander*, 414 F.2d 143 (6th Cir. 1969); *R.M. Smythe & Co. v. Chase Nat'l Bank*, 291 F.2d 721 (2d Cir. 1961); *Childress v. Cook*, 245 F.2d 798 (5th Cir. 1957); *Coastal Air Lines, Inc. v. Dockery*, 180 F.2d 874 (8th Cir. 1950); *Barker v. Louisiana & Arkansas R.R.*, 57 F.R.D. 489 (D. La. 1972). See also 6 C. WRIGHT & A. MILLER, *supra* note 31, at § 1433.

33. See, e.g., *Walmac Co. v. Isaacs*, 220 F.2d 108 (1st Cir. 1955). See also 7 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1710 (1972).

34. For an enthusiastic endorsement of pendent jurisdiction, a particularized application of the ancillary jurisdiction concept, see *United Mine Workers v. Gibbs*, 383 U.S. 715, 724-25 (1966). See also *Zahn v. Int'l Paper Co.*, 469 F.2d 1033, 1039 (2d Cir. 1972) (Timbers, J., dissenting); 11 OKLA. L. REV. 326, 329 (1958).

Justice Brennan cited *Supreme Tribe of Ben-Hur v. Cauble*³⁵ in support of his position. In *Ben-Hur* the Court held that only the original named plaintiffs and defendants needed to satisfy the diversity requirement,³⁶ and that even intervention by nondiverse members of the class would not defeat diversity.³⁷ Thus, in *Ben-Hur* the jurisdictional determination was made solely on the basis of the named representatives of the class. Without reference to *Ben-Hur*, the majority in *Zahn* required that each class member independently satisfy jurisdictional prerequisites.

It is possible to distinguish *Zahn* from *Ben-Hur* on the theory that *Ben-Hur* involved a "true" class action enforcing a "joint" or "common" right of the entire class for injunctive relief,³⁸ while *Zahn* involved a "spurious" class action where the plaintiffs sought to enforce the "separate and distinct" rights of individuals for their separate money damages. Rule 23 (b) (2) injunctive relief class actions are given favorable treatment for purposes of prerequisites for maintenance³⁹ and jurisdictional amount. For instance, to satisfy the "matter in controversy" requirement a (b) (2) class need only show that the value of the right to be protected exceeds \$10,000.⁴⁰

It is arguable that such distinctions do not mean that (b) (2) and (b) (3) class actions should be treated differently for purposes of ancillary jurisdiction. Rule 23 (b) (3) common-question class actions are similar to suits to enforce a right of the entire class since only those opting out of the class are not bound by the judgment. Besides, the most important goal of ancillary jurisdiction is to maximize judicial economy by avoiding piecemeal litigation.⁴¹ This goal is hardly advanced by holding the concept applicable

35. 255 U.S. 356 (1921).

36. *Id.* at 366.

37. *Id.* at 366.

38. *Ben-Hur* was an action for injunctive relief and would have fallen in the category of a "true" class action under the 1938 version of Federal Rule 23. The comparable provision under the present rule is FED. R. Civ. P. 23 (b) (2) (1970). See rule quoted in note 46 *infra*.

Another possible distinction between the cases is that *Ben-Hur* dealt with the determination of diversity of citizenship while *Zahn* concerned the amount in controversy requirement. However, the Court in *Ben-Hur* based its decision on the practical impossibility of examining the citizenship of each and every class member to insure complete diversity, 255 U.S. at 366-67. The logic of *Ben-Hur* seems equally applicable to the jurisdictional amount requirement. The reasoning of *Ben-Hur* should not be rejected simply because the case involved diversity and not jurisdictional amount. It is significant that the majority in *Zahn* made no attempt to distinguish *Ben-Hur* on any basis.

39. See rule quoted in note 46 *infra*. Compare the requirements for the maintenance of a FED. R. Civ. P. 23 (b) (2) action with those of a FED. R. Civ. P. 23 (b) (3) common-question action.

40. See *Comprehensive Group Health Serv. Bd. of Directors v. Temple Univ.*, 363 F. Supp. 1069, 1094 (E.D. Pa. 1973); *Bass v. Rockefeller*, 331 F. Supp. 945, 952 (S.D. N.Y. 1971), *vacated as moot*, 464 F.2d 1300 (2d Cir. 1971); *Marquez v. Hardin*, 339 F. Supp. 1364, 1370 (N.D. Cal. 1969); *Biechele v. Norfolk & Western Ry.*, 309 F. Supp. 354 (N.D. Ohio 1969).

41. See *Fraser, Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27 (1963); *Jacobson v. Atlantic City Hosp.*, 392 F.2d 149, 153-54 (3d Cir. 1968); *Dunbar & Sullivan Dredging Co. v. J. R. Jurgensen Co.*, 44 F.R.D. 467, 473 (S.D. Ohio 1967), *aff'd*, 396 F.2d 152 (6th Cir. 1968); *Lucas v. Seagrave Corp.*, 277 F. Supp. 338, 348 (D. Minn. 1967).

to class actions seeking one particular remedy while denying it to class actions praying for other types of relief. Indeed, the Court itself has rejected this distinction. In *Snyder* both the majority⁴² and dissent⁴³ speak of *Ben-Hur* as controlling in class actions without regard to the type of relief sought. Likewise, the lower courts have regarded *Ben-Hur* as applicable to class actions seeking damages,⁴⁴ as well as to those praying for injunctive relief.⁴⁵ The majority in *Zahn* ignored the ancillary jurisdiction question and *Ben-Hur* entirely.

Assuming that *Zahn* and *Ben-Hur* are in fact distinguishable and that *Zahn* was correctly decided, what will be the next step? Does *Zahn* portend a holding that complete diversity of citizenship is required in a (b)(3) common-question class action? Although such a decision would be unfortunate, after *Zahn* it appears possible.

To the extent *Zahn* and *Ben-Hur* represent differing philosophies concerning jurisdictional requirements of federal class actions, the *Ben-Hur* approach is more practical. This is especially true under new federal rule 23.⁴⁶ The prerequisites for maintaining a (b)(3) class action, especially

42. 394 U.S. at 340.

43. 394 U.S. at 355.

44. See *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D. Pa. 1970); *Neville v. Delta Ins. Co.*, 45 F.R.D. 345 (D. Minn. 1968).

45. *Day-Brite Lighting Div. v. Int'l Br'd. of Elec. Workers*, 303 F. Supp. 1086 (N.D. Miss. 1969); *Collins v. Bolton*, 287 F. Supp. 393 (N.D. Ill. 1968).

46. FED. R. CIV. P. 23 provides in pertinent part:

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivisions (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

the provision that "[t]he questions of law or fact common to the members of the class [must] predominate over questions affecting only individual members",⁴⁷ amply guarantee that ancillary jurisdiction would not be abused. Under the elaborate guidelines and discretion built into new rule 23, the district court should have the power to exercise ancillary jurisdiction over the unnamed class members.

Although there are important exceptions,⁴⁸ after *Zahn* it appears that class actions for damages in the federal courts will be limited to the "extraordinary situations"⁴⁹ in which each member of the class has a claim exceeding \$10,000.⁵⁰ As a result, the alternatives open to prospective plaintiffs are limited. The only available options are individual litigation or state court class actions.

The disappearance of the federal forum resulting from *Zahn* will undoubtedly lead to an increased number of class actions being filed in the state courts. Unfortunately, many states retain very restrictive attitudes with respect to class actions.⁵¹ The situation in New York, where International's plant was located, has recently been described as "darkness largely

(D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who did not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

47. FED. R. CIV. P. 23 (b) (3).

48. The most notable being § 4 of the Clayton Act, 15 U.S.C. § 15 (1970). Another important exception is the abridgement of civil rights, Judicial Code and Judiciary Act, 28 U.S.C. § 1343 (1970). See also Securities Act of 1933, §§ 11, 12, 15 U.S.C. §§ 77k, 77l (1970); Securities Act of 1933, § 12, 15 U.S.C. § 77a (1970); Securities Exchange Act of 1934, § 9 (e), 15 U.S.C. § 78i (e) (1970); Securities Act of 1934, § 10 (b), 15 U.S.C. § 78j (b) (1970) in conjunction with SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1973); Securities Exchange Act of 1934, § 18, 15 U.S.C. § 78r (1970). Jurisdiction over securities cases arising under these provisions is governed by the Securities Act of 1933, § 22, 15 U.S.C. § 77k (1970), and the Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1970); neither mentioning a jurisdictional minimum.

49. C. WRIGHT, *supra* note 7, § 72, at 316.

50. Cf. *Berman v. Narragansett Racing Ass'n*, 414 F.2d 311 (1st Cir. 1969), cert. denied, 396 U.S. 1037 (1970), where a class action on behalf of race horse owners was held to be maintainable under FED. R. CIV. P. 23 (b) (1) (B), since their interest in having the defendants create a fund for their benefit was thought to be "common and undivided", although no class member had a claim exceeding \$10,000.

51. See *Zahn v. Int'l Paper Co.*, 469 F.2d 1033, 1040 (2d Cir. 1972) (Timbers, J., dissenting); Travers & Landers, *The Consumer Class Action*, 18 KAN. L. REV. 811, 819 (1970).

unobscured".⁵² At least one commentator has concluded that New York does not even allow class actions seeking damages to be maintained.⁵³

The situation in Missouri appears to be somewhat brighter. Since Missouri has adopted the new federal class action rule, a class action such as that in *Zahn* is possible. Even under Missouri's new rule, however, the problems awaiting a class action may be formidable.⁵⁴

The alternative to a state court class action is individual litigation in state or federal court. For many plaintiffs this is no alternative at all. In *Zahn* the expense of expert scientific testimony alone would probably prove prohibitive to the individual claimant.⁵⁵ In a jurisdiction retaining a restrictive attitude toward class actions, the net result will be a valid claim with costs exceeding its value. Such a result "will do no judicial system credit."⁵⁶

Absent congressional action in redefining the "matter in controversy" phrase, the role of the federal courts in future class action litigation will be narrow.⁵⁷ It is therefore urged that states adopt a class action rule similar to present federal rule 23.⁵⁸ It is hoped that state courts will give such a rule a practical reading. After *Zahn*, federal rule 23 is living proof that a liberal rule enveloped in restrictive doctrine is of little value. One cannot help but believe that the designers of federal rule 23 intended it to be something more than a mere model for the states.

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52. McLaughlin, Supplementary Practice Commentary, N.Y. CIV. PROC. LAW § 1005 (McKinney Supp. 1973).

53. Travers & Landers, *supra* note 51, at 818-19. See *Hall v. Coburn Corp.*, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970). Since Vermont did not adopt the federal class action rule until July, 1971, it would appear that the federal court was the only forum available to the class in *Zahn*.

54. For an in depth look at Missouri's new rule, see Fisch, *Notice, Costs, and the Effect of Judgment in Missouri's New Common-Question Class Action*, 38 Mo. L. Rev. 173 (1973).

