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Recent Cases

CRIMINAL PROCEDURE—OBTAINING EXPERT SERVICES AT GOVERNMENT EXPENSE UNDER THE CRIMINAL JUSTICE ACT OF 1964

United States v. Schultz

Schultz, an indigent, was arrested for armed robbery in St. Louis on January 16, 1969, and tried for the offense in federal district court. Soon after arrest it was discovered that defendant had a prior history of mental instability. Upon government motion, he was examined to determine his competency to stand trial. Schultz was found competent, and shortly thereafter his court-appointed attorney applied to the court, pursuant to section 3006A of title 18 of the U.S. Code, for an independent psychiatric examination of the defendant for the purpose of establishing a possible defense of lack of criminal responsibility. The request was denied. At trial defendant's counsel presented a defense of lack of criminal responsibility using the testimony of the government doctors who had conducted the competency examination of defendant. Schultz was convicted.

The United States Court of Appeals for the Eighth Circuit reversed the conviction on the grounds that, due to the denial of his request for independent psychiatric examination, Schultz had not been afforded an adequate opportunity to provide a complete defense. The court held that, due to the circumstances surrounding the case, namely defendant's pattern of bizarre behavior, defendant's counsel had adequate grounds to believe that a defense of lack of criminal responsibility might be proper. This situation, coupled with the fact that the defendant could not afford to hire a psychiatrist, led the court to rule that Schultz' motion for expert services should have been granted.

The court's opinion did not spell out the reasons for the trial court's denial of the defendant's motion. Rather, the opinion concerned itself

1. 431 F.2d 907 (8th Cir. 1970).
2. The accused had been previously confined at a St. Louis mental hospital, diagnosed and dismissed from the Army because of an emotionally unstable personality, and, upon his apprehension for this and a previous crime, had stated he was "no good" and that he expected to be caught and killed by the police. Id. at 908.
3. The motion was made pursuant to 18 U.S.C. § 4244 (1970).
4. A competency examination of the defendant is usually of little or no assistance to defendant's counsel in establishing the defense of lack of criminal responsibility. 431 F.2d at 912. See also United States v. Theriault, 440 F.2d 713 (5th Cir. 1971); United States v. Taylor, 437 F.2d 371 (4th Cir. 1971); Wolcott v. United States, 407 F.2d 1149 (10th Cir. 1969); United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968); Swisher v. United States, 354 F.2d 472 (8th Cir. 1966); James v. Boles, 339 F.2d 431 (5th Cir. 1965); Winn v. United States, 270 F.2d 526 (4th Cir. 1965), cert. denied, 365 U.S. 848 (1961); Lee v. Alabama, 291 F. Supp. 921 (N.D. Ala. 1967).
primarily with establishing the standard to be used in future cases which involve a request for services under the Criminal Justice Act.

The defendant made his motion for expert services pursuant to section 2(e) of the Criminal Justice Act of 1964. In 1970—subsequent to the Schultz motion—this section was amended, but section (2)(e) of the Act was substantially the same as what is now section 3006A(e)(1) of title 18 of the U.S. Code. Section 3006A(e)(1) reads as follows:

Services other than counsel.—Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

The legislative history of subsection (e)(1) clearly indicates Congress' reason for enacting it. The Allen Committee, appointed by Attorney General Robert Kennedy to draft the proposed legislation, stressed the necessity of providing a needy defendant with the "tools essential to conduct a proper defense." President Kennedy indicated in a letter to House Speaker John McCormick that the purpose of the legislation was to "diminish the role which poverty plays in our Federal system of criminal justice . . ." Testimony before the Senate Committee on the Judiciary also emphasized that the purpose of providing expert services to defendants otherwise unable to procure them was to reduce the differences between rich and poor defendants in criminal prosecutions.

The Schultz majority emphasized that the purpose of subsection (e)(1) was to provide the defendant with an adequate defense by giving him the tools necessary to meet the government's case against him. The court also pointed out that the government is allowed to examine a defendant

5. Section 3006A(e) was changed by this recent amendment to allow an attorney to obtain §150 in expert services without prior request—although the expenditure is subject to later review. As amended, the section also provides that, unless exceptional circumstances exist, the maximum allowance for expert services will be §300. 18 U.S.C. § 3006A(e) (2)-(3) (1970).
8. The official title of the committee was The Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice.
12. 431 F.2d at 911.
who proposed to use an insanity defense. This rule was intended to put both parties on equal ground and to ascertain the truth about the defendant's mental capacity when he committed the offense. The court concluded that the purpose of subsection (e)(1) was to further this "equal ground" philosophy by providing the needy defendant with the same tools to prepare his defense as the government has available to meet the defense.

Having established the purpose of the Act, the Schultz court turned to the statutory requirements which must be satisfied by the defendant seeking services under subsection (e)(1). The court recognized that the defendant's right to these services is not absolute. Subsection (e)(1) delineates two criteria which must be satisfied in order for a defendant to become eligible for the services. First, he must establish that he is otherwise financially unable to procure the services which he seeks at government expense. It is not required that the defendant be destitute; and it is erroneous to say that only indigent defendants are entitled to these services. Even if the defendant is able to pay for part of his defense, such as his attorney's fee, he is not barred from obtaining expert services pursuant to subsection (e)(1) if he is, in fact, financially unable to obtain them. In testimony before the Senate Committee on the Judiciary it was pointed out that "financial inability" exists whenever any services necessary for an adequate defense cannot be obtained by the defendant. Although Schultz did not deal at any length with the "financial inability" requirement, it did recognize that it must be met by the defendant seeking services under subsection (e)(1).

The second criteria for eligibility under subsection (e)(1)—and the one to which the Schultz court devoted prime attention—is that the defendant must demonstrate that the services are "necessary" to an adequate defense. The court pointed out that it is impossible to arbitrarily determine what constitutes necessity in all circumstances. However, the court attempted to establish a framework in which the trial judge should operate when reviewing the necessity requirement. The court indicated that the statute does not authorize a "fishing expedition" for defendant and demands

13. Id. at 910. See also Alexander v. United States, 380 F.2d 33 (8th Cir. 1967); Pope v. United States, 372 F.2d 710 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968).
14. 431 F.2d at 909. See also United States v. Albright, 388 F.2d 719 (4th Cir. 1968); Alexander v. United States, 380 F.2d 33 (8th Cir. 1967); Pope v. United States, 372 F.2d 710 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968).
15. 431 F.2d at 911.
17. Hearings, supra note 11, at 10. For a discussion of the Senate hearings see Lewin, supra note 11, at 222.
20. 431 F.2d at 911.
that the defendant relate the requested services to a possible defense he might raise at trial. This position was reaffirmed in United States v. Maret, in which the Eighth Circuit ruled that subsection (e)(1) was never intended to authorize services for defendants who failed to show a legitimate need. However, Schultz stated that necessity is established when "underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge." Admittedly this standard of "reasonableness" is a rather nebulous concept, but two important points should be noted concerning it. First, the decision must be viewed as an attempt to establish a standard for judging the defendant's request for services which is lenient enough to make it a practical tool for the needy defendant. Second, the court indicated that services should be provided when exploration of a possible defense would benefit the defendant. It is not necessary that the defendant's entire defense rise or fall on whether or not he gets the expert services. In regard to defendant Schultz, the court ruled that, due to his medical history and bizarre activity during and subsequent to his arrest, it was unreasonable to deny defense counsel's request for a psychiatric examination intended to assist him in exploring the possibility of a defense of lack of criminal responsibility for his client.

The case law as to what establishes necessity under subsection (e)(1) is quite sparse, but several cases, both before and after Schultz, seem to support the reasonableness standard set out in Schultz. Both United States v. Taylor and United States v. Pope, support the Schultz court's assertion that the trial judge need only be satisfied that the services reasonably appear to be necessary to assist the defendant in preparing his defense. Neither case required the defendant to show his cause would be fatally prejudiced unless the services were provided. Judge Wisdom, concurring in United States v. Theriault, further supported the majority position in Schultz. He stated that trial judges should establish a less stringent standard in considering requests for subsection (e)(1) services, and that requests should be granted when they appear reasonably calculated to assist the defendant in preparing his defense.

In both Taylor and Theriault the fact situations were similar to Schultz; in both the defendants requested independent psychiatric examinations for the purpose of exploring the possibility of a defense of lack of criminal responsibility. By applying a reasonableness standard, both courts determined that the defendants had established necessity for the purposes of subsection (e)(1), although neither defendant displayed as many clear cut

21. Id. at 910, citing Christian v. United States, 398 F.2d 517 (10th Cir. 1968) (dictum).
23. 431 F.2d at 911.
25. 437 F.2d 371 (4th Cir. 1971).
27. 440 F.2d 713, 716 (5th Cir. 1971).
28. Id. at 716 (concurring opinion).
symptoms of mental instability as Schultz. Apparently a standard of reasonableness for judging "necessity" was applied, which is consistent with Schultz.

Further support for the Schultz court's position in regard to the necessity requirement can be found by examining the District Court of Nebraska's plan to implement the provisions of the Criminal Justice Act of 1964.29 The plan states that, in order to grant a request for subsection (e)(1) services, the judge need only be satisfied that the services appear reasonably necessary to assist counsel in exploring a possible defense.30 This reasonableness test is virtually identical to that proposed by the majority in the Schultz case. The Nebraska plan was approved by the Eighth Circuit Court of Appeals in May 1965.31

The court's position on what satisfies the necessity requirement of subsection (e)(1) leads to the conclusion that the trial court's discretion to grant or deny such a request for services is greatly narrowed. The court contrasted a trial court judge's discretion to grant a subsection (e)(1) motion with his discretion to grant a request to subpoena witnesses at government expense under rule 17(b) of the Federal Rules of Criminal Procedure.32 Both subsection (e)(1) and rule 17(b) require that the movant demonstrate necessity. Nevertheless, the court concluded that court discretion is far narrower under subsection (e)(1)33 than under rule 17(b).34 When

29. The Criminal Justice Act directed all district courts in the United States to devise plans for the implementation of the Act and submit such plans to their respective circuit courts for approval 18 U.S.C. § 3006A(a) (1970). The plan referred to here is the one devised by the District Court of Nebraska to comply with the Act's directive. PLAN FOR IMPLEMENTING THE CRIMINAL JUSTICE ACT OF 1964 IN THE DISTRICT OF NEBRASKA, in Kutak, supra note 7, at 743.
31. Id. at 780.
32. Fed. R. Crim. P. 17(b): Defendant Unable to Pay—The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.
33. 431 F.2d at 909-10. See also United States v. Tate, 419 F.2d 131 (6th Cir. 1969), indicating the appellate court would be more inclined to review a judge's determination on a subsection (e) request than on a 17(b) request.
34. The following cases indicate that a trial judge's ruling on a rule 17(b) motion will only be reviewed if there is clear abuse of discretion: Wagner v. United States, 416 F.2d 558 (9th Cir. 1969); Slawek v. United States, 413 F.2d 957 (6th Cir. 1969); Findley v. United States, 380 F.2d 752 (10th Cir. 1967); Terlikowski v. United States, 379 F.2d 501 (8th Cir.), cert. denied, 389 U.S. 1006 (1967); Thompson v. United States, 372 F.2d 826 (5th Cir. 1967); United States v. Zuiderveld, 316 F.2d 875 (7th Cir. 1963), cert. denied, 376 U.S. 916 (1964); Fegger v. United States, 302 F.2d 214 (8th Cir.), cert. denied, 371 U.S. 872 (1962); Murrell v. United States, 283 F.2d 589 (10th Cir. 1960), cert. denied, 366 U.S. 953 (1961); Reistffler v. United States, 258 F.2d 379 (8th Cir. 1958), cert. denied, 358 U.S. 927 (1959); Utsler v. Erickson, 315 F. Supp. 480 (D.S.D. 1970), aff'd, 440 F.2d 140 (8th Cir.), cert. denied, U.S.— (1971); United States v. McGaha, 205 F. Supp. 949 (E.D. Tenn. 1962).
dealing with rule 17(b) requests the trial judge determines if the defendant's case would be fatally prejudiced by a denial of the request.\textsuperscript{35} As has been seen \textit{Schultz} held that the trial judge may consider only whether the facts of the case reasonably suggest that the requested services would assist the defendant in preparing a possible defense.\textsuperscript{36}

The impact of the \textit{Schultz} decision on future cases in the federal courts will only be determined in time. For the present the reasonableness standard for determining the defendant's eligibility for subsection (e)(1) services is in force in the Eighth Circuit and must be applied by the district courts. But, despite the court's urging that the standard be applied leniently, an attorney seeking these services must still make a timely motion for them\textsuperscript{37} and demonstrate, by all the evidence available, that his client "needs" the expert services in order to present an adequate defense. If the attorney makes such a showing the motion should be granted to meet the purpose for which section 8006A(e) of the Criminal Justice Act was enacted.

