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Notes

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NOTES

Antitrust Law—Private Actions: The Supreme Court Bars Treble-Damage Suits by Indirect Purchasers

In section four of the Clayton Act[1] Congress provided that parties injured as a result of a violation of the antitrust laws could bring a private action for treble damages against an antitrust violator.[2] When the violation involves price-fixing,[3] the consumer[4] of the product is often the one who bears the additional cost resulting from the overcharge. Because of the multilevel distribution system employed for the sale of most products in the United States, however, the higher price resulting from a price-fixing violation is commonly passed on by intervening purchasers before it reaches the ultimate consumer. Since 1968, when the Supreme Court held that defendants in treble-damage actions could not assert in defense that a direct purchaser-plaintiff had passed on any overcharge to its customers and thus had not been damaged by the alleged violation,[5] the courts have disagreed[6] on whether that decision should be extended to bar a claim of pass-on[7] by a

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1. 15 U.S.C. § 15 (1970) provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

2. The provision for recovery of treble damages was seen as both a remedial provision and as an incentive to private suits, and thereby an aid to enforcement of the antitrust laws. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) (Marshall, J.).

3. *See* Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach*, 85 YALE L.J. 626 (1976). Of the 346 civil and criminal actions initiated during 1971-1976 by the Department of Justice, 192 involved horizontal price-fixing (agreements among competitors), and 4 concerned vertical price-fixing, or resale price maintenance. *Id.* at 536, 555 (citing TRADE REG. REP. (CCH) for the five year period). Since treble-damage actions are frequently commenced after a government prosecution for the same violation, these figures are also a relatively accurate indication of the trend in private actions. *Id.* at 634 n.42.

4. The word "consumer" as used in this Note refers to any individual or business entity buying a product primarily for use rather than for resale. The term "ultimate consumer" or "final purchaser" refers to the last buyer of a product that has passed through several other hands—commonly those of the wholesaler and retailer. "Indirect purchaser" refers to anyone who buys a product from someone other than the manufacturer.

5. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968). For a discussion of this case, see text accompanying notes 21-24 *infra*.

6. *Compare* text accompanying notes 25-29 *with* text accompanying notes 30-35.

7. "Pass-on" refers to the theory that an overcharge added to the cost of a product at one level of the chain of distribution, rather than being absorbed by the buyer at that level, is added

plaintiff in a treble-damage suit. Contrary to the predictions of most commentators[8] and many lower courts,[9] the Supreme Court in *Illinois Brick Co. v. Illinois*[10] has answered that question in the affirmative. Since any prospective plaintiff except the first purchaser of a product must rely on the pass-on theory to allege an injury from an illegal overcharge, *Illinois Brick* appears to have barred treble-damage suits by all indirect purchasers.

The State of Illinois and 700 other governmental entities brought suit against defendant brick manufacturers, alleging violations of section one of the Sherman Act.[11] Plaintiffs claimed that the arbitrarily high price for concrete blocks illegally fixed by the manufacturers had been passed on by the masonry contractors to the general contractors and again by the general contractors to plaintiffs.[12] Defendant manufacturers moved for summary judgment against all indirect purchasers of the concrete block. The district court granted the motion, holding that plaintiffs lacked standing,[13] but the Court of Appeals for the Seventh Circuit reversed.[14] The Supreme Court, on

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on to the price paid by the next buyer in the chain. Assertion of the theory by a plaintiff in a treble-damage suit is labelled "offensive use of pass-on"; when invoked by a defendant it is a "defensive use of pass-on." *See, e.g.*, Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2064-65 (1977).

8. *See, e.g.*, McGuire, *The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages Under Hanover Shoe*, 33 U. PITT. L. REV. 177 (1971); Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-on*, 123 U. PA. L. REV. 976 (1975); Note, *Mangano and Ultimate Consumer Standing: The Misuse of the Hanover Doctrine*, 72 COLUM. L. REV. 394 (1972); Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-on Doctrine*, 46 S. CAL. L. REV. 98 (1972). *But see* Handler & Blechman, *supra* note 3, at 638-49.

9. *See, e.g.*, *In re* Master Key Antitrust Litigation, 528 F.2d 5 (2d Cir. 1975); *In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom.* Standard Oil Co. v. Alaska, 415 U.S. 919 (1974); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied sub nom.* Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971); Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287 (S.D.N.Y. 1975).

10. 97 S. Ct. 2061 (1977).

11. Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. V 1975), provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . ."

12. 97 S. Ct. at 2065. Defendants' blocks were bought primarily by masonry contractors, who built masonry structures under contract to general contractors, who then incorporated those structures into entire buildings that were sold to plaintiffs. Plaintiffs claimed $3 million in actual damages, producing a treble-damage claim of $9 million.

13. Illinois v. Ampress Brick Co., 67 F.R.D. 461 (N.D. Ill. 1975). The district court ruled that plaintiffs were too remote from the alleged violation to have standing to sue under § 4 of the Clayton Act because they were indirect purchasers of a product that, after being sold with the illegal overcharge by the manufacturer, had been incorporated into another product and sold in a different form. *Id.* at 468. The court distinguished between "final" consumers, who buy goods indirectly but in the same condition as when they were originally made and sold, from "ultimate" consumers, who buy the finished product from a middleman who has altered or added to the goods. *Id.* at 467-68. Final consumers, the court noted, were usually granted standing, ultimate ones only rarely. *Id.* at 466.

14. Illinois v. Ampress Brick Co., 536 F.2d 1163 (7th Cir. 1976). The court of appeals also based its holding on the standing question, but stressed that the broad language of the Clayton

certiorari, did not reach the standing question, but held that *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[15] was dispositive of the case.[16] Justice White, writing for the Court,[17] rejected both the argument that plaintiffs should be permitted to use a pass-on theory[18] and the contention that *Hanover Shoe* should be read narrowly to bar the pass-on defense only in its own factual context of overcharges for capital goods.[19] Instead, he enunciated a per se rule against the use of pass-on theory by any indirect purchaser.[20]

In *Hanover Shoe*, the most significant prior case dealing with the use of pass-on theory,[21] the Supreme Court was confronted with the question whether a defendant in a treble-damage action should be allowed to escape liability to a direct purchaser by proving that the alleged illegal overcharge had been passed along to the purchaser's customers.[22] The Court, pointing

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Act's treble damage provision demanded a more liberal test of standing than the district court had applied. The standing test should not be used, the Seventh Circuit declared, to bar a plaintiff who might have difficulty *proving* its injury. *Id.* at 1165-66.

15. 392 U.S. 481 (1968).

16. 97 S. Ct. at 2066 n.7.

17. Justice White was also the author of the *Hanover Shoe* opinion. 392 U.S. at 483.

18. 97 S. Ct. at 2067. This position was taken by the dissenters, Justices Brennan, Marshall and Blackmun, the United States as amicus curiae and the lower courts that had allowed other plaintiffs to use the pass-on theory. *Id.*

19. This position was argued solely by plaintiffs. *Id.* at 2066.

20. *Id.* at 2070. Two limited exceptions to this rule were recognized by the Court. The first exception, coinciding with the sole exception created in *Hanover Shoe*, 392 U.S. at 494, applies when a first purchaser has a pre-existing cost-plus contract with its customer, thus establishing the effect of the overcharge in advance and simplifying the problems of proof. 97 S. Ct. at 2070.

The second exception arises when "the direct purchaser is owned or controlled by its customer." *Id.* at 2070 n.16. *But see* notes 50 & 51 and text accompanying notes 49-51 *infra*.

21. Prior to *Hanover Shoe*, lower courts were divided on the question whether to recognize the pass-on defense. The defense was allowed in the "Oil Jobber Cases," in which plaintiffs, independent jobbers who bought gas from defendant oil companies, resold it to service stations at a resale price uniformly fixed according to costs. *See* Clark Oil Co. v. Phillips Petroleum, 148 F.2d 580 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945); Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944); Twin Ports Oil Co. v. Pure Oil Co., 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941); Leonard v. Socony-Vacuum Oil Co., 42 F. Supp. 369 (W.D. Wis.), *appeal dismissed,* 130 F.2d 535 (7th Cir. 1942). In the "Electrical Cases," however, where defendant electrical equipment manufacturers sought to prove that plaintiff utility companies had passed on overcharges in the price of the equipment to its customers, the defense was denied. *See* Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564 (7th Cir. 1963); Public Util. Dist. No. 1 v. General Elec. Co., 230 F. Supp. 744 (W.D. Wash. 1964); Atlantic City Elec. Co. v. General Elec. Co., 226 F. Supp. 59 (S.D.N.Y. 1964).

In contrast, pre-*Hanover Shoe* courts generally allowed the use of pass-on theory by plaintiffs. *See, e.g.*, South Carolina Council of Milk Producers v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967); Washington v. American Pipe & Constr. Co., 274 F. Supp. 961 (W.D. Wash. 1967); Missouri v. Stupp Bros. Bridge & Iron Co., 248 F. Supp. 169 (W.D. Mo. 1965).

22. Plaintiff Hanover Shoe claimed that defendant United Shoe Machinery, through its policy of leasing rather than selling machinery, had monopolized the shoe industry and had forced Hanover to pay more for the machinery than it would have paid under normal

to the "insurmountable" problems of proving pass-on in most situations and noting the added complications to treble-damage actions such problems would entail,[23] held that the pass-on defense was barred as a matter of law. The Court also emphasized the need to preserve the effectiveness of the treble-damage action as an enforcement and deterrence mechanism: if a violator could defend against a first purchaser by asserting pass-on, it would escape liability altogether, since often ultimate consumers would have only a small stake in any lawsuit that could be brought against a violator and, accordingly, little incentive to sue.[24]

The *Hanover Shoe* opinion offered little insight into the Court's views on the use of pass-on by plaintiffs. This question divided the lower courts for several years. One group of cases, led by *Mangano v. American Radiator & Standard Sanitary Corp.*,[25] read *Hanover Shoe* as barring indirect purchasers from asserting injury through pass-on. In support of its ruling, the lower court in *Mangano* pointed to the *Hanover* Court's concern with the difficulties of proving pass-on.[26] Plaintiffs in *Mangano* claimed that the overcharge had passed through as many as five levels from the manufacturer of plumbing fixtures to the wholesaler, to the plumbing contractor, to the builder, to the first homeowner, and often to a subsequent homeowner.[27] Noting the difficulty of proving that a builder selling a $20,000-$30,000 house had raised his price to reflect a $10-$20 overcharge for plumbing fixtures, the court dismissed the indirect purchasers' complaint.[28] Other courts that rejected claims by ultimate consumers, rather than basing their ruling on *Hanover Shoe*, viewed the issue as one of standing. Those who sought to show an injury several levels removed from the alleged violation were held to be too remote to have a sufficient interest to sue under section four.[29]

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competitive conditions. United contended that Hanover had suffered no actual injury from the overcharge because it was fully reflected in the price of the shoes sold to its customers. 392 U.S. at 487.

23. *Id.* at 493.

24. *Id.* at 494.

25. 438 F.2d 1187 (3d Cir. 1971), *aff'g* Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970). *See also* Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481 (S.D.N.Y. 1973); Travis v. Fairmount Foods Co., 346 F. Supp. 679 (E.D. Pa. 1972); Balmac, Inc. v. American Metal Prods. Corp., 1972 Trade Cas. ¶ 74,235 (N.D. Cal. 1972).

26. 50 F.R.D. at 25-26.

27. *Id.* at 19-20.

28. *Id.* at 26. Defendants' motion to dismiss was based on plaintiffs' failure to file answers to its interrogatories. The motion was granted on this ground, but the district court stated in addition that *Hanover Shoe* required dismissal because it had barred the use of pass-on by all parties. *Id.* at 30. The court of appeals affirmed on both grounds. 438 F.2d at 1188.

29. *See, e.g.*, Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975) (residential subscribers claimed they paid higher rates as a result of anticompetitive practices in the

In another line of cases, lower courts concluded that *Hanover Shoe* was not intended to bar suits by ultimate consumers. These courts emphasized the policy underlying that decision and maintained that barring plaintiffs' claims either under *Hanover Shoe* or on the basis of a strict rule of standing would subvert the purpose of the section four treble-damage action.[30] In the leading case in this area, *In re Western Liquid Asphalt Cases*,[31] plaintiffs were governmental entities claiming that asphalt producers had illegally raised and maintained the price of liquid asphalt used in the construction of public roads. The asphalt was bought from defendants by contractors, who combined it with other ingredients in building the roads.[32] The Court of Appeals for the Ninth Circuit found that the consumers in that case had a substantial interest in the suit, since three million tons of asphalt and thirty-seven thousand contracts were involved. Furthermore, few of the contractors involved had come forward to assert their own claim against the supplier.[33] Nor were they likely to do so, the court reasoned, because of their dependence upon the supplier and the apparent financial control that it exerted over many of its contractors.[34] The court noted that "[t]he day is long past when courts, particularly federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages."[35]

In *Illinois Brick*, however, it was the *Hanover Shoe* Court's resolve to control the complexities of antitrust litigation that determined the outcome of the case. The other principles espoused in *Hanover Shoe*—ensuring enforcement and punishing violators of the antitrust laws— were de-emphasized. Rejecting the argument that offensive use of a pass-on theory should

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telephonic equipment market); *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122 (9th Cir. 1973) (farmers claimed damage to crop yields as a result of conspiracy among auto manufacturers to eliminate competition in air pollution control devices); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 310 (S.D.N.Y. 1971) (purchasers of finished animal feed products containing an antibiotic drug asserted a claim against manufacturers of the drug); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970) (consumers of eggs claimed injury from anticompetitive practices of egg producers).

30. *See, e.g.*, Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973); *In re* Master Key Antitrust Litigation, 1973-2 Trade Cas. ¶ 74,680 (D. Conn. 1973); Southern Gen. Builders, Inc. v. Maule Indus., Inc., 1973-1 Trade Cas. ¶ 74,484 (S.D. Fla., 1972); cases cited note 9 *supra*.

31. 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom.* Standard Oil Co. v. Alaska, 415 U.S. 919 (1974).

32. *Id.* at 194.

33. *Id.* at 198.

34. *Id.*

35. *Id.* at 201. *See also* West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied sub nom.* Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971) (approving a settlement plan involving 66 civil antitrust actions and apportioning damages between direct and indirect purchasers).

be permitted, Justice White first asserted that in order to promote consistency in adjudications the *Hanover Shoe* rule must apply equally to plaintiffs and defendants.[36] He then cited two more practical concerns that impelled the outcome in *Illinois Brick*. First, he expressed the fear that if indirect as well as direct purchasers were allowed to recover, defendants would be exposed to a "serious risk of multiple liability."[37] Second, Justice White reiterated the *Hanover Shoe* Court's apprehension that the attempt to prove pass-on would "greatly complicate and reduce the effectiveness of already protracted treble-damage proceedings."[38]

The Court attributed its reluctance to abandon the *Hanover Shoe* rule or apply it only to instances of overcharges for capital goods, as plaintiffs proposed, both to stare decisis considerations and to its unchanged belief that the *Hanover Shoe* construction of section four would provide the most effective enforcement mechanism for the antitrust laws.[39] Moreover, although the risk to defendants of multiple liability would not be present under this application of *Hanover Shoe*,[40] the Court foresaw additional complications that would arise if all potential plaintiffs were permitted to assert claims based upon a single overcharge.[41]

In a strongly worded dissent, Justice Brennan[42] argued that the majority had overemphasized the importance of efficiency in the resolution of antitrust litigation, since the underlying rationale of the *Hanover Shoe* decision—the need to promote the treble-damage action as a deterrent to antitrust violators[43]—called for permitting plaintiffs to assert pass-on. The ensuing procedural and evidentiary complications and the risk of multiple liability, Brennan argued, could be adequately resolved by means of procedural devices, whereas prohibiting offensive use of pass-on would frustrate Congress' purpose in passing the Clayton Act, by reducing the ability of injured parties to obtain compensation.[44]

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36. 97 S. Ct. at 2067.
37. *Id.*
38. *Id.* at 2068.
39. *Id.* at 2070.
40. Compare text accompanying note 37 *supra*. When a defendant is allowed to assert pass-on by the intervening purchasers and is able to prove it, the defendant will be liable only to the final purchaser.
41. 97 S. Ct. at 2070. The existence of several potential claimants against the defendant, and the necessity of apportioning any recovery among them, would require compulsory joinder of all the claimants in a single action. *See* FED. R. CIV. P. 19. This joinder requirement, the Court feared, "would transform treble-damage actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." 97 S. Ct. at 2072.
42. Justice Brennan's dissenting opinion was joined by Justices Marshall and Blackmun. 97 S. Ct. at 2076.
43. *See* text accompanying note 24 *supra*.
44. 97 S. Ct. at 2083-84 (dissenting opinion).

In this respect the primary purposes of section four of the Clayton Act are of critical importance in guiding any evaluation of the *Illinois Brick* result. The first objective of the Act is to provide compensation: "Any person who shall be injured . . . by reason of anything forbidden in the antitrust laws" may sue to recover his damages.[45] The fact that a claimant may recover *treble* damages, however, indicates a second purpose of the Act—the punishment of violators and the deterrence of future violations. Finally, efficiency in administration may be regarded as an inherent goal of the Act; presumably Congress intended that its two substantive goals would be implemented swiftly and economically, as well as justly.

In *Illinois Brick*, the Court appeared chiefly concerned that antitrust litigation be conducted as efficiently as possible, citing this rationale as the dispositive principle of the *Hanover Shoe* decision. Justice White maintained that its importance was evident from the fact that the Court had recognized an exception to the general *Hanover Shoe* rule for suits based on pre-existing cost-plus contracts, contracts that make it " '*easy to prove*' " that the direct purchaser has not been damaged by an antitrust violation.[46] It is also true, however, that when there is a cost-plus contract, the direct purchaser has the least incentive to sue, while the indirect consumer's injury is obvious and he is more likely to assert a claim. Thus the exception also furthers the enforcement objective of the Act. Moreover, if ease of proof was the reason for allowing the cost-plus exception, one might expect that the *Illinois Brick* Court would have allowed other exceptions for situations in which the "difficulties and uncertainties" of proving pass-on would be comparatively slight. Justice White, however, specifically rejected other, proposed exceptions[47] on the grounds that some difficulty of proof might

45. 15 U.S.C. § 15 (1970).

46. 97 S. Ct. at 2068 n.12 (quoting Hanover Shoe, 392 U.S. at 494) (emphasis added by the *Illinois Brick* Court).

47. Plaintiffs argued that exceptions should be allowed when middlemen resell goods without altering them and when contractors add a fixed percentage markup to their costs in submitting bids. Exceptions were also urged for other situations in which most of the overcharge would logically be passed on—specifically, when "a price-fixed good is a small but vital input into a much larger product, making the demand for the price-fixed good highly inelastic." *Id.* at 2074.

At least two of these exceptions deserved further consideration by the Court. When contractors, or retailers, add a fixed percentage markup to their costs, any overcharge incurred is promptly passed on. Though the extent of the markup may vary with demand conditions, demand is likely to be inelastic where such a pricing system is being employed; otherwise profits would decline. Furthermore, expert testimony may be employed to provide estimates of the elasticity of demand. *See* Schaeffer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883, 905, 916 (1975). Proof of pass-on would be simplified in that once the amount of the overcharge is proved, and the percentage markup being employed by the middleman is established, the price change that is due to the overcharge can be determined. The fact that this pricing system, if the percentage

remain and that "the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility to proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid."[48]

The only additional exception acknowledged by Justice White, however, could create as many problems of classification as those he rejected. After explaining the rationale for the cost-plus exception, he noted :

> Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer. Cf. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969); *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 197, 199 (1973), *cert. denied*, 415 U.S. 919 (1974).[49]

The exception as stated is somewhat ambiguous; although it concerns control of a direct purchaser by its *customer*, the cases cited describe situations in which a purchaser is controlled by its *supplier.*[50] Since the fact that free "market forces have been superseded" in some manner appears to have supplied the rationale for the exception, perhaps Justice White intended to distinguish situations in which control is exerted over a direct purchaser by *either* its customer or its supplier.[51] However it is interpreted, the

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markup is fixed, results in *greater* profits for a middleman when an overcharge has been imposed provides an additional rationale for allowing ultimate consumers to sue the violator, since the middleman in this situation has no incentive to do so.

The exception for a price-fixed good that is a small but vital component of a final product also has merit because of the likelihood that an overcharge on that component will be passed on to the ultimate consumer. The relatively small price increase in the final product resulting from an overcharge on a small, irreplaceable part will have little effect on the demand for the product; therefore pass-on of the overcharge on the component part would be unlikely to reduce profits. *See id.* at 921-25. The difficulty of tracing the overcharge through several market levels would be reduced if a strong presumption of pass-on were allowed on the basis of expert testimony, rebuttable by a showing of alternative reasons for the price increase by the intermediate purchasers.

The exception for middlemen who resell price-fixed goods without altering them has less merit, though initially it appears that proof of pass-on would be simpler in such a situation. This distinction has been criticized for focusing on a fact (extent of alteration of the product) that has no economic significance, and thus no influence over a middleman's ability to pass on an overcharge. *See, e.g., id.* at 928-30. Other factors, such as costs and elasticity of demand, that influence the extent of pass-on might vary widely within this category, and present difficulties of proof in some situations.

48. 97 S. Ct. at 2074.

49. *Id.* at 2070 n.16.

50. In *In re* Western Liquid Asphalt Cases, 487 F.2d at 198, the contractors who constructed roads for the indirect-purchaser plaintiffs were controlled by their asphalt supplier, who was charged with a price-fixing violation. In Perkins v. Standard Oil Co., 395 U.S. 642, 647 (1969), the wholesaler-direct purchaser exerted control over the retailer and the dealer who bought from it.

51. In response to several inquiries, the Reporter of Decisions' Office first indicated that the footnote would be changed to read "supplier." However, Justice White then reconsidered that proposed change. Telephone conversation with Henry C. Lind, Ass't. Reporter of Deci-

exception is certain to provoke frequent, time-consuming litigation on the issue of whether control is present in a given distribution relationship, and if so, how much is required to bring the case within the exception to the *Illinois Brick* holding.[52] The resolution of such issues will require extensive discovery; indeed, it appears that a motion to dismiss against an indirect-purchaser plaintiff based on *Illinois Brick* would be premature unless the plaintiff has been allowed, when it so moved, to proceed with discovery on the issue of control. When this lengthy process is completed, and if some elements of control are found to be present, the court must then decide whether there is enough control to invoke the exception. Thus the trial court will encounter the very problems of classification that the *Illinois Brick* Court sought to avoid when it rejected other exceptions to its holding.[53] Finally, and ironically, the proof of pass-on would not necessarily be any easier in many of the situations in which some form of control might be present than it would be in situations in which no such control existed.[54]

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sions (Sept. 23, 1977). *See also* ANTITRUST & TRADE REG. REP. (BNA), Oct. 27, 1977, at A-3. The footnote reportedly will remain unchanged. Telephone conversation with Reporter of Decisions' office (Dec. 19, 1977).

52. For example, in *In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom.* Standard Oil Co. v. Alaska, 415 U.S. 919 (1974), cited by Justice White, 97 S. Ct. at 2068 n.7, the supplier controlled its direct customers through "acquisition of stock, or indirectly through various financial arrangements, including credit." 487 F.2d at 195. Certainly when a *majority* of the stock of the direct purchaser is owned by the manufacturer-supplier, use of pass-on theory must be permitted the indirect purchaser, since manufacturer and purchaser are virtually the same corporation. Other types of control through stock, however, may not be as well-defined, such as ownership of a substantial minority of the stock of one corporation by another, or the "affiliation" situation, in which a corporation with many of the same shareholders as the manufacturer buys out the direct purchaser. Furthermore, a manufacturer who wished to insulate himself from treble-damage actions might try to take advantage of the *Illinois Brick* rule by setting up a distributor that it could control indirectly. Though outright ownership of a distributor would certainly invoke the control exception, if the distributor were "owned" by a relative or debtor of the manufacturer's majority shareholder, the control is not as readily identifiable.

