RECENT DECISIONS

I. CIVIL PROCEDURE

WORK PRODUCT: CLARIFYING THE SCOPE OF THE IMMUNITY AND CREATING A CENTRAL ISSUE EXCEPTION FOR MENTAL IMPRESSIONS

The work product doctrine provides a qualified immunity from discovery for items prepared in anticipation of litigation.[1] Work product is discoverable only upon the requesting party's showing of both a substantial need for the materials and an inability to obtain their equivalent without undue hardship.[2] Materials[3] classified as work product that reflect mental impressions or opinions (hereinafter opinion work product) are generally not

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1. The Arizona Supreme Court in Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764 (1958) (citing Hickman v. Taylor, 329 U.S. 495 (1947)), first acknowledged the work product immunity codified in ARIZ. R. CIV. P. 26(b)(3) (derived from FED. R. CIV. P. 26(b)(3)). Work product applies to materials prepared by attorneys and other representatives, including insurers. Longs Drug Store v. Howe, 134 Ariz. 424, 429, 657 P.2d 412, 417 (1983); Butler v. Doyle, 112 Ariz. 522, 524, 544 P.2d 204, 206 (1975). For an overview of the work product doctrine see Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760 (1983).

2. ARIZ. R. CIV. P. 26(b)(3) provides, in pertinent part:

> *Trial Preparation: Materials* . . . . [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

3. ARIZ. R. CIV. P. 26(b)(3) extends the immunity only to "documents and tangible things." *Hickman* envisions that work product extends to intangibles such as beliefs and mental impressions resulting from trial preparation but not committed to writing. 329 U.S. at 511; *In re* Grand Jury Subpoena, 622 F.2d 933, 935 (6th Cir. 1980). The Arizona Supreme Court follows the *Hickman* rule. *See Dean*, 84 Ariz. at 112, 324 P.2d at 769. *Hickman* and *Dean* may protect an intangible form of work product which is sought through a deposition or interrogatory. *See* 4 J. MOORE, J. LUCAS & G. GROTHER, MOORE'S FEDERAL PRACTICE ¶ 26.64[1] (2d ed. 1984); Special Project, *supra* note 1, at 839 (suggests intangible work product should receive the higher protection afforded opinion work product because intangibles are generally colored by mental impressions). *But see In Re* Anthracite Coal Antitrust Litig., 81 F.R.D. 516, 522 (M.D. Pa. 1979) (providing intangible work product with greater protection than tangible work product would discourage attorneys from preparing written records). The existence and non-existence of documents and facts contained in tangible or intangible work products are not protected by the immunity and may be discovered through depositions and interrogatories. *Hickman*, 329 U.S. at 513; 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2023, at 194 (1970). However, the content of a witness' statement may not be discovered through depositions or interrogatories. *Hickman*, 329 U.S. at 512-13. *See* Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055, 1067 (1979) (the distinction between facts and the contents of statements may be "tenuous and unworkable").

discoverable.[4]

In *Brown v. Superior Court of Maricopa County*,[5] the Arizona Supreme Court addressed important issues involving work product. The court clarified the scope of the immunity by itemizing several factors that courts and attorneys must examine to determine what qualifies as work product. The court also carved out an exception to the general rule that opinion work product is not discoverable. Finally, the *Brown* court essentially eliminated work product as a barrier to discovery of claims files in insurance bad faith actions.

Robert A. Brown owned two businesses that sustained fire damage.[6] He submitted several claims under policies issued to him by Continental Casualty Company. Continental paid Brown's claim for physical damages, but denied his claims for business interruption, loss of accounts receivable, and loss of valuable papers, alleging that Brown had misrepresented facts that might void one of the policies. Brown instigated an action for these claims and further alleged that the insurance company had acted in bad faith in its dealings with him. Brown then attempted to discover Continental's entire claims file relating to his fire loss. Continental refused to produce the file, arguing that the work product doctrine protected it from discovery. Brown subsequently filed a motion to compel the file's production. After an *in camera* inspection of its contents, the trial court denied the motion stating that the plaintiff had ready access to items contained in a substantial portion of the file and that the balance was "not discoverable."[7] Brown then brought a special action to compel production of the claims file, alleging that the trial court had abused its discretion.

The Arizona Supreme Court determined that only the file materials prepared after Continental denied the claims constituted work product.[8] Nonetheless, the court held that these materials were discoverable because the bad faith claim created a substantial need for them and an inability to obtain their equivalent.[9] The court also permitted the discovery of file materials containing mental impressions under a "central issue" exception to the general rule that opinion work product is not discoverable.[10]

This Casenote examines the major holdings in *Brown* and their potential impact on discovery in insurance bad faith and other actions. First, the multi-factor analysis adopted by the court to determine whether an item qualifies for the work product immunity is analyzed. The court's finding of

4. *Longs Drug Store*, 134 Ariz. at 430, 657 P.2d at 418.

5. 137 Ariz. 327, 670 P.2d 725 (1983).

6. The facts of *Brown* are set forth in 137 Ariz. at 330-31, 335-36, 670 P.2d at 728-29, 733-34.

7. *Id.* at 331, 670 P.2d at 729. The Arizona Supreme Court commented that because the trial court did not state specific grounds for its decision, review would be more difficult. *Id.* at 331 n.5, 670 P.2d at 729 n.5.

8. *Id.* at 335-36, 670 P.2d at 733-34.

9. *Id.* at 336-37, 670 P.2d at 734-35.

10. *Id.* at 337, 670 P.2d at 735. Continental also argued that some of the materials were irrelevant and others were protected by the accountant-client privilege. *Id.* at 332, 338, 670 P.2d at 730, 736. The Arizona Supreme Court held that materials relating to a property damage claim which had previously been settled were irrelevant. *Id.* at 332, 670 P.2d at 730. The court also found that the accountant-client privilege provided no protection to the claims file materials. *Id.* at 338, 670 P.2d at 736. Further discussion of these areas is beyond the scope of this Casenote.

substantial need is also discussed. Next, the "central issue" exception to the general rule that opinion work product is not discoverable is examined, along with suggestions for modification in future cases. Finally, this Casenote discusses an apparent rule resulting from *Brown* which may eliminate work product protection for claims files in bad faith actions.

Clarifying "Prepared In Anticipation of Litigation": A Multi-factor Analysis

The work product immunity extends to documents "prepared in anticipation of litigation."[11] Courts have had difficulty establishing consistent guidelines to determine whether a particular document constitutes work product. Approaches taken by other courts include: (1) rephrasing "prepared in anticipation of litigation";[12] (2) focusing on the purpose of the preparation;[13] (3) quantifying the likelihood of litigation;[14] (4) invoking per se rules;[15] and (5) analyzing on a case-by-case basis.[16]

In *Brown*, the Arizona Supreme Court expressed dissatisfaction with these various approaches. Rephrasing the definition or case-by-case analysis provides trial courts and attorneys with little guidance.[17] Per se rules do not permit the flexibility required to adequately deal with an infinite variety of situations.[18] The remaining approaches are unacceptable because they deal with only one aspect of whether an item was prepared in anticipation of litigation. In light of these criticisms, the Arizona Supreme Court adopted a multi-factor analysis set forth in a student law review note.[19] The analysis is largely a compilation of the various approaches discussed above.

Under this multi-factor work product analysis, courts examine and

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11. ARIZ. R. CIV. P. 26(b)(3), quoted in pertinent part in *supra* note 2.

12. *See, e.g.*, James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 143 (D. Del. 1982) ("prepared with an eye to some specific litigation"); Osterneck v. E.T. Barwick Indus., 82 F.R.D. 81, 87 (N.D. Ga. 1979) (prepared or obtained due to the prospect of litigation); Garfinkle v. Arcata Nat'l Corp., 64 F.R.D. 688, 690 (S.D.N.Y. 1974) ("done with litigation in mind").

13. *See, e.g.*, Dixon v. Cappellini, 88 F.R.D. 1, 3 (M.D. Pa. 1980) (documents resulting from "routine investigations by counsel" are not work product); GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 51 (S.D.N.Y. 1979) (immunity applies if litigation is one of several purposes for the preparation); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 152 (D. Del. 1977) (future litigation must be the "primary concern" when prepared); Carlo v. Queens Trans. Corp., 76 A.D.3d 824, 825, 428 N.Y.S.2d 298, 299 (1980) (documents prepared for multi-purposes are not protected).

14. *See, e.g.*, Coastal State Gas Corp. v. Dep't of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980) (litigation must have been "fairly foreseeable at the time the memoranda were prepared"); Defection Sys., Inc. v. Pittaway Corp., 96 F.R.D. 152, 155 (W.D.N.Y. 1982) (litigation must at least be a real possibility at the time of preparation); Securities Exch. Comm'n v. World-Wide Coin Invs., Ltd., 92 F.R.D. 65, 66 (N.D. Ga. 1981) (must have been a "substantial possibility" of litigation and "commencement of such litigation was imminent").

15. *See, e.g.*, Rakus v. Erie-Lackawanna R.R. Co., 76 F.R.D. 145, 146 (W.D.N.Y. 1977) (routine accident claims investigation reports are not protected under work product); Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367, 372 (N.D. Ill. 1972) (reports made without attorney involvement are "conclusively presumed" to be outside of work product); Almaguer v. Chicago, Rock Island & P.R.R. Co., 55 F.R.D. 147, 149 (D. Neb. 1972) (accident investigation reports are protected under work product).

16. *See, e.g.*, Spaulding v. Denton, 68 F.R.D. 342, 346 (D. Del. 1975).

17. *Brown*, 137 Ariz. at 333, 670 P.2d at 731.

18. *Id.* at 334, 335, 670 P.2d at 731, 733.

19. *Id.* at 335, 670 P.2d at 733 (citing Note, *Work Product Discovery: A Multifactor Approach to the Anticipation of Litigation Requirement in Federal Rule of Civil Procedure 26(b)(3)*, 66 IOWA L. REV. 1277, 1279-80 (1981).

weigh five factors.[20] First, courts examine the nature of the event that prompted the item's preparation to determine the likelihood of litigation.[21] The greater the likelihood at the time of preparation, the greater the inference that the item was prepared in anticipation of litigation.[22] Second, courts determine whether the material contains legal analysis and opinions or merely factual information.[23] The more legal analysis contained in an item, the stronger the inference it is work product.[24] Third, courts look to whether the item was prepared by or for an attorney.[25] Although attorney involvement is some evidence that litigation was anticipated, materials not prepared by or for an attorney may also qualify for the immunity.[26] Fourth, courts examine the nature of the preparation.[27] Materials prepared in the ordinary course of business are generally not protected.[28] Nonetheless, the immunity may still apply if a party's ordinary business is to anticipate litigation.[29] Fifth, courts look to the timing of the preparation.[30] The inference that a document was prepared for litigation is greater after the presentation, discussion, or negotiation of specific claims.[31]

These five factors need not all be present for a document to qualify as work product.[32] A court may determine that a single factor is strong enough to bring the item within the immunity. However, a court must examine all

20. The *Brown* court stated that other factors may be examined if they are relevant to the particular case. 137 Ariz. at 355, 670 P.2d at 733.

21. *Id.*

22. *See, e.g., Longs Drug Store*, 134 Ariz. at 426, 429, 657 P.2d at 414, 417 (reports resulting from an investigation by the defendant after its discovery that a discharged employee had retained counsel qualified as work product because litigation was "possible, if not probable").

23. *Brown*, 137 Ariz. at 335, 670 P.2d at 733.

24. *See, e.g., In re* Grand Jury Subpoena, 599 F.2d 504, 510-15 (2d Cir. 1979) (factual investigation by management was not work product, but attorney notes from interviews qualified); Stix Prods., Inc. v. United Merchants & Mfrs., Inc., 47 F.R.D. 334, 337 (S.D.N.Y. 1969) (document was work product partly because it was "couched in legal terminology, embodying a compendium of the attorney's mental impressions and beliefs").

25. *Brown*, 137 Ariz. at 335, 670 P.2d at 733. *See also*, Carver v. Allstate Ins. Co., 94 F.R.D. 131, 135 (S.D. Ga. 1982) (attorney involvement is a factor in determining what is work product); *Thomas Organ*, 54 F.R.D. at 372 (attorney involvement required if material is to be classified work product); State Farm Ins. Co. v. Roberts, 97 Ariz. 169, 175, 398 P.2d 671, 674 (1965) (attorney must prepare the document to constitute work product) (decided prior to the 1970 amendment to ARIZ. R. CIV. P. 26(b) which extended work product to non-attorney representatives).

26. ARIZ. R. CIV. P. 26(b)(3) expressly extends work product to documents prepared by or for party's non-attorney representatives (e.g., consultants, insurers, and agents). *See supra* note 1 and 2.

27. *Brown*, 137 Ariz. at 335, 670 P.2d at 733.

28. Janicker v. George Washington Univ., 94 F.R.D. 648, 650-51 (D.D.C. 1982) (committee reports prepared due to concerns over future safety were not work product while insurance investigation reports qualified); *Rakus*, 76 F.R.D. at 146 (railroad accident reports required by law are in regular course of business and consequently are not work product).

29. Note, *supra* note 19, at 1294. *See also* Westhemeco Ltd. v. New Hampshire Ins. Co., 82 F.R.D. 702, 708 (S.D.N.Y. 1979) (insurance claims investigations can shift from ordinary course of business to anticipation of litigation); *Longs Drug Store*, 134 Ariz. at 426, 429, 657 P.2d at 414, 417 (materials prepared by insurance investigator regarding potential claim constituted work product).

30. *Brown*, 137 Ariz. at 335, 670 P.2d at 733. *See* Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89, 92 (E.D. Mo. 1980) (in our "litigious society" anticipation of a claim is undeniable when an accident has occurred and a person or property has been injured).

31. Note, *supra* note 19, at 1295. *See also Stix Prods., Inc.*, 47 F.R.D. at 337 (opinion on patent validity prepared prior to litigation qualified as work product because notice of a potential infringement action from a party litigating the validity of the patent was the impetus for preparation).

32. Note, *supra* note 19, at 1298.

factors before deciding the immunity does not apply.[33] If the balancing process yields no clear determination, a court resolves doubt in favor of the qualified immunity, because the work product doctrine is supported by strong public policy.[34]

The Arizona Supreme Court's multi-factor analysis is intended to better accommodate the conflicting policies underlying the discovery process and the work product immunity.[35] The purpose of discovery is to provide the parties with access to all relevant information, to enable the true facts to be brought out at trial, and to prevent unfair surprise.[36] The work product doctrine limits discovery, first to enhance the quality of trial preparation since the immunity encourages attorneys and other representatives to commit their thoughts and the results of their efforts to writing;[37] and second to preserve the strength of the adversarial process by preventing attorneys from relying on their opponents' work when preparing their own cases.[38]

While the Arizona Supreme Court did not clearly state how the multi-factor analysis better accommodates these policies than other courts' approaches, the analysis appears to provide both predictability and flexibility.[39] If attorneys cannot predict what falls within the immunity, they may be deterred from writing down their thoughts. Conversely, courts must maintain flexibility in order to avoid unduly impairing an opposing party's ability to obtain information. The multi-factor analysis facilitates these competing interests by providing a structured analysis that avoids rigid rules[40] and more clearly defines the scope of work product than "prepared in anticipation of litigation."[41]

Applying its multi-factor analysis, the *Brown* court concluded that the pre-denial portion of Continental's claims file was not work product.[42] Continental did not anticipate litigation at that time because relatively few fire loss claims give rise to litigation.[43] The court considered Continental's post-denial items, however, to be work product. The court's holding was based on three of the five factors: (1) litigation was more likely after Continental denied Brown's claim; (2) Continental hired counsel shortly after the denial; and (3) Continental's assertion that Brown had made misrepresentations that might void his policy indicated that this was no longer an ordinary

33. *Id.* Although the *Brown* court appears to adopt the law review note's analysis in its entirety, it can be argued that the court impliedly rejected the note's assertion that to find that an item is not work product, all factors must be examined. *Id.* In analyzing the factors in *Brown*, the court found materials prepared prior to the denial of Brown's claims were not work product solely because "not every fire loss claim gives rise to an anticipation of litigation." 137 Ariz. at 335, 670 P.2d at 733. However, Continental did not argue that materials prepared prior to the denial were work product, *id.*, which may explain why the court performed an abbreviated analysis.

34. *Note, supra* note 19, at 1298. *See also* Upjohn Co. v. United States, 449 U.S. 383, 398 (1981); United States v. Nobles, 422 U.S. 225, 236 (1975).

35. *Brown*, 137 Ariz. at 334, 670 P.2d at 732.

36. *Id.*, *see* Watts v. Superior Court, 87 Ariz. 1, 5, 347 P.2d 565, 567 (1959).

37. *Hickman*, 329 U.S. at 511; *Longs Drug Store*, 134 Ariz. at 428, 657 P.2d at 416.

38. *Hickman*, 329 U.S. at 511, 516 (Jackson, J., concurring).

39. *Brown*, 137 Ariz. at 334, 670 P.2d at 732.

40. *Id.* at 335, 670 P.2d at 733.

41. ARIZ. R. CIV. P. 26(b)(3).

42. 137 Ariz. at 336, 670 P.2d at 734.

43. *See supra* note 33.

claims investigation.[44]

Substantial Need and An Inability to Obtain the Equivalent Without Undue Hardship

To discover the post-denial work product materials, Arizona Rule of Civil Procedure 26(b)(3) requires that Brown have a substantial need for the materials and be unable to obtain their equivalent without undue hardship.[45] The Arizona Supreme Court believed Brown's need for the materials was "overwhelming," and that other means of discovery would not provide their equivalent.[46] Consequently, although the post-denial materials were within the work product immunity, the court permitted their discovery.[47]

In reaching this conclusion, the court examined both the nature of insurance bad faith actions and the uniqueness of insurance claims files. The court recognized that in order to recover in bad faith actions, a plaintiff must show that the insurance company failed to process or pay a claim without a reasonable basis.[48] The court stated that the only way a plaintiff can meet this burden is by "showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did."[49] The claims file was thus viewed as a "unique, contemporaneously prepared history of the company's handling of the claim."[50] The court concluded that a plaintiff's need for the insurance claims file in bad faith actions is overwhelming.[51] Further, the court apparently concluded that because the claims file was "unique," its substantial equivalent could not be obtained elsewhere.[52]

The *Brown* court's rationale for its finding of substantial need does not clearly apply to the materials prepared after Continental's denial. Information regarding how the company investigated the claims and why the com-

44. 137 Ariz. at 335-36, 670 P.2d at 733-34.

45. ARIZ. R. CIV. P. 26(b)(3), *quoted in pertinent part* in *supra* note 2.

46. 137 Ariz. at 336, 670 P.2d at 734.

47. *Id.* at 336-37, 670 P.2d at 734-35. The court pointed out that other privileges, such as the attorney-client privilege, might possibly protect the materials, but the court did not decide the issue since it was not raised by the parties. 137 Ariz. at 337 n.7, 670 P.2d at 735 n.7. *But see* United Servs. Auto. Assoc. v. Werley, 526 P.2d 28, 33-35 (Alaska 1974) (prima facie showing of defendant insurance company's bad faith was enough to overcome the attorney-client privilege under the "civil fraud" exception).

48. *Brown*, 137 Ariz. at 336, 670 P.2d at 734.

49. *Id.*

50. *Id.*

51. *Id.* at 336-37, 670 P.2d at 734-35.

52. *Id.* at 336, 670 P.2d at 734. Continental argued that substantial need and an ability to obtain the equivalent without undue hardship were not present. It argued that Brown had a copy of the defendant's "Claims Handling Guide" describing Continental's method of handling claims and that Brown could have taken depositions which would have revealed how his particular claim was handled. Continental also asserted that Brown could have obtained the substantial equivalent of materials such as investigative reports by conducting his own investigation. Respondent Real Party In Interest's Memorandum In Support of Response to Petition for Special Action at 30-31, *Brown*. The court did not address these arguments, but instead merely asserted that the claims file is important evidence and the need for it in cases such as this is "overwhelming." 137 Ariz. at 336, 670 P.2d at 734 (citing APL Corp. v. Aetna Casualty & Surety Co., 91 F.R.D. 10, 13-14 (D. Md. 1980)). However, the court in *APL* did not make such a sweeping statement, but merely held that the insurance company could not withhold *all* investigative materials. 91 F.R.D. at 14. At issue in *APL* were specific documents relating to the investigation, not the entire claims file. *Id.* at 12-13.

pany decided to deny them would likely be contained in the pre-denial materials. The reasoning that the plaintiff needs the file to adequately prepare his case appears to be directed entirely to these pre-denial materials.[53] The court had previously held, however, that pre-denial materials were discoverable; thus only the post-denial materials were at issue.[54] Even assuming that the plaintiff had a strong need for the post-denial materials, this need would have lessened when Continental made available the pre-denial materials.[55] These items would provide the plaintiff with the information the court deemed essential to his case. Although the *Brown* court recognized this weakness, it failed to resolve the issue because it was not raised by the parties.[56]

Mental Impressions: A Central Issue Exception

Continental's claim file regarding Brown's loss included documents within the work product immunity that contained mental impressions and opinions of the company's claims representatives.[57] Mental impressions are the "core" of work product,[58] and their protection is central to the policies behind the immunity.[59] While courts clearly afford opinion work product greater protection than ordinary work product, they disagree on whether opinion work product is absolutely protected[60] or discoverable under some circumstances.[61] In *Brown*, the court held that opinion work product is discoverable if the opinions reflected in the materials are "directly at issue" and "central to a party's claim or defense."[62] The court reasoned that since the mental impressions of Continental's representatives relating to Brown's

53. The court also suggested that post-denial materials might be irrelevant as well as unnecessary. *Id.* However, the relevancy test for discovery is more liberal than for admission at trial. The information sought during discovery need only be "reasonably calculated to lead to the discovery of admissible evidence." ARIZ. R. CIV. P. 26(b)(1). Post-denial materials would likely have satisfied this requirement. Furthermore, the substantial need requirement provides more protection to documents than relevance and therefore should be the focus of analysis.

54. *Brown*, 137 Ariz. at 335, 670 P.2d at 733.

55. An argument supporting the court's rationale is that an insurance company's duty to deal in good faith with its insured does not end with the denial of a claim. *See* Noble v. National Am. Life Ins. Co., 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981); *see also infra* note 63. Since the insurance company's post-denial actions are at issue in bad faith actions, a plaintiff's need for documents prepared during this time is also compelling. The necessity, however, may be less than that for the pre-denial materials, since the company's continued denial will generally be based on its pre-denial investigation. Further, post-denial preparations may be prompted by the bad faith action itself and not soley by the underlying policy claim.

56. *Brown*, 137 Ariz. at 336 n.6, 670 P.2d at 734 n.6.

57. *Id.* at 337, 670 P.2d at 735.

58. *Nobles*, 422 U.S. at 238; Donovan v. Fitzsimmons, 90 F.R.D. 583, 588 (N.D. Ill. 1981).

59. *See supra* text accompanying notes 37-38.

60. Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 734 (4th Cir. 1975), *cert. denied*, 420 U.S. 997 (1975); Schlumberger Ltd. v. Superior Court, 115 Cal. App. 3d 386, 393, 171 Cal. Rptr. 413, 417 (1981).

61. *In re* Murphy, 560 F.2d 326, 336 (8th Cir. 1977) ("discoverable only in very rare and extraordinary circumstances"); Walker v. United Parcel Servs., 87 F.R.D. 360, 362 (E.D. Pa. 1980) (discoverable if "strong showing of necessity or prejudice or hardship"). The Arizona Supreme Court expressly left open this issue in *Longs Drug Store*, 134 Ariz. at 430 n.7, 657 P.2d at 418 n.7. There, the court held that the parties requesting the reports containing mental impressions could "draw their own conclusions and legal theories" from other available materials and their own investigation, so that discovery of the opinion work product was not required. *Id.* at 430, 657 P.2d at 418.

62. 137 Ariz. at 337, 670 P.2d at 735.

claims were directly at issue in the bad faith action,[63] they were discoverable.[64]

Justice Feldman, writing for the court, cited cases from other jurisdictions[65] and secondary sources[66] to support this "central issue" exception to the general rule that opinion work product is not discoverable.[67] The reasoning in these sources, however, is vague. The exception seems to have arisen from cases in which counsel sought to shield fraudulent activities behind the work product immunity.[68] The exception's principal justification is

63. To prove bad faith, a plaintiff must show "the insurer failed to honor a claim without a reasonable basis for doing so." Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 538, 647 P.2d 1127, 1136, *cert. denied*, 459 U.S. 1070 (1982). The subjective mental impressions of the insurance company representatives are not at issue. Instead, an objective standard of what a reasonable insurer would have done under the circumstances is used. Noble v. National Am. Life Ins. Co., 128 Ariz. at 190, 624 P.2d at 868. *See* North Ga. Lumber & Hardware v. Home Ins. Co., 82 F.R.D. 678, 680 (N.D. Ga. 1979) (discovery of opinion work product disallowed because bad faith is determined by the weakness of the insurance company's defense to the policy claim, not by the mental impressions of the adjusters). Subjective mental impressions may be at issue for punitive damages, which are awarded if the wrongdoer's conduct is "wanton, reckless or shows spite or ill will." Nienstedt v. Wetzel, 133 Ariz. 348, 357, 651 P.2d 876, 885 (Ct. App. 1982). The punitive damage standard, however, can be inferred from the circumstances. *See* Richardson v. Employers Liab. Assurance Corp., 25 Cal. App. 3d 232, 245, 102 Cal. Rptr. 547, 556 (1972). Also, even if it is assumed that evidence of the actual mental impressions of the representatives relating to how the company reached its decision is required, it would likely be contained in the pre-denial materials which the court already held to be discoverable. *See supra* notes 53-55 and accompanying text.

64. *Brown*, 137 Ariz. at 337, 670 P.2d at 735.

65. Justice Feldman cited Donovan v. Fitzsimmons, 90 F.R.D. 583 (N.D. Ill. 1981); Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co., 66 F.R.D. 129 (E.D. Pa. 1975); Securities Exch. Comm'n v. National Student Mktg. Corp., 18 Fed R. Serv. 2d 1302 (D.D.C. 1974); Bird v. Penn Cent. Co., 61 F.R.D. 43 (E.D. Pa. 1973); Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 296 F. Supp. 979 (E.D. Wis. 1969); Bourget v. Government Employees Ins. Co., 48 F.R.D. 29 (D. Conn. 1969).

66. 4 J. MOORE, J. LUCAS & G. GROTHER, *supra* note 3, at ¶ 26.64[4]; Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333 (1978).

67. The court also suggested that the language of ARIZ. R. CIV. P. 26(b)(3) mandates such a result. *Brown*, 137 Ariz. at 337 n.8, 670 P.2d at 735 n.8. Rule 26(b)(3) requires courts to protect from disclosure mental impressions "concerning *the* litigation." Rule 26(b)(3) (emphasis added). According to the court, this language suggests that the absolute immunity is "only applicable to the work product of the very case being litigated." 137 Ariz. at 337 n.8, 670 P.2d at 735 n.8. The overwhelming majority of federal courts considering the issue hold that documents retain the work product immunity after the litigation for which they were prepared has terminated. *See* Federal Trade Comm'n v. Grolier Inc., 103 S. Ct. 2209, 2214 (1983), and cases cited therein. Some courts only extend protection if the subsequent litigation is related. *See, e.g., Hercules, Inc.*, 434 F. Supp. at 153. For a discussion of this issue see generally Note, *The Work Product Doctrine in Subsequent Litigation*, 83 COLUM. L. REV. 412 (1983); 8 C. WRIGHT & A. MILLER, *supra* note 3, § 2024, at 201-02 (1970).

Since the court did not rely on this interpretation, it failed to reconcile the central issue exception with the language of ARIZ. R. CIV. P. 26(b)(3). That rule states that courts "*shall* protect against disclosure of mental impressions" (emphasis added). This language appears to envision an absolute protection from discovery for opinion work product. The state bar committee in adopting Rule 26(b)(3) believed that the rule provided absolute protection. ARIZ. R. CIV. P. 26(b)(3) state bar committee note.

If the court's suggested interpretation of Rule 26(b)(3) was applied, portions of the claims file would probably be absolutely protected. Much of the post-denial opinion work product at issue was likely prepared in anticipation of the bad faith action.

68. *See, e.g.*, Clark v. United States, 289 U.S. 1, 15 (1932) (privileges will not protect commission of a fraud); *In re* Doe, 662 F.2d 1073, 1079 (4th Cir. 1981) (work product not intended to provide attorneys with "an untouchable status"), *cert. denied*, 455 U.S. 1000 (1982). *In re* Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982) (opinion work product not privileged if performed in furtherance of a "crime, fraud, or other type of misconduct fundamentally inconsistent with the basic premises of the adversary system"); *National Student Mktg. Corp*, 18 Fed. R. Serv. 2d at 1305 (attorney involvement in fraud is outside work product because it is beyond the role of a lawyer).

that a party's need for documents containing opinions directly at issue is so compelling that justice and fairness require their discovery.[69] Without this exception, a party who invokes the work product immunity may effectively eliminate his opponent's potential claim or defense because frequently the mental state at issue cannot be proven by other means.[70] Even if other evidence of the opinions is available, opinion work product is often the best evidence, and its absence may severely limit the requesting party's chances at trial.

Brown's *Effect on the Work Product Immunity*

Brown clearly will affect discovery of work product in at least two areas. First, the Arizona Supreme Court created a fairly broad central issue exception that should be more narrowly applied in other factual settings. Second, the court may have eliminated work product as a barrier to plaintiffs in insurance bad faith actions.

An Overly Broad Central Issue Exception?

The central issue exception should be cautiously applied to factual settings other than that set forth in *Brown*.[71] The danger is that an overly broad interpretation may circumvent the work product doctrine in at least two ways. First, it might discourage attorneys and other representatives from committing their thoughts to writing,[72] which would defeat an important purpose behind the immunity.[73] Second, abuse might result if a party is able to circumvent the immunity simply by alleging a claim or defense that puts mental impressions at issue.[74]

This potential for negative side effects has led some courts and observ-

69. *See Donovan*, 90 F.R.D. at 588 (opposing party's need overcomes policy of attorney privacy because evidence of the opinions was critical to the opposition's case); O'Boyle v. Life Ins. Co. of N. Am., 299 F. Supp. 704, 706 (W.D. Mo. 1969) (to disallow discovery of opinion work product in insurance bad faith action would be unjust); Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 296 F. Supp. 979, 982 (E.D. Wis. 1969) (discovering party's need outweighs an opponent's "right to retain benefit of [attorney's] research" when opinions are directly at issue).

70. *See* Kockrums Indus. v. Salem Equip. Inc., 561 F. Supp. 168, 173 (D. Or. 1983) (opinion work product discoverable partly because without these materials the defendant would have had "no chance to prove its potentially valid counterclaims"); Panter v. Marshall Field & Co., 80 F.R.D. 718, 726 (W.D. Ill. 1978) (discovery allowed because advice of counsel was a "critical issue" and information in the documents was not available from other sources); Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 931 (N.D. Cal. 1976) (discovery ordered partly because without the documents, cross-examination of witnesses would be ineffective).

71. Potential areas of applicability include legal malpractice, malicious prosecution and subrogation actions. *See, e.g., Panter*, 80 F.R.D. at 718 ("advice of counsel" defense in shareholders' suit against corporate officials); *Truck Ins. Exch.*, 66 F.R.D. at 136 (indemnity action); Kirkland v. Morton Salt Co., 46 F.R.D. 28, 29 (N.D. Ga. 1968) (malicious use of process action).

72. *Brown* may have this effect on insurance adjusters if the case is viewed as permitting discovery of claims files work product as a matter of law in insurance bad faith actions. *See infra* text accompanying notes 82-88. This apparent per se rule, along with the increasing frequency of bad faith actions, may inhibit adjusters from writing down unfavorable aspects of a claim.

73. *See supra* note 37 and accompanying text.

74. *See* Moody v. Internal Revenue Serv., 654 F.2d 795, 800 n.17 (D.C. Cir. 1981) (allowing discovery of work product to determine if "misbehavior" has occurred is "an exception which threatens to swallow the rule"); Maryland Am. Gen. Ins. Co., v. Blackman, 639 S.W.2d 455, 458 (Tex. 1982) (if allegations of insurance company bad faith putting opinions at issue will vitiate work product, the result would be an allegation of bad faith in all insurance claims).

ers to impose additional requirements before a party can invoke the central issue exception. Three main requirements seem to emerge. First, the discovering party must have a colorable claim or defense.[75] This minimizes potential abuse by parties who might put opinions at issue by alleging frivolous claims or issues.[76] Second, the requesting party's need must be compelling[77] and the evidence critical.[78] Some cases suggest that the likelihood of success on the claim or defense must be significantly reduced without the requested items.[79] Finally, the requesting party must show that he has exhausted his own efforts and has been unable to obtain the information elsewhere because it is exclusively within the knowledge of his opponent.[80] This requirement avoids unnecessary intrusions into work product by forcing parties to otherwise obtain the information when possible.

By considering these additional requirements before allowing discovery of opinion work product under the central issue exception, courts help to preserve the goals behind the work product doctrine. The exception is restrictive enough so that opinion work product is discoverable only in rare circumstances,[81] thereby minimizing abuse. These requirements also focus on the policy behind the exception: work product should not be used to shield mental impressions directly at issue when it prevents a party from effectively asserting a claim or defense.

Elimination of Work Product Immunity in Insurance Bad Faith Discovery?

The *Brown* court may well have eliminated work product as a barrier to plaintiffs who seek to discover insurance claims files in bad faith actions.[82]

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75. *See Clark v. United States*, 289 U.S. at 15 (prima facie showing of fraud required to defeat attorney-client privilege); *In re* Doe, 662 F.2d at 1080 (prima facie showing of fraud required to discover opinion work product); *Kockrums Indus.*, 561 F. Supp. at 173 (prima facie showing of requesting party's claim required to discover opinion work product); *Donovan*, 90 F.R.D. at 587-88 (rejection of attorney client privilege partly because presentation of a colorable claim was a factor in adopting the central issue exception for work product).

76. *See Kearney & Trecker Corp.*, 296 F. Supp. at 982 (work product discoverable because attorney's actions were at issue and because this was not an effort "to rifle an attorney's mind and file" nor an effort to "make sure he has overlooked nothing").

The Arizona Rules of Civil Procedure may provide some protection in this area. The incentive for pleading claims or defenses that put opinions at issue to circumvent work product could be minimized by the use of protective orders under ARIZ. R. CIV. P. 26(c). For example, an insurance company could obtain a protective order preventing discovery of its claims file for use in a bad faith claim until the policy claim was resolved. *See Maryland Am. Gen. Ins. Co.*, 639 S.W.2d at 456. ARIZ. R. CIV. P. 11 (a) requires pleadings be "well grounded in fact" after a "reasonable inquiry" and that they not be interposed for any improper purpose. This rule permits sanctions to be enforced against violators, which may include payment of reasonable expenses to the other party. Also, such pleadings could be eliminated with a motion for summary judgment. ARIZ. R. CIV. P. 56. A motion for summary judgment, however, could be more costly than a motion to compel production, and a party might request a continuance for discovery. ARIZ. R. CIV. P. 56(f).

77. *Brown*, 137 Ariz. at 336, 670 P.2d at 734, *Handgards, Inc.*, 413 F. Supp. at 931; *See also Bird*, 61 F.R.D. at 47; Note, *supra* note 66, at 341-42.

78. *Donovan*, 90 F.R.D. at 588.

79. *See Handgards*, 413 F. Supp. at 931; *Bird*, 61 F.R.D. at 47.

80. Note, *supra* note 66, at 343.

81. *Hickman*, 329 U.S. at 513; *In re* Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979); *Longs Drug Store*, 134 Ariz. at 430, 657 P.2d at 418.

82. Apparently, it has been a routine practice in Arizona to turn over insurance claims files to plaintiffs in bad faith actions. Petitioner's Memorandum of Points and Authorities, Petition for

A plaintiff's substantial need for insurance files relating to a claim which is the subject of a bad faith action now appears to exist as a matter of law.[83] This rule seems to be the inevitable result of the court's reliance on the general nature of insurance bad faith actions rather than on the facts of *Brown* for its holding that the trial court abused its discretion in denying discovery.[84] The extra protection afforded opinion work product is also apparently ineffective in insurance bad faith actions. The nature of insurance bad faith claims was again the underlying rationale for the court's holding that the mental impressions were discoverable under the central issue exception.[85]

The *Brown* court left open two areas in which an insurance company defendant in a bad faith action might argue that work product protects at least portions of the claims file from discovery. First, if the company has not resolved the underlying policy claim, portions of the file relating to that claim might receive the immunity until the claim's disposition.[86] Second, the immunity might still extend to materials prepared after the insurance company determines what benefits to provide under the insurance policy.[87] The *Brown* court suggested that a plaintiff may lack the requisite necessity for those materials. Additionally, privileges, such as the attorney-client privilege, may shield specific documents within the file from discovery.[88]

Conclusion

In *Brown v. Superior Court of Maricopa County*, the Arizona Supreme Court outlined a multi-factor analysis to determine whether a document qualifies as work product. This analysis clarifies the definition of the immunity—"prepared in anticipation of litigation"—yet maintains the flexibility required in individual cases. The court permitted discovery of mental impressions under a central issue exception to the general rule protecting opinion work product from disclosure. This exception allows discovery when the opinions themselves are directly at issue and central to the requesting party's claim or defense. Additional requirements within this exception will avoid undercutting the policies behind the work product doctrine. Finally, the court's application of the substantial need standard and the central issue ex-

Special action, at 1, *Brown*. Consequently, this apparent rule may have little practical effect in most cases. However, some tactical advantages in resisting discovery occasionally arise, as was the apparent situation in *Brown*.

83. The court does not seem to be concerned about the lack of flexibility this apparent per se rules brings to insurance bad faith cases. This is in sharp contrast to the court's rationale for adopting the multi-factor analysis, which considers flexibility of great importance. *See Brown*, 137 Ariz. at 335, 670 P.2d at 733; *supra* text accompanying notes 39-41.

84. *Brown*, 137 Ariz. at 336-37, 670 P.2d at 734-35. *See supra* notes 52 and 63 and accompanying text.

85. *Brown*, 137 Ariz. at 337, 670 P.2d at 735. *See supra* note 63 and accompanying text.

86. *Brown*, 137 Ariz. at 330 n.1, 670 P.2d at 728 n.1. Protective orders could be used to accomplish this purpose. *See supra* note 67, 76.

87. *Brown*, 137 Ariz. at 336 n.6, 670 P.2d at 734 n.6. *See supra* notes 50-54 and accompanying text.

88. *Brown*, 137 Ariz. at 337 n.7, 670 P.2d at 735 n.6. *See* ARIZ. R. CIV. P. 26(b)(3) *quoted in pertinent part supra* note 2 (documents may be obtained under 26(b)(3) only if they are "otherwise discoverable"); *supra* note 47.

ception in *Brown* suggest that work product may provide little, if any, protection for claims files in future insurance bad faith actions.

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II. EMINENT DOMAIN

EMINENT DOMAIN: JUDICIAL REVIEW IN CONDEMNATION UNDER ARIZONA'S SLUM CLEARANCE AND REDEVELOPMENT STATUTE

The Arizona Legislature has authorized municipalities to exercise eminent domain powers to remove slum or blight conditions.[1] In *City of Phoenix v. Superior Court*,[2] the Arizona Supreme Court held that the judiciary has a very limited role in reviewing a condemnor's determination that property is actually blighted. A trial court's review of a condemning authority's determination that property is within a slum or blighted area is limited to questions of fraud, collusion, bad faith, or the condemnor's arbitrary and capricious conduct.[3]

The supreme court in *City of Phoenix* reiterates the long-established rule that any taking by eminent domain must meet two requirements: the taking must be for a public use[4] and must be necessary[5] for the public use. The Arizona statute which authorizes condemnation for slum clearance and redevelopment adds an additional requirement: the condemnor must make a finding of blight or slum conditions on or around the subject property.[6] Both parties in *City of Phoenix* sought to merge this third requirement into one of the two traditional prerequisites for the exercise of eminent domain.[7] Instead, the supreme court decided that the blight requirement is distinct and separate from the public use and necessity requirements.[8]

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1. ARIZ. REV. STAT. ANN. §§ 36-1471 to -1479 (1974).

2. 137 Ariz. 409, 671 P.2d 387 (1983).

3. *Id.* at 416, 671 P.2d at 394.

4. *Id.* at 411, 671 P.2d at 389. ARIZ. CONST. art. II, § 17. *See* Citizens Utilities Water Co. v. Superior Court, 108 Ariz. 296, 497 P.2d 55, *cert. denied*, 409 U.S. 1022 (1972); City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270, 408 P.2d 818 (1965); Cienega Cattle Co. v. Atkins, 59 Ariz. 287, 126 P.2d 481 (1942); Cordova v. City of Tucson, 16 Ariz. App. 447, 494 P.2d 52 (1972).

5. 137 Ariz. at 411, 671 P.2d at 389. ARIZ. REV. STAT. ANN. § 12-1112 (1974) conditions any taking by eminent domain upon a showing that the taking is "necessary" for a proper use. *See also* 1 NICHOLS ON EMINENT DOMAIN § 4.11[1] (J. Sackman, 3rd. ed. rev. 1981) [hereinafter cited as 1 NICHOLS].

6. ARIZ. REV. STAT. ANN. § 36-1473 (1974) provides that:

> No municipality shall exercise any of the powers conferred upon municipalities by this article until its local governing body adopts a resolution finding that: 1. One or more slum or blighted areas exist in the municipality, and 2. The redevelopment of such area or areas is necessary in the interest of the public health, safety, morals or welfare of the residents of the municipality.

Further, ARIZ. REV. STAT. ANN. § 36-1478 requires that the acquisition of any interest in real estate must be necessary for or in connection with a redevelopment project.

7. The City argued that the determination of the existence of blight is essentially a determination of the necessity of the taking, subject only to limited judicial review. The landowners, on the other hand, argued that there exists no valid public use for which a municipality may acquire property pursuant to the slum clearance and redevelopment statutes if no condition of slum or blight exists. Therefore, argued the landowners, it is within the jurisdiction of the trial court to determine the issue of slum or blight conditions in the first instance. *City of Phoenix*, 137 Ariz. at 410-11, 671 P.2d at 388-89.

8. *Id.* at 411, 671 P.2d at 389.

The Underlying Controversy

The controversy in *City of Phoenix*[9] arose when the City of Phoenix (City) attempted to use eminent domain powers to acquire land for the Good Samaritan Redevelopment Plan. The City filed suit to condemn property owned by the Hurley Trust Company (Landowners)[10] and applied for an order granting immediate possession in advance of trial.[11] At the hearing on the immediate possession application, the trial court considered evidence regarding the conditions on and around the property and determined that the statutorily defined slum or blight conditions did not actually exist on the property.[12] The trial court thus rejected the City's application for immediate possession.[13]

The City then filed a Petition for Special Action[14] in the Arizona

9. The facts of *City of Phoenix* are set forth 137 Ariz. at 410, 671 P.2d at 388.

10. The real parties in interest, Hurley Trust Company, an Arizona corporation, and Jane Hurley Haney, conservator of the estate of John Cornelius Hurley, were the owners of the real property sought for acquisition. Other real parties in interest were lessees and sublessees of the property. Petitioner's Petition for Special Action at 2, City of Phoenix v. Superior Court, 137 Ariz. 409, 671 P.2d 387 (1983).

Amicus curiae briefs were filed on behalf of the Trammel Crow Company and the League of Arizona Cities and Towns. Trammel Crow is a Texas corporation which, according to its application to file amicus briefs, previously acted as a private redeveloper under the Arizona slum clearance and redevelopment legislation and intended to act as a redeveloper in the city of Phoenix. Application For Permission to File Memorandum of Law as *Amicus Curiae* by Trammel Crow Company at 2, *City of Phoenix*, 137 Ariz. 409, 671 P.2d 387 (1983).

11. ARIZ. REV. STAT. ANN. § 12-1116 (West Supp. 1984) permits a governmental body which has filed an action to condemn real property to acquire possession of that property in advance of trial, providing that the condemnor can show that the taking is "necessary" and posts a bond to cover the "probable damages."

12. The statutory definitions of "blight" and "slum" are contained in ARIZ. REV. STAT. ANN. § 36-1471 (1956):

> 2. 'Blighted area' means an area, other than a slum area, which by reason of the predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility or usefulness, unsanitary or unsafe conditions, deterioration of the site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accomodations or constitutes an economic or social liability and is a menace to the public health, safety, morals or welfare in its present condition and use.
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> . . . .
>
> 18. 'Slum area' means an area in which a majority of the structures are residential, or an area in which there is a predominance of buildings or improvements, whether residential or nonresidential, and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime, and is detrimental to the public health, safety, morals or welfare.

13. Order of the trial court denying the city's application cited in Count XI of the City's Petition for Special Action. Petition for Special Action at 4, *City of Phoenix*, 137 Ariz. 409, 671 P.2d 387 (1983).

14. The Arizona Supreme Court may accept jurisdiction in a case where there is no equally plain, speedy, and adequate remedy by appeal. 17A ARIZ. REV. STAT. ANN. SPECIAL ACTIONS, RULES OF PROC., Rule 1 (1973). The only questions that may be raised on a special action are: (a) whether the defendant failed to exercise discretion or perform another duty required by law; (b) whether defendant is proceeding or is threatening to proceed without or in excess of jurisdiction; or (c) whether defendant made a determination that is arbitrary and capricious or an abuse of discretion. 17A ARIZ. REV. STAT. ANN. SPECIAL ACTIONS, RULES OF PROC., Rule 3 (1973).