55. — U.S. at —, 94 S. Ct. at 515 (Brennan, J., dissenting).

56. — U.S. at —, 94 S. Ct. at 515 (Brennan, J., dissenting).

57. See note 48 and accompanying text *supra*.

58. Thus far the following jurisdictions have adopted what is substantially the 1966 version of FED. R. CIV. P. 23: Arizona, R. CIV. P. 23; Colorado R. CIV. P. 23; District of Columbia, R. CIV. P. 23; Indiana, R. OF TRIAL PROC. 23; Kansas, R. CIV. P. § 60-223 (Supp. 1973); Kentucky, R. CIV. P. 23; Minnesota, R. CIV. P. 23; Missouri, Mo. R. CIV. P. 52.08; Montana, R. CIV. P. 23; New Jersey, CIV. PROC. R. 4:32; North Dakota, R. CIV. P. 23; Ohio, R. CIV. P. 23; South Dakota, SOUTH DAKOTA COMP. LAWS 15-6-23 (Supp. 1973); Tennessee R. CIV. P. 23 (Supp. 1973); Utah, R. CIV. P. 23 (Supp. 1973); Vermont, R. CIV. P. 23; Washington, RULES OF PLEADING, PRACTICE AND PROCEDURE 23; Wyoming, R. CIV. P. 23. Effective July, 1974, Massachusetts adopted a modified version of the federal rule. The Massachusetts rule was influenced by Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 655-57 (1971).

ESTATE TAX—TRANSFERS IN CONTEMPLATION
OF DEATH—FLIGHT INSURANCE

*Berman v. United States*¹

Joseph Berman, a 67 year old lawyer in good health, purchased a flight insurance policy before boarding a commercial airliner. Berman assigned ownership of the policy to his son, who was also the beneficiary. Berman died when his flight crashed. Decedent's estate paid the tax on the proceeds and sued for a refund. The district court found that the assignment was not a transfer in contemplation of death under section 2035 of the Internal Revenue Code and that the proceeds were thus not includable in the estate for tax purposes.² The Court of Appeals reversed on the ground that the lower court had confused expectation of death with contemplation of death.³

The Supreme Court has held that flight insurance is life insurance for estate tax purposes.⁴ Section 2042 of the Internal Revenue Code of 1954 provides that proceeds from insurance on the decedent's life are taxable to the gross estate if payable to the estate. In addition, where the decedent possessed any incidents of ownership in such policies at his death, proceeds payable to a named beneficiary are also includable in the decedent's estate.⁵ Section 2035(a) requires that the value of property transferred in

1. 487 F.2d 70 (5th Cir. 1973).

2. *Berman v. United States*, 367 F. Supp. 622 (S.D. Miss. 1973). The court relied on the following findings in its decision: (1) The decedent was in excellent health with no pressing problems at the time of the assignment; (2) The policy purchased was the smallest policy issued to the public; (3) The existence of the policy and its assignment had no causal connection with the decedent's death; (4) The policy was only a small part of decedent's estate; (5) Decedent had made the same flight in the past; (6) Decedent had planned certain activities (conducting religious services among other things) in succeeding months.

3. *Berman v. United States*, 487 F.2d 70 (5th Cir. 1973). "But the question is not whether he expected to die, but whether the assignment of the policy was motivated by the thought that he might die." *Id.* at 72.

4. *Commissioner v. Estate of Noel*, 380 U.S. 678 (1965). In response to the contention that flight insurance was not life insurance, the Court said that, since *Ackerman v. Commissioner*, 15 B.T.A. 635 (1929), "it has been the settled and consistent administrative practice to include insurance proceeds for accidental death under policies like these in the estates of decedents." *Id.* at 681. The Court stated that flight insurance was insurance taken out on the life of the decedent and found the donor's attempted assignment to his wife ineffective for estate tax purposes. *Id.* at 682-83.

5. Section 2042 of the Internal Revenue Code of 1954 provides:

The value of the gross estate shall include the value of all property—

(1) Receivable by the executor.—To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.

(2) Receivable by other beneficiaries.—To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For purposes of the preceding sentence, the term "incident of ownership" includes a reversionary interest (whether arising by the express terms of the policy or other instru-

contemplation of death be included in the donor's gross estate for estate tax purposes.⁶ Includability under section 2035 is not affected by the fact that the decedent absolutely parted with his enjoyment of and title to the property.⁷ Thus, the value of a flight insurance policy may be taxed under section 2042⁸ or section 2035,⁹ depending on whether the policy owner transferred the incidents of ownership.

United States v. Wells,¹⁰ the leading case on transfers in contemplation of death, stated that the purpose of the contemplation of death provision was to prevent evasion of the federal estate tax by taxing transfers which were substitutes for testamentary dispositions. A transfer is in contemplation of death if it is prompted by the thought of death.¹¹ Treasury Regulation 20.2035-1 states that a transfer is prompted by the thought of death if: (1) made with the purpose of avoiding death taxes, (2) made as a substitute for a testamentary disposition of the property, or (3) made for any other motive associated with death.¹² *Wells* required that the thought of death be "controlling" and the "dominant" motive prompting the transfer.¹³

Section 2035(b) of the Internal Revenue Code provides that transfers made within three years of the donor's death are deemed to be in contemplation of death unless shown to the contrary.¹⁴ The language of section

ment or by operation of law) only if the value of such reversionary interest exceeded 5 percent of the value of the policy immediately before the death of the decedent. As used in this paragraph, the term "reversionary interest" includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him

Int. Rev. Code of 1954, § 2042.

6. Section 2035(a) provides:

(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.

Int. Rev. Code of 1954, § 2035(a).

7. Treas. Reg. § 20.2035-1(a) (1958). Most of the transfers which are included in the gross estate under §§ 2034-44 of the Internal Revenue Code are taxed on the theory that the donor did not completely transfer the property during his life. See C. LOWNDES & R. KRAMER, *FEDERAL ESTATE AND GIFT TAXES* 32 (2d ed. 1962).

8. *Commissioner v. Estate of Noel*, 380 U.S. 678 (1965). See also 1 A. CASNER, *ESTATE PLANNING* 325 n. 76 (Supp. 1973).

9. *Berman v. United States*, 487 F.2d 70 (5th Cir. 1973). Since the decedent's assignment of the policy transferred all incidents of ownership, the proceeds were no longer includable under § 2042, but were includable under § 2035 as a transfer in contemplation of death. The Supreme Court, in dictum, has recognized that flight insurance may be effectively assigned for the purposes of § 2042. *Commissioner v. Estate of Noel*, 380 U.S. 678, 684 (1965).

10. 283 U.S. 102, 116-17 (1931).

11. *Id.* at 118.

12. Treas. Reg. § 20.2035-1 (c) (1958).

13. 283 U.S. at 118-19. *Wells* also stated that, although the statute referred to contemplation of death rather than contemplation of imminent death, the general expectation of death which all people entertain is not sufficient. "It must be a particular concern, giving rise to a definite motive." *Id.* at 115.

14. Section 2035(b) of the Internal Revenue Code provides:

(b) Application of General Rule—If the decedent within a period

2035(b) indicates that this presumption is rebuttable. A conclusive presumption might be unconstitutional. In *Heiner v. Donnan*,¹⁵ a federal tax statute creating a conclusive presumption that all transfers within two years of the donor's death were made in contemplation of death was held to be so arbitrary and unreasonable that it violated Fifth Amendment due process.¹⁶ Despite *Heiner v. Donnan*, however, the Internal Revenue Service takes a position regarding flight insurance that, where an air travel policy is assigned to a relative, the transfer is conclusively presumed to be in contemplation of death.¹⁷ The rationale is that, since the policy only has value in the event of a disaster which would likely result in death, it is inconceivable that a life motive could exist for its transfer.¹⁸ The court in *Berman* did not adopt that position, however, reversing instead on the ground that there was insufficient evidence to support a finding that Berman did not make the transfer in contemplation of death.¹⁹ The court held that to overcome the section 2035(b) presumption, the estate must show that the decedent had specific life motives in transferring the property, not simply that the donor expected to live.²⁰

Whether a particular transfer was in contemplation of death depends on the intent of the donor and is determined by the factual pattern surrounding the transfer.²¹ Because life insurance has little value during life but substantial value on death, its main economic significance is related to the death of the insured. Courts, nevertheless, recognize that the transfer of life insurance is not inherently testamentary.²² A variety of factors are considered in determining whether a transfer was made in contemplation of

of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate 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.

Int. Rev. Code of 1954, § 2035(b).

15. 285 U.S. 312 (1932).

16. *Id.* at 325.

17. A.B.A. Section of Taxation Bull., Jan. 1962 at 69.

18. *Berman v. United States*, 487 F.2d 70, 73 (5th Cir. 1973). *See also* Kahn v. United States, 349 F. Supp. 806, 811 (N.D. Ga. 1972).

19. 487 F.2d 70, 73 (5th Cir. 1973).

20. *Id.* at 72. Discussing the estate's burden under § 2035 (b), the *Berman* court said that "this is seldom a light burden, and where the property transferred is so inherently death-oriented as life insurance, it is even heavier." *Id.* at 72.

21. *United States v. Wells*, 283 U.S. at 119; C. LOWNDES & R. KRAMER, *supra* note 7 at 74. The court will ascertain the decedent's motivation by balancing the reduction in estate tax against the plausibility of the lifetime motive. Quiggle, *Recent Developments In Contemplation of Death*, N.Y.U. 25th Inst. on Fed. Tax. 1047, 1063 (1967).

22. *Bintliff v. United States*, 462 F.2d 403, 406 (5th Cir. 1972); *Hull's Estate v. Commissioner*, 325 F.2d 367, 368 (3rd Cir. 1963); *Kahn v. United States*, 349 F. Supp. 806, 811 (N.D. Ga. 1972); *Landorf v. United States*, 408 F.2d 461, 472 (Ct. Cl. 1969).

death. Among the most important of these are: (1) the age and physical condition of the donor at the date of transfer; (2) the interval between the transfer and donor's death; (3) the nature of the property transferred; (4) the amount of property transferred in proportion to the amount retained by the donor; and (5) the motive of the transferor.²³ Courts have excluded the proceeds of life insurance from the gross estate where the estate proved that the transfer was made to secure the financial position or emotional state of the donee,²⁴ to put the policies beyond the reach of creditors,²⁵ or to continue an established pattern of gift giving.²⁶ As *Berman* illustrates, however, the special nature of flight insurance makes the section 2035(b) presumption difficult to rebut.