Less direct types of control would include certain franchise arrangements, in which there may be territorial and supply restrictions. In other situations the manufacturer may establish or influence the retail price of its product. Finally, credit arrangements, as mentioned by the *Western Liquid Asphalt* court, *id.* at 195, are not uncommon in distribution relationships and could provide frequent instances in which an indirect purchaser might claim that control was exerted on a direct purchaser by its supplier.

One decision invoking footnote 16 has already been reported. *In re* Toilet Seat Antitrust Litigation, 1977-2 Trade Cas. ¶ 61,601 (E.D. Mich. Aug. 24, 1977). Plaintiff lumber company bought its toilet seats from defendant manufacturer through a purchasing company. The court concluded that the purchaser acted as an agent controlled by plaintiff because it purchased materials, for a fee unrelated to the quantity of goods purchased, at a price approved by plaintiff. The court held that these indirect-purchaser plaintiffs could assert a pass-on theory. *Id.* ¶ 61,601, at 72,496-97.

53. *See* text accompanying note 48 *supra*.

54. Unless the relationship is one of actual ownership, or unless the manufacturer actually sets the retail price, *see* note 52 *supra*, the difficulty of proving pass-on would still depend primarily on external market factors. *See* note 47 *supra*. Of course, the exception is still

In response to the majority's concern that proving pass-on would create new dimensions of complexity in treble-damage actions, Justice Brennan pointed out that nearly all antitrust cases necessarily involve "massive evidence and complicated theories."[55] Indeed, initially proving an overcharge is often just as difficult and complex as is the subsequent burden of proving it was passed on.[56] Nor does the specter of "massive multiparty litigations" cited by the majority[57] pose so immediate and ominous a threat to the capability of litigants and courts that indirect purchasers should be denied any opportunity to prove their injuries and damages. As Brennan noted, ultimate consumers who are so remote that their damages would be speculative may be barred from court by application of the liberal, "target area" test of standing.[58] Moreover, some imprecision in assessing damages has always been tolerated in antitrust cases.[59]

In discussing *Illinois Brick* in the context of the punishment purpose of the statute, the majority opinion focused first on the concern that violators would be excessively punished: if plaintiffs are allowed to assert pass-on while defendants are not, both direct and indirect purchasers would be able to recover the full amount of the overcharge, assuming pass-on could be proved.[60] Although recognizing that those advocating offensive use of pass-on would also allow its defensive use when both direct and indirect purchasers attempt to recover in the same lawsuit,[61] and that various procedural devices could be used to join them in one action,[62] White nevertheless maintained that there would be no protection against multiple liability when one claimant had already recovered from the violator by means of a judgment or settlement.[63] He failed to consider alternative methods of dealing

supported by the rationale that since the direct purchaser is unlikely to bring a treble-damage claim against a supplier that has any amount of control over the purchaser, the indirect purchaser should be allowed to assert pass-on in those situations.

55. 97 S. Ct. at 2081 (dissenting opinion).

56. *Id. See also* Pollock, *Automatic Treble Damages and the Passing-On Defense: The Hanover Shoe Decision*, 13 ANTITRUST BULL. 1183, 1210 (1968).

57. 97 S. Ct. at 2072.

58. *Id.* at 2082 (dissenting opinion). *See also* note 84 and accompanying text *infra*.

59. *See, e.g.*, Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 264 (1946).

60. 97 S. Ct. at 2067.

61. *Id.* at 2067 n.11.

62. The devices most frequently mentioned include transfer for coordinated pretrial proceedings under the Multidistrict Litigation Act, 28 U.S.C.A. § 1407 (West 1976 & Supp. 1977), *see* West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1082 (2d. Cir.), *cert. denied sub nom.* Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971); interdistrict transfers of suits effected under 28 U.S.C. § 1404(a), (b) (1970); and statutory interpleader, *id.* § 1335.

63. One court has suggested an apportionment scheme to be used in consolidated actions. The direct purchaser would recover the amount of the overcharge not passed on, and any lost profits; the ultimate consumers would recover the remainder of the overcharge, if any, and any other damages proximately caused. *In re* Western Liquid Asphalt Cases, 487 F.2d at 201; *see* 97 S. Ct. at 2067 n.11. Justice Brennan, in his dissent, argued that this possibility is largely

with this situation, such as barring a later suit by plaintiffs who had failed to intervene in an action by another class of purchasers, or requiring the plaintiff who wins a judgment or agrees to a settlement to post bond with the court or pay the settlement into escrow until the statute of limitations has run, in the event additional claimants should come forward.[64] The Court's excessive concern that defendants be protected from a double recovery thus results in the denial of *any* recovery for many injured parties.[65]

The Court also maintained that assuring a direct purchaser that he can recover treble the amount of the entire overcharge—if he can prove a violation—would provide the most effective enforcement mechanism for the private antitrust action.[66] It is true that the first purchaser, often a large wholesaler or "middleman," is usually in a better financial position to litigate than are the generally smaller and scattered ultimate consumers. Even though such a middleman may have been able to pass on most of an overcharge and thus may not have an incentive to bring an action on account of actual injury,[67] he may be sufficiently attracted by the prospect of a full treble-damage recovery to undertake the considerable burden of antitrust litigation. Balanced against this tantalizing reward, however, is the danger the middleman faces of impairing relations with his supplier. Even when the supplier does not exert actual financial control over the first purchaser, there

theoretical, since "[t]he extended nature of antitrust actions, often involving years of discovery, combines with the short four-year statute of limitations to make it impractical for potential plaintiffs to sit on their rights until after entry of judgment in the earlier suit." *Id.* at 2084 (dissent).

64. *See* McGuire, *supra* note 8, at 198-200.

65. Justice White expressly rejected the argument that "it is better for the defendant to pay six-fold or more damages than for an injured party to go uncompensated." 97 S. Ct. at 2067 n.11. Yet several commentators have noted that treble damages are unlikely to equal a defendant's wrongful profits, largely because the violator has typically enjoyed interest-free use of his ill-gotten gains for several years before a judgment is rendered against him, and antitrust plaintiffs are denied prejudgment interest on their recoveries. *See, e.g.*, Schaeffer, *supra* note 47, at 911-12.

66. 97 S. Ct. at 2070, 2074-75.

67. The majority contended that because the first purchaser operates in an imperfectly competitive market, he would be forced to absorb some, and "often most" of the overcharge. *Id.* at 2073, 2075. Economic theory suggests the contrary, however—that an overcharge *would* generally be passed on at least in part, in all types of competitive structures, resulting in higher retail prices. *See e.g.*, J. BAIN, PRICE THEORY 141, 145, 198 (2d ed. 1966).

When demand for a product is inelastic, a middleman's profits will be unaffected if he passes on the overcharge to his customers. Though elasticity of demand will of course vary throughout the market, price-fixing violations are more likely to occur when an intermediate purchaser *can* pass on the overcharge to his customers. In that event the intermediate purchaser would have less incentive to expend his resources in detecting the violation, and the profit accruing to the price-fixer would be greater when demand is inelastic, since any drop in the quantity sold as a result of the overcharge would be relatively small. Schaeffer, *supra* note 47, at 897-900.

is often a comfortable business relationship between the two, beneficial to a buyer, that he would be reluctant to jeopardize.[68]

In addition, the Court was concerned that requiring apportionment of any prospective recovery, in the event subsequent purchasers join the middleman in suing his supplier, would further reduce the latter's incentive to sue, and thus further impair enforcement.[69] The present uncertainty as to whether a middleman will sue at all, however, appears to be at least as great a risk to enforcement prospects—especially since the likely alternative, under the *Illinois Brick* holding, is that *no* purchaser, direct or indirect, will bring a suit and the violator will go unpunished.[70] Allowing both direct and indirect purchasers to attempt to prove their damages would at least encourage enforcement of the antitrust laws by the party who is often the one most seriously injured by an overcharge, the ultimate consumer, and thus has the greatest incentive to assert a claim against the violator. Middlemen who have suffered a substantial loss would still have the lure of a substantial recovery, and their problems of proof would not be compounded by the addition as parties to the suit of indirect purchasers, who would have the burden of proving pass-on before recovering.

The *Illinois Brick* opinion indicates that the compensation objective of the treble damage action was of minimal concern to the Court. Justice White recognized that the majority's rule denies recovery to indirect purchasers who may have been actually injured by antitrust violations,[71] but apparently

68. *See, e.g., In re* Western Liquid Asphalt Cases, 487 F.2d at 198; Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319, 1325, 1330-32 (1973). Some direct purchasers may actually have benefited from the overcharge. *See* Schaeffer, *supra* note 47, at 914.

69. 97 S. Ct. at 2074-75.

70. One commentator asserts that even when pass-on is not explicitly invoked, it is an implicit factor in the calculation of damages in almost every damage action. Pollock, *supra* note 56, at 1189. This was borne out in an ironic conclusion to the "Plumbing Fixtures" litigation, Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971), in which indirect purchasers were barred from asserting pass-on. A subsequent settlement between the manufacturers and some direct purchasers was appealed by the direct purchasers, who claimed that the district court had not considered their data on overcharges, quantities and prices. The Court of Appeals for the Third Circuit conceded that the relevant data had not been considered, but noted, "[W]e cannot say that such proof would have been too significant here. . . . [A]mong the numerous factors dictating approval was the fact that the claims of this class were minimized by the probability that overcharges made upon them were passed on to their customers." Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971). Thus, the defendants not only managed to escape liability altogether to the ultimate purchasers, but were also liable for merely reduced damages to the direct purchasers on the theory that the legally injured parties passed on their losses to the same ultimate purchasers. If this is a representative case with respect to proof of damages in such a situation, a middleman who can demonstrate no actual damages will be at a substantial disadvantage in settlement negotiations of a private antitrust suit.

71. 97 S. Ct. at 2075.

felt that this was an unavoidable consequence of emphasizing the efficiency and deterrence objectives of the Clayton Act. It may be true that, as he stated, "*Hanover Shoe* does further the goal of compensation to the extent that the direct purchaser absorbs at least some and often most of the overcharge";[72] economic reality suggests that that extent will be small indeed.[73] It is more likely that "[t]he economic burden of most antitrust violations is borne by the consumers in the form of higher prices for goods and services."[74] Regardless of which is the better view, it is apparent that the dissent has accurately interpreted the intent of Congress in giving priority to the goal of compensating the injured.[75] The recently enacted Hart-Scott-Rodino Antitrust Improvements Act of 1976[76] clearly indicates Congress' intention to emphasize compensation for injured consumers by authorizing state attorneys general to sue as parens patriae on behalf of the states' citizens against antitrust violators.[77] Of more direct significance for *Illinois Brick*, a new bill has been introduced in both houses of Congress that would amend the Clayton Act to expressly overrule *Illinois Brick* and thus provide a remedy for indirect purchasers.[78]

The Supreme Court in *Illinois Brick* elevated the goal of efficiency in treble-damage litigation, to the resulting detriment of the compensation objective, in pursuit of a punishment-deterrence approach that is of dubious merit. Rather than providing for some flexibility in determining which plaintiffs might have a substantial and deserving claim, the majority formulated a rigid, per se rule that bars virtually *all* ultimate-consumer plaintiffs from attempting to prove an injury.

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72. *Id.*

73. *See* note 67 *supra*.

74. S. REP. No. 803, 94th Cong., 2d Sess. 39 (1976), *quoted in* 97 S. Ct. at 2080 (Brennan, J., dissenting).

75. This discussion will be limited to Congress' intentions as illustrated in the Antitrust Improvements Act of 1976, 15 U.S.C.A. §§ 15(b)-(h), 16, 18(a), 26, 1311, 1407 (West Supp. 1977), and in legislation now being considered by Congress. The true intention of the Congress that passed the Sherman Act in 1890 and the Clayton Act in 1914 with regard to the compensation of injured consumers is less clear. *See, e.g.*, 97 S. Ct. at 2068, 2069 n.14 (majority); *id.* at 2079-80 (dissent).

76. Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, 1394-96 (codified at 15 U.S.C.A. §§ 15(b)-(h), 16, 18(a), 26, 1311, 1407 (West Supp. 1977)).

77. *See, e.g.*, 97 S. Ct. at 2080, 2081 (dissent). Since the great majority of consumers are indirect purchasers, the *Illinois Brick* decision seriously undermines the purpose of this legislation.

78. S. 1874 & H.R. 8359, 95th Cong., 1st Sess., 123 CONG. REC. S 12309 (daily ed. July 15, 1977). This bill is sponsored by Senator Kennedy and Representative Rodino. That the measure is directed specifically at this decision is obvious by virtue of a provision that it be retroactive to June 9, 1977—the day the *Illinois Brick* opinion was handed down. *Id.* This provision was included at the suggestion of Senator Hugh Scott, who explained, "The Court deserves to have its attention respectfully recalled to the will of the Congress." *Proposed Amendments to the Clayton Act: Hearings on S. 1874 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on Judiciary*, 95th Cong., 1st Sess. (1977-1978), *quoted in* TRADE REG. REP. (CCH), July 25, 1977, at 2.

The *Illinois Brick* holding not only denies compensation to large groups of parties injured by antitrust violations, it also fails to achieve the desired efficiency in antitrust litigation. By recognizing an exception to its holding for situations in which control is exerted over one party in a distribution relationship,[79] the Court has created a gap in the *Illinois Brick* rule that is potentially as broad as the rule itself. Plaintiffs that would otherwise be barred at the outset of a treble-damage suit against a manufacturer may be encouraged by the exception to move for discovery and litigate the control issue, thus consuming much of the court time that was gained by barring all other indirect purchasers. Moreover, the vague definition of the exception provides trial courts with great latitude in making the determination of "control"[80] and thereby invites inconsistent decisions.

Furthermore, the ruling may have effects on the organization of the economy that are undesirable in terms of the goals of the antitrust laws. Manufacturers who engage in price fixing might be encouraged by the *Illinois Brick* holding to attempt to insulate themselves from any treble-damage action by setting up a direct purchaser that the manufacturer actually controls in some indirect manner, hoping to avoid the sweep of the control exception. Retailers, to preserve their claim in the event of a price-fixing violation by a manufacturer, might seek to employ a common purchasing agent, rather than obtaining goods through an independent middleman. To that extent the *Illinois Brick* holding, read in light of the control exception, appears to foster both vertical integration and horizontal collaboration in the economy.

The difficulties of proof, problems of apportionment and risk of multiple liability that the Court foresaw would indeed present obstacles to the resolution of treble-damage suits by indirect purchasers. But if compensation of the injured is acknowledged as a priority of the Clayton Act, as the language of the Act itself suggests,[81] the Court should have attempted to resolve these problems in a manner that would entail less drastic repercussions for injured consumers. The risk of multiple liability for defendants is not great as a practical matter and could generally be prevented through procedural safeguards.[82] In any event, the protection of antitrust violators should not take precedence over the compensation of those they have injured. Neither does the difficulty of apportioning damages among different claimants justify barring all except one class of plaintiffs from bringing a

79. *See* notes 50-52 and text accompanying notes 49-51 *supra*.
80. *See* note 52 *supra*.
81. *See* note 1 *supra*.
82. *See* text accompanying note 64 *supra*.

treble-damage action. The task of apportionment could be simplified somewhat if a bifurcated trial system is used; gross liability could be determined in one trial, and the recovery could be apportioned among plaintiffs in a second proceeding, in which defendants would not be required to take part.

Moreover, both apportionment problems and difficulties of proof could be alleviated somewhat by the use of the requirement of standing under section four to eliminate the most remote plaintiffs.[83] Lower courts, aware of the need to place some limits on the statute's broad wording, have employed standing tests in a generally equitable, pragmatic manner, inquiring whether prospective plaintiffs have been injured to a sufficiently direct, foreseeable and substantial extent before permitting them to put on their proof.[84] There will be many treble-damage actions in which the interests of

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83. The *Illinois Brick* Court stated that it would not reach the question of standing, but noted that "the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4." 97 S. Ct. at 2066 n.7. Assuming the validity of this statement, the Court's determination of "which persons have been injured," made in the interest of expediency rather than accuracy, nevertheless has the same effect as denial of standing to a plaintiff, but is more damaging because it does so for the wrong reasons. Standing concerns the ability to *allege* injury to an interest protected by the statute, not to *prove* such injury. Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969); Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1148-51 (6th Cir. 1975); *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 129 n.11 (9th Cir. 1973); *In re* Master Key Antitrust Litigation, 1973-2 Trade Cas. ¶ 74, 680, at 94,978-79 (D. Conn. 1973); Boshes v. General Motors Corp., 59 F.R.D. 589, 594, 597 (N.D. Ill. 1973).

84. Two distinguishable approaches have generally been used by the courts to determine whether a plaintiff is one injured "by reason of" an antitrust violation. The "direct injury" approach focuses on the relationship between the plaintiff and defendant, and requires privity between the two as an element of standing. Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910). The "target area" approach is the more modern and widely followed method today. Courts employing this approach in effect inquire whether the plaintiff is "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." Conference of Studio Unions v. Loew's Inc., 193 F.2d 51, 54-55 (9th Cir. 1951). For a thorough discussion of the two approaches and the cases employing them, see *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 126-29 (9th Cir. 1973).

The target area approach is the most promising as a tool for eliminating plaintiffs whose claims would be virtually impossible to prove and would thus needlessly waste the courts' time. As one district court judge explained, "The target area test is essentially a measure of remoteness of injury resulting from antitrust violations. In most cases it serves to eliminate those plaintiffs whose business relationship with defendants is so attenuated as to render the alleged injury negligible or highly speculative." Reiter v. Sonotone Corp., 1977-1 Trade Cas. ¶ 61,360, at 71,268 (D. Minn. Mar. 31, 1977), *appeal docketed,* No. 77-1474 (8th Cir. June 20, 1977). For instances in which some variation of the target area test was employed to eliminate remote plaintiffs, see cases cited in note 29 *supra*. For circumstances in which the test has been the basis for finding plaintiffs had standing, see *In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom.* Standard Oil Co. v. Alaska, 415 U.S. 919 (1974) (defendant asphalt producers sold asphalt to contractors for use in building highways on contract to plaintiff); Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967) (State bought corrugated culverts made by defendant from contractors who built highways); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966) (milk producers sued wholesale and retail grocers for selling milk from their

large, multi-level groups of consumers and middlemen will be implicated and in which the problems of proving pass-on may be insurmountable. There will, however, be others in which ultimate consumers will be the most seriously injured parties, will have suffered appreciable damages and will be well prepared to meet their burden of proof.[85] An initial standing threshold would permit such plaintiffs to press their claims, without burdening the courts with frivolous or unnecessarily complex suits. When the standing requirement would not bar a class of plaintiffs so large as to be unmanageable, a court could refuse to certify the suit as a class action.[86] These procedural bars, though perhaps not as simple to implement as the *Illinois Brick* rule, would permit the courts to promote *all* the objectives fostered by the treble-damage suit as the circumstances of each case require.

MARTHA JOHNSTON MCDONALD

Civil Rights—Title VII and the Religious Employee: *Trans World Airlines, Inc. v. Hardison* Retrenches on the Reasonable Accommodation Requirement

In 1972, Congress amended the Civil Rights Act of 1964 to include a requirement that an employer "reasonably accommodate" his employees' religious practices or observances unless doing so would cause an "undue

own plant at a loss); Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287 (S.D.N.Y. 1975) (defendant made zipper sliders and sold them to zipper manufacturers who sold to plaintiff); Washington v. General Elec. Co., 246 F. Supp. 960 (W.D. Wash. 1965) (public utility sued defendant for overcharges on 10 generators sold it through a contractor).

85. One such case, Reiter v. Sonotone Corp., 1977-1 Trade Cas. ¶ 61,360 (D. Minn. Mar. 31, 1977), *appeal docketed*, No. 77-1474 (8th Cir. June 20, 1977), was recently decided in a federal district court. A purchaser of a hearing aid brought a class action suit against the manufacturer for resale price maintenance, alleging that defendants sold hearing aids to selected retail dealers for approximately $100 and set the price to consumers at about $350. Brief for Appellee at 18. If footnote 16 of Illinois Brick, 97 S. Ct. at 2070 n.16, is interpreted to include control by a supplier, this case should be one of the exceptions to the *Illinois Brick* rule. *See* notes 51 & 52 and accompanying text *supra*. Resale price maintenance, if proved, would surely be recognized as "control" of a retailer by a manufacturer. If the footnote is read to include only "customer" control of a direct purchaser, however, the broad language of the decision might bar the consumer plaintiffs in this case despite their success in establishing their standing in the district court, simply because they are "indirect purchasers." Because this situation, if plaintiff can prove her allegations of resale price maintenance, does not require the use of pass-on theory, it seems particularly unfair to bar the plaintiff under the *Illinois Brick* rule, before any proof may be offered.

86. *See, e.g.*, Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973) (retail consumers of automobiles had standing to sue for alleged overcharges but proposed class of 30 to 40 million car buyers rejected as unmanageable).

hardship" on the conduct of the employer's business.[1] The amendment created continuing confusion about the level to which the employer's accommodation must rise before becoming "unreasonable" and an "undue hardship."[2] The Supreme Court's recent decision in *Trans World Airlines, Inc. v. Hardison*[3] narrowed the definition of "reasonable" accommodation by concluding that an accommodation necessitating the circumvention of seniority provisions of a collective bargaining agreement or requiring that the employer bear more than a de minimis cost in complying with the statute constituted an undue burden. In so holding, the Court followed the 1964 Civil Rights Act requirement of equal treatment of employees[4] and seemingly ignored the congressional mandate in the 1972 amendments to the Act requiring reasonable accommodation of employees' religious beliefs; that is, inequality of treatment of employees on the basis of religion.[5]

Petitioner Trans World Airlines (TWA) hired Larry Hardison, respondent, as a clerk in its Kansas City, Missouri, Stores Department on June 5, 1967.[6] Hardison's position was subject to a collective bargaining agreement with the International Association of Machinists and Aerospace Workers (IAM).[7] In 1968, Hardison became a member of the Worldwide Church of God, a church whose members are required to refrain from work on the Sabbath (sundown on Friday until sundown on Saturday) and on various religious holidays. For some time thereafter, Hardison was able to coordinate his religious practices and his work schedule.[8] In December 1968,

1. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (currently codified at 42 U.S.C. § 2000e(j) (Supp. V 1975)).

2. *See, e.g.*, Note, *Title VII—Religious Discrimination—Employer's Duty to "Reasonably Accommodate" Employee's Religious Practices—Hardison v. Trans World Airlines, Inc., 527 F.2d 33 (8th Cir. 1975)*, 9 CREIGHTON L. REV. 795, 806-10 (1976).

3. 97 S. Ct. 2264 (1977).

4. *Id.* at 2275. The Court pointed out that "[t]he repeated unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities." *Id.* See note 21 *infra* for the text of the applicable provisions of the 1964 Civil Rights Act. The 1972 amendment, by contrast, is quite simply a provision for special treatment to some extent. *See* note 33 and accompanying text *infra*.

5. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (currently codified at 42 U.S.C. § 2000e(j) (Supp. V 1975)).

6. The Kansas City TWA base handles maintenance, and its Stores Department operates 24 hours per day, 365 days per year. Whenever an employee is out in this department, a supervisor or an employee from another section must cover the position because service must be maintained. 97 S. Ct. at 2268.

7. The agreement provides that seniority applies in the fulfillment of shift and vacation assignment preferences and in bidding for vacancies, new jobs and transfers. *Id.* at 2268 n.1.

