Recent Cases

CONSTITUTIONAL LAW—THE EFFECT OF TENURE ON PUBLIC SCHOOL TEACHERS’ SUBSTANTIVE CONSTITUTIONAL AND PROCEDURAL DUE PROCESS RIGHTS

Perry v. Sindermann

Board of Regents v. Roth

I. INTRODUCTION

In recent years there has been some debate in the academic community concerning the extent of constitutional protections afforded public school teachers. Much of this debate has focused on the following questions: (1) What substantive and procedural rights does the fourteenth amendment guarantee to public school teachers; and (2) what effect, if any, does tenure have on these rights? Two recent United States Supreme Court decisions provide some answers to these questions. This note will consider the effect of these two decisions on the substantive and procedural rights of both tenured and nontenured teachers.

II. THE SINDERMANN CASE

Robert Sindermann had been employed for 10 years in the Texas state college system and had spent the last 4 years at Odessa Junior College under a series of 1-year contracts. Although there was no formal tenure system at the junior college, there existed a possible basis upon which de facto tenure could be found. During his last contractual term, Sindermann became involved in public disagreements with the college’s Board of Regents. The

1. 408 U.S. 593 (1972).
2. 408 U.S. 564 (1972).
3. Tenure is a job security device. It has been defined as assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is shown in a fair hearing following established procedures of due process. Tenure is granted after a probationary period of anywhere from two to seven years.
5. The alleged de facto tenure is based on the following language in the junior college’s official faculty guide:

   Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.

   408 U.S. at 600. Some reliance is also placed on guidelines issued by the Co-ordinating Board of the Texas College and University System that indicate that one who has been employed as a teacher in the state college and university system for seven or more years has some form of job tenure. See Co-ordinating Board of the Texas College and University System, Policy Paper 1 (1967).
Board voted not to renew his contract when it expired in May, 1969. The Board never informed Sindermann of the reasons why his contract was not renewed, nor did it grant him the opportunity for a hearing at which he could challenge the nonrenewal. Sindermann filed suit in federal district court, alleging (1) that the nonrenewal infringed upon his constitutionally protected right to free speech because it was based upon his public criticism of the Board, and (2) that the Board's failure to grant him an opportunity for a hearing on his nonrenewal violated procedural due process as guaranteed by the fourteenth amendment.

The district court granted summary judgment for the Board of Regents. The Court of Appeals for the Fifth Circuit reversed, holding that despite Sindermann's lack of tenure, nonrenewal violated his substantive rights if the Board's decision was based upon Sindermann's exercise of first amendment rights.\(^6\) The court of appeals also held that if Sindermann could show an "expectancy" of reemployment, failure to grant him a hearing would violate procedural due process.\(^7\) The court remanded both issues for trial.

On certiorari to the United States Supreme Court, the court of appeals's decision on the substantive issue was affirmed, but the Court expressly disagreed with the appellate court's decision that procedural due process protects the mere "expectancy" of reemployment.\(^8\) Nevertheless, the Court stated that Sindermann should have had an opportunity to prove the existence of de facto tenure, and remanded the case to the district court for a determination of that issue. As explained in part V of this note, the existence of de facto tenure would provide Sindermann with a property right in continued employment, which is protected by procedural due process.

III. The Roth Case

Roth involved a teacher without tenure who was hired by the University of Wisconsin-Oshkosh for one academic year. Wisconsin provides procedural protection against nonrenewal for inadequate cause only under its tenure statute, which also provides that a teacher can obtain tenure only after a four-year probationary period.\(^9\) Roth was informed, without being provided with an explanation or an opportunity for a hearing, that he would not be rehired for the following year. He then filed suit in the Federal District Court for the Western District of Wisconsin alleging: (1) That the reason for his nonrenewal was his public criticism of the university, and thus the university's action infringed upon his first amendment rights; and (2) that the university's failure to provide reasons for nonrenewal and an opportunity for a hearing on its decision violated his constitutionally protected right to procedural due process.

The district court stayed proceedings on the first amendment issue and

\(^6\) Sindermann v. Perry, 430 F.2d 989, 942-43 (5th Cir. 1970), aff'd, 408 U.S. 593 (1972).

\(^7\) Id. at 943-44.

\(^8\) 408 U.S. at 603.

\(^9\) Wis. STAT. § 37.31 (1) (1967), as amended, Wis. STAT. § 37.31 (1) (Supp. 1973). According to this statute, a teacher with tenure cannot be discharged except upon written charges and pursuant to certain procedures. No protection is provided a teacher without tenure whose contract is simply not renewed.

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granted summary judgment for Roth on the procedural issue, ordering the university to provide a hearing and a statement of reasons for non-renewal. The Court of Appeals for the Seventh Circuit affirmed, and the Supreme Court granted certiorari. The Court reversed, holding that Roth had no constitutional right either to a statement of reasons or to an opportunity for a hearing on the decision not to renew his contract.

IV. SUBSTANTIVE CONSTITUTIONAL RIGHTS

Earlier decisions held that public employment, such as teaching, was a privilege that could be conditioned upon waiver of constitutional rights. Erosion of this proposition began in 1952 and culminated in 1967 with Keyishan v. Board of Regents. In Keyishan, the board decided not to renew the one-year contract of a nontenured teacher because he failed to sign a loyalty oath as required by a New York statute. The United States Supreme Court held the statute unconstitutional and expressly rejected the premise "that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights..." This principle was reaffirmed in Pickering v. Board of Education.

Thus, although the Court has rejected the view that there exists a constitutional right to public employment, it has taken the view that dismissal or nonrenewal may not be motivated by a teacher's exercise of his constitutional rights. The Court has specifically applied this principal to a teacher's exercise of first amendment rights, the privilege against self-

12. 408 U.S. at 569.
14. See Wieman v. Updegraff, 344 U.S. 183 (1952). This case involved the issue of whether public employment could be conditioned upon subscribing to a loyalty oath. In holding that it could not, the Court stated:
[T]o assert that there is no constitutionally protected right to public employment is to obscure the issue... It is sufficient to say that constitutional protection extends to the public servant whose exclusion... is patentarily arbitrary or discriminatory.
Id. at 191-92.
16. Id. at 605.
17. 391 U.S. 563 (1968). The Court stated:
[T]o suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights... [is to proceed] on a premise that has been unequivocally rejected in numerous prior decisions of this Court.
Id. at 568. This case involved a nontenured teacher who was dismissed after publication of a letter that was critical of his employers.
19. Pettigrew, supra note 18, at 492.
incrimination,\textsuperscript{21} and the right to freedom of association.\textsuperscript{22} Moreover, \textit{Keyishan}, which involved a teacher without tenure, expressed the view that lack of tenure is immaterial as to violation of his substantive rights. The Court reaffirmed this aspect of \textit{Keyishan} in \textit{Sindermann} by stating that the lack of a contractual or tenural right to reemployment was irrelevant as to Sindermann’s claim that nonrenewal violated his first amendment rights.\textsuperscript{23}

It should be noted, however, that a teacher’s constitutional rights are not absolute. In \textit{Pickering}, the Court stated that there may be exceptions where

the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. [The general test is to] balance . . . the interests of the teacher, as a citizen . . . and the interests of the State, as an employer . . . \textsuperscript{24}

Thus, there may be instances where a state’s interest in efficient school administration may outweigh a teacher’s constitutional rights.\textsuperscript{25}

A situation not dealt with in either \textit{Roth} or \textit{Sindermann} is where both constitutionally protected and unprotected grounds motivate a school board’s dismissal or nonretention of a teacher. This problem was raised in \textit{Ferguson v. Thomas},\textsuperscript{26} where the Fifth Circuit Court of Appeals held that constitutional infringement does not invalidate the nonrenewal action if it is shown to have played only a minor role in the school board’s decision and other permissible grounds are shown to exist.\textsuperscript{27} The court further stated that where the protected grounds play a significant role, a balancing test should be employed to resolve the conflict.\textsuperscript{28} In \textit{McLaughlin v. Tildenis},\textsuperscript{29} the Seventh Circuit took a different view, holding that although the exercise of constitutionally protected rights will not warrant dismissal, the dismissal should stand if other unprotected grounds exist.\textsuperscript{30} The Eighth Circuit, in \textit{Smith v. Board of Education},\textsuperscript{31} espoused a third position in holding that if any protected grounds exist at all, nonrenewal is invalid.\textsuperscript{32}

A further problem exists where the board gives no reasons at all for its nonrenewal or dismissal of a public school teacher. Although the teacher with tenure is protected here,\textsuperscript{33} it has generally been held that a teacher without tenure may be refused reemployment for any reason or for

\textsuperscript{23} 408 U.S. at 597-98.
\textsuperscript{24} 391 U.S. at 568.
\textsuperscript{25} \textit{See, e.g.}, \textit{Orr v. Thorpe}, 427 F.2d 1129 (5th Cir. 1970); \textit{Smith v. Board of Regents}, 426 F.2d 492 (5th Cir. 1970); \textit{Smith v. Board of Educ.}, 365 F.2d 770 (8th Cir. 1966).
\textsuperscript{26} 430 F.2d 852 (5th Cir. 1970).
\textsuperscript{27} \textit{Id.} at 858-59.
\textsuperscript{29} 398 F.2d 287 (7th Cir. 1968).
\textsuperscript{30} \textit{Id.}, at 289-90.
\textsuperscript{31} 365 F.2d 770 (8th Cir. 1966).
\textsuperscript{32} \textit{Id.} at 782-83.
\textsuperscript{33} See note 3, supra; note 47, infra.
no reason at all if no constitutional right is involved. Roth reinforces this view.

V. PROCEDURAL DUE PROCESS

The fourteenth amendment requires that certain procedural safeguards be followed in order to protect one's substantive rights. Before procedural due process will be found to apply, it must first be determined that one has an interest that is "encompassed by the fourteenth amendment's protection of liberty and property." Thus, in order to determine when procedural due process protects a public school teacher's interest in continued employment, one must identify the situations in which the interest amounts to a right to "liberty" or "property" for purpose of the fourteenth.

"Liberty" and "property" are not rigid, narrow terms, but rather are to be defined broadly and flexibly within certain prescribed boundaries so as to give the fourteenth amendment meaning. In determining whether procedural due process applies, it is the nature of the interest, and not its weight or importance, that is significant. Once it has been determined that an interest is within the fourteenth amendment's protection of "liberty" and "property," the weight or importance of the interest is relevant in determining the form of hearing required by procedural due process.

In Roth, the Court indicated that if the state, in refusing to renew Roth's contract, had made charges against him that might damage his standing or associations in the community—i.e., charges of dishonesty or immorality—or had imposed a stigma on him that foreclosed his freedom to seek other employment opportunities, an interest in "liberty" would be involved, and due process would require a hearing with opportunity to refute the charges. The school authorities in both Roth and Sindermann made no such charges, however; they simply did not renew the teachers' contracts. In surveying this situation, the Court in Roth held that when one is merely not rehired in one job, but remains free to seek another, he is not deprived of "liberty" within the meaning of the fourteenth amendment. Likewise, the Court in Sindermann stated that "the mere showing that [a teacher] was not rehired in one particular job, without more, [does not show] a loss of liberty."

The procedural protections of the fourteenth amendment also apply to previously acquired property interests. To have a property interest that

35. 408 U.S. at 569. Even where the teacher without tenure alleges that a constitutionally protected right is involved in the nonrenewal decision, no hearing is required. Id. at 575 n.14.
36. Id. at 569.
37. Id. at 571-72.
38. Id. The district court judge used a balancing test to see if procedural due process should apply rather than looking at the nature of the interest involved.
39. Id. at 570.
40. Id. at 573-74.
41. Id. at 575.
42. 408 U.S. at 599.
is protected by procedural due process, a person "must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 43

Thus, the Supreme Court has held that college professors who are dismissed during the term of their contracts have a protected property interest in continued employment until the end of that term. 44 Their property interest is based upon their contract of employment.

A teacher may also acquire a protected property interest by virtue of an implied promise of continued employment beyond the term of his present contract. 45 It is not entirely clear what constitutes such an implied promise. The Court has indicated that it is similar to an implied contract under contract law. 46

A public college professor with tenure also has a property interest in continued employment that is safeguarded by procedural due process. It is by virtue of having tenure that the professor has a protected property interest. 47 Thus, he cannot be fired without the opportunity for a hearing and a statement of reasons. 48

In addition, even where there is no statutory tenure, de facto tenure may exist. In Sindermann, the Court indicated that in certain situations "there may be an unwritten 'common law' that certain employees shall have the equivalent of tenure." 49 This may be inferred from all relevant circumstances. 50 If de facto tenure is found to exist, a teacher may assert a property interest in continued employment that is protected by procedural due process. 51 Sindermann asserted the existence of de facto tenure at Odessa Junior College based on provisions of the College's faculty guide, 52 and the Supreme Court affirmed the action of the court of appeals in demanding this issue to the district court for determination. 53

Absent a contract of employment, an implied promise of continued employment, or statutory or de facto tenure, does a teacher have any right to procedural safeguards when his contract is not renewed? The lower courts faced with this issue were split on the answer. The majority held that a nontenured teacher was not entitled to either a statement of reasons for nonrenewal or an opportunity for a hearing. 54 One court held that a

43. 408 U.S. at 577.
44. Wieman v. Updegraff, 344 U.S. 183 (1952) (emphasis added).
46. Id.
48. Most tenure statutes provide that the teacher who has acquired tenure shall not be discharged except for cause and upon written charges. See, e.g., §§ 168.102-.180 RSMo 1971 Supp.; Wis. Stat. § 37.31(1) (Supp. 1971).
49. 408 U.S. at 602.
50. Id.
51. Id.
52. Id. at 603.
53. Id.
teacher without tenure had a right to a statement of reasons but not to an opportunity for a hearing. 55 Two courts held that a nontenured teacher had a right to both if he could show an "expectancy" of continued employment. 56 Finally, some writers and courts advanced the theory that the Constitution itself provides a basis upon which a nontenured teacher may claim a property right in continued employment. 57 This theory is commonly known as "constitutional tenure."

The Court in *Sindermann* expressly rejected the view that mere "expectancy" of continued employment is protected by procedural due process. 58 Further, in *Roth* the Court adopted the majority view by holding that the Constitution does not require an opportunity for a hearing or a statement of reasons before nonrenewal of a nontenured teacher's contract, absent a showing that the teacher was deprived of an interest in "liberty" or that he had a "property" interest in continued employment despite the lack of tenure. 59 The Court in *Roth* also expressly discarded the notion of constitutional tenure by stating:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. 60

Thus, in order for a public school teacher's interest in continued employment to amount to a property interest, which is sufficient to invoke procedural due process, the interest must arise from a contract of employment, an implied promise of continued employment, or statutory or de facto tenure.

The dissenting Justices in both cases would have the Court adopt the constitutional tenure theory and give nontenured teachers the right to a hearing and to a statement of reasons on the nonrenewal decision in order to insure that the decision is not arbitrary, capricious, or unreasonable. 61 At least four policy considerations may be advanced against this position. First, probationary teachers are hired for many reasons and purposes. Some are even hired with the understanding that their employment is only temporary. It would place an undue burden on administrative officials to require them to give every nontenured teacher a hearing and a statement of

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56. Sindermann v. Perry, 430 F.2d 989 (5th Cir. 1970), aff'd, 408 U.S. 593 (1972); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).
58. 408 U.S. at 603.
59. 408 U.S. at 569, 579.
60. *Id*. at 577.
61. *Id*. at 579 (Douglas, J., dissenting); *Id*. at 587 (Marshall, J., dissenting).
reasons if he is not rehired. Second, school officials should be given a great deal of discretion in making decisions concerning new faculty members.62 The Court's decision in both cases will allow them to exercise this discretion as in the past. Third, tenure would serve little purpose if teachers without tenure were given the right to a hearing and a statement of reasons, because this would have the effect of giving tenure to a teacher from the moment he is hired. Finally, under the majority's view a nontenured teacher still has some protection from arbitrary, capricious, or unreasonable nonrenewal decisions, at least where such decisions are based on the teacher's exercise of his constitutional rights, because these decisions may be challenged in a section 1983 suit.63

The dissenting Justices advanced the additional argument that it is anomalous to hold on the one hand that a welfare recipient has a protected property interest in continued receipt of welfare benefits under statutory standards,64 and to hold on the other hand that a nontenured teacher has no protected property interest in continued employment. The countervailing argument is obvious, however. There is no anomaly, because the property interest in continued receipt of welfare benefits is based upon a source independent of the Constitution—a statute65—whereas the nontenured teacher's interest in continued employment has no statutory or other independent basis, unless of course the teacher is dismissed before the end of his contract term or can show an implied promise of continued employment.

VI. Conclusion

It is clear that a public college's decision not to rehire a teacher may not be based solely upon his constitutionally protected conduct. Lack of tenure is irrelevant as to this issue. Tenure is, however, important procedurally to a teacher's claim of infringement of constitutional rights. A teacher who has tenure or some other legitimate claim to a property interest in continued employment is procedurally protected. Thus, when this type of teacher alleges that his dismissal is based on constitutionally protected grounds, he must be given an opportunity for a hearing at which he may refute the charges. However, a teacher without tenure and with no legitimate claim to a property interest in continued employment is not procedurally protected by the fourteenth amendment. The mere expectation of being rehired is insufficient to give one a legitimate claim to a property interest in continued employment.66

Further, the Court expressly rejected the idea that a nontenured teacher has a right to a hearing where he asserts that the decision not to rehire him was based upon protected grounds.67 Therefore, it appears that this type of teacher must either raise his constitutional claim in district court by bringing a section 1983 suit68 or be foreclosed from review. Thus, it will

65. Id.
66. See text accompanying note 57 supra.
67. 408 U.S. at 575 n.14; 408 U.S. at 599 n.5.
probably be more difficult for a teacher without tenure to prove his claim of infringement on constitutional rights than for a teacher with tenure, since the burden of proof rests on the nontenured teacher in a section 1983 action.\(^69\) Where the teacher is tenured, the college must bear the burden of proving that its nonrenewal decision is not based on constitutionally protected grounds.\(^70\)

Finally, because some teachers will have the right to a hearing and to a statement of reasons on the nonrenewal decision and others will not, the question becomes: where should the line be drawn? Since the tenure system is already in existence, the Court has drawn it in the most practicable, workable place.

LARRY E. SKAER

DOMESTIC RELATIONS—FRAUDULENT CONCEALMENT OF NARCOTICS ADDICTION AS GROUND FOR ANNULMENT

Costello v. Porzelt\(^1\)

Dolores Costello and Wayne Porzelt were married on February 25, 1971. In early April of 1971, plaintiff Dolores observed that her husband was behaving oddly and discovered that objects were missing from the apartment. She subsequently uncovered a package of heroin and a hypodermic needle hidden in the bathroom medicine cabinet. It was then that she noticed needle marks on defendant Wayne's arms. When confronted with these facts, Wayne admitted his addiction to heroin. After that encounter, plaintiff had no further marital relations with her husband. She subsequently brought this suit for an annulment on the ground that Wayne's concealment of his heroin addiction was a premarital fraud going to the essentials of the marriage. Plaintiff testified that if she had known of defendant's addiction at the time of the marriage she would not have married him.

The Superior Court of New Jersey granted the annulment. Accepting the inherent power of courts of equity to annul fraudulent contracts of marriage, the court initially recognized that since procreation is paramount among the purposes of marriage, any condition or behavior frustrating the sexual aspect of marriage goes to the essence of the marital relation. The court then cited an impressive array of medical authorities in support of the thesis that drug addiction dissipates the user's sexual appetite.\(^2\) Hence, the court concluded that drug addiction frustrated one of the central objects of marriage. On the basis of this premise, the court held the concealment of addiction was a fraud sufficient to warrant the granting of an

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70. Id.
2. 116 N.J. Super. at 382, 282 A.2d at 436.
annulment, even though the marriage had been consummated prior to the disclosure.

Contemporary domestic relations statutes and judicial decisions reflect the uncertainty that has long existed concerning the nature of divorce and annulment and the circumstances under which a marriage is void or voidable. The courts generally grant annulments for causes existing at the time of the marriage that prevent a valid relationship from being created. Thus, a marriage may be annulled because of the legal, mental, or physical incapacity of one of the parties at the time of the ceremony. Further, since it is vital to the validity of the marriage that the parties freely consent to the ceremony, an action for annulment may be predicated on the ground that the marriage was procured by the fraud or deceit of one of the parties.

To obtain an annulment on the ground of fraud, the innocent party must establish his or her justifiable reliance on a misrepresentation of an existing material fact. Once the court finds the required justifiable reliance, the central issue becomes whether the misrepresentation is material. Resolution of this issue has been complicated by the judicial maintenance of a historic distinction between consummated and unconsummated marriages. As the Porzelt court pointed out,

New Jersey courts ... [grant] judicial annulment in [unconsummated marriages] when infected by fraud of any kind whatsoever that would render a contract voidable, but [demand] that the fraud go to the very essence of the marriage relationship when consummation is established.

Actually, the difference is merely a difference in the definition of the term "material"; when the marriage has been consummated, the fraud must relate to the central objects of marriage in order to be material. The ul-

8. Id. at 472, 67 N.E. at 65:
It is a general rule that every misrepresentation of material fact, made with the intention to induce another to enter into an agreement and without which he would not have done so, justifies the court in vacating the agreement.

See also Arndt v. Arndt, 356 Ill. App. 65, 82 N.E.2d 908 (1948).
10. Reynolds v. Reynolds, 3 Allen (85 Mass.) 605 (1862), established what has been termed the essentialia doctrine, under which only that fraud going to the "essentials of the marriage" will permit an annulment of a consummated marriage.

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timate question is always, "Did the misrepresentation relate to facts that the law deems of sufficient significance to merit interference with the marriage relationship?"