\textit{William F. Arnet}

\textsuperscript{35} 431 F.2d at 910.

\textsuperscript{36} Since \textit{Schultz} involved an insanity defense in which the defendant bears the burden of producing evidence it is arguable that psychiatric experts should have been provided regardless of which test is employed to determine necessity. Therefore, the reasonableness test outlined in \textit{Schultz} will probably have its greatest impact in the area of requests for expert services other than for psychiatrists to support an insanity defense. This would include requests for investigative services, handwriting experts, etc., to be used by the defendant to rebut the state's case against him. \textit{See} Reistroffer v. United States, 258 F.2d 379 (8th Cir. 1958).

\textsuperscript{37} It should be noted that the defendant must request the services provided by the Criminal Justice Act. If the defendant fails to make a timely motion, the trial court will not be required to provide the services to the defendant and its failure to do so will not be considered reversible error by the appellate court. \textit{See} United States v. Patterson, 438 F.2d 328 (5th Cir. 1971); United States v. Meek, 388 F.2d 936 (7th Cir.), \textit{cert. denied}, 391 U.S. 951 (1968); Ray v. United States, 367 F.2d 258 (8th Cir. 1966), \textit{cert. denied}, 386 U.S. 913 (1967).

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JURY INSTRUCTIONS—A NEW LIMITATION ON CONVERSING VERDICT DIRECTORS

Watterson v. Portas

This action grew out of an intersectional automobile collision between the minor plaintiff and the defendant. The suit was brought by the minor for personal injuries, and was joined in by his father, who sought medical expenses. The jury returned a verdict for the defendant, but the trial court granted plaintiffs a new trial on the ground that it had erred in giving two instructions conversing defendant's negligence. Defendant appealed.

Each plaintiff submitted a separate verdict directing instruction for damages due to defendant's negligence. The two instructions differed only in the amount of damages sought. At defendant's request the court gave the following instruction from Missouri Approved Jury Instructions (hereinafter referred to as MAI): "Your verdict must be for defendant unless you believe that defendant's conduct was negligent [as submitted in Instruction (s) Number [___]]." This instruction was given twice—once referring to the son's verdict director and once referring to the father's verdict director. Defendant contended he was entitled to give one converse instruction for each plaintiff's verdict directing instruction, but the St. Louis Court of Appeals disagreed and affirmed the trial court's order granting plaintiffs a new trial.

The MAI rules for use of converse instructions have become increasingly difficult to interpret in the past few years. In light of this it would appear proper to review some recent decisions in this area to determine the impact of the present case.

The Missouri Supreme Court Committee on Jury Instructions inserted a committee note in MAI explaining the use of converse instructions. This note states:

When plaintiff submits two separate verdict directing instructions, defendant may converse each such submission with any of the approved converse instruction forms. Defendant may give only one converse for each verdict directing instruction.

The impression given upon reading this note is that a mechanical test of one converse for every one verdict director can be applied to the use of converse instructions. Such a mechanical test was applied in the case of Nugent v. Hamilton & Son, Inc., where the Missouri Supreme Court ruled that three converse instructions as opposed to one verdict director tended to mislead the jury by overemphasizing the defense and was therefore prejudicial error. In that case the plaintiff gave a single humanitarian

1. 466 S.W.2d 129 (St. L. Mo. App. 1971).
3. It should be noted, that the committee notes on use are not merely suggestions, but rather are mandatory requirements and failure to follow them will constitute error. Peak v. W. T. Grant Co., 409 S.W.2d 58 (Mo. En Banc 1966); Sweatman v. McClure, 416 S.W.2d 665 (K.C. Mo. App. 1967).
5. 417 S.W.2d 939 (Mo. 1967).
negligence verdict director. The defendant's first instruction conversed every element of the humanitarian doctrine, and the second and third repetitiously conversed individual elements of the same verdict director. The court reasoned that the motive behind the latter two instructions was to hammer home the defense in the minds of the jury and thereby gain the defendant an added advantage. The court then stated:

[Instruction] Numbers 8 and 9 clearly violate both the letter and the spirit of MAI No. 29.01 and the positive direction that ONLY ONE CONVERSE INSTRUCTION MAY BE GIVEN FOR EACH VERDICT DIRECTING INSTRUCTION. . . . [T]he giving of three converse instructions in response to one verdict directing instruction is a clear disregard of the mandate of MAI. The court clearly interpreted the committee note as intending to achieve a one-to-one ratio of verdict directors to converse instructions.

However, later cases began interpreting the committee note in a different way. In Murphy v. Land a minor sued for personal injuries, and his parents sued for medical expenses. To allow each plaintiff to submit his own damages, two verdict directors, both submitting humanitarian negligence, were required. (Notice that these facts are nearly identical to those presented in Watterson—two plaintiffs each submitting a separate verdict director against a single defendant.) Defendant gave two converse instructions—one conversing each element of humanitarian negligence, and the second conversing all negligence generally. The defendant claimed this was proper, since there were two verdict directors submitted against him. It should be noted that the two converse instructions did not specifically refer to either verdict director, as was the case in Watterson. Thus, in effect, defendant was directing both of the converse instructions toward each one of the verdict directing instructions, which obviously violates a mechanical test of one to one. The court cited Nugent and indicated that the second converse violated the spirit of the committee note and was error. However, the court did not rely solely on the mechanical test but, in addition, introduced a "theories of recovery" concept when it stated:

The [committee note] authorizing multiple converse instructions refers and applies only to the conversing of submissions of multiple theories of recovery. It has no application to this situation, in which the court submitted the same theory of recovery in behalf of different parties plaintiff.

In other words, a single defendant can only submit one converse instruction for each theory of recovery submitted, even though plaintiff has more than one verdict director.

The next case to add a new dimension to the converse instruction rules was Scheele v. American Bakeries Co. Here again there were two
plaintiffs, husband and wife. Each gave a separate verdict director submitting identical negligence while allowing the jury to consider the damages of each plaintiff independently. Two verdict directors were required since the jury might find damages as to one plaintiff but not as to the other. In this case, however, there were also two defendants, an employer and his employee. Agency was admitted. Each defendant submitted two instructions conversing negligence: one for each verdict director. This resulted in four converse instructions against two verdict directors. The court held this was a violation of the committee note as there were two converse instructions for each verdict director. In so holding, the court said that the committee note following MAI 33.01 does not mean every defendant is entitled to a separate converse of each plaintiff's verdict directing instruction. The result of this holding was to require the defendants to join together in conversing so there will be only one converse instruction for each verdict director regardless of the number of defendants. An inconsistency with Murphy here appears. Since the two plaintiffs submitted the same theory of recovery, Murphy would allow only one converse. But Scheele seemed to indicate that two might be allowed, one for each verdict director. Since there were four converse instructions the court reversed anyway, but a conflict in the two cases is a possibility. The court in Scheele cited the Murphy case and referred to the theories of recovery test; however, the holding of the court was based on a mechanical test applied as a whole to the lawsuit—one converse for each verdict director regardless of the number of defendants.

This brings us to Watterson v. Portas and its effect in combination with the two previous decisions. As stated, the facts are similar to those in Murphy, there being two plaintiffs, each giving an identical verdict directing instruction, and one defendant giving two instructions conversing negligence. However, the cases can be distinguished in that the Watterson defendant tied each of his converses to a specific verdict director. His first converse was directed specifically to the son's instruction, while the second converse was directed to the father's. The court could not say, as it did in Murphy, that both converses were directed toward each verdict director. Neither verdict director had more than one converse directed toward it, and thus the mechanical test was met. Nonetheless, the court found the use of two converse instructions to be reversible error, stating:

We hold that where co-plaintiffs' verdict-directing instructions submit the same theory of recovery and defendant desires to converse the same element or elements of each verdict director, the defendant is entitled to only one converse instruction . . . .

The court then suggested the following as being a proper instruction for this fact situation:

Your verdict must be for the defendant and against both John Doe

12. Id. at 363-64.
13. Id. at 364.
14. Id. at 363.
15. 466 S.W.2d 129, 132 (St. L. Mo. App. 1971).
and Mary Doe if you do not believe that defendant was negligent as submitted in Instruction Number 2.\textsuperscript{16}

The state of the law on the subject after Watterson appears to be that there may be only one converse instruction given for each theory of recovery presented (Murphy), regardless of the number of defendants (Scheele), or number of verdict directing instructions submitting said theory of recovery (Watterson).

The problems with this statement become apparent when new fact situations are presented. Suppose, for example, there is one plaintiff and two defendants, an employer and his employee, and agency is at issue. The plaintiff gives two verdict directing instructions—one against the employee alleging negligence, and one against the employer alleging the employee's negligence within the scope of his employment. The employee wants to converse negligence generally while the employer wants to converse negligence and scope of employment. MAI presents this fact situation in an illustration\textsuperscript{17} which suggests that both defendants join in a single instruction conversing negligence and that the defendant-employer then gives a separate instruction conversing scope of employment. However, in light of the recent decisions, the illustration appears to violate the committee note in that this additional converse by defendant-employer results in two converse instructions by the employer against the single verdict directing instruction directed toward him. Another problem is presented in that the Supreme Court of Missouri has recently indicated in Rickman v. Sauerwein\textsuperscript{18} that illustrative MAI instructions may properly be relied on as a guide. But if the employer relies on the illustration, as suggested by Rickman, he runs the risk of having his instruction invalidated for violating the mechanical test of Nugent.

On the other hand if employer gives one converse of both negligence and scope of employment, the employee cannot submit a second converse of negligence only. This would be error under Watterson as giving two converses for the negligence theory of recovery.

The employer's only alternative appears to be to omit a negligence converse and give only a converse of scope of employment. This would meet the mechanical test and the theories of recovery test, but this is at best misleading because a jury acting under these instructions could conceivably find the employer liable even if it found the employee not to be negligent—an obviously inconsistent decision.

The same type of problem could arise with two plaintiffs and only one defendant. The defendant may want to converse negligence as to the first plaintiff, but he may not believe the second plaintiff was injured as alleged and thus want to converse both negligence and damages as to that plaintiff. If he gives one negligence converse for both plaintiffs, he will

\textsuperscript{16} Id., citing Mo. Approved Instr. § 35.05 (5) (2d ed. 1969).
\textsuperscript{17} Mo. Approved Instr. § 35.04 (5-6) (2d ed. 1969).
\textsuperscript{18} 470 S.W.2d 487 (Mo. 1971). In this case the appellant contended that one of respondent's instructions contained a deviation from an applicable mandatory MAI instruction and was thus error. The court allowed the instruction saying there was no deviation since the instruction made reference to and followed an appropriate MAI illustration.
then violate the mechanical test if he gives a second converse instruction on damages to the second plaintiff's single verdict director. Likewise if he gives one negligence converse for the first plaintiff's verdict director and a separate converse to the second plaintiff's instruction for both negligence and damages, he violates the theory of recovery rule.

At this time there is no clear-cut solution to these problems. It would appear that the best course of action is to give only one converse instruction where there is only one verdict director regardless of the number of defendants. Also, where there are multiple verdict directors and each sets forth the same theory of recovery, no more than one converse should be given. This certainly limits the scope of converse instructions but it avoids the high risk of reversal inherent in the alternatives discussed. Until the uncertainty in the interpretation of the committee note is resolved, using only one converse presents a safe solution.

