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Evidence—Good Cause and the Attorney-Client Privilege in Shareholder's Suits

The applicability of the attorney-client privilege to corporations has long been taken for granted.¹ Surprisingly, however, few cases have expressly considered the merits of the availability of the privilege to corporations, and it was not until 1962 that the first major case² presenting the issue was decided. In *Garner v. Wolfenbarger*,³ a shareholder's derivative suit, the Court of Appeals for the Fifth Circuit took advantage of the flexibility afforded by the paucity of weighty precedent and declined an automatic extension of the privilege—originally created for the protection of individuals—to the modern corporation.⁴

In *Garner*, several stockholders of First American Life Insurance Company of Alabama brought a class action against the corporation, various directors and controlling persons alleging violations of federal and state security laws and common law fraud.⁵ The plaintiffs sought to recover the purchase price which they and others had paid for their stock in First American.⁶ Schweitzer had served as attorney for the corporation in connection with the first issuance of First American stock, and later

¹ *United States v. Louisville and Nashville R.R.*, 236 U.S. 318, 336 (1915); *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956), *cert. denied*, 352 U.S. 833 (1956); *Belanger v. Alton Box Board Co.*, 180 F.2d 87, 93-94 (7th Cir. 1950); *CAB v. Air Transp. Ass'n*, 201 F. Supp. 318 (D.D.C. 1961).

² *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771 (N.D. Ill.), *rev'd*, 320 F.2d 314 (7th Cir. 1962), *cert. denied*, 375 U.S. 929 (1963). The lower court's decision denying absolutely the assertion of the privilege against the shareholders brought a flurry of criticism. See, e.g., Note, 48 *CORNELL L.Q.* 551 (1963); Note, 51 *Geo. L.J.* 399 (1963); Note, 76 *HARV. L. REV.* 655 (1963); Note, 37 *N.Y.U.L. REV.* 955 (1962).

³ 430 F.2d 1093 (5th Cir. 1970).

⁴ There are two other interesting questions involved in this case not dealt with in this note: first, whether state law dealing with privilege is substantive for purposes of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (see Wright, *Procedural Reform: Its Limitations and Its Future*, 1 *GA. L. REV.* 563, 571-74 (1967); Comment, *California Law as to Scope of Attorney-Client Privilege Held Applicable In Federal Non-Diversity Proceedings.—Baird v. Koerner* (9th Cir. 1960), 49 *CALIF. L. REV.* 382 (1961)); and second, assuming that state law is applicable, should English common law control instead of state statutes dealing with attorney-client privilege (see Comment, *Attorney-Client Privilege in Shareholders' Suits*, 69 *COLUM. L. REV.* 309, 314 (1969)).

⁵ 430 F.2d at 1095.

⁶ The shareholders also claimed damages derivatively on behalf of the corporation, but the district court apparently made no distinction between the two types of action. 280 F. Supp. at 1018. Arguably, the capacity in which the shareholders sue is irrelevant to the issue of whether the privilege should be available.

had become its president. On deposition, Schweitzer was asked several questions concerning advice given by him to the corporation about various aspects of the issuance and sale of the stock and related matters.⁷ All questions related to times at which Schweitzer acted as attorney, before he became an officer of the company, and before the suit was filed.⁸ Both the corporation, through its counsel, and Schweitzer himself asserted that the attorney-client privilege barred him from revealing the communications between him and the corporation. The court of appeals vacated the district court's summary disallowance of the privilege claim and held that the attorney-client privilege is available to a corporate client—subject,

⁷ The shareholders also sought discovery of several related documents, and the attorney-client privilege was claimed as to them. 430 F.2d at 1096. Assuming the attorney-client privilege were *not* made available to corporations, one possible area of confusion would involve distinguishing what is "work product" from what would have been privileged under the attorney-client rule. This distinction would gain a new significance since "work product" would be available only if the requirements of the *Hickman v. Taylor* rule were met, while other communications would be available without restriction. *Hickman v. Taylor*, 329 U.S. 495 (1947). Judge Campbell, in his decision in *Radiant Burners*, recognized a need to distinguish between "work product," which he felt was legitimately protected, and material subject to the attorney-client privilege. *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771, 776 (N.D. Ill. 1962).