Unfortunately, the requirement that the fraud must pertain to the essentials of the marital relationship has been difficult to apply. As the Porzelt court recognized, there is a "paucity of authority" in the area.11 Many courts have been content to pronounce obscure definitions equating "essentials" with "matters vital to the marriage."12 This vague criterion was amplified in the 1975 New Jersey case of Carris v. Carris.13 Although declining to give a comprehensive definition of "essentials," the Carris court stated that "[o]ne of the leading and most important objects of the institution of marriage under our laws is the procreation of children . . . ."14 In advancing the message underlying these standards, New Jersey courts have granted annulments of consummated marriages for concealing a surgical operation that rendered the woman barren;15 concealing impotence;16 concealing a fixed determination not to have children;17 and suppressing knowledge of a venereal disease.18 These cases and others19 tend to support the pronouncement in Porzelt that "any physical or mental condition or behavior which strikes against the central purpose of marriage, namely its sexual aspect culminating in procreation, goes to the essence of the marital relation."20

The question addressed in Porzelt is whether addiction to narcotic drugs is a "condition . . . which strikes against the central purpose of marriage."21 An imposing series of medical works and periodicals all generally confirming that drug addiction leads to sexual indifference and rejection is set out in the case of Melia v. Melia.22 Many other medical authorities

11. 116 N.J. Super. at 383, 282 A.2d at 435. Porzelt cites virtually all the reported cases in this specific area.
12. See Woronzoff-Daschkoff v. Woronzoff-Daschkoff, 303 N.Y. 506, 104 N.E.2d 877 (1952); cases cited notes 27 & 28 infra.
14. Id. at 524.
15. Turney v. Avery, 92 N.J. Eq. 473, 113 A. 710 (Ch. 1921).
18. Crane v. Crane, 62 N.J. Eq. 21, 49 A. 734 (Ch. 1901).
19. See Heup v. Heup, 45 Wis. 2d 71, 172 N.W.2d 334 (1969) (having children is primary purpose of marriage); Zerk v. Zerk, 257 Wis. 555, 44 N.W.2d 568 (1950) (failure to have sexual relations goes to the essence of a marriage).
21. Id.
22. 94 N.J. Super. 47, 52-53, 226 A.2d 745, 747-48 (1967). For a general understanding of the potential problems see the following sources cited by Porzelt: T. Brown, The ENIGMA of DRUG ADDICTION 89 (1961) (the addict is possessed of only one fervent objective—the ways and means of obtaining his next shot of heroin); Y. Kron & E. Brown, MAINLINE to NOWHERE—The MAKING of A HEROIN ADDICT 153 (1963) (marriage in the life of an addict—if it takes place at all—is a very transitory episode); D. Maurer & V. Vogel, NARCOTICS and NARCOTIC ADDICTION 72 (1954) (general tendency to reduce or obliterate sexual desire); Kolb, Drug Addiction, A Study of Some Medical Cases, 20 ARCHIVES of NEUROLOGY & PSYCHIATRY 171, 183 (1928) (reduction or elimination of sexual desire tends to remove the opiate addict from the category of psychopathic sex offenders).
concur in this pronouncement.\textsuperscript{23} It has been observed that the use of opiate drugs (usually heroin or morphine) "depresses appetite, pain and erotic urges of all sorts, heterosexual, homosexual or autoerotic."\textsuperscript{24} The addict "loses his nature" with regard to sexuality; \textit{i.e.}, his sexual appetite is chilled if not entirely dissipated.\textsuperscript{26} The loss of sexual drive resulting from drug addiction has often been cited to dispute accusations that drugs induce sexual crimes.\textsuperscript{26}

The reported decisional law on this question is as sparse as judicial definitions of "essentials." Though making no definitional representations as to "essentials," Delaware has summarily concluded that drug addiction is not such.\textsuperscript{27} The court equated narcotics addiction with personal traits and moral character, the fraudulent concealment of which does not amount to a fraud sufficient for annulment. The persons desiring to marry have the burden of ascertaining such traits and character prior to marriage.\textsuperscript{28} New York has held to the contrary. In the case of Lockwood \textit{v.} Lockwood,\textsuperscript{29} the New York court held that the husband had a duty in law to make a full and complete disclosure of his narcotics addiction to his wife.\textsuperscript{30} For one purpose of distinguishing the Delaware and New York decisions, it is worthy of note that the Delaware court did not consider the evidence as establishing the precise nature of the drug used, whereas the New York decisions explicitly involved situations where "hard" drugs such as heroin were used. Arguably, the Delaware court's decision would have been different if there had been established an addiction to "hard" drugs.

In those jurisdictions, including Missouri, in which this question has not been considered, a party whose spouse has concealed his drug addiction has two approaches open to him in seeking dissolution of the marriage. First, he could try to obtain an annulment on the ground of fraud by representing the addiction as an "essential" within the jurisdiction's decisional law following the reasoning of the \textit{Porzelt} court. Although Missouri has no specific statute on annulment, Missouri courts have granted


\textsuperscript{25} J. Chein, W. Gerard, W. Lee \& S. Rosenfeld, \textit{The Road to H} 357-58 (1964).

\textsuperscript{26} A. Schur, \textit{Narcotic Addiction in Britain and America} 23 (1962).


\textsuperscript{28} \textit{Id.} at 768. \textit{See} Reynolds \textit{v.} Reynolds, 3 Allen (85 Mass.) 605, 607 (1862), which is usually cited in holding that misrepresentations concerning character, rank, wealth, or condition in life of the spouse are not so connected with the essentials of marriage as to warrant an annulment.

\textsuperscript{29} 29 Misc. 2d 114, 220 N.Y.S.2d 718 (Sup. Ct. 1960).

annulments consistent with general principles of equity. The difficulty in Missouri is a dearth of cases granting annulments for fraud. One case in which the plaintiff did prevail on this ground is *Watson v. Watson.* Prior to the marriage, plaintiff husband had inquired of his wife whether she had a venereal disease. Though infected with syphilis, she said that she was not diseased. The trial court denied an annulment, and the St. Louis Court of Appeals reversed. The court remarked that the wife's misrepresentation related to an essential of marriage. Presumably, the annulment was granted because the fraud pertained directly to the sexual relationship and to reproductive capability. Thus, the lawyer can argue with some confidence that since drug addiction dissipates sexual powers, it meets the Missouri conception of "essentials," and an annulment should be granted.

The second approach is to qualify the misrepresented fact itself as a ground for annulment or divorce. Although addiction to narcotics is not a distinct ground for annulment in Missouri, a divorce can probably be obtained on the grounds of general indignities. Missouri courts have held that the continued use of narcotics tending to render the user callous, reckless, and untruthful, to cause physical prostration, and to destroy the objects of marriage constitutes indignities sufficient for divorce if the habit is incurable. The problem faced by the spouse seeking divorce is that relief is not granted simply on a showing of narcotic addiction, but rather is conditioned upon proof of actual manifestations of the mental and physical impact of the drug addiction.

Even though the *Porzel* decision may be viewed as reinforcing previous New Jersey cases, its implications are of current interest in view of the expanded awareness of the harms potential in drug abuse. Today, narcotic addiction is considered one of this country's greatest social problems. The courts and society in general have realized that drug addiction is an illness, and have established programs aimed at rehabilitating, rather than punishing, the addict. Unfortunately, there has been little, if any, reflection upon the domestic problems caused by the addiction. Judicial recognition of the family's plight has been virtually non-existent. It seems irrational to require one who has suffered from the relationship to resort to the legal fiction of "essentials" in order to prove a fraud sufficient to warrant an annulment. In jurisdictions lacking the definitional guidelines available to the *Porzel* court, the nonaddict spouse is at the mercy of that court's conception of a legal illusion. Surely, equitable considerations should not allow this to happen. Rather, the courts should recognize the misery of the nonaddict spouse and grant relief. Thus, an immediate need exists for the recognition of narcotic addiction as a separate and distinct ground for the dissolution of a marriage.

*Stephen D. Aliber*

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32. 143 S.W.2d 349 (St. L. Mo. App. 1940).
ENVIRONMENTAL LAWSUITS—WHAT MUST ORGANIZATIONS ALLEGEP TO HAVE STANDING TO SUE?

Sierra Club v. Morton

For several years, the Sierra Club and other environmental interest groups have desired to become recognized as pro bono legal representatives of conservationists and preservationist interests in their own rights. On the basis of their generalized ideological interest in the environment they have sought the power to bring environmental lawsuits in their own names without the necessity of obtaining local plaintiffs. The Supreme Court recently quashed those hopes in a case that environmentalists had hoped would be the culmination of successful lawsuits concerning their standing to sue. That case involved a remote area of the Sierra Nevada Mountains where purportedly local plaintiffs were nonexistent.

In 1969, the United States Forest Service approved a plan submitted by Walt Disney Enterprises, Inc., for the construction and operation of a ski resort in the Mineral King Valley of the Sequoia National Forest. The Sierra Club filed suit in the United States District Court for the Northern District of California seeking an injunction against the Forest Service’s issuance of the necessary permits to Disney and a declaratory judgment that the proposed development violated various federal laws. The Sierra Club sued as a membership corporation alleging “a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country” and invoking the judicial review provisions of the Administrative Procedure Act (hereinafter APA).

The government challenged the Sierra Club’s standing to sue, but the district court rejected the argument and granted a preliminary injunction. The United States Court of Appeals for the Ninth Circuit reversed and vacated the injunction, holding that the club had no standing absent a showing of “more direct interest.”

The Supreme Court affirmed in a 4-3 decision.

The Sierra Club asserted two basic arguments to support its claim to standing. First, the club argued that the proposed development would injure its interest in protecting the natural resources of the area and that this injury satisfied the “injury-in-fact” test. The club also claimed stand-

3. See cases cited note 2 infra.
4. The Sierra Club is a nonprofit California corporation with an estimated national membership of 78,000 persons. The club has actively taken a special interest in the conservation and maintenance of our national parks and forests and has been especially active in the Sierra Nevada Mountain area.
5. The Sierra Club argued that the issuing of the necessary permits and the construction of the ski resort would violate the following federal statutes: 16 U.S.C. §§ 1, 41, 43, 45 (c), 497 (1970).
6. 405 U.S. at 730.
9. Id. at 30.
10. See infra.
ing as a private attorney general, *i.e.*, as a representative of the public interest in conserving and protecting the environment.

In order to understand the meaning of the instant case and its impact on these arguments and on conservationists' right to sue, it is necessary to review briefly the law of standing.¹⁰ Just prior to 1940, the Supreme Court set forth the so-called legal interest test in *Tennessee Electric Power Co. v. TVA.*¹¹ In that case, the Court denied standing to competitors of the TVA, holding that one had no standing "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."¹²

Recent Supreme Court decisions have expanded and liberalized the concept of standing, especially where violations of federal statutes are alleged.¹³ In *Flast v. Cohen*¹⁴ the Court stated that standing to raise constitutional issues is to be considered within the framework of the "case or controversy" requirement of article III, section 2 of the Constitution. The Court said:

The question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. . . . The emphasis in standing problems is on whether the party . . . has 'a personal stake in the outcome of the controversy'.¹⁵

In *Association of Data Processing Service Organizations v. Camp,*¹⁶ the Court rejected the "legal interest" test, saying that it is an improper test for standing because it goes to the merits.¹⁷ The Court further applied the "case or controversy" requirement to the question of standing to raise statutory, as well as constitutional, issues in federal court.

*Data Processing*, as clarified by *Barlow v. Collins,*¹⁸ set forth a two-pronged test for standing. First, to satisfy the "case or controversy" requirement, the plaintiff must allege that the "challenged action has caused him injury in fact, economic or otherwise."¹⁹ Second, "the interest sought to be

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¹². 306 U.S. at 137.


¹⁷. *Id.* at 153.


¹⁹. 397 U.S. at 152. The Court recognized that the interest allegedly injured need not be economic, but "may reflect aesthetic, conservational, and recreational values." *Id.* at 154, *quoting from Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 616 (2d Cir. 1965).
protected by the complainant [*must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.\textsuperscript{20} The Court in \textit{Data Processing} held that this two-pronged test is applicable to the question of standing to obtain judicial review under section 10 of the APA.\textsuperscript{21}

In trying to obtain judicial review of the Forest Service's action in this case, the Sierra Club relied upon section 10 of the APA.\textsuperscript{22} The club alleged that the proposed development would injure its interest in protecting and conserving the natural resources of the Sierra Nevada Mountains.\textsuperscript{23} The Court held that this allegation of injury to a general, widely shared interest in the environment failed to satisfy the first prong of the \textit{Data Processing} test, which requires an allegation of injury in fact.

Previously, lower federal courts had held a general interest in the environment sufficient to satisfy the injury-in-fact test.\textsuperscript{24} One of the leading cases is \textit{Scenic Hudson Preservation Conference v. FPC}.\textsuperscript{25} In \textit{Scenic Hudson}, the court stated:

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of aggrieved parties under § 318 (b) [of the Federal Power Act.].\textsuperscript{26}

In \textit{Environmental Defense Fund, Inc. v. Hardin},\textsuperscript{27} the court said that a "demonstrated interest in protecting the environment from pesticide pollution" was sufficient to satisfy the injury-in-fact test.\textsuperscript{28}

\footnotesize
\textsuperscript{20} 397 U.S. at 153. Since the Court decided that the Sierra Club failed to satisfy the injury-in-fact test, it was unnecessary to reach a decision on the zone-of-interests test.
\textsuperscript{21} Id.
\textsuperscript{23} 405 U.S. at 755 n.8.
\textsuperscript{25} 354 F.2d 606 (2d Cir. 1965).
\textsuperscript{26} Id. at 616.
\textsuperscript{27} 428 F.2d 1093 (D.C. Cir. 1970).
\textsuperscript{28} Id. at 1097. The organizations held to have standing in this case were the \textit{Environmental Defense Fund, Inc.}, the \textit{National Audubon Society}, the Sierra Club, the \textit{Western Michigan Environmental Action Council}, and the \textit{Izaak Walton League of America, intervenor}.
The Supreme Court was unwilling to go this far, however. The Court noted with approval the cases that liberalized and expanded the categories of injury that could be alleged in support of standing. But the Court also pointed out that such liberalization is quite different from abandoning the requirement that the party seeking review must have suffered an individualized injury. In rejecting the Sierra Club's claim of standing, the Court said that "the injury in fact test requires . . . that the party seeking review be himself among the injured." The Court further stated:

[A] mere "interest in a problem", no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA.

The key language is by itself. It implies that a general environmental interest might be sufficient if coupled with something else. It is unclear, however, what this something else might be.

An organization's general interest in the environment might be sufficient to satisfy the injury in fact test if coupled with either (1) an allegation of individualized injury to one or more of its members, or (2) joinder of another party who alleges the necessary individualized injury. In fact, in most of the federal court cases in which environmental interest groups were held to have standing, one of these factors was present. In the instant case neither was true.


30. 405 U.S. at 738.
31. Id.
32. Id. at 734-35.
33. Id. at 739 (emphasis added).
34. The individualized injury requirement appears to require that the members of an environmental interest group (or an individual party) who allege the necessary individualized injury either live in or near the area in question or make use of the area in question. A court probably would not grant standing to one who does not live in close proximity to or who has never used the area in question. See Environmental Defense Fund, Inc. v. Corps of Eng'rs, 348 F. Supp. 916, 922 (N.D. Miss. 1972). It is clear that an organization may represent its members in a properly commenced proceeding for judicial review. See NAACP v. Button, 371 U.S. 415 (1963).
36. For cases in which the organization alleged individualized injury to one or more of its members, see cases cited note 24 supra. For cases in which another party alleging individualized injury was joined, see, e.g., Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965) (members of a local environmental interest group who used the area in question); Parker v. United States, 307 F. Supp. 685 (D. Colo. 1969) (individuals living near the area in question); Road Review League v. Boyd, 270 F. Supp. 650 (S.D. N.Y. 1967) (incorporated town affected by the proposed action).
The Sierra Club also relied on the "public action" theory to obtain standing. The club argued that under this theory, its status as an organization with a longstanding concern for the environment gave it standing to obtain judicial review of the "public" question involved in the case.\(^3\) The Court rejected this argument, pointing out that it rested upon a misconception of the public action theory.\(^4\)

That misconception is that the public action theory is a separate theory of standing. This view had its origin in a statement in _Scripps-Howard Radio, Inc. v. FCC_\(^5\) that "these private litigants have standing only as representatives of the public interest."\(^6\) In the field of environmental protection litigation, this approach resulted in a recent lower federal court holding that an alleged contravention of "the public interest in environmental resources" was sufficient to give standing to "responsible representatives of the public."\(^7\) This holding, of course, supported the Sierra Club's position. As the Court in _Morton_ pointed out, however, the public action theory merely allows a party to argue the public interest, as well as his own, once he has established his standing under the tests described previously.\(^8\) In _Scripps-Howard_, the party had obtained standing by alleging economic injury to himself (i.e., injury in fact); the above-quoted passage refers only to the arguments that the party could use to support his claim once he had established his standing.\(^9\)

At first glance the Court's decision in the instant case appears to be a practical one based on strong precedent.\(^10\) To grant standing to anyone who alleges a public or general interest in a problem might seriously diminish the "case or controversy" requirement; without an individualized injury the necessary quality of adverseness might be missing.\(^11\) The Court states that requiring a party seeking judicial review of agency action to allege an individualized injury "put[s] the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."\(^12\) The Court further states that this requirement provides an objective basis to insure that the group bringing the action is genuinely interested in protecting the environment.\(^13\)

However, is this requirement really necessary to insure adverseness in environmental lawsuits? Few groups are more interested than the Sierra Club in protecting the environment. Moreover, the Sierra Club and other such environmental interest groups have the financial resources to insure adequate representation of the conservationists' viewpoint.

\(^3\) 405 U.S. at 786.
\(^4\) Id.
\(^5\) 316 U.S. 4 (1942).
\(^6\) Id. at 14.
\(^8\) 405 U.S. at 737.
\(^9\) Id. at 736-37.
\(^10\) Mr. Justice Blackmun recognizes this in his dissenting opinion. See 405 U.S. at 755.
\(^11\) Lawsuits without this quality of adverseness are inconsistent with the judicial function under U.S. Concr. art. III. 405 U.S. at 732 n.5.
\(^12\) Id. at 740.
There are, however, a few ad hoc environmental interest groups that
may not have adequate financial resources and that do not represent a
sizeable block of public opinion. These groups might act as obstructionists,
rather than as bona fide environmental litigants. The standing requirements
set forth in the instant case appear, in part, to be an attempt to prevent
such obstructionist tactics by small groups of vocal outsiders.48

Both Mr. Justice Douglas and Mr. Justice Blackmun, in their separate
dissenting opinions, argued that environmental interest groups should have
standing without alleging an individualized injury to one of their members
or joining a party with the necessary injury. Mr. Justice Douglas's dissent
is, in part, a plea to allow users of the environment standing to sue. He is
especially concerned about users who live far away.49 This concern
appears to be the basis for his suggestion that inanimate objects in the area to
be affected should have standing to sue.50 These inanimate objects would,
of course, be represented in the lawsuit by a bona fide environmental in-
terest group. Justice Douglas's concern is difficult to understand, however,
because the majority opinion does allow users of the area standing to sue.51

Mr. Justice Blackmun's theory is more practical. He would grant
standing only to those groups who have a "provable, sincere, dedicated, and
established status."52 This limitation would help to insure adverseness
and would be enforced by the courts in the exercise of judicial discretion.53
He also suggested that the Sierra Club try to amend its complaint to meet
the standing requirements set forth in the instant case.

Although the decision in the instant case lays down no new test for
standing, it does make it clear that a general interest in the environment
will not satisfy the injury-in-fact test and thus qualify one as an "aggrieved"
party within the meaning of the APA. The effect of this decision has
already been felt in Missouri. In *Coalition for the Environment v. Linclay
Development Corp.*54 (the Earth City project), the plaintiffs were denied
standing based on *Morton* where the only allegations were that they
preferred open space to an industrially developed area and that an indus-
trial area was personally displeasing to them.55

In most cases the standing requirements set forth in the instant case

48. This attempt has not been entirely successful. In Students Challenging
1972), the plaintiff organization was formed to challenge an ICC grant of a rate
increase on freight shipped by railroad. SCRAP obtained standing under *Morton*
by alleging that its members use the forests, streams, and mountains of Wash-
ington, and that this use will be disturbed because the rate increase will adversely
affect the environment by discouraging the use of recyclable materials. This case
is an example of a far-fetched way to meet the requirements of *Morton* where the
real issue has, at most, a remote connection to a general environmental interest.

49. 405 U.S. at 752.
50. Id. at 741.
51. Id. at 735. See Environmental Defense Fund, Inc. v. Corps of Eng'rs, 348
F. Supp. 916, 922 (N.D. Miss. 1972), decided after *Morton*, where two users of
the area in question were held to have standing based on *Morton*.
52. 405 U.S. at 757-58.
53. Id. at 758.
55. Id. at 637-38.
will pose no barrier to environmental organizations, because they will be able to allege an individualized injury to one of their members or join a party alleging an individualized injury.66 However, what happens if neither one of these requirements can be met? After the decision in this case who, if anyone, will have standing to challenge (1) environmental depredation that the locals want and against which no local protest can be generated (e.g., the Alaska Pipeline), and (2) environmental depredation by the first to arrive in a given area (e.g., oil spills from off-shore drilling platforms)? Following the majority opinion, no one would have standing to challenge the environmental depredation in these two situations. Thus, judicial intervention may be impossible in these situations. This is the fear that Justice Blackmun expressed in his dissent.67

This problem would be solved by expanding the concept of standing, either judicially or legislatively, to allow bona fide environmental interest groups to litigate environmental issues without joining a local plaintiff. In fact, a bill has been introduced in Congress that would allow environmental interest groups to litigate environmental issues in their own names.68 Michigan and a few other states already have such statutes (commonly called "citizen action" statutes).69

It is interesting to note that subsequent to the decision in the instant case, the Sierra Club was granted leave to amend its petition to include local plaintiffs in order to meet the standing requirements of the majority opinion.60 Before this decision the club had steadfastly refused to amend.61 Thus, it appears that the Sierra Club had more than the preserving of Mineral King in mind when it took the case to the Supreme Court. Perhaps the club's main purpose was to obtain Supreme Court approval of the approach to standing for environmental organizations adopted by so many lower federal courts.62 Having failed, the club and other environmentalists are seeking the help of Congress to remedy the standing problem. In the long run the statutory approach to standing for environmental organizations may be the best approach. It will give the environmental organizations the

56. Cases cited notes 24 & 36 supra.
57. 405 U.S. at 755. The majority refuses to recognize that this problem exists. Id. at 740.
60. Sierra Club v. Morton, 3 ENVIRON. REPTR. CURRENT DEV. 339 (N.D. Cal., July 6, 1972). The amended complaint alleged that the club and its members regularly conduct outings in the Mineral King area and that conversion into a resort would harm the environmental and recreational interests of the club and these members. Also, the Mineral King District Association, an organization of cabin owners in Mineral King, were joined as plaintiffs.
61. In fact, in its reply brief the Sierra Club specifically refused to rely on the individualized injury of some of its members as a basis for standing. 405 U.S. at 736 n.8.
right to sue in their own names. It will allow judicial intervention in all cases involving environmental issues whenever necessary. Finally, it avoids any problems that might occur through the modification of the injury-in-fact concept.

LARRY E. SKAER

Estate Planning—Transfers with a Retained Life Interest under Section 2036(a)—Stock Transferred to an Irrevocable Trust

United States v. Byrum

In 1958, decedent Byrum transferred shares of stock in three closely held corporations to an irrevocable trust. After the transfer, Byrum still owned 59 percent, 35 percent, and 42 percent of the stock in the respective corporations; the trust owned 12 percent, 48 percent, and 46 percent. Persons unrelated to Byrum owned the remaining shares. The beneficiaries of the trust were decedent's children, or, if they died before the trust terminated, their surviving children. When the youngest child reached the age of 21, the trust was to be divided into separate trusts for each child. Each individual trust terminated when its beneficiary attained the age of 35. The trust instrument required a corporate trustee. Although the trustee had broad discretionary powers in the administration of the trust, the settlor retained the following powers: (1) To vote all closely held stock; (2) to remove the corporate trustee and all successor trustees and appoint another corporate trustee; (3) to approve investments and reinvestments; and (4) to disapprove the sale or transfer of any assets.