Supreme Court alleging that the trial judge acted in excess of his authority and abused his discretion by denying the City's application for immediate possession. The supreme court agreed, ruling that it was error to refuse the application based on the trial court's independent determination that the property was not plagued by statutorily defined slum or blight conditions.[15]

The supreme court drew an analogy between the blight and necessity requirements in order to justify its holding that the condemnor's determination of blight conditions is subject only to limited judicial review.[16] The court further supported its holding with a public policy rationale.[17]

This Casenote examines the scope of judicial review in slum clearance and redevelopment condemnation cases. It also analyzes the impact of the *City of Phoenix* rule on eminent domain practice in Arizona.

Limitations on Power to Condemn in Arizona

Eminent domain is the power of the government to appropriate private property without the owner's consent.[18] Because the power is inherent in the sovereign,[19] constitutional provisions relating to the taking of property by eminent domain are limitations on exercise of the power rather than grants of power.[20] Unlike a sovereign, a municipality or other condemning agency has no inherent eminent domain powers. The legislature must specifically delegate the authority to exercise eminent domain powers to the political subdivisions.[21] The legislature may therefore enact additional procedural requirements for condemnation or otherwise restrict the delegated power.

The two traditional limitations on the power to exercise eminent domain in Arizona are "public use"[22] and "necessity."[23] The statutory requirement that a condemnor find blight conditions is an additional

15. *City of Phoenix*, 137 Ariz. at 416, 671 P.2d at 394.

16. *Id.* at 412-14, 671 P.2d at 390-92.

17. *Id.* at 413, 671 P.2d at 391.

18. *In re* Forsstrom, 44 Ariz. 472, 479, 38 P.2d 878, 881 (1934); Scott v. Toledo, 36 F. 385, 288 (C.C. Ohio 1888); 1 NICHOLS, *supra* note 5, at § 1.11.

19. City of Mesa v. Salt River Project Agricultural Improvement & Power Dist., 92 Ariz. 91, 104, 373 P.2d 722, 731 (1962); City of Scottsdale v. Municipal Court of Tempe, 90 Ariz. 393, 396, 368 P.2d 637, 638 (1962); County of Maricopa v. Anderson, 81 Ariz. 339, 343, 306 P.2d 268, 271 (1957); *In re* Forsstrom, 44 Ariz. 472, 479, 38 P.2d 878, 881-82 (1934); 1 NICHOLS, *supra* note 5, at § 1.14[2].

20. 1 NICHOLS, *supra* note 5, at §§ 1.3, 1.4. *See* City of Cincinnati v. Louisville & N. R.R. Co., 223 U.S. 390, 400 (1912); City of Scottsdale v. Municipal Court of Tempe, 90 Ariz. 393, 396, 368 P.2d 637, 638-39 (1962); *In re* Forsstrom, 44 Ariz. 472, 479, 38 P.2d 878, 881-82 (1934).

21. *See* City of Cincinnati v. Vester, 281 U.S. 439, 448 (1930) (condemnation permitted by the constitution was nevertheless struck down because of non-compliance with the statute granting authority to condemn); City of Phoenix v. Donofrio, 99 Ariz. 130, 134, 407 P.2d 91, 93 (1965) (holding that the "buildings and grounds" provision of ARIZ. REV. STAT. ANN. § 12-1112 does not include the power to condemn private property for parking for official vehicles, public officials, and individuals with official business); County of Maricopa v. Anderson, 81 Ariz. at 343, 306 P.2d at 271 (1957) ("A county is a creature of the state and while no part of sovereignty is vested in the county, it may be given the right to exercise that power . . . but in doing so it is acting as the agent of the sovereign state."); *Forsstrom*, 44 Ariz. at 477, 38 P.2d at 881 (1934) (Art. II, § 17 of the Arizona Constitution is not self-executing but requires legislation to put it into effect). *See generally* I. LEEVY, CONDEMNATION IN USA § 3.02(3) (1969).

22. *See supra* note 4 and accompanying text.

23. *See supra* notes 5 and 6 and accompanying text.

requirement unique to condemnation for slum clearance and redevelopment.[24]

Traditional Public Use Analysis

In all American jurisdictions, the first prerequisite to any governmental taking of private property without the owner's consent is that the taking be for a public use.[25] The Arizona Constitution expressly states this requirement.[26] Further, the Arizona Constitution provides that the determination of whether "a contemplated use be really public shall be a judicial question, and determined without regard to any legislative assertion that the use is public."[27]

In Arizona, public use is broadly defined to require only some form of public benefit or advantage. Actual use by some segment of the public is not required.[28]

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24. ARIZ. REV. STAT. ANN. § 36-1473; *City of Phoenix*, 137 Ariz. at 410, 671 P.2d at 388.

25. Alabama (ALABAMA CONST. art. I, § 23), Colorado (COLO. CONST. art. II, § 17), Missouri (MO. CONST. art. I, § 28), Oklahoma (OKLA. CONST. art. II, § 23), South Carolina (S.C. CONST. art. I, § 17), Washington (WASH. CONST. art. I, § 16), and Wyoming (WYO. CONST. art. I, § 32) have constitutional provisions similar to the Arizona general prohibition on the taking of property for private use. In other states, the taking of property under eminent domain powers for private uses is not specifically prohibited. 2A NICHOLS ON EMINENT DOMAIN § 7.01 (J. Sackman 3rd. ed. rev. 1981) [hereinafter cited as 2A NICHOLS]. Many state constitutions merely provide that property shall not be taken for the public use without compensation. 1 NICHOLS, *supra* note 5 at § 1.3. Courts, however, universally hold that a governmental appropriation of private property must be for a public use. For a discussion of the various approaches used to find a public use requirement in constitutional provisions, see 2A NICHOLS, *supra* § 7.01.

In United States *ex rel* Tennessee Valley Auth. v. Welch, 327 U.S. 546 (1946), the Supreme Court approved the use of excess condemnation in connection with a public dam-building project. One student author considered the case and concluded that the Supreme Court had repudiated the public use doctrine and would in the future be evoked only nostalgically in dicata. Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949); *See also* Epstein, *The Public Purpose Limitation on the Power of Eminent Domain: A Constitutional Liberty Under Attack*, 4 PACE L. REV. 231 (1984).

Another writer criticized the "Advance Requiem" and concluded that the public use doctrine still retains some vitality. Note, *The Public Use Doctrine: "Advance Requim" Revisited*, 1969 LAW AND THE SOCIAL ORDER [1 ARIZ. ST. L.J.] 688, 703 (1969); *See also* Lawrence, *Constitutional Limitations on Governmental Participation in Downtown Development Projects*, 35 VANDERBILT L. REV. 277 (1982); Comment, *Eminent Domain—The Meaning of the Term "Public Use"—Its Effect on Excess Condemnation*, 18 MERCER L. REV. 274 (1966).

For an overview of judicial review of public use issues in Arizona, see Citizens Utilities Water Co. v. Superior Court, 108 Ariz. 296, 497 P.2d 55, *cert. denied*, 409 U.S. 1022 (1972); Inspiration Consol. Copper Co. v. New Keystone Copper Co., 16 Ariz. 257, 144 P. 277 (1914); Oury v. Goodwin, 3 Ariz. 255, 26 P. 376 (1891). *See also* Casenote, *Judicial Review in Eminent Domain Proceedings*, 15 ARIZ. L. REV. 796, 797-800 (1973).

26. ARIZ. CONST. art. II, § 17.

27. *Id.* Most states do not have a constitutional provision directing the courts to determine whether a use is public without regard to any legislative assertion. 2A NICHOLS, *supra* note 25, at § 7.16. However, most jurisdictions hold that the question of public use is ultimately a judicial one. For a list of decisions so holding, *see* 2A NICHOLS, *supra* note 25, at § 7.01, § 7.01[2]. *But see* Berman v. Parker, 384 U.S. 26, 32 (1954) where the Court reviewed the power of Congress to condemn property in the District of Columbia for urban development: "The role of the judiciary in determining whether [eminent domain] power is being exercised for a public purpose is an extremely narrow one." Where there is no constitutional admonition to disregard any legislative assertion of public use, the courts presume that a use is public when the legislature declares that it is. *See infra* note 32.

28. *Citizens Utilities Water Co.*, 108 Ariz. at 298, 497 P.2d at 57 (1972). The Arizona Supreme Court adhered to the broad view of the public use limitation, stating that "[t]he untrammeled right

Although public use is broadly defined, each attempt to condemn is generally subject to thorough judicial scrutiny on the public use issue.[29] Arizona courts have repeatedly held that the judiciary makes the initial determination of public use.[30] Courts decide the public use issue on a case by case basis, determining the constitutionality of each taking on the facts presented in the case.[31] While in some jurisdictions, courts will consider or defer to legislative declarations that a particular use is public,[32] Arizona courts adhere to the state constitution's admonition that public use be determined without regard to any legislative assertion.[33]

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to use property to be condemned, then, is not the criterion of whether the use is to be made a public one." *Id.*

29. Because of the separation of powers' doctrine, it is a judicial function to rule as a matter of law whether the declared use is actually a public use: "[t]he question of the public character of the use is aimed at the very power of the legislature, under the Constitution, to authorize the condemnation at all; and this question of its own constitutional power cannot be conclusively decided by the legislature itself." C. ELLIOT, THE PRINCIPLES OF THE LAW OF MUNICIPAL CORPORATIONS § 117 (3d ed. 1925).

30. Citizens Utilities Water Co. v. Superior Court, 108 Ariz. 296, 497 P.2d 455, *cert. denied*, 409 U.S. 1022 (1972); City of Phoenix v. Phoenix Civil Auditorium & Convention Center Ass'n, 99 Ariz. 270, 408 P.2d 818 (1965); Oury v. Goodwin, 3 Ariz. 255, 26 P. 376 (1891).

31. *Citizens Utilities Water Co.*, 108 Ariz. at 297, 497 P.2d at 58. In the following cases, courts have applied the constitutional public use test to particular applications of eminent domain powers: Citizens Utilities Water Co. v. Superior Court, 108 Ariz. 296, 497 P.2d 55 (1972) (condemnation of a water utility outside municipal boundaries and not used to serve the city's citizens was a taking for public use) *cert. denied*, 409 U.S. 1022 (1972); City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270, 408 P.2d 818 (1965) (municipal auditorium and convention center was a public use); Humphrey v. City of Phoenix, 55 Ariz. 374, 102 P.2d 82 (1940) (law authorizing slum clearance is constitutional even though the property's ultimate use is private low-income housing); Inspiration Consol. Copper Co. v. New Keystone Cooper Co., 16 Ariz. 257, 144 P. 277 (1914) (condemnation for a tunnel to be used only with permission of private party not a valid public use); Oury v. Goodwin, 3 Ariz. 255, 26 P. 376 (1891) (irrigation of agricultural lands is a public use); Cordova v. City of Tucson, 16 Ariz. App. 447, 494 P.2d 52 (1972) (taking to preserve historic property represents a proper public use).

32. The presumption is that a use is public if the legislature has declared it to be such. Hirsh v. Block, 267 F. 614 (D.C. Cir.), *rev'd on other grounds*, 256 U.S. 135 (1920); United States *ex rel*, Tennessee Valley Auth. v. Three Tracts of Land, 377 F. Supp. 631 (N.D. Ala. 1974); Humphrey v. Phoenix, 55 Ariz. 374, 102 P.2d 82 (1940); People v. Superior Court of Merced County, 68 Cal. 2d 206, 605 Cal. Rptr. 342, 436 P.2d 342 (1968); Port of Umatilla v. Richmond, 212 Or. 596, 321 P.2d 338 (1958); 2A NICHOLS, *supra* note 25, at § 7.16 [1].

The presumption is not binding on the courts, however. If the court determines that the purpose has no substantial relationship to the public use, it has a duty to declare the taking unconstitutional: "Whatever may be the scope of the judicial power to determine what is a 'public use' in Fourteenth Amendment controversies, this Court has said that when Congress has spoken on this subject '[I]ts decision is entitled to deference until it is shown to involve an impossibility.' Old Dominion Co. v. United States, 269 U.S. 55, 66." United States *ex rel* Tennessee Valley Auth. v. Welch, 327 U.S. 546, 552 (1946). *See also* Rindge Co. v. Los Angeles County, 262 U.S. 700, 706 (1923) (court will be influenced by judgment of local authority regarding what should be deemed public uses in any state), *aff'g* 53 Cal. App. 166, 200 P. 27 (1923); Cincinnati v. Vester, 33 F.2d 242, *aff'd*, 281 U.S. 439 (1930); Housing Auth. of Oakland v. Forbes, 51 Cal. App. 2d 1, 124 P.2d 194 (1942); 2A NICHOLS, *supra* note 25, at § 7.16[1].

The courts in the following cases will review a legislative determination of public use only upon a showing that the determination is manifestly arbitrary or palpable: County of Los Angeles v. Anthony, 224 Cal. 2d 103, 36 Cal. Rptr. 308 (1964); Gregory Marina, Inc. v. Detroit, 378 Mich. 364, 396, 144 N.W.2d 503, 535 (1966); *In re* Petition of Seattle, 96 Wash. 2d 616, 638 P.2d 549 (1981).

33. *City of Phoenix*, 137 Ariz. at 411, 671 P.2d at 389; *Citizens Utilities Water Co.*, 108 Ariz. at 297, 497 P.2d at 56.

Eradication of Slum Conditions Constitutes a Public Use

Application of the public use test to attempted condemnation for slum clearance and redevelopment presents special problems. The slum clearance and redevelopment statute authorizes the resale of condemned land to private parties for private development.[34] Admittedly, when the ultimate use of condemned property is private development, that use may not be a public use even under a broad definition.[35]

In Arizona, the legislature had declared, and the Arizona courts have agreed, that "the acquisition of property for the purpose of eliminating slum conditions or conditions of blight . . . [is a] public use."[36] Courts in other jurisdictions have similarly held that statutes authorizing such property acquisitions satisfy the public use test despite provisions for the sale by the condemnor of all or part of the property to private interests for redevelopment purposes.[37]

The public use test in these cases is satisfied because the elmination of blight conditions is for the public advantage, not because the ultimate use of the property is public.[38] Takings of private property for slum or blight clearance should be distinguished from takings for schools and other public buildings or for highway and canal rights of way since the ultimate use of the latter constitutes a public use.[39]

The Necessity Requirement

Unlike the public use doctrine, the necessity requirement in eminent

34. ARIZ. REV. STAT. ANN. § 36-1474(3)(c) (West Supp. 1984) authorizes municipalities "[t]o sell, lease, exchange, transfer, assign, subdivide . . . any real or personal property or any interest therein in a redevelopment project." *See also* ARIZ. REV. STAT. ANN. § 36-1480 (1956) Disposal of property in redevelopment project area.

35. 2A NICHOLS, *supra* note 25, at § 7.01[1]. *But see* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) in which the Michigan Supreme Court upheld the use of a redevelopment act to condemn private property for the construction of a General Motors plant stating: "There is no dispute about the law. All agree that condemnation for a public use or purpose is permitted. All agree that condemnation for a private use cannot be authorized whatever the incidental public benefit and condemnation for a public purpose cannot be forbidden whatever the incidental private gain." *Id.* at 619, 304 N.W.2d at 458. The majority held that any benefit which accrued to General Motors was merely incidental to the dominant public purpose of stemming regional economic instability (*i.e.*, to persuade General Motors not to move its plan from the region). *Id.* at 620, 304 N.W.2d 459. Secondary authorities discussing *Poletown* include Bixby, *Condemnation of Private Property in Order to Construct General Motors Plant Is for "Public Use": Poletown Neighborhood Council v. City of Detroit*, 13 URB. LAW 694 (1981); Schulman; *Comment: What's Good for General Motors . . . ,* LAND USE L. & ZONING DIG., Aug. 1981, at 22; Note, *Poletown Neighborhood Council v. City of Detroit: Economic Instability, Relativism, and the Eminent Domain Public Use Limitation*, 24 J. URBAN & CONTEMP. LAW. 215 (1983).

36. ARIZ. REV. STAT. ANN. § 36-1472(4) (1974); *City of Phoenix*, 137 Ariz. at 411, 671 P.2d at 389; Cordova v. City of Tucson, 16 Ariz. App. 447, 449, 494 P.2d 52, 54 (1972).

37. Berman v. Parker, 348 U.S. 26 (1954); East Bay Municipal Util. Dist. v. Richmond Redevelopment Agency, 93 Cal. App. 3d 346, 155 Cal. Rptr. 636 (1979); Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1972); Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981); Urban Renewal Agency of Reno v. Iacometti, 79 Nev. 113, 379 P.2d 466 (1963).

38. "The controlling motive for the condemnation is to clear from the area in question the moral or physical blight which slum and congestion have created and this dominant aspect of the case establishes the public use." 2A NICHOLS, *supra* note 25, at § 7.43.

39. *Id. See also supra* note 36 and accompanying text.

domain proceedings is statutory in Arizona.[40] There are two statutory provisions related to the necessity requirement in the slum clearance setting. The first is a general requirement that the acquisition of property by eminent domain is "needed" for some public use.[41] In addition, the slum clearance legislation requires that a municipality adopt a resolution finding that "[t]he development of such area or areas is necessary in the interest of the public health, safety, morals, or welfare of the residents of the municipality."[42]

Because necessity is a legislative and not a constitutional requirement, the courts engage only in limited review of condemnor's findings of necessity.[43] For example, in *City of Phoenix v. McCullough*,[44] the Arizona Court of Appeals followed the majority of jurisdictions in refusing to disturb a condemnor's determination of necessity in the absence of fraud or arbitrary and capricious conduct.[45]

Required Finding of Slum or Blight Conditions

In *City of Phoenix v. Superior Court*, the Landowners' challenge to the attempted condemnation was not based on the public use or necessity requirements, but rather on the ground that the property was not plagued by blight or slum conditions. Although the supreme court reiterated the traditional public use and necessary requirements,[46] it focused on the ultimate issue: whether a determination that property is within a slum or blighted area is a legislative or judicial question.[47]

The *City of Phoenix* court recognized that the blight issue is separate from the traditional requirements.[48] The supreme court attempted to define the scope of judicial review of a municipality's findings of slum conditions in such a manner as to be consistent with earlier definitions of scope of review in the traditional necessity and public use requirement cases.

The court drew an analogy between the determination of blight conditions and the necessity test to conclude that the scope of judicial review is limited.[49] The blight and necessity requirements are similar in two respects:

40. ARIZ. REV. STAT. ANN. § 12-1112 (1974).

41. *Id.*

42. ARIZ. REV. STAT. ANN. § 36-1473 (1974).

43. City of Phoenix v. Oglesby, 112 Ariz. 64, 537 P.2d 934 (1975); Citizens Utilities Water Co. v. Superior Court, 108 Ariz. 296, 497 P.2d 55 (1972) (court reviewed city's finding of necessity to determine whether it was capricious), *cert. denied*, 409 U.S. 1022 (1972); Mosher v. City of Phoenix, 39 Ariz. 470, 472, 7 P.2d 622, 624 (1932) (trial court properly held that necessity determination by the legislative body of the city was conclusive); Tucson Community Development and Design Center, Inc. v. City of Tucson, 131 Ariz. 454, 641 P.2d 1298 (Ariz. App. 1982). The same rule is followed outside of Arizona; the question of the necessity or expediency in condemnation is not a proper subject of judicial review. 1 NICHOLS, *supra* note 5, at §4.11. Judicial review is limited to questions of bad faith, arbitrariness or capriciousness, United States v. Carmack, 329 U.S. 230, 243-48 (1946); Simmonds v. United States, 199 F.2d 305, 306 (9th Cir. 1952); Bowling v. State, 428 P.2d 331, 336 (Okla. 1967); City of Tacoma v. Welcker, 65 Wash. 2d 677, 684, 399 P.2d 330, 335 (1965).

44. 24 Ariz. App. 109, 536 P.2d 230 (1975).

45. *Id.* at 114, 536 P.2d at 235.

46. *City of Phoenix*, 137 Ariz. at 411, 671 P.2d at 389.

47. *Id.* at 410, 671 P.2d at 388.

48. *Id.* at 410-13, 671 P.2d at 388-91. The court accepted jurisdiction over the case after finding that it presented important questions of public interest. *Id.* at 410, 671 P.2d at 388.

49. *Id.* at 413, 671 P.2d at 391.

both requisites are statutory, not constitutional;[50] and statutory language giving rise to both requirements specifically charges the governing body of the municipality, not the judiciary, with the obligation and power to make the "finding" of necessity or existence of blight conditions.[51]

The court also cited public policy to support the proposition that the determination of blight or slum conditions is a legislative question.[52] Such an inquiry requires "knowledge of a wide range of social and economic circumstances and the application of broad measures of public policy."[53] Legislative bodies have uninhibited fact-finding capabilities, while judicial tribunals are bound by evidentiary rules not suited to resolve such broad questions as whether an area is a slum or blighted.[54]

The rule of limited judicial review of a condemnor's determinative of slum or blight conditions announced in *City of Phoenix* does not totally preclude review.[55] As stated by the court, the statute sets out factors which define a slum or blighted area, and the condemning body must make a finding based on those factors.[56] A trial court may consider evidence on the blight issue and may determine from that evidence whether the condemnor's finding of slum or blight conditions is arbitrary.[57] If the evidence is such that the condemnor could reasonably have found a condition of slum or blight, the finding is not arbitrary.[58]

After deciding that a limited standard of review was appropriate, the supreme court applied this standard to the *City of Phoenix* facts. It found that the City's express findings in its resolution satisfied the procedural requirements of the slum clearance and redevelopment statute.[59] The court also considered the evidence presented at the hearing for immediate possession and determined that the record supported the City's findings that the subject property was either blighted or a slum.[60] The court emphasized that the "area concept" precludes the judiciary from considering only the conditions of a single plot of property. The condition of surrounding and nearby properties may also qualify the subject property for acquisition for slum and blight clearance.[61]

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50. *Id.* at 412, 671 P.2d at 390.
51. *Id.*
52. *Id.*
53. *Id.* at 412-13, 671 P.2d at 390-91.
54. *Id.* at 413, 671 P.2d at 391.
55. *Id.*
56. *Id.* at 414, 671 P.2d at 392.
57. *Id.*
58. *Id.* (citing *Tucson City Development and Design Center*, 131 Ariz. at 459, 651 P.2d at 1303 (1982)); *See also* City of Phoenix v. McCullough, 24 Ariz. App. 109, 114, 536 P.2d 230, 235 (1975); Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp., 518 S.W.2d 11 (Mo. 1974).
59. 137 Ariz. at 414, 671 P.2d at 392.
60. *Id.* at 414-15, 671 P.2d at 392-93.
61. *Id.* at 415, 671 P.2d at 393. Under the "area concept" adopted by the court, the condition of the area, not just the individual lot sought for condemnation, determines whether blight sufficient to justify condemnation exists. This concept is almost universally accepted in all American courts that have considered the question. The United States Supreme Court stated:

> [C]ommunity redevelopment programs need not, by force of the [United States] Constitution, be on a piecemeal basis—lot by lot, building by building.
>
> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been

Since the trial court could not properly have found that the City's determination was abitrary, the supreme court held that the trial judge exceeded his legal authority and erred in refusing to grant the application for immediate possession.[62] The court vacated the order denying the application and instructed the superior court to allow the City to take possession of the Landowner's property.[63]

Landowners' Remedy: Frame a Constitutional Issue Around Evidence of Blight Conditions

Although *City of Phoenix* seems, at first glance, to limit the ability of a landowner to challenge a condemnation under the redevelopment legislation, this may not be so. Arizona case law, including *City of Phoenix*, lends support to the proposition that the trial court can hear evidence on the question of slum or blight conditions and frustrate the condemnation action on constitutional grounds.