In view of the fact that Schweitzer soon became president of First American, some question is presented as to whether he was acting in the capacity of business adviser rather than counsel. The privilege does not exist, for example, where the attorney was acting in capacity of corporate director. *United States v. Vehicular Parking, Ltd.*, 52 F. Supp. 751, 753-54 (D. Del. 1943). The line is not easily drawn, particularly when, as often happens, the attorney performs duties in both capacities. Whether to approach the communication between the corporation and the lawyer as an individual communication or to determine if the preponderance of his duties is the giving of legal advice has been the choice confronting the courts in attempting to establish a rule for deciding in which capacity the attorney acts. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950); *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792 (D. Del. 1954); *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85 (D. Del. 1962). Approaching each communication individually and allowing the judge to decide, on the facts of each case, in which capacity the attorney was acting is to be preferred. See Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 952, 969 (1955); Annot., 98 A.L.R.2d 228, 247-53 (1964). The court in *Garner* did not deal with this issue, however, stating in the facts that all communications involved were made to Schweitzer in his capacity as counsel before he became a director.

⁸ The fact that Schweitzer was serving as *house counsel* rather than an independent practitioner complicates the decision on capacity due to the routine assignment of both business and legal tasks to one in such a position. The court expressly refused to find this determinative, which is probably the better view. *Georgia-Pacific Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463 (S.D.N.Y. 1956). Not to allow this privilege would be to discriminate against the larger corporations, since they alone have the resources and work load necessary to retain house counsel.

however, to the right of the stockholders to show cause why it should not be invoked.

The attorney-client privilege as applied to *individuals*⁹ is one of the most favored of all privileges. Although some commentators are taking a long, hard look at this privilege in its modern context,¹⁰ it is generally felt that the impediment to fact finding is outweighed by the benefits of franker disclosure in the lawyer's office.¹¹ Nevertheless,

the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits, consistent with the logic of its principle.¹²

It was with these considerations in mind that the court in *Garner* approached the attorney-client privilege. Previous decisions dealing with the availability of the privilege to corporations were concerned largely with various legalistic and somewhat conceptual arguments.¹³ Thus it has been asserted that since the corporation is a legal entity, it should be able to claim the privilege; however, it has been argued in retort that since the corporation is a creature of the state, rather than an individual for whom the privilege was historically designed,¹⁴ it must be given the privilege by statute. The attorney-client privilege has also been analogized to the privilege against self-incrimination,¹⁵ which is denied to corporations

⁹ One commonly used statement of the requirements for the attorney-client privilege is found in Professor Wigmore's treatise:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 J. WIGMORE, EVIDENCE § 2292 (rev. ed. 1961) [hereinafter cited as WIGMORE].

¹⁰ See, e.g., C. McCORMICK, EVIDENCE § 91, at 182 (1954). "If one were legislating for a new commonwealth, without history or customs, it would be hard to maintain that a privilege for lawyer-client communications would facilitate more than it would obstruct the administration of justice." See also Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279 (1963). Radin, *Lawyer and Client*, 16 CALIF. L. REV. 487 (1928).

¹¹ C. McCORMICK, EVIDENCE § 91, at 181 (1954).

¹² 8 WIGMORE § 2291, at 554, cited by the court in *Garner*. 430 F.2d at 1100.

¹³ The most notable of these is Judge Campbell's decision in *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771 (N.D. Ill. 1962).

¹⁴ *Id.* at 773.