8. In a memo to a TWA supervisor, the manager of the Stores Department suggested that the steward try to change Hardison's job or days off, that Hardison have his religious holidays off if he agreed to work on more traditional Christian holidays, and that the supervisor should look for another job for Hardison that would not require Sabbath work. *Id.* at 2268. Hardison found his own solution by switching to the 11 p.m. to 7 a.m. shift, which allowed him to observe the Sabbath.

however, the situation deteriorated when Hardison transferred to a dayshift position in another building that had a separate seniority list. Hardison dropped to second lowest in seniority because of the transfer and was asked to work on Friday evening and Saturday.[9] Hardison, his supervisor and the union steward met and discussed several potential solutions to the dilemma, but none was instituted.[10] Finding no solution forthcoming, Hardison simply failed to report for work on three consecutive Saturdays. A discharge hearing was held on March 31, 1969; Hardison was found guilty of insubordination and discharged on April 2, 1969.[11] After filing an unlawful employment practice charge with the Equal Employment Opportunity Commission and exhausting his administrative remedies, Hardison filed suit against TWA and IAM alleging religious discrimination pursuant to 42 U.S.C. § 2000e-2.[12]

The district court found that TWA's efforts to resolve Hardison's conflict fulfilled the requirement of reasonable accommodation and that any further effort by TWA would work an undue hardship.[13] The Eighth Circuit

9. This situation arose when the lowest person on the seniority list went on vacation in March 1969. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 36 (8th Cir. 1975).

10. The union refused to waive seniority requirements, and Hardison had insufficient seniority to bid for another shift or job. TWA was unwilling to allow Hardison to work a four-day week as shifts were already cut to a minimum on weekends. Hardison's presence was critical because he was the only one available from his shift to perform his function and bringing in a supervisor or another employee from outside would have understaffed some other area. Scheduling someone not assigned to the Saturday shift would have required payment of overtime. 97 S. Ct. at 2268-69.

There was some dispute as to whether someone from another shift was willing to trade shifts. *Id.* at 2275, 2281-82. A brief filed by IAM notes that even given such a substitute, the union would only allow Hardison to switch if his seniority was sufficient to allow it. Brief for International Association of Machinists and Aerospace Workers at 9. It is unclear whether either TWA or IAM actually checked to see if there was someone with greater seniority than Hardison who wanted the potential substitute's job and would therefore have a preeminent claim to the position.

11. 97 S. Ct. at 2267. After Hardison was notified that the hearing had been scheduled, but before it actually occurred, he voluntarily switched to the twilight shift (3:00 p.m. to 11:00 p.m.). IAM was prepared to argue that Hardison should not be discharged as a solution had been found, but when Hardison left work at sundown on Friday, March 28, it became apparent that there was as yet no resolution. *Id. See also* Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877, 885 (W.D. Mo. 1974).

12. 42 U.S.C. § 2000e-2 (1970 & Supp. V 1975). Hardison based his claim on the requirement that employers make "reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business" found in the EEOC guidelines, 29 C.F.R. § 1605.1(b) (1976), and on the similar language in the 1972 amendments to Title VII, *see* note 33 and accompanying text *infra*.

13. Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877, 887 (W.D. Mo. 1974). The district court held specifically that IAM was not required to breach the provisions of its collective bargaining agreement and that TWA was not required to shortchange another area to replace Hardison or pay premium wages to a replacement. *Id.* at 891. The court also considered challenges to the constitutionality of the reasonable accommodation requirement but found that the provision was not invalid as an unconstitutional establishment of religion. *Id.* at 887-88.

reversed with respect to TWA and affirmed with respect to IAM,[14] finding that TWA had discarded three reasonable alternative accommodations and had proffered none.[15]

The Supreme Court reversed the Eighth Circuit in part,[16] holding in favor of both TWA and IAM.[17] It found no suggested alternative that would not create an undue burden. The key to the Court's decision was its holding that reasonable accommodation does not include breaching seniority provisions and violating the seniority rights established therein.[18] The Court, however, went on to make it clear that an employer is not required to bear more than a de minimis cost in its efforts to accommodate.[19]

Hardison dealt primarily with the 1972 amendments to Title VII of the Civil Rights Act of 1964. These amendments were the product of a congressional response to administrative and judicial interpretations of the 1964 Act's prohibition against religious discrimination.[20] Although the Civil Rights Act of 1964 proscribed employment discrimination based on religion as an unlawful employment practice,[21] it was, in the minds of its proponents, primarily an attack on racial discrimination.[22] Nevertheless, Congress

14. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 42-43 (8th Cir. 1975). The district court's judgment in favor of IAM was not directly challenged on appeal. Consequently the favorable judgment was affirmed.

15. The alternatives suggested were permitting Hardison to work a four-day week by filling in with a supervisor or another worker, filling Hardison's Sabbath shift with other available personnel within the bounds of the seniority system, or arranging a swap between Hardison and another employee for the entire shift on the Sabbath alone. *Id.* at 41. The court also suggested that if the seniority provision of the collective bargaining agreement were too inflexible to allow such a swap, it would, of itself, constitute an unlawful employment practice. *Id.*

16. 97 S. Ct. at 2270. The reversal was a seven to two decision with Justices Marshall and Brennan dissenting.

17. *Id.*

18. *Id.* at 2275.

19. *Id.* at 2277.

20. *See* text accompanying notes 27-34 *infra*.

21. Civil Rights Act of 1964, Title VII, § 703(a), 42 U.S.C. § 2000e-2(a) (1970 & Supp. V 1975). The provision states:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

22. Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 599 (1971). The House debates on the statute reveal that the Judiciary Committee had received little testimony dealing with religious discrimination. *Id.* at 600 n.10 (quoting 110 CONG. REC. 1528-29 (1964)).

included religious discrimination as a prohibited practice in the tradition of earlier fair employment practices legislation.[23]

In order to ensure the implementation of the goals of Title VII, the 1964 Act created the Equal Employment Opportunity Commission.[24] The EEOC, pursuant to its responsibility of assisting employers in complying with the statute, issued guidelines suggesting that an employer should make reasonable accommodation to employee religious practices unless such measures would result in an undue hardship in the conduct of the employer's business.[25] Although the guidelines did not provide a definition of "undue hardship," it became clear in EEOC rulings made under the guidelines that only a showing of "compelling circumstances" absolved a non-accommodating employer.[26]

In requiring "reasonable accommodation" by employers, the EEOC postulated a broader realm of discrimination than that envisioned by Congress in its enactment of the Civil Rights Act.[27] The EEOC formulation suggested that religious discrimination included not only intentional discrimination or inequality of treatment, but also uniform treatment of employees that had a harsher impact on some because of their religious beliefs, in other words, discrimination by effect.[28] Thus, according to the EEOC definition, an employer might apply work rules uniformly to all employees and still be guilty of religious discrimination.

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23. *Id.* at 600. For examples of earlier fair employment legislation, see *id.* at 600 n.9.

24. 42 U.S.C. § 2000e-4 (1970 & Supp. V 1975). The Commission was, in addition to other responsibilities, to have power "to furnish persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder" and "to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public." *Id.* § 2000e-4(g)(3), (5).

25. EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1976). These guidelines changed the language of a 1966 EEOC statement that excused accommodation that would result in "serious inconvenience." EEOC Guidelines on Discrimination Because of Religion, 31 Fed. Reg. 8370 (1966).

26. Edwards & Kaplan, *supra* note 22, at 627. Undue hardship has been found, for example, when an employee with beliefs requiring that she not work on the Sabbath was hired for harvesting season and, to accommodate her, the employer would have had to train a replacement for one day a week. EEOC Dec. 70-99 (1969), [1973] EEOC Dec. (CCH) ¶ 6061, at 4096. *See also* Note, *Religious Discrimination in Employment: The 1972 Amendment—A Perspective*, 3 FORDHAM URB. L.J. 327, 340 n.81 (1975).

27. 97 S. Ct. at 2275; *see* note 4 *supra*.

28. *See* Edwards & Kaplan, *supra* note 22, at 619. Edwards and Kaplan suggest three possible definitions of "religious discrimination" under Title VII: intentional and wilful acts of discrimination; discrimination by effect, that is, an employer rule neutral on its face but not uniform in its impact on employees holding different religious beliefs; and a discrimination by effect standard that provides for exculpation if the employer has made a reasonable effort to accommodate the religious needs of the employee or if an accommodation cannot be made without undue hardship to the employer. *Id.* The legislative history of Title VII seems to indicate that Congress intended the intentional discrimination formulation in 1964. *Id.* at 620-22.

Judicial reaction to the guidelines was mixed; several courts chose to ignore them altogether and to require a showing of intentional discrimination. For example, in *Reid v. Memphis Publishing Co.*,[29] the court observed that, although the 1967 guidelines with their "undue hardship" language had already been issued, it would not apply them because they exceeded the congressionally intended scope of Title VII's bar to religious discrimination.[30] Likewise, in *Dewey v. Reynolds Metals Co.*,[31] the court refused to apply the guidelines, speaking even more boldly:

> It should be observed that it is regulation 1605.1(b) and not the statute (§ 2000e-2(a)) that requires an employer to make reasonable accommodation to the religious needs of its employees. As we have pointed out, the gravamen of an offense under the statute is *only* discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted.[32]

In answer to the courts' hostile reception of the EEOC guidelines, Congress amended Title VII in 1972 adding the following definitional provision (section 701(j)): "[T]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[33] Congress, by using the language of the EEOC regulation, gave the force of law to the reasonable accommodation requirement and to a discrimination by effect definition of "religious discrimination."[34]

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29. 521 F.2d 512 (1975), *cert. denied*, 429 U.S. 964 (1977).

30. *Id.* at 518-20.

31. 429 F.2d 324 (1970), *aff'd per curiam by an equally divided Court*, 402 U.S. 689 (1971).

32. *Id.* at 331 n.1.

33. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (currently codified at 42 U.S.C. §2000e(j) (Supp. V 1975)). In introducing the amendment from the floor of the Senate, Senator Randolph expressed his concern about the dwindling membership of certain minority religious sects that had strict tenets regarding observance of the Sabbath. He further suggested that the Civil Rights Act of 1964 had been intended to protect religious conduct as well as belief and is "to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments." 118 CONG. REC. 705 (1972). With little debate, the provision was passed unanimously on the floor of the Senate. *Id.* at 730-31. Senator Randolph then ordered printed in the record the decisions in Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided Court*, 402 U.S. 689 (1971), and Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972) (employer made no effort to accommodate). The assumption has been that Congress acted in response to footnote 1 of Dewey v. Reynolds Metals Co., 429 F.2d at 331 n.1, *quoted* at text accompanying note 32 *supra*. *See* Cooper v. General Dynamics, 533 F.2d 163, 167 (5th Cir. 1976).

34. *See* note 28 *supra*.

Again, judicial response to the obligation placed on employers was inconsistent. The variation, however, resulted largely from difficulties in the application of the reasonable accommodation requirement to the unique facts of each case,[35] rather than from hesitation to accept the discrimination by effect definition. In response to this confusion among the lower courts the Supreme Court granted certiorari in *Hardison* to delimit the reach of the reasonable accommodation obligation.[36] But instead of merely providing guidelines to aid the lower courts in making difficult factual determinations, the Court rejected the discrimination by effect standard so thoroughly that the 1972 amendments were left virtually meaningless.

35. *See, e.g.*, Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 429 U.S. 964 (1976) (employer not required to accommodate Sabbatarian practices when accommodation would require hiring an additional employee, incurring overtime expenses or violating seniority expectancies of other workers); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided Court*, 429 U.S. 65 (1976) (complaints of fellow workers of employee not undue hardship). *Compare* Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975) (offer to transfer employee at a pay reduction is not a reasonable accommodation when substitution could have been arranged), *with* Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382 (D. Neb. 1974) (transfer of employee with pay reduction was a reasonable accommodation when substitution would have necessitated payment of overtime).

36. Indeed, the Court initially considered whether TWA had made reasonable *efforts* to accommodate. Rather than closely examining the district court determination that any further accommodation would work an undue hardship, 375 F. Supp. at 891, the Court measured the scope of the efforts TWA had made. Thus, the focus shifted from a determination of what *could* have been done to accommodate to what had been done in an unsuccessful effort to do so. Justice Marshall in the dissenting opinion suggested several alternatives that had not been raised earlier. 97 S. Ct. at 2281-82. In essence, § 701(j) of the Equal Employment Opportunity Act of 1972 was reconstructed to require "reasonable efforts at accommodation" rather than reasonable accommodation. In Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 519-20 (6th Cir. 1975), the court looked for other viable alternatives not pursued, even though the employer had made reasonable efforts to accommodate. On the other hand, the Court in *Hardison*, despite the dissent's protest, 97 S. Ct. at 2281-82, accepted the district court's finding that TWA had done all that it could do to accommodate Hardison's religious beliefs without either incurring substantial costs or violating the seniority rights of other employees. *Id.* at 2276 n.14.

As an adjunct of its "reasonable efforts" requirement, the Court noted the existence of a seniority system as a significant accommodation to employee religious needs. *Id.* at 2264. The relationship of the seniority system to the accommodation obligation is discussed at text accompanying notes 37-52 *infra*. It is significant to note that although seniority systems have been protected as bona fide under § 703(h) of the Civil Rights Act of 1964 even though discriminatory in impact, *see* note 44 *infra*, they had *not*, prior to the *Hardison* decision, been viewed as a specific accommodation of employee religious practices under the terms of the 1972 amendment. The Court's observation on this point raises the question whether an employer's acquiescence to a seniority provision in a collective bargaining agreement automatically fulfills its duty of reasonable accommodation. In his dissenting opinion, Justice Marshall rightly noted that "[t]he accommodation issue by definition arises only when a neutral rule of general applicability [*e.g.*, routine application of a seniority provision] conflicts with the religious practices of a particular employee." 97 S. Ct. at 2278. It is unlikely that an employer may offer the mere existence of a seniority system against a charge of unlawful religious discrimination, despite the Court's broad language, without some additional showing of an effort to accommodate.

The Court's consideration of the relationship between Hardison's collective bargaining agreement seniority provision and the reasonable accommodation requirement of section 701(j) juxtaposed differing definitions of discrimination. The legislative history of the Civil Rights Act indicated that Congress viewed discrimination as intentional inequality of treatment.[37] Additionally, in section 703(h) of the Civil Rights Act Congress gave express protection to the bona fide application of a seniority system absent discriminatory intent in the application.[38] However, section 701(j), enacted in the 1972 amendments, required reasonable accommodation of employee religious beliefs, thereby extending the definition of religious "discrimination" to include the discrimination by effect situation.[39] Arguably, the 1964 Act and section 703(h) did not control such a situation because they were

37. Edwards & Kaplan, *supra* note 22, at 620-22.

38. *See* note 44 *infra*.

39. *See* text accompanying notes 33 & 34 *supra*. A key problem in recognizing the discrimination by effect standard in the religious discrimination area is the danger that the accommodation remedy oversteps the bounds of the establishment clause. Legislation concerning religion must avoid excessive entanglements between government and religion, have a secular legislative purpose, and have a principal or primary effect that neither advances nor inhibits religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The arguments for and against the survival of § 701(j) under these tests are set forth in Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided Court*, 429 U.S. 65 (1976). The majority in *Cummins*, upholding the statute, found a secular purpose in strengthening Title VII's prohibition of religious discrimination and in ensuring that employees are not punished for following the dictates of conscience. *Id.* at 552. It found the requisite neutral effect in that the Act primarily ensures job security for people whose religious requirements conflict with uniform work rules and does not treat one religion differently from another. *Id.* at 552-53.

The dissent in *Cummins* suggested that the Act, by protecting only certain religious views conflicting with job requirements, confounds the secular purpose of Title VII standing alone. *Id.* at 556 (Celebrezze, J., dissenting). Additionally, the dissent suggested that, by discriminating between the religious and the non-religious and between religious employees whose beliefs do and do not conflict with work rules, the Act fails the neutral effect test. *Id.* at 558.

Finally, supporters have noted that the government's only involvement is in determining whether there has been reasonable accommodation or undue hardship. *Id.* at 553-54. Critics suggest that such a determination requires inquiry into the sincerity of employees' religious beliefs. *Id.* at 559. *See generally* Comment, *Religious Discrimination in Employment: Striking the Delicate Balance*, 80 DICK. L. REV. 717 (1976).

The Supreme Court has granted exemption from restrictive laws that interfere with the free exercise of religion. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398, 409 (1963). Its position has been that " '[n]eutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemption from onerous duties, so long as an exemption is tailored broadly enough that it reflects valid secular purposes." Gillette v. United States, 401 U.S. 437, 454 (1971) (citation omitted).

Justice Marshall, dissenting in *Hardison*, noted "[i]f the State does not establish religion over non-religion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer." 97 S. Ct. at 2280. When the State grants an exemption to one of its laws that interferes with the free exercise of religion, it is counterbalancing its invasion of a protected right rather than establishing religion. But when the State requires an exemption or gives favored treatment based on religion when it has *not* interfered with the free exercise of religion, the balance between the free exercise and establishment clauses has been upset. A citizen has no choice as to whether he will experience the impact of a

directed at intentional racial discrimination.[40] Consequently, it was unclear whether section 703(h) protected seniority rights after section 701(j)'s expanded definition of discrimination.

Authority existed for both the intentional inequality of treatment and the discrimination by effect approaches. The EEOC had adopted the discrimination by effect approach and was exacting in its requirements of employers with respect to collective bargaining agreements, holding that the agreement must be capable of modification if necessary to effect reasonable accommodation.[41] Several courts had determined that if the employer had any leeway to assign shifts, he must accommodate religious needs, seniority practices notwithstanding.[42] The court of appeals decision in *Hardison* seems to have been the high water mark in the trend questioning the inviolability of seniority provisions in religious discrimination cases, observing that "[i]t would seem that a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act."[43]

On the other hand, the language of section 703(h) requires intentional discrimination in the application of a seniority system for a violation of the Act. This requirement seems conclusively to protect the routine application of a seniority system regardless of its effect.[44] In view of the explicit

law. By contrast, an employee voluntarily chooses his employer, at least theoretically, and therefore voluntarily assumes the constraints of the employer's work rules.

For critics who view § 701(j) as an establishment clause violation, see Edwards & Kaplan, note 22 *supra*; Note, *Constitutional Law—Establishment Clause—Sixth Circuit Questions Validity of the Reasonable Accommodation Rule*, 44 FORDHAM L. REV. 442 (1975); Note, *Is Title VII's Reasonable Accommodations Requirement a Law "Respecting An Establishment of Religion"?*, 51 NOTRE DAME LAW. 481, 491 (1976). *Contra*, Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided Court*, 429 U.S. 65 (1976); Hardison v. Trans World Airlines, Inc., 375 F. Supp. at 886-87; Note, *Civil Rights—Religious Discrimination in Employment—Title VII Standards of "Reasonable Accomodation" and "Undue Hardship" Are Constitutional, But Recent Cases Illustrate Judicial Overzealousness in Enforcement*, 54 TEX. L. REV. 616 (1976).

40. Edwards & Kaplan, *supra* note 22, at 600 n.10.

41. [I]f a collective bargaining agreement is so inflexible as to have the effect of requiring a party to the agreement to discriminate against an individual because of his religion and if the inflexibility of the agreement is not justified by substantial business considerations, then Title VII requires that the agreement be modified so as to eliminate its discriminatory effect.

EEOC Dec. 73-2066 (1972), [1973] EEOC Dec. (CCH) ¶ 6367, at 4668 (footnote omitted).

42. Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1976); Shaffield v. Northrop Worldwide Aircraft Serv., Inc., 373 F. Supp. 937, 942 (M.D. Ala. 1974) (agreement had a clause stating that "*classification seniority cannot be the sole determining factor in making shift assignments*").

43. 527 F.2d at 41. This observation would seem to be in direct contradiction to § 703(h), as the Supreme Court decision noted. 97 S. Ct. at 2275.

44. Critics of the Civil Rights Act expressed concern that passage of that Act would interfere with already established seniority rights of workers in previously segregated work

intentional discrimination limitation in section 703(h), the Court in *Hardison* correctly upheld the inviolability of seniority rights in a confrontation with the accommodation obligation. Congress protected seniority rights even in the face of its deep concern for the intentional racial discrimination at which the Civil Rights Act was primarily directed.[45] This same protection undoubtedly would have stood with respect to religious discrimination, a peripheral concern, if section 703(h) had been considered contemporaneously with the expanded discrimination definition of 701(j).

The Court did not, however, rely exclusively on the explicit language of section 703(h) requiring intent to discriminate in upholding TWA's seniority system. It based its decision as well on the broad language of Title VII emphasizing the elimination of discrimination in employment.[46] Although "discrimination" as used in the Civil Rights Act is susceptible of several interpretations,[47] the Court suggested that the only proper definition

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areas. Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promoting*, 82 HARV. L. REV. 1598, 1608-09 (1969). In response, two interpretive memoranda were included in the *Congressional Record* asserting that already established seniority rights would not be affected. The memoranda were prepared by Senators Clark and Case, 110 CONG. REC. 7212 (1964), and the Justice Department, *id.* at 7207; *see* Franks v. Bowman Transp. Co., 424 U.S. 747, 759-60 nn.15 & 16 (1976). Subsequently, a substitute bill was offered by Senators Mansfield and Dirksen containing the provision that was later adopted. *See id.* at 759-61.

The Civil Rights Act of 1964, Title VII, § 703(h), 42 U.S.C § 2000e-2(h) (1970) provides:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

It has generally been accepted that § 703(h) is an accurate representation of the Clark-Case memorandum's conclusion that Title VII will not affect vested seniority rights absent discriminatory intent. *But see* Cooper & Sobol, *supra* at 1607. The Supreme Court has, since the passage of § 703(h), held that the routine application of a bona fide seniority system is *not* an unlawful employment practice, even when it locks in the effects of past intentional discrimination. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). Again, this provision is directed primarily at the racial discrimination area. It has virtually no application to the religious discrimination situations because religious "discrimination" in employment is seldom the result of an *intent* to discriminate, but rather the product of the clash between an employer's uniform work rules and an employee's religious practices, resulting in a discriminatory impact.

The remedy suggested in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), is not available for victims of religious discrimination. In *Franks*, an award of retroactive seniority was allowed to victims of post-Act or pre-Act racial discrimination, bringing them up to the level of seniority they would have achieved absent intentionally discriminatory practices. *Id.* at 770. In effect, this remedy constitutes a retroactive award of equal treatment. In the case of religious discrimination, where there has been no past intentional discrimination but present discrimination by effect, an infringement of others' seniority rights could be, in essence, an award of unearned superseniority to the accommodated employee.

45. *See* notes 21 & 22 and accompanying text *supra*.

46. 97 S. Ct. at 2277.

47. *See* note 28 *supra*.

under the Act is inequality of treatment.[48] In so doing, the Court ignored the anomaly that while the 1964 Act mandates *equality* of treatment in employment, by the Court's interpretation, section 701(j) specifically calls for *special* treatment based on religious preferences. The Court did not address this conflict; instead it read section 701(j) as applying only when it would result in no inequality of treatment of employees.[49] This approach suggests that the uniform application of *any* work rule is an acceptable employment practice as long as it is not applied with an intent to discriminate, regardless of its impact on employees with strongly held religious beliefs.[50]

There is little room for remedying the discrimination by effect situation under this reading of the statute. Such a situation arises when a work rule of

48. The Court observed that the thrust of the statute is that "similarly situated employees are not to be *treated differently* solely because they differ with respect to race, color, religion, sex, or national origin." 97 S. Ct. at 2270 (emphasis added). Furthermore, according to the Court, the Act proscribes discrimination when it is directed against majorities as well as minorities. *Id.*

It is arguable that Griggs v. Duke Power Co., 401 U.S. 424 (1971), conflicts with such an interpretation. *Griggs* involved the institution of requirements of a high school diploma or the passing of an intelligence test as a condition of employment. The Court held that if an employment practice that operates to exclude Blacks cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent. *Id.* at 436. It may be, however, that *Griggs* is distinguishable from the religious discrimination situation in that the adoption of such employment prerequisites as diplomas and intelligence tests perpetuate the effects of past intentional racial discrimination. In addition, if the requirements are not reasonably related to job performance, discriminatory intent may be inferred. *See* Edwards & Kaplan, *supra* note 22, at 623-24. Thus, *Griggs* may be applicable only to situations involving some history of intentional discrimination.