It is possible that the need for converse instructions has been overemphasized. Even the committee that authorized them has indicated that they may not be necessary.19 "If a plaintiff's verdict directing instruction tells the jury that plaintiff can recover only if the jury finds elements 1, 2, 3, and 4, it adds very little to tell the jury in another instruction that plaintiff cannot recover if element 2 is missing."20

At this time the risks involved in the use of converse instructions are substantial. The courts certainly have not as yet settled all the problems that are present. In contemplating their use, one should evaluate the importance of converse instructions and their worth to his particular case. If the facts of the case do not fit into one of the situations where converse instructions may be used safely, they should probably be avoided altogether.

JAMES R. BICKEL

20. Id.
PLEADING—PRE-TRIAL AMENDMENTS—
JUDICIAL DISCRETION TO DENY BECAUSE OF DELAY

Boling v. State Farm Mutual Automobile Insurance Co.1

Donald Boling, while driving home one evening, lost control of his car and ran off the shoulder of the road. The car turned over, and a passenger in the car, Paul Hunt, was injured. Hunt subsequently filed suit against Boling. A declaratory judgment action was filed in July, 1968, by Aetna Casualty & Surety Co. to have its policy issued to Boling declared excess coverage to a similar policy issued by State Farm to Paul Hunt, d/b/a Hunt Materials Co. State Farm had previously refused to defend the suit against Boling, or to indemnify him for any judgment which might be obtained by Hunt.2

Between November, 1968 and March, 1969, interrogatories were exchanged and depositions taken. The trial was set for April 21, 1969, and continued to September 8, 1969. On August 13, 1969, without notice, State Farm was granted leave to amend its pleading to include the defense that Hunt and Boling were fellow employees, which would exclude Boling from coverage under another clause in its policy. Plaintiff's motion to strike the amendment was sustained on August 29, 1969.3 The issue at trial was whether the named insured was Paul Hunt or Hunt Materials, Inc. The trial court found that the named insured was Hunt Materials and rendered judgment for the plaintiffs.

On appeal, State Farm contended, inter alia, that the denial of the pleading amendment before trial was an abuse of discretion resulting in a miscarriage of justice. The court ruled that since (1) the facts upon which the amendment was based were or should have been known by State Farm six months prior to trial, (2) State Farm delayed in seeking the amendment, and (3) the amendment would have required plaintiff to meet a new defense one month before trial was set, the trial court did not abuse its discretion in striking the amended answer presenting a new defense.4

Missouri has long recognized that the trial court is able to exercise a considerable degree of discretion in granting or denying a pleading amendment.5 Since as early as 1856 Missouri cases have stated that the appeal court must find that the trial court "palpably abused" its discretion before it will reverse a decision of the trial court.6 Soon after the adoption of the present rule 55.53 of the Missouri Rules of Civil Pro-

1. 466 S.W.2d 696 (Mo. 1971).
2. Id. at 697.
3. Id. at 699.
4. Id.
5. See Wright v. Groom, 246 Mo. 158, 163-67, 151 S.W. 465, 466-67 (1912) (good discussion of early Missouri pleading amendment law); Ensworth v. Barton, 67 Mo. 622 (1878); Martin v. Martin's Adm'r, 27 Mo. 227 (1858); Chauvin v. Lownes, 23 Mo. 223 (1856); Dallam v. Bowman, 16 Mo. 225 (1852).
procedure it was decided that discretion still remained with the trial court to deny or allow pleading amendments, and the words "palpably abused" are still used almost exclusively today to describe the limits of a trial court's discretionary power.

Boling raises this question: How broad is the trial court's discretionary power to deny an amendment to pleadings offered before trial on the grounds of undue delay? The language of the courts in Missouri prior to Boling seems to indicate that, when delay is present, the granting or denying of a pleading amendment is within the discretion of the trial court. However, the cases prior to Boling which mention delay as grounds for denial of amendment involved fact situations where the amendment was sought at a later point in the proceedings than Boling (where amendment was sought one month before trial). In those cases amendment was sought on the day of trial, during trial, at the close of the evidence, or after judgment. There are also a few cases which mention delay as a supporting factor in denying amendment before trial, but other grounds were controlling. There are other Missouri cases, prior to Boling, which

7. § 509.490, RSMo 1969; Mo. R. Civ. P. 55.53:
A party may amend his pleading as a matter of course at any time before a responsive pleading is filed and served, or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is filed. Otherwise a party may amend his pleading only by leave of court or by consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

9. See Parsons Constr. Co. v. Missouri Pub. Serv. Co., 425 S.W.2d 166 (Mo. 1968) (properly denied amendment in middle of trial when discovery not available and continuance not practical); Pender v. Foeste, 329 S.W.2d 656 (Mo. 1960) (properly denied amendment at close of evidence, because evidence did not raise matter sought to be pleaded); Dennis v. Sears, Roebuck & Co., 461 S.W.2d 325 (K.C. Mo. App. 1970) (properly allowed plaintiff at trial to amend to conform with the evidence); Montgomery v. Travelers Protective Assurance of America, 454 S.W.2d 17 (Spr. Mo. App. 1968) (properly allowed amendment on day of trial changing inception date of disability when defendant was aware of this fact).

10. Neville v. D'Oench, 327 Mo. 84, 84 S.W.2d 491 (1931); Moore v. Mansfield, 286 S.W. 553 (Mo. En Banc 1926); Scullin Steel Co. v. Mississippi Valley Iron Co., 308 Mo. 453, 273 S.W. 95 (En Banc 1925); Bradley v. Page, 46 S.W.2d 208 (Spr. Mo. App. 1922).

11. Pinkston v. Stone, 3 Mo. 69 (1832); Norvell v. Schupbach, 185 S.W.2d 323 (St. L. Mo. App. 1945); Bradley v. Page, 46 S.W.2d 208 (Spr. Mo. App. 1922).


13. Pender v. Foeste, 329 S.W.2d 656 (Mo. 1960); Moore v. Mansfield, 286 S.W. 553 (Mo. En Banc 1926); Joyce v. G rowney, 154 Mo. 253, 55 S.W. 466 (1900).


15. Scullin Steel Co. v. Mississippi Valley Iron Co., 308 Mo. 453, 273 S.W. 95 (En Banc 1925) (amendment was a counter-claim which defendant could bring suit upon in an independent action); Bader v. Beck, 173 S.W.2d 647 (Spr. Mo. App. 1939) (trial court could find the amendment introduced a new cause of action).
affirm the denial of a pleading amendment before trial where delay is not mentioned as a factor. Each of these cases involved a situation where the offered amendment introduced a new cause of action.\textsuperscript{16} Under the new code, even the fact that the amendment introduces a new cause of action is no longer valid grounds for denial,\textsuperscript{17} and it may be reversible error to deny a pleading amendment solely on this ground.\textsuperscript{18} In short, prior to Boling there was virtually no Missouri case law indicating that delay before trial, standing alone, provides sufficient grounds for denial of a motion to amend.

The wording of rule 15(a) of the Federal Rules of Civil Procedure is similar to Missouri rule 55.53.\textsuperscript{19} Therefore, a quick look at how the federal courts have treated amendment to pleadings may be helpful in determining when amendment before trial can be properly denied. In Foman v. Davis,\textsuperscript{20} the United States Supreme Court said:

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. [citation omitted] If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim upon the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."\textsuperscript{21}

The federal courts have denied pleading amendments before trial when the moving party delayed in seeking amendment,\textsuperscript{22} but generally even a long period of delay is not considered sufficient grounds to deny a pleading amendment before trial\textsuperscript{23} without a showing that the opposing party has been prejudiced by the delay.\textsuperscript{24} When a party seeks an amendment on

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  \item \textsuperscript{16} Personal Fin. Co. v. Schwartz, 170 S.W.2d 701 (St. L. Mo. App. 1943); Bader v. Beck, 173 S.W.2d 647 (Spr. Mo. App. 1939).
  \item \textsuperscript{17} White v. Sievers, 359 Mo. 145, 221 S.W.2d 118 (1949).
  \item \textsuperscript{18} Baily v. Williams, 326 S.W.2d 115 (Mo. 1959); White v. Sievers, 359 Mo. 145, 221 S.W.2d 118 (1949).
  \item \textsuperscript{19} Fed. R. Civ. P. 15(a) is not materially different from the Missouri rule. See rule quoted note 7 supra.
  \item \textsuperscript{20} 371 U.S. 178 (1962).
  \item \textsuperscript{21} Id. at 182.
  \item \textsuperscript{22} See, e.g., Frank Adam Elec. Co. v. Westinghouse Elec. & Mfg. Co., 146 F.2d 165 (8th Cir. 1945) (delay of 1 year, 5 months from date answer filed); Canister Co. v. National Can Corp., 6 F.R.D. 613 (D. Del. 1946) (amendment offered 2 years after suit commenced).
  \item \textsuperscript{23} See, e.g., Maschmeijer v. Ingram, 97 F. Supp. 639 (S.D.N.Y. 1951) (2 year delay); Hirshhorn v. Mine Safety Appliances Co., 101 F. Supp. 549 (W.D. Pa. 1951), aff'd, 195 F.2d 489 (3d Cir. 1952) (amendment granted 7 years, 9 months after original complaint filed).
\end{itemize}
the eve of trial and offers a new defense, the federal courts have found prejudicial delay because the opposing party is forced either to meet a new defense unprepared or seek a continuance.\textsuperscript{25} It will be remembered that in Boling the amendment was sought one month before trial;\textsuperscript{26} this may be contrasted with the federal cases, where amendments were denied when sought six days before trial,\textsuperscript{27} three days before trial,\textsuperscript{28} and on the very eve of trial.\textsuperscript{29} The federal courts have also used the failure to offer an explanation for delay as grounds for denial of pleading amendments.\textsuperscript{30} In Boling (although the court does not mention it in the opinion) the amending party apparently failed to give any explanation for its delay.\textsuperscript{31}

In light of the Missouri case law prior to Boling, and in light of the interpretation federal courts have given to rule 15 (a), the Boling decision may raise a few eyebrows, especially since Missouri rule 55.53 says amendments “shall be freely given when justice so requires . . . .” The trial court’s denial of leave to amend the petition one month before trial appears to approach a “palpable abuse” of discretion until the factors involved are more carefully considered.

A Missouri appellate decision seemingly contrary to Boling may be helpful in distinguishing the factors. In Esty v. Walker,\textsuperscript{32} which was brought to the court’s attention by the appellant in Boling,\textsuperscript{33} the Kansas City Court of Appeals ruled that it was reversible error to deny an amendment offered on the day of trial.\textsuperscript{34} Esty alleged that Walker had bought Esty’s sow, Black Lil II, and refused to pay for it. Defendant Walker at first denied buying the sow. On the day of the trial he asked for an amendment to specifically allege that, at the time of the purchase, he thought the sow was owned by a person who owed him money; that he bought the sow to regain something from his loan; and that he had credited the debtor’s account for the purchase price.\textsuperscript{35} The trial court denied the amendment because it would require a continuance. The appeal court reversed holding that the fact that the amendment would cause a continuance was not a sufficient reason for disallowing an amendment.\textsuperscript{36} In Esty, the court arguably could have found that undue delay constituted sufficient grounds for affirming

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26. 466 S.W.2d at 699.
29. Inland Container Corp. v. Atlantic Coast Line R.R., 266 F.2d 857 (5th Cir. 1959).
32. 253 S.W. 38 (K.C. Mo. App. 1923).
34. 253 S.W. at 39.
35. Id. at 38.
36. Id. at 39.
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the lower court's decision since the trial was set for a date almost two years after the event occurred; however, the factor of delay was not mentioned.\textsuperscript{37}

In Boling the court's language seems to indicate that the delay factor was crucial. However, the court found other circumstances present which also supported denial.\textsuperscript{38} By stating other reasons which support the denial, it would seem that, like the federal courts, the Missouri court is in effect holding that delay alone is not enough to support a denial of an amendment prior to trial.\textsuperscript{39} Another indication that the court is requiring something more than mere delay is its refusal to expressly overrule Esty. In Esty the appellate court said that the fact an amendment would merely result in a continuance was not sufficient grounds to deny the amendment. Instead of rejecting this holding, the court in Boling apparently found plaintiff would have been prejudiced to a greater extent than he would have been were he merely forced to seek a continuance. The court points to the fact that in Boling interrogatories were exchanged and depositions taken six months before the amendment was offered. This means the moving party knew or should have known his possible defenses six months before he offered the amendment.\textsuperscript{40} This may not have been the case in Esty, or at least the appellate court did not state facts that would indicate an analogous situation. In addition, the new pleading offered in Esty was a specific allegation of facts following a general denial;\textsuperscript{41} in Boling the amendment offered an entirely new defense.\textsuperscript{42} Thus, it would seem that the court in Boling is requiring that something more than mere delay be present before the trial court has sufficient discretion to deny an amendment offered before trial.