¹⁵ The bases of the attorney-client privilege and the privilege against self-incrimination are completely different. Briefly, while the former is to encourage

because of its personal nature.¹⁶ A further example of the mechanistic, conceptual approach concerns the confidential nature of privileged communications. To be privileged, communications must have been made in confidence. The directors of a corporation, who usually are the agents claiming the privilege for it, often have business interests outside the corporation. Thus they are not likely to preserve the confidentiality of a communication if disclosure would benefit their outside interest. Therefore, it has been argued that since few communications are confidential, the privilege should be disallowed as to all.¹⁷ Furthermore, it also has been asserted that when a *public* corporation is formed, confidentiality should be surrendered in favor of giving the stockholders access to communications relating to the management of the corporation.¹⁸

All these approaches, however, serve only as a peg upon which to hang a decision after the judge has balanced the circumstances involved. But as Judge Godbold said in *Garner*, "[c]onceptualistic phrases . . . are not useful tools of analysis."¹⁹ And even though many of these ingenious arguments are indicative of the basic problems involved in an extension of the privilege, it would be preferable to deal straightforwardly with those problems. In *Garner* the conflicting policies are set forth, as are the particular circumstances to be appraised in striking a balance between a corporation's right to invoke the privilege and the stockholder's right to reach the information.

Certain policies historically set forth as justifications for granting the privilege to individuals readily lend themselves to application within the corporate setting. Due to the complexity of guiding the corporation through the growing maze of state and federal regulations, the corporation as directed by management is in need of legal counsel.²⁰ It is in the interest of all concerned that management be encouraged to seek counsel without

free disclosure between the attorney and client, the latter is a *personal right* granted by the constitution. Thus the analogy is quite imperfect. See Comment, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 65 NW. U.L. REV. 235, 241 (1961).

¹⁶ *United States v. White*, 322 U.S. 694 (1944).

¹⁷ *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771, 774 (N.D. Ill. 1962).

¹⁸ *Id.* at 775.

¹⁹ 430 F.2d at 1101.

²⁰ *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85, 88 n.12 (D. Del. 1962); *A.B. Dick Co. v. Marr*, 95 F. Supp. 83, 102 (S.D.N.Y. 1950); Comment, *Evidence: Federal Rules of Civil Procedure: Attorney-Client Privilege as Applied to Corporations: Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771 (N.D. Ill. 1962); *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), 48 CORNELL L.Q. 551, 564 (1963).

hesitation.²¹ Therefore, the encouragement of freedom of disclosure, the main justification for the availability of the privilege to the individual, should also be the main justification when a corporation is involved.²¹

A second justification for the extension of the privilege is also related to the effectiveness of corporate operation. Management should be free to exercise their sound judgment without being harrassed by a few dissatisfied shareholders, who in bad faith seek to disrupt the smooth operations of the company at the expense of the other shareholders.²² The cost of litigating or settling these "strike suits" is, of course, born by all the shareholders of the corporation. A strong public policy dictates that the dissident few should not be given an added incentive to initiate such actions by allowing them to discover what has been disclosed in confidence to counsel in an effort to manage the corporation more effectively. This consideration is not found in the situation involving an individual and lends strong support to those who advocate that the privilege be made available to corporations.

Nevertheless, the policy of allowing full discovery of essential facts weighs heavily against the granting of the privilege to corporations, perhaps even more so than in the individual attorney-client situation.²³ Management already has the ability to obscure much of what they do and yet remain within legitimate managerial practices.²⁴ Allowing this privilege gives the corporation an additional method to effectuate this zone of silence.²⁵ Although it is true that the mere presence of an attorney at a board meeting, for example, would never shield what transpired there,²⁶ the corporation nevertheless would have considerable leeway in which to conceal important information under the guise of privilege.

²¹ See text at note 11 *supra*.

²² As the court in *Garner* said:

Due regard must be paid to the interest of nonparty stockholders, which may be affected by impinging on the privilege, sometimes injuriously (though not necessarily so—in some situations shareholders who are not plaintiffs may benefit). The corporation is vulnerable to suit by shareholders whose interests or intention may be inconsistent with those of other shareholders, even others constituting a majority.

430 F.2d at 1101 n.17.

²³ See text at note 12 *supra*.

²⁴ By utilizing complicated organizational structures, vast number of agents, and advantageous accounting procedures, management can be very successful in hiding from the lay investor exactly what it is doing.

²⁵ See *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771, 774 (N.D. Ill. 1962), quoting Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 955-56 (1956).