49. As Justice Marshall's dissent notes, 97 S. Ct. at 2279, the majority's approach is precisely that taken in Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided Court*, 402 U.S. 689 (1971). The court in *Dewey* stated, "To accede to Dewey's demands would require Reynolds to *discriminate* against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation. This would constitute unequal administration of the collective bargaining agreement . . . and lead to grievances and additional arbitration." *Id.* at 330 (emphasis added).

The result in *Dewey* was specifically criticized during the introduction of the 1972 amendments, and the text of the case was included in the *Congressional Record*. 118 CONG. REC. 705-06 (1972); *see* note 33 *supra*. The Court's similar rationale in *Hardison*, 97 S. Ct. at 2275, unabashedly contraverts the congressional intent in passing the 1972 amendment.

Additionally, the Court's use of the term "discrimination" against majority employees in accommodating the religious employee even when the majority employees' contractual rights are not abridged, *id.* at 2277, raises the specter of grievances filed by disgruntled employees whenever an effort is made to accommodate the religious employee. Certainly the existence of § 701(j) should exempt an employer from any such danger unless another employee's contractual rights are in fact abridged or his employment situation is in fact worsened as a result of the accommodation.

50. Justice Marshall strongly disagreed with this interpretation in his dissent. He suggested that the kind of exemption that has traditionally been granted to those with strongly held religious beliefs when *governmental* obligations conflict with these beliefs should be allowed in the employment situation. 97 S. Ct. at 2280. Indeed, this seemed to be the legislative intent underlying the enactment of § 701(j). *See* note 33 *supra*.

general applicability has a harsher impact on an employee with strongly held religious beliefs. Congress mandated in section 701(j) that an effort be made to adjust employment conditions for the religious employee to equalize the impact of such work rules.[51] Nevertheless, the Court concluded that it is unacceptable for an employee to be treated differently on the basis of his religion.[52] The result is that the "undue burden" test is satisfied by a demonstration that accommodation would result in unequal treatment of employees on the basis of their religion.

The logical extension of such a theory is that *any* accommodation exclusively for religious beliefs necessitates unequal treatment and constitutes an "undue burden." The Court, however, avoided this extreme, never stating that no accommodation is required. In concession to the existence of section 701(j), the Court seems to visualize a realm of accommodation that is acceptable, indeed required, although technically constituting unequal treatment on the basis of religion. This unequal treatment does not rise to the level of "undue hardship." For example, the Court seemed to view favorably the efforts that TWA had made to accommodate Hardison. These included meeting with Hardison to discuss possible solutions, accommodating Hardison's religious holiday observance (in return for his working Christian holidays) and authorizing the union steward to search for someone to swap shifts, a normal procedure.[53] No real costs were incurred, Hardison received no greater employment advantages than other employees in having his holidays off because he had to work others, and seeking a swap was a normal union procedure. Consequently, the threshold at which unequal treatment constitutes an undue burden was not crossed.

Furthermore, the Court implied that incurring de minimis costs on the basis of religion did not cross the inequality of treatment threshold.[54] Although no definition of "de minimis" was tendered, the rejection of two accommodative measures that the court of appeals had found reasonable somewhat delineated the Court's conception of "de minimis."[55] These

51. *See* text accompanying notes 33 & 34 *supra*.

52. 97 S. Ct. at 2277.

53. *Id.* at 2273 (quoting 375 F. Supp. at 890-91).

54. *Id.* at 2277.

55. In concluding that the potential cost of accommodating Hardison would be greater than de minimis, the Court suggested that TWA might have many employees whose religious practices prohibit them from working on Sunday. *Id.* at 2277 n.15. This suggestion seems of little substance as there is nothing in the record indicating such numbers. Clearly TWA would have had the burden of producing those statistics had they existed. The opinion, however, implicitly suggests that if it could be shown that the aggrieved employee was a unique case, perhaps the cost of replacing him or of paying overtime wages might not be greater than de minimis. *Id.* The employer's size may be a consideration in making such a determination. Nonetheless, this concession must be read in light of the Court's equality of treatment ap-

alternatives were that Hardison work a four-day week with the uncovered shift being manned by a supervisor or worker from another department already on duty or that a replacement be found through the enticement of overtime wages.[56] Either of these alternatives could have been implemented without violating the seniority system. Nevertheless, the Court found that incurring these costs of lost efficiency in other departments and payment of a substitute's overtime wages reached a level of inequality of treatment that is unreasonable and an undue burden.[57]

In sum, the analysis seems to be that an employer must make an effort to accommodate, but the manner in which it may do so is severely limited. It may be required to incur de minimis costs. It should allow voluntary swaps between employees. It is, however, not required to violate any uniform work rule so that the religious employee receives greater aggregate benefits than the other employees on the basis of his religion. The Court evidently did not consider the time and administrative costs of planning the accommodation as crossing the inequality of treatment threshold in view of its favorable assessment of TWA's efforts.

After *Hardison*, several questions remain to confront employers concerning their obligations under section 701(j). Although the Court delineated what is *not* required, it failed to clarify what an employer is still obligated to do to comply with the statute. It is clear that an employer cannot refuse to make *any* effort on the employee's behalf.[58] Any negotiated accommodation that results in no greater employment benefits in the aggregate for the religious employee should be allowed. For example, Hardison was allowed to have his religious holidays off in return for working on Christian holidays. This accommodation resulted in no burden to the employer or the other employees that would violate the inequality of treatment restriction even though it theoretically gave Hardison special treatment on the basis of his religion. In addition, the employer may be required to incur some minimal costs, but they should not rise to the level of financing an additional day off for an employee on the basis of his religion.[59] In sum, an employer can be required to shoulder only minimal burdens in an effort to accommodate.

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proach. Perhaps the suggestion is that incurring de minimis costs in accommodation does not rise to the level of inequality of treatment so as to become discrimination. Thus, the definition of de minimis becomes imperative in determining compliance with the requirement. The Court offers little guidance on the point.

56. *Id.* at 2273.

57. *Id.* at 2277.

58. *See* Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172 (W.D.N.C. 1975).

59. 97 S. Ct. at 2277.

A second question remains concerning the extent to which the *Hardison* decision applies to unions as distinguished from employers. Even though IAM technically was a prevailing party in the court of appeals, the Court granted its petition for certiorari because the lower court decision had assumed that IAM should be required to waive the collective bargaining agreement to accommodate Hardison.[60] The Court did not, however, explicitly discuss the union's duties, stating merely that "since we reverse the judgment against TWA, we do not pursue the union's status in the Court."[61] This language suggests that the case's holding is as applicable to unions as to employers.[62] It would seem then that unions are relieved from (or burdened with) the accommodation duty to the same extent as employers.

Third, the Court premised its protection of vested seniority rights in the face of the accommodation requirement on two grounds: that section 703(h) expressly requires intentional discrimination to render the application of a seniority system an unfair employment practice *and* that accommodation would require inequality of treatment of employees.[63] As a result, it is unclear whether this protection is extended to other terms of collective bargaining agreements absent the specific statutory language of section 703(h) that is directed *only* to seniority provisions. As the Court employed its equality of treatment approach in considering other alternative accommodations not regulated by an agreement, the indication is that any term included in a collective bargaining agreement is protected from the reasonable accommodation requirement so long as inequality of treatment would result from the accommodation.[64]

Hardison leaves impotent the congressional mandate in section 701(j) that an employer reasonably accommodate employee religious practices. The amendment's significance, apart from the 1964 Act's general prohibition of discrimination, was the recognition of the discrimination by effect situation when a uniform work rule has a greater impact on employees with certain strongly held religious beliefs.[65] The Court, ignoring this evident variation in the definition of discrimination, returned without extensive

60. *Id.* at 2270 n.5.

61. *Id.*

62. This conclusion is further bolstered by the fact that other provisions of Title VII have been held to apply to unions. Hardison v. Trans World Airlines, Inc., 527 F.2d at 42.

63. *See* text accompanying notes 46-48 *supra*.

64. An example of such a provision is the agency shop clause, found in many collective bargaining agreements, requiring each employee to contribute to the union. These provisions have been held to conflict with strictly held religious views barring support of labor unions. *See, e.g.*, Yott v. North Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974).

65. *See* note 28 and accompanying text *supra*.

comment to the pre-1972 amendments stance of the Civil Rights Act requiring equality of treatment. Thus, an employer no longer has to make a showing of *undue* hardship; it need only show that accommodation will require greater than de minimis costs or "unequal" treatment of employees. In so circumscribing the requirement, the Court nearly proclaims the amendment a nullity.

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Commercial Law—Anticipatory Repudiation: A New Measure of Buyers' Damages Under the Uniform Commercial Code

Measuring an aggrieved buyer's damages when a seller wrongfully repudiates a contract before performance is due has long been considered a troubling and complex task.[1] The complexity concerns, first, the time from which damages should be measured if the buyer chooses not to purchase substitute goods (cover) and, second, the application of the Uniform Commercial Code's concept of cover in determining this time.[2] Section 2-713 of the Code, which sets forth the buyer's damages for nondelivery, states that damages should be measured by calculating the difference between contract price and market price at the time the buyer "learned of the breach."[3] Section 2-610, however, indicates that if a seller repudiates before performance is due, an aggrieved buyer may await performance for a "commercially reasonable time" before taking any action.[4] Damages can be calculated

1. *See, e.g.*, R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 149 (1970); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 6-4 (1972).

2. U.C.C. § 2-712 provides:

"Cover"; Buyer's Procurement of Substitute Goods

(1) After a breach within the preceeding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

3. U.C.C. § 2-713 provides in pertinent part:

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.

4. U.C.C. § 2-610 provides in pertinent part: "When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may (a) for a commercially reasonable time await performance by the repudiating party . . . ."

with little difficulty if the buyer does cover.[5] The buyer who does not cover, however, is subjected to great uncertainty in damage measurement because of the clash between the "learned of the breach" language of section 2-713 and the "commercially reasonable time" policy of section 2-610. The buyer does not know if his damages will be measured in relation to market price at the time he became aware of the seller's intent not to perform, or if he can await performance and have damages measured by the market price at some later date. The puzzle is made even more complex by the difference in "learned of the breach" in section 2-713 and the use in section 2-723, which details the measure of damages in anticipatory repudiation cases coming to trial before time of performance, of the time the buyer "learned of the repudiation."[6]

In the recent case of *Cargill, Inc. v. Stafford*,[7] the United States Court of Appeals for the Tenth Circuit offered a new solution to the puzzle by holding that under section 2-713 a buyer may encourage the seller's performance for a reasonable time, but that at the end of that reasonable period he should cover if substitute goods are readily available. The court stated that if the buyer can readily cover and does not do so within a reasonable time, damages should be based on the market price of the goods at the end of the reasonable time rather than on the price when performance is due.[8] If, however, the buyer has a valid reason for not covering, damages should be calculated from the time when performance is due.[9]

The court's opportunity to address the problem presented itself in a case involving contracts for the sale of wheat. Cargill, the aggrieved buyer,[10] made two July telephone contracts with defendant-seller Stafford. On August 24, plaintiff received written notice that defendant, objecting to some provisions of the confirmations that plaintiff had mailed to him, considered the contracts void and refused to perform.[11] Plaintiff continued

5. *See* note 2 *supra*.

6. U.C.C. § 2-723 provides in part:

> (1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2-708 and 2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party *learned of the repudiation*.

Id. (emphasis added); *see* R. NORDSTROM, *supra* note 1, § 149, at 455-56; J. WHITE & R. SUMMERS, *supra* note 1, § 6-7, at 197-202.

7. 553 F.2d 1222 (10th Cir. 1977).

8. *Id.* at 1227. The seller will be most likely to repudiate in a rising market; therefore, the buyer's damages measured at this time will ordinarily result in lesser damages than those measured at a later time.

9. *Id.* Colorado law governed the case; Colorado has adopted without change the sections of the U.C.C. considered in the *Cargill* decision. *See* COLO. REV. STAT. §§ 4-2-610, -708, -713, -723 (1973).

10. Plaintiff is a cash merchandiser in agricultural commodities. 553 F.2d at 1223.

11. *Id.* at 1226.

to urge defendant to complete performance of the contract until there was a final rebuff from defendant on September 6. Plaintiff then notified defendant that the contracts were cancelled.[12]

In his suit for breach of contract,[13] plaintiff claimed that its damages should be measured either by the difference between the contract price and the market price on August 24, the date plaintiff received notice of defendant's definite repudiation of the contracts, or by the difference between the contract price and the market price on September 30, the date performance of the contract was due.[14] The district court measured the damages using September 6, the date of Stafford's final rebuff, as the date for determining the market-contract price differential.[15] The court of appeals, stating that the district court "gave no reason for its selection of the September 6 date,"[16] remanded the case to determine the correct date for measuring damages. In doing so, the Tenth Circuit indicated that September 6 would be the correct date only if Cargill did not have a valid reason for his failure or refusal to cover,[17] but that September 30, the date performance was due, would be the date from which to measure damages if Cargill had a valid reason for not covering.[18]

The court effectively interpreted the "learned of the breach" language of section 2-713[19] to mean the "time performance is due" since a buyer would normally have a valid reason for not covering.[20] The court looked to

12. *Id.* at 1224.

13. Defendant had asserted that neither of the two contracts was enforceable under the Statute of Frauds because he had made timely objection to the written confirmation sent to him by the buyer. *Id.* at 1225. COLO. REV. STAT. § 4-2-201(2) (1973) states:

> Between merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirement of subsection (1) of this section against such party unless written notice of objection to its contents is given within ten days after it is received.

Stafford's statutorily required written objection to the second contract, however, did not reach Cargill within the required 10 day period. 553 F.2d at 1225.

14. 553 F.2d at 1223.

15. *Id.* at 1225.

16. *Id.*

17. The court noted, "The record does not show that Cargill covered or attempted to cover. Nothing in the record shows the continued availability or nonavailability of substitute wheat." *Id.* at 1227.

18. *Id.*

19. *See* note 3 *supra*.

20. Courts have considered the validity of reasons for not covering when deciding whether a buyer should be awarded consequential damages under U.C.C. § 2-715, *quoted in* note 39 *infra*. These cases provide some examples of potentially valid excuses for not covering in determining when to measure damages under the *Cargill* test. *See, e.g.*, Lake Village Implement Co. v. Cox, 252 Ark. 224, 478 S.W.2d 36 (1972) (failure to cover by procuring substitute equipment excused when equipment for harvest not readily available and crop ready for harvest); Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists, 14 Cal. App. 3d 209, 92 Cal. Rptr. 111 (1971) (plaintiff unable to cover because substitute items unavailable at prices within his financial ability).

the use of "repudiation" in section 2-723[21] and reasoned that if the drafters of the Code had intended "learned of the breach" in section 2-713 to mean "learned of the repudiation," the word "repudiation" would have been used.[22] The court also relied heavily on the common law tradition interpreting "learned of the breach" to mean "time performance is due."[23] The court's emphasis on cover does not, however, arise from any common law tradition, but is instead an extension of the Code provisions concerning the subject.

At common law, damages traditionally were measured by calculating the difference between contract price and market price at the time performance was due.[24] Section 67(3) of the Uniform Sales Act, which codified the common law approach, adopted this same measure.[25] According to the *Restatement of Contracts*, "[T]he rules for determining the damages recoverable for an anticipatory breach are the same as in the case of a breach at the time fixed for performance."[26]

Cargill follows this pre-Code tradition in its determination that in cases of anticipatory repudiation by the seller the buyer's damages are to be measured by the contract-market price differential at the time performance was due. This formulation represents a definite break from other post-Code cases interpreting section 2-713, which generally have presumed that the buyer learned of the breach when he learned of the seller's repudiation.[27]

21. *See* note 6 *supra*.

22. 553 F.2d at 1226.

23. *Id.*

24. *Id.; see, e.g.*, McJunkin Corp. v. North Carolina Natural Gas Corp., 300 F.2d 794, 801 (4th Cir. 1961), *aff'd on rehearing*, 300 F.2d 794 (4th Cir.), *cert. denied*, 371 U.S. 830 (1962) (damages measured from the time performance due); Reliance Cooperage Corp. v. Treat, 195 F.2d 977, 982 (8th Cir. 1952) (reversing district court measurement of damages from the time of repudiation in an anticipatory repudiation case); Continental Grain Co. v. Simpson Feed Co., 102 F. Supp. 354, 363 (E.D. Ark. 1951), *aff'd*, 199 F.2d 284, 286 (8th Cir. 1952) (damages are measured when performance is due; an aggrieved buyer "is not required to go upon the open market and purchase upon receipt of notice that the seller does not intend to perform"); Comment, *A Suggested Revision of the Contract Doctrine of Anticipatory Repudiation*, 64 YALE L.J. 85, 92 n.40, 95 n.54 (1954).

25. UNIFORM SALES ACT § 67(3) states:

> Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

26. RESTATEMENT OF CONTRACTS § 338 (1932).

27. *See* Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977); Maxwell v. Norwood Marine, Inc., 19 U.C.C. Rep. 829 (Mass. Dist. Ct. App. Div. 1976).

Many commentators have ignored or failed to recognize the inconsistencies inherent in § 2-713. *See, e.g.*, Hey, *Remedies for Breach of Sales Contract Under the Code*, 7 WASHBURN L.J. 35 (1957); Small, *The Remedy Provisions of Article 2 of the Uniform Commercial Code: A Practical Orientation*, 4 GONZ. L. REV. 176 (1969).

Damages then were measured by calculating the difference between the contract price and the market price at the time of the seller's repudiation.[28] There is no suggestion in those cases that a damage calculation should be based on the time performance was due.

In its interpretation, the *Cargill* court depended chiefly upon White and Summers,[29] who strongly urge that "learned of the breach" in section 2-713 means "time performance is due" and conclude that the Code should not be interpreted in a manner that changes pre-Code law without a more definite statement that clearly indicates the change.[30] *Cargill's* utilization of the time performance was due as the time from which to measure damages was conditioned upon a finding that the aggrieved buyer had a valid reason for failing or refusing to cover.[31] Here the common law provided little guidance. Pre-Code decisions did not require or even encourage an aggrieved buyer to purchase substitute goods. If he chose, a buyer could cover and ordinarily recover the difference between the contract price and the substitute price if he used reasonable care in making his substitution.[32] If, however, the price the buyer paid for cover exceeded the court's determination of the market price at the time performance was due, the buyer had to absorb the additional loss.[33]

The Code statutorily recognizes and places new emphasis upon the concept of cover. Karl Llewellyn, chief reporter for the Code,[34] wanted to require cover whenever possible.[35] The Code itself, however, although

28. In a case relied upon in *Cargill*, Oloffson v. Coomer, 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973), *cited at* 553 F.2d at 1226, however, the court considered times other than repudiation for the purpose of measuring damages. Although the *Coomer* court calculated damages based on the time of repudiation, *id.* at 921, 296 N.E.2d at 873, it also took into account the commercially reasonable time requirement of § 2-610 in its decision that in this case damages measured from the time of repudiation also met the commercially reasonable time requirement. The *Coomer* court reasoned that because the seller's statement was an unequivocal repudiation and cover was easily obtained, it would have been unreasonable for the buyer to await performance. *Id.* at 922, 296 N.E.2d at 874. *Cargill* is consistent with *Coomer* in this respect, but goes beyond *Coomer* by suggesting a time from which to measure damages if the buyer has a valid excuse for not covering. 553 F.2d at 1227.

29. J. WHITE & R. SUMMERS, *supra* note 1, § 6-7, at 198-202.

30. *Id.* § 6-7, at 201-02.

31. 553 F.2d at 1227.

32. *See, e.g.*, Hosiery Co. v. Cotton Mills, 140 N.C. 452, 53 S.E. 140 (1906).

33. *See, e.g.*, Missouri Furnace Co. v. Cochran, 8 F. 463 (C.C.W.D. Pa. 1881).

34. The history of the Code is described in Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967). Llewellyn wrote of the "democratic process" that produced the Code "over a period of more than fifteen years, out of the labors of more than fifteen hundred skillful lawyers" in Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 374 (1957).

35. Llewellyn set forth his reasoning in REVISED UNIFORM SALES ACT § 58-A, Comment (Second Draft, 1941):

> If there should be real desire to give effect to the principle frequently announced by the Courts, that "one party to a contract will not be allowed to speculate upon the

clearly favoring cover, does not expressly require that a buyer make a substitute purchase. Furthermore, none of the Code's scattered references and comments related to cover indicate that, in cases of anticipatory repudiation, the time from which damages are measured should be determined by reference to whether a buyer could have covered. Section 2-711, a catalogue of buyers' remedies, states that the buyer may cover or recover damages under 2-713.[36] Section 2-712, the primary Code provision concerning cover, states that a buyer "may" cover; the official comment to this section stresses that "the buyer is always free to choose between cover and damages for non-delivery."[37] The final comment to section 2-713 states, "[T]he present section provides a remedy which is *completely alternative* to cover . . . ."[38] The only indication in the Code that the buyer might suffer if he does not cover is section 2-715(2)'s assertion that consequential damages might be limited by a party's failure to cover.[39]

Although the Code does not expressly require cover, the combination and effects of available remedies may make the procurement of cover a practical necessity for the buyer, particularly if the buyer's damages are to be measured at the time of repudiation. Use of this time to measure damages gives the repudiating seller a commanding position because he can choose the time of repudiation and therefore dictate the time at which damages will be measured.[40] Typically, the buyer will cover and damages will be meas-

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other," the measure for the purpose would be a provision, in regard at least to anticipatory breach, whereby the party in breach could require the aggrieved party, by demand, to resort to cover or cancel without liability, within a reasonable time after such demand. Inability to effect cover after reasonable effort would of course not in any manner impair the common remedies of the aggrieved party.

36. U.C.C. § 2-711 provides in part:

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (Section 2-713).

37. *Id.* § 2-712, Comment 3.

38. *Id.* § 2-713, Comment 5 (emphasis added).

39. *Id.* § 2-715(2) provides in part: "Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise . . . ."

40. *See, e.g.*, Anderson, *Repudiation of a Contract Under the Uniform Commercial Code*, 14 DEPAUL L. REV. 1 (1964); Squillante, *Sales Law in Iowa Under the Uniform Commercial Code—Article 2*, 20 DRAKE L. REV. 1 (1970). Anderson's article, which presumes that the buyer's damages are to be measured at the time of repudiation, is the strongest statement of this position:

The new formula diminishes the value of [the buyer's] action for damages: he recovers the amount that the market price has increased between the date of the contract and

ured under section 2-712.[41] The buyer, however, cannot be certain how his damages will be measured if he does not cover.[42] There is very little case law in this area upon which the buyer can rely.[43] There is not even agreement about whether cover must be used as a measure of damages if it is obtained, or whether the buyer procuring cover retains an option to bring suit for damages.[44] Furthermore, commentators on the Code disagree about the propriety of a requirement of cover.[45]

Cargill clearly places cover in a critical position. In *Cargill*, the entire measure of damages hinges on whether a contract for substitute goods could have been made. Under the test suggested by the court, measurement of damages will vary widely, depending upon the acceptability of the buyer's excuse for not procuring cover.[46] If the buyer has no acceptable excuse, his damages are measured by the difference between the contract price and the market price at the end of a "reasonable time."[47] If measured at this time,

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> the date of the repudiation, and an alert seller can make that difference small or nothing by repudiating immediately after a price rise appears to be likely. This deterioration to the point of worthlessness in the buyer's action for damages practically compels him to resort to the remedy of "cover."