If the Boling court is requiring something more than mere delay, it may be very analogous to what the federal courts call prejudicial delay.\textsuperscript{43} The fact that the amendment in Boling offered a new defense one month before trial would probably have been sufficient for a finding of prejudicial delay in the federal courts.\textsuperscript{44} In Boling the court lists other facts which indicate amendment could have been prevented had the defendant been diligent. This also tends to indicate that the Missouri court found something like prejudicial delay, although the opinion never explicitly so states. If prejudicial delay is required to support the denial of an amendment before trial, then the moving party would be well advised to demonstrate, even though there is delay present in the filing of his motion, that the granting of the amendment at a late date will not unduly prejudice the opposing party. In addition to the possible prejudicial effects of permitting a new defense, the failure of the moving party in Boling to give any explanation for its delay in amending seems to have significantly contributed

\textsuperscript{37} Id. at 38.
\textsuperscript{38} 466 S.W.2d at 699.
\textsuperscript{39} See cases cited note 24 supra.
\textsuperscript{40} 466 S.W.2d at 699.
\textsuperscript{41} 253 S.W. at 39.
\textsuperscript{42} Id.
\textsuperscript{43} See text accompanying note 24 supra.
\textsuperscript{44} See text accompanying note 25 supra.
to its downfall both at trial and on appeal. The trial court’s conclusions of law contain the statement that “no reason of any kind was offered to support the filing of such answer raising a new defense at such late date.”46 It will be remembered that federal decisions have held that the failure to offer a justifiable excuse for delay is adequate ground for the denial of an amendment.46 In short, Boling can be read as saying that, when delay is present, it is within the discretion of the trial court to deny an amendment before trial if the moving party (1) fails to offer some explanation for his delay, and (2) does not demonstrate that the granting of his amendment will not unduly prejudice the opposing party.

The code of civil procedure aims at simplifying legal procedure, expediting trials and upper court reviews, and lessening litigation expenses, so that substantial justice will be done to the parties.47 The trial lawyer should keep the objectives of the rules in mind and not be blinded by the “liberal” language of the pleading amendment rule. The decision in Boling is consistent with the objectives of expediting trials and upper court reviews and lessening litigation expenses. Boling should warn the attorney that, if he delays in seeking a pleading amendment, he should be prepared to present an explanation for his delay and to show that the opposing party would not be prejudiced by the granting of the amendment. The trial court in Missouri has wide discretion in granting or denying pleading amendments which extends to pleading amendments offered before trial. An appellant must be able to show that the trial court “palpably abused” its discretion before its ruling will be disturbed on appeal. To do this requires that the record as to the offered amendment be clean when presented on appeal. The trial lawyer should have all his ammunition ready when he first seeks leave to file a pleading amendment before trial for, in light of the decision in Boling, it may be the last chance he gets to fire his guns.

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46. See text accompanying note 31 supra.
PROFESSIONAL RESPONSIBILITY—CONFLICTS OF INTEREST BETWEEN LEGAL AID LAWYERS

Borden v. Borden

On September 22, 1969, the plaintiff, Helen Borden, filed a complaint in the Washington, D.C. Court of General Sessions, Domestic Relations Branch, seeking a divorce from the defendant, George Borden, on grounds of adultery. An April 2, 1970, the plaintiff, proceeding in forma pauperis, and represented by an attorney from the Neighborhood Legal Services Program, moved for assignment of counsel to represent her defendant-husband. The trial court ordered David S. Raycroft, also an attorney employed by Neighborhood Legal Services, to represent the defendant. On June 7, 1970, both the plaintiff's attorney and Raycroft moved to set aside the court's order arguing that, since both the attorneys were employed by the same organization, the order created a conflict of interests.

The trial court denied the motion, relying on its earlier decision in McGee v. McGee. In McGee, the court held that attorneys employed by the same legal services organization could represent both sides of a lawsuit because there existed no conflict of interests. That court reasoned that, since the attorneys were not paid by their clients, but rather by the taxpayers, and because the attorneys were not associated for the practice of law in the sense that private members of a law firm were associated, no conflict of interests arose.

The attorneys appealed denial of their motion to the District of Columbia Court of Appeals. For purposes of argument, the court of appeals consolidated this appeal and two other similar cases for review.

The main issue was whether there was sufficient community of interests between the two legal aid attorneys so as to dilute their loyalty to their individual clients. The court, by granting the motion to disqualify, answered this question affirmatively. The court indicated its ruling was intended to be broad enough to include not only Neighborhood Legal Services but all organizations similarly engaged. The crux of the Borden

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2. This is the name of the O.E.O.-financed legal aid program in Washington, D.C.
3. D.C. Code Ann. § 16-918 (1967): In all uncontested divorce cases, and in any other divorce or annulment case where the court deems it necessary or proper, a disinterested attorney shall be assigned by the court to enter his appearance for the defendant and actively defend his cause.
5. Id. at 931.
7. 277 A.2d at 93.
8. Id. at 93 n.10, where the court states:
   This would of course include attorneys in the offices of not only NLSP, but the Public Defender, the Corporation Council, and the United States Attorney, as well as members of the bar who are "house counsel" for corporations engaged in the practice of "public interest" law.
court's decision to invoke disqualification lies in its analogy of the legal aid service to the private law firm. 9

The initial test in determining if a conflict of interests exists between an attorney and his client is whether there is an actual or possible dilution of the attorney's loyalty to the client. 10 It is well settled that, where the situation involves privately retained counsel, the same attorney may not represent both sides of the same suit. 11 It is obvious in this situation that an attorney cannot faithfully serve the interests of two clients without the danger of diluting his loyalty to at least one of them. 12

This disqualification rule has been extended by analogy to apply to private partnerships and law firms. Partners or members of the same law firm are also generally barred from representing both sides of the same suit. 13 In reaching this result, the courts have invoked the fiction that what one member of a firm knows about his client's case is vicariously imputed to his associates. 14 The effect of this fiction is to put the firm collectively in the same position as an individual attorney; the firm's undivided loyalty to two clients cannot be fully and faithfully served. The courts base this

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9. The court stated: "While the NLSP is not a law firm it is a group of attorneys practicing law together in an organizational structure much like a law firm." Id. at 91.


11. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105 (B) 1969 [hereinafter cited as ABA Code]:

A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105 (C).


No one can consciently contend that the same attorney may represent both the plaintiff and defendant in an adversary action . . . . Obviously the attorney cannot serve the opposed interests of his two clients fully and faithfully. The ancient rule against one's attempting to serve two masters interposes. Id. at 235, 135 A.2d at 254.

13. ABA Code DR 5-105 (D):

If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

Brasseaux v. Girouard, 214 So. 2d 401 (La. Ct. App. 1968), states:

Not only the individual attorney who previously represented the client is thus subject to disqualification. An entire law firm is subject to disqualification whenever grounds for disqualification exist against any of its partners or law associates. Id. at 406.

See also Maxie v. Cox, 357 F.2d 335 (10th Cir. 1966); Laskey Bros., Inc. v. Warner Bros. Pictures, 224 F.2d 824 (2d Cir. 1955), cert. denied, 350 U.S. 932 (1956); Weidlich v. Weidlich, 147 Conn. 160, 157 A.2d 910 (1960); Cox v. Barnes, 45 Neb. 172, 85 N.W. 394 (1895); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, Nos. 16, 33, 49, 50, 72, 103, 142, 185, 192, 271 (1967).

imputation of information to all members of a firm on the proposition that there is generally ready access to confidential information between the members of a law firm and even inadvertent disclosure is possible because of the close association members have with each other.

Another factor which is said to put members of a private firm within the same community of interests, creating the possibility of dilution of their loyalties to their clients, is the economic arrangement which prevails. Since there is normally a sharing of profits within the private law firm, each attorney has a distinct economic interest in any client that his associates engage to represent. In N.A.A.C.P. v. Button, the United States Supreme Court indicated, in dictum, that this element of economic interest was very significant. The court implied that the primary consideration in determining if there exists a possibility of a dilution of an attorney’s loyalty to his client is whether there exists any economic interest which might cause the attorney to subvert his loyalty to his client. The Code of Professional Responsibility also emphasizes the overriding importance of the presence of the element of economic interest in detecting the existence of a conflict of interests.

In addition, it is clear that the courts fear that if an attorney who has a possibility of diluting his loyalties to his client were not disqualified, the confidential relationship between the attorney and client might be destroyed. The courts feel that to allow an individual attorney or a firm to represent conflicting interests would cause the client to be apprehensive about making disclosures in confidence to his attorney for fear that they might be used against him, thus impairing the free flow of information.

Another reason for disqualification is that to allow such a practice would lead to a loss of public confidence in the bar and legal system.

15. See authorities cited note 14 supra.
16. See Kaplan, supra note 14 at 927. Some proponents of a more flexible law firm disqualification rule assert that modern day practice within a firm is less conducive to close association, lessening the possibility of exchange of information. See Comment, Unchanging Rules in Changing Times; The Canons of Ethics and Intra-Firm Conflicts of Interests, 73 Yale L.J. 1058 (1964). However, this argument has been rejected by the courts in favor of a more strict application of the rule. See, e.g., W. E. Bassett Co. v. H. G. Cook Co., 201 F. Supp. 821 (D. Conn.), aff’d per curiam, 302 F.2d 268 (2d Cir. 1962).
17. “A partnership is an association of two or more persons to carry on as co-owners a business for profit.” Uniform Partnership Act § 6.
19. “[N]o monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself . . . .” Id. at 443. See also Comment, Ethical Problems Raised By the Neighborhood Law Office, 41 Notre Dame Law. 961, 970 (1966).
20. ABA Code, EC 5-22 (in part):
   Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client . . . .
This rationale is particularly persuasive in a Borden-type situation, since the court is upholding a member of the bar's attempt to self-regulate his professional conduct. By upholding disqualification in these circumstances, the court adds re-enforcement to the confidence of the client and public in the honesty and integrity of the attorney and the bar in general. There is less image enforcement when the court is forced to disqualify the attorney over his own objections. Also, the primary objective of the legal aid program is to provide the indigent client with the same quality of legal representation that more fortunate persons receive by privately retaining a lawyer. By insuring an equal quality of legal services to the poor, by holding the attorneys to the same ethical standards, the court is, in effect, helping to fulfill that objective and at the same time enhance the image of the legal profession.

However, the Borden decision creates some problems. The court's analogy between legal aid attorneys and private law partners is not entirely accurate. Missing in the legal aid situation is an economic community of interests between the lawyers. A government-financed organization of lawyers does not receive any compensation directly from its clients; therefore, a legal aid attorney has no economic interest in a client represented by a colleague in the same office. The Borden court was willing to admit this basic difference. Nevertheless, the court maintained that the fiction of imputed information between attorneys within the same firm applies to the legal aid services organization.