Because flight insurance policies have no cash surrender or loan value, the estate's argument in a flight insurance case, that there was a life motive behind the policy assignment of giving the donee a valuable present property interest, is weaker than in life insurance cases.²⁷ In *Berman*, the estate argued that the purpose of the assignment was to give the decedent's son full control of disability benefits provided in the flight insurance policy.²⁸ Since the disability benefits would be paid only if the insured survived, the transfer of these benefits could not have been in the contemplation of death. The court held, however, that there was no evidence that the decedent differentiated between possible death benefits and possible disability benefits, and thus the estate's contention that the transfer was motivated by a sense of moral obligation to the son's business venture was insufficient to

23. *LOWNDES & KRAMER, supra* note 7, at 71. See also, *Estate of Oliver Johnson*, 10 T.C. 680 (1948), which mentions other factors such as the relationship of the donee to the decedent, the nature and disposition of the decedent, and the existence of a long established gift making policy by the decedent. *Id.* at 688.

24. *Hull's Estate v. Commissioner*, 325 F.2d 367 (3rd Cir. 1963); *Cronin's Estate v. Commissioner*, 164 F.2d 561 (6th Cir. 1947). See also, *Estate of Louis Baskind*, 10 P-H B.T.A. Mem. 546 (1941). In *Baskind*, the court held that the decedent's willingness to surrender the insurance policies for cash (an amount less than the death benefits) was persuasive that the transfer was motivated by purposes associated with life.

25. *Estate of Verne C. Hunt*, 14 T.C. 1182 (1950).

26. *Landorf v. United States*, 408 F.2d 461 (Ct. Cl. 1969). Other motives which have been suggested as indicia of thoughts of life are business motives, saving income or property taxes, solving family problems, fulfilling a moral obligation, and relief from the burdens of managing the policies. See *Quiggle, supra* note 20, at 1052-56. *United States v. Wells*, 283 U.S. 102, 119 (1931), stated that the desire "to recognize special needs or exigencies or to discharge moral obligations" for one's children is recognized as a motive inconsistent with the contemplation of death.

27. This argument, as applied to life insurance, was successful in *Hull's Estate v. Commissioner*, 325 F.2d 367 (3rd Cir. 1963), where the court found that the purpose of the transfers was to improve the mental and emotional state of the decedent's daughter (who had just been divorced). The decedent transferred a total of fifteen policies to his three daughters in order to treat them equally. The court held that the transfers were not made in contemplation of death, even though the decedent continued to pay the premiums after the transfers. *Id.* at 369-70. The transfer of flight insurance does not create such a present property interest.

28. *Berman v. United States*, 487 F.2d 70, 73 (5th Cir. 1973).

show a dominant life motive.²⁹ Although the estate's argument in *Berman* failed, the possibility that flight insurance policy benefits may be paid during the life of the insured could, under some circumstances, be a factor in rebutting the section 2035(b) presumption.³⁰

An estate's best chance of rebutting the presumption in the case of a decedent's assignment of flight insurance is to prove an established pattern or plan of gift giving.³¹ In *Landorf v. United States*,³² the decedent transferred a group life insurance policy to his wife, who was also the beneficiary, within three years of his death. The transferred policy was similar to a flight insurance policy in that it had no cash surrender or loan value. The Court of Claims excluded the proceeds from the gross estate, concluding that the estate established a pattern of gift giving by showing that the decedent had made gifts and assigned other life insurance policies to his wife and children in the past.³³ The estate in *Berman* had no similar pattern of gift giving to assist it in meeting its burden of persuasion. Evidence of such a plan might dictate a different result.

The case of *Kahn v. United States*³⁴ illustrates that a decedent can transfer an accidental death insurance policy with life motives. In *Kahn*, a young husband and his wife applied for group accidental death insurance having no cash surrender or loan value, which was paid for by the husband's employer. The insurance agent, a family friend, suggested that each spouse place ownership of the policy in the other, and they did so without question. Both were killed in a hotel fire soon after. The government, contending that the transfers were in contemplation of death, included the insurance policy proceeds in the estate of the insured. The estates sued for refunds. The court noted that: (1) the decedents were in good health; (2) the insurance policy was a result of the employer's initiative; (3) neither of the decedents had engaged in any significant estate planning and that the agent's motives could not be imputed to them; and (4) the policy also covered dismemberment and disability, and therefore could result in payments during the life of the insured.³⁵ This circumstantial evidence led the court to conclude that the policies were transferred simply because the decedents trusted and relied upon the agent's advice.³⁶ The court found that neither the thought of death nor the avoidance of estate taxes were the

29. *Id.* at 73.

30. *See, e.g., Kahn v. United States*, 349 F. Supp. 806 (N.D. Ga. 1972).

31. A transfer is not considered in contemplation of death if the decedent's motive for the transfer was to fulfill a plan to distribute his property during his lifetime. *Bel v. United States*, 452 F.2d 683, 688 (5th Cir. 1971).

32. 408 F.2d 461 (Ct. Cl. 1969).

33. *Id.* at 473. The court recognized that the transfer of the life insurance policy involved some death-connected motivation, because insurance proceeds are payable only upon the insured's death. In the case of policies without cash surrender or loan values, it admitted that the estate's burden of showing dominant life motives was even more difficult. The court concluded, however, that this presumption was rebutted by showing a history of gift giving.

34. 349 F. Supp. 806 (N.D. Ga. 1972).

35. *Id.* at 811.

36. *Id.* at 812.

dominant, controlling, or impelling motives behind the transfer and held that the estate had proven life motives.³⁷ The *Kahn* court questioned the government's position that people transfer property only as a result of concrete motivation which is dominated by thoughts of either life or death.³⁸ The court's approach suggests counterarguments to the government's contention that a transfer of flight insurance must be in contemplation of death.

Landorf and *Kahn* may be favorable precedents for a taxpayer trying to exclude flight insurance proceeds from the gross estate. The problem is showing that flight insurance should be treated like other accidental death or group life insurance (policies having no cash surrender or loan value).³⁹ Even if *Landorf* and *Kahn* are applicable to flight insurance, the estate will nevertheless have a heavy burden of persuasion to prove that a life motive was dominant in the assignment of a flight insurance policy. The taxpayer's position is strengthened, however, by the holding in *Heiner v. Donnan* that a conclusive presumption that a transfer is in contemplation of death violates the Fifth Amendment. A history of transfers of ownership of other policies and property by the decedent would create a strong taxpayer case for the jury to consider. Under *Commissioner v. Duberstein*,⁴⁰ where the jury has tried the issues upon correct instructions, appellate review is restricted to inquiring whether reasonable men could not reach the jury's determination of the transferor's intent. Thus, if an estate could show that the decedent's transfer of a flight insurance policy was motivated by the desire to carry out a previously established estate plan, it would appear to have some chance of rebutting the heavy presumption against it.⁴¹

CONCLUSION

The assignment of flight insurance creates a strong presumption that the transfer was in contemplation of death. Although *Berman* does not adopt

37. "Since there were no death motives involved in the transfers, it follows that the real motives for the transfers [decedents' trust in the insurance agent and perfunctory acceptance of his advice] were life motives." *Id.* at 812.

38. *Kahn v. United States*, 349 F. Supp. 806, 812 (N.D. Ga. 1972).

39. See Berall, *Use of Life Insurance in Estate Planning—Recent Developments*, N.Y.U. 31st Inst. on Fed. Tax. 1053, 1103 (1973):

In light of the *Kahn* holding that life motives could exist for the purchase or transfer of an accidental death or dismemberment policy, even airport accidental death insurance (which ordinarily includes dismemberment coverage) might be excludable from the insured's gross estate, where life motives could be proven.

40. 363 U.S. 278, 290-91 (1960). "Where the trial has been by a judge without a jury, the judge's findings must stand unless clearly erroneous." *Id.* at 291.

41. See Berall, *supra* note 34, at 1091:

[S]ince the amount of premium is relatively small, if the beneficiary could be the applicant, use his own funds (not any received indirectly from the insured in the form of a gift or a household allowance), and have proof that his funds were used to pay the premium, the policy should be excludable from the insured's estate.

The difficulties of having the beneficiary as the applicant and proving that he paid for the policy with his own funds makes the airport purchase method of obtaining insurance against accidental death not very practical, at least until the vendors of such insurance change their sales procedures.

the government position that this is an irrebuttable presumption, it does indicate that the estate will have to show specific life motives, such as the fulfillment of an estate plan, to prevail. Under *Heiner v. Donnan*, there is some question whether any decision adopting the extreme government position would stand if appealed to the Supreme Court. The fact that the policy includes disability benefits payable during the insured's life may not be sufficient, by itself, to rebut the presumption.

PIETER BROWER

EVIDENCE—THE UNAVAILABILITY REQUIREMENT FOR
DECLARATIONS AGAINST INTEREST—
SHOULD IT BE RETAINED?

*Orr. v. State Farm Mutual Automobile Insurance Co.*¹

The plaintiffs, Homer Orr and his daughter Sharon, were injured and Homer's wife was killed in an automobile collision with Charles Young. The question arose whether the insurance policy of Charles' father covered the automobile Charles was driving, which belonged to Charles' grandmother. The policy issued to Charles' father covered non-owned automobiles, but excepted non-owned automobiles "furnished or available for the frequent or regular use of the named insured, his spouse, or any relation of either residing in the same household"²

On February 4, 1969, an adjuster for State Farm obtained from Charles a statement that his grandmother's car was available for his frequent use at all times. This statement was recorded on a dictaphone, transcribed, and shown to Charles. Shortly thereafter, State Farm notified Charles of its intention to disclaim any obligation under the insurance policy of Charles' father. Plaintiffs filed suit on December 19, 1969, and agreed with Charles to levy execution only against State Farm. On January 10, 1970, State Farm's attorneys questioned Charles concerning use of his grandmother's car and its availability to him. This conversation was recorded by a court reporter and transcribed. Charles stated that for nearly a year prior to the accident he had used the car from two to four times each week.

A few days before trial, State Farm took Charles' deposition, apparently expecting him to reaffirm his previous statements. Charles stated, however, that he could not remember how often he used the car and that he did not remember the questions and answers from his prior statement.³

The trial court admitted the prior statements of Charles as declarations against interest.⁴ On appeal, in support of the trial court's action, State Farm suggested that the Missouri Supreme Court should abandon the unavailability requirement for declaration against interest. The court noted that there

1. 494 S.W.2d 295 (Mo. En Banc 1973).

2. *Id.* at 296.

3. *Id.* at 297-98.

4. *Id.*

was considerable support for eliminating the unavailability requirement⁵ and exhibited a strong inclination towards following that trend.⁶ The court was able to side step a definitive ruling on the issue, however, by ruling that Charles was "unavailable" due to his loss of memory.⁷ The purpose of this note is to consider the wisdom of eliminating the unavailability requirement and to suggest alternative courses of action.⁸

In order to appreciate the unavailability requirement for declarations against interest, it is necessary to understand the rationale for the American rules of hearsay evidence. Hearsay is any out-of-court statement offered to prove the truth of its contents.⁹ The factors upon which the credibility of any out-of-court statement depend are perception (Did the declarant accurately observe the event?), memory (Did the declarant remember what he observed?), narration (What did the declarant mean by the words he used?), and sincerity (Is the declarant telling the truth?).¹⁰ Hearsay is generally inadmissible because the circumstances under which the statement is made do not adequately insure that these factors are present.