The *City of Phoenix* Landowners sought to merge the determination of slum or blight requirement with the public use test.[64] The argument that the existence of slum or blight conditions determines whether the condemnation is for a public use is logically appealing. The elimination of blight conditions, not the ultimate use, is a valid public use in redevelopment cases.[65] Since the existence of blight conditions determines whether the taking is for a public use and thus constitutional,[66] the factual question of the condition of the property is a judicial question.[67] The public use question must be decided on a case by case basis.[68] It follows, therefore, that the court must necessarily have the power to consider evidence on the condition of the property and to make an initial determination whether the elimination of such conditions constitutes a valid public use.

The court's rejection of the Landowners' argument in *City of Phoenix* does not necessarily preclude a judicial determination of slum or blight conditions. In fact, the opinion hints that, in a properly presented case, the court would have such a power: "*If put in issue*, 'the question whether the contemplated use be really public shall be a judicial question. . . .' "[69] The court also points out that the trial judge did not hold that the proposed acquisition in this case was for a private use rather than a public use. Instead, it held that the property "is not a part of a blighted area, nor part of a

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decided, the amount and character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

Berman v. Parker, 348 U.S. 26, 35 (1954). *See also* Cordova v. City of Tucson, 16 Ariz. App. 447, 494 P.2d 52 (1972); Velishka v. City of Nashua, 99 N.H. 161, 106 A.2d 571 (1954); Apostle v. City of Seattle, 70 Wash.2d 59, 422 P.2d 289 (1966); Miller v. City of Tacoma, 61 Wash.2d 374, 378 P.2d 464 (1963).

62. 137 Ariz. at 416, 671 P.2d at 394.
63. *Id.*
64. *Id.* at 410, 671 P.2d at 388. *See supra* note 7.
65. *See supra* note 36 and accompanying text.
66. *See supra* note 38 and accompanying text.
67. *See supra* note 29-30 and accompanying text.
68. *See supra* note 31 and accompanying text.
69. 137 Ariz. at 411, 671 P.2d at 389 (emphasis added).

slum area as those terms are defined [in the statute]."[70] The objection to the trial court's actions, then, is not that the judge considered evidence that he should have rejected, nor that he should have validated the condemnation in the absence of capriciousness or fraud on the part of the condemnor. Rather, the objection is that the judge should not have invalidated the attempted acquisition *on statutory grounds.*[71]

While this subtle distinction seems to obscure and unnecessarily complicate the rules in slum clearance and redevelopment cases, there are important reasons why the separation of the public use, necessity, and determination of slum or blight condition tests should be maintained. The statute which requires the legislative determination of slum or blight conditions has applications outside of eminent domain law. For example, private developers may obtain federal loans and grants to develop property within the boundaries of a statutory redevelopment district.[72] In Arizona, inclusion in such a district requires that the local governing body makes a finding and declaration that the property is blighted.[73] At least one Arizona municipality has, at the request of the landowners, declared operating business properties blighted to qualify the owners for government-sponsored financing at below-market rates to remodel and refurbish the properties.[74] Because the municipality did not make its determination of blight conditions in conjunction with any effort to condemn property, the public use and necessity tests are inapplicable.

Conclusion

Public use, necessity, and a condemnor's finding of slum or blight con-

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70. *Id.* at 412, 671 P.2d at 390.

71. *Id.*

72. Private developers may receive federal loans or grants directly from the federal government or through an intermediary local government:

> Whenever the Secretary of Commerce certifies to the Secretary (1) that any county, city, or other municipality . . . is situated in an area designated . . . as a redevelopment area, and (2) that there is a reasonable probability that with assistance provided under [the Area Redevelopment Act] and other undertakings the area will be able to achieve more than temporary improvement in its economy, the Secretary is authorized to provide financial assistance to a local public agency in any such municipality under this subchapter and the provisions of this section.

42 U.S.C. § 1464 (1978 & West Supp. 1984). 42 U.S.C. § 1452b(a) authorizes loans for redevelopment. Federal grants in aid are provided for in 42 U.S.C. § 1453.

The Arizona legislature has empowered municipalities to utilize the federal redevelopment programs. The slum clearance and redevelopment statutes provide that: "Every municipality shall have all the powers . . . including the following powers in addition to others granted by this article:

5. To borrown money and to apply for an accept advances, loans, grants, contributions and any other form of financial assistance from the federal government . . . ." ARIZ. REV. STAT. ANN. § 36-1474(5) (1974).

73. ARIZ. REV. STAT. ANN. § 36-1473 (1974).

74. The Arizona Daily Star reported:

> The city [of Tucson] and South Tucson have designated large tracts as blighted to qualify for federal redevelopment funds. As a result, developers who would not otherwise be able to do so, can finance renewal of obviously non-blighted properties through tax-free bonds. . . .
>
> The bonds can save developers 25 percent or more on financing costs and enable them to get longer-term financing. Bonds usually extend the debt for 10 years or more, while conventional commercial loans are for about five years, developers say.

The Arizona Daily Star, Sept. 30, 1984, at E1, col. 4.

ditions are three separate and distinct prerequisites to the exercise of eminent domain powers under the Arizona slum clearance and redevelopment statutes. The public use doctrine subjects the condemnation proceeding to rigorous judicial scrutiny, while the other two requirements are legislative in nature and therefore subject only to limited judicial review.

In *City of Phoenix v. Superior Court*, the Arizona Supreme Court held that it was an abuse of power for a trial judge to prohibit a condemnation acquisition of land for a redevelopment project on the ground that the conditions of the property did not meet the statutory definition of slum or blight. The trial judge can properly prohibit the condemnation only after finding that the condemnor's declaration of slum or blight was arbitrary and capricious.

While there may be a need to separate the determination of a blight condition issue from the public use issue, it is clear that evidence of the slum or blight condition of the property sought for condemnation is relevant to the public use requirement. If there is to be any judicial check on the legislative judgment in individual condemnation proceedings, the courts must have the power to determine in the first instance whether eradication of existing conditions on or around the subject property constitutes a public use. A question of the legislature's own constitutional power should not be conclusively decided by the legislature itself.

Michael D. Hoy

III. EMPLOYMENT

LIMITING EMPLOYMENT-AT-WILL IN ARIZONA: *LEIKVOLD V. VALLEY VIEW COMMUNITY HOSPITAL*

For over a century, the "employment-at-will" rule has generally governed indefinite term employment in the United States.[1] This common law doctrine provides that an employment relationship of indefinite duration is terminable at the will of either the employee or employer.[2] Under this rule, the employee may quit at any time without notice and the employer may discharge the employee for any reason or for no reason at all.[3] The potentially harsh application of the employment-at-will rule to a majority of American workers[4] has led to increasing dissatisfaction with the rule.[5] Courts have thus created a number of exceptions and limitations to the employment-at-will rule.[6]

In *Leikvold v. Valley View Community Hospital*,[7] the Arizona Supreme Court considered whether an employer's personnel manual can become part of the employment contract and thus limit the employer's ability to discharge an otherwise at-will-employee.[8] In holding that an employer's representations in such a manual can become terms of the employment contract, the court recognized a significant limitation to the employment-at-will rule.

The Leikvold *Decision*

Joan Leikvold was hired by Valley View Community Hospital in 1972

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1. H.G. Wood announced the American rule in his 1877 treatise on master-servant relationships: "With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will . . . and is determinable at the will of either party." H. WOOD, MASTER AND SERVANT § 136, at 283 (2d ed. 1886).

2. *See* 3A A. CORBIN, CORBIN ON CONTRACTS § 684 (1963); 9 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1017 (3d ed. 1967). This view of terminability does not treat the employment agreement as a contract at all, but rather as "an expression in which the promises are illusory, since refusal to perform is not a breach, being merely the exercise of the reserved power to terminate." 1 A. CORBIN, CORBIN ON CONTRACTS § 96 (1963). Courts have nevertheless treated the employment relationship as contractual in nature, even when relying on the employment-at-will rule to avoid enforcing the "contract." *See also* Comment, *Employment At Will and the Law of Contracts*, 23 BUFFALO L. REV. 211, 212-16 (1973).

3. *See* Adler v. American Standard Corp., 290 Md. 615, 618, 432 A.2d 464, 467 (1981): "The common law rule . . . is that an employment contract of indefinite duration, that is, at will, can be legally terminated at the pleasure of either party at any time." *See also* 53 AM. JR. 2D *Master and Servant* § 43, at 117-18 (1970), which states "[w]hen the employment is not for a definite term and there is no contractual or statutory restriction upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability" (footnotes omitted).

4. Approximately two-thirds of all American employees are employees-at-will. *See* U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACTS OF THE UNITED STATES 392 (table 644) (total labor force) (1979).

5. *See, e.g.*, Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404-06 (1967); Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8-10 (1979); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

6. *See infra* notes 26-30 and accompanying text.

7. 141 Ariz. 544, 688 P.2d 170 (1984).

8. *Id.* at 546, 688 P.2d at 172.

as Operating Room Supervisor and was promoted to Director of Nursing in 1978.[9] On October 1, 1979, she requested a transfer to her former position in the operating room. Leikvold had several meetings concerning the transfer with Andrew Allen, the newly-hired Chief Executive at Valley View. At one of those meetings, Allen expressed his opinion that it was inappropriate for someone in a managerial position to take a position of lesser authority. Allen subsequently, on November 14, 1979, fired Leikvold despite her withdrawal of the transfer request. Although Leikvold's personnel file showed "insubordination" as the reason for her discharge, Allen indicated in his deposition that Leikvold was terminated because of her requested transfer to an unavailable subordinate position. Leikvold's request for a "grievance hearing," as provided for in the Valley View Community Hospital Administrative and Personnel Policies Manual, was denied.

Leikvold filed suit against Valley View, Valley View's corporate owner, and Allen alleging breach of contract and defamation. The defendants moved for summary judgment contending that the employment relationship was terminable at will and that they had made no defamatory statements. The Maricopa County Superior Court entered judgment against Leikvold.[10] Leikvold appealed on the breach of contract claim only, and the court of appeals reversed the entry of summary judgment and remanded the case to the trial court for further proceedings.[11] The defendants petitioned the Arizona Supreme Court to review the appeals court decision. Upon review the supreme court vacated the decision. The court also reversed the trial court's entry of summary judgment and remanded the case to the trial court.[12]

Under the common law, employment contracts of indefinite duration are generally considered to be terminable at the will of either party for any reason or for no reason at all.[13] The Arizona Supreme Court characterized this general rule as merely a rule of construction and not as a substantive limitation on contract formation.[14] Accordingly, the court found that the parties to an employment contract of indefinite duration may include provi-

9. *Id.* at 545, 688 P.2d at 171. The facts of *Leikvold* are set forth 141 Ariz. at 545, 688 P.2d at 171.

10. *Id.*

11. 141 Ariz. 575, 688 P.2d 201 (1983), *vacated*, 141 Ariz. 544, 688 P.2d 170 (1984).

12. 141 Ariz. at 545, 688 P.2d at 171.

13. *See supra* notes 2 and 3 and accompanying text.

14. *Leikvold*, 141 Ariz. at 547, 688 P.2d at 173. The supreme court cited several authorities to support this proposition, including RESTATEMENT (SECOND) OF AGENCY § 442 (1971) (inference that employment is terminable at will may be rebutted by specific terms of the agreement); Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 597, 292 N.W.2d 880, 884 (1980) (the general employment-at-will rule "is not a substantive limitation on the enforceability of employment contracts but merely a rule of 'construction' "); Pine River State Bank v. Mettille, 333 N.W.2d 622, 628 (Minn. 1983) (the general rule "is only a rule of contract construction"); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 466, 443 N.E.2d 441, 446, 457 N.Y.S.2d 193, 198 (1982) (the general rule has "no greater status than that of a rebuttable presumption"). The court found further support for the proposition in Dover Copper Mining Co. v. Doenges, 40 Ariz. 349, 12 P.2d 288 (1932), the seminal Arizona case stating the at-will rule. The *Dover* court quoted Echols v. New Orleans, Jackson & Great N. R.R. Co., 52 Miss. 610, 614 (1876), that "[a]n agreement to furnish a . . . service . . . *will be construed* either as terminable at pleasure, or as implying that the thing to be done shall be performed within a reasonable time . . . ." 40 Ariz. at 357, 12 P.2d at 292 (emphasis added by *Leikvold* court).

sions for job security, such as representations in a personnel manual.[15]

When Valley View hired Leikvold in 1972, it gave her a copy of the personnel manual and told her that she was to follow the policies while working for the hospital.[16] The manual included sections on wages and salaries, holidays and sick time, insurance benefits, working hours, the complaint and grievance procedure, and the termination procedure. Leikvold argued that personnel manuals can become part of indefinite term employment contracts and that Valley View's manual did become part of her employment contract.[17] She claimed that Valley View breached the contract when it did not follow stated termination policies and procedures in discharging her from employment. Specifically, Leikvold argued, the manual limited Valley View's right to discharge non-probationary employees to cases of unsatisfactory job performance or gross violations of conduct. She also contended the manual guaranteed a "grievance hearing" to appeal an employee's dismissal in any case.[18]

The supreme court agreed with Leikvold's general contention that personnel manuals can become part of employment contracts. It did not consider her specific allegation that Valley View's manual became part of her employment contract, remanding this question of fact to the trial court.[19] The court then outlined the conclusions the trial court must draw after the jury determines this question of fact. If the jury finds that the personnel manual was not part of the employment contract, then Leikvold was an at-will employee, her dismissal was proper, and judgment should be for the defendants.[20] If the jury finds that the manual was part of the employment contract, then the court must construe the exact terms of the contract, using extrinsic evidence if necessary to resolve any ambiguities in the manual's language.[21] After the court interprets the contract, the jury must decide whether it was breached.[22]

Background to the Leikvold *Decision: Employment-at-Will in Arizona*

Arizona is one of many states that follow the common law rule that either party may terminate an employment-at-will contract at any time, for any reason.[23] Although courts in other jurisdictions have created a growing number of exceptions and limitations to the at-will rule,[24] Arizona courts have been reluctant to modify the rule. In *Daniel v. Magma Copper Co.*,[25] the Arizona Court of Appeals refused to recognize a breach of contract

15. 141 Ariz. at 547, 688 P.2d at 173. *See also* Pine River State Bank v. Mettille, 333 N.W. 2d at 628.
16. 141 Ariz. at 547, 688 P.2d at 173.
17. *Id.*
18. *Id.*
19. *Id.* at 548, 688 P.2d at 174.
20. *Id.*
21. *Id.*
22. *Id.*
23. *See* Builder's Supply Corp. v. Shipley, 86 Ariz. 153, 341 P.2d 940 (1959); Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (Ct. App. 1980); Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977). *See also supra* notes 2 and 3 and accompanying text.
24. *See infra* notes 26-30 and accompanying text.
25. 127 Ariz. 320, 620 P.2d 699 (Ct. App. 1980).

claim for wrongful discharge where the discharge was allegedly motivated by bad faith, malice, or retaliation.[26] In *Larson v. Motor Supply Co.*,[27] the Arizona Court of Appeals appeared to recognize an exception to the employment-at-will rule imposing liability on an employer who discharges an employee for a purpose which contravenes public policy.[28] The court, however, construed the public policy exception narrowly to include only violations of state criminal or employment statutes.[29]

The *Leikvold* court emphasized that the claim at issue was one for breach of contract, not one in tort, and expressly reserved comment on wrongful or abusive discharge tort claims based on various exceptions to the employment-at-will doctrine adopted by courts in other states.[30] The court's cognizance of the various exceptions to the at-will rule[31] indicates that it may consider those exceptions in appropriate future cases. *Leikvold*, however, provides only a limited exception to the application of the at-will doctrine in Arizona.

Analysis of Leikvold

The *Leikvold* decision follows the Michigan Supreme Court's reasoning in *Toussaint v. Blue Cross & Blue Shield of Michigan*.[32] In *Toussaint*, the employee was given oral assurances of job security when hired[33] and was also given a personnel manual stating that all non-probationary employees would be dismissed "for just cause only" and in accordance with specified policies and procedures.[34] The *Toussaint* court held that a promise to discharge only for cause may be incorporated into an indefinite term employment contract either by express oral or written agreement or as "*a result of an employee's legitimate expectations grounded in an employer's policy*

26. *Id.* at 324, 620 P.2d at 703. The leading case applying the malice and bad faith exception to the employment-at-will rule is Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (termination motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract). *See also* Moore v. Home Ins. Co., 601 F.2d 1072 (9th Cir. 1979); Fortune v. National Cash Register Co., 377 Mass. 96, 364 N.E.2d 1251 (1977); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 164, 610 P.2d 1330, 167 Cal. Rptr. 839 (1980) (indefinite term employee who is discharged without cause has a cause of action for breach of implied duty of good faith and also an action in tort for wrongful discharge); RESTATEMENT (SECOND) OF CONTRACTS § 231 (Tentative Draft No. 7 1973).

27. 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977).

28. *Id.* at 508, 573 P.2d at 908.

29. *Id.* Examples of discharges found to be contrary to public policy include: Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (discharge for refusal to commit perjury); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E. 2d 353 (1978) (discharge for filing workman's compensation claim); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978) (discharge for agreeing to serve jury duty).

30. *See supra* notes 26 and 29 for two exceptions to the at-will doctrine. The third exception imposes liability for breach of the implied-in-law covenant of good faith and fair dealing. *See, e.g.*, Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). There, the court found termination of a long-term at-will employee without just cause violated the implied covenant of good faith and fair dealing found in all contracts. The employer had a duty not to harm the employee's position. *Id.* at 450, 168 Cal. Rptr. at 726. Under *Cleary*, an employer is liable for compensatory and punitive damages for any unjust dismissals. *Id.* at 456, 168 Cal. Rptr. at 729.

31. 141 Ariz. at 545-46 n.1, 688 P.2d at 171-72 n.1.

32. 408 Mich. 579, 292 N.W.2d 880 (1980).

33. *Id.* at 597, 292 N.W.2d at 884.

34. *Id.* at 598, 292 N.W.2d at 884.

statements."[35]

Leikvold parallels the reasoning in *Toussaint* in three important respects and extends *Toussaint* to the situation where the policy manual does not expressly provide for good cause termination. First, the *Leikvold* court determined that the employment-at-will rule is a rule of construction and not a substantive rule of contract formation.[36] Second, the court found that indefinite term employment contracts can still provide for job security.[37] Third, the court held that if an employer chooses to issue personnel policies providing a measure of job security and encourages reliance thereon, the employer is not free to ignore those policies.[38]

In finding that the general employment-at-will rule is "at best a rule of construction" and "not a limit on the parties' freedom to contract,"[39] the *Leikvold* court views the general rule as raising only a presumption of terminability which the employee may rebut. If the trier of fact finds sufficient evidence of job security, the at-will presumption is rebutted. The court then looks to the surrounding circumstances of the employment relationship to determine the parties' true intentions.[40] Under general contract principles, a contract need not be expressly stated, but may be implied by the promisor's words or conduct in light of surrounding circumstances.[41] Because the promisor here issued a personnel manual containing employment policies and procedures, a court may properly consider those terms in determining the exact nature of the employment contract.

The *Leikvold* court also found that provisions for job security in a personnel manual can be incorporated into an employment contract of indefinite duration.[42] This represents a substantial break with the employment-at-will doctrine, which holds that indefinite term employment contracts are expressly terminable at will,[43] but is consistent with the use of the general at-will rule as merely a rebuttable presumption.

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35. *Id.* at 598, 292 N.W.2d at 885 (emphasis added). The court held that such a promise is enforceable even though no mutual intention to create contract rights in the employee existed, neither party had signed the statement, the policy could be amended by the employer anytime subsequent to the hiring, and the employee had not learned of the policy until after the hiring. *Id.* at 613, 292 N.W.2d at 892.

36. Id. at 547, 688 P.2d at 173.

37. *Id.*

38. *Id.* at 548, 688 P.2d at 174.

39. *Id.* at 547, 688 P.2d at 173. *See also supra* note 14.

40. The leading case is Littel v. Evening Star Newspaper Co., 120 F.2d 36 (D.C. Cir. 1941) (even absent special consideration, where the parties clearly intend to make a contract for permanent employment, such a contract is enforceable and not terminable at will). *See also* Drzewiecki v. H. & R. Block, Inc. 24 Cal. App. 3d 695, 704, 101 Cal. Rptr. 169, 174 (1972) (employment contracts should be construed to effectuate the intention of the parties as demonstrated by the language used and the circumstances surrounding the agreement); 3A A. CORBIN, CORBIN ON CONTRACTS § 684 (1963).

41. *See* Smith v. Neely, 93 Ariz. 291, 294, 380 P.2d 148, 150 (1963); *see generally* 3 A. CORBIN, CORBIN ON CONTACTS § 561-72 (1963).

42. 141 Ariz. at 547, 688 P.2d at 173. *See also* Pine River State Bank v. Mettille, 333 N.W.2d 622, 628 (Minn. 1983) ("[i]f the parties choose to provide in their employment contract of an indefinite duration for provisions of job security, they should be able to do so"); Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 598, 292 N.W.2d 880, 885 (1980) ("a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term—the term is 'indefinite' . . . .").

43. *See supra* notes 1-3 and accompanying text.

The third finding of *Leikvold*—that employers who choose to issue personnel policy statements and encourage reliance thereon are not free to ignore those policies[44]—also parallels *Toussaint*. The *Toussaint* court reasoned that since the employer obtains the benefits of an orderly and cooperative work force through its promotion of personnel policies, the employer has created an atmosphere "instinct with an obligation."[45] It may not treat the policies as illusory even though the policies were not bargained for at the time of hiring.[46]

Although neither the *Leikvold* nor the *Toussaint* court specified the theoretical basis upon which this holding rests, promissory estoppel seems most likely. The doctrine of promissory estoppel applies where a party reasonably relies on a promise to its detriment and the promisor can reasonably forsee that reliance.[47]

Because the employers in both *Leikvold* and *Toussaint* made promises regarding personnel policies and discharge procedures in personnel manuals directed at the entire work force, those promises were capable of inducing reasonable reliance in the employee.[48] Arguably, the employer's very purpose for creating the policies was to convince employees that they could rely on the employer for fair treatment. Leikvold attested in her affidavit that she had passed up other opportunities to work because of the stability of her employment with Valley View. This forseeable detrimental reliance by the employee makes the employer liable for breach of implied promise if it ignores its stated policies and procedures.[49]

In reaching this result, the *Leikvold* court emphasized that employers are free to issue no personnel manual at all or to issue a manual that clearly informs their employees that the manual is not a part of the employment contract and that the employee's job is terminable at the employer's will for any reason or for no reason at all.[50] Because the supreme court said these disclaimers would instill no reasonable expectations of job security in the employees or give them any reason to rely on the manual,[51] the traditional

44. 141 Ariz. at 548, 688 P.2d at 174.