Anderson, *supra* at 18-19.

41. *See* note 2 *supra*.

42. One commentator blames these uncertainties on the general attitude of the Code draftsmen towards damages, pointing out that the Code makes every effort to protect reasonable investments actually made in the market, but that "the Code shifts about, erratically and unpredictably, when damages are to be measured by a market to which the complainant has had no recourse. It is almost as if the draftsmen felt that such a remedy was in any case so undeserving that its precise statement became unimportant." Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 267 (1963).

43. Oloffson v. Coomer, 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973), *discussed in* note 28 *supra*, is the only case (other than *Cargill*) that discusses at length an interpretation of § 2-713 in connection with anticipatory repudiation when the buyer does not cover. Other cases determining when damages should be measured under § 2-713 generally choose the time of the seller's repudiation without any detailed discussion. *See* Ralston Purina Co. v. McFarland, 550 F.2d 967, 971 (4th Cir. 1977) (date of seller's repudiation presumed to be correct date for damage measurement); Fredonia Broadcasting Corp. v. RCA Corp., 481 F.2d 781, 800 (5th Cir. 1973) (comparison of § 2-713 with pre-Code Texas law stating damages measured at time and place of breach); Maxwell v. Norwood Marine, Inc., 19 U.C.C. Rep. 829, 831 (Mass. Dist. Ct. App. Div. 1976) (damages refused to buyer because of no evidence on exact date he learned of seller's repudiation); Sawyer Farmers Coop. Ass'n v. Linke, 231 N.W.2d 791, 795 (N.D. 1975) (acceptance of repudiation not necessary to effectuate breach); Tennell v. Esteve Cotton Co., 546 S.W.2d 346, 356 (Tex. Ct. App. 1976) (buyer learned of the breach when seller repudiated).

44. *See* Maxwell v. Norwood Marine, Inc., 19 U.C.C. Rep. 829 (Mass. Dist. Ct. App. Div. 1976).

45. *Compare* 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.4403, at 249 (1964) *and* R. NORDSTROM, *supra* note 1, § 145, at 445 n.88 (Code does not require cover) *with* J. WHITE & R. SUMMERS, *supra* note 1, § 6-4, at 191 n.77 (practical necessity for cover under the Code).

46. 553 F.2d at 1227. The court does not discuss what an acceptable excuse would be. Earlier cases indicate that a wide variety of reasons are acceptable. *See* note 20 *supra*.

47. 553 F.2d at 1227. This presumably corresponds with § 2-610's "commercially reasonable time." *See* note 4 *supra*.

the damages would be likely to correspond closely with the damages assessed in cases in which the buyer does cover, because substitute goods must be procured within a commercially reasonable time. The buyer with an acceptable excuse for not covering would measure his damages in relation to the market price when performance was due. Any correspondence between this measure of damages and damages in cases in which the buyer does cover would be fortuitous.

The interpretation chosen by the *Cargill* court is not, however, the only alternative interpretation of section 2-713's language and the concept of cover. Nordstrom stresses a reconciliation of the Code sections concerning anticipatory repudiation and concludes that the aggrieved buyer's damages in such cases should be measured at a reasonable time after the repudiation.[48] This reasonable time, which takes section 2-610 into account,[49] would be such time after the repudiation as would allow the buyer to contract for substitute goods.[50] In a period of fluctuating market value, the buyer would not be at the mercy of a seller who could choose the time of repudiation. Nor would the buyer be able to speculate at the seller's expense by determining whether he could more profitably cover or collect damages, since the two figures would correspond closely.[51]

The choice between the various analyses of section 2-713 would be difficult even if only historical considerations and the "commercially reasonable time" requirement of section 2-610 were weighed in the balance. The language of section 2-723(1), however, requires that the time of the seller's repudiation be used to calculate damages in cases of anticipatory repudiation that come to trial before the time of performance.[52] This requirement provides a simple method for determining what the market price would be at the time of performance—a time that, in the situation addressed by section 2-723, would not yet have arrived. If one interprets "learned of the breach" in section 2-713 to mean the time of "repudiation" as used in section 2-723, however, the aggrieved buyer is foreclosed from awaiting the seller's performance for a "commercially reasonable time," a privilege the buyer has under section 2-610. Therefore, an analysis equating "learned of

48. R. NORDSTROM, *supra* note 1, § 149, at 455.

49. *See* note 4 *supra*.

50. R. NORDSTROM, *supra* note 1, § 149, at 455. White and Summers reject this explanation as doing more violence to the language of § 2-713 than their conclusion. J. WHITE & R. SUMMERS, *supra* note 1, § 6-7, at 201 n.108; *see* Leibson, *Anticipatory Repudiation and Buyer's Damages—A Look Into How the U.C.C. Has Changed the Common Law*, 7 UNIFORM COM. CODE L.J. 272 (1975).

51. *See* note 55 *infra*.

52. *See* note 6 *supra*.

the breach" with "time of repudiation" in section 2-723 merely shifts the focus of the inconsistencies.[53]

The Code's internal inconsistencies,[54] the lack of a strong interpretive trend in court decisions, and disagreement among major Code commentators all make it difficult to determine a buyer's damages in cases of anticipatory repudiation. The strength of the *Cargill* court's conclusion depends upon the interpretation of the purpose of section 2-713. If the section is viewed as blending with and supporting the other sections of the Code concerning anticipatory repudiation, the "time the buyer learned of the breach" should correspond closely with the time required for procuring cover.[55] If, however, the relationship between section 2-713 and the other Code sections is not considered paramount, the pre-Code formula equating "time the buyer learned of the breach" with "time performance is due" is more logical.[56] The Tenth Circuit believed that the section was not meant to change the common law and its statutory statement in section 67(3) of the Uniform Sales Act[57] and accordingly tied its conclusion to pre-Code considerations,[58] rejecting the rather weak trend of post-Code cases of deter-

53. The *Cargill* court believed that the use of "repudiation" in § 2-723 and "learned of the breach" in § 2-713 indicated that the two expressions referred to two different times. 553 F.2d at 1226. Most commentators, however, begin with the presumption that the "breach" of § 2-713 refers to the same time as the "repudiation" of § 2-723 and then try to reconcile the two. *See* R. NORDSTROM, *supra* note 1, § 149, at 455 (since § 2-723 measures damages from time of repudiation when case comes to trial before performance is due, "time of performance" would be used when the case comes to trial after performance is due); J. WHITE & R. SUMMERS, *supra* note 1, § 6-7, at 199 (cautions against overstressing the importance of § 2-723); Peters, *supra* note 42, at 265 (§ 2-723 relates only to evidentiary difficulties); Comment, *supra* note 24, at 104 (poses interpretation of § 2-723 that would make the section repugnant to basing damages for anticipatory repudiation on a time other than when performance is due). Section 2-610 must weigh more heavily in the balance, however, in interpreting § 2-713 than does § 2-723. R. NORDSTROM, *supra* § 149, at 455; Liebson, *supra* note 50, at 281; Comment, *supra* at 104.

54. The harshest indictment of the inconsistency of Code language is found in Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185 (1967). This article, however, does not specifically address § 2-713 problems.

55. Presumably the damages figures would closely correspond because the calculations of the contract-market price differential would use approximately the same time period in measuring damages. Thus, if the buyer covers (something he must do without unreasonable delay), the cover price will be used in determining damages. If, however, the buyer does not cover, the price at the time he should have covered (at the end of a reasonable time after learning of repudiation) will be used.

56. If Code considerations were put aside, the reasons for following common law tradition would be even stronger as both a desire for consistency in measurement and the strength of the long tradition would point towards continuing the common law interpretation.

57. *See* note 25 *supra*.

58. Various authorities have put forth theories about the purpose of § 2-713 that offer a wide range of interpretive possibilities. Peters suggests in her article that it could be interpreted as a statutory liquidated damages clause. Peters, *supra* note 42, at 259. One commentator suggests that § 2-713 was not intended by the draftsmen to apply to situations of anticipatory breach, but "was drafted to meet those instances where the buyer does not learn of the breach until *after* the date of performance." Comment, *supra* note 24, at 103. White and Summers

mining anticipatory repudiation damages in relation to the contract-market differences at the time of the seller's repudiation.[59]

The *Cargill* decision accomplishes two things. At the very least, it analyzes carefully the phrase "learned of the breach" as it relates to the concept of cover. This fact in itself would separate the case from other decisions that ordinarily *presume* that "learned of the breach" means time of repudiation.[60] The decision should also clearly illustrate to the Permanent Editorial Board of the Uniform Commercial Code[61] that the problems long discussed by Code commentators are now resulting in widely divergent judicial opinions.[62] The Code itself was drafted in order to establish simplicity, clarity and uniformity of law.[63] These goals are not being realized in those cases when sellers repudiate before time of performance has arrived and the buyer does not cover. *Cargill* is an attempt at clarification, but no court can reconcile the language of section 2-713 and the sections that specifically discuss anticipatory repudiation until the purpose of section 2-713 is further explained.

The *Cargill* decision adds to the uncertainty by making an acceptable excuse for not covering the determinant in setting the time from which to measure damages.[64] The buyer must be concerned not only with when his damages will be measured under the *Cargill* formula, but also with what will be considered a valid reason for not covering. The only reasonable escape for the buyer from this maze of uncertainties is to cover and have damages measured according to section 2-712.[65] For the buyer who does not

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agree with this theory, adding that perhaps it is to induce the buyer to cover. J. WHITE & R. SUMMERS, *supra* note 1, § 6-7, at 199, 205. Nordstrom is less kind to the draftsmen, stating that "it looks as if the problem of measuring damages following a repudiation was either not considered by the drafters or was considered on different occasions and resolved differently each time it was considered." R. NORDSTROM, *supra* note 1, § 149, at 455-56.

59. 553 F.2d at 1226.

60. Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977); Maxwell v. Norwood Marine, Inc., 19 U.C.C. Rep. 829 (Mass. Dist. Ct. App. Div. 1976).

61. 1961 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTIETH YEAR 166 indicates the board is to consider proposed amendments when "(a) It has been shown by experience under the Code that a particular provision is unworkable or for any other reason obviously requires amendment; or (b) Court decisions have rendered the correct interpretation of a provision of the Code doubtful and an amendment can clear up the doubt . . . ."

62. Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977), which calculated damages in an anticipatory breach case from the date of repudiation, was decided only a few months before *Cargill*. It represents the opposite extreme (from time performance was due) in setting the time for measuring damages.

63. *See* U.C.C. § 1-102.

64. *See* text accompanying notes 17-18 *supra*.

65. The buyer, of course, could escape the maze by circumventing it completely. Detailed drafting of the contract could include a provision stating when the market price is to be determined in a situation of anticipatory breach by the seller in which the buyer does not cover. U.C.C. § 1-102(3) provides that the provisions of the Code may be "varied by agreement."

cover, however, a more faithful interpretation of the language of the Code would keep cover as a choice, not as an integral determinant of damage measurement.

Pre-Code law favored a method for calculating damages that could be applied in all cases.[66] Perhaps this policy of uniformity should also help determine the direction of post-Code decisions. An interpretation of section 2-713's "learned of the breach" to mean that an aggrieved buyer who does not cover would also "learn" of the breach at the end of the same time period he would have had to procure cover would serve a dual purpose. It would reconcile section 2-713 with the basic policy of allowing a buyer a "commercially reasonable time" before taking any action and, in contrast to *Cargill*, would be more likely to yield the same amount in damages as when the buyer covered. In this way, the courts would be upholding an important traditional purpose of damage measurements while resting their decisions on Code considerations and policies.

CARLYN GRAU POOLE

Criminal Law—Polygraph Examination Results Admissible in Post-Conviction Hearings

Despite the widespread use of and reliance upon the polygraph or "lie detector"[1] in nonjudicial and pretrial investigations,[2] courts have regarded the polygraph with suspicion. Polygraph examination results have been barred from most courts in the United States[3] on the ground that such

66. *See* text accompanying notes 24-26 *supra*.

1. The polygraph, commonly called a "lie detector," is designed to monitor and measure certain physiological responses of a person who is answering a set of "yes" or "no" questions. The device consists of three basic parts: (1) a "pneumograph tube" which is fastened around the subject's chest to record respiration; (2) a blood pressure cuff to record pulse and blood pressure; and (3) electrodes fastened to the hands or fingers through which an imperceptible electric current passes in order to record galvanic skin response. The instrument produces an electromechanical recording of unconscious physiological changes theoretically produced by internal stress caused by an examinee's conscious insincerity. The polygraph examiner's expert opinion regarding his examinee's sincerity is based on his analysis of the recording and other circumstances of the examination. *See generally* 3A WIGMORE ON EVIDENCE § 999 (J. Chadbourn rev. 1970 & Supps. 1975 & 1977).

2. *See, e.g.*, People v. Reagan, 395 Mich. 306, 313, 235 N.W.2d 581, 584-85 (1975) (Michigan Supreme Court took judicial notice of investigative usefulness of polygraph).

3. *E.g.*, Marks v. United States, 260 F.2d 377 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959); People v. York, 174 Cal. App. 2d 305, 344 P.2d 811 (1959). *But see* United States v.

evidence has not gained "general scientific acceptance,"[4] the traditional test for admission of such evidence originally set forth in *Frye v. United States*.[5] Michigan has joined the majority of jurisdictions in barring polygraph evidence from use at trial.[6] In a case of first impression, however, the Michigan Supreme Court in *People v. Barbara*[7] held that, in ruling on a post-conviction motion for a new trial, the judge may in his or her discretion weigh the results of a polygraph examination.[8]

Movant Joseph Barbara, Jr., was accused of having extorted money from Delores Lazaros by threatening the lives of her son and imprisoned husband.[9] In fear of movant's threats, Lazaros informed no one of the incident until her husband, Peter Lazaros, returned from prison.[10] The authorities were informed at that time and, following testimony at the trial by both Peter and Delores Lazaros, Barbara was convicted.[11]

Following a number of unsuccessful appeals,[12] Barbara moved for a new trial, asserting that newly discovered evidence showed that Peter Lazaros had given perjured testimony.[13] Movant offered two new witnesses and testimony regarding the results of polygraph examinations passed by one of the two new witnesses;[14] although the trial court barred the polygraph

Ridling, 350 F. Supp. 90 (E.D. Mich. 1972) (rejected nonadmissibility); Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 313 N.E.2d 120 (1974) (special exception made when defendant agrees in advance to take a polygraph test and submit the tests irrespective of results).

4. *See* text accompanying notes 27-29 *infra*.

5. 293 F. 1013 (D.C. Cir. 1923).

6. As recently as 1968, the Michigan Supreme Court in People v. Frechette, 380 Mich. 64, 155 N.W.2d 830 (1968), reaffirmed its opposition to the use of polygraph evidence at trial, stating, "There can be no doubt at present that in this jurisdiction the results of lie detector tests are inadmissible." *Id.* at 68, 155 N.W.2d at 832.

7. 400 Mich. 352, 255 N.W.2d 171 (1977).

8. *Id.* at —, 255 N.W.2d at 197-98.

9. *Id.* at —, 255 N.W.2d at 173.

10. Delores Lazaros alleged that while her husband was imprisoned, movant came to her home, raped her and extorted money from her. *Id.*

11. *Id.*

12. Barbara's initial appeal asserted that the behavior of witnesses Peter and Delores Lazaros in injecting extraneous and prejudicial matters into their testimony in the presence of the jury deprived movant of his right to a fair trial by an impartial jury. The Michigan Court of Appeals rejected Barbara's claim on appeal, 23 Mich. App. 540, 179 N.W.2d 105 (1970), and the Michigan Supreme Court denied leave to appeal, 383 Mich. 803 (1970). The United States District Court granted movant's writ of habeas corpus, *see* 400 Mich. at —, 255 N.W.2d at 173, but was reversed by the Court of Appeals for the Sixth Circuit. Barbara v. Johnson, 449 F.2d 1235 (6th Cir. 1971), *cert denied,* 405 U.S. 922 (1972).

13. 400 Mich. at —, 255 N.W.2d at 173.

14. One of Barbara's new witnesses, a cousin of Peter Lazaros, testified that Lazaros told him his wife was not raped and that Lazaros admitted making up the story to get out of prison. The witness had successfully taken a polygraph examination. He came forward with his testimony after he learned that movant had been sentenced to a long prison term. *Id.* at —, 255 N.W.2d at 173-74.

evidence it permitted a special record of the tests to be made.[15] Barbara's motion for a new trial was denied[16] on the grounds that Michigan law prevented the admission into evidence of polygraph examination results in a post-conviction proceeding and that the testimony did not constitute newly discovered evidence sufficient to warrant a new trial.[17]

On appeal[18] the Michigan Supreme Court reaffirmed its view that polygraph evidence is inadmissible at trial,[19] but rejected the trial judge's assumption that he had no discretion to consider the polygraph evidence in a post-conviction motion for a new trial, even if he was satisfied with the reliability of the polygraph machine and the proficiency of the polygraph operator.[20] The court reasoned that such discretion was permissible because a motion for a new trial requires lesser standards of proof than a trial itself.[21]

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15. *Id.* at —, 255 N.W.2d at 174.

16. The hearing judge conceded that Peter Lazaros' cousin's testimony discredited the testimony of Peter Lazaros, but concluded that it did not discredit the testimony of the complainant, Delores Lazaros. The court attributed Barbara's conviction to the complainant's testimony, as the alleged offense took place while Peter Lazaros was in prison, and concluded that the new evidence was not sufficient to render a different result probable on retrial. *Id.*

The discovery that testimony introduced at trial was perjured, however, may be grounds for ordering a new trial in Michigan. *Id.* Barbara contended that the polygraph results he offered would have facilitated his demonstration, and the hearing judge's determination, that Peter Lazaros committed perjury. Specifically, if the jury would believe his new witness, then the credibility of both Peter *and* Delores Lazaros would be impeached. *Id.* at —, 255 N.W.2d at 174-75. In this context it should be noted that when newly discovered evidence is positive as to the accused's innocence, the technical rules of evidence may be relaxed. *See, e.g.*, State v. Jones, 89 S.C. 41, 44, 71 S.E. 291, 292 (1911); State v. Laper, 26 S.D. 151, 157-58, 128 N.W. 476, 479 (1910).

Although movant offered the result of his own favorable polygraph examination, the Michigan Supreme Court held that the offer was merely duplicative of Barbara's denial of guilt and, therefore, not new evidence. 400 Mich. at — n.2. 255 N.W.2d at 175 n.2.

17. 400 Mich. at —, —, 255 N.W.2d at 174, 199. The purpose of a post-conviction hearing for a new trial based on newly found evidence is, as its name suggests, an action to determine whether, in the interests of justice, new evidence is of sufficient importance to entitle a party to a new trial. Four basic requirements must be met before a court will grant a new trial because of newly discovered evidence. Movant must show that: (1) The evidence itself, not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) the evidence is such as to render a different result probable on a retrial of the cause; and (4) the party could not with reasonable diligence have discovered and produced it at trial. People v. Clark, 363 Mich. 643, 647, 110 N.W.2d 638, 640 (1961).

18. The Michigan Court of Appeals denied Barbara leave to appeal, but the Michigan Supreme Court granted leave. No. 15815 (Mich. Ct. App., docketed March 23, 1973), *appeal granted*, 391 Mich. 761 (1974).

19. The *Barbara* court cited two reasons for its refusal to reject the *Frye* rule: (1) The field of polygraphy is still challenged forcefully on theoretical grounds; and (2) the results of polygraphy have yet to achieve a predictable level of consistency among examiners, despite significant progress in recent years. 400 Mich. at —, 255 N.W.2d at 186 (citing Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 429, 313 N.E.2d 120, 125 (1974)).

20. *Id.* at —, 255 N.W.2d at 199.

21. Justice Coleman, in his dissenting opinion, contended that the majority's "argument that a motion for a new trial requires lesser standards of proof than a trial itself and, therefore, we should experiment with an admittedly unreliable source of evidence, is unpersuasive." *Id.* at —, 255 N.W.2d at 202 (Coleman, J., dissenting).

Characterizing a new trial hearing as a "preliminary procedure" in which a defendant's guilt or innocence is not at issue,[22] the *Barbara* court noted that a judge may use certain data, such as affidavits, which would be inadmissible at trial, to assist in rendering his decision.[23]

The *Barbara* court then held that judges hearing post-conviction motions for new trials may in their discretion consider the results of polygraph examinations provided that the results of the test are offered on the defendant's behalf, the test was taken voluntarily, the examiner's qualifications, the quality of the equipment and the procedures employed are approved, the test results are considered only with regard to the general credibility of the new witness, and all knowledge of the test is barred from the trier of fact in a new trial.[24] The court emphasized that its limitations on the permissible use of the polygraph in court kept its holding "well within the limits prescribed by the state of the art" and avoided "prematurely considering those policy questions which inevitably accompany use of such evidence at trial."[25] A two-fold advantage to limited admission of polygraph evidence was acknowledged by the *Barbara* court. The test results could assist the defendant in demonstrating, and the judge in determining, that a newly discovered witness is credible without casting the polygraph in a decisive role. In addition, the courts would have the opportunity to establish a "track record" of polygraph reliability under strictly controlled conditions.[26]

The historical roots of *Barbara* can be traced back to *Frye v. United States*,[27] which marked the first attempt to introduce polygraph evidence in court. In that case defendant sought to introduce an expert to testify at trial about the results of a systolic blood pressure deception test,[28] a forerunner to the modern polygraph. In excluding the evidence, the *Frye* court said:

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22. *Id.* at —, 255 N.W.2d at 197.

23. *Id.* at —, 255 N.W.2d at 199. The court conceded, though, that "experimentation would be unwise when an individual's life or freedom might hinge directly on the effect at trial of a questionable device." *Id.* at —, 255 N.W.2d at 198.

24. *Id.* at —, 255 N.W.2d at 197-98.

25. *Id.* at —, 255 N.W.2d at 198.

26. *Id.* One of the strongest contentions against the admission of polygraph evidence has been its scientifically unsubstantiated reliability. *See* Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694 (1961). For a thorough discussion of case law and scientific information concluding that the polygraph is highly accurate, see Note, *The Emergence of the Polygraph at Trial*, 73 COLUM. L. REV. 1120 (1973).

27. 293 F. 1013 (D.C. Cir. 1923).

28. A systolic blood pressure deception test simply recorded blood pressure and pulse. The modern polygraph records not only blood pressure and pulse but also respiration and galvanic skin reflex or electrodermal response. *See* J. REID & F. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH ("LIE-DETECTOR") TECHNIQUE 1-3 (1966).

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*[29]

Academic criticism has since been leveled against the *Frye* standard of general scientific acceptance on the ground that it is an unnecessarily strict test for the admission of scientific evidence, amounting in effect to a rigorous rule of judicial notice.[30] *Frye*, however, has long been adhered to by the great majority of jurisdictions, and remains today the leading case on the subject.[31] The *Frye* standard was first enunciated in Michigan in *People*

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29. 293 F. at 1014 (emphasis added).

30. An expert witness offering scientific testimony usually applies a general scientific principle (conscious deception causes internal stress which, in turn, produces unconscious physiological changes) to specific data or evidence (abnormal blood pressure, respiration or galvanic skin response) in an effort to reach a conclusion relevant to the issues of the particular case (witness credibility). The validity of the principle underlying the technique may be so widely accepted, as in handwriting analysis, fingerprinting and ballistics, that judicial notice of it will be taken by a court without the necessity of establishing a foundation through expert testimony. *See* United States v. Ridling, 350 F. Supp. 90, 94 (1972); Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility In a Perjury-Plagued System*, 26 HASTINGS L. REV. 917, 941 (1975). Although critics of the *Frye* rule concede that the general acceptance standard is appropriate for taking judicial notice of scientific assertions, they do note believe it is a proper standard for gauging the admission of scientific evidence. "Any relevant conclusions [from scientific evidence] which are supported by a qualified expert witness should be received unless there are other reasons for exclusion." MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 203, at 491 (2d ed. E. Cleary 1972) (footnote omitted) [hereinafter cited as MCCORMICK]; Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1, 9. *See also* Kaplan, *The Lie Detector: An Analysis of its Place in the Law of Evidence*, 10 WAYNE L. REV. 381, 386 (1964).