Exceptions to the hearsay rule developed because certain excepted out-of-court statements were believed to possess significant additional indicia of trustworthiness over normal hearsay and/or because the evidence represented by the excepted statement was otherwise not available.¹¹ If there is sufficient trustworthiness, the amount of other evidence available is unimportant. Where, however, an exception is framed which does not adequately guarantee its own reliability, then the exception will apply only when the declarant is unavailable.¹²

5. *Id.* at 298. Dean McCormick's treatise on evidence suggests:

The reasoning which admits the admissions of a party and spontaneous declarations . . . without regard to the unavailability of the party or the declarant — namely that the admission, or the spontaneous declaration, is just as credible as his present testimony would be — seems equally applicable to the declaration against interest.

C. McCORMICK, EVIDENCE § 280, at 678 (2d ed. 1972). McCormick's position is seconded by Professor Jones: "The requirement is not imposed with respect to admissions of parties or 'res gestae' statements, and the declaration against interest would seem to carry adequate qualities of trustworthiness, whether the declarant is or is not present." 2 B. JONES, EVIDENCE § 295, at 561 (5th ed. 1958). MODEL CODE OF EVIDENCE rule 509 (1) (1942) and UNIFORM RULES OF EVIDENCE 63(10) reject the unavailability requirement. Justice Traynor abolished the unavailability requirement for declarations against interest in California in *People v. Spriggs*, 60 Cal. 2d 868, 876, 389 P.2d 377, 382, 36 Cal. Rptr. 841, 846 (1964). Traynor's new rule was quickly modified by the legislature, however. See note 22 *infra*.

6. 494 S.W.2d at 298.

7. *Id.* at 299.

8. Orr dealt with two other questions: (1) Whether loss of memory is unavailability, and (2) whether a party's taking a deposition renders the witness available to him. These aspects of the case are beyond the scope of this note.

9. *Cottonseed Delinting Corp. v. Roberts Bros. Inc.*, 218 S.W.2d 592, 594 (1949); C. McCORMICK, *supra* note 5, § 246, at 584; UNIFORM RULES OF EVIDENCE 63.

10. C. McCORMICK, *supra* note 5, § 245, at 581.

11. 5 J. WIGMORE, EVIDENCE § 1420, at 202 (3rd ed. 1940).

12. C. McCORMICK, *supra* note 5, § 253, at 608.

Hearsay exceptions requiring unavailability are based on the premise that, although it is better to have the declarant on the stand where the reliability of his testimony can be cross-examined, admitting evidence having questionable reliability is preferable to admitting no evidence at all. Hearsay statements are admitted under these exceptions because the declarant's in-court testimony cannot be obtained because of his unavailability, and the out-of-court statements have some degree of reliability. A declaration against interest does not have a high degree of trustworthiness because there are no safeguards with respect to perception, memory, and narration.¹³ The declaration against interest exception should therefore apply only when the declarant is unavailable.

Several practical problems would be created if the requirement of unavailability were eliminated. For instance, where the declarant had previously made a declaration against interest favorable to an attorney's case, the attorney may be reluctant to call the declarant as a witness, thus avoiding the possibility of the declarant changing his testimony on the stand. This would permit the attorney to use evidence of lesser reliability at his discretion, thereby depriving the jury of the better evidence.

Another consequence of eliminating the unavailability requirement is that it relieves the proponent of the declaration from the burden of producing the declarant in court.¹⁴ The other party will have this burden once the declaration has been proved, if he wishes to test the statement's reliability.¹⁵ In addition, the rule against impeaching one's own witness may foreclose impeachment of the declarant by the party against whom the declaration was used, since he would be forced to call the declarant as his own witness.¹⁶

13. The declarant is not on the witness stand; his statement is being related by a witness who heard it. The witness cannot testify as to how the declarant perceived the event of the circumstances which prompted his declaration. Similarly, the witness cannot testify to the accuracy of the declarant's memory. A third danger is that the language of the declaration may be subject to interpretation and the witness would not be able to assist in determining what the declarant meant by the words he used.

14. Normally, when the proponent's evidence is in a form that is subject to cross-examination. In the case of hearsay, the opponent can obtain meaningful cross-examination as to the truth of the statement only by bringing the declarant into court.

15. See Note, *California Admits Declarations Against Penal Interest Regardless of Unavailability*, 17 STAN. L. REV. 322, 327 (1965). The admission of hearsay evidence has generally been held not to violate a criminal defendant's right to confrontation guaranteed by the sixth amendment to the U.S. Constitution, and made applicable to the states by *Pointer v. Texas*, 380 U.S. 400 (1965). Cases wherein hearsay evidence has held not to violate the confrontation clause include: *California v. Green*, 399 U.S. 149 (1970); *Mattox v. United States*, 156 U.S. 237 (1895). See also *Stein v. New York*, 346 U.S. 156, 196 (1953), where the court expressly rejected the notion that the hearsay evidence rule should be read into the fourteenth amendment. See C. McCormick, *supra* note 5, § 252, at 607.

16. Missouri law does not permit a party to impeach his own witness. See, e.g., *Waller v. Oliver*, 296 S.W.2d 44 (Mo. 1956); *Frank v. Wabash R.R.*, 295 S.W.2d 16 (Mo. 1956); Ross, *Impeaching One's Own Witness in Missouri*, 37 Mo. L. Rev. 507 (1972). There are limited exceptions to this rule, however. Impeachment is allowed if the proponent is surprised or if the witness is a hostile

Although some distinguished authorities on the law of evidence have advocated the abandonment of the unavailability requirement,¹⁷ the rationale for such a change shows some weak points upon critical analysis. Some proponents for amendment of the current majority rule compare declarations against interest to spontaneous declarations, a type of hearsay which is admissible regardless of availability of the speaker.¹⁸ A comparison of the hearsay dangers involved in declarations against interest with those in spontaneous declarations demonstrates the fallacy of this comparison. The latter type of hearsay evidence is intrinsically more reliable than the former. There is no memory problem in a spontaneous declaration with regard to the declarant because the statement is made immediately after the event. The only memory which needs to be tested is that of the witness who is repeating declarant's remark in court. Since this witness is on the stand, he is subject to cross-examination and his memory can thus be satisfactorily tested. In contrast to this situation is the case of declarations against interest. Such statements may be spoken long after the declarant's recollections have been blurred by time and intervening events. This substantial memory problem must be considered in comparing these two exceptions.

Another reason why the spontaneous utterance partakes of a greater reliability is perception. In the case of a spontaneous utterance, the reporting witness frequently provides a check on the declarant's perception because he was, by definition, sufficiently proximate to the scene of the declaration to hear it. He probably (but not necessarily) witnessed either the actual event or at least the surrounding circumstances of the event which prompted the declarant's statement, and may be cross-examined thereon. The reporter of a declaration against interest usually has not observed the event on which it was based, and hence an effective evaluation of the declarant's perception is impossible.

Both spontaneous declarations and declarations against interest have some indicia of sincerity.¹⁹ As the above discussion indicates, however, the rationale for the two exceptions are very different in other ways. The absence of an unavailability requirement in connection with spontaneous declaration

witness. See, e.g., *State v. Gordon*, 391 S.W.2d 346, 348-49 (Mo. 1965) (surprise); *Mooney v. Terminal R. Ass'n of St. Louis*, 352 Mo. 245, 260, 176 S.W.2d 605, 611 (1944) (hostile witness). Some cases have put other limitations on these exceptions, such as requiring not only surprise, but also that the testimony be favorable to the opposing party. See *Hughes v. Patriotic Ins. Co. of America*, 193 S.W.2d 958, 959 (St. L. Mo. App. 1946).

17. See note 5 *supra*.

18. Spontaneous declarations, traditionally called *res gestae*, cover several types of declarations that are allowed into evidence as exceptions to the hearsay rule without a showing of unavailability. The types of declarations covered are: 1) declarations of present bodily condition; 2) declarations of present mental state; 3) excited utterances; and 4) declarations of present sense impressions. See C. McCORMICK, *supra* note 5, § 288, at 686; 6 J. WIGMORE, EVIDENCE § 1745, at 131 (3rd ed. 1940).

19. The spontaneous declaration has sincerity safeguards since the declarant does not have time to fabricate. See J. WIGMORE, *supra* note 18, § 1749, at 139. The declaration against interest also has this safeguard, because it is unlikely that one will falsify to his own disadvantage. See 5 J. WIGMORE, *supra* note 11, § 1457, at 262-63.

is probably not sufficient justification for eliminating this requirement for declarations against interest.

Proponents of eliminating the unavailability requirement have also compared the declaration against interest to the hearsay exception for admissions of a party opponent, which does not require unavailability.²⁰ Although upon first glance one might assume that the same logic supports both exceptions, careful analysis reveals that the rationale for admitting admissions is entirely different than the rationale supporting declarations against interest. In the latter case the only circumstance which counterbalances the presence of the four hearsay dangers is the notion that one is unlikely to falsify to his own disadvantage. Contrarily, the impetus for admitting admissions is that the objecting party is also the declarant. Here the basis is not veracity but barnyard justice; the objector shall not be heard to complain that he is not given an opportunity to cross-examine himself. If he wishes to explain the out-of-court statement he has merely to take the stand and do so. The simple mechanics inherent in proving an opponent's out-of-court statement,²¹ not inherent trustworthiness, constitutes the rationale for the admissions exception. Since the logic underlying each of these hearsay exceptions is so different, it is fallacious to say that because one does not require unavailability, the other should not either.

There are other alternatives which, if coupled with the elimination of the unavailability requirement for declarations against interest, would make the proposed change more acceptable. One possibility is to allow the proponent of the out-of-court declaration to put his declaration into evidence, but only on condition that he produce the declarant, if available, and allow his opponent to cross-examine the declarant as though he were a hostile witness.²² Another more extreme approach would retain the unavailability requirement as to declarations against interest, but allow a party to impeach his own witness,²³ and allow prior inconsistent statements to be substantive evidence of their contents.²⁴ It is very possible that an important but un-

20. See C. McCORMICK, *supra* note 5, § 262, at 628.

21. E. MORGAN, BASIC PROBLEMS OF EVIDENCE 259 (1957); C. McCORMICK, *supra* note 5, § 262, at 628.

22. See 52 CORNELL L. REV. 301, 309 (1967). Allowing the opponent to cross-examine the declarant as a hostile witness would allow him to impeach the declarant. See note 16 *supra*.

23. If the declarant failed to make the same declaration on the stand, the attorney would at least be able to show the jury that the declarant had made a different statement previously in order to question his credibility.