At the date of decedent's death in 1964, the trust owned the shares originally transferred and other property of small value. The Commissioner of Internal Revenue determined that the rights retained by decedent placed the transfer within the scope of section 2036(a) of the Internal Revenue Code of 1954, which provides for the inclusion in a decedent's gross estate of property that he transferred inter vivos if he retained for his lifetime

1. 408 U.S. 125 (1972).
2. The assets of the trust were $89,000 in stock and three Series E bonds worth $800 at maturity.
3. Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954, as amended. Section 2036(a) provides:

   The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—(1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.
certain specified powers with regard to the property. The executrix paid the tax and filed a refund action in district court. The government, which could have prevailed by showing that either subsection (1) or (2) of section 2036 (a) applied, contended that both subsections were applicable, relying more heavily on subsection (2). The district court found for the executrix, and the Sixth Circuit Court of Appeals affirmed. Six Justices of the Supreme Court, in an opinion by Mr. Justice Powell, affirmed the court of appeals. Mr. Justice White, joined by Justices Blackmun and Brennan, dissented vigorously.

I. SECTION 2036 (a) (1) ARGUMENT AND HOLDING

Section 2036 (a) (1) applies to transfers in which the decedent retained the possession or enjoyment of the property transferred, or the right to the income therefrom. The government contended that the decedent retained "enjoyment" of the transferred shares because his right to vote them and his power to veto their sale, together with his rights in the shares he still owned, gave him control of the corporations. The government said such control guaranteed decedent continued employment, remuneration and the right to liquidate or merge the corporations.

The Court read section 2036 (a) (1) as requiring that the decedent retain an attribute of the property transferred, such as the use of the property, the right to the income it produces, or a power of appointment with respect to either income or principal. The Court said that the benefits decedent retained were not attributable to the transferred shares, but rather to his control of the corporations. Thus, because decedent had transferred less than 50 percent of the outstanding shares of each corporation, he had not transferred control, and section 2036 (a) (1) was inapplicable.

The Court further stated that even if decedent had transferred controlling interests in the corporations, he still would not have retained enjoyment of the property under section 2036 (a) (1). The Court reached this conclusion by defining "enjoyment" to mean substantial, present economic benefit. The power to liquidate or merge the corporation is not a present benefit; rather, it is speculative and contingent, because it may or may not be exercised. The probability of continued employment and remuneration is not a substantial economic benefit for two reasons. First, under Ohio law, the director of a corporation may be liable for retention of incompetent officers and for payment of excessive salaries.

6. 408 U.S. at 132.
7. Id. at 132.
8. Id. at 145.
9. Id. at 149.
10. Id. at 148-49.
11. Id. at 149.
12. Id.
13. Id. at 150.
Second, the Internal Revenue Service would disallow any business expense deduction for unreasonable compensation. In refusing to recognize the assurance of future employment and remuneration, standing alone, as enjoyment of the property or an income interest therein, the Court's decision is in accord with previous cases that have considered the question.\(^\text{15}\)

The Court could have determined that the totality of the decedent's retained benefits and interests constituted enjoyment in the "normal and customary" sense.\(^\text{16}\) By retaining control of the corporations, decedent retained, in addition to the benefits noted above, that portion of the control premium allocable to the shares that he did not transfer. Further, the Court failed to consider the psychological or mental benefits associated with corporate control, such as personal satisfaction, community prestige, and business challenge. These latter benefits may be as good a measure of the decedent's enjoyment as economic benefits. No case has ever held that enjoyment is limited to purely economic benefits. In light of the purpose of section 2036 (a) and its companion sections, \textit{i.e.,} to prevent essentially testamentary transfers in which the grantor retains substantial interests in the property, the argument for applying section 2036 (a) (1) has merit.

\section*{II. Section 2036 (a) (2) Argument and Holding}

\subsection*{A. The Government's Position and the Court's Response}

Section 2036 (a) (2) applies to transfers in which the decedent retained the right "to designate . . . the persons who shall possess or enjoy the property or the income therefrom."\(^\text{17}\) Because the dividends from the transferred stock were virtually the sole source of income for the trust,\(^\text{18}\) the government contended that decedent's control of corporate dividend policy allowed him to determine when the beneficiaries would enjoy the income.\(^\text{19}\) The government argued further that decedent could withhold dividends completely, thereby shifting enjoyment to the remaindermen.\(^\text{20}\) In \textit{United States v. O'Malley},\(^\text{21}\) the Supreme Court held that the ability to shift or defer the beneficial enjoyment was the right to designate the persons who shall enjoy the property under section 2036 (a) (2). In that case, three trustees (including settlor) could, in their sole discretion, pay the trust income to the beneficiaries or accumulate it as principal. Thus, the trustees could control present enjoyment of the income. In fact, they could deny any enjoyment until the trust terminated. Although the government argued that \textit{O'Malley} was indistinguishable, the Court refused to reach the \textit{O'Malley} result for the following reasons.

\begin{itemize}
  \item[15.] \textit{See} Estate of William F. Hofford, 4 T.C. 790 (1945); Estate of Pamela D. Holland, 1 T.C. 564 (1943). Unless the grantor retains some security interest in the title to the property or other substantial enjoyment, a grant of corporate shares contingent on future employment does not incur estate tax liability.
  \item[16.] The language is that of Mr. Justice Powell defining the term "right."\(^\text{408 U.S. at 136.}\)
  \item[17.] \textit{INT. REV. CODE of 1954, § 2036 (a) (2).}\)
  \item[18.] An insignificant amount of income was derived from the three Series E bonds.\(^\text{408 U.S. at 132.}\)
  \item[19.] \textit{Id.}\)
  \item[20.] \textit{383 U.S. 627 (1966).}\)
\end{itemize}
B. The Court's Rationale

1. Reasonable Reliance on Precedent

Mr. Justice Powell, writing for the majority, stated that it is a well-established principle that a settlor's retention of broad management powers over trust assets does not necessarily subject an inter vivos trust to the federal estate tax. He believed that decedent's retained powers were within the scope of that principle and that therefore decedent had reasonably relied on the principle. The courts, Mr. Justice Powell concluded, should not now penalize decedent's estate by a reexamination of the principle; instead, review of the principle is for Congress.

This principle was probably inapplicable to decedent's transfer. The lower federal court decisions that established the principle make an important distinction between two types of powers over trust assets. Certain powers, the exercise of which only indirectly affects income and principal, may be designated as administrative powers. Typically, they include the following rights: To determine whether receipts and disbursements are allocable to principal or income; to invest in hazardous, speculative, or unproductive assets; and to sell or transfer any or all of the trust property on any terms. Retention of administrative powers usually will not result in estate tax liability, even though by exercising them a settlor-trustee could significantly affect the beneficial enjoyment of trust income. On the other hand, a settlor-trustee's retention of direct powers over income and principal will result in estate tax liability, unless an external, judicially ascertainable standard qualifies the settlor-trustee's power. Examples are the following powers: To invade corpus; to distribute income or prin-
The majority considered decedent's retained powers to be administrative powers. Decedent could, therefore, reasonably rely on the principle that retention of such powers would not subject the transfer to section 2036 (a)(2). It would have been more accurate to have classified decedent's retained powers as direct powers. Although Byrum's exercise of his right to vote the shares was an administrative function, his use of control to determine the amount of income flowing into the trust was a direct power over income. Moreover, no external standard qualified this power. At the time decedent drafted his trust, the cases held that under such circumstances, estate tax liability should result.

At the very least, the law with respect to retained powers was so uncertain that it is inaccurate to say that decedent reasonably relied on precedent. Further, the cases that developed the principle upon which the majority relied involvedsettors who were also trustees. Arguably, a trustee's fiduciary obligation is more readily enforceable than that of a majority shareholder. Therefore, the settlor-trustees' powers over trust income and principal were more narrowly circumscribed than were those of Byrum. Finally, along with retaining what were conceivably direct powers, decedent retained all the usual administrative powers. All of these factors tend to negate the Court's argument based upon Byrum's reasonable reliance on precedent.

2. The Meaning of "Right"

The majority read section 2036 (a)(2) as requiring that the decedent retain an "ascertainable and legally enforceable power" to designate the
beneficiaries who shall enjoy the income. In O'Malley, decedent's power was that of a trustee and was legally enforceable. In Byrum, decedent's power over trust income resulted from his ability as majority shareholder to elect directors who would carry out his wishes with respect to dividend and compensation policy. Byrum's power was not legally enforceable; at best, it was a de facto power only. The Court was apparently prepared to rely solely on this distinction for its decision under section 2036 (a) (2). 40 Such a distinction is inconsistent with the Court's recently announced intention to determine tax liability on the basis of the substance, not the form, of a transaction. 41 The result of the Byrum decision was to enable the decedent to control the beneficial enjoyment of the property without incurring estate tax liability; whereas, the decedent in O'Malley could not retain such control without incurring estate tax liability. The practical effect of the two transactions was the same. In fact, the government's case was stronger in Byrum because decedent's withholding of beneficial enjoyment could inure to his benefit directly in the form of salary. Decedent in O'Malley did not otherwise benefit from his control of beneficial enjoyment. Further, the Court's literal reading of section 2036 (a) (2) contradicts its reading of section 2036 (a) (1) with respect to the situation where two persons declare separate trusts with the other as beneficiary. Although these so-called reciprocal trusts are outside the literal meaning of section 2036 (a) (1), the Court has had little difficulty holding that section applicable. 42 Moreover, the federal courts have previously rejected an argument for a literal definition of "right" in section 2036 (a) (2). 43 As Mr. Justice White points out in dissent, the legislative history of section 2036 (a) (2) lends no support to such a distinction. 44 Finally, the distinction implies a substantive difference between "right" in section 2036 (a) (2) and "power" in section 2038, a companion section, that the courts have not recognized. 45

The Court could have found that decedent did have an ascertainable and legally enforceable power to control the income flowing into the trust. As majority shareholder, he could have elected himself to the board of directors (the record does not show whether or not he was a director). Then, in conjunction with the other directors, decedent would have had the legal right to determine dividend policy. Section 2036 (a) (2) would have

40. See id. at 136-137.
42. Id.
43. See DuCharme's Estate v. Commissioner, 164 F.2d 959 (6th Cir. 1947) modified on other grounds, 169 F.2d 76 (6th Cir. 1948).
44. 408 U.S. at 160 (dissenting opinion). The legislation was introduced and passed by Congress on the last day of the session in response to a Supreme Court decision the previous day.
45. The Supreme Court, 1971 Term, 86 HARV. L. REV. 272, 277 & n.26 (1972). Section 2038 (a) speaks of a grantor's power to alter, amend, revoke, or terminate the trust agreement. Retention of such a power subjects the trust to taxation. The article points out that the test under both sections has traditionally been the same, i.e., whether a grantor's power was limited by determinable standards enforceable.
been applicable even though decedent exercised the right as a director, rather than as a trustee.46

3. The Extent of Decedent's Power

The majority determined that decedent was, in fact, unable to control the beneficial enjoyment of the property.47 Thus, even if a de facto power were within the statutory language of section 2036 (a) (2), no federal estate tax liability would have resulted to decedent's estate. Decedent's fiduciary obligation as majority shareholder to minority interests and the fiduciary obligation of the board of directors to promote the interests of the corporations as a whole prevented decedent from controlling trust income and the beneficial enjoyment of the property.48 The dissent, however, stated that such constraints impose no substantial restriction on the majority shareholder's power to promote his own interests,49 noting the deference courts give to the directors' business judgment.50

The Supreme Court considered the power of a majority shareholder in a closely held corporation in Commissioner v. Sunnen.51 In that case, taxpayer, licensor, who owned a controlling interest in the corporate licensee, had assigned the license contracts to his wife. The Court held that the royalties on the license contracts were taxable to the majority shareholder under section 22 (a) of the Internal Revenue Code of 193952 because taxpayer had retained, after the assignment to his wife, power over the income. Essential to this holding was a finding that taxpayer could exercise virtually complete control of corporate policy involving the license contracts. The Court found that the taxpayer could go so far as to compel the corporation to cease producing the licensed devices altogether, even though the revenue produced by them constituted a substantial part of gross receipts. In view of Sunnen, it is arguable that decedent was actually able to control beneficial enjoyment of the trust property.

For income tax purposes, Byrum probably would be considered the owner of the trust under section 675 (4) (A) and (B)53 because of the rights

47. 408 U.S. at 143.
48. Id. at 141-42.
49. 408 U.S. at 148.
50. 408 U.S. at 158-69.
51. 333 U.S. 591 (1958). Although the case dealt with power over assigned income, rather than the right to such income, the finding that taxpayer had control of corporate policy was a necessary element of the case. Therefore, it is relevant precedent for the issue of control in Byrum.
53. Section 675 provides:
The grantor shall be treated as the owner of any portion of a trust in respect of which—(1) A power of administration is exercisable in a nonfiduciary capacity by any person without the approval or consent of any person in a fiduciary capacity. For purposes of this paragraph, the term "power of administration" means any one or more of the following powers: (A) a power to vote or direct the voting of stock or other securities of a corporation in which the holdings of the grantor and the trust are significant from the viewpoint of voting control; (B) a power to
he retained in the transferred shares. The purpose of section 675 is to tax, as income to the grantor, trust income over which the grantor retains substantial power. Implicit in section 675 (4) (A) is the assumption that a grantor who retains voting rights in the transferred shares that, together with his own holdings, give him a significant amount of voting control, has a substantial amount of power over the trust income. Clearly, the existence of corporate fiduciary duties does not significantly diminish the grantor's power over dividend policy for income tax purposes.

In holding that Byrum's fiduciary obligation as majority shareholder and the fiduciary duties of the directors significantly qualified Byrum's power to control the flow of dividend income, the Court may have signalled an increased significance for the settlor-trustee's fiduciary obligation as a qualification of retained interests under section 2036 (a) (2). The settlor-trustee has the fiduciary obligation to act consistently with the best interests of the beneficiaries. As noted earlier, the courts consider this obligation to be an insufficient qualification of a direct power over income because the standard it imposes is too vague and uncertain to be enforceable. The fiduciary obligations involved in Byrum impose similarly vague and uncertain standards. Corporate directors must act in the best interests of the corporation as a whole, and a majority shareholder cannot prejudice minority interests. Yet, the Byrum Court found these standards to be ascertainable and enforceable. In the future, consistent reasoning could result in finding, not necessarily that a settlor-trustee's fiduciary duty alone is a sufficiently ascertainable qualifying standard to avoid application of section 2036 (a) (2), but that a less certain and restrictive external standard is required. If so, settlor-trustees will be able to retain an increased amount of control over transferred property without incurring federal estate tax liability.

III. Conclusion

The Byrum Court could well have found that the transfer decedent made was within the scope of section 2036 (a). Its failure to do so may represent concern for the unique estate planning problems of the controlling shareholder of a closely held corporation. Mr. Justice Powell mentions some of these considerations in footnotes to his opinion. If the government's control rationale, asserted under both paragraphs of section 2036 (a), had been accepted, the irrevocable trust as a means of keeping the value of the shares out of the gross estate would be unavailable to all grantors who still had voting control of the corporation after the transfer. This would be true regardless of how the ownership of the shares was split between the grantor and the trust. Thus, the controlling shareholder would be en-
couraged to liquidate his business at some point in his life; and that portion of the market thereby vacated might well be taken over by a large, publicly held corporation. Alternatively, he would be encouraged to merge his corporation with a larger, publicly held business. Operation of a small business would therefore be discouraged at a time when many view the centralization of power in American industry with alarm.

Brooks Wood

INCOME TAXATION—BUSINESS BAD DEBT DEDUCTION FOR SHAREHOLDER-EMPLOYEE—
DOMINANT MOTIVATION REQUIRED

United States v. Generes

Taxpayer Generes owned 44 percent of the stock of a corporation engaged in construction work. His original investment in this stock was $38,900. A son and a son-in-law of taxpayer owed 12 percent of the shares. As president of the enterprise, taxpayer received an annual salary of $12,000. He devoted no more than six to eight hours a week to this position, because he also served as president of a savings and loan association, a full-time job paying an annual salary of $19,000. Taxpayer earned a total income of approximately $40,000 per year. In 1958, he signed a blanket indemnity agreement with a surety company which furnished bid and performance bonds for the corporation’s construction projects. In 1962, taxpayer paid the underwriter more than $162,000 when the corporation defaulted on a project. That same year, the corporation entered receivership, and taxpayer was unable to obtain reimbursement. Taxpayer deducted part of the resulting loss as a business bad debt on his 1962 federal income tax return and carried back the excess as a net operating loss. The Commissioner disallowed this carryback on the ground that taxpayer’s indemnification loss constituted a nonbusiness bad debt. Taxpayer sued for a refund in district court.

Section 166 of the Internal Revenue Code deals with bad debts. This section permits taxpayers to deduct business bad debts to the extent of ordinary income. If this deduction does not exhaust these losses, tax-

1. 405 U.S. 93 (1972).
2. Id. at 97-99.
4. Int. Rev. Code of 1954, § 166 provides in part:
   (a) General Rule.—
   (1) Wholly worthless debts.—There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

i.e., the shareholder in a publicly held corporation. This possible inequity is increased by the fact that the liquidity problem arising when closely held shares are subjected to estate tax is much greater than in the case of publicly held shares.
payers may carry back the unused portion under section 172. Nonbusiness bad debts, however, receive less favorable tax treatment. Thus, the issue in Generes was whether taxpayer's loss constituted a business or a nonbusiness bad debt under section 166 of the Internal Revenue Code.

The district court, by special interrogatory, asked the jury to determine whether taxpayer's loss was "proximately related to his trade or business of being an employee" of the corporation. The government argued that to satisfy the proximate relationship requirement, taxpayer's corporate employment must have been his dominant motivation for signing the indemnity agreement. The district judge, however, instructed the jury that significant motivation is the proper standard. The jury found that the requisite proximate relation to trade or business existed, and the court entered judgment for taxpayer.

The government unsuccessfully appealed to the Court of Appeals for the Fifth Circuit, which approved the significant motivation standard.

The Supreme Court granted certiorari to resolve a conflict among the circuits. In reversing the Fifth Circuit, the Court held that dominant motivation is the proper criterion for determining whether a bad debt bears a proximate relation to the trade or business of a shareholder-employee. The Court further held that taxpayer's indemnification loss

(d) NONBUSINESS DEBTS.—
(1) GENERAL RULE.—In the case of a taxpayer other than a corporation—
(A) subsections (a) and (c) shall not apply to any nonbusiness debt; and
(B) where any nonbusiness debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months.

(2) NONBUSINESS DEBT DEFINED.—For purposes of paragraph (1), the term "nonbusiness debt" means a debt other than—
(A) a debt created or acquired (as the case may be) in connection with a taxpayer's trade or business; or
(B) a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business.

5. Int. Rev. Code of 1954, § 172 states that when a taxpayer's business deductions exceed his business gross income, he may carry the loss back three years and then carry it forward five years.

6. Int. Rev. Code of 1954, § 166(d)(1)(B) treats losses resulting from nonbusiness debts as short-term capital losses. Thus, tax treatment of nonbusiness bad debts is subject to the restrictions imposed by sections 1211 and 1212. Further, section 172(d)(2) restricts the use of nonbusiness losses for carryback purposes:

NONBUSINESS DEDUCTIONS OF TAXPAYERS OTHER THAN CORPORATIONS—In the case of a taxpayer other than a corporation, the deductions allowable by this chapter which are not attributable to a taxpayer's trade or business shall be allowed only to the extent of the amount of the gross income not derived from such trade or business . . . .

7. 405 U.S. at 94-95.
8. 67-2 U.S. Tax Cas. at 85,535; see note 24 infra; text accompanying note 26 infra.
9. 67-2 U.S. Tax Cas. at 85,536, 85,540, 85,542.
11. See text accompanying notes 34-39 infra.
constituted a nonbusiness bad debt as a matter of law and remanded the case, directing entry of judgment for the United States.12

Because a corporation has a legal personality separate from its shareholders, the phrase "trade or business" possesses a special meaning for tax purposes.13 A shareholder qua shareholder is not engaged in a trade or business.14 Corporate employment, however, qualifies as an independent trade or business under the Internal Revenue Code.15 In Generes, taxpayer's dual status relative to the corporation was responsible for the litigation.16

In Higgins v. Commissioner,17 taxpayer sought to deduct salaries and expenses incurred in the management of his investment portfolio, under section 23 (a) of the Internal Revenue Code of 1939. The Supreme Court, in denying the deduction, stated that managing one's investments does not constitute a trade or business, regardless of the time consumed.18

To relieve taxpayers in the Higgins-type situation, Congress amended section 23 (a) of the 1939 Code by the Revenue Act of 1942. This act allowed a deduction for expenses incurred in income-producing activities which did not amount to a trade or business.19 At the same time, Congress narrowed section 23 (k) (the forerunner of present section 166) to distinguish between business and nonbusiness bad debts.20 The major purpose in making this distinction was to prohibit business bad debt deductions for loans made by a taxpayer to his family or friends with no expectation of repayment.21 As a related purpose, Congress sought "to put nonbusiness investments in the form of loans on a footing with other nonbusiness investments."22

The Internal Revenue Code of 1954 provides no test for determining whether a bad debt is business or nonbusiness.23 Treasury Regulations

12. 405 U.S. at 103, 106. Two Justices took no part in the decision. Id. at 107. Two Justices would have remanded the case to allow the trial court to decide whether a new trial was merited. Id. at 112 (White & Brennan, JJ., concurring).
15. See, e.g., Batzell v. Commissioner, 266 F.2d 371 (4th Cir. 1959); Roberts v. Commissioner, 258 F.2d 634 (5th Cir. 1958); Pierce v. United States, 254 F.2d 885 (9th Cir. 1958); Overly v. Commissioner, 249 F.2d 576 (3d Cir. 1957); Folker v. Johnson, 230 F.2d 906 (2d Cir. 1956).
16. An anomalous situation arises when a taxpayer is an investor in a limited partnership. See George A. Butler, 36 T.C. 1097 (1961), where taxpayer was granted a business bad debt deduction.
17. 405 U.S. at 100.
18. 312 U.S. 212 (1941).
19. Id. at 215.
promulgated under present section 166, however, adopt the language of the committee reports on former section 23 (k). These Regulations define business bad debt as a bad debt that bears a \textit{proximate relation to the trade or business} of the taxpayer.

In \textit{Trent v. Commissioner}, taxpayer successfully argued that his loan to a corporation constituted a business bad debt. Taxpayer owned one-third of the stock of his corporate employer. The controlling shareholder threatened to terminate taxpayer's employment, unless taxpayer made certain loans to the company. After taxpayer complied with these demands, the loans became worthless. The Second Circuit Court of Appeals held that a corporate employee is entitled to a business bad debt deduction for worthless obligations that he incurs because of his employee status (e.g., a loan made to protect his employment with the corporation). The court did not specifically allude to the Regulations' test. Subsequent decisions, however, have cited the \textit{Trent} opinion as a leading example of a proximate relationship-type analysis.

The Supreme Court approved the Regulations' test in \textit{Whipple v.}}
Taxpayer, the controlling stockholder, provided managerial services for the corporation. He claimed that a business bad debt resulted when his loan to the company became uncollectible. The Whipple opinion stated that to qualify for a business bad debt deduction, taxpayer must initially demonstrate that he is engaged in "an independent trade or business of his own." The Court then held that providing managerial services to a corporation in order to enhance one's investment does not constitute a trade or business for tax purposes. Although the Court in Whipple did not reach the Generes-type question, the opinion carefully distinguished between business and nonbusiness bad debts for a shareholder-employee:

[C]are must be taken to distinguish bad debt losses arising from his own business and those actually arising from activities peculiar to an investor concerned with, and participating in, the conduct of the corporate business.