45. 408 Mich. at 613, 292 N.W.2d at 892.

46. *Id.*

47. RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tentative Draft No. 7 1973): "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promissee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." According to the *Restatement*, promissory estoppel is a method of enforcing promises in the absence of consideration supporting the promise. Under this view, promissory estoppel is not a species of consideration or an element in the bargain-type contract. It applies only where the bargained-for element of consideration is missing and the promise has induced detrimental reliance. J. MURRAY, MURRAY ON CONTRACTS § 92, at 201 (2d ed. 1974).

48. *Leikvold*, 141 Ariz. at 548, 688 P.2d at 174; *Toussaint*, 408 Mich. at 613, 292 N.W.2d at 892.

49. The court of appeals in *Leikvold* viewed Leikvold's detrimental reliance as a benefit to the promisor constituting sufficient consideration to support a contract. 141 Ariz. 575, 579, 688 P.2d 201, 205 (1983), *vacated*, 141 Ariz. 544, 688 P.2d 170 (1984). *See* Mustang Equip., Inc. v. Welsh, 115 Ariz. 206, 564 P.2d 895 (1977) (consideration consists of a benefit to one party or a detriment to the other); McGrath v. Bill Johnston Golf Properties, Inc., 13 Ariz. App. 49, 52, 474 P.2d 56, 59 (1970) ("Good consideration in Arizona consists of a benefit to a promisor or a loss or a detriment to the promisee."). *See also supra* note 47.

50. 141 Ariz. at 548, 688 P.2d at 174.

51. *Id.*

employment-at-will rule would presumably still apply.

Impact of Leikvold*: A Gain or a Loss for Employees?*

The common law rule that an indefinite term employment contract is terminable at the will of either party has subjected many employees to the risk of arbitrary discharge. In *Leikvold v. Valley View Community Hospital*, the Arizona Supreme Court may have afforded a measure of job security to a significant number of Arizona employees. On the other hand, the gain in employment security may prove short-lived as *Leikvold* signals employers to make indefinite-term employment contracts expressly terminable at will.

The most promising aspect of *Leikvold* from the employee's perspective is the court's holding that employers who choose to issue personnel policy statements and encourage reliance thereon are not free to ignore those policies when dealing with specific employees.[52] Since many medium and large-sized companies distribute personnel manuals, post policies on company bulletin boards, and issue memoranda concerning personnel policies,[53] the potential number of employees—both at-will and otherwise—affected by *Leikvold* is large. Presumably, *Leikvold* provides that employees are entitled to benefit from any of their employer's policies which are in force. This might include the announcement of an additional vacation day or a progressive disciplinary policy, as well as terms providing job security in a personnel manual.

Conversely, the final effect of *Leikvold* might be to provide at-will employees with even less job security than they presently enjoy. *Leikvold* clearly does not infringe upon an employer's right to make an employment contract expressly terminable at will.[54] Moreover, after the *Leikvold* decision becomes known, many employers may exercise that right by including disclaimer clauses in company personnel manuals[55] and/or requiring employees to acknowledge that they serve at the will of the employers.[56]

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52. *See supra* notes 44-49 and accompanying text.

53. The court did not restrict its holding to personnel manuals only. 141 Ariz. at 548, 688 P.2d at 174 ("in a manual or otherwise . . .").

54. *Id. See supra* text accompanying notes 50, 51.

55. It is unlikely that courts would strike a written disclaimer of job security from an employment contract as an unconscionable term. A term may be unconscionable if it appears in small print, is in a document where rights and duties are not expected, or evidences a vast inequality in bargaining power between the parties. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); U.C.C. § 2-302 (1978); 1 A. CORBIN, CORBIN ON CONTRACTS § 128 (1963). Because personnel manuals can be expected to recite the rights and responsibilities of the parties, an assertion of unconscionability on that basis would be unlikely to succeed. More problematic is the question of inequality in bargaining position. Although an employee is generally in an inferior bargaining position when dealing with an employer, most prospective employees have a choice of some alternative employment. In Hennington v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), a waiver of liability for injuries was held to be an unconscionable term in a contract for purchase of a new car, partially because the waiver term was universal in the automobile industry, leaving the customer no choice but to waive liability. By analogy, if all employers (or perhaps all employers in one industry) issued personnel manuals with disclaimers of job security, then such disclaimers might be stricken from the employment contract as unconscionable. *See also* Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977) (good faith duty implied in contract despite written at-will term); *cf.* U.C.C. § 1-102(3) (good faith duty not disclaimable).

56. In Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980), the court, relying on *Toussaint*, validated a disclaimer of job security on the company's job application form. The form provided, in part: "In consideration of my employment, I agree to conform to the rules of Sears,

Accordingly, any expansion of the discharge protection afforded to at-will employees by *Leikvold* is speculative. If employers make the employment-at-will relationship explicit, employees will have no basis upon which to rebut the common law presumption that an indefinite term employee is terminable at will. However, if employers seek to maintain the benefits of good will, loyalty, and a productive work force created by policy statements providing a measure of job security, their employees can expect to be able to safely rely upon those policies.

Conclusion

In *Leikvold v. Valley View Community Hospital*, the Arizona Supreme Court held that an employer's representations in a personnel manual can become terms of the employment contract and can limit the employer's ability to discharge an otherwise at-will employee. The court provided further that if an employer chooses to issue personnel policies providing a measure of job security and encourages reliance thereon, the employer is not free to ignore those policies.

Leikvold may prove to be a mixed blessing for at-will employees seeking protection from the risk of arbitrary discharge. On the one hand, a significant number of Arizona employees, who work for employers whose discharge policies and procedures appear in a company personnel manual, may enjoy increased job protection. On the other hand, *Leikvold* may encourage employers to eliminate current policy statements providing job security and to require that prospective employees disclaim such rights. Because the court also held that where there are no policies there can be no reasonable reliance, the long term effect of *Leikvold* may be to diminish rather than enhance the protection from arbitrary discharge afforded to at-will employees.

Guy D. Keenan

Roebuck and Co., and my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself." *Id.* at 346.

IV. INSURANCE LAW

THE SUSPENSION OF COLLATERAL ESTOPPEL BETWEEN INDEMNITORS AND INDEMNITEES IN THE CONFLICT OF INTEREST SITUATION

In *Farmers Insurance Co. of Arizona v. Vagnozzi*,[1] the Arizona Supreme Court held that the doctrine of collateral estoppel does not preclude indemnitors and indemnitees from relitigating issues where a conflict of interest existed between them in a previous proceeding.

In *Vagnozzi*, an individual insured by Farmers Insurance Company injured Vagnozzi during a basketball game.[2] Vagnozzi filed a negligence action against the insured. Farmers' policy specifically excluded from coverage injuries that the insured intentionally caused. Farmers defended the insured against Vagnozzi's claim, but also filed a separate declaratory judgment action to establish that the policy did not cover Vagnozzi's intentionally-caused injuries. Vagnozzi subsequently filed a motion for summary judgment in the negligence action. Farmers moved to consolidate its declaratory judgment action with Vagnozzi's negligence action to prevent the court from entering a finding of negligence before acting on the declaratory judgment action. Farmers also filed a motion for summary judgment in the declaratory judgment action.

Before the court ruled on Farmers' motions, it granted Vagnozzi partial summary judgment in the negligence action, which established the insured's negligence as a matter of law.[3] However, Farmers subsequently obtained a ruling in its declaratory judgment action that the insured acted intentionally and therefore the policy did not cover Vagnozzi's injuries.

Prior to *Vagnozzi*, Arizona courts held that an insurer that defends the insured in a negligence action is bound by the findings essential to the judg-

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1. 138 Ariz. 443, 675 P.2d 703 (1983). The facts of *Vagnozzi* are set forth 138 Ariz. at 444-45, 447, 675 P.2d at 704-05, 707.

2. The basketball game in which Vagnozzi and the insured were involved featured fast, rough play. Vagnozzi knocked down the insured who leapt up and pursued the person with the ball, angrily swinging his arm at Vagnozzi's chest. Vagnozzi was bending over at the time and the insured's elbow caught Vagnozzi in the face, causing him to fall backwards onto the concrete where he hit his head and lost consciousness. *Id.* at 448-49, 675 P.2d at 708-09.

3. *See* Nicoletti v. Westcor, Inc., 131 Ariz. 140, 142, 639 P.2d 330, 332 (1982). The motion for summary judgment was not opposed by Farmers' insured because of an agreement between the insured and Vagnozzi. Vagnozzi agreed not to execute any judgment against the insured's personal assets if the insured agreed not to contest the motion for summary judgment on the issue of negligence. When the agreement was offered by Vagnozzi's attorney, the attorney retained by Farmers to defend the insured withdrew from the case because the offer created an ethical conflict. The conflict arose because the attorney could not serve both the insured's and Farmers' interests regarding the agreement. *See Vagnozzi*, 138 Ariz. at 447, 675 P.2d at 707. For a discussion of the ethical problems facing an attorney retained by an insurer to defend the insured when the interests of the insurer and the insured conflict, see *infra* note 54.

The agreement between Vagnozzi and Farmers' insured was not revealed to Farmers or the court. The *Vagnozzi* court stated that the purpose of the nonexecution agreement in this case was to obtain an uncontested judgment of negligence which would establish Farmers' liability for Vagnozzi's injuries under the policy. Farmers would then be collaterally estopped from contesting the judgment on the grounds that the insured's actions were intentional rather than negligent. The *Vagnozzi* court "hesitate[d] to condone such sharp practices," but made no ruling concerning the agreement because of the disposition of the case. *See Vagnozzi*, 138 Ariz. at 447, 675 P.2d at 707.

ment in that action.[4] Further, under Arizona law a finding of negligence and a finding that the insured acted intentionally are mutually exclusive.[5] On this ground, Vagnozzi appealed the declaratory judgment ruling, contending that Farmers was collaterally estopped from asserting that the insured had acted intentionally. The Arizona Supreme Court recognized that a conflict of interest existed between Farmers and the insured which had prevented Farmers from raising the policy's intentional acts exclusion clause in the negligence action. Consequently, the court held that Farmers was not collaterally estopped from raising this defense in the subsequent declaratory judgment action.[6] The court also held that summary judgment had been improperly granted for Farmers because reasonable minds could differ on whether deliberately hitting another player in a fast-paced basketball game constituted an intentional or a negligent act.[7]

This Casenote reviews the doctrine of collateral estoppel and the insurer's duty to defend the insured. It then discusses the problems caused by the application of collateral estoppel where a conflict of interest exists between the insurer and the insured. Finally, this Casenote analyzes *Vagnozzi*'s treatment of these problems.

Collateral Estoppel

The doctrine of collateral estoppel[8] prevents persons[9] who have been adversaries[10] in a previous action and who have had a fair opportunity to

4. *See infra* note 67 and accompanying text.

5. *See infra* note 53 and accompanying text.

6. *Vagnozzi*, 138 Ariz. at 448, 675 P.2d at 708. *See also infra* notes 79-85 and accompanying text.

7. *Vagnozzi*, 138 Ariz. at 450, 675 P.2d at 710.

8. Collateral estoppel is a form of issue preclusion. It occurs when the issue in question was decided in a previous proceeding based upon a different cause of action. Where the previous proceeding was based upon the same cause of action as the one in which the issue is sought to be relitigated, issue preclusion is sometimes referred to as direct estoppel. RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment b (1982); 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4416, at 138 (1981).

9. In general, due process requires that only those persons who have had their "day in court" as parties to an action can be bound by the determination of issues in that action. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.22, at 575 (2d ed. 1977); 1B J. MOORE, J. LUCAS, & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 4.11[1], at 388-89 (2d ed. 1984). The concept of privity is an exception to this rule. Persons who are not parties to an action may be collaterally estopped from relitigating issues determined in it if they are in privity with parties in the action. *See id.* ¶ 4.11[3-1], at 741. Such persons have been found to be in privity where (1) they control the action to a substantial degree, (2) the parties are acting as the persons' representatives, or (3) the persons are successors in interest to a property right which has been the subject of litigation by their predecessors in interest. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 39, 41, and 43 (1982); Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 855-65 (1952).

10. Traditionally, collateral estoppel could be applied in a subsequent action only between persons who were parties (or in privity with the parties) to the action in which the issue had been decided. This rule was termed the mutuality rule—only a person who was bound by the determination of an issue could assert that his adversary should be collaterally estopped from contesting the determination made in a prior action between them. *See* 18 C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 8, § 4463, at 559; Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1459 (1968). Most jurisdictions have abolished the mutuality rule. 18 C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 8, § 4464, at 570. Where the mutuality requirement has been eliminated, a person who has had a fair opportunity to litigate his position with respect to an issue may be collaterally estopped from relitigating that issue in subsequent proceedings—whether or not his adversaries were parties to the action in which the issue was determined. See

obtain a judicial determination on specific issues from relitigating those issues.[11] Provided that certain criteria are met, a determination of the issues in a prior action will be final and binding in all subsequent actions between the parties.[12] The public policy considerations supporting the doctrine of collateral estoppel include conserving both the parties' and the courts' resources by preventing repetitious litigation, preventing inconsistent verdicts, and establishing the finality of judicial determinations upon which parties can rely.[13]

Collateral estoppel should not deprive a party of the right to litigate an issue. Arizona courts hold, therefore, that findings in a previous action will be given preclusive effect only when the following criteria are met: (1) the particular issue was actually litigated[14] and determined[15] in the previous action; (2) the issue was essential to the previous judgment;[16] (3) the party against whom collateral estoppel is sought had a full and fair opportunity to

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RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982). A person who brings an action and loses on a particular issue will not be allowed to relitigate that issue by suing someone else. The defendant in the second action can use collateral estoppel *defensively* to assert that the plaintiff should be bound by the earlier determination. Example: A sues B. A loses on a particular issue. A sues C on the same issue. C defends by asserting that A should be collaterally estopped from relitigating an issue that has already been determined against him. *See* Food For Health v. 3839 Joint Venture, 129 Ariz. 103, 107, 628 P.2d 986, 990 (Ct. App. 1981). Arizona allows defensive use of collateral estoppel. *Id.*

Offensive use of collateral estoppel occurs where a person who was not a party to an action sues the party who lost on a particular issue in that action and asserts that the party is collaterally estopped from relitigating the issue on which he lost in the previous action. Example: A sues B. B loses on a particular issue. C sues B and asserts that B is collaterally estopped from relitigating the issue on which B lost to A. *See* Standage Ventures, Inc. v. State, 114 Ariz. 480, 484, 562 P.2d 360, 364 (1977). Arizona does not allow offensive use of collateral estoppel. *See id.;* Spettigue v. Mahoney, 8 Ariz. App. 281, 283-88, 445 P.2d 557, 559-64 (1968).

11. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) states: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

12. *Id.* Collateral estoppel is sometimes confused with the doctrine of res judicata. *See* Ross v. International Brotherhood of Elec. Workers, 634 F.2d 453, 457 n.6 (9th Cir. 1980). *See also* Industrial Park Corp. v. U.S.I.F. Palo Verde Corp., 26 Ariz. App. 204, 206, 547 P.2d 56, 58 (1976) (citing Lawlor v. National Screen Serv. Corp., 349 U.S. 322 (1955)). The *Lawlor* court stated: "under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars the second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." *Lawlor*, 349 U.S. at 326.

13. *See* 18 C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 8, § 4416, at 139-40.

14. *Food For Health*, 129 Ariz. at 105, 628 P.2d at 988. *See also* Barassi v. Matison, 134 Ariz. 338, 656 P.2d 627 (Ct. App. 1982). The defendant in *Barassi* had executed promissory notes of $4,500 and $90,000 to the plaintiff, and the prior action brought by the plaintiff concerned only the $4,500 note. The plaintiff was not collaterally estopped from bringing suit to collect on the $90,000 note since this issue was not litigated in the prior action.

15. Neinstedt v. Wetzel, 133 Ariz. 348, 355, 651 P.2d 876, 883 (Ct. App. 1982). *See also* State v. Jones, 124 Ariz. 284, 603 P.2d 555 (Ct. App. 1979) (the federal prosecution against the defendant was dismissed, but the state was not collaterally estopped from trying the defendant because no issues were decided in the federal case).

16. Moore Drug Co. v. Schoneman, 10 Ariz. App. 587, 589, 461 P.2d 95, 97 (1969). *See also* Fuller v. Hartford Accident and Indem. Co., 124 Ariz. 76, 601 P.2d 1360 (Ct. App. 1979) (the issue of whether the driver of the insured's car at the time of the accident resided with the insured was not essential to the judgment of negligence in the tort action; therefore, the insurer was not collaterally estopped from litigating this issue).

litigate his or her position on the issue;[17] (4) the issue was significant enough to have warranted vigorous litigation in the previous action;[18] (5) the previous judgment was on the merits,[19] valid,[20] and final;[21] and (6) no other circumstances exist that would make applying collateral estoppel unfair.[22]

The Liability Insurer's Duty to Defend

The insurer's duty to defend complicates the application of collateral estoppel between insurers and insureds. A liability policy typically contains an agreement by the insurer to pay amounts for which the insured is legally liable as a result of causing injury or property damage covered by the policy.[23] Because the insurer is required to indemnify the insured if liabilities covered by the policy are established,[24] the policy gives the insurer the right to control the defense or settlement of any claim alleging such damages.[25] In conjunction with the right to control the disposition of such claims, the insurer undertakes a correlative duty to defend the insured from claims al-

17. *See* Ferris v. Hawkins, 135 Ariz. 329, 660 P.2d 1256 (Ct. App. 1983). In *Ferris*, the court stated that in an action to collect unemployment benefits, a determination by the court that the plaintiff had been unfairly dismissed from his state job should not be given preclusive effect in the plaintiff's suit contesting the state personnel board's decision to uphold his dismissal. The legislature established separate administrative proceedings for dealing with unemployment benefits and personnel grievances. Moreover, the state did not have a full and fair opportunity to litigate the merits of its personnel case in the unemployment compensation proceeding. *See also Food For Health*, 129 Ariz. at 106, 628 P.2d at 989 (motion for judgment on the pleadings constituted full and fair opportunity to litigate for the purpose of giving the issues determined therein preclusive effect).

18. *See Ferris*, 135 Ariz. at 332 n.3, 660 P.2d at 1259 n.3 (where the amount at issue in the first action was $1,530 and the amount at issue in the second action was $17,715.77, the state may have lacked incentive to litigate the first case fully).

19. *See Barassi*, 134 Ariz. at 340, 656 P.2d at 629.

20. *See* Matter of Maricopa County Juvenile Action No. J-89724, 127 Ariz. 512, 622 P.2d 71 (Ct. App. 1980) (where the superior court order did not represent a valid and final judgment it had no collateral estoppel effect).

21. *See id.*

22. *See Ferris*, 135 Ariz. at 331, 660 P.2d at 1258.

23. One example of this type of clause reads as follows:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> A. bodily injury or
>
> B. property damage
>
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient. . . .

R. KEETON, BASIC TEXT ON INSURANCE LAW, Appendix G, at 658 (1971).

24. The insurer's duty to pay amounts for which the insured is legally liable as a result of causing injuries or property damages covered by the policy is known as its duty to indemnify the insured. *See* A. WINDT, INSURANCE CLAIMS AND DISPUTES § 6.01, at 225 (1982). In assuming the risk of paying for damages caused by the insured, the insurer occupies the role of indemnitor, while the insured is the indemnitee. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 57 comment a (1982).

25. *See supra* note 23. The right to control the litigation enables the insurer to select an attorney to defend the insured. This right protects the insurer from the possibility that the insured will not have the information necessary to choose an attorney who will provide him or her with the best possible defense. It also allows the insurer to decide whether to settle the claim and guarantees that any settlement offered will be in accord with the insurer's estimation of the claim's worth. *See* Binder, *Defense and Settlement of Claims*, in 1 THE LAW OF LIABILITY INSURANCE § 5.02, at 5-5 and 5-7 (R. Long ed. 1984). The insurer's control of the litigation makes it less likely that the insured will act in collusion with the injured party to the insurer's detriment. *See id.* at 5-5.

leging damages within the policy's coverage, even if the claims are "groundless, false, or fraudulent."[26] Consequently, a purchaser of liability insurance buys protection from incurring legal expenses connected with being sued on a claim within the policy's scope, as well as protection from paying damages covered by the policy.[27]

The insurer's duty to defend is based upon the allegations in the injured party's complaint against the insured.[28] The insurer must defend if the complaint alleges facts that, if proven, would result in establishing damages covered by the policy.[29] The insurer cannot escape the duty to defend by pointing to facts not stated in the complaint that indicate the claim has no basis or the insured is not liable for the alleged damages.[30]

The duty to defend is determined in accordance with the terms of the contractual agreement from which it arises.[31] As a result, the duty to defend against false or groundless claims does not obligate the insurer to defend against a claim that is, on its face, outside the policy's scope.[32] Some courts have established an exception to this rule: where the alleged facts are not within the scope of the policy, but the actual facts are within its scope, the insurer has a duty to defend if it knows or should know the actual facts.[33]

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26. *See supra* note 23; 7C J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4682, at 16 (1979); Binder, *supra* note 25, § 5.02, at 5-4 and 5-5.

27. State Farm Mut. Auto Ins. v. Paynter, 122 Ariz. 198, 200, 593 P.2d 948, 950 (Ct. App. 1979) (citing Orleans Village v. Union Mut. Fire Ins. Co., 133 Vt. 217, 221, 335 A.2d 315, 318 (1975)). The *Orleans Village* court stated: "A purchaser of liability insurance has a right to expect not only indemnification at the end but also a shield against liability claims at the outset." *See* RESTATEMENT (SECOND) OF JUDGMENTS § 58 comment a (1982).

28. Kepner v. Western Fire Ins. Co., 109 Ariz. 329, 331, 509 P.2d 222, 224 (1973); 14 G. COUCH, COUCH ON INSURANCE 2d § 51:42, at 453 (Rev. ed. 1982).

29. *See* 7C J. APPLEMAN, *supra* note 26, § 4682, at 23; A. WINDT, *supra* note 24, § 4.01, at 101-02 and § 4.05, at 114.

30. *See* 7C J. APPLEMAN, *supra* note 26, § 4683.01, at 65-66; D. Binder, *supra* note 25, § 5.03, at 5-10, 5-11, and 5-16; A. WINDT, *supra* note 24, § 4.04, at 109-10.