24. Presently, Missouri allows the introduction of prior inconsistent statements for the limited purpose of impeachment. *State v. Granberry*, 491 S.W.2d 528 (Mo. En Banc 1973). If prior inconsistent statements were substantive evidence, the declarations against interest could be heard by the jury and used as evidence by them in reaching their results. Although the court has recently rejected a move to allow prior inconsistent statements as substantive evidence in *Granberry*, perhaps a small exception could be carved out. This has been done for prior inconsistent statements contained in the deposition of the witness. *Pulitzer v. Chapman*, 85 S.W.2d 400 (Mo. 1935). The court would need only to allow prior inconsistent statements as substantive evidence where such statements are also declarations against interest.

stated factor behind the court's inclination to do away with the unavailability requirement is a desire to admit out-of-court statements as substantive evidence. Once a witness is called, his prior inconsistent statements cannot be used as substantive evidence. Even though the statement in *Orr* was a prior inconsistent statement, the court was able to admit it as substantive evidence because it was also a declaration against interest. A third possible alternative would require that the witness be called if available, but would allow an out-of-court declaration against interest to be used substantively as well as to impeach. The latter may be the better alternative, since it gives the jury the benefit of all available evidence, the witness' in-court testimony as well as his prior out-of-court declaration.

Admitting declaration against interest without regard to unavailability would not be desirable. Such a move, while solving some of the problems caused by the present application of the unavailability requirement in declarations against interest could create other problems. The court should carefully consider other alternatives before discarding outright the unavailability requirement.

MARK A. SHKLAR

NEGLIGENT MISREPRESENTATION—
LIABILITY OF ACCOUNTANTS TO THIRD PARTIES—
THE PRIVACY REQUIREMENT

*Aluma Kraft Manufacturing Co. v. Elmer Fox & Co.*¹

Solmica, Incorporated, contracted to purchase 80 percent of Aluma Kraft's stock at a price equal to the book value of the shares on June 30, 1969. The contract provided that Aluma Kraft would supply financial statements needed to compute the sale price. Elmer Fox & Company, Aluma Kraft's auditor, prepared and furnished statements to Aluma Kraft which overstated book value by \$150,000. In reliance on these statements, Solmica purchased the Aluma Kraft stock at an inflated price. Solmica sued Fox for damages, but the circuit court dismissed the case for lack of privity.²

On appeal, Solmica's principal theory of recovery was that Fox negligently performed the audit with knowledge that Solmica would use and rely on the statements in determining the stock's price.³ Fox's defense was that Solmica had not stated a cause of action because Solmica and Fox were not in privity.⁴ The St. Louis District of the Missouri Court of Appeals held that privity of contract between plaintiff and defendant was not essential

1. 493 S.W.2d 378 (Mo. App., D. St. L. 1973).

2. *Id.* at 379.

3. Solmica also contended that Missouri statutes (§§ 326.111, .120, RSMo 1969) and various rules regulating the conduct of and establishing standards for accountants create a cause of action for negligence. The court rejected this theory, saying that although the statutes could be used in determining the standard of care required of an accountant, the statutes impose criminal penalties only and do not create independent civil actions. 493 S.W.2d at 380-81.

4. *Id.* at 279-80.

on the facts presented, and that therefore, the plaintiff's case was submissible to the jury.⁵

The essential issue presented by this case is jury submissibility. Ultimately, the court had to decide if plaintiff had presented a case which, under court-devised standards, was submissible to the jury. To fully understand the decision and the standards that the court considered in determining that Solmica's case was submissible, the concept of privity of contract as a defense must be considered.

The idea that privity of contract is required between parties before one can recover for negligence was first presented in *Winterbottom v. Wright*.⁶ There, a mail coach driver was denied recovery for injuries caused by the defendant's faulty maintenance of his coach because he was not in privity with the defendant-mechanic.⁷ The court reasoned that if privity were not required, the number of such actions would be limitless.⁸ As a consequence, defendant was deemed immune from liability for negligent acts to all but those with whom he was in privity of contract. This inclusive perimeter of immunity resulted from an erroneous juxtaposition of contract law with tort law. Under the privity doctrine, there is no analysis of the probability of the resulting harm stemming from the act. There is only a cursory look to determine whether privity of contract existed between the plaintiff and defendant.⁹ If such a relation existed, then the court allows the case to reach the jury; if not, the defendant wins a dismissal.

The *Winterbottom* perimeter of immunity was slightly retracted in the case of *Glanzer v. Shepard*.¹⁰ There, a bean seller had asked defendants, public weighers, to weigh beans and furnish plaintiff buyer with a copy of the certificate; the certificate overstated the weight substantially. The court sustained a directed verdict for plaintiff because, although he had not actually contracted with the defendant, "the end and aim of the transaction was to inform the plaintiff of the weight."¹¹ In imposing tort liability to parties not actually in privity, however, the court again erroneously focused, not on the defendant's negligent act and a determination on whether its effect on the plaintiff was probable, but rather on the contract and whether its end and aim was to affect the plaintiff. The perimeter of immunity was retracted slightly, but the court's analysis remained contract-oriented.

In a subsequent case, *Ultramares v. Touche*,¹² the same court denied the submissibility of a third party's negligence case against an accounting

5. *Id.* at 379.

6. 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

7. *Id.* at 114-15, 152 Eng. Rep. at 405.

8. *Id.* at 114-15, 152 Eng. Rep. at 405.

9. See W. PROSSER, *THE LAW OF TORTS* §93 (4th ed. 1971).

10. 233 N.Y. 236, 135 N.E. 275 (1922).

11. *Id.* at 238-39, 135 N.E. at 275. For an extensive discussion of the proposition that a defendant might be liable if (1) he knows the identity of the plaintiff at the time of the negligent audit, and (2) the transmission of the statement to the plaintiff was the end and aim of the audit, see Hallet, *Auditors' Responsibility for Misrepresentation*, 44 WASH. L. REV. 139 (1968).

12. 255 N.Y. 170, 174 N.E. 441 (1931).

firm for erroneous balance sheets.¹³ The defendant knew that the sheets were generally supplied to a variety of third parties, but did not know the particular parties who would rely on them. The court erroneously required privity, because a mistake or miscalculation "may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."¹⁴ Judge Cardozo noted that in *Glanzer* there was a connection so close between the plaintiff and defendant as to approach privity because defendant knew the "end and aim" of the transaction was to benefit that particular plaintiff.¹⁵ In *Ultramares*, on the other hand, the plaintiff's identity was unknown to the defendant. Judge Cardozo left open the possibility of recovery without privity for an audit fraudulently done or for a reckless misstatement,¹⁶ and stated that evidence of negligence may sustain an inference of fraud.¹⁷ To recover for mere negligence, however, the injured party not in privity must establish the criteria set forth in *Glanzer*.¹⁸ The *Ultramares* court refused to constrict the perimeter of immunity further than *Glanzer* and again resorted to the privity label as justification for this failure.

Where plaintiff has suffered physical harm, courts have traditionally been reluctant to require privity.¹⁹ Where the loss is purely economic, however, the privity doctrine has more vitality.²⁰ A few courts, fearing the

13. *Id.* at 189, 174 N.E. at 448. Recovery might be allowed, however, on a theory that fraud could be inferred from the defendant's negligence. *Id.* at 190-91, 174 N.E. at 449.

14. *Id.* at 179, 174 N.E. at 444.

15. *Id.* at 182-83, 174 N.E. at 445-46.

16. *Id.* at 189, 174 N.E. at 448.

17. *Id.* at 190-91, 174 N.E. at 449.

18. *Id.* at 182-83, 174 N.E. at 445-46. The idea that negligence can be actionable without privity (if the defendant knew of the plaintiff's intended reliance and *Glanzer's* "end and aim" test is met) is somewhat clouded in New York by *State Street Trust Co. v. Ernst*, 15 N.E.2d 416, 418 (1932), in which the court said:

[I]n the absence of a contractual relationship or its equivalent, accountants cannot be held liable for ordinary negligence in preparing a certified balance sheet even though they are aware that the balance sheet will be used to obtain credit.

This statement can, however, be seen as merely reasserting Judge Cardozo's concept of a need to limit liability to a determinate class instead of eliminating an action of negligence without privity of contract. See *Investment Corporation of Florida v. Buchanan*, 208 So. 2d 291 (Fla. App. 1968); 46 A.L.R. 3d 979 (1972).

19. *Mac Pherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 377 P.2d 897 (1963). See W. PROSSER, *THE LAW OF TORTS* §§96-97 (4th ed. 1971); Prosser, *Misrepresentation and Third Persons*, 19 Vand. L. Rev. 231 (1966); Prosser, *The Fall of the Citadel*, 50 Minn. L. Rev. 791 (1966); Annot., 74 A.L.R.2d 1111 (1960).

20. See Prosser, *Misrepresentation and Third Persons*, 19 Vand. L. Rev. 231, 232 (1966). Plaintiffs not in privity with the defendant have occasionally recovered on theories of fraud and third party beneficiary contract. Fraud cases include *Duro Sportswear, Inc. v. Cogen*, 131 N.Y.S.2d 20, *aff'd.*, 285 App. Div. 867, 137 N.Y.S.2d 829 (1954); *State Street Trust Co. v. Ernst*, 278 N.Y. 104, 15 N.E.2d 416 (1938) (gross negligence amounting to fraud); *Ultramares v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). See also Annot. 46 A.L.R.3d 979, 996

spectre of unlimited liability to an unlimited class,²¹ have blindly required actual privity of contract.²² These courts would dismiss for lack of privity even though the defendant knew that a particular plaintiff would rely on his work.²³ Other courts have adopted the *Glanzer* position,²⁴ but have refused to further relax the privity requirement.

In a broad departure from privity, *Rusch Factors, Inc. v. Levin*²⁵ asserted that an accountant should be liable for a negligent statement relied on "by actually foreseen and limited classes of persons."²⁶ This view requires, not that a particular individual be known to the defendant, but only that defendant know of a limited class to which the plaintiff belongs. The *Rusch*

(1972) (listing the large number of courts recognizing fraud as a basis for an accountant's liability to a third party not in privity).

Federal securities legislation may more readily allow for recovery. See 15 U.S.C. § 77k (1964); 15 U.S.C. §78j (b) (1970); 17 C.F.R. § 240, 10(b) (5); *Escott v. Barchris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968); *Fischer v. Kletz*, 266 F. Supp. 180 (S.D.N.Y. 1967); *Kurland, Accountant's Legal Liability—Ultramares to Barchris*, 25 BUSINESS LAWYER 155 (1969) (asserting that federal securities legislation will preclude the application of *Ultramares*).

21. See *Savings Bank v. Ward*, 100 U.S. 195, 197 (1879); *O'Connor v. Ludlam*, 92 F.2d 50 (2d Cir. 1937).

22. See *Canaveral Capital Corp. v. Bruce*, 214 So. 2d 505 (Fla. App. 1968); *Sickler v. Indian River Abstract & Guaranty Co.*, 142 Fla. 528, 195 So. 195 (1940); *Blank v. Kartz*, 350 Mass. 779, 216 N.E.2d 110 (1966); *Duro Sportswear, Inc. v. Cogen* 131 N.Y.S.2d 20, *aff'd* 285 App. Div. 867, 137 N.Y.S.2d 829 (1954); *Landell v. Lybrand*, 264 Pa. 406, 107 A. 783 (1919). Annot. 46 A.L.R.3d 979 (1972).