In applying the Regulations' test to shareholder-employees, the courts of appeals differed as to the proper measure of proximate relationship. In Weddle v. Commissioner, taxpayer was the salaried president and controlling stockholder of the corporation. She guaranteed certain loans to the company when a business venture depleted its working capital. After liquidation of the corporation, taxpayer partially paid one of these loans and claimed a deduction for a business bad debt. Although the Second Circuit applied the significant motivation standard, taxpayer failed to meet this test; her employment with the corporation was not a significant motivation for the loan guarantees.

The Seventh Circuit, however, rejected the significant motivation test in Niblock v. Commissioner. Taxpayer owned a one-half interest in a corporation and received a salary as an officer. After sustaining losses on loan guarantees, he sought a business bad debt deduction. The court held that to qualify for this deduction, taxpayer's corporate employment must have been his primary or dominant motivation for guaranteeing the loans. Because taxpayer's dominant motivation was to protect his stock value, the deduction was denied. The court interpreted the Whipple language as requiring a strict standard of proximate relationship for

30. Id.; see note 29 supra; United States v. Generes, 405 U.S. 93, 102 (1972).
31. 373 U.S. at 202; see id. at 201-03.
32. Id. at 202.
33. Id.
34. 325 F.2d 849 (2d Cir. 1963).
35. Id. at 851. The court relied on the tort concept of proximate cause as an aid in determining the meaning of "proximate" in the Regulations. The Fifth Circuit in Generes was impressed by this reasoning. 427 F.2d at 282.
36. 325 F.2d at 852. A concurring judge criticized the test, but not the result. He pointed out that two fundamental motivations (protecting salary and investment) are invariably involved in this type of situation. The concurring opinion stated that asking whether the protection of salary motivation was significant will usually result in a verdict for taxpayer. It concluded that the majority had not applied its own logic. Id. at 852-53 (concurring opinion).
37. 417 F.2d 1185 (7th Cir. 1969).
38. See text accompanying note 33 supra.
shareholder-employees. The opinion reasoned that only the dominant motivation standard could provide certainty to the interpretation of section 166.49

Most courts adopted dominant motivation as the criterion for proximate relationship.40 Apparently, in the interim between Weddle and Generes, only one case unreservedly applied the significant motivation standard.41 A few decisions rested on the cautionary language in Whipple42 without discussion of dominant or significant motivation.43 Finally, some courts avoided selecting between the competing standards by determining that taxpayer could not even meet the significant motivation test.44

The cases manifest a cautious approach to the business bad debt problem.45 The courts have limited application of the Trent doctrine to situations where the shareholder-employee is required to make the loan.46 Shareholder-employees have argued that loans made to keep the corporation functioning are proximately related to their corporate employment. This contention emphasizes that if the corporation fails, the taxpayer will lose his job. This circular reasoning, however, has not impressed the courts.47 A controlling shareholder cannot argue that he will be fired if he does not make the loan. Further, such taxpayers usually make loans to the corporation in order to protect their proprietary interest. Thus, some courts have candidly admitted that a controlling shareholder will usually fail to obtain a business bad debt deduction.48

Determining whether a shareholder-employee has incurred a business or nonbusiness bad debt is largely a matter of balancing the facts on a case-by-case basis. The courts have regarded the following factors as significant in establishing a proximate relationship between the bad debt

89. 417 F.2d at 1187. In Generes, however, the Fifth Circuit interpreted Whipple as implicitly allowing a more lenient standard. 427 F.2d at 282. See also Stratmore v. United States, 420 F.2d 461, 467 (3d Cir.) (dissenting opinion), cert. denied, 398 U.S. 951 (1970).


41. Raymond E. Morrow, 34 P-H Tax Ct. Mem. 264 (1965). In Oddee Smith, 55 T.C. 260 (1970), vacated, 457 F.2d 797 (5th Cir. 1972), the court stated that it agreed with the Seventh Circuit test, but felt constrained to apply the Fifth Circuit standard. The case has been vacated and remanded in light of the Generes ruling.

42. See text accompanying note 33 supra.

43. E.g., Millsap v. Commissioner, 387 F.2d 420, 422 (8th Cir. 1968); see, e.g., James J. Brahmis, 33 P-H Tax Ct. Mem. 1561 (1964).


48. See, e.g., Millsap v. Commissioner, 387 F.2d 420, 422 (8th Cir. 1968); see note 29 supra.
and the shareholder's corporate employment:49 (1) A requirement that
the shareholder-employee make the loan as a condition of continued
employment;50 (2) the probability that the taxpayer will be unable to
find other employment, because of age or personality problems;51 (3)
the accrual of little or no investment income to the taxpayer;52 (4) own-
ership by the taxpayer of a small proportionate equity interest;53 (5) a
disproportionate relationship between the size of the shareholder-employee's
loan and the value of his investment.54 The presence of one or more of
these factors in a case will not always result in a successful business bad
debt argument. These factors, however, do tend to demonstrate the
existence of a proximate relationship.

The Generes opinion emphasized that the Internal Revenue Code
distinguishes between business and nonbusiness items, not only in section
166, but also in other sections.55 The Court reasoned that adoption of
the significant motivation standard would obliterate or blunt this dis-
tinction.56 Dominant motivation was appraised as a more workable test:
"It provides a guideline of certainty for the trier of fact. The trier then
may compare the risk against the potential reward and give proper
emphasis to the objective rather than to the subjective."57 After articulat-
ing the policy of promoting consistency in tax law, the opinion pointed

49. A discussion of the promoter of corporations or business of lending
money theories is beyond the scope of this note. For discussion of the former, see
Whipple v. Commissioner, 375 U.S. 193, 202-03 (1962); Giblin v. Commissioner,
227 F.2d 692 (5th Cir. 1955). United States v. Henderson, 375 F.2d 36 (5th
Cir. 1967), discusses the requirements of the loan business doctrine. For a general
survey of these theories, see 5 J. MERTENS, LAW OF FEDERAL INCOME TAXATION

50. Trent v. Commissioner, 291 F.2d 669 (2d Cir. 1961); see text accompanying
notes 27-29, 46 supra.

Jaffe each held a 50 percent interest in a corporation. Isidor was 70 years old
and virtually unemployable if he lost his job. Samuel's personality made work-
ing for an enterprise not under his control difficult. The court did not discuss
dominant or significant motivation, but held that taxpayers made the loans to
protect their employment. In Estate of Kent Avery, 38 P-H Tax Ct. Mem. 385
(1969), a talented fabric stylist, who because of personality problems could not
work well with others, formed a wholly owned corporation. The court held
that he was entitled to a business bad debt deduction. The opinion reasoned
that the advance was primarily related to his trade or business as a stylist, because
it enabled him to carry on his work. See also Philip W. Fitzpatrick, 36 P-H Tax

52. See B.A. Faucher, 39 P-H Tax Ct. Mem. 1039 (1970); Isidor Jaffe, 36 P-H Tax


55. 405 U.S. at 103. Intr. Rev. Code of 1954, § 165 (c) (1) provides for deduc-
tions for losses incurred in a trade or business, and § 165 (c) (2) provides for
"losses incurred in any transaction entered into for profit, though not connected
with a trade or business." Section 162 gives allowances for trade or business
expenses. Section 262 states: "Except as otherwise expressly provided in this
chapter, no deduction shall be allowed for personal, living, or family expenses."

56. 405 U.S. at 103-04. But see Note, Shareholder-Creditor Bad Debts Under
Section 166 of the Internal Revenue Code, 75 Harv. L. Rev. 589, 601 (1962).

57. 405 U.S. at 104.
out that dominant motivation is the test under several other related Code sections.\textsuperscript{58} The Court, however, found no inconsistency in the application of significant motivation in some areas of tax avoidance activity.\textsuperscript{60} Finally, the analogy to the tort concept of proximate cause did not impress the Court.\textsuperscript{60}

Critics of the Generes opinion point out that the dominant motivation test does not appear in the Code or Regulations, and thus is a judge-made standard, imposing a heavy burden of proof on the taxpayer.\textsuperscript{61} The Court, however, feared that adoption of the significant motivation test would create a loophole enabling taxpayers to mitigate their investment losses; taxpayers on corporate payrolls at nominal salaries could claim business bad debt deductions for losses from investments made in the form of loans.\textsuperscript{62}

To conclude, Generes does not offer a litmus test for deciding whether a debt is business or nonbusiness, but does set out a workable guideline for future cases. Dominant motivation is a sounder test than significant motivation, because it provides a more objective analysis of the relationship between the bad debt and taxpayer's corporate employment.

\begin{flushright}
\textbf{Kimberly Somerville Hughes}
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\textsuperscript{58} \textit{Id.} at 105; see Imbesi v. Commissioner, 361 F.2d 640 (3d Cir. 1966) (primary motivation required for a deduction under section 165 (c) (1)); Austin v. Commissioner, 298 F.2d 583 (2d Cir. 1962) (primary motivation required for a deduction under section 165 (c) (2)).


\textsuperscript{60} 405 U.S. at 105. The Court stated: “It has little place in tax law where plural aspects are not usual, where an item either is or is not a deduction, or either is or is not a business bad debt, and where certainty is desirable.” \textit{Id.}

\textsuperscript{61} 405 U.S. at 113 (dissenting opinion); Note, \textit{Shareholder-Creditor Bad Debts Under Section 166 of the Internal Revenue Code}, 75 \textit{Harv. L. Rev.} 589, 601 (1962).

\textsuperscript{62} See 405 U.S. at 111 (Marshall, J., concurring). Justice Marshall in concurring pointed out that Congress had this sort of intra-family loan in mind when it distinguished between business and nonbusiness bad debts: “The fact that he took a nominal salary for nominal services does not, in my opinion, require a different result.” \textit{Id.}
PRODUCTS LIABILITY—
IMPLIED WARRANTY IN THE SALE OF A NEW HOUSE

Smith v. Old Warson Development Co.1

The defendant subdivided a tract of land into residential lots and hired an agent to construct a display home, which the plaintiffs purchased. The contract of sale contained no warranties concerning the quality of the house. Defendant conveyed the property by general warranty deed. Within a few months, a concrete slab supporting two rooms settled, causing the doors to stick, the caulked space between the bathtub and wall to become larger, cracks to develop in the walls, and a space to appear between a baseboard and wall.

Plaintiffs brought an action for damages. Their complaint set forth two alternative theories of recovery: (1) Breach of an implied warranty of fitness2 for use as a residence; and (2) negligence in the construction of the house. At the close of defendant’s evidence, plaintiffs submitted the case only on the theory of implied warranty of fitness. After the jury returned a verdict in favor of the plaintiffs, the trial judge directed a verdict for the defendant. The St. Louis Court of Appeals reversed, and the Supreme Court of Missouri adopted the lower appellate court’s opinion.

Until recent years, courts have been reluctant to allow purchasers of new homes to recover damages for defects in the homes. Generally, they have required an express covenant of habitability and fitness in the deed before granting such relief.3 Recently, however, some courts have permitted recovery without such a covenant.4 In so doing, these courts have employed one of three theories: Strict liability;5 statutory warranty;6 or implied warranty.

The vast majority of cases permitting recovery in this area utilize the implied warranty theory.7 As early as 1884, in the case of Kellogg Bridge Co.

1. 479 S.W.2d 795 (Mo. En Banc 1972).
2. As used in this casenote, the terms “implied warranty” and “implied warranty of fitness” are used under the Uniform Commercial Code § 2–314.
6. Only Louisiana has such a statutory warranty. La. Civ. Code Ann. art. 2475 (West 1952). The 1987 New York Law Revision Commission recommended similar legislation, but no action has been taken as of this time. Most states have local ordinances containing building and zoning regulations. Violations of these ordinances may affect the liability of the builder-vendor. In Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964), the court noted violations of building code provisions, but this was not the controlling point for finding an implied warranty.
v. Hamilton, the Supreme Court of the United States recognized that, in an appropriate situation, there is an implied warranty in the sale of realty. The Court said that if the buyer justifiably relied on the judgment of the builder-vendors, the law implies a warranty that the article is reasonably fit for the use for which it was designed. Such an implied warranty was the basis of the Smith decision, and this note concerns itself with that theory.

Two doctrines have been traditional bars to recovery under implied warranties in the sale of residential real estate. These doctrines are caveat emptor and merger.

The doctrine of caveat emptor places upon the purchaser all risk as to the quality or condition of the property being sold. Thus, caveat emptor requires that the purchaser examine, judge, and test for himself the property that he buys. The doctrine is inapplicable where the vendor has misrepresented the quality or condition of the property. Further, the parties can place the risk of defects on the vendor by entering into an express covenant to that effect.

Many authorities have found that current policy considerations favor abandoning caveat emptor. The doctrine was designed to apply when parties to a sale were on an equal footing. The builder-vendor and the purchaser of a new home are not on an equal footing, however. The pur-


8. 110 U.S. 108 (1884).

9. Id. at 116.

10. Arguably, the implied warranty created by Smith is in the nature of strict liability in tort. This proposition is supported by the court's reference to Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969). Keener expressly adopted the theory of strict liability as expressed in Restatement (Second) of Torts § 402A (1965). Smith quotes from Keener:

"The difference between "strict liability" or "implied warranty" would not in this case be one of substance . . . since our courts are clearly recognizing the tort nature of the liability imposed."

479 S.W.2d at 798. See also Krauskopf, Products Liability, 92 Mo. L. Rev. 459, 469 (1967).

If Smith is viewed as essentially a strict liability case, perhaps the contract law considerations dealt with by the court were inappropriate. That is, merger, privity, and disclaimers are irrelevant to recovery in strict liability. Instead, other tort defenses may be available to the builder-vendor. For example, a defendant could raise the defense of "contributory fault" (see Keener v. Dayton Elec. Mfg. Co., supra at 365), or he could allege "assumption of the risk." See Keeton, Assumption of Products Risks, 19 Sw. L.J. 61 (1965).

11. State ex rel. Jones Store Co. v. Shain, 352 Mo. 630, 694, 179 S.W.2d 19, 20 (En Banc 1944). This case involves personal property, but the rule stated has general applicability.

12. Hargous v. Stone, 5 N.Y. 73, 82 (1851); Humphrey v. Baker, 71 Okla. 272, 176 P. 896 (1918). These cases involve personal property, but the definition of caveat emptor is the same for personality and realty.


chaser lacks the competence to discover latent defects;\textsuperscript{15} therefore, he must rely on the skill and judgment of the builder-vendor.\textsuperscript{16} Also, the mass producer of homes is now a merchant as well as an artisan. As such, he no longer merits the special protection afforded by caveat emptor.\textsuperscript{17} In fact, he is in a better position than the purchaser to spread the risk of defects in homes.\textsuperscript{18} Further, he is in a better position to select a proper site, materials, and foundation. This makes the builder-vendor, even if he is exercising reasonable care, less innocent than the completely innocent and unsuspecting purchaser.\textsuperscript{19}

Of course, those favoring caveat emptor have countervailing arguments. They argue that it is difficult to distinguish a latent defect from a defect arising through natural wear and that the vendee often provides improper maintenance for the house. Further, they argue that the vendee's expectations of quality are often unreasonable. Finally, they point out that, at present, there is no reasonably priced insurance to cover the builder-vendor in the absence of caveat emptor.\textsuperscript{20}

The second bar to recovery on an implied warranty in the sale of realty is the doctrine of merger. Under this doctrine, any implied or express warranties in the contract of sale merge into the deed, and are thereby lost upon execution of the deed, unless expressly included therein.\textsuperscript{21} Because of the harshness of this doctrine, courts have created many exceptions to the general rule.\textsuperscript{22} Additionally, some judicial thought has recently de-emphasized the importance of merger by finding it merely a corollary of

\textsuperscript{15} Id. at 545.
\textsuperscript{17} Roberts, \textit{The Case of the Unwary Home Buyer: The Housing Merchant Did It}, 52 CORNELL L.Q. 835, 863 (1967).
\textsuperscript{20} Bearman, \textit{supra} note 14, at 573.
\textsuperscript{21} 7 S. WILListon, CONTRACTS § 926, at 797 (3d ed. 1963).
\textsuperscript{22} Roberts, \textit{supra} note 17, at 860. \textit{See generally} Annot., 25 A.L.R.3d 383 (1969). Under the exception of "collateral promises," if the parties intended that a covenant survive the deed, it did, even if not included in the deed. This exception required awkward determinations of what the parties' actual intent was. Moreover, in some jurisdictions the vendor could avoid the doctrine by stating in the contract that merger should operate on all warranties not within the deed. In many other jurisdictions, the courts decided this statement could only be applicable and sensible in regard to patent defects, as opposed to latent defects.

Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957), exemplifies another exception. Vanderschrier, one of the earliest American cases finding an implied warranty in the contract for sale of a new house, also demonstrates the importance of merger in the older cases. The court found an implied warranty where the contract of sale was entered into prior to completion of the house, but expressly distinguished this situation from one where the house is completed prior to the sale. Where the contract of sale is entered into prior to completion of the house, the purchaser needs an implied warranty because he has no opportunity to inspect the finished product before becoming legally bound and must, therefore, rely on the builder. If the contract of sale is entered into after completion, merger would bar any implied warranties therein, because the purchaser can inspect the completed premises with no necessary reliance on the builder-vendor.
caveat emptor.23 Thus, if the court rejects caveat emptor, it automatically rejects merger as well. Moreover, some have said that merger should not operate in the case of sales of new homes, as it would in other instances of real property sales, because mass-produced homes are comparable to any other mass-produced product. Therefore, a new house should have the same status under the law as a mass-produced automobile.24

In Smith, the court dealt directly with the implied warranty theory and the doctrines of caveat emptor and merger. Before Smith, the Missouri courts had rejected the possibility of an implied warranty in the sale of real estate. In Combow v. Kansas City Ground Investment Co.,26 the court stated: "[A]bsent an express agreement to the contrary, a seller of real estate cannot be held liable for defective condition of the premises."20 Smith, however, repudiated this position, and established that in Missouri an implied common law warranty of merchantable quality and fitness exists in the sale of new homes. The court decided that caveat emptor should not bar the purchaser's recovery, because the doctrine is no longer in accord with modern home-buying practices.27 The modern purchaser has no opportunity to inspect the house during construction. Further, his comparatively weak bargaining position prevents him from demanding warranties in the deed. The court also determined that the doctrine of merger does not bar recovery for defects in a new home, because the implied warranty does not arise from the contract of sale at all. Rather, the court stated, "[I]mplied warranty is a tort concept not a contract right. Plaintiffs' rights arise as a matter of law from their purchase of the house, not from their sale contract or the deed."28 Thus, merger is not even an appropriate consideration.29

Although the court clearly disposed of the caveat emptor and merger problems, it left unresolved several problems related to the implied warranty in the sale of a new house. One such problem is how serious the defect in the house must be to permit recovery. The Smith court said that the implied warranty requires a product of reasonable quality or fitness; it does not

25. See, e.g., Humber v. Morton, 426 S.W.2d 554 (Tex. 1968). The cases that give some weight to the doctrine of merger in the implied warranty situation hold that the doctrine of caveat emptor applies to sales of real property, reducing the "merger" theory to the status of a "unicorn hunting bow" (a broken and inoperative cross-bow that suffices for its purpose because no one has seen a unicorn since the time of Noah).


27. 358 Mo. 934, 218 S.W.2d 599 (1949).
28. Id. at 938, 218 S.W.2d at 541.
29. Id. at 801.
require a perfect product. Some commentators, however, have deemed the “reasonableness” test too broad. They argue that reasonableness test opens up the possibility that the building industry will be burdened with recoveries for minor defects, because the average juror will find virtually any defect unreasonable. The test that they propose, however, is arguably just the Smith reasonableness standard couched in more specific terms.

At any rate, what “reasonable” means in this context is, at present, unknown.

The next problem Smith raises is the degree of privity of contract required for the plaintiff to recover. Both the St. Louis Court of Appeals and the Missouri Supreme Court referred to the defendant as the “builder-vendor,” thus avoiding any question of privity. The court of appeals carefully referred to the actual builder as the defendant’s agent. Although the court avoided the privity issue, it was careful to point out a recent Missouri Supreme Court decision, Morrow v. Caloric Appliance Corp. that abolished the requirement of privity in an implied warranty on personality.

In cases where the builder and vendor cannot be characterized as the same entity, the courts normally permit recovery against the builder, but not the vendor, although no privity exists between the builder and the consumer purchaser. It appears very unlikely that the Missouri courts will im-

30. 479 S.W.2d at 798-99. The court also said that the duration of liability would be premised on a standard of reasonableness. Id. at 801. See also Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 92, 207 A.2d 314, 326 (1965).

31. See, e.g., Bearman, supra note 14, at 575.

32. See id. Bearman suggests the following test: “Will this construction pass without objection in the trade?” In view of UNIFORM COMMERCIAL CODE § 2–314, query whether this test is distinguishable from Smith’s reasonableness test. Section 2–314, which promulgates what is basically a reasonableness test (Woodruff v. Clark County Farm Bureau Coop. Ass’n, 286 N.E.2d 188, 194 (Ind. Ct. App. 1972)), adopts language identical to that of the Bearman test to serve as one of its suggested tests for determining merchantability of goods.

33. See generally Hammon, Homeowners’ Litigious Revenge, Ins. L.J. 681 (1970). This enlightening article discloses that virtually every dwelling is improperly constructed to some degree. The author states:

The last house I inspected in this respect had 77 defects, only 6 of which the owners had noticed. . . . The ones I found were the serious variety that posed a constant danger to the entire family and which probably would make the jury angry that any builder could be so callous.

Id. at 684.

Under a test that permits compensation for every “unreasonable” defect, will not the purchaser be encouraged to search out and sue for defects that may never cause serious inconvenience? The end result could be an unbearable burden on the building industry.

34. 362 S.W.2d 282 (Spr. Mo. App. 1962), aff’d, 372 S.W.2d 41 (Mo. En Banc 1963).

35. 479 S.W.2d at 798.

36. See Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966). But see UNIFORM COMMERCIAL CODE § 2–314. The Code imposes liability on the merchant as well as the manufacturer. No stated rationale has been found for immunizing the merchant of houses. Perhaps the variance in treatment can be explained by the fact that the commercial vendor who is not also the builder is in little better position than the consumer-purchaser in discovering defects by his own inspection.
pose a requirement of privity in this situation.\textsuperscript{37} The consumer purchaser is the person who should derive the benefit of an implied warranty.\textsuperscript{38} It is submitted that the builder should be unable to avoid liability by first selling the house to a commercial vendor. Such a technical requirement of privity could destroy the purpose of the implied warranty.