31. *See* MCCORMICK, *supra* note 30, § 207, at 506. Although *Frye* has been followed in the vast majority of jurisdictions, the *Barbara* court cited two federal cases and one state case that have called the *Frye* rule into question: United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970) (sub silentio substitution of a different rule for *Frye*); United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972) (substitution of a more lenient test than *Frye*); Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 313 N.E.2d 120 (1974) (special exception to the *Frye* rule created when defendant agrees in advance to take a polygraph test and submit the tests irrespective of results). The *Barbara* court called these cases "anomalies." 400 Mich. at —, 255 N.W.2d at 186; *cf.* People v. McLaughlin, 3 Mich. App. 391, 393, 142 N.W.2d 484, 485 (1966) (fact of polygraph examination admissible at trial without objection).

Although no appellate court has specifically rejected *Frye,* in United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972), the District Court for the Eastern District of Michigan rejected the *Frye* court's conclusion. The *Ridling* court declared that the scientific basis for the polygraph examination was well established and directly relevant to that case (a perjury case). *Id.* at 93, 95.

The complete requirements established by the *Ridling* court for the admission of polygraph evidence in trials are:

v. Becker.[32] The *Becker* court held that the admissibility of polygraph evidence would be contigent upon "testimony offered which would indicate that there is at this time a general scientific recognition of such tests."[33] Michigan courts have relied on the *Becker/Frye* holdings and the subsequent failure of the polygraph to gain general scientific approval in barring the admission of polygraph evidence in most judicial contexts.[34] Although courts in other states have allowed opposing parties to stipulate before the test is administered that the results could be admitted into evidence,[35] the courts in Michigan have denied this option.[36] Given Michigan's historical intolerance for use of polygraph evidence in almost any judicial context, the impact of the supreme court's decision in *Barbara* in favor of limited admission of such evidence becomes all the more significant.

Prior to *Barbara*, the Michigan courts had twice confronted the issue whether polygraph evidence could be used to aid in the evaluation of witness credibility in a new trial hearing.[37] In both cases the Michigan Court of Appeals relied on the *Becker/Frye* rule in denying the admission of such

1. The parties will meet and will recommend to the Court three competent polygraph experts other than those offered by the defendant. 2. The Court will appoint one or more of the experts to conduct a polygraph examination. 3. The defendant will submit himself for such examination at an appointed time. 4. The expert appointed by the Court will conduct the examination and report the results to the Court and to the counsel for both the defendant and the government. 5. If the results show, in the opinion of the expert, either that the defendant was telling the truth or that he was not telling the truth on the issues directly involved in this case, the testimony of the defendant's experts and the Court's expert will be admitted. 6. If the tests indicate that the examiner cannot determine whether the defendant is or is not telling the truth, none of the polygraph evidence will be admitted.

Id. at 99.

32. 300 Mich. 562, 2 N.W.2d 503 (1942).

33. *Id.*; *accord*, People v. Frechette, 380 Mich. 64, 68, 155 N.W.2d 830, 832 (1968); People v. Davis, 343 Mich. 348, 370, 72 N.W.2d 269, 281 (1955).

34. Results of polygraph examination or any reference to them are inadmissible evidence in: (l) Competency hearings, People v. Liddell, 63 Mich. App. 491, 495, 234 N.W.2d 669, 672 (1975); (2) presentence reports, People v. Allen, 49 Mich. App. 148, 152, 211 N.W.2d 533, 535 (1973); (3) sentencing proceedings, People v. Towns, 69 Mich. App. 475, 478, 245 N.W.2d 97, 99 (1976); and (4) civil proceedings, Stone v. Earp, 331 Mich. 606, 610, 50 N.W.2d 172, 174 (1951).

35. *See, e.g.*, State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962); People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948); State v. Freeland, 255 Iowa 1334, 125 N.W.2d 825 (1964); State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (1972); State v. Stanislawski, 62 Wis. 2d 730, 216 N.W.2d 8 (1974).

36. Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951); People v. Levelston, 54 Mich. App. 477, 221 N.W.2d 235 (1974).

37. People v. Alexander, 72 Mich. App. 91, 249 N.W.2d 307 (1976); People v. Sinclair, 21 Mich. App. 255, 175 N.W.2d 893 (1970). The court in *Barbara* also cited two cases from other jurisdictions, United States v. Stromberg, 179 F. Supp. 278 (S.D.N.Y. 1959), and State v. Scott, 210 Kan. 426, 502 P.2d 753 (1972), in which the issue whether polygraph evidence could be used to buttress the credibility of the *defendant* in a new trial hearing had been considered. 400 Mich. at — n.45, 255 N.W.2d at 197-98 n.45. Both courts denied the admissibility of such evidence on the ground that it was merely cumulative and inadmissible at trial. 179 F. Supp. at 280; 210 Kan. at 434, 502 P.2d at 760.

evidence. In *People v. Sinclair*,[38] defendant, following his conviction for armed robbery, moved for a new trial based on newly discovered evidence after an inmate at a state prison signed an affidavit stating that he, and not defendant, had committed the crime in question.[39] A police administered polygraph test indicated that the affiant's confession was a fabrication.[40] Statements by the judge hearing defendant's motion revealed that he gave weight to the test results in denying Sinclair's motion for a new trial.[41] The court of appeals, citing *Becker*, held that it was error to admit or to consider the test results in the hearing for a new trial and remanded for rehearing.[42] The *Sinclair* court, unlike the *Barbara* court, failed to note any procedural differences between a trial and a hearing following a motion for a new trial that might warrant distinguishing *Sinclair* from previous decisions on the polygraph.

Defendant in *People v. Alexander*[43] was convicted of armed robbery and moved for a new trial based on newly found evidence.[44] In support of his motion, defendant offered two new witnesses and was prepared to offer polygraph evidence presumably supporting his innocence.[45] The hearing judge refused to admit testimony that would lay a foundation for the admission of the polygraph examination results and subsequently denied defendant's motion for a new trial.[46] The court of appeals affirmed and, deferring to the supreme court's pending decision in *Barbara*, said, "Until changed by the Supreme Court polygraph results are inadmissible."[47] If defendant's test results were offered to buttress the credibility of at least one of the new witnesses,[48] then *Barbara* overrules sub silentio the court of

38. 21 Mich. App. 255, 175 N.W.2d 893 (1970).

39. *Id.* at 256, 175 N.W.2d at 894.

40. *Id.* at 257, 175 N.W.2d at 894.

41. The trial court made the following remark in the new trial hearing:

> "They did put Mr. Todd on a polygraph to determine whether or not there was any substance to his story. Although the results of a polygraph are not admissible in a proceeding in court, nevertheless, it was the conclusion of the polygraph operator and the police that this was a fabrication on the part of Mr. Todd merely to wipe off an offense for Defendant Sinclair."

Id. (quoting trial court).

42. *Id.* at 258, 175 N.W.2d at 894-95 (citing People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942)).

43. 72 Mich. App. 91, 249 N.W.2d 307 (1976).

44. *Id.* at 97, 249 N.W.2d at 308. Alexander's newly found evidence consisted in part of a new witness, a friend of defendant, who allegedly knew who committed the robbery for which Alexander was convicted. *Id.* at 93-94, 249 N.W.2d at 308-09.

45. *Id.* at 97, 249 N.W.2d at 309-10. It is unclear from the court's opinion in *Alexander* whether the polygraph test results were offered to support the testimony of defendant, of the new witnesses, or of both.

46. *Id.* at 97, 249 N.W.2d at 310.

47. *Id.*

48. If the polygraph evidence was offered only to buttress defendant's own credibility, that evidence was cumulative under the court's opinion in *Barbara*. *See* note 16 *supra*.

appeals' holding in *Alexander*.[49]

The *Barbara* decision constitutes a limited victory for advocates of a more liberal rule for the admission of polygraph evidence. The Michigan Supreme Court, in deciding *Barbara*, apparently reassessed the counterbalancing factors traditionally advanced for excluding polygraph evidence at trial. Few critics of the polygraph today would contend that the opinion of a qualified polygraph expert has no probative value in assessing the sincerity of his examinee.[50] Even prior to *Barbara* the Michigan Supreme Court went so far as to take judicial notice of the fact that the polygraph is a useful investigative device.[51] In the past, however, the probative value of the polygraph has been outweighed by judicial fear of the prejudicial effect of such evidence upon the trier of a defendant's guilt or innocence.[52] Because of the polygraph's misleading reputation as a "truth teller," courts have demanded that the opinion of a polygraph expert be almost infallible because the trier of fact will invariably think it so.[53] By barring the results of a polygraph examination from the trier of fact in a new trial, and by strictly limiting the admission of such evidence to new trial hearings in which new witness credibility is a central issue, *Barbara* minimizes the prejudicial effect of polygraph evidence while maximizing its probative value. Relevant evidence is presumably yielded through admission of polygraph evidence in this judicial context. The question remains, however, whether the probative value of the polygraph, even without its prejudicial effect on the jury, is still sufficient to warrant the time-consuming procedures mandated for court-approved admissibility.[54]

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49. *Barbara* does not overrule the court of appeals decision in *Sinclair* because the polygraph evidence in the new trial hearing was unfavorable to defendant. *See* text accompanying note 24 *supra*.

50. *See* MCCORMICK, *supra* note 30, § 207, at 507.

51. People v. Reagan, 395 Mich. 306, 313, 235 N.W.2d 581, 584-85 (1975).

52. MCCORMICK, *supra* note 30, § 207, at 507; *see, e.g.*, United States v. Stromberg, 179 F. Supp. 278, 280 (S.D.N.Y. 1959) (admission of polygraph evidence at trial would be tantamount to overturning the jury system); People v. Davis, 343 Mich. 348, 372, 72 N.W.2d 269, 282 (1955) ("The tremendous weight which such tests would necessarily carry in the minds of a jury requires us to be most careful regarding their admission into evidence and we should not do so before its accuracy and general scientific acceptance and standardization are clearly shown."); People v. Leone, 25 N.Y.2d 511, 518, 255 N.E.2d 696, 700, 307 N.Y.S.2d 430, 435 (1969) ("We are all aware of the tremendous weight which such tests would necessarily have in the minds of a jury.").

53. MCCORMICK, *supra* note 30, § 207, at 507. Courts in Michigan had likewise barred the results of polygraph examinations from new trial hearings because of the presumed prejudicial effect of such tests on the judge. *See, e.g.*, People v. Allen, 49 Mich. App. 148, 211 N.W.2d 533 (1973); People v. Sinclair, 21 Mich. App. 255, 175 N.W.2d 893 (1970); *cf.* People v. Towns, 69 Mich. App. 475, 245 N.W.2d 97 (1976) (error for sentencing judge to have knowledge of polygraph examination results).

54. To lay a proper foundation for the admission of polygraph evidence in a new trial hearing in accordance with the *Barbara* court's requirements, the polygraph examiner, his

Barbara constitutes a new limitation on the scope of the *Frye* rule in Michigan. Although the court reaffirmed its support of *Becker/Frye* with respect to the admission of polygraph evidence at trial,[55] the exclusionary barrier of general scientific acceptance first raised in *Frye* was not applied with respect to new trial hearings. Demonstrated probative value, as opposed to demonstrated scientific approval, now appears to be the standard for the admission of polygraph evidence in Michigan new trial hearings based on newly found evidence.[56] *Barbara* is itself a conservative refinement of the holdings of those few courts that have admitted polygraph evidence at trial.[57] While the polygraph's usefulness in gauging witness credibility is employed in such cases, *Barbara*'s implementation alone succeeds in eliminating the instrument's prejudicial effect on the jury.

The new trial hearing has been designated the appropriate judicial "lab" for testing the polygraph's reliability,[58] but the *Barbara* court's characterization of the new trial hearing as a preliminary procedure is misleading. While such a hearing may be merely a proceeding preliminary to trial, it may also, in effect, be the defendant's final attack on the conviction. The judge ultimately determines whether the new trial hearing is a preliminary or final proceeding because he is the trier of the sufficiency of the evidence[59] and is not himself shielded from the prejudicial effect of the test results. The *Barbara* court implicitly recognized this problem by limiting the admissibility of polygraph evidence to test results favorable to the defendant.[60] One can only speculate what effect a defendant's omission in providing such test results will now have on the hearing judge's discretion to grant or to deny a motion for new trial.[61]

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equipment and the procedures employed must be approved by the court. Furthermore, the examinee may be subjected to a second, and conceivably a third, polygraph test upon the request of the prosecutor or the court. 400 Mich. at —, 255 N.W.2d at 197-98. These procedures may be too involved to provide a conclusion the judge could make on the basis of his own powers of observation. *See* United States v. Urquidez, 356 F. Supp. 1363, 1365-67 (C.D. Cal. 1973). *But cf.* Tarlow, *supra* note 30, at 958 (the objection that admission of polygraph evidence would require prolonged adjudication in each case is a "minor" one).

55. 400 Mich. at —, 255 N.W.2d at 186; *see* note 19 and accompanying text *supra*.

56. *Cf.* United States v. Zeiger, 350 F. Supp. 685, 687-88 (D.D.C.), *rev'd*, 475 F.2d 1280 (D.C. Cir. 1972) ("*Frye* has been interpreted to demand general acceptance among the experts that current polygraph techniques possess a degree of reliability which satisfies the court of its probative value."); Tarlow, *supra* note 30, at 945-46 (the interpretation of *Frye's* "general acceptance" as "reliable enough to have probative value" would appear close to the traditional standard for the admission of scientific evidence).

57. *See* note 31 *supra*.

58. 400 Mich. at —, 255 N.W.2d at 198-99; *see* text accompanying notes 18-23 *supra*.

59. *See, e.g.*, People v. Sinclair, 21 Mich. App. at 258, 175 N.W.2d at 895.

60. 400 Mich. at —, 255 N.W.2d at 198; *see* text accompanying note 24 *supra*.

61. New trial hearing judges in Michigan may now come to expect defendants to submit polygraph examination results with their new witnesses Failure to provide such results may improperly influence the judge in the same manner as the judge's knowledge of a defendant's

Permitting limited admission of polygraph evidence in a hearing upon a motion for new trial is a novel compromise between the strict evidentiary standard of general scientific acceptance and the liberal rules of relevant evidence. *Barbara* preserves the sanctity of the trial from a "questionable device," but permits the court to test the utility of the polygraph under strictly controlled conditions. If the polygraph fails to demonstrate its reliability in gauging witness sincerity within the confines of new trial hearings, the *Barbara* court has limited adequately the effect of its decision through the numerous conditions imposed on the permissible use and purpose of such evidence.[62] Conversely, if the polygraph succeeds in demonstrating its reliability in assessing witness credibility, the *Frye* standard of general scientific acceptance should be satisfied and the door properly opened to the general admission of polygraph evidence for impeachment purposes.

MICHAEL MORRIE JONES

Labor Law—*Shopping Kart*: The Need for a Broader Approach to the Problems of Campaign Regulation

In accordance with its authority under the Labor Management Relations Act to regulate union election campaigns,[1] the National Labor Relations Board has developed a complex set of election standards to protect employee "freedom of choice"[2] in voting for or against union representation. The Board conceives of free choice not simply as an uncoerced

refusal to submit to a polygraph examination. *Cf.* People v. Towns, 69 Mich. App. 475, 245 N.W.2d 97 (1976) (improper for trial court to induce defendant to take polygraph test prior to sentencing even though court told defendant that refusal to take the test would not affect the sentence); People v. Allen, 49 Mich. App. 148, 211 N.W.2d 533 (1973) (improper to ask defendant if he were willing to take a polygraph test).

62. *See* text accompanying note 24 *supra*.

1. Section 9(c)(1) of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 159(c)(1) (1970), states in part, "[I]f the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." The Supreme Court interpreted a similar provision under § 9(c) of the National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 453 (1936), to give the Board authority to promulgate regulations necessary to conduct a fair election. Southern S.S. Co. v. NLRB, 316 U.S. 31, 37 (1942); NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940).

2. Hollywood Ceramics Co., 140 N.L.R.B. 221, 223 (1962).

choice,[3] but also as one that is "informed" and "reasoned."[4] To promote such rational decisionmaking by employees, the Board seeks in the elections it supervises to "provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible."[5] This "laboratory conditions" ideal has provided a rationale under which the Board has developed extensive rules for determining when conduct or speech by either employer or union will be grounds for setting aside an election.[6] As part of this development, for over two decades the Board has held that a substantial misrepresentation by either side that could be found to have had a probable impact on the election would be a sufficient basis for invalidating an election and ordering another.[7] In an unexpected decision[8] in April, 1977, however, the Board reversed this long-standing policy and declared in *Shopping Kart Food Market*[9] that it will no longer probe into the truth or falsity of campaign statements, or set aside elections on the basis of alleged misrepresentations.[10] Beyond its effect of deregulating one facet of election practices, *Shopping Kart* illustrates the limitations of the Board's adjudicative approach to policymaking and the desirability of the Board's effectuating any further changes in its campaign regulations in a comprehensive, rather than piecemeal, manner.

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3. Coercion of employees is expressly prohibited under § 8(a)(1) of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 158(a)(1) (1970), which makes any action that interferes with, restrains or coerces employees in the exercise of their rights under § 7 of the Act, *id.* § 157, an unfair labor practice. Section 7 provides that employees have the right of self-organization and the right to form or join labor organizations.

4. The Board has stated:

> Our function . . . is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.

Sewell Mfg. Co., 138 N.L.R.B. 66, 70 (1962).

5. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

6. *See* text accompanying notes 24-33 *infra*.

7. Notable cases in the Board's development of controls over misrepresentations include United Aircraft Corp., 103 N.L.R.B. 102 (1953) (election invalidated when one union fabricated a letter from the president of a second union admitting election misconduct and praising the first union), and Gummed Products Co., 112 N.L.R.B. 1092 (1955) (election set aside because of union's misrepresentation concerning wages negotiated with another employer). *See* text accompanying notes 29-33 *infra*.

8. The Board did not indicate before Shopping Kart Food Market, 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705 (Apr. 8, 1977), that it was considering a reevaluation of its long-standing policy on misrepresentations. Thus, counsel for both sides were not able to submit briefs or orally argue the merits of the policy change. Motion for Reconsideration 1 (copy on file in office of *North Carolina Law Review*). Following the Board's decision, counsel for both the employer and the union argued that the record should be reopened for oral and written argument on the change in policy. *Id.*; Brief in Reply to Employer's Motion for Reconsideration (copy on file in office of *North Carolina Law Review*).

9. 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705 (Apr. 8, 1977).

10. *Id.* at —, —, 94 L.R.R.M. at 1705, 1708.

In *Shopping Kart*, a union official told employees on the day preceding the election that the employer had earned profits of $500,000 in the past year, although actually they had totalled only $50,000.[11] The employer lost the election and challenged the results, alleging that the misrepresentation had caused the union's victory. The Regional Director, applying the Board's policy on misrepresentations as articulated in *Hollywood Ceramics Co.*,[12] according to which only material misrepresentations would invalidate an election, found that the misrepresentation was not material.[13] The Board, although agreeing with the Regional Director that the union should be certified, determined in a three to two decision to overrule *Hollywood Ceramics* altogether.[14]

In the majority opinion, Board members Penello and Walther argued that the Board's painstaking, subjective determinations of the probable impact on employees of election misrepresentations had resulted in inconsistent rulings, an increased number of objections and a delay in the final outcome of elections.[15] The problem of delay had been exacerbated, they noted, by the frequent refusal of the courts to enforce Board decisions, which had encouraged parties to litigate to the fullest.[16] The majority contended that the negative effects of Board control over misrepresentations could no longer be justified since an influential empirical study had shown that employees are not influenced by election campaigns anyway.[17] Thus, they concluded, "[T]he *Hollywood Ceramics* rule operates more to frustrate free choice than to further it and . . . the purposes of the Act would be better served by its demise."[18] Although ex-Chairman Murphy joined Penello and Walther in overruling *Hollywood Ceramics*, she stated in a concurring opinion that she will continue to vote to set aside elections in which a party makes an "egregious mistake of fact."[19] The three members

11. *Id.* at —, 94 L.R.R.M. at 1705.

12. 140 N.L.R.B. 221 (1962); *see* text accompanying notes 29-33 *infra*.

13. 228 N.L.R.B. at —, 94 L.R.R.M. at 1705. The Regional Director found that the union official had neither actual nor imputed knowledge of the employer's profits. *Id.; see* note 38 and text accompanying notes 32 & 33, 38-41 *infra*.

14. 228 N.L.R.B. at —, 94 L.R.R.M. at 1705.

15. *Id.* at —, 94 L.R.R.M. at 1706-07. The majority also criticized the *Hollywood Ceramics* policy for its effect of restricting free speech. *Id.* Although this has been a major criticism leveled at the Board in connection with this policy, *see* note 28 *infra*, the *Shopping Kart* majority did not emphasize the issue.

16. 228 N.L.R.B. at —, 94 L.R.R.M. at 1707.

17. *Id.* The empirical study relied on by the majority is discussed in notes 64, 71-76 and text accompanying notes 64-76 *infra*.

18. 228 N.L.R.B. at —, 94 L.R R.M. at 1708.

19. *Id.* (concurring opinion). Unfortunately, Murphy did not define any standard for an "egregious" misrepresentation except by negative implication. She stated that she would find such election interference "only in the most extreme situations" and would not set aside

were in total agreement, however, in holding that the Board would continue to invalidate elections on the basis of forgeries and misrepresentations involving Board processes.[20]

In a strongly worded dissent, members Fanning and Jenkins argued that it was only through its regulations that the Board maintained a high standard of campaign conduct in a majority of elections[21] and that the Board's abandonment of its regulatory role would lead to an increase in propaganda and misrepresentations.[22] The dissent also attacked the behavioral study that the majority relied on to support its decision.[23]

The policy established in *Shopping Kart* of not examining the substance of campaign representations is not new to the Board. Between 1935 and 1947, the Board intervened only rarely in cases of union misrepresentations; employers, on the other hand, were held to a standard of strict neutrality.[24] In 1947, Congress, in an attempt to ensure greater latitude to employers in speaking against unionization in election campaigns, adopted section 8(c) of the Taft-Hartley Act, which removed most speech from the ambit of unfair labor practices.[25] In response, in *General Shoe Corp.*[26] the Board held that section 8(c) applied only to unfair labor practices, and that campaign speech would continue to be subject to regulation under the Board's section 9(c)[27] power over election practices, regardless of any

elections on the basis of "gross errors" or examine statements "for mere truth or falsity." *Id.* As examples of elections she would not set aside, Murphy cited two cases involving gross wage misrepresentations by unions. *Id.* at —, 94 L.R.R.M. at 1708-09 (citing Contract Knitter, Inc., 220 N.L.R.B. 579 (1975); Henderson Trumbull Supply Corp., 220 N.L.R.B. 210 (1975)).

20. *Id.* at —, 94 L.R.R.M. at 1708 (majority & concurring opinions).

21. *Id.* at —, 94 L.R.R.M. at 1709 (dissenting opinion).

22. *Id.* at —, 94 L.R.R.M. at 1710 (dissenting opinion).

23. *Id.* at —, 94 L.R.R.M. at 1709-10 (dissenting opinion). For a discussion of this study, see notes 64, 71-76 and text accompanying notes 64-76 *infra*. Board member Jenkins dissented further on the basis of his disagreement with the conclusions of the study. 228 N.L.R.B. at —, 94 L.R.R.M. at 1712.