31. In Navajo Freight Lines, Inc. v. Liberty Mut. Ins. Co., 12 Ariz. App. 424, 471 P.2d 309 (1970), the court stated:

> The Arizona courts have in many instances held that an insurance policy is a contract, and that liability, if any, must be based upon the terms of that contract read in the light of any controlling statutes [citations omitted]. There is no contention made in the present case that any statutory provisions are here involved which enlarge the insurer's duty to defend. Therefore the insurer's liability must be based upon the language used in its policy.

Id. at 431, 471 P.2d at 316.

The insurer has no duty to defend despite allegations in the complaint within the policy's scope if: (1) the policy was not in force at the time the incident in question occurred, *see* 14 G. COUCH, *supra* note 28, § 51:45, at 479; (2) the insured has failed to comply with policy provisions, *see* 7C J. APPLEMAN, *supra* note 26, § 4684, at 88-89; (3) the claim on its face falls within a policy exclusion, *see* Tucson Public School Dist. Number One v. Home Ins. Co., 9 Ariz. App. 233, 235, 451 P.2d 46, 48 (1969); 7C J. APPLEMAN, *supra* note 26, § 4684.01, at 89; or (4) the person seeking to be defended is not insured under the policy, *see Navajo*, 12 Ariz. App. at 429, 471 P.2d at 314; A. WINDT, *supra* note 24, § 4.05, at 114.

32. *See* Pesqueria v. Factory Mut. Liab. Ins. Co., 16 Ariz. App. 407, 412, 493 P.2d 1212, 1217 (1972); 7C J. APPLEMAN, *supra* note 26, § 4684, at 72-73, § 4684.01, at 91-92; Binder, *supra* note 25, § 5.02, at 5-5.

33. *See* 7C J. APPLEMAN, *supra* note 26, § 4683.01, at 7 (Supp.); Binder, *supra* note 25, § 5.09, at 5-36, 5-37; A. WINDT, *supra* note 24, § 4.03, at 107, where the author states: "The logic behind the rule is unassailable. An insurer should not be able to escape its defense obligation by ignoring the true facts and relying on either erroneous allegations in the complaint or the absence of certain material allegations in the complaint."

This exception has been justified as in keeping with the "reasonable expectations" of the insured. *See* R. KEETON, *supra* note 23, § 7.6(a), at 469-71. *See also* Comment, *The Insurer's Duty To*

The Arizona Supreme Court has recognized a corresponding exception. In *Kepner v. Western Fire Insurance Co.*,[34] the court held that an insurer has no absolute duty to defend where the alleged facts are within the policy's scope but the actual facts are outside its scope. In *Kepner*, the insured had a homeowner's policy that contained an exclusion for injuries occurring in connection with the insured's business. The insured's grandson was injured by a power saw that was being used to convert the carport of the insured's home into a business office. A tort action was subsequently brought against the insured and the insurer refused to defend. The child's parents later brought a garnishment action against the insurer to collect the tort judgment. The parents contended that the insurer had breached its duty to defend because the complaint did not mention that the injury occurred in connection with excluded business activities. The *Kepner* court rejected the contention that the insurer had a duty to defend where actual facts excluding coverage were not reflected in the complaint.[35]

The *Kepner* holding appears to be contrary to the general rule that because the insurer agrees to defend against even false, fraudulent, or groundless suits alleging injuries covered by the policy, the insurer cannot point to facts outside the complaint to escape its duty to defend.[36] There is a distinction, however, between actual facts outside the complaint that establish that the claim against the insured has no merit and those that establish that the claim arises from an occurrence that is not within the scope of the insuring agreement. The latter facts often have no bearing on the insured's liability to the injured party and will not be decided in the tort action.[37]

The *Kepner* court recognized that the insurer's knowledge of facts that establish lack of coverage could create a situation in which the insured's and insurer's interests conflict.[38] Where this conflict of interest could interfere

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Defend Under a Liability Insurance Policy, 114 U. PA. L. REV. 734, 748 (1966) where the author states:

> As to the insured's expectations, it is safe to assume that if the ordinary insurance consumer had thought about them, his expectations would be that the insurer would defend him whenever there was a threat of liability to him and the threat was based on facts within the policy. The insured probably would be surprised at the suggestion that defense coverage might turn on the pleading rules of the court that a third party chose or on how the third party's attorney decided to write the complaint.

Arizona courts have not adopted the exception. A few Arizona cases have referred to the exception in dicta, stating that it was not applicable in the circumstances in question. *See Tucson Public School Dist.*, 9 Ariz. App. at 235, 451 P.2d at 48 ("there are no 'true facts' which are alleged to have come to the insurance company's attention which would indicate any grounds for liability other than those alleged in the complaint filed by the plaintiff"); Paulin v. Fireman's Fund Ins. Co., 1 Ariz. App. 408, 412, 403 P.2d 555, 559 (1965) (the court found no "divergence between the alleged facts and the true facts").

34. 109 Ariz. 329, 509 P.2d 222 (1973). The facts of *Kepner* are set forth at 329-30, 509 P.2d at 222-23.

35. *Id.* at 331, 509 P.2d at 224.

36. *See supra* note 30 and accompanying text.

37. *Kepner*, 109 Ariz. at 331, 509 P.2d at 224.

38. *Id.* at 331-32, 509 P.2d at 224-25. The insured has a contractual right to a defense against claims alleging injuries covered by the policy, regardless of the ultimate liability of either the insured or the insurer for the alleged injuries. *See* Binder, *supra* note 25, § 5.03, at 5-12, 5-13, and 5-16; G. COUCH, *supra* note 28, § 51:48, at 489, § 51-52, at 502. The insurer, on the other hand, has the right to exclude certain occurrences from coverage and to make coverage contingent upon certain obligations on the part of the insured. *Kepner*, 109 Ariz. at 330, 509 P.2d at 223. The *Kepner* court recognized the insurer's right to establish limitations to the extent that they are not counter to public

with the insured's defense, the court stated, the insurer should not control the defense.[39] The coverage issue should be resolved in an action between the insurer and the insured, with each side represented by its own counsel.[40] The court suggested two methods for resolving the coverage question. The insurer could bring a declaratory judgment action before the trial on the tort action, or the insured or the injured party could bring a garnishment action to collect the tort judgment after the trial on the tort action.[41] The court cautioned that an insurer that refuses to defend the insured and waits until after the tort action to contest liability will be liable for breach of the duty to defend if coverage is subsequently found to exist.[42]

The Application of Collateral Estoppel Between Insurers and Insureds in the Conflict of Interest Situation

Under Arizona law, an insurer may be collaterally estopped from contesting findings in an action against the insured whether or not the insurer defends the insured in the action.[43] The interests of the insurer and the insured in defeating the injured party's action are assumed to be the same.[44] Where the insurer defends the insured, the basis for applying collateral es-

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policy. *Id.* By its holding, the court implicitly recognized that the scope of the insuring agreement should not be expanded by the complaint's failure to reflect actual facts making the agreement's limitations applicable. *See id.* at 330-31, 509 P.2d at 323-24.

39. *Id.* The conflict of interest situation can interfere with the insured's defense where both the insured's tort liability and the insurer's liability under the policy depend upon issues that will be resolved by the tort action. *See* Note, *Insurance Policy Defenses and Collateral Estoppel*, 43 N.Y.U. L. REV. 140, 145 (1968). Where the facts which establish that no coverage exists would also establish that the insured is liable to the injured party, the insurer will be unable to conduct the defense in a manner which will protect both its own interests and those of the insured. *See* R. KEETON, *supra* note 23, § 7.7(c), at 501. The cases cited by the *Kepner* court in its discussion of the conflict of interest problem involve this type of situation. *See Kepner*, 109 Ariz. at 331-32, 509 P.2d at 224-25 (*citing* Glen Falls Ins. Co. v. American Oil Co., 254 Md. 120, 254 A.2d 658 (1969); Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 267 A.2d 7 (1970)). For further discussion of the conflict of interest problem see *infra* note 77. For a discussion of the problems faced by an attorney retained by the insurer to defend its insured where there is a conflict of interest between the insurer and the insured see *infra* note 54.

40. *Kepner*, 109 Ariz. at 332, 509 P.2d at 225.

41. *Id.* For further discussion of the methods for resolving the coverage question where a conflict of interest exists see *infra* note 77.

42. *Id.* An insurer that is found to have breached its duty to defend will be liable for the reasonable costs of the insured's successful or unsuccessful defense of the tort action, including attorney's fees, court costs, investigatory costs, and the cost of an appeal. Binder, *supra* note 25, § 5.15, at 5-93 through 5-97. The insurer will also be liable to the extent of the policy amount for any judgment against the insured in the action in which the insurer wrongfully refused to defend. *Paynter*, 122 Ariz. at 204-05, 593 P.2d at 954-55. The insurer's breach frees the insured from any obligations under the policy, including the obligation not to enter into a settlement without the insurer's consent. A. WINDT, *supra* note 24, § 4.09, at 120. Consequently, the insurer will be liable up to the policy amount for any reasonable settlement entered into by the insured after the breach. 14 G. COUCH, *supra* note 28, § 51:71, at 558; R. KEETON, *supra* note 23, § 7.6(e), at 485-86. The insurer will also be liable for additional costs that the insured can show are the direct result of the insurer's wrongful failure to defend. 14 G. COUCH, *supra* § 51:66, at 548. The insured may enter into an agreement with the injured party whereby the party agrees not to execute any judgment against the insured's personal property in exchange for an assignment of the insured's claim against the insurer for its failure to defend. *See* Damron v. Sledge, 105 Ariz. 151, 152-53, 460 P.2d 997, 998-99 (1969). The insurer may be collaterally estopped from contesting the determination of any issues essential to the judgment in the tort action which it wrongfully refused to defend. *See infra* note 49 and accompanying text.

43. *Vagnozzi*, 138 Ariz. at 446, 675 P.2d at 706.

44. *Id.*

toppel is that the insurer has control of the litigation.[45] Where the insurer wrongfully refuses to defend, the application of collateral estoppel may be based upon the insurer's duty to indemnify or upon the duty to defend the insured. The insurer has the right to control the defense of an action if it would be required to indemnify the insured from the judgment in that action.[46] If the insurer refuses the opportunity to protect its interests by controlling the litigation, it cannot later contest the findings essential to the judgment in the action.[47] Where the insurer has agreed to defend the insured from even "false, fraudulent, or groundless" claims alleging injuries within the scope of the policy, the insurer has a duty to defend even where it is obvious that the insurer will not be required to indemnify because the claim has no merit.[48] An insurer will be collaterally estopped from contesting findings essential to the judgment in an action in which it has breached its duty to defend.[49]

Conflicts of interest involving coverage often arise where the coverage question depends upon issues that the tort action will resolve.[50] Prior to *Vagnozzi*, an insurer in this situation could be collaterally estopped from contesting coverage after the tort action, whether or not it defended the insured.[51]

In *Vagnozzi*, the complaint alleged that the insured acted negligently, but the insurer believed that coverage did not exist because the insured acted intentionally.[52] Negligence and intent are mutually exclusive findings in Ar-

45. *See supra* note 25 and accompanying text. RESTATEMENT (SECOND) OF JUDGMENTS § 39 (1982) states: "A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party." *See id.* § 57 comment a. In order to contest, in a subsequent proceeding, issues that are not essential to the judgment in the tort action, the insurer must notify the insured that the right to contest these issues by defending the insured in the tort action is not waived. *Damron*, 105 Ariz. at 155, 460 P.2d at 1001. For a discussion of reservation of rights letters and non-waiver agreements, see Binder, *supra* note 25, § 5.17, at 5-107 through 5-114; R. KEETON, *supra* note 23, § 6.6(a), at 410-12.

46. *See supra* notes 24-25 and accompanying text.

47. RESTATEMENT (SECOND) OF JUDGMENTS § 57 and comment a (1982). An insurer that has been given an opportunity to control an action is said to have been "vouched in." *See Paynter*, 122 Ariz. at 200-01, 593 P.2d at 950-51; 1B J. MOORE, L. LUCAS, & T. CURRIER, *supra* note 9, ¶ 405[9], at 247-52. The application of collateral estoppel between insurer and insured eliminates the need for two separate lawsuits—"injured v. insured and injured or insured v. insurer." *Vagnozzi*, 138 Ariz. at 446, 675 P.2d at 706.

48. *See supra* note 30 and accompanying text.

49. RESTATEMENT (SECOND) OF JUDGMENTS § 58 and comment a (1982). The application of collateral estoppel where an insurer has breached its duty to defend "operates to guarantee an insured the protection against lawsuits and legal liability for which he has contracted." *Vagnozzi*, 138 Ariz. at 446, 675 P.2d at 706. RESTATEMENT (SECOND) OF JUDGMENTS § 58 comment a (1982) explains the application of collateral estoppel to enforce the duty to defend.

> The duty to provide a defense is enforced by rules creating strong disincentives against default in performance of the duty. One such rule is that if the indemnitor fails to assume defense of an action involving a claim that "might be found to be" within the indemnity obligation, he is precluded from contesting not only the existence and extent of the indemnitee's liability to the injured person but also the obligation to indemnify.

Id.

50. *See Vagnozzi*, 138 Ariz. at 446-47, 675 P.2d at 706-07; Note, *The Effect of Collateral Estoppel on the Assertion of Coverage Defenses*, 69 COLUM. L. REV. 1459, 1464 (1969); Note, *Insurance Policy Defenses and Collateral Estoppel*, 43 N.Y.U. L. REV. 140, 145 (1968).

51. *Vagnozzi*, 138 Ariz. at 446, 675 P.2d at 706.

52. *See id.* at 445, 675 P.2d at 705.

izona.[53] If the insurer defended the insured, the insurer could not demonstrate that the insured's actions were intentional and therefore outside the policy's scope without breaching the duty to defend.[54] On the other hand, having assumed control of the defense, the insurer would be collaterally estopped from contesting issues determined in the tort action—including a finding of negligence.[55] If the insurer refused to defend, a finding in the tort action that the insured's actions were negligent would also constitute a finding that they were within the scope of the policy.[56] The insurer's refusal to defend, therefore, would constitute a breach of its duty to defend and a rejection of the opportunity to protect its interests.[57] Consequently, the insurer would be collaterally estopped from asserting in a later proceeding that the insured's actions were intentional rather than negligent.[58]

Given these results, an insurer that believes the insured intentionally caused the third party's injuries can protect its interests only by filing a declaratory judgment action.[59] As *Vagnozzi* demonstrates, however, a finding of negligence in the tort action while the declaratory judgment action is pending can result in the denial of any opportunity for the insurer to be heard on the coverage issue.[60]

Analysis of the Vagnozzi *Decision*

In *Vagnozzi*, the Arizona Supreme Court examined the interaction of the concepts of collateral estoppel and the duty to defend.[61] Previous Arizona cases had established the following principles: (1) an insurer that breaches its duty to defend is collaterally estopped from contesting issues

53. Globe Indem. Co. v. Blomfield, 115 Ariz. 5, 7, 562 P.2d 1372, 1374 (Ct. App. 1977) (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31, at 145 (4th ed. 1971)).

54. *See* Binder, *supra* note 25, § 5.05, at 5-23; 14 G. COUCH, *supra* note 28, § 51:78, at 565-66; Note, *The Role of Declaratory Relief and Collateral Estoppel In Determining the Insurer's Duty to Defend and Indemnify*, 21 HASTINGS L.J. 191, 197 (1969). The attorney retained by an insurer to defend the insured is faced with a dilemma when the interests of the insurer and the insured conflict. In Parsons v. Continental Nat'l Am. Group, 113 Ariz. 223, 550 P.2d 94 (1976), the Arizona Supreme Court stated that an attorney retained by an insurer to defend the insured "owes undivided fidelity to the insured." *Id.* at 226, 550 P.2d at 97 (citing the A.B.A. Committee on Ethics and Professional Responsibility and the State Bar of Arizona Committee on Rules of Professional Conduct). The *Parsons* court made it clear that the client is the person the attorney was hired to represent, regardless of the fact that the insurer may be paying the attorney's fee. *Id.* at 227, 550 P.2d at 98. The attorney retained by the insurer cannot represent the insurer's interests to the extent that its interests conflict with those of the insured. *See id.* at 227-28, 550 P.2d at 98-99; 17 A.R.S. Sup. Ct. R. 42, ER 1.7, ER 1.8(f); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1, 5-14, 5-15, 1-23, DR 5-105(A), (B), and DR 5-107 (1981). For further discussion of the attorney's dilemma in conflict of interest situations *see* Binder, *supra* note 25, § 5.67, at 5-494 through 5-515; R. KEETON, *supra* note 23, § 7.7(b), at 493-99; Morris, *Conflicts of Interest in Defending Under Liability Insurance Policies: A Proposed Solution*, 1981 UTAH L. REV. 457.

55. *See supra* note 45 and accompanying text.

56. *See Vagnozzi*, 138 Ariz. at 445, 675 P.2d at 705; *Blomfield*, 115 Ariz. at 7, 562 P.2d at 1374.

57. *See supra* notes 47 and 49 and accompanying text.

58. *Id.*; *Paynter*, 122 Ariz. at 200, 593 P.2d at 950, Herendeen v. United States Fidelity and Guar. Co., 19 Ariz. App. 399, 401, 507 P.2d 1011, 1013 (1973).

59. In rejecting the insurer's contention that collateral estoppel should not prevent it from raising a defense that it could not have raised in the tort action, the *Blomfield* court stated: "The argument ignores the availability of a determination before trial by declaratory judgment in a separate action. . . ." 115 Ariz. at 8, 562 P.2d at 1375.

60. *See Vagnozzi*, 138 Ariz. at 445, 675 P.2d at 705.

61. *Id.*

essential to the judgment in the tort action;[62] (2) collateral estoppel does not preclude an insurer from litigating, in a subsequent proceeding, issues not essential to the judgment in the tort action;[63] (3) an insurer has no absolute duty to defend where actual facts not reflected in the complaint place the occurrence outside the scope of the policy;[64] (4) where the insurer believes coverage does not exist and coverage does not depend upon issues that the tort action will resolve, the insurer can litigate coverage before or after the tort action;[65] (5) if the insurer refuses to defend and waits until after the tort action to contest coverage, the insurer is liable for breach of contract if coverage is found to exist;[66] and (6) an insurer that defends the insured is collaterally estopped from contesting issues essential to the judgment in the tort action.[67]

The *Vagnozzi* decision creates an exception to this last principle where a conflict of interest exists between insurer and insured in the tort action.[68] The court noted that the application of collateral estoppel between insurer and insured assumes that the two have identical interests in defeating the injured party's tort claim.[69] In this situation, collateral estoppel eliminates separate trials between the injured party and the insured to determine tort liability and between the injured party or the insured and the insurer to determine policy coverage.[70] The rationale behind this application of collateral estoppel is not valid, however, where the interests of the insured and the insurer conflict.[71]

In *Vagnozzi*, the coverage question depended upon issues that the tort action would resolve.[72] This created a conflict of interest that was not present in *Kepner*, where the coverage question could be litigated separately because it depended upon issues unrelated to the question of tort liability.[73] The *Vagnozzi* court recognized that to require the insurer to defend under the circumstances would place both the insurer and the insured in the "untenable position" of trying to work together when their interests were opposed.[74]

In *Vagnozzi*, Farmers met its duty to defend by retaining an attorney to represent the insured.[75] Farmers then attempted to resolve the coverage question prior to the tort action.[76] Its efforts to determine its rights and

62. Hartford Accident & Indem. Co. v. Villasenor, 21 Ariz. App. 206, 209, 517 P.2d 1099, 1102 (1974).
63. *Fuller*, 124 Ariz. at 78, 601 P.2d at 1362.
64. *Kepner*, 109 Ariz. at 331, 509 P.2d at 224.
65. *Id.* at 332, 509 P.2d at 225.
66. *Id.*
67. *Blomfield*, 115 Ariz. at 7, 562 P.2d at 1374.
68. *Vagnozzi*, 138 Ariz. at 448, 675 P.2d at 708.
69. *Id.* at 446, 675 P.2d at 706. The court also recognized that collateral estoppel is applied to enforce the duty to defend, stating that it guarantees the insured protection from legal expenses. *See id.*; *see supra* note 49.
70. *Vagnozzi*, 138 Ariz. at 446, 675 P.2d at 706.
71. *Id.* at 446, 448, 675 P.2d at 706, 708.
72. *Id.* at 447, 675 P.2d at 707.
73. *Kepner*, 109 Ariz. at 331, 509 P.2d at 224.
74. *Vagnozzi*, 138 Ariz. at 446, 675 P.2d at 706.
75. *Id.* at 447, 675 P.2d at 707.
76. *Id.*

obligations—through either a declaratory judgment action or through a motion to consolidate the declaratory judgment action with the tort action—were unsuccessful.[77] Because Vagnozzi won the "race to the courthouse," he obtained a judgment that, in Arizona, bound Farmers to the negligence finding.[78] The court rejected this result and held that collateral estoppel does not preclude insurers and insureds from relitigating issues as to which a conflict of interest existed in the earlier tort action, whether or not the insurer defended in that action.[79]

With this holding, the court adopted section 58 of the Restatement

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77. *Id.* The *Kepner* court recommended the use of a declaratory judgment action to resolve conflicts of interest between the insurer and the insured. *Kepner*, 109 Ariz. at 332, 509 P.2d at 225. Where a conflict of interest exists, a declaratory judgment action has the advantage of providing the insurer and insured with a determination of their rights and obligations as quickly as possible. Binder, *supra* note 25, § 5.18A, at 5-115. A declaratory judgment allows the insurer to avoid the risk of relying solely on its own evaluation of the duty to defend in a given situation. Note, *The Role of Declaratory Relief and Collateral Estoppel in Determining the Insurer's Duty to Defend and Indemnify*, 21 HASTINGS L.J. 191, 194 (1969); Note, *Use of Declaratory Judgment to Determine a Liability Insurer's Duty to Defend—Conflict of Interests*, 41 IND. L.J. 87, 96 (1965). If the action results in a judgment in the insurer's favor, the insurer can avoid the time and expense involved in defending the insured. Binder, *supra* note 25, § 5.18A, at 5-15. A declaratory judgment may encourage settlement, thereby sparing the injured party and the insured costly and lengthy litigation as well. *Id.* To avoid losing control of the defense and making itself liable for breach of contract before it is certain that no coverage exists, the insurer usually defends the insured in the tort action pending the outcome of the declaratory judgment action. *Id.* § 5.18A at 5-117.

Many courts reject the use of a declaratory judgment action where the insurer's duty to defend depends upon issues that are also determinative of the insured's tort liability. *See* Binder, *supra* note 25, § 5.18B, at 5-118; A. WINDT, *supra* note 24, § 8.04, at 325. The judgment in the declaratory judgment action will not bind the injured person unless he or she is made a party to the action. Binder, *supra* note 25, § 18B, at 5-119. Courts have rejected the use of a declaratory judgment action to litigate issues central to the tort action on the grounds that joinder of the injured party could deprive him or her of the right to choose a forum and control the case. *See* A. WINDT, *supra* note 24, § 8.04, at 326; Note, *Use of Declaratory Judgment to Determine a Liability Insurer's Duty to Defend—Conflict of Interests*, 41 IND. L.J. 87, 101 (1965). Courts have also stated that a declaratory judgment action is unnecessary where the tort action will resolve the issues in question. *See* A. WINDT, *supra* note 24, § 8.04, at 326.