Another problem is the possible exclusion of the implied warranty. The \textit{Smith} court left open the possibility that an express warranty might displace an implied warranty. Presumably, the rules of implied warranties established in the privity cases will extend to the implied warranty in the sale of a new house. These rules may make the implied warranty established in \textit{Smith} ineffective. For example, many pre-Uniform Commercial Code cases flatly stated that an express warranty excludes an implied warranty in the sale of personality.\textsuperscript{39} Such statements are unduly broad, however.\textsuperscript{40} The general rule has been more narrowly expressed:

A more accurate statement of the correct rule is that an express warranty excludes an implied warranty of fitness (1) if the express warranty is inconsistent with the warranty which would have been implied had none been expressed; or (2) if the express warranty relates to the same or a similar subject matter as one which would have been implied.\textsuperscript{41}

Another problem is that Missouri common law permits express disclaimers of all warranties.\textsuperscript{42} If an express exclusion of implied warranties is permissible, builders-vendors can easily defeat the effect of the \textit{Smith} decision. The \textit{Smith} opinion suggests some indication, however, that a disclaimer or exclusion must be precise to be effective.\textsuperscript{43} The contract in \textit{Smith} provided: "Property to be accepted in its present condition unless otherwise stated in contract."\textsuperscript{44} The court held that this clause did not exclude the implied warranty because the provision meant only that the builder was to do no additional work. In other words, the provision did not mean that

\textsuperscript{37} The \textit{Smith} court's reference to \textit{Morrow v. Caloric Appliance Corp.} (see text accompanying note 34 supra) indicates that the supreme court will not require privity in this situation.

\textsuperscript{38} Bearman, supra note 14, at 571-72.

\textsuperscript{39} Springer \textit{v. Indianapolis Brewing Co.}, 126 Ga. 321, 55 S.E. 58, 55 (1906); Rogers \textit{v. Toni Home Permanent Co.}, 167 Ohio St. 244, 249, 147 N.E.2d 612, 616 (1958).

\textsuperscript{40} 77 C.J.S. Sales § 316 (1952).

\textsuperscript{41} Mitchell \textit{v. Rudaill}, 332 S.W.2d 91, 95 (St. L. Mo. App. 1960); \textit{Cf. Uniform Commercial Code} § 2-317. Arguably, the second prong of the \textit{Mitchell v. Rudaill} test is modified by the Uniform Commercial Code. This section purports to find express and implied warranties cumulative unless such construction would be unreasonable.

\textsuperscript{42} DeGrendele Motors, Inc. \textit{v. Reeder}, 382 S.W.2d 431, 433 (St. L. Mo. App. 1964); Hargrove \textit{v. Lewis}, 313 S.W.2d 594, 595 (Spr. Mo. App. 1958).

\textsuperscript{43} \textit{See also} Wawak \textit{v. Stewart}, 247 Ark. 1098, 449 S.W.2d 922 (1970). The contract clause in that case provided: Buyer certifies that he has inspected the property and he is not relying upon any warranties, representations or statements of the Agent or Seller as to the age or physical conditions of improvements. \textit{Id. at} 1101, 449 S.W.2d at 926. The court held this clause did not purport to exclude all warranties, but only warranties against discoverable defects.

\textsuperscript{44} 479 S.W.2d at 800.
the buyer accepted unknown, structural defects.\footnote{Id.} Perhaps reference to the Uniform Commercial Code would be instructive in drafting an effective disclaimer.\footnote{See Uniform Commercial Code § 2-316 (2), (3) (a).}

Smith clearly states that there is, in Missouri, a common law, implied warranty of merchantable quality and fitness in the sale of a new home. The opinion disposes of the problems of caveat emptor and merger. It leaves open, however, the questions of the seriousness of the defect, the degree of privity required for recovery, and the possible exclusion or disclaimer of the warranty. Even with these open questions, Smith is an important decision for the builders and buyers of new homes.

PAUL T. LUCKENBILL

PROFESSIONAL RESPONSIBILITY—WILL DRAFTING—PROVISIONS NAMING THE DRAFTSMAN AS EXECUTOR OR DIRECTING HIS RETENTION AS ATTORNEY FOR THE ESTATE

State v. Gulbankian\footnote{54 Wis. 2d 605, 196 N.W.2d 733 (1972).}

Defendants, brother and sister, had practiced law as partners since 1955. From January 1, 1955, through January 23, 1971, they had filed 147 wills for probate in the County Court for Racine County, Wisconsin. Of these, they had drafted 135. Out of that number, there was a striking incidence of certain clauses. These clauses and the number of wills containing each such clause were:

1. Directions that either of the defendants be employed to probate the will: 71.
2. Directions that defendant Gulbank K. Gulbankian be employed as attorney for the purpose of probating the estate: 26.
3. Directions that defendant Vartak Gulbankian be employed as attorney for the purpose of probating the estate: 4.
4. Directions to appoint Akabe Gulbankian, sister of the defendants, as either executrix or co-executrix: 41.
5. Directions to appoint Vartak Gulbankian as the executrix: 1.

Because of these provisions, the Wisconsin State Bar charged the Gulbankians with soliciting the probate of estates.

The defendants denied they had solicited the probate of estates.
First, the defendants pointed out that they were of Armenian extraction and that their office was in a large Armenian community. The defendants contended that their clients placed an unusually great amount of trust in them, based on their language and ethnic affinity, and that each testator specifically requested that they be named as either the executor or the attorney for the estate. Second, the defendants pointed to the existence of a custom in Racine County for attorneys drafting wills to name themselves as attorney for the estate. Indeed, the evidence tended to show that in 5 to 50 percent of the wills drafted in Racine County, the drafting attorney had included a clause directing that he be retained to probate the estate.

The Wisconsin Supreme Court held that there was no solicitation, but implied that in the future such a high percentage of similar clauses might lead to a different result. In its opinion, the court considered two ethical problems. These problems were: (1) Whether an attorney should act as custodian of a will that he has drafted; and (2) whether drafting a will with a provision directing the executor to retain the draftsman as attorney for the estate or naming the draftsman as executor constitutes unethical practice.

The court voiced its disapproval of attorneys keeping wills that they have drafted. The court stated that the best practice is for the testator to keep the original will, and that the attorney should keep the will only upon the specific request of the testator. An excerpt from Partridge’s book, Country Lawyer, illustrates the reason behind this rule:

For a time [my father] puzzled over the best way to build up a probate practice . . . . Following the hearse, so it was called, did not appeal to my father at all. He had a much better idea: if he could draw their wills—and he could keep the originals in his safe—he would eventually, if he lived long enough, have a probate business. He reasoned that if people had to come to him to get the will they were very likely to give him the work of settling the estate.

An informal opinion of the American Bar Association expressed a view similar to that of the Wisconsin Supreme Court, and concluded, “[T]here is nothing unethical about a lawyer or a trust company acting as custodian of the original of a client’s will if this is done with the client’s express permission.”

With respect to the second problem, it should first be noted that a lawyer by drafting a will acquires no vested interest in representing the testator’s estate; the testator may select any attorney he wishes. Therefore, the draftsman may ethically provide for the retention of his services only at the specific request or suggestion of the testator; he may not simply in-

2. Id.
3. Id. at 611-12, 196 N.W.2d at 736.
4. B. PARTRIDGE, COUNTRY LAWYER 38 (1939).
5. ABA COMMITTEE ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, NO. 981 (1967).
6. ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS, NO. 244A (1957); see ABA COMMITTEE ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, NO. 602 (1963).
clude such a provision as a matter of course in each will he drafts, even if he reads the will to the testator and obtains the testator's consent.7

Furthermore, even if the testator requests inclusion of a provision for the retention of the draftsman's services, the draftsman still may be guilty of unethical conduct in the securing of that request. The authorities all agree that the solicitation of legal business is unethical.8 A corollary to this proposition is that it is both improper and unethical for an attorney either to suggest that he be named executor or attorney for the estate or to solicit from the testator a request that he serve in that capacity. For example, the Missouri Bar Advisory Committee has stated: "[I]t is unprofessional for a lawyer drafting a will to suggest that he be named in the will as attorney for the executor."9 With respect to soliciting such a request, the Code of Professional Responsibility states: "A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument."10 Thus, taken as a whole, the authorities indicate that an attorney may draft a will designating himself as executor or directing the executor to employ him as attorney for the estate, if he includes such provision at the unsolicited request of the testator.11

The drafting of a will with provisions directing the executor to retain the draftsman as attorney for the estate or naming the draftsman as executor is not unethical per se. Nevertheless, when a high percentage of the wills drafted contain such provisions, the pattern thus created may well lead to an inference of the draftsman’s solicitation. Because of the secrecy surrounding the transaction, proof of solicitation may rest upon such circumstantial evidence. In Pasternak v. Mashak,12 the St. Louis Court of Appeals said that because of the great difficulty of obtaining proof of undue influence "the rule is that the fact may be proven by circumstantial evidence."13 Moreover, evidence of a custom of inserting such provisions in wills is insufficient to rebut this inference of solicitation, because the existence of a custom will not sanctify a practice that violates the Code of Professional Responsibility.14

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7. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, NO. 602 (1965). The Committee stated:

The customary and regular inclusion of provisions in wills directing the retention of the services of the attorney drawing the will, without the specific request or suggestion of the client is clearly in violation of Canon II and improper.

8. See, e.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103 (A); ABA CANONS OF PROFESSIONAL ETHICS No. 27; In re Woodward, 500 S.W.2d 385 (Mo. En Banc 1957).


10. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-6.


12. 392 S.W.2d 631 (St. L. Mo. App. 1955).

13. Id. at 637.


This is tantamount to saying "We have been driving through red lights for so many years without serious mishap that it is now lawful to do so."

The fact that these practices have continued for many years and have
Although a high percentage of such clauses may support an inference of solicitation, there are several reasons other than solicitation that might account for the frequency of the clauses. As one author has noted, distinct advantages are to be gained for the client in having the drafting attorney handle the probate of the estate because of the attorney's familiarity with the testator's affairs and property. In Missouri, there is an additional advantage. When an attorney is appointed as the executor of an estate, there can be a considerable savings to the estate under section 473.155, RSMo 1969. Professor Blackmar dramatizes the situation in an imaginary, but very practical, conversation between an attorney and client over who should be the executor in the testator's will. The conversation brings home the point that if an attorney is executor, the resulting combination of functions will produce a savings for the client.

A Missouri attorney has the duty to point out to his client the savings to the estate made possible by the appointment of an attorney as executor. While the naming of any attorney would produce these savings, it is clear that a large number of clients will request that the attorney-draftsman be named as executor in the will after learning of the possible savings. Thus, a Missouri attorney must face the problem of explaining the possible savings while being careful to avoid suggesting that he be named executor.

The preceding discussion suggests that the following guidelines would be of help to an attorney in the drafting of wills that include provisions for his appointment as executor or his employment as attorney for the estate:

1. The attorney should be careful during his conversations with the testator not to suggest either directly or indirectly that he be employed as executor or as attorney for the executor. The attorney is, however, under the duty to explain the executor's duties and, in Missouri, the possible savings to the estate resulting from having an attorney as executor.

2. The attorney should avoid the customary and regular inclusion of provisions calling for his employment as executor or as attorney for the estate. He should draft such clauses only at the testator's specific request.18

been acquiesced in by the bar does not make such activities any less the practice of law .... It is apparent that the bar has been remiss in allowing the present custom to develop unabated .... Thus, neither the public's blissful acquiescence nor the bar's confessed lethargy can clothe the activities with validity.

Id. at 99, 366 P.2d at 13.
15. McCown, supra note 9.
16. Section 473.155 states:
If the executor or administrator is an attorney, no allowance shall be made for legal services performed by him or at his instance unless such services are authorized by the will or by order of the court or are consented to by all his heirs and devisees whose rights may be adversely affected by the allowance.

17. See Blackmar, Does the Public Get Value Received for Probate Fees?, 23 J. Mo. B. 247 (1967).
18. Several of these precautions are similar to measures taken when the attorney-draftsman is a beneficiary of the will.
3. When such a provision is to be inserted in a client’s will and the shadow of impropriety may appear, the attorney might want to have the testator state his wishes to a disinterested witness, who may then testify if necessary.²⁰

4. In cases where the testator does desire the lawyer as executor or attorney for the estate, the attorney should consider having the testator submit the will to another lawyer prior to its execution.²¹

5. The draftsman might have another attorney draft a codicil containing the provision for the draftsman’s employment in order to avoid any inference of solicitation.²²

6. The attorney might use a disclaimer signed by the testator stating that provision for employment of the attorney was included solely at the testator’s spontaneous request.

In conclusion, the best practice with regard to the safekeeping of wills is for the testator to keep the will. The attorney should keep the will only at the testator’s specific request. Provisions naming the attorney-draftsman as executor or directing the executor to employ him as attorney for the estate should be included only at the unprompted, unsolicited request of the testator. No Missouri case has yet dealt with this latter issue. However, it is hoped that the Missouri Supreme Court would weigh heavily the factors of the attorney-draftsman’s familiarity with the testator’s affairs and the possible savings to the estate before holding that a high percentage of wills containing provisions providing for employment of the draftsman supports an inference of solicitation.

NILES S. CORSON

²⁰. H. DRINKER, LEGAL ETHICS 94 (1953).
²². H. DRINKER, supra note 20.
SCIENTIFIC EVIDENCE—ADMISSIBILITY OF VOICEPRINTS

State ex rel. Trimble v. Hedman

On May 22, 1970, the St. Paul, Minnesota, Police Headquarters received a telephone call requesting assistance for a woman about to have a child. Two officers responded, but found no one at the address described in the call. One officer went to the rear of the house, heard a shot and returned to the front, where he found his companion mortally wounded.

The St. Paul Police Department tapes all emergency calls. It made voiceprints of the call that had lured the policemen to the scene and of 18 residents in that neighborhood. A comparison of the unidentified voiceprint with those of the residents convinced police laboratory experts that Constance Trimble was the unknown caller. Based on this opinion, a judge issued a warrant for Trimble's arrest. Trimble was arrested, indicted by a grand jury and charged with first degree murder. She then applied for a writ of habeas corpus on the ground that the matching of the voiceprints did not constitute probable cause for arrest. When the lower court discharged the writ, Trimble appealed to the Minnesota Supreme Court. This court held that probable cause existed for the arrest and stated in strong dictum that voiceprint evidence should be admissible at Trimble's trial, at least to corroborate voice identifications made by ear alone.

Generally, a witness may identify a person on the basis of having heard his voice at different times. Such testimony is generally admissible whether the words were spoken or recorded by mechanical means. The question in Trimble, on the other hand, concerned the probative value of voiceprint evidence on the identity issue.

The scientific basis of the voiceprint technique is that speech is a composite of different frequencies. In practice, a subject's voice is recorded. A two- or three-second segment of that recording is transposed to a second magnetic tape. This tape is formed in a loop and placed on a special tape player. While the loop continuously replays this segment, a variable filter in a voice spectrograph separates a band of frequencies from the sound. The energy from each band activates a stylus, which traces a line on a rotating drum; the greater the energy in the band, the darker the line. The variable filter then automatically adjusts to a higher band of frequencies, and the speech segment replays. The stylus draws another line on the rotating drum, parallel to and a short distance from the previous line. This process continues until the spectrograph has recorded the energy levels in a wide range of frequencies. The result is a pattern of closely spaced lines:

In this example, the vertical axis is frequency, and the horizontal is time. The darkness of the horizontal lines represents the intensity of the sound within a particular frequency band. If a comparison of the unknown

1. 291 Minn. 442, 192 N.W.2d 432 (1971).
2. Id. at 458, 192 N.W.2d at 441.
3. Id. at 448, 192 N.W.2d at 435.
4. Id. at 449, 192 N.W.2d at 436.
voiceprint with a known one of the same sound results in a sufficient number of matching patterns, the unknown voice is identified.⁶

Three propositions support the voiceprint theory: (1) Every individual has unique speech characteristics that distinguish his voice from all others;⁷ (2) the voice spectrograph can record these distinct characteristics; (3) these unique characteristics remain stable with respect to passage of time and change of circumstance. Little controversy surrounds the first proposition. The combination of multiple features of anatomy and speech habit makes it highly unlikely that two individuals have exactly the same speech characteristics.⁸ Although unverified, the second proposition is also largely undisputed. The voiceprint is at least as sensitive as the human ear to these unique characteristics.⁹ The third proposition is the most controversial. Many speech characteristics can be varied at will or affected by changes in a person's emotional state or physical condition. Further, even if certain unique speech characteristics remain stable, other variable traits may contaminate a speech pattern.¹⁰ At present, the voice spectrograph

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⁵. This example, contained in Kamine, *The Voiceprint Technique*, 6 San Diego L. Rev. 213, 214 (1969), shows the two basic forms of voiceprints. The upper is the bar form, and the lower is the contour form. The bar form is the spectrogram normally used for voiceprints. *Id.*


⁸. See Kamine, * supra* note 6, at 226.

⁹. *Id.* at 224.

¹⁰. See Bolt, * supra* note 7, at 559.
cannot discriminate between the mutable and immutable characteristics of speech.\textsuperscript{11}

A comparison of voiceprint matching with fingerprint matching is instructive.\textsuperscript{12} Fingerprint patterns show directly the physical patterns of the loops and whorls on the fingers. Voiceprint patterns, however, describe only indirectly the vocal anatomy. Further, fingerprint identification results from comparison of the minute details of skin ridge patterns, which are not changed by time or emotional stress. In contrast, voiceprint identification involves gross pattern matching; this process compares general shapes rather than the details of the locus defining the shape. Finally, while a person cannot easily disguise or fake fingerprint patterns, he can alter speech patterns without much difficulty. In view of these differences, voiceprint identification will probably never achieve the reliability of fingerprint identification.\textsuperscript{13}

The reliability of the voiceprint technique is disputed. Lawrence Kersta,\textsuperscript{14} who conducted the first reported voiceprint experiments,\textsuperscript{15} reported an accuracy rate of 99 percent. Other researchers, however, made numerous attempts to verify Kersta's results, but found much higher error rates.\textsuperscript{16} Further, all of these experiments were closed trials in which the examiner knew that his samples included matching voiceprints. This simplified the task, because in actual criminal investigations, the examiner does not know whether a match exists. A committee of the Acoustical Society of America surveyed these experiments and concluded:

The available results are inadequate to establish the reliability of voice identification by spectrograms. We believe this conclusion is shared by most scientists who are knowledgeable about speech; hence, many of them are deeply concerned about the use of spectrographic evidence in courts.\textsuperscript{17}

The committee urged further investigation of the reliability of voiceprint identification under conditions approximating the actual forensic situation.

In September, 1968, the Law Enforcement Assistance Administration granted $300,000 to the Michigan State Police to conduct a comprehensive study of the reliability of the voiceprint technique. The state police subcontracted this study to the Michigan State University School of Criminal

\textsuperscript{11} Id. Recent investigations indicate that a disguised voice can frustrate the voiceprint technique. Report of W. Endres to the 80th Meeting of the Acoustical Society of America, Nov. 6, 1970, in 49 J. ACoustical Soc'y Am. 188 (1971).

\textsuperscript{12} See Bolt, supra note 7, at 599, 6 app. B at 606-08, for an exhaustive comparison of the voiceprint and fingerprint techniques.

\textsuperscript{13} Id. at 600.

\textsuperscript{14} Kersta is probably the most enthusiastic proponent of the voiceprint. He is now president of Voiceprint Laboratories, which manufactures and sells the voice spectrograph. Cederbaums, Voiceprint Identification: A Scientific and Legal Dilemma, 5 CRIM. L. Bull. 323, 326 (1969).

\textsuperscript{15} Kersta, Voice Identification, 196 NATURE 1253, 1255 (1962).


\textsuperscript{17} Bolt, supra note 7, at 603.

https://scholarship.law.missouri.edu/mlr/vol38/iss2/6
Justice. Dr. Oscar Tosi, who directed this study, found in the forensic situation an approximate 6 percent rate of false identification (i.e., when the examiner found a match but none existed) and a 12 percent rate of missed identification (i.e., when the examiner found no match but one existed). In spite of these high percentages of error, Dr. Tosi concluded that the voiceprint was extremely reliable, if trained examiners applied the proper technique. He reasoned that, in reality, the 6 percent rate of false identification should be reduced to 2.4 percent, because in 60 percent of the erroneous decisions, the examiner indicated that he was not sure of his judgment. Dr. Tosi also pointed out that because the actual forensic situation would involve a more experienced, better motivated examiner, who could study the voiceprints for an extended time, the expected rate of incorrect identification should be reduced further. Dr. Tosi, however, failed to mention the factors in the actual forensic situation that tend to increase the error. For example, a one-month period separated the recordings in the test situation. In actual investigations, on the other hand, a much longer time lapse may intervene between the recording of the known voice and of the unknown one. This analysis also fails to consider that emotional distress may affect voice patterns.

Professor McCormick says that evidence is prima facie admissible if it in some degree "advances the inquiry." Even assuming a 6 percent false identification rate, voiceprint evidence clearly "advances the inquiry." McCormick goes on to say that counter-balancing factors can destroy prima facie admissibility where the "cost" of the evidence (in terms of time, accuracy and the like) is too high.

18. The results of the study were submitted to the Department of Justice in an unpublished report. Tosi, Oyer, Lashbrook, Pedrey & Nichol, Michigan State University Voice Identification Project, Feb., 1971 [hereinafter cited as Michigan State Project].

19. Dr. Tosi, a professor at Michigan State, holds a doctorate degree in physics and engineering, and another in audiology and speech science. Cederbaums, supra note 14, at 381. He recorded the voices of 250 students chosen at random from the 25,000 males at the university. Michigan State Project, supra note 16, at 90.

20. Dr. Tosi attempted to test the reliability of the voiceprint technique under circumstances similar to an actual criminal investigation. The known and unknown recordings were not contemporaneous. The cue words were spoken in unmatched context. The examiner did not know whether his group of known voiceprints included a match to that of the unknown speaker. Michigan State Project, supra note 18, at 120-21.

21. Id. at 121.
23. See Michigan State Project, supra note 18, at 122. The experiments allowed the examiner 15 minutes to match the voiceprints. Id.
25. The police recorded Trimble's voice without her knowledge in a relatively stress-free situation; she was called to the welfare office on the pretext of discussing her AFDC payments. 291 Minn. at 444, 192 N.W.2d at 433-34.
27. See text accompanying note 21 supra.
confusion, etc.) outweighs its probative value. In the case of the voice-
prints, good reasons exist to require that the probative value be high in
order to counterbalance the “cost” of the evidence. Expert opinions con-
flict regarding the reliability of the voiceprint technique. Further,
the reliability issue is complex and beyond the experience of the average juror.
This difficult collateral question threatens to distract the jury from the
central issues, thereby causing confusion that outweighs the probative value
of the evidence. In addition, the “aura of certainty which often envelopes
a new scientific process, obscuring its current experimental nature,” might mislead the jury.

In deciding whether the probative value outweighs the cost of voice-
print evidence, examination of the courts’ treatment of similar scientific
techniques is helpful. United States v. Frye set out the standard of re-
liability for admitting polygraphic evidence:

> Just when a scientific principle or discovery crosses the line be-
tween experimental and demonstrable stages is difficult to de-
fine. Somewhere in this twilight zone the evidential force of the
principle must be recognized, and while courts will go a long way
in admitting expert testimony deduced from a well recognized
scientific principle or discovery, the thing from which the deduc-
tion is made must be sufficiently established to have gained gen-
eral acceptance in the particular field in which it belongs.