24. *See* R. WILLIAMS, P. JANUS & K. HUHN, NLRB REGULATION OF ELECTION CONDUCT 17-19 (Univ. of Pa. Wharton School Labor Relations and Public Policy Series No. 8, 1974) [hereinafter cited as WILLIAMS]; Christensen, *Free Speech, Propaganda and the National Labor Relations Act*, 38 N.Y.U.L. REV. 243, 255-63 (1963). See Note, *Limitations upon an Employer's Right of Noncoercive Free Speech*, 38 VA. L. REV. 1037 (1952), for a compilation of cases that enforced the policy of strict employer noninterference.

25. Labor Management Relations (Taft-Hartley) Act § 8(c), 29 U.S.C. § 158(c) (1970) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

For an excellent discussion of the legislative history of § 8(c), see Koretz, *Employer Interference with Union Organization Versus Employer Free Speech*, 29 GEO. WASH. L. REV. 399 (1960).

26. 77 N.L.R.B. 124 (1948).

27. Labor Management Relations (Taft-Hartley) Act § 9(c), 29 U.S.C. § 159(c) (1970), *quoted in* note 1 *supra*.

immunity under section 8(c).[28] This policy was subsequently applied to both employers and unions.

After 1947, the Board, through case-by-case adjudication, gradually established a set of criteria to be used in judging the impact of a misrepresentation on an election.[29] These criteria were summarized by the Board in 1962 in *Hollywood Ceramics Co.*,[30] which became the definitive statement of the Board's misrepresentation policy:

> We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party . . . from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election . . . . But even where a misrepresentation is . . . substantial, the Board may still refuse to set aside the election if it finds . . . that the statement would not be likely to have had a real impact on the election. For example, the misrepresentation might have occurred in connection with an unimportant matter. . . . Or, it could have been so extreme as to put the employees on notice of its lack of truth. . . . Or, the Board may find that the employees possessed independent knowledge with which to evaluate the statements.[31]

An additional consideration, which had been articulated in previous cases,[32] was added in a footnote to *Hollywood Ceramics*[33]—whether the informant's knowledge of the subject matter that was misrepresented was so special that it would induce employees to attach unusual significance to the misstatement.

In applying the *Hollywood Ceramics* standards, the Board has had to make a series of subjective determinations in every case; as a result, Board

28. 77 N.L.R.B. at 126, 127; *see* WILLIAMS, *supra* note 24, at 19-20; Christensen, *supra* note 24, at 258-62.

The *General Shoe* policy has been frequently attacked by Board critics. A Senate report found that the Board's regulation of campaign speech under § 9 is "in conflict with the spirit of section 8(c)" and noted that "the idea that speech of any kind, much less 'protected speech' can invalidate an election is unacceptable outside of labor law, and is dubious within it." Excerpts from the Report of the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 120 CONG. REC. 11304 (1974). *But see* Wirtz, *The New National Labor Relations Board; Herein of 'Employer Persuasion,* 49 NW. U.L. REV. 594, 612-16 (1954) (use of the banner of freedom of speech to characterize employers' expressions of opinion to their employees about unionization is misleading).

29. *See, e.g.*, Kawneer Co., 119 N.L.R.B. 1460, 1461 (1958); Calidyne Co., 117 N.L.R.B. 1026, 1028 (1957); Gummed Products Co., 112 N.L.R.B. 1092, 1093-94 (1955); Merck & Co., 104 N.L.R.B. 891, 892 (1953); WILLIAMS, *supra* note 24, at 20-25.

30. 140 N.L.R.B. 221 (1962).

31. *Id.* at 224 (footnotes omitted).

32. *See, e.g.*, Gummed Products Co., 112 N.L.R.B. 1092, 1094 (1955).

33. 140 N.L.R.B. at 224 n.10.

decisions in misrepresentation cases have been inconsistent and frequently have been overturned by the courts.[34] Evaluating the substantiality of a misrepresentation has required the Board to decide what degree of departure from the truth in each case is actually significant.[35] When a misrepresentation has been judged to be substantial the Board then has had to decide how much time was needed for an effective rebuttal, and, in cases in which the opposition has not responded to the misrepresentation, whether it could have so responded.[36] Determining the materiality of a misrepresentation has involved the Board in difficult examinations of the relative importance of the issues in each campaign.[37] Finally, in considering the credibility of the source of the misrepresentation and employees' knowledge about the subject of the misrepresentation, the Board has had to evaluate the employees' state of mind and receptivity.[38] The Board has said numerous times that it does not look for evidence of employees' *actual* knowledge,[39] but instead makes

34. *See* WILLIAMS, *supra* note 24, at 28-61; Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 82-90 (1964).

35. The subjectivity inherent in this type of determination has led to inconsistency in application. *See* WILLIAMS, *supra* note 24, at 28-33; Bok, *supra* note 34, at 84-86. *Compare, e.g.*, Cross Baking Co., 186 N.L.R.B. 199 (1970), *rev'd*, 453 F.2d 1346 (1st Cir. 1971) (wage misrepresentation amounting to 15 cents an hour was not substantial), *with* Kawneer Co., 119 N.L.R.B. 1460 (1958) (union's representation that hourly wages elsewhere were $1.81 and vacation time was two weeks when actually wages ranged from $1.73 to $1.90 and vacation time was one week was substantial) *and* Trane Co., 137 N.L.R.B. 1506 (1962) (inference fostered by employer that union dues were five dollars a month whan they were actually four dollars a month was substantial).

36. For examples of Board-court disagreement over the application of the timing standard, see Aircraft Radio Corp. v. NLRB, 519 F.2d 590 (3d Cir. 1975) (Board and court reached different conclusions on effectiveness of employer's rebuttal to a prior union misrepresentation); NLRB v. Cactus Drilling Corp., 455 F.2d 871 (5th Cir. 1972) (Board and court applied different standards concerning responsibility of employer to investigate and respond to union's misrepresentation made four days prior to election); WILLIAMS, *supra* note 24, at 39-46.

37. The Board and the courts have frequently disagreed in applying the materiality standard. *See* NLRB v. Santee River Wool Combing Co., 537 F.2d 1208 (4th Cir. 1976) (Board's finding that false assertion by union that one employee had been illegally discharged was immaterial since the company had in fact illegally discharged other employees reversed); Luminator Div. of Gulton Indus., Inc. v. NLRB, 469 F.2d 1371 (5th Cir. 1972) (Board's decision that union misrepresentation of wages and benefits received under a different contract was immaterial reversed); NLRB v. Graphic Arts Finishing Co., 380 F.2d 893 (4th Cir. 1967) (Board's determination concerning the materiality of claims about union strike benefits set aside); WILLIAMS, *supra* note 24, at 33-39.

38. One study of Board decisions in this area has found that:

> [T]he Board's decisions reflect a fundamental ambivalence as to how much emphasis should be placed upon the voters' own abilities to recognize campaign propoganda for what it is and either disregard it or take independent steps to verify it before voting in reliance thereon. In some cases, the Board appears to have regarded the employees as exceptionally naive and in need of extensive protection from the agency. In others, the Board has seemed willing to impose a high degree of responsibility on the voters . . . to protect themselves from being misled by campaign claims.

WILLIAMS, *supra* note 24, at 57.

39. Pinkerton's Nat'l Detective Agency, Inc., 124 N.L.R.B. 1076, 1077 n.3 (1959); 41 NLRB ANN. REP. 66 (1976). *See also* Bok, *supra* note 34, at 40 n.8; Note, *Behavioral and Non-Behavioral Approaches to NLRB Representation Cases*, 45 IND. L.J. 276, 284 (1970).

its own judgment, based on its "administrative expertise," as to what employees might reasonably be expected to know.[40] Though this approach has maximized the Board's administrative flexibility, it has done so at the sacrifice of a clearly defined standard.[41]

The subjectivity of the determinations inherent in the application of the *Hollywood Ceramics* standards has given the courts of appeals the latitude to make independent factual determinations in misrepresentation cases,[42] despite pleas from the Board that such determinations are more properly within the purview of its administrative powers.[43] The courts also have at times refused to apply all the standards,[44] or have applied additional standards,[45] and have sometimes enforced the standards with a rigidity explicitly

40. Modine Mfg. Co., 203 N.L.R.B. 527 (1973), *enforced*, 500 F.2d 914 (8th Cir. 1974).

41. WILLIAMS, *supra* note 24, at 48. The fact that earlier Board decisions focused on the actual special knowledge of the source of the misrepresentation whereas later cases looked more to the *reliance* of employees has also impeded formulation of a clear standard in this area. *Id.* at 46-51. Different Board members often apply different formulations of the standard and arrive at different results. *See, e.g.*, Cumberland Wood & Chair Corp., 211 N.L.R.B. 312 (1974). In some cases, the Board has applied the earlier test, focusing on the actual knowledge of the speaker, but the courts, setting aside orders, have reached different results based on a standard that focuses more on reliance. *See* NLRB v. A.G. Pollard Co., 393 F.2d 239 (1st Cir. 1968); WILLIAMS, *supra* at 46-51.

The Board has further contributed to the confusion at times by failing to look to the source of the misrepresentation when it would be appropriate. *See, e.g.*, Medical Ancillary Servs., Inc., 212 N.L.R.B. 582, 583 (1974) (Penello dissenting) (majority set aside an election because of misleading statements made by a union stewardess who did not occupy a position of authority or have any special knowledge about the matters at issue).

Board member Jenkins has at times apparently ignored the source factor in overturning elections. *See, e.g.*, Ereno Lewis, 217 N.L.R.B. 239 (1975); Medical Ancillary Servs., Inc., 212 N.L.R.B. 582 (1974). However, in *Shopping Kart*, Jenkins and Fanning stressed the importance of the source factor in concluding that, even under *Hollywood Ceramics,* the election should not be overturned. 228 N.L.R.B. at —, 94 L.R.R.M. at 1709.

42. *See, e.g.*, Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224 (2d Cir. 1974); Walled Lake Door Co. v. NLRB, 472 F.2d 1010 (5th Cir. 1973); Luminator Div. of Gulton Indus., Inc. v. NLRB, 469 F.2d 1371 (5th Cir. 1972); NLRB v. G.K. Turner Assocs., 457 F.2d 484 (9th Cir. 1972); Cross Baking Co. v. NLRB, 453 F.2d 1346 (1st Cir. 1971).

43. [T]here must be a reasonably flexible and not too constrained or rigidly controlled area left for administrative expertise in determining, in the best judgment we can muster from our knowledge and experience in the field, and in the exercise of sound administrative discretion, what circumstances justify either invalidating an election or holding a hearing on misrepresentation issues.

Modine Mfg. Co., 203 N.L.R.B. 527, 530 (1973), *enforced*, 500 F.2d 914 (8th Cir. 1974).

44. In particular, the courts have resisted considering whether the source had special knowledge, and whether the employees' independent knowledge would largely counter the misrepresentation, on the grounds that these considerations allow the guilty party to escape unpunished. *See* LaCrescent Constant Care Center, Inc. v. NLRB, 510 F.2d 1319 (8th Cir. 1975); Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224 (2d Cir. 1974); NLRB v. Millard Metal Serv. Center, Inc., 472 F.2d 647 (1st Cir. 1973); WILLIAMS, *supra* note 24, at 54.

45. *See, e.g.*, NLRB v. Santee River Wool Combing Co., 537 F.2d 1208, 1211 (4th Cir. 1976) (considering the element of deliberateness or intentionality in determining the effect of the misrepresentation on employees); Aircraft Radio Corp. v.NLRB, 519 F.2d 590, 593-94 (3d Cir. 1975) (considering both deliberateness and the closeness of the original election vote);

rejected by the Board in *Hollywood Ceramics*.[46] These conflicts between the Board and the courts have resulted in an enforcement rate in misrepresentation cases that is much lower than the enforcement rate for Board decisions in general.[47]

An examination of the measurable effects of the Board's past regulation of misrepresentations shows that the negative results have outweighed the benefits. Although *Hollywood Ceramics* objections to elections have not necessarily become routine as implied by the majority in *Shopping Kart*,[48] the number of objections based on alleged misrepresentations have constituted a large proportion of post-election objections.[49] Very few of these

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Tyler Pipe Indus., Inc. v. NLRB, 447 F.2d 1136, 1139-41 (5th Cir. 1971) (stressing the element of the deliberateness of the misrepresentation).

46. The Board expressed a realistic view of election campaigning in *Hollywood Ceramics*:

> We are . . . aware that absolute precision of statement and complete honesty are not always attainable . . . . Election campaigns are often hotly contested and feelings frequently run high. At such times a party may, in its zeal, overstate its own virtues and the vices of the other without essentially impairing "laboratory conditions."

140 N.L.R.B. at 223-24. This view has not been consistently followed by either the Board or the courts. *See* WILLIAMS, *supra* note 24, at 28-33; Bok, *supra* note 34, at 88. The classic statement of an idealistic approach to elections was made in a case that predated *Hollywood Ceramics*: "If truth is diluted, it is no longer truth. A glass of pure water is no longer pure if a one-ninth part thereof is contaminated, nor is it 'virtually' pure. There cannot be 'virtually' the truth any more than there can be 'virtually' a virgin." Allis-Chalmers Mfg. Co. v. NLRB, 261 F.2d 613, 616 (7th Cir. 1958).

One reason for the courts' rigidity may be the perception by the courts of a pro-union bias on the part of the Board. WILLIAMS, *supra* note 24, at 57-59; *see* Automation & Measurement Div., The Bendix Corp. v. NLRB, 400 F.2d 141, 146 (6th Cir. 1968); NLRB v. Lord Baltimore Press, Inc., 370 F.2d 397, 401 (8th Cir. 1966).

47. The courts have refused to enforce 51.1% of the Board's decisions in misrepresentation cases; in contrast, the set-aside rate for Board decisions in general is 14.7%. Speech by Peter Walther to State Bar Ass'n of Texas (June 17, 1977) [hereinafter cited as Walther], *reported in* [1977] LAB. L. REP. (CCH) ¶ 9126A, at 15,474.

48. 228 N.L.R.B. at —, 94 L.R.R.M. at 1706 (citing WILLIAMS, *supra* note 24, at 60). The criticism by the majority does not seem to be well founded. As the dissent noted, 300 to 400 yearly challenges based on misrepresentations out of a total of approximately 9,000 elections indicates that challenges are not routine. *Id.* at —, 94 L.R.R.M. at 1710 (dissenting opinion).

49. According to ex-Board member Walther, employer objections based on misrepresentations constituted 1 of every 4 employer election objections filed in fiscal year 1976. Walther, *supra* note 47, *reported in* [1977] LAB. L. REP. (CCH) ¶ 9126A, at 15,473. However, since employers filed 223 misrepresentation objections, Shopping Kart, 228 N.L.R.B. at —, 94 L.R.R.M. at 1710 (dissenting opinion); *see* note 50 *infra*, out of a total 493 election objections, 41 NLRB ANN. REP., *supra* note 39, at 232 app., table 11C, it appears the ratio is closer to 1 out of 2. Of the 678 union election objections in 1976, *id.*, 84 were based on alleged misrepresentations. Shopping Kart, 228 N.L.R.B. at —, 94 L.R.R.M. at 1710 (dissenting opinion); *see* note 50 *infra*.

objections, however, have been sustained.[50] Furthermore, the number of changed outcomes resulting from rerun elections has been even smaller.[51] By far the most significant practical effect of the regulation of misrepresentations has been the delay in obtaining final results in challenged elections; in 1976 final election results were delayed by litigation from 286 days to 4 years.[52] Any advantage a union gains from such litigation[53] is relatively slight compared to what an employer gains. As ex-Board member Walther

Misrepresentations alleged to have been made by unions	Percent of objections sustained
1971—174	1.7
1972—176	9.1
1973—240	3.8
1974—142	10.6
1975—245	4.1
1976—223	3.6

Misrepresentations alleged to have been made by employers	Percent of objections sustained
1971—205	10.7
1972—150	11.3
1973—210	10.0
1974—104	15.4
1975—207	7.2
1976— 84	21.4

228 N.L.R.B. at —, 94 L.R.R.M. at 1710 (dissenting opinion).

51. In 1976, 18 rerun elections were ordered in response to union objections and 8 in response to employer objections. Walther, *supra* note 47, *reported in* [1977] LAB. L. REP. (CCH) ¶ 9126A, at 15,473. In fiscal year 1976, approximately 40% of all rerun elections resulted in outcomes different from the original election. 41 NLRB ANN. REP., *supra* note 39, at 232 app., table 11C. Therefore, the 26 reruns probably yielded 10 or 11 changed outcomes.

52. Misrepresentation cases that eventually reach the courts of appeals require lengthy litigation since Board determinations involving representation questions cannot be directly appealed. AFL v. NLRB, 308 U.S. 401, 411 (1940). Therefore, if a union brings a misrepresentation charge and loses, the union cannot appeal. When an employer brings a misrepresentation charge and loses, the union is certified. The employer, however, can refuse to bargain with the victorious union and be found guilty of an unfair labor practice. On appeal of the unfair labor practice finding, all questions, including those involving the original representation election, are reviewable by the courts. *Id.* at 409-12.

In 1976, the 9 misrepresentation cases that went to the courts of appeals for enforcement of Board orders were not decided until 1 1/2 to 4 years after the elections were originally held. Although unions won in 5 of the 9 appeals, the time delay was sufficient to dissipate the union's bargaining power. Lengthy delays also occurred in the 37 summary judgment bargaining orders issued by the Board in misrepresentation cases. Walther, *supra* note 47, *reported in* [1977] LAB. L. REP. (CCH) ¶ 9126A, at 15,473. Even the fully contested misrepresentation cases that were not appealed were, on the average, decided by the Board 286 days after the original election. Speech by John Fanning before American Bar Ass'n in Chicago (Aug. 9, 1977), *reported in* [1977] 95 LAB. REL. REP. (BNA) 381, 384. Thus, even for cases not appealed to the courts, the time consumed in fully contesting a misrepresentation charge and conducting a rerun probably approximated a year, which coincides with the time established by statute after which a defeated union can obtain a new election in any event. 29 U.S.C. § 159(c)(3) (1970).

53. A union might be interested in filing an unwarranted objection so as to maintain an employee nucleus at a partially organized plant. Samoff, *NLRB Elections: Uncertainty and Certainty*, 117 U. PA. L. REV. 228, 242 (1968).

has observed, "[I]f effectuation of a certification can be delayed a year or more . . . the union's following is dissipated and its strength at the bargaining table nil."[54]

Given the problems in application and enforcement of the *Hollywood Ceramics* standards and the negative side effects of prolonged litigation, it seems that the maintenance of the regulatory standards would be justifiable only if they in fact have had a deterrent effect. Neither the majority nor the dissent, however, analyzed the probability or strength of such a deterrent effect. The majority side-stepped the issue by contending that employees are not influenced by misrepresentations anyway.[55] The dissent, on the other hand, assumed without question that the standards had successfully deterred misrepresentations in ninety-five percent of the elections conducted in the past year.[56] The validity of this assertion is debatable considering the vagueness of the standards and their subjective and often inconsistent application.[57] The articulation of the standards on a case-by-case basis rather than in clearly enunciated rules of general applicability probably has also minimized their deterrent effect.[58] In addition, the impossibility of deterring unintentional, careless or unauthorized misstatements, and the use of tactics such as rumor-spreading, were not recognized by the dissent.[59] Given these considerations, it is likely that undetected violations have occurred in numerous elections[60] and that more objections have not been filed because

54. Walther, *supra* note 47, *reported in* [1977] LAB. L. REP. (CCH) ¶ 9126A, at 15,473. An employer is also encouraged to file an objection by considerations of the possible money savings that might accrue if bargaining is delayed and of the increased possibility of success if the case eventually is appealed to the courts. *See* Bok, *supra* note 34, at 87; Samoff, *supra* note 53, at 237.

55. 228 N.L.R.B. at —, 94 L.R.R.M. at 1707. The majority implied that since employees are not influenced by misrepresentations it is unnecessary to deter misrepresentations. This proposition is questionable, however, since the conclusions of the study cited by the majority for the proposition that employees are not influenced by campaign misrepresentations, *see* note 64 and text accompanying notes 64-67 *infra*, were based on studies of elections conducted under the *Hollywood Ceramics* standards. It is arguable that these standards generally helped to deter gross misrepresentations in the elections studied and that, were employees subjected to totally unregulated campaigning, there would be a greater impact on employee voting. *See* Miller, *The Getman, Goldberg and Herman Questions*, 28 STAN. L. REV. 1163, 1170 (1976).

56. 228 N.L.R.B. at —, 94 L.R.R.M. at 1709-10 (dissenting opinion). One Board critic has described such faith as an "unwarranted confidence in the capacity of the law." Samoff, *supra* note 53, at 247.

57. *See* notes 35-38, 41 and text accompanying notes 34-41 *supra*.

58. *See* Bernstein, *The NLRB's Adjudication-Rulemaking Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 590 (1970); Bok, *supra* note 34, at 92; Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 759 (1961); Wirtz, *supra* note 28, at 616.

59. *See* Bok, *supra* note 34, at 86, 87 & n.132 (rumor-spreading is an effective, unregulated way of communicating misinformation). *See also* Samoff, *supra* note 53, at 240.

60. This conclusion is supported by data showing that employees reported campaign violations in as many elections that the Board later found to be "clean" as in those that the

of the cost and the improbability of success upon Board review.[61] Despite the improbability that the Board's standards have, in fact, acted as an effective deterrent, the majority's remedy of total deregulation of campaign speech would seem less drastic and be more defensible had the Board considered testimony from unions and management concerning the actual deterrent effect of the now-discarded regulations.[62]

Although considerations of inconsistent results, Board-court conflict and prolonged litigation were important factors motivating the *Shopping Kart* decision, these considerations were all articulated in 1973 when in *Modine Manufacturing Co.*[63] the Board expressly declined to overrule *Hollywood Ceramics*. Thus, the key to the *Shopping Kart* decision appears to lie in the reexamination of the behavioral assumption underlying *Hollywood Ceramics*: that employees are actually influenced by campaigns. This reexamination apparently was provoked, at least in part, by an influential empirical study of employee voting behavior (the Getman study)[64] which found, following an examination of thirty-one elections in five midwestern states, that eighty-one percent of the employees surveyed voted according to their precampaign attitudes and intent,[65] and that, in general, employees did not remember most campaign issues.[66] From this and other data, the authors of the study concluded that employees are generally inattentive to campaigns, and that their vote is not determined by information received during campaigns.[67]

Influential observers of the Board have long noted the need for an empirical study of employee behavior that would test the behavioral as-

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Board later overturned. J. GETMAN, S. GOLDBERG, & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 117-18 (1976) [hereinafter cited as GETMAN].

61. *See* note 50 *supra*.

62. Testimony might have shown, for example, that standards of election behavior with regard to misrepresentations are largely self-imposed. *See* note 89 and accompanying text *infra*.

63. 203 N.L.R.B. 527, 529-31 (1973), *enforced*, 500 F.2d 914 (8th Cir. 1974).

64. GETMAN, *supra* note 60. The study also appeared in two parts: Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976), and Getman, Goldberg & Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465 (1975).

The purpose of the study was to determine the effect of the pre-election campaign on employee voting behavior. The authors' staff interviewed 1,239 employees who voted in 31 elections. Employees were interviewed as soon as possible after the beginning of the campaign to ascertain their attitudes toward the union and the employer and their voting intent. The second interview, conducted after the election, determined actual vote, issues remembered and reasons given for voting choice. GETMAN, *supra* at 33.

65. GETMAN, *supra* note 60, at 53-64, 72.

66. *Id.* at 73-85.