The *Kepner* court stated that a conflict of interest between the insurer and the insured could be resolved in an action between them before or after the tort action. *Kepner*, 109 Ariz. at 332, 509 P.2d at 225. Some courts have resolved the conflict of interest problem in a manner that is more in keeping with the public policy of conserving the resources of the courts and the parties. These courts have resolved the conflict of interest issue and the issue of the insured's tort liability in the same proceeding. *See* R. KEETON, *supra* note 23, § 7.7(c), at 504. This alternative can be accomplished by joining the injured party in the declaratory judgment action, allowing the insurer to refuse to defend the insured and to intervene in the tort action, or by allowing the insurer to be joined in the tort action. *Id.* at 504-05.

78. 138 Ariz. at 447, 675 P.2d at 707. The court disapproved of the tactics by which the judgment for Vagnozzi was obtained. *See supra* note 3.

79. 138 Ariz. at 448, 675 P.2d at 708. In *Blomfield*, 115 Ariz. 5, 562 P.2d 1372, the Arizona Court of Appeals held that an insurer that had defended the insured in the tort action was collaterally estopped to contest a finding of negligence. *Id.* at 7, 562 P.2d at 1374. The court rejected the insurer's contention that it could not have raised the defense that the insured acted intentionally in the tort action, stating that the insurer could have filed a declaratory judgment action to resolve the coverage question before the tort action. *Id.* at 8, 562 P.2d at 1375. The *Blomfield* insurer was asked if it would consider a certain act on the part of the insured a breach of the insured's contractual agreement to cooperate with the insurer. *Id.* at 6, 562 P.2d at 1373. The insurer did consider the act a breach of the cooperation clause, but would not respond to the inquiry. Instead, the insurer ordered the attorney it had retained to defend the insured to withdraw from the case. The attorney refused because of the proximity of the trial date. *Id.* The *Vagnozzi* court distinguished *Blomfield*, stating that the insurer's handling of the defense and its failure to file a declaratory judgment action "might well warrant the imposition of an estoppel to prevent a later denial of coverage." *Vagnozzi*, 138 Ariz. at 447-48, 675 P.2d at 707-08.

(Second) of Judgments.[80] Section 58 recognizes that a party is not precluded from contesting issues determined in an action in which it appeared in one legal capacity when it appears in a second action in a different legal capacity and there is a conflict of interest between the two capacities.[81] Where the insurer believes that coverage does not exist and the tort liability and coverage questions hinge upon the same issues, section 58 states that the insurer must act in different capacities with regard to its duties to defend and to indemnify the insured.[82] In fulfilling its duty to defend, the insurer cannot represent its own interests to the extent that they are counter to those of the insured.[83] In its capacity as indemnitor, the insurer is not liable for the judgment against the insured in the action in which it defended its insured if the claim is outside the policy's scope.[84] Section 58 recognizes that collateral estoppel should not preclude the insurer in its capacity as indemnitor from establishing facts it could not establish while fulfilling its duty to defend.[85]

An indemnitor that refuses the opportunity to protect its interest and defend against a claim within the scope of the indemnity agreement will be collaterally estopped from contesting any of the issues determined in the action in which it refused to defend.[86] Where a conflict of interest exists, however, general indemnity principles hold that the indemnitor cannot take control of the defense.[87] The indemnitor is not collaterally estopped from contesting any of the issues determined in an action where a conflict of interest prevented it from defending.[88]

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80. *Vagnozzi*, 138 Ariz. at 448, 675 P.2d at 708. RESTATEMENT (SECOND) OF JUDGMENTS § 58 (1982) states:

> (1) When an indemnitor has an obligation to indemnify an indemnitee (such as an insured) against liability to third persons and also to provide the indemnitee with a defense of actions involving claims that might be within the scope of the indemnity obligation, and an action is brought against the indemnitee involving such a claim and the indemnitor is given reasonable notice of the action and an opportunity to assume its defense, a judgment for the injured person has the following effects on the indemnitor in a subsequent action by the indemnitee for indemnification:
>
> (a) The indemnitor is estopped from disputing the existence and extent of the indemnitee's liability to the injured person; and
>
> (b) The indemnitor is precluded from relitigating those issues determined in the action against the indemnitee as to which there was no conflict of interest between the indemnitor and the indemnitee.
>
> (2) A "conflict of interest" for purposes of this Section exists when the injured person's claim against the indemnitee is such that it could be sustained on different grounds, one of which is within the indemnitor's obligation to indemnify and another of which is not.

81. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 58 comment a (1982) (incorporating § 36).

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.*

86. RESTATEMENT (SECOND) OF JUDGMENTS § 57 comment a (1982).

87. *Id.* at § 57 comment c which states in part:

> Because of the conflict, the indemnitor cannot properly be called on to take control of the defense of the action, for he would be required either to sacrifice his own interests without a fair opportunity to litigate questions concerning his liability or to commit a breach of his duty to conduct a vigorous defense of the indemnitee.

88. *Id.* This rule is complicated by the insurer's duty to defend, which requires the insurer to provide its insured with a defense in the conflict of interest situation where general indemnity principles would not require the insurer to defend. *Id.* at § 58 comment a. An indemnitor that defends the indemnitee is collaterally estopped to relitigate issues determined in the action in which it defended the insured because their interests are assumed to be the same. *Id.* at § 57 comment a. Section 58 recognizes that the duty to defend requires the insurer to appear in a capacity in which it

An insurer that breaches its duty to defend is also collaterally estopped from contesting issues determined in the action in which it refused to defend.[89] In the instance of an insurer's refusal to defend where a conflict of interest exists, general indemnity principles do not support the application of collateral estoppel; collateral estoppel can be applied in this situation only as a result of the insurer's breach of the duty to defend.[90]

One ambiguity remains after *Vagnozzi*. The court stated that collateral estoppel will not preclude insurers and insureds from relitigating issues as to which a conflict of interest existed in a previous proceeding, even if the insurer did not defend in the tort action.[91] If a conflict of interest arises only where the insurer knows actual facts not reflected in the complaint that *plainly* exclude coverage, this aspect of *Vagnozzi* is consistent with *Kepner*.[92] The basis of both decisions would appear to be that the insurer has no absolute duty to defend.[93] The *Vagnozzi* court, however, discussed conflict of interest in terms of the insurer's knowledge of "facts which *might* exclude coverage"[94] and "facts which *tend* to place the claim outside coverage of the policy."[95] Consequently, the *Vagnozzi* basis for suspending collateral estoppel when the insured does not defend is ambiguous.

Conclusion

Collateral estoppel should not apply where a party has not had a full and fair opportunity to litigate his or her position on an issue.[96] Prior to *Vagnozzi*, an insurer could be deprived of any opportunity to be heard on the coverage question.[97] By guaranteeing the insurer's right to be heard, the *Vagnozzi* decision gives full effect to the principles underlying the doctrine of collateral estoppel.[98]

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cannot protect its interests and allows the insurer the opportunity to be heard in a later action. *Id.* at § 58 comment a.

89. *See supra* note 49 and accompanying text.
90. *See supra* notes 47, 49, and 88 and accompanying text.
91. *Vagnozzi*, 138 Ariz. at 448, 675 P.2d at 708.
92. *See Kepner*, 109 Ariz. at 331, 509 P.2d at 227.
93. *See id.*
94. *Vagnozzi*, 138 Ariz. at 446, 675 P.2d at 706 (citing *Kepner*, 109 Ariz. at 332, 509 P.2d at 225 (emphasis added)).
95. *Vagnozzi*, 138 Ariz. at 446, 675 P.2d at 706 (emphasis added).
96. *See supra* note 17 and accompanying text.
97. *See supra* notes 54-60 and accompanying text.
98. *See supra* notes 14-22 and accompanying text.

V. MEDICAL MALPRACTICE

A. THE INCREASED RISK RULE: ESTABLISHING "PROBABLE" CAUSATION THROUGH MERE POSSIBILITY

In the recent case of *Thompson v. Sun City Community Hospital, Inc.*[1], the Arizona Supreme Court considered a private hospital's general duty to provide emergency care and the issue of causation in medical malpractice actions. The court rejected existing Arizona law[2] that required the plaintiff to show that a defendant's negligence was, more likely than not, the cause of the injury.[3] Instead, the court adopted a rule which renders a defendant subject to liability if the negligent conduct merely increased the plaintiff's risk of harm.[4]

The Underlying Controversy

The plaintiff in *Thompson* was a thirteen-year-old boy.[5] He was taken to the Boswell Community Hospital emergency room following a serious accident in which he was pinned against a wall by a car. His injuries included multiple fractures in the pelvic area and a transected femoral artery in the left thigh that interrupted blood flow to the leg. Because his parents indicated they did not have adequate insurance coverage for inpatient admission to Boswell, the plaintiff was transferred to the county hospital. Boswell's policy was to transfer an indigent patient to the county hospital if the emergency room physician determined that the patient was "medically transferable." The surgeons at the county hospital did not begin surgery on the plaintiff's leg until more than four hours after his arrival from Boswell.[6] The boy ultimately suffered residual impairment of his left leg. He brought suit alleging that Boswell was negligent in transferring him and that the delay resulting from the transfer caused permanent injury to his leg.[7]

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1. 141 Ariz. 597, 688 P.2d 605 (1984).

2. Hartford Accident & Indemnity Co. v. Industrial Comm'n of Arizona, 38 Ariz. 307, 299 P. 1026 (1931); Hiser v. Randolph, 126 Ariz. 608, 617 P.2d 774 (Ct. App. 1980); Kreisman v. Thomas, 12 Ariz. App. 215, 469 P.2d 107 (1970); Harris v. Campbell, 2 Ariz. App. 351, 409 P.2d 67 (1965).

3. *Thompson*, 141 Ariz. at 608, 688 P.2d at 616.

4. *Id.*

5. The facts of *Thompson* are set forth Thompson v. Sun City Community Hosp., Inc., 142 Ariz. 1, 3-6, 688 P.2d 647, 649-52 (Ct. App. 1983). The plaintiff was 13 years old at the time of the injury. The boy's mother brought suit on behalf of her son to recover damages for his injuries which were allegedly aggravated by the failure to give prompt treatment. The boy's mother also sued for negligent infliction of emotional distress. *Id.* at 3-4, 688 P.2d at 649-50 (Ct. App. 1983). The Arizona Supreme Court affirmed the lower court's rejection of the emotional distress claim, refusing to reconsider its holding in Keck v. Jackson, 122 Ariz. 114, 593 P.2d 668 (1979). *Thompson*, 141 Ariz. at 609, 688 P.2d at 617.

6. Although the surgeons at the county hospital began working on the plaintiff about two hours after his arrival, performing exploratory abdominal surgery, they did not begin work on the boy's leg until approximately four hours after his arrival. Thompson v. Sun City Community Hosp., Inc., 142 Ariz. 1, 5, 688 P.2d 647, 651 (Ct. App. 1983).

7. At trial, the jury found against the plaintiff and in favor of Boswell and the attending emergency room physician. *Id.* The Arizona Court of Appeals affirmed, citing Hiser v. Randolph, 126 Ariz. 608, 617 P.2d 774 (Ct. App. 1980), as controlling on the issue of causation. *Id.* at 10-11, 688 P.2d at 656-57. *Hiser* requires that the plaintiff present evidence showing that the defendant's negligence was, more likely than not, the cause of the injury. *Hiser* at 612, 617 P.2d at 778.

The supreme court in *Thompson* focused on two issues. First, the court considered the duty owed by a private hospital to an emergency patient in need of inpatient treatment.[8] Second, the court considered whether the statutory requirement of proximate causation[9] is met when the plaintiff in a medical malpractice action[10] has shown that defendant's negligence is only a *possible* rather than the *probable* cause of the injury.[11] This Casenote briefly discusses the first issue, but focuses on the second.

The Emergency Standard of Care

The Arizona Supreme Court previously considered a private hospital's duty to provide emergency medical care in *Guerrero v. Copper Queen Hospital*.[12] There, the court concluded that a hospital which maintains emergency care facilities has a duty to provide necessary emergency treatment to anyone requiring such care. *Guerrero* did not directly address the issue of whether patients who are considered medically transferable can be transferred after initial examination and treatment.

In *Thompson*, the Arizona Supreme Court reaffirmed *Guerrero v. Copper Queen Hospital* and further held that a private hospital has a duty to provide all "medically indicated" inpatient treatment,[13] even though the patient is judged to be "medically transferable."[14] The court reasoned that indigency, by itself, is not sufficient cause to transfer a patient. Under *Thompson*, if the private hospital has the means to treat the patient, transfer of the patient solely on the basis of ability to pay is a breach of duty as a matter of law.

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8. *Thompson*, 141 Ariz. at 601, 688 P.2d at 609.

9. ARIZ. REV. STAT. ANN. § 12-563 (1982) provides:

The following shall be necessary elements of proof that injury resulted from the failure of a health care provider to follow the accepted standard of care:

1. The health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances; and

2. Such failure was a proximate cause of the injury.

10. Although the *Thompson* rule is applied in a medical malpractice case, the language of the holding is broad enough to encompass situations outside of the medical malpractice context. However, the court does not define the scope of application outside of the immediate context. *See infra* notes 26-27 and accompanying text. This Casenote focuses only on application of the court's holding to medical malpractice actions.

11. *Thompson*, 141 Ariz. at 605-06, 688 P.2d at 613-16.

12. 112 Ariz. 104, 537 P.2d 1329 (1975). In *Guerrero*, the defendant hospital refused to treat two alien Mexican children who had been badly burned in a stove explosion.

13. This term was drawn from the accreditation standards of the Joint Commission for Accreditation of Hospitals: "No person should be denied impartial access to treatment or accomodations that are available and medically indicated, on the basis of such considerations as . . . the nature of the source of payment for his care." JCAH, ACCREDITATION MANUAL FOR HOSPITALS 23.

14. *Thompson*, 141 Ariz. at 602, 688 P.2d at 610. The term "medically transferable" was not specifically defined in the supreme court's opinion. The court simply stated that a hospital administrator testified that indigent emergency patients are transferred when the physician, using his professional judgment, determines that "a transfer could occur." *Id.* at 600, 688 P.2d at 608. The court of appeals used the definition that was given to the jury at trial: "medically transferable" means that "transfer will not subject the patient to an unreasonable risk of harm to his life or health." Thompson v. Sun City Community Hosp., Inc., 142 Ariz. 1, 5 n.1, 688 P.2d 647, 651 n.1 (Ct. App. 1983).

The Causation Issue

Arizona Law Prior to Thompson

Arizona's requirements for recovery in a medical malpractice action brought against a physician or hospital are set forth in section 12-563 of the Arizona Revised Statutes.[15] The statute requires that the negligence of the health-care provider must be the proximate cause of the plaintiff's injury. Prior to *Thompson*, the Arizona courts adhered to the rule that proximate cause would exist only if the plaintiff presented evidence showing that the defendant's actions were the probable cause of the alleged harm.[16] Under this rule, if the plaintiff's evidence does not show that the defendant's negligence was, more likely than not, the actual cause of injury, then a prima facie case for negligence has not been made.[17] Following accepted principles of statutory construction, it seems likely that the Arizona legislature intended to adopt this traditional rule through the language of section 12-563.[18]

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15. For the text of the statute, *see supra* n.9.

16. Hartford Accident & Indemnity Co. v. Industrial Comm'n of Arizona, 38 Ariz. 307, 299 P. 1026 (1931); Kreisman v. Thomas, 12 Ariz. App. 215, 469 P.2d 107 (1970); Harris v. Campbell, 2 Ariz. App. 351, 409 P.2d 67 (1965). The traditional rule was repeated recently in Hiser v. Randolph, 126 Ariz. 608, 617 P.2d 774 (1980). The defendant in *Hiser* was the on-call physician for the Mohave County General Hospital emergency room. The plaintiff's wife entered the emergency room in a semi-comatose condition and the defendant physician was called. The defendant stated that he would not treat the patient and that another doctor should be contacted. About forty minutes after the call to the defendant another physician arrived and began treating the patient, but she died several hours later.

The *Hiser* court held that the plaintiff was required to show by expert testimony that the patient *probably* died as a result of the forty minute delay in treatment. Citing Cooper v. Sisters of Charity of Cincinnati, Inc., 27 Ohio St. 2d 242, 272 N.E.2d 97 (1971), the court stated that "the mere loss of an unspecified increment of the chance for survival is, of itself, insufficient to meet the standard of probability." *Hiser*, 126 Ariz. at 613, 617 P.2d at 779.

17. Cooper v. Sisters of Charity of Cincinnati, Inc., 27 Ohio St. 2d 242, 252, 272 N.E.2d 97, 104 (1971).

18. ARIZ. REV. STAT. ANN. § 12-563 (1982) provides that a plaintiff can recover only if the health-care provider failed to follow the accepted standard of care and "such failure was a *proximate cause* of the injury" (emphasis added). In its construction of the statute, the court must look to the legislative intent at the time the statute was enacted. Bushnell v. Superior Court of Maricopa County, 102 Ariz. 309, 311, 428 P.2d 987, 989 (1967). The most reliable evidence of intent is the language of the statute itself. State *ex rel.* Corbin v. Pickrell, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983). If the meaning of words within a statute have become well known and well settled by judicial decision, it must be presumed that the legislature used those words in the same sense in which they were used in acquiring judicial sanction. State v. Jones, 94 Ariz. 334, 336, 385 P.2d 213, 215 (1963); Marine v. Allstate Ins. Co., 12 Ariz. App. 229, 232, 469 P.2d 121, 124 (1970).

ARIZ. REV. STAT. ANN. § 12-563 became effective in February of 1976. At that time, and up until *Thompson*, it was well-settled in Arizona case law that to establish proximate cause the plaintiff in a medical malpractice action must show that the defendant's breach of duty was the *probable*, and not merely a *possible* cause of the harm suffered. Hartford Accident & Indemnity Co. v. Industrial Comm'n of Arizona, 38 Ariz. 307, 299 P. 1026 (1931); Kreisman v. Thomas, 12 Ariz. App. 215, 469 P.2d 107 (1970); Harris v. Campbell, 2 Ariz. App. 351, 409 P.2d 67 (1965).

The legislature was undoubtedly cognizant of the judicial interpretation of the term "proximate cause." That precise term would not have been used had the legislature intended that a health-care provider be held liable for breach of a duty when such conduct was only a possible cause of the plaintiff's injury. Thus, it can be argued that the legislature has already rejected the "increased risk" rule. Accordingly, the *Thompson* court should not have invalidated this declaration of public policy enacted by the legislature. *See* Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369, *modified on other grounds*, 39 Ariz. 367, 7 P.2d 254 (1931).

Adoption of the "Increased Risk" Rule in Thompson

The *Thompson* court, citing section 323 of the Restatement (Second) of Torts,[19] held that the issue of causation in a medical malpractice action must go to the jury even if the plaintiff's evidence merely shows that the defendant caused an increase in the risk of harm.[20] In adopting this rule the court disapproved of the rule in *Hiser v. Randolph*[21] which required the plaintiff to show that the defendant's negligence was the probable cause of the injury. The court argued that adherence to the traditional rule in *Hiser* defeats the deterrence function of the tort system.[22] In addition, the court maintained that the traditional rule is unfair in cases based on statistical possibilities, "because . . . the rule prevents any individual in a group from recovering, even though it may be statistically irrefutable that some have been injured."[23] The court also charged that the existing rule was unfair because it "puts a premium on each party's search for the willing witness,"[24] presumably making the determination of probability of causation less reliable.

The *Thompson* increased risk rule is not intended to be the subject of a jury instruction; its effect is to eliminate directed verdicts and to permit the jury to find a "probability" that the defendant's actions caused the plaintiff's injury where the plaintiff has shown only that the defendant increased the risk of harm.[25] The court stated that this increased risk rule will apply in cases where the defendant "undertook to protect plaintiff from a particular harm and negligently interrupted the chain of events, thus increasing the risk of that harm."[26] The court also noted that this rule is applicable to those cases where "the duty breached was one imposed to prevent the type of harm which plaintiff ultimately sustained."[27] The scope of this language is somewhat unclear and could be construed to apply the increased risk rule to virtually all medical malpractice cases.

A few other jurisdictions have adopted an increased risk rationale for determining causation in medical malpractice actions. A variant of the increased risk rule was first discussed in the malpractice context as dictum in *Hicks v. United States.*[28] The *Hicks* language indicated that if the evidence

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19. Section 323 states:,

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform the undertaking, if

(a) his failure to exercise such care increases the risk of such harm . . . .

RESTATEMENT (SECOND) OF TORTS § 323 (1965).

20. *Thompson*, 141 Ariz. at 608, 688 P.2d at 616.

21. 126 Ariz. 608, 612, 617 P.2d 774, 778 (Ct. App. 1980).

22. *Thompson*, 141 Ariz. at 607, 688 P.2d at 615.

23. *Id.*

24. *Id.*

25. *Id.* at 607-08, 688 P.2d at 615-16.

26. *Id.* at 608, 688 P.2d at 616. The intended scope of this language is uncertain. *See supra* note 10 and accompanying text.

27. *Id.*

28. 368 F.2d 626, 632 (4th Cir. 1966). The *Hicks* court drew support for its rule from cases unrelated to medical malpractice. For example, in Gardner v. National Bulk Carriers, Inc., 310 F.2d 284 (4th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963), a seaman on a ship had not been seen for several hours, and it was determined that the man had fallen overboard. There was no way to knowing exactly when or where he had fallen overboard. The captain of the ship decided that a

shows that the defendant deprived the plaintiff of a "substantial possibility" of survival, then a prima facie case has been made.[29] Other courts have expanded on *Hicks* and held, as *Thompson* did, that evidence of an increase in the risk of harm will be sufficient to get the causation issue to the jury.[30]

Thompson *and the "Chance Interest"*

In support of its new rule of causation, the *Thompson* court stated that the interest of the law is protection of the *chance* for survival or complete recovery, which was taken away by the defendant's negligence. However, the court did not adopt a true "loss of chance"[31] rule. *Thompson* does not require the jury to determine the value of a lost chance and to award damages only for that value. Rather, with evidence of *any* lost chance of recovery, the plaintiff is protected from a directed verdict and the jury will be allowed to consider the causation question and hold the defendant liable for the total damages of the ultimate injury.