²⁶ With regard to privileged written communications, see *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 324 (7th Cir. 1963).

A further consideration not present in the individual attorney-client privilege situation involves the special relationship of corporate management to the stockholders.²⁷ As Judge Godbold said in *Garner*, "it must be borne in mind that management does not manage for itself and that the beneficiaries of its action are the stockholders."²⁸ This fiduciary relationship has been the basis of attempts to apply the joint-client exception to the attorney-client privilege to corporations.²⁹ The basis for this exception is that parties jointly seeking legal advice have a common interest, and therefore do not intend the communication to be privileged in a suit by one against the other. It is arguable that this exception does not apply in the corporate situation because the identity of interest is missing. As the court in *Garner* recognized, the corporation and management may have interests adverse to the shareholders.³⁰

The special duty that management owes to the shareholders has ramifications broader than its use merely as a basis for applying the joint-client exception. It is, in fact, the most compelling argument against making the privilege available to corporations. In view of management's general fiduciary capacity, perhaps it would be preferable as a matter of public policy to allow the decisions as well as the information upon which they were based to stand on their merits instead of permitting management to hide behind the attorney-client privilege.³¹ This is particularly applicable in the *Garner* case since the communications with counsel dealt with what possibly was criminal activity. "To grant the corporate management plenary assurance of secrecy for opinions received is to encourage it to disregard with impunity the advice sought."³²

²⁷ See H. HENN, CORPORATIONS § 235 (2d ed. 1970).

²⁸ 430 F.2d at 1101.

²⁹ When "the same attorney acts for two parties having a common interest, and each party communicates with him [,] . . . they are not privileged in a controversy between the two original parties." 8 WIGMORE § 2312.

³⁰ 430 F.2d at 1101. One problem resulting from this fiduciary relationship is that funds of the corporation are used to compensate counsel utilized by management. At first blush, it appears that the shareholders are bearing the burden of compensation, yet are denied access to the information thereby attained. This seemingly unjust result is easily understood by viewing these expenditures as necessary for the effective operation of the business. The alternative would be to force management to obtain private counsel, but that would be unduly burdensome and the cost would ultimately be borne by the shareholders in the form of increased salaries. See Comment, *The Attorney-Client Privilege in Shareholders' Suits*, 69 COLUM. L. REV. 309, 319 (1969).

³¹ 430 F.2d at 1101.

³² 430 F.2d at 1102. "It has been agreed from the beginning that the privilege can not avail to protect the client in concerting with the attorney a *crime* or other evil enterprise. This is for the logically sufficient reason that no such enterprise

In *Garner*, the court applied Professor Wigmore's test requiring a balancing of "injury" against "benefit derived"³³ to determine whether the privilege should be granted. Under that test a balance already delicate when the client is an individual is made even more so because of the danger of abuse³⁴ in the corporate setting and the special fiduciary role of corporate management.³⁵ The presence or absence of a single fact or circumstance may be crucial when the balancing test is used. On the other hand, a rigid rule either allowing or disallowing the privilege in the corporate situation would foreclose taking the crucial fact into consideration and might well lead to an inequitable result. Obviously this criticism is mollified to a certain extent by judicially imposed restrictions on the application of an absolute rule.³⁶ But even with these restrictions, neither absolute rule has the flexibility necessary to deal effectively with this delicate balance. It is here—as well as in the refusal to base the privilege

falls within the just scope of the relation between legal adviser and client." 8 WIGMORE § 2298, at 572. The shareholders' complaint alleged that the First American Prospectus—carrying Schweitzer's name, and about which Schweitzer had been consulted—failed to disclose the price actually paid by one of First American's directors for shares of stock and take-out agreements guaranteeing certain directors a profit. Reply Brief For Appellants-Petitioners and Cross-Appellees at 6, *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970). Arguably then, the court could have found that the privilege was not applicable because Schweitzer was consulted as to illegal acts or fraud. Instead, the court used this merely as one factor to be considered in deciding whether the privilege should apply.