Subsequent polygraph cases almost universally followed the “general ac-
ceptance” test enunciated in Frye. Further, many courts extended this
standard to other types of scientific evidence. Thus, in 1966 one au-
thority stated: “[t]he Frye case has always been the guiding principle in
the field of scientific evidence.” Nevertheless, Frye has not persuaded
all of the authorities. For example, McCormick regards “general acceptance”

Draft, 1971). A good discussion of the admissibility of scientific evidence appears
in Gilmore, Identification of Evidence by Neutron Activation Analysis, 37 Mo. L.

29. For an account of the dimensions of the scientific dispute over the voice-
print see Cederbaums, supra note 14, condensing the 1900 pages of testimony on

30. A New Jersey court suggested that admission of controversial scientific
evidence can result in a trial of the scientific technique instead of the issues. See

31. Huntingdon v. Crowley, 64 Cal. 2d 647, 656, 414 P.2d 382, 390, 51 Cal.
Rptr. 254, 262 (1966). See also State v. Stout, 478 S.W.2d 368, 372 (Mo. 1972).

32. 293 F. 1013 (D.C. Cir. 1923).

33. Id. at 1014 (emphasis added).

34. See 1 E. CONRAD, MODERN TRIAL EVIDENCE § 714 (1956); J. RICHARDSON,
MODERN SCIENTIFIC EVIDENCE § 6.16 (1961).

35. United States v. Stifel, 433 F.2d 431, 441 (6th Cir. 1970) (neutron activation
analysis); People v. Williams, 164 Cal. 2d 858, 860, 351 P.2d 251, 253 (Super.
Ct. 1958) (Nalline test); Brook v. People, 139 Colo. 388, 393, 339 P.2d 993, 996
(1960) (paraffin test); People v. Morse, 325 Mich. 270, 272, 38 N.W.2d 322, 324
(1949) (Harger breath test); State v. Stout, 478 S.W.2d 368, 369 (Mo. 1972)
(neutron activation analysis); State v. Coolidge, 109 N.H. 403, 421-22, 260 A.2d

36. 1 E. CONRAD, supra note 34, § 711 (Supp. 1966).
as the criteria for taking judicial notice of the reliability of a scientific technique.\textsuperscript{37} If the reliability of the technique in question is not "generally accepted," however, the court should judge admissibility by balancing the probative value against the "cost" of the evidence. Thus, this analysis avoids the dogmatism of the Frye standard and weighs each new scientific technique according to the fundamental rules of evidence. Moreover, McCormick points out that recent cases have tacitly ignored the "general acceptance" test.\textsuperscript{38}

Prior to Trimble, the voiceprint cases did not consistently apply the "general acceptance" test. In 1967-1970 the New Jersey Supreme Court in State v. Cary\textsuperscript{39} considered the testimony of Kersta and others on the reliability of the voiceprint. After hearing the case three times, the court reluctantly concluded that the technique lacked general scientific acceptance.\textsuperscript{40} In contrast, the United States Court of Military Appeals in United States v. Wright\textsuperscript{41} failed to mention the "general acceptance" test. In admitting the evidence, the court expressly ignored expert testimony questioning the reliability of voiceprint matching and said that the triers of fact could determine the margin of error in this technique.\textsuperscript{42} The next reported case, People v. King,\textsuperscript{43} arose from a CBS documentary film in which an unidentified youth made incriminating statements concerning his role in the Watts riot. About two weeks after the broadcast, the defendant was arrested on a narcotics charge. The police made a voiceprint of the defendant, which they compared with one of the youth in the film. At trial, Kersta testified that as a means of identification the voiceprint matched the infallibility of the fingerprint. However, seven defense witnesses challenged the method's reliability. The court held the voiceprint evidence inadmissible, because the technique lacked general acceptance in the scientific community.\textsuperscript{44}

The preceding three cases constituted the only recorded opinions on admissibility of voiceprint evidence when the court considered Trimble. The Minnesota court agreed with Wright and rejected the Frye standard:

Where experts disagree, it is for the factfinder, whether that be jury or court, to determine which is more credible and therefore more acceptable. The opinion of an expert is admissible, if at all, for the purpose of aiding the jury or the factfinder in a field in which he has no particular knowledge or training. The weight and credibility to be given to the opinion of an expert lies with the factfinder.\textsuperscript{45}

\textsuperscript{37} G. McCormick, supra note 26, § 204, at 491.
\textsuperscript{38} Id. at 490.
\textsuperscript{41} 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967).
\textsuperscript{42} Id. at 490, 37 C.M.R. at 453-54.
\textsuperscript{43} 266 Cal. App. 2d 437, 72 Cal. Rptr. 478, (Ct. App. 1968).
\textsuperscript{44} Id. at 460, 72 Cal. Rptr. at 493.
\textsuperscript{45} 291 Minn. at 456, 192 N.W.2d at 440.
The court hedged this rejection, however, by referring to the "general acceptance" test and discussing the degree to which the scientific community accepted Dr. Tosi's experiments. The court did not reject the reasoning of the prior cases holding voiceprint evidence inadmissible. Instead, it emphasized that Dr. Tosi's experiments answered the objections of these cases by providing accurate information about the reliability of voiceprint matching.

At present, Trimble is the leading case on the admissibility of voiceprint evidence. Since that decision, two other courts have dealt with this problem. In United States v. Raymond the same court that decided the Frye case held voiceprint evidence admissible. Although the court did not expressly mention the "general acceptance" test, the Frye case apparently influenced the decision; the court stated that Dr. Tosi's study had substantially changed the opinion of the scientific community as to the reliability of the voiceprint technique. A Florida case, Worley v. State, also held voiceprint evidence admissible. The opinion mentioned the Cary and King cases, which rejected such evidence on the basis of the "general acceptance" test. The court suggested, however, that in light of Dr. Tosi's experiments these cases would yield different results today.

Experience demonstrates the usefulness of the voiceprint technique. Further, on the basis of Dr. Tosi's experiments, this process is sufficiently reliable to warrant the admission of voiceprint evidence for limited purposes, such as establishing probable cause for an arrest warrant, corroborating other evidence that connects the defendant with the crime, and proving a subsidiary fact. Nevertheless, the voiceprint technique needs further testing. The effects of time passage, voice disguise and emotional stress on this process are still largely unknown. Thus, the present state of scientific knowledge suggests that voiceprint evidence should be inadmissible in criminal trials where the voice identification question goes directly to the issue of guilt.

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46. Id. at 452, 192 N.W.2d at 438.
47. Id. at 451-58, 192 N.W.2d at 437-41.
49. Id. at 644-45.
51. The voice identification unit of the Michigan Department of State Police has conducted 679 voice identification investigations. Thirty of the identified persons later confessed. Nothing indicated that any of these identifications were incorrect. Of these cases, 172 resulted in positive eliminations. Possible identifications or eliminations occurred in 31 cases. In 382 the examiner could not reach a conclusion, because of insufficient or poor voice samples. See Michigan State Project, supra note 17, at 125. One well known voiceprint examiner, however, has made at least one incorrect identification. Kerst (see note 14 supra) mistakenly identified a New York City police officer as the unknown telephone voice in a booking operation. See N.Y. Times, Mar. 27, 1971, at 57, col. 2. Comparison of these contentions with those made concerning the polygraph is interesting. An Army test concluded that with "highly trained and experienced personnel," the polygraph will yield correct judgments in about 80 percent of the cases, no judgment in about 17 percent and incorrect judgments in about 5 percent. G. McCormick, supra note 25, § 174, at 372.
TORTS—INTERSPOUSAL IMMUNITY IN PERSONAL TORTS—MISSOURI'S POSITION CLARIFIED?

Ebel v. Ferguson

On May 1, 1966, plaintiff sustained injuries in an accident while riding as a passenger in an automobile driven by her husband. After obtaining a divorce, plaintiff filed suit against her former husband and the driver of the other car to recover for the personal injuries that she suffered in the accident. The trial court granted her former husband's motion for summary judgment, based on the doctrine of interspousal immunity. On appeal, the Missouri Supreme Court affirmed, holding that a former wife may not recover damages from her former husband for a personal tort committed during their marriage.

The doctrine of interspousal immunity evolved at early common law. The judicial fiction developed that marriage merged the spouses into a single person for legal purposes. As a consequence, the courts required joinder of the husband in actions brought by or against his wife. Thus, a "procedural bar" precluded a suit by one spouse against the other. Otherwise, the husband would be a party to both sides of the suit. As another consequence, the courts stated that no cause of action arose when one spouse wrongfully injured the other during coverture. Thus, a "substantive bar" also prevented suits between husband and wife.

A majority of American jurisdictions retain the interspousal immunity doctrine, despite frequent attacks on this common law rule. Courts have

1. 478 S.W.2d 334 (Mo. En Banc 1972).
2. Id. at 334; see Brief for Appellant at 2, Ebel v. Ferguson, 478 S.W.2d 334 (Mo. En Banc 1972).
3. 478 S.W.2d at 336. Personal torts involve injuries or damage to the person, reputation, feelings, or body. Property torts embrace injury or damage to real or personal property. See Smith v. Smith, 300 S.W.2d 275, 280 (Spr. Mo. App. 1957). This note deals with the interspousal immunity in personal torts, where the law is in flux. The courts have universally held that the married women's property statutes have abrogated the interspousal immunity in the property tort area. See W. Prosser, The Law of Torts § 122, at 861 (4th ed. 1971). For a discussion of the interspousal immunity in property torts in Missouri, see Smith v. Smith, supra.
4. I W. Blackstone, Commentaries *442.
utilized both the procedural bar and the substantive bar to justify the immunity.\textsuperscript{6} The traditional doctrine, however, has also been upheld on public policy grounds,\textsuperscript{10} including preservation of domestic peace,\textsuperscript{11} prevention of a flood of litigation, and protection from collusive suits.\textsuperscript{12} Some courts have regarded abrogation of the immunity as a legislative function.\textsuperscript{13} Further, others have maintained that the divorce and criminal law provide adequate remedies for the injured spouse.\textsuperscript{14} In contrast, a minority of jurisdictions have abandoned the common law rule and thus permit one spouse to sue the other for a personal tort.\textsuperscript{15} Finally, a few jurisdictions

\begin{itemize}
\item 8. \textit{E.g.}, many courts have rejected the argument that the jurisdiction's Married Woman's Act abrogated the common law rule. \textit{See, e.g.}, Thompson v. Thompson, 218 U.S. 611, 617 (1910).
\item 9. For cases relying primarily on the substantive bar, see Maine v. James Maine & Sons Co., 198 Iowa 1278, 201 N.W. 20 (1924); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Ebel v. Ferguson, 478 S.W.2d 334 (Mo. En Banc 1972). For cases relying primarily on the procedural bar, see David v. David, 161 Md. 582, 157 A. 755 (Ct. App. 1923); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915). Most cases rely on or at least mention both bars to interspousal suits. \textit{See, e.g.}, Willott v. Willott, 333 Mo. 896, 62 S.W.2d 1084 (1933).
\item 10. \textit{E.g.}, Abbott v. Abbott, 67 Me. 304 (1877).
\item 15. \textit{Alabama:} Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932); \textit{Alaska:} Cramer v. Cramer, 379 P.2d 95 (Alas. 1963); \textit{Arizona:} Windauer v. O'connor, 107 Ariz. 267, 485 P.2d 1157 (1971) (wife may maintain action for intentional tort against husband that she divorced); \textit{Arkansas:} Leach v. Leach, 227 Ark. 599,
have adopted an intermediate position, allowing interspousal suits in some fact situations but not in others.16

The Missouri Supreme Court first considered the issue of interspousal immunity in Rogers v. Rogers.17 In that case, a wife sued her present husband and others for false imprisonment that occurred during coverture. The plaintiff-wife contended that Missouri's Married Woman's Act18 abrogated the common law doctrine. The court rejected this argument, holding that under Missouri law a wife could not maintain an action against her husband for a personal tort committed during coverture.19 Notably, the


17. 265 Mo. 200, 177 S.W. 382 (1915).
A married woman may, in her own name, with or without joining her husband as a party, sue and be sued in any of the courts of this state having jurisdiction, with the same force and effect as if she was a femme sole, and any judgment in the case shall have the same force and effect as if she were unmarried.

§ 1735, RSMo 1909.

A married woman shall be deemed a femme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for and against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party. . . .

§ 8304, RSMo 1909.

19. 265 Mo. at 208, 177 S.W. at 384. The fact that the wife could still recover from the other defendants possibly made the court's decision easier.
court seemed to base its decision on the procedural bar;\(^{20}\) the substantive bar was not mentioned.

Succeeding Missouri cases strictly adhered to the \textit{Rogers} decision.\(^{21}\) In \textit{Willot v. Willot},\(^{22}\) however, the Missouri Supreme Court first indicated that a substantive bar also precluded interspousal suits. The opinion emphasized that at common law, neither husband nor wife had a cause of action against the other for personal injuries.\(^{23}\)

\textit{Mullally v. Langenberg Brothers Grain Co.}\(^{24}\) initiated an apparent trend toward repudiation of the interspousal immunity doctrine. In that case, plaintiff sustained injuries while riding in a motor vehicle operated by her husband and owned by his employer. Plaintiff sued the employer, contending that at the time of the accident, her husband was acting within the scope of his employment. The court held that the wife could maintain her action even though her husband would be liable to his employer for any damages recovered.\(^{25}\) Further, the court indicated that allowing the suit would advance the interests of public policy.\(^{26}\) Judges advocating complete repudiation of the immunity have cited this dicta in subsequent cases.\(^{27}\)

\textit{Hamilton v. Fulkerson}\(^{28}\) dealt with the application of the interspousal immunity doctrine to antenuptial torts. Plaintiff-wife filed suit for personal injuries against her fiancé two days prior to their marriage. In allowing the action, the court stated that section 451.250, RSMo 1949 [now section 451.250, RSMo 1969]\(^{29}\) abrogated the common law rule that

\begin{footnotesize}
20. The court seemed to assume that defendant-husband had committed a tort against plaintiff-wife and only questioned whether she had a remedy against him.


22. 333 Mo. 896, 62 S.W.2d 1084 (1933).

23. \textit{Id.} at 898, 62 S.W.2d at 1085.

24. 339 Mo. 582, 98 S.W.2d 645 (1936).


26. 339 Mo. at 586, 98 S.W.2d at 646. The court did not specify what public policies were involved.

27. \textit{E.g.}, \textit{Brawner v. Brawner}, 327 S.W.2d 808, 819 (Mo. En Banc 1959) (dissenting opinion); \textit{Hamilton v. Fulkerson}, 285 S.W.2d 642, 647 (Mo. 1955).

28. 285 S.W.2d 642 (Mo. 1955), \textit{noted in Davis, Negligence—Action by Wife Against Husband for Antenuptial Personal Tort}, 22 Mo. L. Rev. 216 (1957).

29. All real estate and any personal property, including rights in action, belonging to any woman at her marriage, or which may come to her during coverture, by gift, bequest or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or has grown out of any violation of her personal rights, shall, together with all income, increase and profits thereof, be and remain her separate property and under her sole control . . . .

. . . [A]nd any such married woman may, in her own name and without joining her husband, as a party plaintiff institute and maintain any action . . . for the recovery of any such personal property, including rights
\end{footnotesize}
marriage terminates any cause of action between spouses that arose prior to their marriage.\textsuperscript{30} The court refused to restrictively interpret this statute, saying that "any common-law rule based upon the fiction of the identity of husband and wife ... should not be applied to any 'first impression' fact situation arising in this state."\textsuperscript{31} Further, the court rejected several public policy arguments for applying the immunity.\textsuperscript{32}

In \textit{Ennis v. Truhitte},\textsuperscript{33} the plaintiff was injured during coverture while a passenger in a vehicle driven by her husband, who subsequently died. The court allowed the wife to recover from her deceased husband's estate. The opinion seemed to abolish the common law's substantive bar to interspousal suits in Missouri: "[I]t belies reality and fact to say that there is no tort when the husband either intentionally or negligently injures his wife."\textsuperscript{34} Further, the court pointed out that any public policy objections to allowing the action "vanished" with the husband's death.\textsuperscript{35}

This trend toward abrogation of the interspousal immunity doctrine ended in \textit{Brawner v. Brawner}.\textsuperscript{36} \textit{Brawner} held that a husband could not sue his wife for personal injuries incurred during their marriage. The opinion pointed out that the legislature, although active in the domestic relations field, had not repudiated the common law rule.\textsuperscript{37} Although \textit{Ennis} and \textit{Hamilton} were distinguished as involving "special circumstances,"\textsuperscript{38} \textit{Rogers} was regarded as binding precedent.\textsuperscript{39} The court also indicated that public policy supported the immunity.\textsuperscript{40} The court, however, might have

\begin{quote}
in action, as aforesaid, with the same force and effect as if such married woman was a femme sole ....
\end{quote}

\textsuperscript{30} § 451.250, RSMo 1949.
\textsuperscript{31} 285 S.W.2d at 645.
\textsuperscript{32} Id.
\textsuperscript{33} Id. at 647. The court stated that tort actions between spouses disturb domestic tranquility; cause marital discord and divorce; encourage fictitious, collusive, and fraudulent claims; produce a rise in liability insurance rates; and promote trivial actions. Further, the court remarked that, in any event, the criminal and divorce laws provide the injured spouse with an adequate remedy. The opinion said that no matters of public policy justified extension of the \textit{Rogers} doctrine to antenuptial torts. This was an alternative basis for the decision. The court also based its decision on the theory that the statute had abrogated the interspousal immunity.

\textsuperscript{34} 306 S.W.2d 549 (Mo. En Banc 1957), \textit{noted in Dalton, Torts—Negligence—Missouri—Action by Wife Against Administrator of Estate of Deceased Husband for Personal Injury}, 23 Mo. L. Rev. 366 (1958).
\textsuperscript{35} 306 S.W.2d at 551.
\textsuperscript{36} Id. at 550. The court failed to specify what "public policy" encompassed.
\textsuperscript{37} 327 S.W.2d 808 (Mo. En Banc 1959), \textit{followed in Deatherage v. Deatherage}, 328 S.W.2d 624 (Mo. 1959) \textit{and Noland v. Farmers Ins. Exch.}, 413 S.W.2d 530 (K.C. Mo. App. 1967).
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id. The court spoke of public policy in its broad sense as the protection of the public good and indicated that the legislature had approved the interspousal immunity by inaction.
decided differently in the absence of the interpretation of the Married Woman's Act\textsuperscript{41} in \textit{Rogers}.\textsuperscript{42}

A strong dissent contended that public policy no longer justified the immunity\textsuperscript{43} and that cases subsequent to \textit{Rogers} had repudiated that decision.\textsuperscript{44} The dissenting opinion also argued that interpreting the same statute to allow a wife to sue her husband for a property tort that occurred during coverture but not for a personal tort that occurred during coverture was inconsistent.\textsuperscript{45}

Although \textit{Brawner} seemed to indicate a return to the strict common law doctrine, subsequent decisions at times relied on \textit{Hamilton} and \textit{Ennis}.\textsuperscript{46} Thus, examination of the Missouri cases preceding \textit{Ebel v. Ferguson}\textsuperscript{47} reveals an unsettled judicial attitude toward the interspousal immunity.

In \textit{Ebel}, the principal opinion purported to clarify the ambiguities in the case law that, according to the court, had developed from the misconception that the interspousal immunity is based on the procedural bar.\textsuperscript{48} The court stated that this immunity is based instead on the substantive bar.\textsuperscript{49}

The concurring opinion justified disallowance of the suit on public policy grounds. The majority's rigid application of the unity of spouses concept\textsuperscript{50} was rejected.\textsuperscript{51} The concurring opinion, however, failed for the most part to enumerate the public policies that precluded the suit.\textsuperscript{52}

The dissenting opinion attacked the substantive basis for the immunity, quoting statements in \textit{Ennis} and \textit{Hamilton} condemning the unity doctrine.\textsuperscript{53} The Missouri Married Woman's Act\textsuperscript{54} was construed as repudiating the common law rule of interspousal immunity.\textsuperscript{55} Thus, the dissent completely ignored the previous construction of the Act in \textit{Rogers}. This opinion further indicated that the divorce removed the public policy considerations that would otherwise preclude the suit.\textsuperscript{56}

\textsuperscript{41} §§ 1735, 8304, RSMo 1909 [now §§ 507.010, 451.290, RSMo 1969]; see note 18 \textit{supra}.
\textsuperscript{42} See 327 S.W.2d at 811; text accompanying notes 17-20 \textit{supra}.
\textsuperscript{43} Id. at 821-22 (dissenting opinion).
\textsuperscript{44} Id. at 819-20. The dissent cited \textit{Hamilton} and \textit{Ennis} for this proposition.
\textsuperscript{45} 327 S.W.2d at 817 (dissenting opinion).
\textsuperscript{46} See, e.g., Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. En Banc 1960) (court ruled, drawing an analogy to \textit{Ennis}, that death negated the public policies that supported application of the parental immunity and thus allowed the suit); Berry v. Harmon, 329 S.W.2d 784 (Mo. 1959) (followed \textit{Hamilton} and allowed recovery for an antenuptial tort where suit was brought after marriage).
\textsuperscript{47} 478 S.W.2d 334 (Mo. En Banc 1972).
\textsuperscript{48} Id. at 337.
\textsuperscript{49} Id.
\textsuperscript{50} Notably, the unity of spouses concept fostered both the procedural bar and the substantive bar. See text accompanying notes 4-6 \textit{supra}.
\textsuperscript{51} 478 S.W.2d at 339 (concurring opinion).
\textsuperscript{52} The concurring opinion offered a "for instance" stating that to allow the suit would destroy the finality of divorce decrees. Id.
\textsuperscript{53} Id. at 337 (dissenting opinion).
\textsuperscript{54} § 451.290, RSMo 1969; see note 18 \textit{supra}.
\textsuperscript{55} 478 S.W.2d at 338 (dissenting opinion).
\textsuperscript{56} Id. The dissent cited the dissenting opinion in \textit{Brawner} for arguments based on public policy.
Although *Ebel* purported to overrule *Ennis*, only three judges relied on the substantive bar as the rationale for their decision. Thus, the principal opinion in *Ebel* may have little precedential value. Arguably, in the future the concurring and dissenting judges may combine to form a majority that will allow interspousal suits where substantial public policy reasons for applying the immunity are absent. The court, however, cited with approval *Hamilton.* That case allowed a suit that would have been procedurally impossible at common law. Thus, *Ebel* arguably abandoned the procedural bar to interspousal suits. As a practical effect, this shift may decrease the likelihood that the Missouri court will abolish the immunity in the future; the courts are more reluctant to change substantive than procedural law.

The *Ebel* case seems to indicate that at present in Missouri a spouse may not maintain suit in most cases against the other for a personal tort committed during marriage. The presence of the “public policy” proponents on the court, however, precludes a definite conclusion as to cases where the circumstances (e.g., the death of one of the spouses) might negate all public policies that ordinarily support disallowing the suit. *Ebel* indicates that divorce alone does not remove all policy considerations favoring application of the immunity. The court did not enumerate the public policies that justify applying the immunity. Thus, determining the circumstances, if any, where the court will allow interspousal suits is impossible. Only subsequent cases can clarify this situation.

The *Ebel* holding departs from the trend in this country toward abandonment of the interspousal immunity doctrine. Although the principal and concurring opinions disagreed as to the proper rationale for the decision, a majority of the Missouri Supreme Court favors retaining the immunity, at least in certain cases.

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57. See id. at 337.