It can be argued persuasively, however, that a further distinction should be made. The attorneys in a legal aid service are not associated for the practice of law in the same sense that private law firm members are associated. Legal aid operates solely as a non-profit, public benefit organization. The Borden court does not discuss this distinction. The court asserted that the sole impelling reason for invoking disqualification is the mere existence of an association between the legal aid attorneys, thus raising the possibility of information leaks. This raises several problems. The court failed to define, in more concrete terms, what amount of association provides sufficient grounds for disqualification, thus affording little aid to the practicing attorney whose duty it is to identify when these influences operate to constitute a conflict of interests. Therefore, the question be-

24. See Comment, supra note 19, at 961, 968.
25. 277 A.2d at 91.
27. For a complete analysis of the public service functions of legal aid services, including the O.E.O. Program, see Cahn, The War on Poverty: A Civilian Perspective, 73 YALE L.J. 1317 (1964); Johnson, An Analysis of the OEO Legal Services Program, 38 MISS. L.J. 419 (1967); Shriver, Legal Services and the War on Poverty, 14 CATHOLIC L.N. 92 (1968).
28. ABA Code, EC 5-21 (in part): A lawyer subjected to outside influences should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.
comes how far the courts are willing to go in using mere association with
other practicing attorneys as the basis for disqualification. In Borden, the
court held that the existence of a formal organizational structure was
sufficient to create a possibility of a conflict of interests. But the court's
language infers that sufficient association may exist even outside of the
context of firm or formal organization.29 The inference seems to be that
association between two lawyers not working for the same firm might be
sufficient to disqualify one of them. This could possibly extend disqualifi-
cation to a vast new area of situations, including social, economic, and
political association outside the legal firm. In fact, the ABA Committee
on Professional Ethics has already suggested this.30

Finally, although there may be a sufficient possibility of an information
leak within a legal aid organization to justify disqualification in order to
maintain the attorney-client relationship and public confidence in the bar,
there may be a countervailing justification for not disqualifying the attor-
ney. This ruling may damage the overall effectiveness of the legal aid pro-
gram. Since the primary purpose of legal aid is to provide otherwise unattain-
able legal services for the poor, disqualification of an entire legal services
program in a given community from representing opposing parties to an
action may eliminate the availability of the legal services for one of the
parties, making it more difficult for the poor to obtain legal counsel in
civil matters.31

In the final analysis, the Borden court's analogy between a legal aid
association and a private firm is questionable. This is unfortunate. It is
also unfortunate that the court indicated that it's reasoning could extend
by implication to disqualify an attorney, who feels no sense of conflict
of interests as to his indigent client, merely because of the theoretical possi-
bility of a conflict of interests arising from his affiliation with a legal aid
association.

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29. The court stated:
Lawyers who practice their profession side-by-side, literally and figuratively,
are subject to subtle influences that may well affect their professional
judgment and loyalty to their clients . . . . 277 A.2d at 91.


31. The Borden court indicated that it was not persuaded that "the supply
of attorneys available in the District of Columbia has been exhausted so that
NLSP attorneys must now represent both sides of a divorce action." 277 A.2d at
Mo. 1963); Pye & Garraty, The Involvement of the Bar in the War Against Pov-
erty, 41 notre dame law. 860, 872 (1966).
TAXATION—NO AMORTIZATION FOR VALUE OF A LIFE ESTATE RECEIVED IN SETTLEMENT OF DISPUTED GIFT

Early v. Commissioner

In 1957 Rose Van Wert transferred to taxpayer, her accountant, and taxpayer's wife 70,000 shares of stock in the El Paso Natural Gas Company. Van Wert's 1957 federal gift tax return failed to disclose this transfer. Van Wert died in 1958 leaving a will in which taxpayer and another were named as executors. Upon Van Wert's death several intestate heirs contested the will and taxpayers' retention of the El Paso shares. In 1959 taxpayers surrendered the stock to the estate in return for a joint life interest in 32 percent of the income from a trust established in the will. The El Paso stock comprised 53 percent of the corpus of this trust. In 1960 taxpayer, acting as co-executor of the estate, filed an amendment to Van Wert's 1957 gift tax returns and paid a gift tax. Later taxpayer negotiated a compromise whereby the value of the gift was measured by the actuarial value of the joint life interest he and his wife received.

From 1961 to 1965 taxpayer reported as income payments received from the trust and claimed annual deductions for amortization of the cost basis of the life estate. The Commissioner disallowed these deductions on the ground that the joint life interest was acquired by "gift, bequest, or inheritance" and the deductions were therefore prohibited by section 273 of the Internal Revenue Code. The Tax Court held in a split decision that section 273 was not applicable and allowed the deduction. The United States Court of Appeals for the Fifth Circuit reversed the tax court decision and held that section 273 did apply.

The general rule is that the purchaser of a life interest may amortize over his life expectancy the cost basis of that interest. But section 273 of the Code denies this benefit to the holders of a life or other terminable interest acquired by "gift, bequest, or inheritance." As a consequence,

1. 445 F.2d 166 (5th Cir.), cert. denied, 92 S.Ct. 100 (1971).
2. Id. at 168.
4. 445 F.2d at 172.
5. See Fry v. Commissioner, 283 F.2d 869 (6th Cir. 1960); Bell v. Harrison, 212 F.2d 253 (7th Cir. 1954); Elmer J. Keitel, 15 B.T.A. 903 (1929). The statutory basis for this treatment is § 212 of the Internal Revenue Code of 1954. This section provides:

   In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

   (1) for the production or the collection of income;
   (2) for the management, conservation, or maintenance of property held for the production of income; or
   (3) in connection with the determination, collection, or refund of any tax.


   Amounts paid under the laws of a State, a Territory, the District of Columbia, a possession of the United States, or a foreign country as income to the holder of a life or terminable interest acquired by gift, be-
the problem under section 273 (and in Early) becomes one of classification: Did the taxpayer acquire his interest in the trust by purchase, or by gift? In reaching the decision in Early, the court of appeals relied on the decision of the United States Supreme Court in Lyeth v. Hoey. In Lyeth the United States sought to tax as income amounts received by a taxpayer in compromise of a will contest proceeding brought by him as an heir. The Code then, as now, excluded from income amounts received by "gift, bequest, devise, or inheritance." The Supreme Court ruled for the taxpayer; what he

quest, or inheritance shall not be reduced or diminished by any deduction for shrinkage (by whatever name called) in the value of such interest due to the lapse of time.

7. Before Early, Bell v. Harrison, 212 F.2d 253 (7th Cir. 1954), and Fry v. Commissioner, 283 F.2d 669 (6th Cir. 1960), were the principal cases interpreting § 273. Both Bell and Fry held that a remainderman, after purchasing a life estate to which he is to succeed, can amortize the cost of the life interest. The courts in both cases disregarded the "merger" argument and strictly maintained the separation of the life estates and the remainders. To this effect Bell quoted Elmer J. Keitel, 15 B.T.A. 903, 907 (1929):

The fact that petitioner owned a remainder interest in part of what he so purchased does not effect the question here presented... What he purchased, and that is all that concerns us, was a terminable estate and the termination of the estate will end all that he purchased.

Fry followed the reasoning in Peter Risko, 26 T.C. 485 (1956).

Another important situation in which the life estate has been held "purchased" and amortizable is the surviving spouse's election to take under the will in a community property state. See Gist v. United States, 428 F.2d 1118 (9th Cir. 1970); Commissioner v. Siegel, 250 F.2d 389 (9th Cir. 1957); Christ's Estate, 54 T.C. 493 (1970); and the text accompanying notes 31-41 infra.


A principal area where a life estate is regarded as being derived from a "gift, bequest, or inheritance" is the receipt of such an estate by the heirs or legatees under a compromise of a will contest. Harte v. United States, 252 F.2d 259 (2d Cir. 1958). In this situation the heir will have to pay income tax on the life estate payments if none of the contested estate's corpus came to him in the settlement, and no deduction for shrinkage will be allowed. Cf. Irwin v. Gavit, 268 U.S. 161 (1925); Codman v. Miles, 28 F.2d 823 (4th Cir. 1928), cert. denied, 278 U.S. 654 (1929); E. L. E. Brenneman, 10 B.T.A. 544 (1928); Helene R. McConnell, 3 B.T.A. 260 (1926).


9. Int. Rev. Code of 1954, § 102 (a) (b) (2) provides:
   (a) General Rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.
   (b) Income.—Subsection (a) shall not exclude from gross income...
received from the estate was held to have come to him as an "heir." The Court said:

Save as heir he had no standing . . . .

[1]f in any appropriate proceeding . . . he had recovered a judgment for a part of the estate, that part would have been acquired by inheritance within the meaning of the act. We think that the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement . . . is too formal to be sound, as it disregards the substance of the statutory exemption [by disregarding] the heirship which underlay the compromise . . . .

The ruling in *Lyeth* has been extended to include "legatees" as well as heirs, and even to those contesting as assignees. It has not included such situations as an heir receiving added payments from the will after threatening to break it, or the voluntary rearrangement by the legatees of the bequeathed property. A further limitation on *Lyeth*, generally accepted but difficult to draw from the opinion itself, is that imposed by *White v. Thomas*, which stated that the *Lyeth* doctrine applies only when what is received by compromise is part of the very thing claimed.

The Tax Court concluded that the interest was purchased, and allowed the taxpayer to amortize the cost basis of his life estate. Instrumental in reaching this conclusion was the court's view that the 1957 stock transfer validly established in taxpayer a "bona fide claim of title" in the stock, and the right to transfer it. The court admitted a "but for" connection between

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(2) where the gift, bequest, devise, or inheritance is of income from property, the amount of such income.

11. *Id.* at 195-96.
15. Commissioner v. Vease’s Estate, 314 F.2d 79 (9th Cir. 1963). *Lyeth* has likewise not been extended to include a charitable organization which had been a legatee under the testator’s first will but was excluded by the testator’s second will and received property in settlement of a contest on the second. *Bach v. McGinnes*, 333 F.2d 979 (3d Cir. 1964).
16. 116 F.2d 147 (5th Cir. 1940).
17. 52 T.C. at 566. The court applied Code § 167(a)(2), which allows for a depreciation deduction for the "exhaustion, wear, and tear" of property "held for the production of income." *See generally Manufacturers Hanover Trust Co. v. Commissioner*, 431 F.2d 664 (2d Cir. 1970); *Kiro, Inc. v. Commissioner*, 51 T.C. 155 (1968). The normal procedure followed in allowing amortization of a life estate’s cost basis is to apply § 212 (quoted note 5 *supra*), which is cited in § 265(1) to prohibit double deductions for interest from tax-exempt income. Judge Tannenwald’s dissent to the Tax Court’s opinion in *Early* urged that there is a distinction to be made between depreciation and amortization; as a result, he would apply § 212. *See 52 T.C. at 570-71* (dissenting opinion of Tannenwald, J.), *See also Gulf Television Corp. v. Commissioner*, 52 T.C. 1038 (1969); *Tribune Publishing Co.*, 52 T.C. 717 (1969).
the 1957 transfer and the acquisition of the joint life interest in the trust but refused to apply the Lyeth rationale. The court also invoked the White limitation on Lyeth by stating that the life estate that was received was not a part of the very thing claimed (i.e., the stock).19

The Tax Court decision elicited sharply opposed views from six dissenting judges.20 The principal dissent came from Judge Tannenwald, who emphasized the fact that the majority opinion allowed only for a "bona fide claim" of ownership, not absolute title, and consequently failed to assert that there was a completed gift in 1957.21 He then used a broadened view of Lyeth (the actual holding applied to "heirs" only) to urge that taxpayer's "bona fide claim," short of absolute title, did not dispel his "donor standing."22 To hold otherwise, Tannenwald pointed out, would render Lyeth useless "since every settlement within the ambit of the case necessarily involves a bona fide claim."23

On appeal the Court of Appeals for the Fifth Circuit ruled for the Commissioner on the ground that taxpayer acquired his interest in 1959, not by purchase but by gift.24 The court stated that when a settlement is achieved, there is a relinquishment of the right to litigate the dispute. This relinquishment prevents a final determination on the issue of whether taxpayer had acquired full title to the stock from the 1957 gift.25 The necessity of the settlement itself seemed to be regarded as presumptive of the existence of a substantial dispute. The court stated:

[S]o long as the settlement is in substantial measure to resolve an underlying and disputed claim based upon a purported gift, bequest, inheritance, or the like, what is received in settlement must be characterized, for tax purposes, by the nature of the underlying and disputed claim resolved.26

This reasoning gave full thrust to Judge Tannenwald's broadened view of Lyeth since it was applied to the 1959 transaction even though that exchange resembled a sale of property.27 The Lyeth rationale governs unless the peculiar circumstances of the transaction "fairly exclude the possibility

19. 52 T.C. at 555.
20. Id. at 567-72.
21. Id. at 568 (dissenting opinion of Tannenwald, J.).
22. Id. at 569 (dissenting opinion of Tannenwald, J.). See generally Helvering v. Safe Deposit & Trust Co., 316 U.S. 56 (1942) (dictum); Bailey v. Ratterree, 144 F. Supp. 449 (N.D.N.Y. 1956); Estate of Milner, 6 T.C. 874 (1946).
23. 52 T.C. at 569 (dissenting opinion of Tannenwald, J.). It seems obvious that Tannenwald sought to extend Lyeth, since he distinguished those cases cited by the majority which dealt with unquestionable rights in the parties involved to take certain property by "bequest or inheritance." See Gist v. United States, 423 F.2d 1118 (9th Cir. 1970); Commissioner v. Matheson, 82 F.2d 980 (5th Cir. 1936); Sherman Ewing, 40 B.T.A. 912 (1939). Such situations require only a narrow reading of Lyeth since there are no "underlying disputes" concerning the status of the party to be settled.
24. 445 F.2d at 170.
25. Id.
26. Id.
27. Id. at 169.
that the exchange is in reality a compromise of an underlying and controverted claim."