³³ The court cited Wigmore's four requirements for the establishment of any privilege:

- (1) The communications must originate in a *confidence* that will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relationship between the parties. (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*. (4) The injury that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

As applied to the attorney-client privilege, "all four conditions [were] present, with the only condition open to any dispute being the fourth." 430 F.2d at 1100, citing 8 WIGMORE § 2285, at 527-28.

³⁴ See text at note 25 *supra*.

³⁵ See text at note 28 *supra*.

³⁶ *E.g.*, *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771, 775-76 (N.D. Ill. 1962) ("trade secrets" as well as "work product" should be privileged); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 360 (D. Mass. 1950) (strict confidentiality requirement); *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962) (only those in a control position may claim the privilege for the corporation); *Grant v. United States*, 227 U.S. 74, 79 (1913) (regular business documents not privileged); see *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792 (D. Del. 1954); see Comment, *The Lawyer-Client Privilege: Its Application to Corporations, The Role of Ethics, and Its Possible Curtailment*, 56 Nw. U.L. REV. 235, 241-44 (1961).

on a conceptual, mechanistic argument—that the court in *Garner* strikes out on a new approach.³⁷

[W]here the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.³⁸

That the attorney-client privilege in the corporate setting is still viable is expressly accepted by the court. Furthermore, the court rejected the argument that the fiduciary relationship is in itself a sufficient basis for denial.³⁹ More is needed, and it is expressed in terms of “good cause.”

It is the utilization of “good cause” that gives the *Garner* decision its flexibility. The decision sets out several largely self-explanatory factors necessary for “good cause.”⁴⁰ The general import behind the major category is the prevention of the “strike suit.” If many shareholders are involved in a suit, and a large percentage of stock is represented, it is unlikely that the suit is for nuisance value only. The nature of the claim of the shareholders is also relevant. If the claim is obviously colorable, a court will be less likely to refuse the privilege than if fraud or criminal conduct is involved. In the latter situation public policy would also dictate that the privilege not be granted. Furthermore, the burden should be on the shareholder to show that the information is necessary and its availability from other sources is limited. One of the main justifications for granting the attorney-client privilege is that only the attorney is silenced; the client is still available for questioning on all matters other than the communication itself.⁴¹ However, in *Garner*, for example, several of the people involved in the alleged wrong-doing exercised their privilege against

³⁷ The court does try to deemphasize the originality of its approach by comparing it to the approach prescribed for inspection of corporate records by stockholders. 430 F.2d at 1104 n.21. The main reason for requiring good cause in record inspection is to prevent nuisance and harassment; this reason is also involved in the privilege situation, but the main justification for the attorney-client privilege is the promotion of freedom of disclosure. Thus allowing good cause to be shown to prevent the invocation of the attorney-client privilege goes further than requiring a showing of good cause in record inspection and is a new approach.

³⁸ 430 F.2d at 1103-04.

³⁹ 430 F.2d at 1103.

⁴⁰ 430 F.2d at 1104.

⁴¹ Usually, the allowance of the attorney-client privilege would cause a relatively small loss of relevant information, since the party claiming the privilege could be called under oath and freely interrogated. Assuming that the claiming party will not perjure himself, very little could be added by questioning the attorney as to what was said. See 8 WIGMORE § 2291, at 554.

self-incrimination, and were unavailable as sources of information.⁴² The final factor in this category deals with whether the information is identifiable and not just the object of a fishing expedition.

The second and third categories concern the protection of an attorney's "work product" and communications with respect to trade secrets. "Work product" is protected by the decision in *Hickman v. Taylor*,⁴³ and trade secrets by the trial judge's use of discretion; nevertheless, the court in *Garner* makes it abundantly clear that its decision does not infringe upon these areas. Therefore, communication and advice concerning the litigation itself will not be made available even if the privilege is held not to apply. The court in *Garner* suggests the use of *in camera* inspection to facilitate the examination of the above factors in order to prevent harm to the interests of the corporation.