58. See Bahr v. Bahr, 478 S.W.2d 400 (Mo. 1972) and Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. En Banc 1960), indicating that where the familial relation is destroyed, the reasons for applying the parental immunity no longer exist and the suit should be allowed.

59. 478 S.W.2d at 336.

60. See text accompanying notes 4-5, 28-32 supra.

61. Cf. 478 S.W.2d at 336.

62. See 478 S.W.2d at 337.

63. In referring to immunity rules in general, Professor Smith stated: The survival of some immunity rules despite their lack of merit can be explained only by the power of persistent advocacy in the courts. While liability insurance has made the immunities anachronisms, ironically its union with the tort process also has kept them alive.


UNINSURED MOTORIST COVERAGE—OTHER-INSURANCE CLAUSE—"AVAILABLE" INTERPRETED

Gordon v. Maupin

Plaintiff Marjorie Gordon and her sister-in-law Phyllis Gordon purchased separate automobile liability insurance policies from defendant American Family Mutual Insurance Company. Each policy contained an uninsured motorist endorsement with limits of $5,000 for one person injured and $10,000 for two or more persons injured. Plaintiff was one of three passengers in an automobile driven by Phyllis Gordon when it collided with an automobile negligently driven by defendant George Maupin, an uninsured motorist. Phyllis Gordon and the two passengers other than plaintiff collected $8,397 from the $10,000 limit of the Phyllis Gordon policy, leaving only $1,603 available to satisfy the plaintiff's $5,000 injury claim. Plaintiff attempted to collect from her own policy, which had applicable limits of $5,000. American denied coverage under that policy because of the policy's "other-insurance clause," which provided:

With respect to bodily injury to an insured while occupying an automobile not owned by a named insured under this endorsement, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this endorsement exceeds the sum of the applicable limits of liability of all such other insurance.

Plaintiff brought suit against American and won a judgment of $5,000.

American appealed, and the St. Louis Court of Appeals affirmed the judgment. The court, in a case of first impression, based its decision on an interpretation of the word "available" in the other-insurance clause. The court interpreted "available" against American because it was ambiguous. In support of this result, the court pointed out that plaintiff should be entitled to recover at least the minimum level of liability because she had purchased the additional uninsured motorist protection.

The court interpreted "available" to mean actually available at the time plaintiff sought compensation, rather than theoretically available at the time of the accident. Because only $1,603 was actually available at the

1. 469 S.W.2d 848 (St. L. Mo. App. 1971).
2. The new limits of liability are $10,000 for one injured and $20,000 for two or more injured, pursuant to §§ 303.030, RSMo 1969, 379.203, RSMo Supp. 1971.
4. Other-insurance clauses appear in many different types of insurance policies. R. Keeton, Basic Text on Insurance Law § 3.11 (a), at 168-70 (1971).
5. At first glance, the court's assertion that "[i]t matters not whether we look
time plaintiff sought recovery under the driver's policy, the court made an award of $5,000. If the driver's and the plaintiff's policies had been with different insurance carriers, the judgment would have been $1,603 from the driver's insurer and $3,397 ($5,000 less the similar insurance available of $1,603) from the plaintiff's insurer.\(^6\)

Although the court interpreted only the word "available," an additional interpretation is implicit in the decision in order to justify obtaining the $5,000 judgment in the manner described above, in light of the language of the entire other-insurance clause. The latter part of the other insurance clause provided that the plaintiff's insurance shall "apply only in the amount by which the applicable limit of liability . . . exceeds the sum of the applicable limits of liability of all such other insurance."\(^7\) The stated limit of liability of the plaintiff's policy was $5,000, and the driver's stated limit of liability was $10,000. Obviously, the plaintiff's $5,000 limit did not exceed the driver's $10,000 limit. Therefore, to reach the $3,397 figure the court must have either ignored the latter part of the other-insurance clause or interpreted "applicable limits of liability" as having two different meanings. If the court gave effect to the latter part of the other-insurance clause, it must have considered the "applicable limits of liability" of the plaintiff's policy as being the stated limit ($5,000), and the "applicable limits of liability" of the driver's policy as being the amount that happened to be left in the fund after the driver's and the other passengers' claims were satisfied ($1,603). Such an interpretation seems to disregard the principle of insurance contract interpretation that allows the parties generally to restrict the insurer's liability to any extent to which they may agree.\(^8\)

Another principle of interpretation, however, arguably supports the court's result. In construction of any insurance contract, social policy dictates an interpretation for the insured and against the insurer, the

upon Phyllis Gordon's $10,000 uninsured motorist coverage as being 'available' at the time of collision or at the time plaintiff sued" \(\text{id. at 849-50}\) seems to bring this statement into question. The court was merely saying, however, that Phyllis Gordon's $10,000 uninsured motorist coverage was actually available to plaintiff neither at the time of the accident nor at the time of suit.

In arriving at the exact amount plaintiff was entitled to recover under her own uninsured motorist endorsement, the court clearly had to decide at which time "available" applied. If it applied at the time of the accident, plaintiff could recover $5,000 under her uninsured motorist coverage, because the court concluded that nothing was actually available to plaintiff under Phyllis Gordon's coverage at the time of the accident. If, however, "available" applied at the time of suit, plaintiff could recover only $3,397 under her coverage, because $1,603 was available to her at that time under Phyllis Gordon's coverage. In a footnote to its opinion, the court pointed out that had Phyllis Gordon's policy been with an insurer other than plaintiff's insurer, plaintiff's insurer would have been liable for only $3,397. \(\text{See id. at 850 n.3; text accompanying note 6 infra.}\) Thus, the court implicitly interpreted "available" as applying at the time of suit.

\(^6\) 469 S.W.2d at 850 n.3.

\(^7\) \text{id. at 849; text accompanying note 3 supra.}

drafter of the policy, when the phrase or word in question is ambiguous. Missouri courts have applied this principle of construction to uninsured motorist endorsements, finding for insureds when the phrase is ambiguous, or for insurers when the phrase is unambiguous. If the phrase "applicable limits of liability" is susceptible to two different interpretations in the same sentence, that phrase is arguably ambiguous, and should be interpreted for the plaintiff insured.

As a policy reason in support of its holding, the court in Gordon stated that an insured who pays a premium should be allowed to recover the minimum limit of liability. This reason, often asserted in other jurisdictions invalidating other-insurance clauses, has not been actuarially shown to justify invalidating the clause. The insurer no doubt assumes that the actual amount of coverage the insured is entitled to receive for the amount of the premium paid includes the situation when another policy covers the insured. It is reasonable to assume that the decreased risk associated with other-insurance clauses figures in determining rate structures, resulting in lower premiums. Thus, the plaintiff in Gordon no doubt paid a lower premium for her uninsured motorist coverage because of the other-insurance clause.

None of the cases in other jurisdictions have examined other-insurance clauses in light of the reason for originally inserting such clauses in insurance policies, which was to protect the insurer against the possibility of over-insurance. An insured may be tempted to destroy or neglect over-insured objects. Hence, other-insurance clauses are most often found in various forms of property insurance; they seldom appear in life insurance policies, because the value of a life cannot be over-insured. Because Missouri courts have limited recovery to the amount of actual damages proved and have frowned upon any "stacking" of policies, the moral risks incident to over-insurance are low in cases of uninsured motorist

13. Although this factor was not considered in Gordon, at least one Missouri court has been influenced by the impact of higher premiums resulting from decisions for insureds. See Kisling v. MFA Mut. Ins. Co., 399 S.W.2d 245 (Spr. Mo. App. 1966).
15. Id. at 169-70.
16. 469 S.W.2d at 851.
17. Id. "Stacking" is the recovery on two or more of an insured's policies by aggregating the liability of the policies' limits. See Deterding v. State Farm Mut. Auto. Ins. Co., 78 Ill. App. 2d 29, 222 N.E.2d 529 (1965), see also 222 N.E.2d 592 (Mo. 1965). In most jurisdictions approving "stacking" the policies are only stacked to the extent they provide recovery for actual damages sustained, even though the other insurance clause limitation is disregarded. See Sellers v. United States Fidelity & Guar. Co., 185 So. 2d 689 (Fla. 1966); Annot., 28 A.L.R.3d 551 (1969).
coverage. Hence, as to uninsured motorist policies, there is little justification for the other-insurance clause aside from decreasing premiums.

Most jurisdictions that have tested the validity of other-insurance clauses have done so by looking to the purposes of their uninsured motorist statutes. The insurer issued the policy in Gordon, however, before Missouri adopted its uninsured motorist statute in 1967. Therefore, the court had to interpret the insurance contract without the aid of the statute.

The approaches that the jurisdictions other than Missouri have taken in determining the validity of uninsured motorist clauses fall into three basic categories. First, some jurisdictions uphold the clause by interpreting their statute as intending the endorsement to provide the insured with the same protection he would have had if the uninsured motorist had been insured to the limit of the statutory minimum. This is the so-called substituted coverage theory. This type of jurisdiction would have reasoned in Gordon that the minimum level of liability coverage the defendant George Maupin could have had available for two or more persons injured was $10,000. Hence, the $10,000 fund theoretically available from the driver's policy would have been sufficient under this approach, and the plaintiff would not have recovered. Second, a few jurisdictions simply enforce the clause because they find it unambiguous. Finally, the recent trend seems to be to interpret uninsured motorist statutes as prohibiting an other-insurance clause from reducing uninsured motorist coverage below the statutorily prescribed minimum. Although this approach reaches the same result as Gordon while avoiding the possible multiple interpretation of “applicable limits of liability” in Gordon, it may rest upon a strained

18. See cases cited note 23 infra.
19. § 379.203, RSMo 1969, as amended, § 379.203, RSMo Supp. 1971. Section 379.203 requires all automobile liability policies issued or delivered in Missouri to provide uninsured motorist protection.
22. There are two variations of uninsured motorist statutes. One allows an insured to reject the endorsement by written request (as did § 379.203, RSMo 1969 before the 1971 amendment). The other allows no written or other kind of rejection. In the latter type of jurisdiction the statutory purpose mandating all policies to carry a minimum level of liability follows more easily, because a policy can not issue without the endorsement. These jurisdictions would invalidate the entire other-insurance clause as being in contravention of state law. Plaintiff in Gordon would have recovered her $5,000 limit of liability in addition to the $1,603 from her sister's policy.
interpretation of the purpose of the uninsured motorist statute in question. Indeed, no legislative histories have been cited in support of such statutory constructions.24

The future impact of Gordon may depend largely upon whether insurance companies make other-insurance clauses less ambiguous. The holding in Gordon was grounded upon the court’s interpreting “available” as meaning available at the time of suit rather than theoretically available at the time of the accident. Therefore, if insurance companies attempted to make other-insurance clauses unambiguous by inserting language clearly defining “available” to mean available at the time of the accident, a court should have little choice but to uphold the plain meaning of the clause.

In Swaringin v. Allstate Insurance Co.,25 the insured, Swaringin, was injured in an automobile collision with a driver who was insured at the time of the accident. The other driver’s insurance carrier became insolvent, however, before Swaringin could recover for his injuries, so he sought recovery from his policy’s uninsured motorist endorsement on the theory that the other driver was uninsured. Swaringin was denied recovery because his policy specifically defined “uninsured automobile” to mean an automobile on “which there is no bodily injury liability insurance applicable at the time of the accident.”26 The St. Louis Court of Appeals held the language was not susceptible to construction; the meaning was “plain and straightforward” because of the phrase “at the time of the accident.”27 This treatment of the phrase “at the time of the accident” should signal insurance carriers to insert the phrase to modify “available” in the other-insurance clause.

Making the other-insurance clause unambiguous, however, may not solve the insurance companies’ problem. Because section 379.203 of the Revised Statutes of Missouri, enacted in 1967 and amended in 1971, was not


25. 399 S.W.2d 131 (St. L. Mo. App. 1966).
26. Id. at 133 (emphasis added).
27. Id. at 133-34. The Swaringin case was overruled by § 379.203, RSMo 1969, as amended, § 379.203, RSMo Supp. 1971, which defined “uninsured motor vehicle” to include a driver whose insurance carrier becomes insolvent within two years.

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in force when plaintiff's policy was issued, it was not controlling in Gordon. Webb v. State Farm Mutual Automobile Insurance Co.\textsuperscript{28} gives some indication of the purpose that the courts may attribute to section 379.203 in the future. In Webb, the Kansas City Court of Appeals held the insurer could not deduct its payments under the medical benefits provisions of the policy from the uninsured motorist endorsement limit of liability, despite a policy provision allowing such deduction. The court gave three reasons for its holding. First, it interpreted section 379.203 as requiring "that each insured under such coverage have available the full statutory minimum to exactly the same extent as would have been available had the tortfeasor complied with the minimum requirements of the financial responsibility Law."\textsuperscript{29} Second, it held that any reduction of uninsured coverage below the minimum level of liability required by section 379.203 is void as being in conflict with the state's public policy.\textsuperscript{30} Third, the court stated that because the medical payments clause and the uninsured motorist endorsement were independent the statutory minimum could not be reduced by an independent clause.\textsuperscript{31} Although these three independent grounds are consistent in the Webb context, the first two could justify opposite results in a Gordon situation. The first rationale of Webb is the substituted coverage theory and would dictate enforcing an unambiguous other-insurance clause.\textsuperscript{32} The second rationale would invalidate the entire other-insurance clause and yield the same result attained in Gordon.\textsuperscript{33} The only Missouri authority cited in Webb supported the substituted coverage theory. However, that case, Sterns v. MFA Mutual Insurance Co.,\textsuperscript{34} was decided in 1966 before Missouri adopted section 379.203 and before the recent trend of cases invalidating the entire clause evolved. For purposes of determining which theory Missouri should follow, it is of little aid to compare section 379.203 with the statutes of the two types of jurisdictions because they are without significant deviation.\textsuperscript{35} Therefore, the public policy that Missouri will finally select for a future Gordon situation is uncertain.

In conclusion, it is probable that insurance companies can avoid the impact of Gordon by defining available to mean available at the time of the accident. In such case, Missouri courts may be forced to select either public policy for section 379.203. Until that time, insureds have available a fund at least equal to the minimum level of liability of their uninsured motorist endorsements.

ARTHUR S. HASELTINE

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28. 479 S.W.2d 148 (Mo. App., D.K.C. 1972), noted in Hellmuth, supra note 8.
29. Id. at 152.
30. Id.
31. Id. at 154.
32. See text accompanying notes 20 & 21 supra.
33. See text accompanying note 23 supra.
34. 401 S.W.2d 510, 514 (K.C. Mo. App. 1966).

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UNINSURED MOTORIST COVERAGE—VALIDITY OF MEDICAL SETOFF CLAUSE

Webb v. State Farm Mutual Automobile Insurance Co.1

An uninsured motorist negligently collided with an automobile that plaintiff John E. Webb, a minor, occupied with three other youths. The collision caused the death of one of the youths, and seriously injured the others. The defendant, State Farm, had issued an automobile liability insurance policy to the parents of the driver of the car that the uninsured motorist struck. The policy covered all of the occupants of that car. The medical payments coverage of the policy provided for payment of reasonable medical expenses up to $500 for each occupant of the insured automobile. The policy limit on uninsured motorist coverage was $20,000 total for injury to or death of more than one person. A medical setoff clause in the uninsured motorist section of the policy provided that any amount payable under uninsured motorist coverage would be reduced by the amount paid under the separate medical payments coverage of that policy.2

The insureds brought suit against State Farm when a dispute arose concerning the effect of this setoff clause on the insurer’s total liability under the policy.3 The value of all claims for injuries, wrongful death, loss of services, and medical expenses exceeded the $20,000 policy limit under the uninsured motorist coverage, and apparently the medical expenses exceeded $500 per person. Based on the medical setoff clause, State Farm claimed the right to reduce its $20,000 liability under the uninsured motorist coverage by the $500 paid or payable to each insured under medical payments coverage, and thus limit its total liability under the policy to $20,000. The insureds insisted that the company pay them $500 each under the medical payments coverage, and contended that such payments should not affect the insurer’s full $20,000 liability under the uninsured motorist coverage.

The trial court refused to enforce the medical setoff clause, and held that the defendant State Farm was not entitled to deduct medical expense payments from the $20,000 liability otherwise payable under the uninsured motorist section of the policy. The Kansas City District of the Mis-

2. Insurance companies commonly use such medical setoff clauses to limit their liability under uninsured motorist coverage. The medical setoff clause appearing in the Uninsured Automobile Coverage section of the insurance policy construed in Webb provides as follows:

13. LIMITS OF LIABILITY

(b) Any amount payable under this coverage because of bodily injury sustained in an accident by a person who is an insured under this coverage shall be reduced by:

(3) All sums paid or payable on account of such bodily injury under [Medical Payments Coverage] of a policy issued by this company.

Id. at 149-50.

3. The suit was brought by two of the injured parties and the parents of the youth killed in the accident. State Farm had settled with one of the injured youths and his parents for their loss of services for $2,500. Id. at 150.
souri Court of Appeals affirmed the trial court's judgment for the plaintiffs, holding the medical setoff clause void.4

The court advanced three complementary arguments to justify its invalidation of the setoff clause. First, the court held that the clause was void on its face because its effect was to reduce uninsured motorist coverage below the minimum statutory requirement of $10,000/$20,000.5 The second theory on which the court voided the clause was adopted from the Nebraska case of Stephens v. Allied Mutual Insurance Co.6 This theory (hereinafter referred to as the "dual policy" theory) views medical payments coverage and uninsured motorist coverage as separate, independently contracted for provisions for which separate premiums are paid.7 It is used to overcome the argument that medical setoffs do not really reduce uninsured motorist coverage, but merely reduce medical payments coverage.8 The court adopted the "substituted coverage" theory as the third ground for invalidating the clause. According to this theory, the highly remedial character of Missouri's uninsured motorist statute requires that an insured under uninsured motorist coverage be treated exactly as he would have been if the uninsured motorist had been covered by liability insurance with full $10,000/$20,000 limits.9 In Webb, if the uninsured motorist had carried $10,000/$20,000 liability, the insureds could have recovered both medical expenses from their carrier and $20,000 from the tortfeasor's carrier. Thus, the substituted coverage theory, in an uninsured motorist situation, requires that the insureds have a full $20,000 fund available under uninsured motorist coverage in addition to their medical payments coverage.

In analyzing cases involving medical setoff clauses, the following two variables are significant: (1) The exact wording of the setoff clause; and (2) the amount of damages in relation to the policy limits (i.e., the extent to which allowing recovery under both uninsured motorist coverage and medical payments coverage allows an insured double recovery for the same damages).10 Thus, while Webb invalidated a particular setoff clause in a

4. After the settlement with the one youth and his parents, only $17,500 remained in the uninsured motorist fund. Ultimately, State Farm paid out $20,000 total under uninsured motorist coverage, in addition to $1,500 total under medical payments coverage.
5. 479 S.W.2d at 150. Section 379.203, RSMo 1969, provides for minimum uninsured motorist coverage as follows:
1. No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than the limits for bodily injury or death set forth in section 308.080, RSMo 1969.
7. 479 S.W.2d at 152.
8. The dual policy theory was used to rebut this argument in Bacchus v. Farmers Ins. Group Exch., 106 Ariz. 280, 475 P.2d 264 (1970).
9. 479 S.W.2d at 151-52.
10. A potential double recovery situation arises when the total damages are less than the sum of the limits of medical payments coverage and uninsured motor-
particular damages situation, the decision is unlikely to foreclose future litigation in Missouri over medical setoff clauses in cases that differ in one or both of these variables.

These multiple variables render a discussion of medical setoff cases complicated and difficult to follow. In varying fact situations, the courts have followed as many as three approaches to recovery. The chart below will thus be helpful in illustrating possible recoveries under each approach in different fact situations.

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<th>SITUATION</th>
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<td>Medical Expenses</td>
<td>Other Damages</td>
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The chart presupposes a situation where a single non-contributorily negligent insured is injured by a negligent uninsured motorist. The insured has $1,000 medical payments coverage and $10,000 uninsured motorist coverage. The three columns of figures on the left half of the chart show the amount of medical expenses, other damages, and total damages incurred by the insured in various situations. Note that in Situations A, B, C and D the total damages are less than the combined limits of medical payments coverage and uninsured motorist coverage. These situations present possible double recoveries, whereas Situations E and F do not. The right half of the chart indicates possible recoveries in the various damages situations. The first column shows the insured's total recovery where no medical setoff is allowed.11 The middle column illustrates total recovery where a setoff is allowed to the extent it prevents double recovery for the same damages.12


The final column indicates total recovery where a medical setoff is allowed in all damages situations. Note that in terms of the chart the Webb court allowed the insureds Recovery I in Situation F.

For purposes of discussion, decisions involving medical setoff clauses may be categorized by the first variable, i.e., the wording of the particular setoff clause. Basically, there are three different setoff clauses found in cases of this genre, though the potential for variance is limited only by the ingenuity of draftsmen of insurance contracts. It is logically possible for one jurisdiction to follow one approach to recovery with one type of setoff clause, and another approach with a different setoff clause. Thus, if Webb is narrowly construed as applicable to its facts only, a later Missouri court may well choose to validate a differently worded setoff clause in the same damages situation. Therefore, it is necessary to analyze the various setoff clauses as to their exact meaning.

The first type of clause is the Webb clause. It is quite straightforward


15. For example, in Bacchus v. Farmers Ins. Group Exch., 12 Ariz. App. 1, 467 P.2d 76, rev'd, 106 Ariz. 280, 475 P.2d 264 (1970), the Court of Appeals of Arizona held that a setoff clause, which by its terms purported to characterize medical expense payments as a loan to be paid back in case payment was made under uninsured motorist coverage, was valid because it did not reduce statutorily required uninsured motorist coverage, but merely reduced medical expense coverage. The court stated:

While offsets attempting to reduce mandatory coverages [i.e., Webb type offsets, acting by their terms on uninsured motorist coverage] will not be permitted, there is nothing to prevent the insurer and a person desiring to have medical expenses insurance from employing any provisions with respect to the payment or nonpayment of these benefits which they choose.

Id. at 2, 467 P.2d at 77.

However, the Arizona Supreme Court reversed the lower appeals court, holding that its decision amounted to nothing more than a triumph of form over substance. Bacchus v. Farmers Ins. Group Exch., 106 Ariz. 280, 475 P.2d 264 (1970). Nonetheless, a court anxious to uphold a setoff clause for another reason, such as to prevent a double recovery, might embrace such a formalistic argument, particularly if the insurer could show that the premium was adjusted downward on the medical expense policy because of the setoff. See Keys v. Beneficial Ins. Co., 39 Mich. App. 450, 197 N.W.2d 907 (1972) (dissenting opinion).