One of taxpayer's secondary contentions on appeal was that, since a gift tax had been paid on the 1957 transfer, the Commissioner was now estopped from denying that the gift was completed. This argument was rebutted in a manner consistent with the principal holding in the case. The court willingly accepted the "validity" of the 1957 gift, but found that it was disputed and then settled by compromise. Consequently the validity of the gift remained questionable and was the basis of the "underlying claim" which required settlement.

Section 273 prohibits any tax deduction for shrinkage of life or other terminable interests received by gift, bequest, or inheritance, and, as mentioned earlier, the main issue in determining the possible applicability of the section is whether the interest is acquired by purchase, or by gift, bequest or inheritance. An area of significant controversy in this respect is that presented by a surviving spouse's election to take under the will in a community property state as opposed to the same election in a non-community property state. If the surviving spouse is regarded as having a vested interest in the property of the estate, then his election to take a life interest under the will and release his interest in the community property amounts to a purchase, since he disposes of his vested interest in exchange. The cost basis of that life interest can then be amortized for income tax purposes. But if the surviving spouse has no such vested interest, his election may be viewed as merely being a settlement of an "underlying claim" as per Lyeth and Early. This would make section 273 applicable and prevent amortization. Gist v. United States held that in a community property state, the surviving spouse has a vested interest in one half of the estate's property, and the election to take a life estate under the will, relinquishing the right to dispose of the community interest, amounts to a purchase, with the relinquishment of a vested right as consideration. Gist allowed a widow

28. Id. at 170. The court refuted the broad proposition that the "nature of the transaction" (i.e., gift or bequest) by which the party acquired ownership of the property used to purchase the life estate must govern the tax treatment of the life estate. This broad view would not recognize a life estate as being purchased if it was acquired with property received by gift, bequest, or inheritance. The court more narrowly reasoned that when the life estate is received through settlement, the "nature of the underlying claim" that is being settled must be applied to the tax treatment of the life interest. This means that the "nature of the transaction" through which the party asserts ownership will govern when that very transaction is disputed, as in Early, but otherwise need not. Id. at 170 n. 6.

29. Congress has shown no intent to integrate the income, estate, and gift tax provisions in the Int. Rev. Code of 1954. See generally Lockard v. Commissioner, 166 F.2d 409 (1st Cir. 1948) (dictum); Commissioner v. Beck's Estate, 129 F.2d 243 (2d Cir. 1942).


32. 428 F.2d 1118 (9th Cir. 1970), noted in 3 U. San Fran. L.R. 946 (1969); see note 7 supra.
to amortize the cost basis of her life interest. It remains undecided in non-community property states whether the surviving spouse has such a vested interest that can be used to purchase a testamentary life estate. But in most situations the surviving spouse is hard-pressed to prove that an inchoate right amounts to a vested interest.\textsuperscript{33} This is best evidenced by complications arising out of potential or disputed divorce proceedings.\textsuperscript{34}

Missouri seems to share in the uncertainty of the other non-community property states since the surviving spouse's statutory rights to take against the will provide a valuable, but not a vested, interest.\textsuperscript{35} There is no Missouri case precedent dealing with this issue in terms of section 273;\textsuperscript{36} but an analogous issue, that of the "non-terminable interest" under the surviving spouse's allowance, has produced some persuasive language.\textsuperscript{37} In holding that Missouri law provides for such a non-terminable interest, the courts have labelled the surviving spouse's interest as absolute, unequivocal, and vested.\textsuperscript{38} However, Justice Blackmun, as a member of the United States Court of Appeals for the Eighth Circuit, dissented from this reasoning on the basis of specific statutory language. This language has since been altered to expressly provide for a vested interest in the area of the surviving spouse's allowance.\textsuperscript{39} Since no Missouri case has attempted to extend the "surviving spouse's allowance" reasoning to include the inchoate right of the surviving spouse in the property of the estate, it would appear that in Missouri the spouse's interest is received by "inheritance" which places it directly within the ambit of section 273 when the surviving spouse elects to take under the will. However, another view has been proposed.\textsuperscript{40} It reasons that since the surviving spouse's statutory share in Missouri is inchoate


\textsuperscript{36} But cf. Brant v. Brant, 40 Mo. 266 (1867); see Annot., 2 A.L.R.2d 607 (1948).

\textsuperscript{37} See § 474.260, RSMo 1969.


\textsuperscript{39} Justice Blackmun's dissent in Bookwalter v. Phelps, 325 F.2d 186, 189 (8th Cir. 1963), involved the opening sentence of § 474.300, RSMo 1959, which provided (in part): "When a surviving spouse dies . . . no allowance shall be made under section 474.260 for his maintenance for any period after such death . . . ." This purportedly indicated a "terminable" interest since it was extinguished upon the death of the surviving spouse. This gap was closed in § 474.300, RSMo 1969, which provides (in part):

Death of a surviving spouse within the one year period for which the allowance is provided under section 474.260, for his maintenance, shall not affect the right of the surviving spouse to the allowance or the ordering thereof by the court. . . .

\textsuperscript{40} Magruder, supra note 35, at 603.
before the testator's death, and since it is legally inaccurate to say that it vests upon his death, it should logically follow that he has a "valuable" interest which he can use as consideration to "purchase" a life estate in part of the deceased spouse's estate.\(^{41}\)

To conclude, the court in Early, following the rationale of Lyeth v. Hoey, applied section 273 and thereby refused to allow the amortization of an asserted cost basis of a life estate received in settlement of a disputed gift. Clearly Early will fortify the no-deduction effect of section 273 even if narrowly applied, but the main thrust of the decision may be in its application to certain unresolved issues such as the status of the interest of a surviving spouse in the property of the decedent spouse in a non-community property state.

JAMES E. CROWE, JR.

**WATER LAW—GROUNDWATER RIGHTS IN MISSOURI— A NEED FOR CLARIFICATION**

*Higday v. Nickolaus\(^1\)*

Appellants are the owners of some 6000 acres of land which overlies an alluvial water basin. Their lands are used for agricultural purposes. According to appellants' petition, the high level subterranean water supplies the moisture needs of their crops, whatever the vagaries of the weather, resulting in excellent yields. Appellants use the underground water for personal consumption, for their livestock, and in the near future will require it for the surface irrigation of their crops.

Respondent, the city of Columbia, Missouri, is a municipality of 60,000 inhabitants threatened by a diminishing water supply. Respondent has acquired well sites in the area of appellants' lands, and is constructing shallow water wells. The city plans to extract the groundwater and transport it to its corporate boundaries some miles away for the purpose of sale.

On the basis of these allegations the appellants sought a declaratory judgment to the effect that "defendant City is without right to extract the percolating waters for sale away from the premises or for other use not related with any beneficial ownership or enjoyment of the land from which they are taken . . . ."\(^2\) Further relief in the form of an injunction against the city was also requested.

On the city's motion, the trial court dismissed appellants' claim without hearing evidence. The judgment of dismissal was entered on a determination that appellants' petition failed to plead either a justiciable controversy or any claim upon which relief could be granted. On appeal, the Kansas

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41. *Id.*

1. 469 S.W.2d 859 (K.C. Mo. App. 1971).
2. *Id.* at 862. A city owning land is subject to the same rules of law concerning rights in percolating water as a private individual in the same circumstances. Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1937).
City Court of Appeals held that appellants' petition stated a justiciable controversy, and outlined a "new" doctrine to be used in determining rights to percolating groundwater in Missouri. The court remanded the case for a hearing on the merits.

Basically, groundwaters are classified as either underground streams or percolating groundwaters. An underground stream has water "that passes through or under the surface in a definite channel or in a direction that is reasonably ascertainable." The law of underground streams is governed by the riparian doctrine as it pertains to surface watercourses. Percolating groundwater includes all water which oozes, seeps, filters and otherwise circulates through the interstices of the subsurface strata without a definite channel, or in a course that is not discoverable from surface indications without excavation for that purpose. All underground water is presumed to be percolating, and the party seeking to prove an underground stream must produce evidence rebutting this resumption.

The law of percolating groundwater is not governed by the riparian doctrine applicable to surface watercourses because, unlike surface watercourses and underground streams, the presence and extent of percolating groundwater is difficult if not impossible to ascertain. Through the years, no cases have been decided on this issue, and no legal doctrine has been developed to resolve it.

3. 469 S.W.2d at 870.
4. The groundwater doctrine proposed by the court in Higday may or may not be new to Missouri, as will later be explained in this note.
5. 469 S.W.2d at 865. See Jones v. Oz-Ark-Val Poultry Co., 228 Ark. 76, 306 S.W.2d 111 (1957); Sycamore Coal Co. v. Stanley, 292 Ky. 163, 166 S.W.2d 293 (1942); Nourse v. Andrews, 200 Ky. 467, 255 S.W. 84 (1923); Finley v. Teeter Stone, Inc., 251 Md. 428, 248 A.2d 106 (1968); Jones v. Home Bldg. & Loan Ass'n, 252 N.C. 626, 114 S.E.2d 638 (1960); Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1937); 93 C.J.S. Waters § 86 (1955).
6. 469 S.W.2d at 865. See Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. 780 (1896); Jones v. Home Bldg. & Loan Ass'n, 252 N.C. 626, 114 S.E.2d 638 (1960); Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1937); 93 C.J.S. Waters § 86 (1955).
8. 469 S.W.2d at 865. See United Fuel Gas Co. v. Sawyers, 259 S.W.2d 466 (Ky. 1953); Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1937); Clinchfield Coal Corp. v. Compton, 148 Va. 497, 139 S.E. 908 (1927); 93 C.J.S. Waters § 86 (1955).
five basic doctrines have evolved to determine rights to percolating groundwater. These doctrines are: (1) the English absolute ownership rule; (2) the reasonable use doctrine; (3) the correlative rights doctrine; (4) the California "correlative rights" or common-pool doctrine; and (5) the prior appropriation doctrine.

The English absolute ownership rule was the first doctrine developed in the area of percolating groundwater rights. The rule was enunciated in Acton v. Blundell and in its most basic form indicates that the owner of the soil owns all that lies beneath the surface and has the absolute right to take the water found beneath land and make any use of it he pleases—regardless of the effect the use may have on an adjoining landowner through whose land the water, in its natural course, would filtrate, percolate or flow. Under the English rule, damage or inconvenience to an adjoining landowner are damnum absque injuria and will not constitute the basis of a cause of action. The rule is normally interpreted to hold a percolating groundwater user liable only for waste or malicious injury to his neighbor.

With the advent of the 20th century, knowledge of groundwater expanded and information on the presence and extent of groundwater became more readily available. Thus, one of the important reasons for the strict English or common law approach disappeared. Consequently, many

Law Doctrines, in Water Resources and the Law 51, 74 (1958). Knowledge of percolating water has greatly expanded in recent years through developments in the field of hydrology. 469 S.W.2d at 869.

12. The term "groundwater" hereinafter shall be used in reference only to percolating water and will not include reference to underground streams, which are beyond the scope of this note.