As in the application of any flexible rule, the court involved will be called upon to make a case-by-case application. It has been argued that to require a court to make this judgment would place an additional burden on our already overburdened court system,⁴⁴ whereas an absolute rule could be easily administered. However, an absolute rule—disallowing the privilege, for example—could lead to even more of a burden, since it might encourage stockholders' suits motivated solely by curiosity. It could also be argued persuasively that a flexible rule would lead to erratic decisions.⁴⁵ Nevertheless, the benefit of having a flexible rule arguably outweighs this potential harm. Finally there is the question of whether management's knowledge that communications made to counsel may later

⁴² Reply Brief for Appellants-Petitioners and Cross-Appellees at 9, *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970).

⁴³ 329 U.S. 495 (1947). The court noted that documents in the possession of the attorney can be beyond the reach of the opposing party either because of the invocation of the attorney-client privilege or because it is a product of the attorney's preparation for the litigation. *Id.* at 508-10. The latter is protected for reasons wholly different from the policies behind the attorney-client privilege. "Work product" can be obtained by the showing of the good cause, but privileged documents were formerly unobtainable regardless of good cause. Comment, *The Attorney-Client Privilege in Shareholders' Suits*, 69 COLUM. L. REV. 309, 315 n.29 (1969). The decision in *Garner* could well be read to put privilege and "work product" on an equal footing.

⁴⁴ Petitioner's Brief for Certiorari at 10, *Garner v. Wolfenbarger*, — U.S.L.W. — (U.S. 1971).

⁴⁵ FED. R. CIV. P. 34 was amended in 1970 to exclude the requirement of good cause for the production of documents. When the deletion was originally proposed, one of the reasons given was to eliminate uncertain and erratic protection to the parties from whom production was sought. Advisory Committee on the Federal Rules of Civil Procedure, Proposed Amendments to The Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 526 (1969) (Advisory Committee's Note).

be divulged will curtail freedom of consultation with legal advisers.⁴⁶ The *Garner* decision should have limited impact, since the privilege would be denied only when a corporation is involved in a suit with its shareholders and the shareholders can show "good cause" why it should not be extended. Since the need for counsel is still eminent, full disclosure by honest management should not be affected.

MICHAEL D. MEEKER

Federal Estate Taxation—The State Street Trust Doctrine, 1959-1970: R.I.P.

In March, 1970, the Court of Appeals for the First Circuit buried one of the most vexatious concepts in the field of estate taxation. The court, in *Old Colony Trust Co. v. United States*,¹ specifically overruled *State Street Trust Co. v. United States*² by holding that "no aggregation of purely administrative powers"³ would cause the corpus of a trust to be included in the settlor's estate under sections 2036(a)(2) and 2038 of the Internal Revenue Code of 1954.⁴ In *State Street* the court held that when a decedent-settlor had retained as trustee broad powers of administration which permitted him to exchange trust property without reference to value, to invest in securities yielding either high income or no income at all (specifically including wasting investments) and to allocate assets to income or principal in all cases (whether state law as to proper alloca-

⁴⁶ See Comment, *The Lawyer-Client Privilege: Its Application to Corporations, The Role of Ethics, and Its Possible Curtailment*, 56 NW. U.L. REV. 235, 256-59 (1961).

¹ 423 F.2d 601 (1st Cir. 1970).

² 263 F.2d 635 (1st Cir. 1959).

³ 423 F.2d at 603.

⁴ INT. REV. CODE of 1954, §§ 2036(a)(2), 2038. Section 2036 of the Code includes in a decedent's estate property transferred to another in which the decedent retained a life estate. Specifically included is property with respect to which the decedent retained "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." This section is only applicable to transfers made after March 3, 1931. Section 2036 includes the total amount of the property transferred. Section 2038 includes within a decedent's estate transferred property subject to the power of the decedent to "alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death." It makes no difference under section 2038 whether the decedent ever owned the property subject to the power; it is only necessary that the decedent had the power on the date of his death or had transferred it in contemplation of his death. Both sections 2036(a)(2) and 2038 include property even if the power is exercisable only in a fiduciary capacity. Treas. Reg. §§ 20.2036-1(b)(3), 20.2038(a) (1958).