23. *Watts Industries, Inc. v. Haskins*, 843 F.2d 357, 359 (10th Cir 1971), stated that "as to third parties—even those who the accountant knew or should have known were relying on his audit—liability can be founded only upon fraudulent conduct, and proof of mere negligence will not suffice."

24. See *Shatterproof Glass Corporation v. James*, 466 S.W.2d 873 (Tex. Civ. App. 1971), following RESTATEMENT (SECOND) OF TORTS §552, at 14 (Tent. Draft No. 12, 1966). The Restatement extends liability to loss suffered

(a) by the person or one of the persons for whose benefit and guidance he intends to supply the information, or knows that the recipient intends to supply it; and through reliance upon it in a transaction which he intends the information to influence, or knows that the recipient so intends, or in a substantially similar transaction.

C.I.T. Financial Corp. v. Clover, 224 F.2d 44 (2nd Cir. 1955) (citing *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441, with approval and requiring that the financial reports be made for the primary benefit of the plaintiff). *Lucas v. Hamm* 56 Cal. 2d 583, 364 P.2d 685, 689, (1961), *cert. denied*, 368 U.S. 987 (1962) (rejecting the privity requirement and imposing a balancing test weighing (1) the extent to which the transmission was meant to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that plaintiff was injured, (4) the closeness of connection between the plaintiff's injury and the defendant's act, and (5) the policy of preventing future harm); Annot. 46 A.L.R. 3d 979; *Rozney v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969) (extending recovery to those who might foreseeably rely on defendant's inaccurate survey if the class is limited to a comparatively small group); *Ryan v. Kanne*, 170 N.W.2d 395 (Ia. 1969) (allowing recovery to those actually known to the defendant as prospective users of the audit and at whom the transaction was aimed); See also *Tartera v. Palumbo*, 453 S.W.2d 780 (Tenn. 1970) (reliance on negligent survey).

25. 284 F. Supp. 85 (D.R.I. 1968).

26. *Id.* at 93.

decision rejected the "unlimited liability" spectre the *Ultramares* court²⁷ used to justify the privity requirement.²⁸ The *Rusch* case was cited in *Rhode Island Hospital Trust National Bank v. Swartz*,²⁹ in which a bank recovered from a negligent accountant because he knew the bank would rely on his audit of a prospective borrower.³⁰ In both the *Rusch* and *Rhode Island* cases, the court could have allowed the plaintiff to get to the jury by merely relying on the *Glanzer* end and aim test, since the defendant knew that the individual plaintiff would rely on his work.³¹ In each case, however, the court indicates a desire to shrink the perimeter of immunity to make the case submissible, not merely to a plaintiff specifically known to the defendant, but to all plaintiffs in an actually foreseen and limited class.³²

Missouri courts allow recovery for negligence without privity when the plaintiff has suffered physical harm.³³ Early Missouri cases denied recovery for economic loss without privity, using the *Ultramares* "indefinite liability" argument.³⁴ More recent decisions have relaxed the privity requirement to the same degree as *Glanzer*, but have employed the same erroneous, contract-oriented analysis. In *Westerhold v. Carroll*,³⁵ an indemnitor of a surety on a performance bond sued an architect for certifying an incorrect amount of material and work used in construction. Although there was no privity between plaintiff and defendant, the court, as in *Glanzer*, found the relationship between the plaintiff and defendant to be so close as to approach privity.³⁶ The court believed that requiring a close relationship eliminated the danger of unlimited liability to an indeterminate class.³⁷ No such relationship existed in *Anderson v. Boone County Abstract Company*,³⁸ where defendant abstractor prepared a certified abstract which subsequently passed from the original owner through two other owners to the plaintiff. The court said defendant was not liable because he had no reason to expect that the plaintiff would rely.³⁹ In *Slate v. Boone County Abstract Com-*

27. 255 N.Y. at 181, 174 N.E. at 445.

28. 284 F. Supp. at 91. The court asks, "Why should an innocent reliant party be forced to carry the weighty burden of an accountant's professional malpractice? Isn't the risk of loss more easily distributed and fairly spread by imposing it on the accounting profession, which can pass the cost insuring against the risk onto its customers, who in turn pass the cost onto the entire consuming public?"

29. 455 F.2d 847 (4th Cir. 1972).

30. *Id.* at 851.

31. *Id.* at 851, 284 F. Supp. at 91.

32. *Id.* at 851, 284 F. Supp. at 93.

33. *Lesser v. William Holliday Cord Assoc., Inc.* 349 F.2d 490 (8th Cir. 1965); *Wolfmeyer v. Otis Elevator Company*, 262 S.W.2d 18 (Mo. 1953).

34. *See Gordon v. Livingston*, 12 Mo. App. 267 (1882); *Roddy v. Missouri Pac. Ry.*, 104 Mo. 234, 15 S.W. 1112 (1891); *Zweigardt v. Birdseye*, 57 Mo. App. 462 (1894) (applied privity requirement even where plaintiff knew specifically that the defendant would rely on his abstract of title). *Schade v. Gehner*, 133 Mo. 252, 34 S.W. 576 (1896).

35. 419 S.W.2d 73 (Mo. 1967).

36. *Id.* at 78. *See Wieler, Torts—Negligent Performance of a Contract—Privity: Have the Exceptions Finally Swallowed the Rule?*, 33 Mo. L. REV. 531 (1968).

37. *Id.* at 79.

38. 418 S.W.2d 123 (Mo. 1967).

39. *Id.* at 130.

pany,⁴⁰ however, defendant supplied an abstract to the owner knowing that plaintiff, a prospective buyer, would rely on it.⁴¹ The court allowed recovery since, as in *Glanzer*, the "end and aim" of the transaction between the defendant and the purchaser of the abstract was for the benefit of the plaintiff.⁴² As these cases indicate, in Missouri the perimeter of immunity has been identical with that of *Glanzer*. Unlike the personal injury area, little attempt has been made to analyze economic injury cases using the traditional tort terms of causation in fact and direct and probable consequences.⁴³ The courts establish an arbitrary perimeter of immunity by focusing on the contract, and do not apply traditional negligence theory. Such analysis denies recovery to a large class of plaintiffs by hinging jury submissibility on finding privity or meeting the *Glanzer* exception.

In *Aluma Kraft*, there is some indication that the court wishes to further relax the perimeter of immunity and allow recovery to a limited and foreseeable class of plaintiffs not individually known to the defendant. The court, citing *Rusch*,⁴⁴ discusses the growing trend to permit submission of such cases to the jury.⁴⁵ The opinion rejects the privity requirement where the defendant knows that the individual plaintiff will rely on the defendant's acts or knows that the recipient intends to supply the information to prospective users.⁴⁶ The court also disparages the "unlimited liability" concept that has been the main justification for the privity requirement.⁴⁷

Despite this expansive language, the court fails to extend liability much beyond *Glanzer*. The court states that whether the defendant will be held liable to a third party not in privity involves the balancing of the following factors: 1) the extent to which the transaction was intended to affect the plaintiff; 2) the foreseeability of harm to him; 3) the degree of certainty that the plaintiff suffered injury; and 4) the closeness of the connection between the defendant's conduct and the injury suffered.⁴⁸ In effect, the court is merely delineating the limits of the immunity established by the *Glanzer* end and aim test in traditional tort terms. The factors taking into account the extent to which the transaction was intended to affect the plaintiff and the foreseeability of harm to him, are difficult to distinguish from the *Glanzer* and *Westerhold* requirement that the plaintiff be known to the defendant, and that the end and aim of the transaction be to affect the plaintiff. In addition, the first factor still suggests contract-oriented analysis rather than traditional tort analysis.

40. 432 S.W.2d 305 (Mo. 1968).

41. *Id.* at 306. See Maher, *The Liability of Abstractors in Missouri*, 34 Mo. L. REV. 420 (1969).

42. 432 S.W.2d 307 (Mo. 1968).

43. See *State ex rel. Blond v. Stubbs* 485 S.W.2d 152 (Mo. App. D. K.C. 1972); and *State ex rel. Smith v. Weinstein* 398 S.W.2d 41 (St. L. Mo. App. 1965).

44. See text accompanying note 24 *supra*.

45. 493 S.W.2d at 382-83.

46. *Id.* at 383.

47. *Id.* at 382-84.

48. *Id.* at 383.

The *Aluma Kraft* court notes the logical faults of the unlimited liability basis for the privity rule,⁴⁹ yet still applies a strict foreseeability rule. If privity has no basis, then why limit liability to strictly foreseeable plaintiffs? In other negligence areas, such as personal injury cases, courts use a direct and probable consequence test.⁵⁰ The answer may be found in the court's statement that "the extension of limits of liability should be done on a 'case-by-case basis' and "[w]e believe that *Westerhold* and *Glanzer* are authority to reject the requirement of privity under the facts here."⁵¹ Nevertheless, by analyzing the economic injury cases through contract terms and concepts rather than negligence theory, the court perpetuates an arbitrary, though more constricted, perimeter of immunity, leaving the plaintiff less able to submit his case to a jury than in personal injury cases.

JOHN R. SIMS

PRIOR INCONSISTENT STATEMENTS AS SUBSTANTIVE
EVIDENCE—MISSOURI RETAINS THE ORTHODOX RULE

*State v. Granberry*¹

James Granberry and Kenneth Hackett were indicted for murder. The State, however, dismissed its case against Hackett after he made a videotaped statement implicating Granberry in the crime. At Granberry's trial, the State called Hackett as a witness. Hackett testified that Granberry was not involved in the crime. The State thereupon claimed surprise, and was given leave to impeach its own witness.² The State questioned Hackett as

49. *Id.* at 383-84.

50. In *State ex rel. Smith v. Weinstein*, 398 S.W.2d 41, (St. L. Mo. App. 1965), the plaintiff was injured in a wreck with car driven by defendant, Smith. On the way to the hospital, plaintiff was again injured when the ambulance was involved in a wreck. In holding the defendant Smith liable for the plaintiff's injuries in both accidents, the court said:

[a] person who has received an injury due to the negligence of another is entitled to recover all damage proximately traceable to the primary negligence, including the subsequent aggravation which the law regards as a sequence and natural result likely to flow from the original injury, even though there may have been some intervening agency contributing to the result.

Id. at 44. This case was followed in *State ex rel. Blond v. Stubbs* 485 S.W.2d 152, 155 (Mo. App. D.K.C. 1972). See Comment, *Auditor's Responsibility for Misrepresentations: Inadequate Protection for Users of Financial Statement*, 44 Wash. L. Rev. 139, 179 (1968) (arguing for expanded liability since the accountant's work is directed primarily at third parties and the accountant actively solicits their reliance).

See also Annot. 46 A.L.R.3d 979 (1972).

51. *Aluma Kraft Mfg. Co. v. Elmer Fox & Co.*, 493 S.W.2d 378, 382 (Mo. App., D. St. L. 1973).