13. The English absolute ownership rule is sometimes referred to as the "common law doctrine."


In a few states the rule is strictly applied so that the water user faces no liability, despite the waste or malicious involved. See Frazier v. Brown, 120 Ohio St. 294 (1861); Chatfield v. Wilson, 28 Vt. 49 (1855); Huber v. Merkel, 117 Wis. 355, 94 N.W. 354 (1903); Mayor of Bradford v. Pickles, [1895] A.C. 597.

18. See authorities cited note 11 supra. The common law courts were reluctant to hold a man liable for interference with groundwater when he had no way of discovering the presence or extent of such water.
American jurisdictions deviated from the English standard and developed their own doctrines for dealing with percolating groundwater.

The reasonable use groundwater doctrine\(^\text{19}\) is the rule now applied to percolating groundwater in several American jurisdictions. The rule of reasonable use limits a landowner's use of groundwater to beneficial purposes having some reasonable relationship to the use of his overlying land, without regard to the effect on the supply of water to adjacent landowners.\(^\text{20}\)

The reasonable use groundwater doctrine differs from the English absolute ownership rule in that it exposes the water user to liability for damage to an adjacent landowner caused by his use of water, but only if that use is not a beneficial use relating to the overlying land.\(^\text{21}\)

A second deviation from the English rule is the correlative rights doctrine. The rule of correlative rights requires the use of the percolating groundwater on one's own land to be reasonable in relation to the rights and needs of neighboring landowners.\(^\text{22}\) It is analogous to the riparian doctrine of reasonable use as applied to watercourses, and involves a multifactor balancing approach.\(^\text{23}\)

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\(^{19}\) This doctrine is not to be confused with the reasonable use groundwater doctrine.


\(^{21}\) Some authorities indicate that there may be no difference between the reasonable use groundwater doctrine and the English absolute ownership rule modified to allow liability for waste or malicious injury. See Zeigler, *supra* note 11, at 78. However, a difference may arise in the practical effect of the application of the two theories in that a court might require a greater showing of waste or malice as a basis for relief under the English absolute ownership rule than it would require under the reasonable use groundwater doctrine.


\(^{23}\) Ellis, *supra* note 20; Note, *Water and Watercourses—Subterranean Percolating Waters—Action to Enjoin Use Which Impairs Adjoining Landowner's Use*, 11 Vand. L. Rev. 945 (1958). The reasonable use watercourse doctrine determines if the water use is reasonable by considering the purpose of the use, destination of the use, and whether a riparian has received a fair share, as in those situations where there are two riparians on opposite sides of the stream. 1 R. CLARK, *WATERS AND WATER RIGHTS* § 51.3 (1967); 5 R. POWELL, *REAL PROPERTY* 362-67 (1970). *See also* RESTATEMENT OF TORTS §§ 852-54 (1939). This is analogous to the correlative rights doctrine as applied to groundwater. Such a change in terminology to describe similar theories leads to much confusion.
In California the correlative rights doctrine has taken a different tack. The California "correlative rights" doctrine considers percolating groundwater a common pool to be shared by overlying landowners in proportion to their land holdings. Under this doctrine the rights of all landowners over a common saturated area are co-equal or correlative and one cannot use more than his proportional share, even for the benefit of his own land, where the rights of others are injured by such use.\(^{24}\)

Some Western States (in areas where water is at a premium) have developed a prior appropriation doctrine that is applicable to percolating groundwater. The rule gives priority to the landowner who is the first to put the groundwater to use. Under this rule, the first landowner to take the water will be the last to be cut off in time of shortage.\(^{25}\)

Prior to *Higday v. Nickolaus* only one Missouri case had dealt with percolating groundwater law. That case, *Springfield Waterworks Co. v. Jenkins*,\(^{26}\) has been interpreted as applying the English absolute ownership rule to groundwater in Missouri.\(^{27}\) Under the English rule, in the absence of waste or malice, no damage caused by a landowner's use of percolating groundwater, however great, is actionable at law or in equity.\(^{28}\)

In *Higday* the court of appeals rejected the English absolute ownership rule\(^{29}\) and in its place outlined a "new" groundwater doctrine for Missouri.


\(^{25}\) This groundwater doctrine is analogous to the prior appropriation watercourse doctrine which gives a right to continued use of the water so long as the water is diverted and applied to an economically beneficial use, and the use is continuous. For a general discussion of the prior appropriation doctrine see Clark, *Ground Water Legislation in the Light of Experience in the Western States*, 22 Mont. L. Rev. 42 (1960). See also R. Clark, *Waters and Water Rights* §§ 51.5-51.9 (1967); 5 R. Powell, *Real Property* 439-92 (1970).

\(^{26}\) 62 Mo. App. 74 (St. L. Ct. App. 1895).

\(^{27}\) 469 S.W.2d at 859. A close look at the language in *Springfield Waterworks* indicates that the court might have been applying the reasonable use groundwater doctrine and not the English absolute ownership rule. In outlining the applicable groundwater doctrine, the court quoted the Latin phrase sic utere tuo (62 Mo. App. at 89), which means: so use your own property as not to injure another's. Ziegler, *supra* note 11, at 77. This phrase is often cited as a catch-phrase to characterize the reasonable use approach. Id. The court in *Springfield Waterworks* also referred to the landowner's right to use the water for any "useful purpose," which is analogous to the beneficial use test of the reasonable use groundwater doctrine. 62 Mo. App. at 89. The Kansas City Court of Appeals in *Higday* recognized that the *Springfield Waterworks* case might not have adopted the English absolute ownership rule, but rather, may have applied the reasonable use groundwater doctrine. 469 S.W.2d at 868.

\(^{28}\) 469 S.W.2d at 869. See text accompanying note 16 *supra*.

\(^{29}\) 469 S.W.2d at 869. The court recognized that one of the reasons for the strict English absolute ownership rule was the lack of knowledge concerning groundwater. See text accompanying note 18 *supra*. The *Higday* court determined that extensive scientific analysis of the presence and quantity of underground water led the city to purchase well sites adjacent to appellants' lands, and stated that: "[T]he City cannot be permitted to escape liability by appeals to a doctrine which assumes that the very information the City has acted upon was not available to it." 469 S.W.2d at 869.
The court purported to be adopting the rule of "reasonable use" and cited several cases applying the reasonable use doctrine. However, in effect, it appears that the court did not apply the reasonable use doctrine, but rather the doctrine of correlative rights. In outlining the new Missouri doctrine the court said:

Recently . . . the Supreme Court of Missouri applied the rule of reasonable use to determine the rights of riparian owners . . . . We believe the same rule should apply to subterranean percolating waters.

In applying the doctrine, the court discussed allocating water "most equitably and beneficially among competing users." This language indicates a comparison and balancing of competing uses, a process characteristic of the correlative rights doctrine, and not of the reasonable use doctrine as applied to percolating groundwater. The latter does not consider the effect of the water use on adjacent landowners.

The court outlined factors to be considered in this balancing process:

What is a reasonable use must depend to a great extent upon many factors, such as the persons involved, their relative positions, the nature of their uses, the climatic conditions, and all facts and circumstances pertinent to the issues.

Such a multi-factor balancing test is the approach of the correlative rights doctrine. In other words, the court adopted the test which has previously been associated with the correlative rights doctrine while designating that test the reasonable use doctrine. The court apparently failed to realize that the reasonable use water course doctrine is analogous to the percolating groundwater doctrine of correlative rights and not to the reasonable use doctrine as applied to percolating groundwater.

This confusion of terminology by the court in *Higday v. Nicholas* has left the law of percolating groundwater in Missouri in a state of confusion. At present, it is unclear from the court's opinion whether the doc-

30. 469 S.W.2d at 869.
33. 469 S.W.2d at 869.
34. Id. (emphasis added).
35. See text accompanying note 22 supra.
36. See text accompanying note 20 supra.
37. 469 S.W.2d at 866.
38. See note 23 supra.
39. See note 23 supra.
40. Besides using confusing language, the court, as illustrative of its new groundwater doctrine, cited cases which applied three different rules of ground-
trine of reasonable use or the correlative rights doctrine is the groundwater rule adopted for Missouri.\textsuperscript{41} A clarification of which doctrine has been adopted is crucial, as the choice of doctrine may change the outcome in a given case.

Given a fact situation like that in \textit{Higday}, the reasonable use and correlative rights groundwater doctrines require different showings by the plaintiff in order to establish a cause of action. There are two questions which are pertinent to both theories in determining whether a cause of action has accrued. First, what damages must an adjoining landowner show to establish a cause of action? Second, is injury required before a cause of action accrues?

Under the reasonable use groundwater doctrine the act of transporting water away from the land for sale is actionable \textit{per se}, since it fails to meet the test of a beneficial use of water connected with the use and enjoyment of land;\textsuperscript{42} the cause of action accrues to the adjoining landowner at the time the non-beneficial water use begins. This is true despite the absence of any interference with the neighbor's use of water, since the offending landowner's open, notorious, continuous, and adverse use of the water for the period of the statute of limitations\textsuperscript{43} will give him a legal right to continue the use.\textsuperscript{44}

Contrary to the practice under the reasonable use groundwater doctrine (the doctrine the \textit{Higday} court said they were adopting), the Kansas City Court of Appeals indicated that a showing of actual damages, \textit{i.e.},

water law. For cases cited by the \textit{Higday} court which apply the reasonable use groundwater doctrine see Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 178 (1953); Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1937); and Forbell v. City of New York, 164 N.Y. 522, 58 N.E. 644 (1900). The court cited Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663 (1902), a California "correlative rights" case, as an example of the application of the reasonable use groundwater doctrine. And the court cited a correlative rights groundwater case, Jones v. Oz-Ark-Val Poultry Co., 228 Ark. 76, 305 S.W.2d 111 (1957), as illustrating an application of the reasonable use groundwater doctrine.

\textsuperscript{41} If the doctrine of reasonable use is the groundwater doctrine actually proposed by the court, the case of \textit{Higday v. Nicholaus} may not have changed the law of groundwater in Missouri. See note 27 supra, where it is argued that Springfield Waterworks Co. v. Jenkins, 62 Mo. App. 74 (St. L. Ct. App. 1895), applied the reasonable use groundwater doctrine and not the English absolute ownership rule. However, if the \textit{Higday} court adopted the correlative rights groundwater doctrine, but inadvertently mislabeled its rule the "reasonable use" groundwater doctrine, then there is a "new" Missouri doctrine. It is submitted that the latter is more likely.


\textsuperscript{43} See § 516.010, RSMo 1969.

\textsuperscript{44} See Indian Ref. Co. v. Ambraw River Drainage Dist., 1 F. Supp. 937 (E.D. Ill. 1932); Kennedy v. Niles Water Supply Co., 173 Mich. 474, 139 N.W. 241 (1918); and Swan v. Munch, 65 Minn. 500, 67 N.W. 1022 (1896). In \textit{Kennedy} the court used laches as a basis for refusing to issue an order enjoining a water company's injurious withdrawals of water. (The landowners had failed to assert their claim for 30 years.)
interference with the plaintiff's use of water, is required before a cause
of action accrues. In this regard the Higday court said that the adjoining
landowners would have "no basis for complaint if the City of Columbia's
withdrawals of groundwater for municipal purposes . . . do not interfere
with the plaintiffs' beneficial use of water."45 The requirement of a showing
of actual damages has in some cases been required as a prerequisite to
relief under the correlative rights groundwater doctrine and the analogous
reasonable use watercourse doctrine.46 But a required showing of actual
damage is inconsistent with the reasonable use groundwater doctrine,
which considers any sale of water off the land actionable per se.