67. *Id.* at 53-64, 73-85, 140-41.

sumptions underlying the Board's campaign regulations.[68] The Board's willingness to reexamine its regulations now that such a study has been done must be commended. The treatment afforded the study in *Shopping Kart*, however, illustrates the need for a more thorough analysis and scrutiny of the data and a more cautious application of the study's results. The majority accepted uncritically the study's conclusions,[69] despite conflicting data that indicates that campaign speech may affect a significant minority of elections, perhaps a large enough number to warrant its continued regulation in some form. For example, as the dissent noted, half the employees polled were aware of union claims concerning wages elsewhere, and 22% recalled the precise amount within 10%.[70] Although the authors of the study concluded that the average employee was not "very" familiar with campaign issues,[71] the averaging of employee recognition of significant issues with insignificant ones arguably underemphasizes the consistent salience of certain key issues such as prospective plant closings, loss of benefits and possible discharges (employer issues), and wages and working conditions (union issues) that were recognized by 23 to 71% of all employees.[72] In addition, the study's finding that union campaigns did in fact influence voters who were exposed to them,[73] and the extensive shifting of votes in the most successful union and company campaigns[74] suggest that at least some campaigns probably have an effect. By ignoring this data and other weak-

68. *See* Bernstein, *supra* note 58, at 582; Bok, *supra* note 34, at 40, 46-53, 88-90; Samoff, *supra* note 53, at 233 n.15, 245 n.41; Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 106-08 (1955).

69. 228 N.L.R.B. at —, 94 L.R.R.M. at 1707.

70. *Id.* at —, 94 L.R.R.M. at 1710 (dissenting opinion); *see* GETMAN, *supra* note 60, at 82.

71. GETMAN, *supra* note 60, at 107. The average employee could remember only 10% of the company campaign issues and 7% of the union issues. *Id.* at 76.

72. Eight employer issues concerning loss of benefits, improvements not being dependent on unionization, union dues and the destructive effects of unionization were recognized by 25 to 40% of the employees. *Id.* at 78-79. Six union issues generally concerning wages, working conditions, benefits, grievances and union gains obtained elsewhere were recognized by 23 to 71% of the employees. *Id.* at 80-81. Additionally, certain issues were of critical importance in individual campaigns, being recognized by as many as 89% of the employees. *Id.* at 82-83.

73. Among voters who were initially undecided and those who switched from one party to the other, those who voted for the union were significantly more familiar with the union campaign than were those who voted for the company, but those who voted for the company were no more familiar with the company campaign than were those who voted for the union. *Id.* at 103-09. This suggested to the authors a causal relationship between attendance at union meetings, familiarity with the union campaign and vote switching to the union. *Id.; see* Eames, *An Analysis of the Union Voting Study from a Trade-Unionist's Point of View*, 28 STAN. L. REV. 1181, 1187 (1976).

74. In the five most successful company campaigns the average loss in union support from the card-sign to the vote was 35%; in the most successful union campaigns, however, the unions gained an average 10% from the card-sign to the vote. The authors could find no explanation for these strong gains and losses. GETMAN, *supra* note 60, at 100-03; *see* Eames, *supra* note 73, at 1185-86; Miller, *supra* note 55, at 1164.

nesses and inconsistencies in the study,[75] and selectively accepting the study's conclusion concerning general employee behavior, the majority avoided directly confronting several difficult issues.[76] It did not have to make the difficult value judgment concerning how many elections must be shown to be affected by campaign tactics in order to justify Board regulation.[77] Additionally, the majority did not have to consider whether the Board's remedy of election invalidation is supported by any proof of the Board's ability to identify those elections that have actually been influenced by unfair campaigning.[78]

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75. A major weakness is that, although the votes of the 6% of the initially undecided voters and the 13% of the voters who switched from one party to the other determined the outcome of 9 of the 31 elections, GETMAN, *supra* note 60, at 103, the authors were unable to determine what factors influenced the voters' decisions in those elections. *Id.* at 98; *see* Miller, *supra* note 55, at 1168-69.

The study's conclusion that the campaign had no effect is inconsistent with the proposition that the campaign probably strengthened latent voting predispositions, GETMAN, *supra* at 142, since the strengthening of predispositions may be important in influencing employees' actual votes. Miller, *supra* at 1187. In addition, the voting predispositions of a majority of employees in some elections may be very weak because of lack of exposure to unions and absence of strong feelings about the employer. In these elections the information received during the campaign may have more impact on the voters' choice. *See* Flanagan, *The Behavioral Foundations of Union Election Regulation*, 28 STAN. L. REV. 1195, 1199 (1976). With regard to this possibility, it seems significant that the majority of the voters studied by the Getman group had had significant exposure to unions. GETMAN, *supra* at 66.

The conclusion that campaign violations do not influence voters is not consistent with two previous studies of rerun elections that show that the probability of a different outcome in a rerun depends, at least partially, on the type of violation reported in the first election. *See* Drotning, *NLRB Remedies for Election Misconduct: An Analysis of Election Outcomes and Their Determinants*, 40 U. CHI. J. BUS. 137 (1967); Pollitt, *NLRB Re-run Elections: A Study*, 41 N.C.L. REV. 209 (1963).

Despite these criticisms, the Getman study's general conclusions seem to be in accord with other more limited studies of employee voting behavior. *See* Brotslaw, *Attitude of Retail Workers Toward Union Organization*, 18 LAB. L.J. 149 (1967) (primary determinants of employee voting are previous union experience, general perceptions about unions and job satisfaction); Comment, *An Examination of Two Aspects of the NLRB Representation Election: Employee Attitudes and Board Inferences*, 3 AKRON L. REV. 218 (1970) (positive experiences with management, satisfaction with working conditions, and perception of personal job security are most critical in voting choice).

For favorable responses to the Getman study, see Flanagan, *supra*; Raskin, *Deregulation of Union Campaigns: Restoring the First Amendment Balance*, 28 STAN. L. REV. 1175 (1976); Goetz & Wike, Book Review, 25 U. KAN. L. REV. 375 (1977).

76. The dissent, in contrast to the majority, seized on the inconsistencies of the study and seemingly rejected *in toto* its conclusions, 228 N.L.R.B. at —, —, 94 L.R.R.M. at 1709-10, 1712 (dissenting opinions), thereby disregarding valuable information that, even if accepted only in part or with reservations, suggests that *some* modification of the Board's misrepresentation policy is needed.

The approaches of both the majority and the dissent illustrate that critical comment and analysis from informed observers should be solicited before any further use of the study is attempted. *See* Bernstein, *supra* note 58, at 582; note 89 and accompanying text *infra*.

77. *See* Miller, *supra* note 55, at 1168-69 (we do not demand a cost-benefit analysis for all worthwhile regulations in society, so we should not necessarily demand one in this area).

78. *See* note 60 and accompanying text *supra*.

The majority's use of the Getman study in *Shopping Kart* also illustrates the danger that the study will be selectively applied by the Board in isolated areas of its regulatory policy to overturn some election controls, while others of equally questionable behavioral validity are preserved. This type of selective use was apparent in the majority's decision to continue to invalidate elections on the basis of forgeries and misrepresentations in which one party has implied Board support for its position,[79] despite the fact that the Getman study indicates that such tactics have no greater impact on employee voting than do other campaign misrepresentations.[80] The decision to continue to invalidate elections when Board neutrality has been misrepresented probably reflects the high value placed on Board impartiality and the desire to maintain respect for the Board's operations.[81] The majority should have considered, however, whether some method of enforcement other than election invalidation would be preferable in these cases, for overturning elections in which misrepresentations have probably not affected the outcome actually frustrates employee freedom of choice.[82]

The decision to continue to invalidate elections on the basis of forgeries seems to have been motivated by a misunderstanding of the Getman study, although unarticulated considerations may have influenced the decision. The majority argued that employees are generally sophisticated about campaign misrepresentations but may be misled by misrepresentations made in such a deceptive manner that even sophisticated voters could not recognize their inaccuracy.[83] In using the Getman study as support for the proposition that employees are not influenced by campaign propoganda because they are sophisticated, however, the majority distorted the study's conclusions and disregarded the study's finding of employee inattentiveness to the campaign.[84] It is also possible that the Board retained election regulations in

79. 228 N.L.R.B. at —, 94 L.R.R.M. at 1708.

80. GETMAN, *supra* note 60, at 150-53; *see* text accompanying notes 64-67 *supra*.

81. The Board readily overturns elections in which official documents have been reproduced by unauthorized parties, even if the actual impact on the election is doubtful. *See, e.g.*, Rebmar, Inc., 173 N.L.R.B. 1434 (1968) (election invalidated because union had reproduced Board's official election notice, despite the innocuous nature of the alteration); Allied Electric Prods., Inc., 109 N.L.R.B. 1270 (1954) (upheld policy against reproducing official ballot so as to not imply Board support for any particular party).

82. *See* GETMAN, *supra* note 60, at 113-18, 155 (suggesting Board's inability to make impact determinations, and need for remedies other than election invalidation that would be triggered automatically by election misconduct without regard to whether the misconduct had had an impact on the election).

83. 228 N.L.R.B. at —, 94 L.R.R.M. at 1708.

84. The majority's emphasis on employee sophistication, *id.* at —, 94 L.R.R.M. at 1707, implies a view of employees weighing and evaluating information in a rational manner. The Getman study found, on the other hand, that employees' votes were largely determined by general attitudes towards unions and attitudes about working conditions. GETMAN, *supra* note

cases involving forgeries because of the greater justification in punishing such deliberate and intentional behavior[85] and the relatively greater ease in determining when such violations have occurred. As with the decision concerning violations of Board neutrality, however, the majority should have considered other means of deterring such behavior than election invalidation.

The inadequacy of the Board's analysis of the Getman study in *Shopping Kart* and the apparent unwillingness of both the majority and the dissent to consider other approaches to campaign speech regulation, aside from the general retention or abandonment of the *Hollywood Ceramics* rules, illustrates the limitations of the Board's traditional adjudicatory approach to problems more amenable to rulemaking.[86] That policy analysis of the type attempted in *Shopping Kart* is better conducted in accordance with established rulemaking procedures[87] rather than through adjudication has been suggested by numerous Board critics.[88] The primary advantage of a rulemaking approach is that it generally opens up the decisionmaking process, thereby providing an opportunity for wide participation to all interested parties and helping to assure a variety of inputs.[89] It also offers

60, at 54-64, 72. These findings, and the additional finding of employee inattentiveness to the campaign, suggest that employee voting behavior, although not irrational, does not involve the rational intake of new information in the sophisticated manner implied in the majority interpretation of the study. *Id.* at 143.

85. The courts have often considered the element of intentionality. NLRB v. Santee River Wool Combing Co., 537 F.2d 1208 (4th Cir. 1976); Tyler Pipe Indus., Inc. v. NLRB, 447 F.2d 1136 (5th Cir. 1971).

86. Rulemaking, as defined by the Administrative Procedure Act, is a process for "formulating, amending, or repealing" an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4), (5) (1970 & Supp. V 1975). The NLRB has preferred to develop substantive rules through adjudication, even when general rules of widespread applicability have been articulated. *See* Peck, *supra* note 58, at 736-40.

87. Section 6 of the Labor Management Relations Act authorizes the Board to "make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter." 29 U.S.C. § 156 (1970); *see* note 89 *infra*.

88. *See generally* Baker, *Policy by Rule or Ad Hoc Approach—Which Should It Be?*, 22 L. & CONTEMP. PROB. 658 (1957); Bernstein, *supra* note 58; Peck, *supra* note 58; Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254 (1968) [hereinafter cited as Peck, *A Critique*]: Samoff, *Coping With the NLRB's Growing Caseload,* 22 LAB. L.J. 739 (1971); SAMOFF, *supra* note 53; Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 HARV. L. REV. 921 (1965); Note, *Administrative Law Making Through Adjudication: The National Labor Relations Board*, 45 MINN. L. REV. 609 (1961).

89. Rulemaking procedures include publication in the Federal Register of general notice of the proposed rulemaking and hearing, a statement of the proposed substance of the suggested rule, an opportunity for interested parties to submit written data and arguments with or without oral presentation, and publication in the Federal Register of the rule as adopted. 5 U.S.C. § 553(a)-(e) (1970 & Supp. V 1975).

greater flexibility in considering alternatives other than merely upholding or overruling precedent.[90] For example, with regard to the difficulties of regulating campaign misrepresentations noted in *Shopping Kart*, the critical problem of prolonged litigation could have been considered in light of possible administrative and procedural changes such as increasing the power of Regional Directors and commensurately decreasing the scope of Board review.[91] As an alternative to general deregulation, the Board could have

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Although, as one critic has noted, following a rulemaking procedure will not in itself guarantee that the Board actually will consider the opinions and testimony elicited, Bernstein, *supra* note 58, at 593, such a procedure would at least ensure that a variety of opinions is presented. NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974); Bernstein, *supra* at 591, 616-18; Peck, *supra* note 58, at 756-57; Peck, *A Critique, supra* note 88, at 263; Shapiro, *supra* note 88, at 932. Such participation was notably lacking in *Shopping Kart* since the impending reconsideration of Board policy was unannounced. *See* note 8 *supra*. Analysis of the type described above may be critical with regard to the Getman study considering its unique nature, its scope and its potential impact on other areas of Board election regulation. *See* text accompanying notes 64-78 *supra*. Participation of affected parties increases the probability that defects in proposed rules will be noted before the rules are adopted. Peck, *A Critique, supra* at 272, and that interrelationships with other rules will be studied, Bernstein, *supra* at 591. Additionally, "[I]n rulemaking, all potentially affected have the opportunity to shape the initial decision before the agency attitude hardens, whereas adjudication often burdens nonparties with persuading the agency to overrule or modify a precedent." *Id.*

The proposed Labor Reform Act of 1977, H.R. 8410, 95th Cong., 1st Sess. (1977), passed by the House of Representatives on Oct. 6, 1977, 123 CONG. REC. H10,713 (daily ed. Oct. 6, 1977), and awaiting Senate action in 1978, requires the Board to make rules governing when election misconduct will be grounds for election invalidation. H.R. 8410 § 5, 95th Cong., 1st Sess. (1977). See 123 CONG. REC. H10,702-14 (daily ed. Oct. 6, 1977); *id.* H10,630-79 (daily ed. Oct. 5, 1977); and *id.* H10,540-63 (daily ed. Oct. 4, 1977) for debate on the various provisions of the bill.

90. *See* Peck, *A Critique, supra* note 88, at 272.

91. Limiting the scope of Board review and reducing court review of Board decisions would tend to accelerate ultimate resolution of cases. Both possibilities, of course, would be strongly opposed by some parties on grounds of due process. As Chairman Fanning has noted, "One man's unconscionable delay is another's due process. Where one shades into the other is a perception much influenced by where you sit." Speech by John Fanning, *supra* note 52, *reported in* [1977] 95 LAB. REL. REP. (BNA), at 383.

The proposed Labor Reform Act, discussed at note 89 *supra*, includes various provisions that would ameliorate the difficulty in achieving final results in disputed elections within a reasonable time. The provisions include setting time limits for parties to appeal adverse Board decisions, cutting back, though not eliminating, court review of Board decisions involving certification and increasing the number of Board members from five to seven. H.R. 8410 §§ 2, 6, 9, 95th Cong., 1st Sess. (1977).

The special task force appointed to investigate and recommend changes in NLRB procedure considered various procedural changes that would accelerate the filing procedure on objections, increase the burden on the objecting party to show substantiating evidence at an early stage in the objection process, allow for parties to waive the right of review, eliminate as a basis for review the ground that a substantial factual issue was clearly decided erroneously and increase the power of Regional Directors to issue decisions in all cases subject to limited review. INTERIM REPORT AND RECOMMENDATIONS OF THE CHAIRMAN'S TASK FORCE ON THE NLRB FOR 1976, at 18-30 (1976).

The Board also could reduce the possibility of parties using its regulations in order to delay bargaining by providing for expedited review of objections brought by parties with a history of filing objections.

established threshold requirements for Board intervention in misrepresentation cases, thereby eliminating Board intervention in numerous cases, setting clearer guidelines for election conduct and preserving Board control in cases in which misrepresentations are most likely to have an impact.[92]

A rulemaking approach would also have enabled the Board to consider each facet of its election controls within the context of a comprehensive and complementary regulatory scheme. Comprehensive policy examination of this nature is impelled by the Getman study[93] and by the fact that the Board's regulation of other campaign practices has produced many of the same problems as its now-discarded controls over misrepresentations.[94] Moreover, the Board's policies in various areas of campaign regulation are intimately connected and therefore should be considered together. For example, the policy of providing unions limited access to employer premises serves a goal similar to that of the Board's regulation of campaign misconduct: both policies have as their overriding purpose the effectuation of a free and informed voter choice.[95] Abandonment of controls over misrepresentations might have been more justifiable had the Board concurrently taken positive action to provide unions with equal access to employer premises[96]—a step

92. One threshold suggested by the results of the Getman study is for the Board to consider only cases in which the margin of victory is smaller than 20%. GETMAN, *supra* note 60, at 150 n.21; *see* Bok, *supra* note 34, at 91. Such a policy is supported by studies indicating that the original margin of victory is the most important factor in determining whether there is a different outcome in a rerun election. *See* Drotning, *supra* note 75, at 142; Pollitt, *supra* note 75, at 220.

The Board also could refuse to hear claims concerning misrepresentation made within three working days of the election, thereby putting greater responsibility on the parties themselves to police the campaign. Additionally, the Board could refuse to examine ambiguous statements, *see* Bok, *supra* at 91, and any misrepresentation made to less than a Board-determined percentage of the employees in a unit. It could also limit review to misrepresentations about certain key issues, absent substantial proof by the complaining party that a unique or usually minor issue was important in a given campaign. See GETMAN, *supra* at 78-79, and note 72 and accompanying text *supra*, for a summary of which issues are generally important in campaigns. These thresholds could be determined in light of the Board's 25 years of experience with misrepresentation charges.

93. The study recommends deregulation of speech, including threats and promises, misrepresentations, interrogation, emotional appeals and speeches made to massed groups of employees within 24 hours of the election. GETMAN, *supra* note 60, at 146-50.

94. The Board's regulation of inflammatory, emotional appeals, illegal threats and promises and illegal discharges, among others, requires that the Board make very subjective determinations concerning either motive or impact. For the problems of making impact judgments, see notes 37-38, 41, 44-47 and text accompanying notes 34-47 *supra*.

95. The Board's policy of requiring employers to disclose names and addresses of their employees is predicated on the policy of enhancing the probability of a free and reasoned choice. Excelsior Underwear Inc., 156 N.L.R.B. 1236 (1966).

96. The need for greater access is shown by the Getman study's finding that, although unions were furnished with employees' names and addresses and could conduct meetings off the employer's premises, employee exposure to the union campaign was significantly less than employee exposure to the company campaign. GETMAN, *supra* note 60, at 96, 143-44, 156-59. Many commentators have advocated greater union access to employer premises as an alterna-

supported both by considerations of fairness and by the desirability of maximizing the opportunity to rebut misinformation.[97] Significantly, in *Shopping Kart* the Board ignored the fact that the Getman study's recommendations with regard to deregulation were made in the context of other proposals advocating equal access to company premises[98] and stronger remedies for other types of campaign misconduct.[99]

The outlines of the Board's new policy of not examining alleged campaign misrepresentations are still somewhat unclear given ex-Chairman Murphy's failure to more precisely define standards for the "egregious" misrepresentations that will continue to be grounds for setting aside an election.[100] Indications are, however, that Board intervention will occur only when the misrepresentation approaches actual fraud.[101] If *Shopping Kart* is not overruled,[102] the primary effect of the decision will be to eliminate a basis for objection to election results that has been used to unduly prolong litigation and delay bargaining in hundreds of cases every year. The decision also eliminates the need for the Board to make difficult impact determinations in one category of election cases. There is, however, the possibility that the general deregulation of election speech will result in an escalation of propaganda in some elections, though probably only a minority. In cases in which such an escalation occurs, unions will probably be at a decided disadvantage because their access to employees is generally more restricted than is management's, and thus their opportunity to rebut is more limited.

Despite these potential problems, *Shopping Kart* illustrates a healthy willingness on the part of the Board to reexamine, on the basis of new behavioral data, long-held assumptions and the policies they have previous-

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tive to strict campaign regulation. *See* Bok, *supra* note 34, at 91-92; Samoff, *supra* note 53, at 239, 248-50. A provision mandating that the Board formulate rules providing for greater union access to employees is included in the proposed Labor Reform Act of 1977. H.R. 8410 § 3, 95th Cong., 1st Sess. (1977), *discussed at* note 89 *supra*.

97. *See* GETMAN, *supra* note 60, at 157; Bok, *supra* note 34, at 52-56, 91-92.

98. GETMAN, *supra* note 60, at 157; *see* Speech by Stephen Goldberg to Labor Relations Law Section of ABA (Aug. 6, 1977), *reported in* [1977] 95 LAB. REL. REP. (BNA) 390 (Goldberg, co-author of the Getman study, emphasized the fact that the suggested changes were not to be considered in isolation).

99. *See* GETMAN, *supra* note 60, at 113-18, 151-55; Speech by Stephen Goldberg, *supra* note 98.

100. *See* note 19 *supra*.

101. In a case arising after *Shopping Kart*, Murphy indicated that an "egregious" mistake of fact might have to amount to fraud in order to invalidate an election. Thomas E. Gates & Sons, Inc., 229 N.L.R.B. No. 100, at — n.6, 95 L.R.R.M. 1198, 1199 n.6 (May 17, 1977).

102. Since *Shopping Kart* was decided, Peter Walther resigned from the Board and was replaced by John Truesdale, who, along with Fanning and Jenkins, could constitute the majority needed to overrule *Shopping Kart*.

ly supported. It is also encouraging that the established misrepresentation policy was overturned on the basis of the Board's experience with the practical consequences of the *Hollywood Ceramics* rules rather than as a result of political changes in the Board's composition.[103] The decision, in conjunction with the challenge to the foundation of existing campaign regulations presented by the Getman study,[104] raises the possibility that the Board will reexamine other election regulations that exhibit many of the characteristics of the *Hollywood Ceramics* standards.[105] *Shopping Kart* demonstrates, however, that such a reexamination should be made only after a more thoughtful analysis of the Getman study. *Shopping Kart* also illustrates the desirability of effectuating any further changes in existing campaign standards through rulemaking proceedings, rather than through adjudication. Such an approach would provide a wider forum for discussion and analysis of the Getman study and of controversial changes. A rulemaking approach would also allow for the establishment of regulatory priorities, the consideration of remedies other than election invalidation, the alteration of administrative and procedural practices where necessary and the concurrent examination of the issue of access and other means of promoting the goal of enhancing informed voter choice.

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103. Most policy changes effected by the Board have resulted from changes in the Board's composition. *See* Bernstein, *supra* note 58, at 597; Wirtz, *supra* note 28, at 611-12. This has been especially true in the politically sensitive area of "free speech." Hickey, *Stare Decisis and the NLRB*, 17 LAB. L.J. 451, 462 (1966).

104. *See* note 93 *supra*.

105. *See* note 94 *supra*. Although the Board may not be willing to eliminate its election regulations to the extent suggested by the Getman study, the rationale of *Shopping Kart*, that employees are generally sophisticated enough to protect themselves from campaign propaganda and that employees are largely uninfluenced by such propaganda anyway, would at least support the abandonment of other regulations justified only by the *General Shoe* doctrine, *see* note 28 and text accompanying notes 26-28 *supra*, rather than by specific statutory prohibition. For example, despite the majority's express indication that it will continue to oversee campaign conduct other than misrepresentations, 228 N.L.R.B. at —, 94 L.R.R.M. at 1708, it is difficult to see how the Board can continue to overturn elections on the basis of appeals to racial or religious prejudices, *see, e.g.*, Sewell Mfg. Co., 138 N.L.R.B. 66 (1962).