1. 491 S.W.2d 528 (Mo. En Banc 1973).

2. See Ross, *Impeaching One's Own Witness in Missouri*, 37 Mo. L. Rev. 507 (1972).

to the video-taped statement and other statements³ he had made implicating Granberry. Granberry was convicted. On appeal, Granberry contended that Hackett's prior inconsistent statements had been used as substantive evidence of guilt.⁴ The Missouri Supreme Court agreed and reversed Granberry's conviction.⁵

In *Granberry*, the Missouri Supreme Court re-examined Missouri's position with respect to the use of prior inconsistent statements.⁶ The court opted to retain its present position,⁷ which is essentially the orthodox view with an exception for prior statements contained in depositions.⁸

3. Hackett was questioned concerning statements made to an investigator, to two attorneys for the State, to a police detective, and a deposition taken in a case involving another defendant. 491 S.W.2d at 530.

4. The jury was instructed to use the out-of-court statements only in determining the credibility of the witness and not to use them substantively. The alleged error occurred when the prosecutor over-emphasized the importance of the prior statements in his closing argument.

5. Five judges (Judges Donnelly, Henley, Seiler, Finch and Holman) thought the emphasis placed on the prior statements resulted in their substantive use. Judges Morgan and Bardgett felt that "the closing argument of the state was legitimate retaliatory argument and did not even constitute non-prejudicial error". 491 S.W.2d at 539.

6. Prior inconsistent statements are offered in two situations. The most common situation is where a witness, after testifying in direct examination, is cross-examined about a prior inconsistent statement he has made. The other instance is where a witness testifies on direct examination and his testimony surprises the direct examiner. The direct examiner is then given leave to impeach his own witness, and in impeaching the witness, the prior inconsistent statement is introduced. The latter situation is involved in *Granberry*. In the first situation, the cross-examiner impeaches the witness and the direct examiner seeks to rehabilitate him. In the second situation, the direct examiner impeaches and the cross-examiner seeks to rehabilitate. Despite the role reversal, however, the same analysis applies to both situations.

Much depends on the witness' response to the questions concerning the prior inconsistent statement. 1) Where the witness admits making the prior inconsistent statement and also admits its truth, thereby abandoning his former in-court testimony, there is no problem with admissibility of the prior statement. The witness had adopted the prior statement as his present testimony and can be cross-examined upon it. 2) The classic prior inconsistent statement situation arises where the witness admits making the statement but denies its truth. 3) A difficult problem arises where the witness denies making the prior statement. See note 37, *infra*.

7. Five judges (Judges Donnelly, Henley, Seiler, Morgan and Bardgett) favored retention of the orthodox view. Judges Finch and Holman endorsed the unorthodox position, but reversed the conviction because some of the statements admitted did not qualify for substantive admission under their proposed rule.

8. The Missouri position with respect to criminal cases, as stated by Judge Donnelly, is:

(2) if a witness is present at trial (whether he testifies at trial or not), his deposition, if taken by the State under the provisions of Art. I, § 18(b), *supra*, is not made inadmissible by the hearsay rule, and so far as it is admissible under other rules of evidence, may be used by the State and "accepted as substantive proof of the facts stated" in the deposition; and

(3) if a witness is not present at trial, and it appears he is dead or that the State has made a good-faith effort to obtain his presence at trial . . . his deposition, if taken by the State under the provisions of Art. I, § 18(b), *supra*, is not made inadmissible by the hearsay rule,

The orthodox view holds that a prior inconsistent statement made by a witness is admissible to impeach or discredit the witness, but not as substantive evidence.⁹

The orthodox view has stirred much criticism¹⁰ and several proposals for change have been made.¹¹ Missouri was one of the first jurisdictions to make inroads into the orthodox view.¹² In *Pulitzer v. Chapman*¹³ the Missouri Supreme Court allowed a prior inconsistent statement in a witness' deposition taken in the same civil case to be used as substantive evidence.¹⁴ In 1945, the *Pulitzer* position was extended to felony cases by a new provision in the Missouri Constitution.¹⁵ Missouri has not, however, further liberalized its position.¹⁶

The basis of the orthodox view is that a prior inconsistent statement is hearsay, and therefore is inadmissible as substantive evidence.¹⁷ Hearsay is inadmissible as substantive evidence because the finder of fact cannot adequately test the declarant's perception, memory, narration, and sincerity.¹⁸ The three dangers of hearsay are: (1) the extrajudicial statement is not made under oath; (2) the trier of fact cannot observe the declarant's demeanor as he makes the statement; and (3) there was no opportunity for cross-examination when the statement was made.¹⁹ Proponents of the ortho-

and, so far as it is admissible, under other rules of evidence, may be used by the State and "accepted as substantive proof of the facts stated" in the deposition.

491 S.W.2d at 531.

With respect to civil cases, the court reaffirmed the position taken in *Pulitzer v. Chapman*, 337 Mo. 298, 85 S.W.2d 400 (1935) (a prior inconsistent statement made by a witness in a deposition in the same case can be used as substantive evidence).

9. Annot., 133 A.L.R. 1454, 1455 (1941).

10. See 3A, J. WIGMORE, EVIDENCE § 1018 (Chad. Rev. 1970): "Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the hearsay rule has already been satisfied." See, Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192-96 (1948); McCORMICK, *The Turncoat Witness—Previous Statements as Substantive Evidence*, 25 TEXAS L. REV. 573 (1947).

11. PROP. FED. R. EVID. 801(d)1 (1972). (However, the House Amendment to the Proposed Federal Rules of Evidence modified Rule 801(d)1 to essentially adopt the orthodox rule. H.R. 5463 as amended by the Subcommittee on Criminal Justice, House Committee on the Judiciary). *Model Code of Evidence*, Rule 503 (1942); UNIFORM RULES OF EVIDENCE 63 (1947).

12. McCormick, *The Turncoat Witness—Previous Statements as Substantive Evidence*, 25 TEXAS L. REV. 573, 584 (1947).

13. 337 Mo. 298, 85 S.W.2d 411 (1935).

14. *Id.* at 320, 85 S.W.2d at 441. The *Granberry* court reaffirmed the *Pulitzer* position. 491 S.W.2d at 531.

15. Mo. CONST. art. I, § 18(b).

16. 491 S.W.2d at 531.

17. *Ruhala v. Roby*, 379 Mich. 102, 150 N.W.2d 146 (1967); *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939), 3A J. WIGMORE, EVIDENCE § 1018 (Chad. Rev. 1970); C. McCORMICK, EVIDENCE § 251 (2d Ed. 1972).

18. C. McCORMICK, EVIDENCE § 245 (2d Ed. 1972).

19. C. McCORMICK, EVIDENCE § 245 (2d Ed. 1972).

dox rule assert that prior statements possess the three dangers characteristic of hearsay evidence.²⁰

Critics of the orthodox rule, on the other hand, contend that the hearsay dangers are not present because the declarant is in court and subject to cross-examination upon his prior statement. They argue that, although the prior extrajudicial statement was not made under oath, the oath requirement is satisfied because the declarant is cross-examined under oath at trial concerning his prior statement.²¹ The oath, in any case, is not regarded as the principal safeguard of the trustworthiness of the testimony.²² Concerning the second hearsay danger, critics of the orthodox view contend that the opportunity to observe the witness' in-court testimony about his prior statement compensates for the trier of fact's inability to observe the witness' demeanor at the time the prior statement was made.²³

The real crux of the argument in support of the orthodox view is that the rule against hearsay requires an opportunity for immediate cross-examination, that delayed cross-examination at trial on the prior statement is inadequate.²⁴ The rationale for this requirement has never been articulated clearly.²⁵ In his concurring opinion in *Granberry*, Judge Seiler took this

20. See, e.g., *State v. Saporen*, 205 Minn. 358, 361-62, 285 N.W. 898, 901 (1939).

21. See note 10, *supra*.

22. Professor McCormick stated, "Probably most trial lawyers and most students in the field of evidence would now agree that the oath and the penalties of perjury, though of substantial value, are not the principal safeguard of the trustworthiness of testimony." McCormick, *The Turncoat Witness*, 25 TEXAS L. REV. 573, 576 (1947).

23. Judge Learned Hand said, "If from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court." *DiCarlo v. U.S.*, 6 F.2d 364 at 368 (2nd Cir. 1925).

24. *Ruhala v. Roby*, 379 Mich. 102, 150 N.W.2d 146 (1967); *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1935). Cf. *State v. Mlynczak*, 268 Minn. 417, 130 N.W.2d 53 (1964).

25. In *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939), Justice Stone attempted an explanation for holding the hearsay rule required an opportunity for immediate cross-examination:

The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others, whose interest may be, and often is, to maintain falsehood rather than truth.

Id. at 362, 285 N.W. at 901.

Justice Stone's rationale has been questioned. Professor Morgan argues, Why does falsehood harden any more quickly or unyielding than truth? What has become of the idea that truth is eternal and, though crushed to earth, will rise again? Isn't the opportunity for reconsideration and for baneful influence by others even more likely to color the later testimony than the prior statement?

Morgan, *Hearsay Dangers and the Application of the Hearsay Concept* 62 HARV. L. REV. 177, 193 (1948).

approach, holding that prior inconsistent statements are inadmissible as substantive evidence because later cross-examination as to these statements is ineffective.²⁶ Judge Seiler relied on an opinion by the Michigan Supreme Court in *Ruhala v. Roby*,²⁷ in which two hypothetical cross-examinations were compared.²⁸ In the first hypothetical, the cross-examiner induces the witness to change his testimony. The witness' admission that he was mistaken on direct examination makes a strong impression on the jury. The witness' discredited statement is probably wiped from the jury's collective mind.²⁹ This cross-examination is very effective.

In the second hypothetical, the witness on direct examination testifies favorably to the cross-examiner. Claiming surprise, the direct examiner impeaches the witness with a prior inconsistent statement. On cross-examination, the cross-examiner can only try to explain away the prior inconsistency. Because the witness' in-court testimony favored the cross-examiner, he cannot cross-examine the witness in an adversary manner. All he can do is have the witness repeat his testimony given on direct examination. As a result, the prior statement is never discredited, the "ghost of the prior statement" remains.³⁰ In the analysis of the *Ruhala* court, the cross-examination in the second hypothetical is ineffective.³¹ Because the prior inconsistent statement cannot be effectively cross-examined, the court held that the prior inconsistent statement should not be admitted as substantive evidence.³²

Justice Stone's argument that the hearsay rule requires an immediate opportunity to cross-examine falters when applied to prior inconsistent statements. Justice Stone fears that the testimony of the witness will "harden" if not tested by immediate cross-examination. In the case of inconsistent statements, however, the witness' testimony does not "harden", because, by hypothesis, the witness' courtroom testimony has contradicted his prior statement.

26. 491 S.W.2d at 533 (concurring opinion).

27. 379 Mich. 102, 150 N.W.2d 146 (1967).

28. *Id.* at 125-28, 150 N.W.2d at 156-58.

29.