The scope of judicial inquiry under the correlative rights doctrine
would differ greatly from that under the reasonable use groundwater
doctrine in a fact situation like that presented in Higday. In applying the
reasonable use groundwater doctrine a court would look at the city's sale
of water off the land and determine that the use was unreasonable per se
regardless of whether the city's use of water was in fact a beneficial use. At
this point the inquiry would end, leaving only the remedy to be fashioned
by the trial court.47 However, in applying the correlative rights ground-
water doctrine the court must first determine if the landowner's use of the

45. 469 S.W.2d at 870. See the cases cited in note 42 supra which indicate that
under the reasonable use groundwater doctrine the act of transporting water away
from the land for sale is actionable per se, and a showing of actual injury is not
required to establish a cause of action. See also Koch v. Wick, 87 So. 2d 47 (Fla.
1956), where the court granted relief to adjacent landowners under the correlative
rights groundwater doctrine, even though actual damages could not yet be ascer-
tained. The city's sale of water off the land might be actionable per se under the
correlative rights groundwater doctrine as well. A majority of jurisdictions, in
applying the reasonable use watercourse doctrine (analogous to the correlative
rights groundwater doctrine), consider a use of water on non-riparian land (land
not part of or adjacent to the bed of the watercourse from which the water was
taken) unreasonable as a matter of law. See e.g., Pabst v. Finmand, 211 P. 11 (Cal.
1922). But the courts have found two ways of circumventing this rule. In Stratton
v. Mt. Hermon Boys' School, 216 Mass. 83, 103 N.E. 87 (1913), the court deter-
mined that the diversion of water to non-riparian land was not actionable in the
absence of injury, and in City of Canton v. Shock, 65 Ohio St. 19, 160 N.E. 600
(1902), the court held that a city situated on a watercourse was in its corporate
capacity a riparian proprietor, so that a use of water in the city was not a non-
riparian use.

46. See RESTATEMENT OF TORTS § 862, comment b at 389-90 (1939). Re-
statement (Second) of Torts § 855, comment b at 127 (Tent. Draft No. 17, 1971)
provides (in part):

[A] non-riparian use by a riparian proprietor may be reasonable and en-
titled to protection against interference by an unreasonable use. This rule
follows the policy that riparian law should be utilitarian and should en-
courage the maximum beneficial use of water, and it places no artificial
restrictions on the riparian proprietor to whom the privilege of water use
belongs. . . . Those courts which enforce the rule that a non-riparian use
is per se unreasonable and not entitled to protection, and that it subjects
the riparian user to liability for impairment of future uses, cling to the
notion that riparian rights serve land, not people.

See also note 45 supra.

47. See Forbell v. City of New York, 164 N.Y. 522, 58 N.E. 644 (1900), Canada
v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1937).
water is unreasonable with respect to neighboring uses. Only after this determination has been made does the question of an appropriate remedy arise.

Besides this fundamental question as to which groundwater law doctrine was adopted by the court in Higday, the opinion leaves many gaps and unanswered questions in its outline of a “uniform legal standard” applicable to percolating groundwater rights in Missouri. First, what injury must a landowner show to state an accrual of a cause of action? Second, if the court adopted the reasonable use watercourse doctrine for groundwater, to what extent are collateral watercourse principles applicable, i.e., use preferences, prescriptive easements, etc.? Third, does a water user have a property interest in the water itself, or only in his right to use the water? Fourth, what relief is available to an adjacent landowner who is damaged by the owner’s use of water? Finally, what factors are to be considered by the courts in determining whether a landowner’s use of water is unreasonable?

48. An “objective reasonableness” test is that proposed to determine the liability of a water user under the correlative rights groundwater doctrine. McArtor v. Graylyn Crest III Swim Club, Inc., 187 A.2d 417, 419 (Del. 1963).
49. 469 S.W.2d at 869.
51. For a general discussion of prescriptive water rights see 93 C.J.S. Waters §§ 197-66 (1956).
52. For a general discussion of the nature of property rights in groundwater see 1 R. CLARK, WATER AND WATER RIGHTS § 59 (1967). Rights in water are usually regarded as “usufructuary,” or rights in the use of the water and not in the corpus of the water.
53. The question of remedy raised in Higday is whether an adjacent landowner is entitled to any relief for injury caused by the city’s use of water off the land. If on remand the trial court determines that the city’s use of water is unreasonable, the adjacent landowners will be entitled to relief, either in the form of an injunction or damages. The Higday court recognized that an injunction against the city is unlikely because of the great public interest in an adequate municipal water supply. 469 S.W.2d at 871. And even if the trial court were to enjoin the city’s use of water, the city could subsequently condemn the appellants’ lands. See Forbell v. City of New York, 169 N.Y. 522, 58 N.E. 644 (1900). The practical result of an injunction followed by condemnation would be the same as an award of damages by the court. For a general discussion of a city’s powers of condemnation see City of Los Angeles v. Pomeroy, 57 P. 585 (Cal. 1899); Johnson, Condemnation of Water Rights, 46 Tex. L. Rev. 1054 (1968); Lawson, Eminent Domain—Compensation for Condemnation of an Easement, 26 Mo. L. Rev. 367 (1961).
54. The only way that an injunction might achieve a final result other than a payment of a money settlement to appellants would be if the court granted an injunction limiting the city’s use of water to less than the natural recharge rate of the groundwater. Such an injunction might protect appellants from injury by raising the level of the cones of depression caused by the pumping from wells, and it might be economically wiser for the city to limit its use of water in this way than to go to the expense of a subsequent condemnation of appellants’ lands.
55. See, as examples, the factors proposed by Restatement of Torts §§ 862-63 (1959), and Restatement (Second) of Torts § 850B (Tent. Draft. No. 17, 1971).
Unfortunately, another appellate court decision will be necessary to correct the confusion and fill in the gaps left by the Kansas City Court of Appeals opinion in Higday v. Nicholas. In the interim, trial courts are left on their own to determine how the Higday description of groundwater rights is to be applied to a given case. The wise application of Higday would result in the adoption of the correlative rights groundwater doctrine, along the lines discussed in the Restatement of Torts. This doctrine is

55. The last Missouri case concerning groundwater law (Springfield Waterworks) was decided in 1895.

56. The Restatement of Torts applies a balancing test to both watercourses and groundwater which is the same or very similar to the test of the correlative rights groundwater doctrine. See Restatement of Torts §§ 852-54, 861-63 (1939). The Restatement says "[a] possessor's use of subterranean water is unreasonable... unless the utility of the use outweighs the gravity of the harm." Id. § 861. The Restatement considers the following factors as important in determining the utility of the landowner's use of water: (1) the social value which the law attaches to the primary purposes for which the use is made; (2) the suitability of the use to the character of the locality; (3) the impracticability of preventing or avoiding the harm; and (4) the place where the water is used. Id. § 862.

The utility of the use is then balanced against the gravity of the harm to adjacent landowners by considering the following factors: (1) the extent of the harm involved; (2) the social value which the law attaches to the particular type of water use which is interfered with; (3) the suitability of such use to the character of the locality; and (4) the burden on the possessor harmed of avoiding the harm. Id. § 863. The comments recognize that since most uses of groundwater are well suited to the character of the locality and there is ordinarily no way in which an adjacent landowner can avoid the harm caused by another's use, the gravity of the harm in most cases depends on the extent of the harm involved and upon the social value of the particular type of water use which is interfered with. Id. § 863, comment a at 590-91.

After applying the Restatement formula to a fact situation like that presented in Higday, a court might determine that, first, in balancing the utility of the use against the gravity of the harm, generally the extent of the harm to the adjacent landowner at this point in time is undetermined, so that this factor can not weigh against the reasonableness of the city's use. The court in Higday would not recognize accrual of a cause of action on "harm" to an adjacent landowner without a showing of actual damages. 469 S.W.2d at 870. And the Restatement says: "It is obvious that the greater the degree of interference the greater the gravity of the harm involved, and that a use must be of great utility to justify a degree of interference which amounts to substantial destruction of another's use." Id. § 854, comment c at 370.

Second, a court might determine that the "social value" of the domestic use of water by 60,000 persons in the city of Columbia outweighs the social value of the domestic and agricultural use of the water by a small number of adjacent landowners. The contrary argument would be that the city's use of water is not a domestic use, but an industrial use, outweighed by the adjacent landowner's use of the water for domestic and agricultural purposes. The general rule is that municipal uses do not have the preference for domestic use that is granted to the individual. Montrose Canal Co. v. Lousthenizer Ditch Co., 23 Colo. 283, 48 P. 552 (1896). But some state statutes have enlarged the meaning of domestic use to include municipalities. See Cal. Water Code § 1460 (1970) and S.D. Code § 61.0102 (1939). In a general discussion of the social value of water uses the Restatement of Torts says:

How much social value a use of water for a particular, beneficial purpose has depends upon the importance and necessity of using water for such purposes in the community, and must be determined in the light of community standards of relative value prevailing at the time and place as well
preferrable to the reasonable use groundwater doctrine. First, it balances the reasonableness of the landowner’s use of water against the rights and needs of his neighbors, rather than merely focusing upon the issue of whether the individual landowner’s use constitutes a “beneficial use” to him, as under the reasonable use groundwater doctrine. Second, the correlative rights groundwater doctrine determines water rights on the basis of all the facts and circumstances of a given case, rather than basing a decision on a single factor, i.e., whether the water is used on the land from which it is taken. Third, the application of the correlative rights groundwater doctrine is most likely to reach a fair and equitable determination of water rights among conflicting users, due to its multi-factor balancing

as in the light of traditional standards of relative value among the various purposes for which water is used. Restatement of Torts § 853, comment e at 364-65 (1939).

Third, The sale of water by the city off the land is not a use suitable to the character and locality of the rural, agricultural land. On the other hand, the court might determine that the city’s land, having no real value except for the water rights, could be put to use only by a sale of water off the land. The adjacent landowner’s use of water for domestic and irrigation purposes is a use well suited to the character and locality of the rural land.

Fourth, As the Higday court indicated, it might be possible for the city to use the water in such a way as to avoid injury to adjacent landowners. The court in Higday said:

Under the facts pleaded, the water table could be maintained at its normal level and damage to plaintiffs avoided if the City were to limit its withdrawals to such quantity as would not exceed the daily recharge rate of 10.5 million gallons. 469 S.W.2d at 870.

However, the court might determine that it would be impracticable or impossible for the city to gain the advantages sought from its investment without causing injury to adjacent landowners by withdrawing water at the planned rate. The Restatement of Torts says:

[W]hen the proprietor would have to abandon his use, or incur expense or hardships of such magnitude that it would be substantially less profitable to make the use, in order materially to reduce the harm to others, that harm is not practically avoidable and the use has utility from the standpoint of this factor.

Restatement of Torts § 853, comment g at 367 (1939).

Fifth, The use of water off the land is a factor striking against the reasonableness of the city’s use. However, the Restatement of Torts does not foreclose a determination that a use of water off the land from which it was taken is reasonable. Id. §§ 861-63. In balancing these factors, the overriding public interest in water for municipalities might tip the scales in favor of the city, resulting in a determination that the city’s water use is reasonable. This result is the opposite of that reached by an application of the correlative use groundwater doctrine, i.e., that the use of water by the city is actionable per se. The court might reach a middle ground between these extremes and determine that the city’s planned use of the water was reasonable, but limit the quantity of water used by the city to avoid injury to adjacent landowners.

The Restatement (Second) of Torts outlines a fact situation almost identical to that in Higday. There, due to the use of water by the city, the water table under an adjacent landowner’s land is lowered below the depth of the well that supplies his farmstead with domestically used water, and below the driven well, powered by a windmill, that supplies his dairy herd with water. The Restatement would hold the city liable to the adjacent landowners for actual damages. Restatement (Second) of Torts § 858 A, Ill. 1 at 159 (Tent. Draft No. 17, 1971).
approach. Finally, the doctrine of correlative rights will achieve the most preferrable use of water from a social and economic point of view, because (1) it considers the social value of the use as a factor in determining the reasonableness of the use, and (2) it reaches an economically acceptable determination, because off-site municipal and industrial uses are more likely to be allowed than under the reasonable use groundwater doctrine.57

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57. Municipal and industrial uses of water are likely to be uses off the land or for a purpose unconnected with the overlying land, and thus unreasonable per se under the reasonable use groundwater doctrine. The correlative rights groundwater doctrine presents some short comings as well as advantages. The doctrine holds a landowner liable for an unreasonable use of water that causes injury to his neighbor, even though the landowner had no way of knowing whether his use would cause injury, and no way of preventing such injury. Scientific data on groundwater is available to a municipality, but a private landowner cannot afford the expensive hydrological tests necessary to insure that his use of water will not expose him to liability. The private landowner has a choice. He can use the water and risk liability, or make no use of the water. In reality, this choice is no choice at all.