16. See note 2 supra.

There are very few cases involving a Webb type clause. Besides Webb, the only other case found by this writer that deals with such a clause is Morgan v. State Farm Mut. Auto. Ins. Co., 195 So. 2d 648 (La. App. 1967). In Morgan, the court upheld a Webb type setoff clause, allowing Recovery III in Situation
and on its face purports to reduce the available uninsured motorist fund by the amount paid out in medical expense benefits. It is particularly susceptible to attack as being violative of uninsured motorist statutes, since by its terms it reduces uninsured motorist coverage below statutory minimums. This, indeed, was the first theory upon which the Webb court relied to invalidate this clause.17

The second type of clause characterizes payments made pursuant to medical payments coverage as mere advancements, to be repaid if the insurer incurs liability under uninsured motorist coverage arising out of the same accident. By its terms, this clause (hereinafter referred to as the "advancements" clause) purports not to affect uninsured motorist coverage at all, but, instead, to act solely upon medical payments coverage.18 While the wording of the advancements clause obviates the criticism that it reduces uninsured motorist coverage below statutory minimums, the clause is fully susceptible to attack under the dual policy theory. In Bacchus v. Farmers Insurance Group Exchange,19 one of the few cases construing an advancements clause, the Arizona Supreme Court vigorously embraced the dual policy theory to invalidate the clause.20 The court maintained that

a policy provision which the insured considers to be additional protection and for which he pays a premium with such extra protection in mind cannot be transposed by the insurer into a reduction of the mandatory minimum language.21

This choice of words in the Bacchus case is interesting. While the setoff clause purports to act only on medical payments coverage, the court views it as but a subterfuge, which acts to reduce uninsured motorist coverage. This exposes the dual policy theory as grounded on the same basic premise as the theory opposing a straightforward reduction of uninsured motorist payments by the amount of medical expense payments.

The damages variable is not outwardly a significant consideration in interpreting a Webb or advancements clause, although the potential for double recovery may be an unspoken factor.22 The reason is that these

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17. 479 S.W.2d at 150.
20. Id. at 283, 475 P.2d at 267.
21. Id. Query what the Arizona court would have done if the insured was given his choice between setoff with reduced premium, and no setoff.
22. For instance, the Webb court might have been reluctant to void the medical setoff clause if such a decision would have resulted in a windfall double recovery for the insureds. Suppose, for example, an insured has suffered $10,000 total damages, all for medical expenses, in a collision with an uninsured motorist. He has $10,000 medical payments coverage in addition to $10,000 uninsured motorist coverage. In such a case, invalidating the setoff clause would give the in-
two types of clauses do not by their terms differentiate between different damages situations. They purport to reduce uninsured motorist coverage in every situation. Thus, when faced with one of these clauses, a court has but two alternatives: validate the setoff clause and arrive at Recovery III, or invalidate the clause and arrive at Recovery I.23

The third type of clause (hereinafter referred to as the "standard" clause) is the most common setoff clause and reads as follows:

The company shall not be obligated to pay under this coverage [Uninsured Motorist] that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under [Medical Payments].24

There is a split of authority as to the exact meaning of the standard clause. A number of courts, without explicitly analyzing the specific language of the clause, interpret it as providing for medical setoff regardless of the damages situation. Thus interpreted, the clause is functionally the same as a Webb clause. Such courts uniformly hold the clause void in all damages situations (allowing Recovery I in terms of the chart), for one or more of the reasons employed in Webb to void the Webb clause.25 Other courts, which more closely examine the wording and meaning of the standard clause, interpret it as being quite different from the Webb clause. These courts hold that the standard clause, by its terms, is an attempt to preclude from recovery under uninsured motorist coverage only those damages payable under medical payments coverage. In other words, it is an attempt to prevent double recovery for the same damages (in terms of the chart, an attempt to achieve Recovery II in all situations).26 Thus, sured a $20,000 recovery for $10,000 of damages. Surely, such a possibility might have colored the Webb court's view as to exactly what was the public policy behind Missouri's uninsured motorist statute.

23. A court which invalidates a setoff clause, as the Webb court did, should realize that it is paving the way for windfall double recoveries in certain damages situations (e.g., Situations A, B, C, and D on the chart). A court might be justified, on the basis of policy considerations against double recovery, in interpreting a Webb or advancements clause as being valid to the extent it prevents double recovery, but applicable only in double recovery situations. The next clause to be discussed, which insurance companies frequently use, does lend itself to such a construction.


25. Of the four main cases cited as authority for the holding in Webb, three deal with a standard clause. They are: Heiss v. Aetna Cas. & Sur. Co., 250 Ark. 474, 465 S.W.2d 689 (Ark. 1971); Tuggle v. Government Employees Ins. Co., 207 So. 2d 674 (Fla. 1968); Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N.W.2d 135 (1968). None of these cases discuss the meaning of the standard clause. They merely assume it is meant to operate in all damages situations. In Tuggle and Heiss, there are vigorous dissenting opinions, however, pointing out this deficiency.

when the court interprets the standard clause in this manner, the damages situation is very significant, for it will determine whether the clause will operate in the particular case. If the total amount of damages is less than the combined policy limits, the clause will operate to prevent double recovery. If the total amount of damages exceeds the combined policy limits, the clause simply does not apply to the situation.

In Melson v. Illinois National Insurance Co.,\textsuperscript{27} the Illinois Supreme Court interpreted a standard clause in this latter way. In Melson, the insured had sustained total damages of more than $26,000 from a negligent uninsured motorist.\textsuperscript{28} The court allowed him to recover the full limit of $2,000 under medical payments coverage and the full $10,000 under uninsured motorist coverage, despite the fact that his policy contained a standard setoff clause.\textsuperscript{29} The damages situation in Melson was analogous to that in Webb, equating with Situation F on the chart: total damages were in excess of the combined upper limits of recovery under medical payments coverage and uninsured motorist coverage. Although the Melson court reached the same result as the Webb court, requiring the insurer to pay the full limits of uninsured motorist coverage in addition to full medical payments coverage, the Melson court did not invalidate the medical setoff clause, but merely held it to be inapplicable in a situation where there was no potential for double recovery for the same damages.\textsuperscript{30}

The question then arises how a Missouri court will interpret a standard clause in a future case with Situation F damages. The court will have a choice between the above two alternatives. The court can blindly follow Webb and hold that a standard clause is essentially the same as the Webb clause, and as such is void for the same reasons the Webb clause is void. This nondiscriminating approach to differently worded setoff clauses was followed in Stephens v. Allied Mutual Insurance Co.,\textsuperscript{31} a decision, heavily relied upon in Webb, that invalidated a standard clause. In fact, the Webb court stated that the policy provisions involved in Stephens were "very similar to those we consider."\textsuperscript{32} If a future Missouri court were to follow this approach it would foreclose the possibility of Recovery II in Missouri, regardless of the type of setoff clause under consideration.

Alternatively the court can take the Melson approach and hold that the clause by its terms is inapplicable to a Situation F case, which presents no possibility of double recovery. (Note that in terms of the chart, Recoveries I and II reach the same result in non-double recovery situations E and F). Under this approach the court would not need to rule on the validity of the clause.

If a Missouri court were to give a standard setoff clause a Melson type

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\textsuperscript{27} 1 Ill. App. 3d 1025, 274 N.E.2d 664 (1971).
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 1028, 274 N.E.2d at 666.
\textsuperscript{30} The Melson court held that where the total damages incurred by the insured are greater than the combined limits of uninsured motorist and medical payments coverage, the setoff provision does not apply. Id.
\textsuperscript{31} 182 Neb. 562, 156 N.W.2d 133 (1968).
\textsuperscript{32} 479 S.W.2d at 152.
construction, a further question arises: Would the court, if presented with a standard clause in a double recovery situation (i.e., Situations A, B, C, and D on the chart), allow the setoff to prevent double recovery (Recovery II on the chart), or would it invalidate the clause (Recovery I)? The answer to this question is difficult to forecast. It may depend in part on how a future court feels the rationales employed in Webb to invalidate the Webb clause apply to a standard clause interpreted as in Melson.

The first Webb rationale was that a setoff clause must not reduce uninsured motorist coverage below statutorily required limits of $10,000/§20,000. It is arguable that this theory is inapplicable when a standard clause is interpreted, not as reducing uninsured motorist coverage, but as limiting those damages to which it applies (i.e., damages payable under uninsured motorist coverage do not include those expenses already paid once under medical payments coverage). The dual policy theory was admittedly used in Bacchus v. Farmers Insurance Group Exchange to support double recovery under an advancements clause. Nonetheless, its vitality seems somewhat strained in a double recovery situation. Stephens v. Allied Mutual Insurance Co. was extensively quoted in Webb as authority for the dual policy theory. To justify application of the dual policy theory to invalidate medical setoffs, the Stephens court pointed out that a medical setoff could leave uninsured motorist coverage of nugatory value, if an insured had medical payments coverage approaching, equal to, or in excess of the limits of uninsured motorist coverage. However, the Stephens court was thinking only in terms of the consequences of totally validating the clause, thereby allowing Recovery III in all damages situations. The objection made by the Stephens court loses its urgency where a standard clause is interpreted as in Melson. For example, an insured with $10,000 medical payments coverage and $10,000 uninsured motorist coverage can recover up to a total of $20,000 (under Recovery II), so long as he suffers $20,000 worth of damages. Thus, the high medical payments coverage is not useless as in the situation hypothesized in Stephens.

33. Invalidating a standard clause after having given it a Melson construction would result in the same approach to recovery as that followed by the Webb court with the Webb clause, and thus would foreclose Recovery II in Missouri.
36. 182 Neb. 562, 156 N.W.2d 133 (1968).
37. 479 S.W.2d at 152-53.
38. The relevant passage, as quoted in Webb (id. at 153), reads as follows:
   The complex, if not devious, ramifications of the application of the language of this clause can be quite simply illustrated. If the plaintiff in this case had contracted for medical expense coverage in the sum of $10,000 and had suffered medical expenses in excess of this amount, the effect of the setoff clause herein involved would be to completely eliminate the uninsured motorist coverage.
182 Neb. at 566, 156 N.W.2d at 138-39.
It is ironical that although this hypothetical would be perfectly true as applied to the Webb clause, it is not necessarily true as to the standard clause, which the Stephens court was interpreting.
The substituted coverage theory was the third rationale on which the Webb court invalidated the Webb clause. It is conceivable that a future Missouri court would apply this theory to invalidate a standard type clause as well. In Missouri, though not in many other jurisdictions, double recovery is admittedly the rule in insured motorist situations. An insured can recover under his medical payments coverage without subrogating to his insurer any of his rights against the tortfeasor. Therefore, it may be argued that the substituted coverage theory should apply so that double recovery will also be the rule in uninsured motorist situations. A common sense of economy would dictate otherwise, however. Surely, there are those who would prefer to give up the chance of double recovery to save a bit of their premium dollar. Such people should not be precluded from this option by courts that are overzealous in their attempts to protect them. Furthermore, in Gordon v. Maupin, the St. Louis Court of Appeals expressly rejected the substituted coverage theory. Though the Webb court for some reason failed to mention Gordon, the Missouri Supreme Court may well choose to follow the reasoning of Gordon and reject the substituted coverage theory. In fact, it seems best to abolish the theory, which serves as no more than a shorthand way to explain results, and can lead to undesirable results in different fact situations.

The failure of courts to recognize and analyze the two variables (i.e., the wording of the setoff clause and the damages situation) in medical setoff cases has created an unusual amount of diversity of opinion. The
Webb decision is by no means immune from a charge of deficiency in this respect. In fact, the decision is weak with respect to its treatment of each of the two variables. First, the decision blindly refuses to recognize the significance of different wording in different clauses. It considers all three clauses discussed herein to be similar in wording and potential effect. This patently is not so. Although the three clauses may ultimately be treated similarly, this should result from sound policy considerations, not inadvertance. Second, the language of the decision is much too broad and fails to recognize the consequences of varying damages situations. For example, the Webb court quoted a portion of Bacchus v. Farmers Insurance Group Exchange, which allowed double recovery under an advancements clause, without discussing the differences in the fact situations in the two cases. This could lead later courts to allow double recovery without properly considering the alternatives.

The ultimate question is which of the three approaches to recovery outlined on the chart will be available in Missouri. It is unlikely that Recovery III will be allowed in Missouri, regardless of the particular medical setoff clause in question. To allow Recovery III would require a complete break with the philosophy in Webb. Whether insureds will be allowed Recovery I or Recovery II is open to serious debate. It is hoped that the case deciding that issue will have the benefit of such serious debate.

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43. 479 S.W.2d at 152-53.
45. An alternative to judicial solution of the medical setoff problem would be to deal with the problem by statute. For example, the California uninsured motorist statute, CAL. INS. CODE § 11580.2 (c) (West 1972), provides as follows:

The policy . . . may provide that if the insured has valid and collectible automobile medical payment insurance available to him, the damages which he shall be entitled to recover from the owner or operator of an uninsured motor vehicle shall be reduced for purposes of uninsured motorist coverage by the amounts paid or due to be paid under such automobile medical payment insurance.

Legislative solution of the medical setoff problem properly allows the legislature to make the policy decision of how medical setoffs and uninsured motorist coverage should operate. Furthermore, legislative action could simplify the law and provide a greater degree of certainty for insurance companies and their policyholders.
WILLS—STANDING TO CONTEST—
THE STATE AS AN INTERESTED PERSON

In re Estate of Moll

The executor under the alleged will of the decedent Florence D. Moll filed a petition to admit this document to probate. The State of Arizona opposed the petition alleging undue influence, lack of testamentary capacity and absence of execution. The proponent moved to dismiss the contest contending that the state lacked standing under the Arizona will contest statute. The trial court overruled this motion. The jury found that the decedent did not sign the will and lacked testamentary capacity at the alleged time of execution. The trial court decreed that the document offered for probate was not a valid will. On appeal, the executor and the residuary legatee challenged the trial court’s ruling that the state had standing to contest. The Arizona Court of Appeals affirmed.

Generally, will contest statutes allow any “interested person” to contest the probate of a will. An “interested person” must have a direct financial interest which admission of the document to probate would impair or destroy. The contestant need not establish the requisite pecuniary interest as a certainty; a prima facie showing is sufficient. In Moll, the state established a prima facie interest by alleging that the decedent died without heirs within the state or elsewhere. Thus, if the will was invalid, and there was no other valid will, the property would escheat. The court deemed the possibility that an heir might later appear and assert his claim as insufficient justification for overriding the state’s contingent interest.

In analyzing the interests that may give a state standing to contest, consideration of other types of “interested persons” is helpful. Although disinherited by a prior unprobated will, an heir has standing to contest the admission of a subsequent document to probate. The heir is an “interested person” because the prior will may also be invalid, thus forcing the estate to pass by intestacy. If the heir admits the validity of the earlier will,

2. Id.
3. Ariz. Rev. Stat. Ann. § 14-341 (1956): “Any person interested may appear and contest the will himself or by his guardian or attorney appointed by him, or by the court for that purpose.”
5. Id. at 85, 86, 495 P.2d at 855, 856.
6. Any “interested person” may petition in the circuit court to contest the validity of a will. E.g., § 478.083, RSMo 1969. Even in jurisdictions where the statutory language allows “anyone” to contest a will, the courts apply the “interested person” formula. See 3 W. Page, Wills § 26.52 (Bowe-Parker rev. ed. 1961).
7. 17 Ariz. App. at 85, 495 P.2d at 855. See also In re Estate of Molera, 23 Cal. App. 3d 993, 100 Cal. Rptr. 696 (1972); Campbell v. St. Louis Union Trust Co., 346 Mo. 200, 139 S.W.2d 935 (1940); State ex rel. Damon v. McQuillin, 246 Mo. 674, 152 S.W. 341 (1912); First Presbyterian Church v. Feist, 397 S.W.2d 728 (Spr. Mo. App. 1965); Steinberg v. Central Trust Co., 18 Ohio St. 2d 33, 247 N.E.2d 303 (1969).
8. 17 Ariz. App. at 85, 495 P.2d at 855; see In re Harootenian’s Estate, 38 Cal. 2d 879, 238 P.2d 992 (1951).
9. 17 Ariz. App. at 85, 495 P.2d at 855.
however, he forfeits his standing to challenge the later instrument. The surviving spouse of the decedent is an "interested person" if she would benefit from a successful contest. The decedent's creditors and debtors, however, generally lack standing. The authorities conflict as to whether the following persons may contest: Creditors of the decedent's heirs; and assignees, personal representatives, or heirs of a deceased heir.

As a general rule, an executor named in a prior will or an administr-
tor appointed on a theory of intestacy lacks standing to contest a subsequent document if his only interest is his statutory fee. Therefore, an executor under a prior will may not contest a subsequent instrument simply because it names a new executor. The policy of preventing spurious and time-consuming claims supports this rule.\(^{20}\)

The rule may differ, however, where under a prior will, the executor is also the donee of a power of appointment. A donee of a general power, including one who is also an executor, should have standing to contest a subsequent document that reduces or eliminates the power. He occupies the same position as any other devisee.\(^{21}\) *McClain v. American Security & Trust Co.*\(^{22}\) considered the interest of an executor who was also the donee of a special power. In that case, the will bequeathed to the executor the power to appoint certain personal property to any person or charity "worthy of such gift." The executor contested a codicil that increased the shares of the residuary legatees and thus reduced the corpus subject to the power. The court held that the executor, as donee of the special power of appointment, was an "interested person."\(^{23}\) The *McClain* court undoubtedly reached the proper conclusion. Any donee of a special power of appointment, not only one who is also the executor, should have standing to contest a subsequent document in order to protect the interests of the ultimate beneficiaries of the power. The courts should also consider the relationship between the donor and the donee. The donor may have created the power because of his confidence in the donee. Failing to recognize these issues, some courts have reached contrary results.\(^{24}\)

139 S.W.2d 995 (1940); Braueuel v. Reuther, 270 Mo. 603, 193 S.W. 283 (1917); Watson v. alderson, 146 Mo. 333, 48 S.W. 478; see text accompanying note 42 infra. See also Annot., 39 A.L.R.3d 695 (1971); 2 De Paul L. Rev. 257 (1959); 27 Iowa L. Rev. 443 (1942).


The following cases stated that the administrator had no standing: Austin v. Patrick, 179 Miss. 718, 176 So. 714 (1937); Cajoleas v. Attaya, 145 Miss. 436, 111 So. 359 (1927); Love v. White, 348 Mo. 640, 649-44, 154 S.W.2d 759, 760-61 (1941) (dictum); O'Connell v. Dockery, 102 S.W.2d 748, 749-50 (St. L. Mo. App. 1937) (dictum); In re Fischer's Estate, 173 Neb. 510, 118 N.W.2d 625 (1962). *Contra*, In re Cornelius, 14 Ark. 675 (1894); In re Davis's Will 182 N.Y. 468, 75 N.E. 590 (1905). *See generally* Annot., 31 A.L.R.2d 756 (1953).


21. By definition, a donee of a general power of appointment may exercise the power in favor of any person, including himself. Thus, he has a direct financial interest in the validity of the will. Coster v. Lorillard, 14 Wend. 269 (N.Y. 1835); Thompson v. Garwood, 3 Whart. 305 (Pa. 1837).

22. 392 F.2d 818 (D.C. Cir. 1968).

23. Id. at 819.

When the contestant is designated trustee by an earlier will, the courts are more willing to allow standing. As a prevailing rule, a testamentary trustee under a prior will is an "interested person."25 The trustee would take title to the property on behalf of the beneficiaries. Therefore, he must be allowed to represent the beneficiaries and to defend their interest.26 If a prior will names a single person as both trustee and executor, he acquires a sufficient interest as trustee even though not as executor.27 The rule may differ, however, where the subsequent will or codicil names a new trustee, but the beneficiaries and corpus remain the same. For example, suppose a subsequent will devises Blackacre to A in trust for certain beneficiaries and that the prior will had devised Blackacre to B in trust on the same terms for the same beneficiaries. Does B as trustee have standing to contest the subsequent will? On this point, the cases follow the "executor rationale": the trustee's interest in his fee alone is insufficient.28

The decisions concerning the state as an "interested person" follow the various rationales that the courts apply to other persons attempting to contest a document offered for probate.29 Suppose that a will is offered for probate that devises Blackacre to A and that decedent's sole heir is missing in action in Viet Nam. Does the state have standing to contest the will? As a general rule, when the state's petition alleges that the decedent died with no known heirs within the state or elsewhere, the state has established standing to contest.30 The courts have held insufficient, however, a petition alleging only that no known heirs reside within the particular state.31 The state must establish that escheat is a legitimate possibility, but need not establish it as a probability. The possibility that an heir may later appear and assert his claim is irrelevant.32

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27. See, e.g., State v. Haddock, 140 So. 2d 631 (dictum), rev'd on other grounds, 149 So. 2d 552 (Fla. 1962); Reed v. Home Nat'l Bank, 297 Mass. 222, 8 N.E.2d 601 (1937); In re Estate of Maricich, 140 Mont. 319, 371 P.2d 354 (1962).


29. See text accompanying notes 12-28 supra.


Other interests may also give the state standing to contest. Under the parens patriae doctrine, the state may have standing to represent the interests of unknown heirs. The jurisdictions that apply this rationale, however, fail to recognize that the state has an interest adverse to that of an unknown heir, who may subsequently appear and prevent escheat. The state may not have standing under this theory to contest for the missing-in-action soldier; he is not an unknown heir. At least one court has rejected the parens patriae argument.

The state may also have an interest if a successful contest of the will in question would yield a larger inheritance tax. In re Stephani, however, held that this interest was insufficient to establish standing. The commentators generally agree with the Stephani case: "[T]he state cannot contest a will simply because the amount of the estate or inheritance tax may be affected greatly by the validity or invalidity of the will." Nevertheless, however, this pecuniary and proprietary interest should be sufficient to provide the state with standing to contest.

The basic policy of will contest statutes is to prevent the admission of fraudulent wills to probate. In construing these statutes, the courts should consider the consequences where there are no "interested persons." This consideration is especially important in jurisdictions like Missouri where the will is offered in common form and the proceeding in the probate court is basically ex parte. If the will is admitted to probate and the circuit court determines that there are no "interested persons," a forgery may go uncontested. This situation can also occur if persons with interests will not or cannot contest the will (e.g., they may be unavailable or lack the necessary financial means). Holdings in Missouri that an interested person's right to standing is neither assignable nor descendible (i.e., it is personal and dies with him) further complicate this practical problem. Thus, even though an assignee has a beneficial interest under a prior will, he cannot contest a subsequent document. In conclusion, the courts should consider the basic policy of preventing uncontested forgeries, while doing justice to the concerned parties, in determining whether a person is "interested" under a will contest statute.

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33. In State v. Rector, 134 Kan. 685, 8 P.2d 323 (1933), the court explicitly held this interest sufficient. See also Warren v. Estate of Sidney, 183 Miss. 669, 184 So. 806 (1938); T. Atkinson, supra note 17, § 99; 27 Am. Jur. 2d Escheat § 30 (1966); 95 C.J.S. Wills § 329 (1957).
34. State v. Rector, 134 Kan. 685, 688, 8 P.2d 323, 324 (1933); Warren v. Estate of Sidney, 183 Miss. 669, 675, 184 So. 806, 808 (1938).
37. Id. at 49-50, 288 N.Y.S. at 493.
38. 3 W. Page, supra note 6, § 26.54.
42. See Thompson v. Butler, 136 F.2d 644 (8th Cir. 1943); Campbell v. St. Louis Union Trust Co., 946 Mo. 200, 199 S.W.2d 935 (1940); Breaux v. Reuther, 270 Mo. 603, 198 S.W. 283 (1917); Watson v. Alderson, 146 Mo. 353, 48 S.W. 478 (1898). See also Ill. Rev. Stat. ch. 3, § 90 (1969); note 18 supra.

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