When a cross-examiner on timely cross-examination *succeeds* in getting the witness to change his story, the integrity of the recantation is apparent, and *his original, recanted version no longer stands as substantive evidence*. If the only evidence of an essential fact in a lawsuit were a statement made from the witness stand which the witness himself completely recanted and repudiated before he left the witness stand, no one would seriously urge that a jury question had been made out.

Id. at 128, 150 N.W.2d at 158.

30. *Id.* at 128, 150 N.W.2d at 158.

31.

By these hypothetical examples we have tried to show the windmill-fighting nature of stale cross-examination with respect to the prior statement. No matter how deadly the thrust of the cross-examiner, the ghost of the prior statement stands. His questions will always sound like attempts to permit the witness to explain *why* he changed his story before coming to court, with the jury being left to infer that he might have been induced to change his story in the intervening months or years, for some unrevealed and sinister reason.

Id. at 128, 150 N.W.2d at 158.

32. *Id.* at 128, 150 N.W.2d at 163. In both situations in which prior inconsistent statements are introduced, *discussed* in note 6, *supra*, the *Ruhala* court was concerned with the position of the party harmed by the prior inconsistent state-

Admittedly there is a difference in the two cross-examinations. The cross-examination in the first hypothetical has a more powerful effect on the jury. The witness' recantation is more striking when done in the jury's presence. The effectiveness of the second hypothetical cross-examination, however, depends upon how credibly the witness explains away the prior statement. The Michigan court concluded, based on a comparison of the two cross-examinations, that the second hypothetical cross-examination is less effective.³³ Judge Seiler, in his concurring opinion in *Granberry*, agrees.³⁴ This analysis, however, by-passes the main issue. The question is not which cross-examination is more effective; rather the question is whether the second cross-examination is so ineffective as to mandate the inadmissibility of the prior inconsistent statement as substantive evidence. The expressed reason for the *Ruhala* court's conclusion is that the cross-examiner³⁵ could never completely explain away the prior statement.³⁶ The court cannot, however, mean that "effective" cross-examination occurs only when the cross-examination explains away the prior statement and convinces the jury to believe the in-court testimony. If so, the substantive admissibility of the prior statement would hinge on the witness' effectiveness in explaining it away. The court must mean that the cross-examination is ineffective because it is somehow "unfair" to burden the cross-examiner with explaining away the prior statement. But why such a requirement is unfair is not discernable. On the contrary, it seems unfair to allow a party to use a witness' favorable testimony without requiring him to explain away the witness' prior, unfavorable, inconsistent statement.³⁷

ment. If the prior statement is introduced on cross-examination, the direct examiner, on redirect examination, would have the task of explaining away the prior inconsistent statement in an attempt to rehabilitate the witness. In the situation where the prior statement is introduced on direct examination, after a showing of surprise, the cross-examiner would have to explain away the prior inconsistent statement.

33. *Ruhala v. Roby*, 379 Mich. 102, 126, 150 N.W.2d 146, 157 (1967).

34. Judge Seiler wrote

But *Granberry's* lawyers cannot cross-examine Hackett in actual fact—all they can do is to get him to repeat what he earlier said in his testimony—that is, that *Granberry* was not there. They have no way to destroy his prior statement because the only way they can meet it is to have him repeat what he said on direct examination. This is not cross-examination at all, nor is there any way the witness can be subject to genuine cross-examination by the party who wants to discredit the prior statement.

State v. Granberry, 491 S.W.2d 528, 533 (Mo. En Banc 1973).

35. Where a prior inconsistent statement is introduced on cross-examination and the witness denies the truth of the statement, it is the party conducting redirect who has the task of explaining away the prior statement. See note 6 *supra*.

36. See note 31 *supra*.

37. In the second *Ruhala* cross-examination, the witness admits that he made the prior statement, but denies the truth of that statement. The admission that the prior statement was made gives the cross-examiner the opportunity to let the witness explain away the prior statement. A more difficult problem arises when the witness denies that he made the prior statement. In that case, the cross-examiner cannot explain away the prior statement because the witness does not admit making the statement, and hence cannot offer an explanation for changing his story. Whether the witness made the prior statement then becomes a question of fact. If the trier of fact decides that no prior statement was made, then the

Even in the face of the *Ruhala* analysis, there may be good reasons to admit prior inconsistent statements for their substance. Critics of the orthodox rule argue that prior inconsistent statements have sufficient indicia of trustworthiness to be admitted as substantive evidence.³⁸ The prior statement is made nearer in time to the event than the in-court testimony, at a time when the declarant's memory is accordingly more likely to be accurate.³⁹ A prior statement is less susceptible to outside influence as it is generally made before there is a chance for such influence.⁴⁰ It is also argued that nothing is gained by excluding prior inconsistent statements as substantive evidence because the limiting instruction is ineffective to preclude the substantive use of the those statements by the jury.⁴¹ The modern authorities who have

alleged prior statement is disregarded. Should the trier of fact conclude, however, that the prior statement was made, the statement may be given further consideration.

Because cross-examination is effective only where the witness admits making the prior statement, logic dictates that the unorthodox rule should be applied only where the witness admits making the statement, thereby giving the cross-examiner a chance to have the witness explain away the inconsistency. Such a rule, however, might foster perjury. A witness might falsely deny that he made the prior statement in an attempt to prevent the prior statement from being admitted as substantive evidence. In this regard, two different situations can be distinguished. The first situation is where the witness' prior statement is unrecorded and comes into the lawsuit when another witness testifies as to what the first witness told him. In this case, if the first witness denies making the prior statement and the only evidence is the conflicting testimony of the witnesses, there is a genuine question as to whether the statement was actually made. No logical argument can be made for the admission of the prior statement as substantive evidence, given that the actual making of the statement is in doubt and that there is no opportunity for effective cross-examination. Conversely, where there is *substantial* evidence that the statement was actually made (statement proved to have been written or signed by the witness or a video-taped statement), the witness's mere in-court denial of making the statement should not render the statement inadmissible as substantive evidence. The rationale for such substantive admissibility is that a party should be stuck with the unfavorable, as well as the favorable, statements of its witnesses.

Professor McCormick's proposal, *see* n. 48, *infra*, is directed at insuring that there is adequate proof that the prior statement was actually made, so as to avoid injecting a collateral issue into the lawsuit. Although there is no indication that Professor McCormick considered the situation where the witness denied making the prior statement, his proposal does incorporate the suggestion discussed above.

38. These authorities would admit prior inconsistent statements as substantive evidence, not as exceptions to the hearsay rule, but under a definition of hearsay that excludes prior inconsistent statements. *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969); *Gelhaar v. State*, 41 Wis. 2d 230, 163 N.W.2d 609. *See also* PROP. FED. R. EVID. 801 (1972) (A House Amendment, however, modified the proposed rule to adopt essentially the orthodox position); MODEL CODE OF EVIDENCE, Rule 503 (1942); CAL. EVID. CODE, § 1235 (West. Supp. 1966); KAN. STAT. ANN. § 60-460 (a) (1964).

39. McCormick, *The Turncoat Witness*, 25 TEXAS L. REV. 573 at 577 (1947). The text statement assumes, of course, that the verbal content of the statement can be accurately established.

40. *Id.* at 578.

41. Professor McCormick says of the limiting instruction to the jury, . . . such an instruction, as seems to be generally agreed is a mere verbal ritual. The distinction is not one that most jurors would understand. If they could understand it, it seems doubtful they would attempt to follow

examined the question have concluded that prior statements have none of the hearsay dangers and should not be excluded as hearsay.⁴²

The unorthodox rule is not without problems. Such a rule was at one time thought to violate a criminal defendant's right to confrontation under the Sixth Amendment.⁴³ In *California v. Green*,⁴⁴ however, the U.S. Supreme Court dispelled that thought.⁴⁵ It has been suggested,⁴⁶ nevertheless, that the orthodox rule may violate the confrontation clause of the Missouri Constitution.⁴⁷ Fabrication of the prior statement is also possible. With this in mind, however, supporters of the unorthodox rule, have placed an additional requirement to safeguard against a fabricated prior statement. In his concurring opinion in *Granberry*, Judge Finch endorsed Professor McCormick's proposal that prior statements be substantively admissible only if there is adequate proof that the prior statement was actually made.⁴⁸

it. Trial judges seem to consider the instruction a futile gesture.

C. McCORMICK, EVIDENCE (Hornbook Series 1954).

This, however, is a makeweight argument. Even if juries do not understand the limiting instruction, no one has suggested that judges cannot comprehend and apply it. If substantive admissibility of prior statements should turn on this argument, different rules would apply dependent upon whether a judge or a jury were considering the evidence. If valid reasons preclude admissibility of prior inconsistent statements, the limiting instruction should be revised so as to be effective.

42. See, e.g., C. McCORMICK, EVIDENCE § 251 (2nd Ed. 1972).

43. *People v. Johnson*, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968) (testimony of a witness at a grand jury hearing without an opportunity for the defendant to cross-examine was not substantively admissible, because the California Supreme Court held the defendant's right to confrontation was violated).

44. 399 U.S. 149 (1970).

45. In *Green*, the Court said, "Viewed historically, then, there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *Id.* at 158. *Green* overruled *People v. Johnson*, 68 Cal.2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968).

46. *State v. Granberry*, 491 S.W.2d at 539 (Judge Bardgett dissenting).

47. Mo. CONST. art. I, § 18(a).

48. Professor McCormick would allow a prior statement by a witness to be used substantively if,

(1) the statement is proved to have been written or signed by the declarant, or to have been given by him as testimony in a judicial or official hearing, or the making of the statement is acknowledged by the declarant in his testimony in the present proceeding, and

(2) the party against whom the statement is offered is afforded an opportunity to cross-examine the declarant.

McCormick, *The Turncoat Witness*, 25 TEXAS L. REV. 573, 588 (1947).

Professor McCormick's rule was adopted in Wisconsin in *Gelhaar v. State*, 41 Wis.2d 230, 163 N.W.2d 609 (1969).

Judge Finch would also allow video-taped statements to be admitted as substantive evidence. 491 S.W.2d at 538. On the admissibility of video tape evidence, see Conrad, *Evidence—Admission of Video Tape*, 38 Mo. L. REV. 111 (1973).

Although Judge Finch endorsed Professor McCormick's rule, 491 S.W.2d at 537, he nevertheless would have reversed the conviction. Purely oral statements made by the witness, not coming under the McCormick rule, were admitted into evidence. 491 S.W.2d at 538. This constituted reversible error.

Granberry restates the Missouri rule regarding the substantive use of prior inconsistent statements. Nevertheless, the multiple opinions delivered may indicate a more analytical approach to the problem and herald possible change in the law. In view of the argument that prior statements should not be excluded by the hearsay rule and considering the additional indicia of their reliability, the unorthodox rule suggested by Professor McCormick⁴⁹ and endorsed by Judge Finch in *Granberry* seems to be the better reasoned rule.

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49. See note 48 *supra*.