Impact of the "Increased Risk" Rule

In holding that an "increased risk" rule of causation would be applied in situations where the defendant's failure to exercise reasonable care increased the risk of the harm which the defendant undertook to prevent, the court explicitly adopted the rule of the Restatement (Second) of Torts, section 323.[32] Such reliance on the Restatement is misplaced in the context of causation analysis. Section 323 operates to create a duty of reasonable care in a situation where the defendant acts to aid the plaintiff even though the defendant had no duty to act at all. If the defendant is negligent in rendering services to aid the plaintiff, the defendant may be liable "for physical harm *resulting from* his failure to exercise reasonable care . . . ."[33] The Restatement's language incorporates the prima facie requirement that the harm must result from the negligence, but the application of section 323 assumes that the element of causation has already been established.[34] There

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rescue attempt would almost certainly fail and he did not attempt to search for the lost seaman. The seaman's family sued, claiming that the captain breached his duty in not attempting a rescue. The plaintiffs could not prove that the failure to attempt a rescue was the probable cause of the drowning. However, the Fourth Circuit held that if a "reasonable possibility" of survival was established, the defendant could be held liable for the value of the chance of survival lost because the captain breached his duty to attempt rescue. The *Gardner* rule is usually referred to as a "loss of chance" rule since the plaintiff is compensated only for the value of the chance of avoiding injury, rather than the total cost of the actual injury.

29. 368 F.2d at 632.

30. Herskovits v. Group Health Coop. of Puget Sound, 99 Wash. 2d 609, 664 P.2d 474 (1983); Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978).

31. For a detailed discussion of the application of a pure "loss of chance" rationale, see King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981). A discussion of the "loss of chance" rule is beyond the scope of this Casenote, although some aspects of the rule are discussed in connection with the *Thompson* "increased risk" rule.

32. *Thompson*, 141 Ariz. at 608, 688 P.2d at 616. The text of the Restatement is quoted *supra* n.19.

33. *Id.* (emphasis added).

34. The clear purpose of this section is to impose a duty of reasonable care on the defendant; the plaintiff still must show that his physical harm "result[ed] from" the defendant's actions. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

is no mention at all, in either the text of the rule or the comments, of relevance to causation analysis.

Regardless of the Restatement's applicability to the court's ruling, the "increased risk" rule is seriously flawed. In support of the new rule, the court states that in a case based on statistical probabilities, the traditional rule is unfair because it "prevents any individual in a [statistical] group from recovering, even though it may be statistically irrefutable that some have been injured."[35] However, it seems at least equally unfair that *Thompson* potentially imposes liability on *all* the defendants in a statistical group, even though it is irrefutable that most of the defendants have caused no harm whatsoever.

The nature of the evidence in a medical malpractice case also makes the increased risk rule undesirable. In most medical malpractice cases the evidence is highly technical. The layperson cannot use general knowledge to make a rational inference of causation.[36] Ordinarily, the plaintiff must use medical expert testimony to establish the causal link between the defendant's conduct and the plaintiff's injury.[37] Under *Thompson*, a jury is permitted to find causation even though the plaintiff's expert testimony or other evidence does not establish a probability of causation. The court recognizes that this "permits the jury to engage in some speculation with regard to cause and effect."[38] In fact, allowing the jury this latitude to draw inferences of causation from technical evidence—when medical experts are unable to draw similar inferences—enables the jury to base a finding of causation on conjecture and speculation.[39]

In addition to precipitating speculative jury findings, the rule stated in *Thompson* is illogical. Under *Thompson*, the plaintiff can show that there is proximate cause merely by presenting evidence of any increase in the risk of harm. The *Thompson* court stresses that the jury must find a probability of causation,[40] but in essence the court is saying that the plaintiff can prove something is probable by proving it is merely possible. An event, however, cannot be probable unless its occurrence is more likely than not. For example, if a plaintiff's expert testifies that the defendant's negligence increased

35. *Thompson*, 141 Ariz. at 607, 688 P.2d at 615.

36. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 86-87 (1956); Casenote, *Malpractice Liability: Failure to Act*, 23 ARIZ. L. REV. 538, 545 (1981). There are some cases, however, where the layman can judge mistakes of a physician and the causation of injury through the use of general knowledge. For example, if a surgeon mistakenly removes a healthy organ or limb, or leaves a foreign object inside the patient's body, the physician's mistake is obvious to the layman and res ipsa loquitur is available to allow an inference of negligence. Malone, *supra*, at 88. Likewise, if the negligent action was the amputation of a healthy limb, expert testimony would not be necessary to establish the causal link between the negligence and the loss of the limb. Causation can often be inferred in these extreme cases without specific medical testimony.

37. Boyce v. Brown, 51 Ariz. 416, 421, 77 P.2d 455, 457 (1938); Hiser v. Randolph, 126 Ariz. 608, 612, 617 P.2d 774, 778 (Ct. App. 1980); Faris v. Doctors Hospital, Inc., 18 Ariz. App. 264, 270, 501 P.2d 440, 446 (1972); Kreisman v. Thomas, 12 Ariz. App. 215, 218, 469 P.2d 107, 110 (1970).

38. *Thompson*, 141 Ariz. at 607, 688 P.2d at 615.

39. If the evidence is of a technical nature so as to require expert testimony to explain the meaning of the evidence, and the experts testify that the defendant's conduct, more likely than not, did not cause plaintiff any injury, a contrary finding of probability by the jury would not be based on an objective evaluation of the evidence, but arguably would be influenced primarily by sympathy for the injured plaintiff.

40. *Thompson*, 141 Ariz. at 608, 688 P.2d at 616.

the plaintiff's risk of harm, but both the plaintiff and defense experts agree that there is only a 1% chance that the defendant's conduct caused injury, the jury would still be able to find a "probability" of causation under the *Thompson* rule. This is an extreme example, but the *Thopmson* rule would allow this case to go to the jury which could then determine that a "probability" of causation exists. The jury would have no logical basis for such a determination, but the *Thompson* holding significantly compromises any challenge by the defendant on the verdict.

Another serious problem with the increased risk rule is that no special instruction regarding damages is given to the jury.[41] The defendant can be liable for the plaintiff's total damages even if both parties' experts admit that the defendant only slightly reduced the patient's chance of recovery. The *Thompson* court implies that this does not present a great problem since the increased risk rule merely recognizes a jury's tendency to discount damages in cases where the issue of liability is less certain.[42] However, the jury in a negligence case is instructed to consider the elements of liability and damages independently. In such a case, the application of the "loss of chance" rule, where the plaintiff would be compensated only for the value of the lost chance of recovery, seems more equitable. It makes sense that if the plaintiff is only required to prove increased risk of harm, then the defendant should be liable only for the value of that increased risk. Rather than determining the damages and causation issues separately, the jury should be instructed to reduce the damages accordingly when the plaintiff has shown only a less than probable chance of causation.

Conclusion

The Arizona Supreme Court's decision in *Thompson v. Boswell Memorial Hospital* expanded a private hospital's duty to provide emergency care, holding that the transfer of an emergency patient solely on the basis of ability to pay is a breach of duty as a matter of law. More significant was the court's adoption of an "increased risk" rule of causation, which allows a medical malpractice plaintiff to prove a "probability" of causation merely by showing that the defendant caused an increase in the risk of harm to the plaintiff. This rule allows a jury of laypersons to make inferences of "probability" based only on conjecture and speculation in a situation where qualified experts from both sides are unable to make the same inferences from the technical medical evidence at hand. The application of such a rule is contrary to the probable intent of the state legislature regarding the requirements of recovery in a medical malpractice context.[43] More importantly, the plaintiff who is required to prove a *probability* of causation can submit the causation question to the jury when the evidence is a mere possi-

41. *Id.*
42. *Id.*
43. *See supra* note 18.

bility of causation. This result is plainly illogical and poses serious application problems for courts in the future.

David W. Counce

B. FOR WANT OF A NAIL: THE DISCOVERY RULE IN MEDICAL MALPRACTICE CASES

In most negligence actions, injury occurs at the time of the tortious act and the statute of limitations begins to run at that point. In some situations, however, the injury is not known until some time after the tort is committed. This is particularly true in the area of medical malpractice. To ameliorate the harsh result that an expired statute of limitations has on a later-discovered injury, both case law and statutory law in many jurisdictions have developed the "discovery rule." Application of the discovery rule tolls the running of the statute of limitations until the plaintiff discovers or, in the exercise of reasonable diligence, should have discovered the injury.[1]

In *Kenyon v. Hammer*,[2] the Arizona Supreme Court confronted the question of the constitutionality of the statute of limitations in an action based on medical negligence.[3] The court was asked to review section 12-564(A) of the Arizona Revised Statutes,[4] which requires that suit be brought within the three years following the date of injury, regardless of when the plaintiff actually discovers his injury.

In *Kenyon*,[5] the plaintiff wife delivered her first child in July, 1972. During the course of that pregnancy a routine blood test revealed she had Rh negative blood. An employee of the defendant physician, Dr. Hammer, erroneously recorded the test result as Rh positive in the plaintiff's medical file. Because of the increased risk to both the mother and child in subsequent pregnancies, a substance called RhoGAM is routinely administered to Rh negative mothers within 72 hours of delivery.[6] Relying on the incorrect

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1. W. PROSSER & W.P. KEETON, THE LAW OF TORTS § 30, at 165-66 (5th ed. 1984).
2. 142 Ariz. 69, 688 P.2d 961 (1984).
3. ARIZ. REV. STAT. ANN. § 12-564 (1976).
4. *Id.* This statute provides:

A. A cause of action for medical malpractice against a licensed health care provider accrues as of the date of the injury and shall be commenced and prosecuted within three years after the date of injury. In no event shall the time for commencement of legal action exceed three years from the date of injury except as provided in subsections B, C and D.

B. In an action based on injury through the leaving of a foreign object having no therapeutic, diagnostic or other medical reason for remaining in the patient's body, the period of limitations shall be tolled until the discovery of the foreign object or when the foreign object, with the exercise of reasonable diligence, should have been discovered, whichever occurs first.

C. In an action where a defendant or an agent of a defendant has intentionally prevented the discovery of an injury caused by that defendant by concealing or misrepresenting facts about the injury, the period of limitations shall be tolled from the date of the injury until the discovery of the injury or the time when, with the exercise of reasonable diligence, it should have been discovered, whichever occurs first.

D. Notwithstanding the provisions of § 12-502, in an action on behalf of a minor injured under the age of seven, the applicable period of limitations begins to run when the minor reaches his or her seventh birthday or on death, whichever occurs earlier.

5. The facts of *Kenyon* are set out 142 Ariz. at 71-72, 688 P.2d at 963-64.

6. Incompatability between a mother and the baby she is carrying develops when the mother is Rh negative and the baby is Rh positive. Because of circulation across the placenta, the baby's red blood cells enter the bloodstream of the mother. These "intruders" stimulate the mother's production of antibodies, much as antibodies are produced to fight infection. This antibody production does not ordinarily begin until after delivery of the first baby, so first children of incompatible

medical record, Dr. Hammer did not administer RhoGAM to Mrs. Kenyon.

In mid-1977 Mrs. Kenyon again became pregnant, still unaware of her potential for the immune response which timely administration of RhoGAM prevents. The child was stillborn in April, 1978, her blood cells destroyed by her mother's Rh antibodies. Mrs. Kenyon immediately underwent tubal ligation to prevent future pregnancies.

The Kenyons sought damages for both the wrongful death of the child and for personal injuries to Mrs. Kenyon. The trial court granted the defendant's motion for summary judgment, ruling that the action was barred by the statute of limitations under Arizona law.[7] The Arizona Court of Appeals reversed[8] and the supreme court granted review.

The plaintiffs maintained that the earliest time Mrs. Kenyon could have been injured was when her second child was conceived. Since suit was filed within three years of that time,[9] the Kenyons argued it was timely. The court of appeals accepted this argument.[10] The defendant's position was that the statute began to run at the time of the negligent act, which occurred either when the incorrect information was placed in Mrs. Kenyon's records or when Dr. Hammer failed to administer RhoGAM following the birth of the first child in July, 1972. In either case the period of limitations would have expired long before either the conception or birth of the second child. The Arizona Supreme Court determined the date of injury to be the latter of these two possibilities, noting that once Mrs. Kenyon did not receive the RhoGAM, she had a cause of action against Dr. Hammer for her decreased ability to bear healthy children in the future.[11]

Since the supreme court also determined that the harm was "both undiscovered and undiscoverable" at the time of injury,[12] it was faced with the dilemma created by A.R.S. § 12-564(A):[13] the plaintiff whose cause of action is lost—before its existence can be known—through the operation of the statute of limitations. Confronting the issue head on, the court held that the right to bring an action for personal injury is a fundamental right under the Arizona Constitution, and that absent a compelling state interest, any law abridging that right fails to survive the strict scrutiny test.[14] Finding no compelling state interest in the legislation that abolished the discovery rule for most medical malpractice claimants,[15] the court held that portion of the statute to be an unconstitutional violation of the equal protection clause of

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mothers are seldom affected. However, an untreated mother becomes sensitized, and in subsequent pregnancies the antibodies she produces attack the red blood cells of the unborn child, resulting in profound fetal anemia, with varying degrees of damage to the baby. Injection of RhoGAM within 72 hours of each subsequent birth prevents the production of maternal antibodies and protects any future fetuses from red blood cell destruction. *See* THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 956-57 (R. Berkow ed. 1977).

7. 142 Ariz. at 71, 688 P.2d at 963. *See supra* note 4.

8. Kenyon v. Hammer, 142 Ariz. 124, 688 P.2d 1016 (Ct. App. 1983), *vacated*, 142 Ariz. 69, 688 P.2d 961 (1984).

9. 142 Ariz. at 75, 688 P.2d at 967.

10. 142 Ariz. at 137, 688 P.2d at 1019.

11. 142 Ariz. at 72-73, 75, 688 P.2d at 964-65, 967.

12. *Id.* at 75-76, 688 P.2d at 967-68.

13. *See supra* note 4.

14. 142 Ariz. at 83, 688 P.2d at 975.

15. *See infra* note 23 and accompanying text.

the Arizona Constitution.[16] To cure the unconstitutionality of the statute as it existed, the court imposed in malpractice cases the discovery rule which applies to all other tort claims,[17] and which in a different form had existed in medical malpractice cases prior to the passage of the Medical Malpractice Act.[18]

This Casenote focuses on the development of medical malpractice law in Arizona over the past fifteen years and places particular emphasis on the interaction between the courts and the legislature during this development. *Kenyon* and its predecessor, *DeBoer v. Brown*,[19] represent the newest stage of this evolution.

Medical Malpractice Law Until 1976

Prior to 1971 there was no special statute of limitations applicable to medical malpractice actions. Rather, a malpractice case was treated as any other personal injury action and was to be brought within two years of the time the claim accrued.[20] Conspicious by its absence was a definition of when a cause of action for personal injury accrued, an omission which was to plague the courts and the legislature for years to come. Moreover, only when fraud and concealment were present in a personal injury action was the statute tolled until the date the plaintiff discovered the injury.[21]

The uncertainty concerning accrual in medical malpractice cases was resolved temporarily in 1971 by *Mayer v. Good Samaritan Hospital*.[22] The plaintiff in *Mayer* sustained injury to her pituitary gland as a result of insulin shock following childbirth. Although she diligently tried to find the cause of her continuing problems, she was unable to do so until over three years later, by which time the statute of limitations had run. The Arizona Court of Appeals treated the question of accrual as one of first impression and

16. 142, Ariz. at 87, 688 P.2d at 979. Article 2, section 3, of the Arizona Constitution provides: "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." This is considered the equal protection clause of Arizona's Constitution. *Kenyon v. Hammer*, 142 Ariz. at 77, 688 P.2d at 969.

17. 142 Ariz. at 87, 688 P.2d at 979.

18. Arizona adopted the discovery rule in medical malpractice cases in Mayer v. Good Samaritan Hospital, 14 Ariz. App. 248, 482 P.2d 497 (1971). *See infra* notes 22-24 and accompanying text.

19. 138 Ariz. 178, 673 P.2d 922 (Ct. App. 1983) and DeBoer v. Brown, 138 Ariz. 168, 673 P.2d 912 (1983).

20. ARIZ. REV. STAT. ANN. § 12-542 (1956) (amended 1971) provided:

> [T]here shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following actions:
> 1. For injuries done to the person of another.
> 2. For injuries done to the person of another when death ensues from such injuries, which actions shall be considered as accruing at the death of the party injured.
> 3. For trespass for injury done to the estate or the property of another.
> 4. For taking or carrying away the goods and chattels of another.
> 5. For detaining the personal property of another and for converting such property to one's own use.
> 6. For forcible entry or forcible detainer, which action shall be considered as accruing at the commencement of the forcible entry or detainer.

21. Morrison v. Acton, 68 Ariz. 27, 33-34, 198 P.2d 590, 594-95 (1948), *citing* Acton v. Morrison, 62 Ariz. 139, 155 P.2d 782 (1945). *See also* Rodriquez v. Manoil, 9 Ariz. App. 225, 450 P.2d 737 (1969).

22. 14 Ariz. App. 248, 482 P.2d 497 (1971).

adopted the discovery rule for medical malpractice cases.[23] The court stressed that it was attempting to determine the intent of the legislature and invited that body to clarify its desire.[24] The legislature lost no time in accepting the invitation; less than two months later it rewrote the Arizona limitations statute to include a specific limitation for actions based on the negligence of health care providers.[25] The new subsections provided for an absolute limit of six years from the date of injury, established a discovery rule with its own two-year statute of limitations, and permitted the tolling of the statute altogether in cases of fraudulent concealment by the defendant. In addition, the statute was tolled for minors and incompetents for the periods of their disabilities.[26]

The major case to emerge at the appellate level following the revision of A.R.S. § 12-542 was *Landgraff v. Wagner*,[27] in which the plaintiff's physician left a surgical clamp in her abdomen. The clamp was not discovered for nine years, far beyond the point at which the six-year limit of the amended statute had expired. The issue before the court was whether a cause of action could be lost before the plaintiff knew it existed. This question was answered in the affirmative by a unanimous court. The *Landgraff* court found the equal protection argument[28] to be "without merit" in that all malpractice claimants were treated alike under A.R.S. § 12-542(B).[29] The court further found that losing a cause of action before becoming aware it existed was not an abrogation of the constitutional right to sue for personal injury[30] nor was it a denial of due process.[31] Finally, the court held that the cause of action accrued on the date of the negligent act, not the date on which dam-

23. The court held that "a cause of action in a malpractice case accrues when the plaintiff knew or by the exercise of reasonable diligence should have known of the defendant's conduct and therefore the statute of limitations does not begin to run until that time." *Id.* at 252, 482 P.2d at 501.

24. *Id.* at 252-53, 482 P.2d at 501-02.

25. The *Mayer* opinion was filed on March 17, 1971. The amendment to ARIZ. REV. STAT. ANN. § 12-542 was signed into law on May 12, 1971, adding two sections (Subsections B and C) to the existing statute. Those new sections provided:

> B. A cause of action for injury or death against a physician or surgeon, dentist, registered nurse, dispensing optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, licensed clinical laboratory director, naturopath, or a licensed hospital as the employer of any such person, based upon such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, shall accrue as of the date of injury and shall be commenced and prosecuted within six years after the date of injury or two years after the injured party discovers or through the use of reasonable diligence should have discovered the malpractice, whichever period first occurs. These time limitations shall be tolled for any period during which such person has failed to disclose any act, error or omission upon which such action is based and which through the use of reasonable diligence should have been known to him.
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> C. Subsection B shall not be construed nor intended to modify any rights a minor or incompetent person may otherwise have at law.

Act of May 12, 1971, ch. 175, § 1, 1971 Laws (repealed 1976).

26. *Id.*

27. 26 Ariz. App. 49, 546 P.2d 26 (1976).

28. *See supra* note 16.

29. *Landgraff*, 26 Ariz. App. at 55, 546 P.2d at 32 (1976).

30. Article 18, section 6, of the Arizona Constitution provides: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."

31. Article 2, section 4, the due process clause of the Arizona Constitution, states: "No person shall be deprived of life, liberty, or property without due process of law."

ages resulting from that act appeared.[32] Although *Landgraff* did not specifically overrule *Mayer*,[33] *Landgraff* treated the holding in *Mayer* as no longer applicable in the light of amended A.R.S. § 12-542.[34]

One other case discussing the question of when a cause of action accrues for statute of limitations purposes arose under revised A.R.S. § 12-542. *Russo v. Diethrich*[35] involved allegedly needless surgery. The court of appeals held that the injury occurred "when [the plaintiff] went under the surgeon's knife."[36]

The Malpractice Crisis

During the early 1970s many of the companies writing medical malpractice insurance became reluctant to continue offering this service to their physician customers. The companies typically chose to either cease writing malpractice coverage altogether or to dramatically increase the premium charged.[37] The Arizona legislature was called into special session to resolve the problem and in February, 1976, passed the Medical Malpractice Act.[38] The Act was comprehensive in scope and controversial in effect.[39]

That portion of the Arizona statute dealing with limitations of actions

32. *Landgraff*, 26 Ariz. App. at 55-56, 546 P.2d at 32-33. Unfortunately, the opinion of the *Landgraff* court alternated between very specific language ("the legislature intended the date of injury *in this type of case* to be the date on which the foreign body was left within the patient's body, but *here* there is no factual dispute . . . .") and much broader language ("A.R.S. § 12-542 . . . provide[s] for a maximum period of six years within which medical malpractice actions must be brought. . . . [T]he period is to begin upon the occurrence of the negligent conduct not upon its later consequences.") *Id.* (emphasis supplied). Because of this lack of clarity, courts and litigants alike have found support for widely varying positions in the *Landgraff* opinion. *See infra* note 57 and accompanying text.

33. Mayer v. Good Samaritan Hospital, 14 Ariz. App. 248, 482 P.2d 497 (1971).

34. *See supra* note 25 and accompanying text.

35. 126 Ariz. 522, 617 P.2d 30 (Ct. App. 1980). *Russo* arose under revised A.R.S. § 12-542, but was not filed until after passage of the 1976 Medical Malpractice Act.

36. *Id.* at 525, 617 P.2d at 33.

37. For a capsule history of the malpractice crisis and Arizona's response to it, see DeBoer v. Brown, 138 Ariz. 178, 180-82, 673 P.2d 922, 924-26 (Ct. App. 1983).

38. The Act, Chapter 5.1 of ARIZ. REV. STAT. ANN., is comprised of §§ 12-561 through 12-569.

39. Aside from changes in the statute of limitations, the primary provisions of the Act were:

1. Assault and battery were eliminated as grounds for suit. ARIZ. REV. STAT. ANN. § 12-562 (1976).
2. Contract actions, unless based on a written contract, were eliminated as grounds for suit. *Id.*
3. A state-wide standard of care was established. ARIZ. REV. STAT. ANN. § 12-563(1) (1976).
4. The collateral source rule was abolished. ARIZ. REV. STAT. ANN. § 12-565 (1976). *See infra* note 51.
5. The complaint could not state a dollar amount of damages. ARIZ. REV. STAT. ANN. § 12-566 (1976).
6. The medical liability review panel and its procedures were established. ARIZ. REV. STAT. ANN. § 12-567 (1976). For more discussion on the panel system, see Note, *Medical Malpractice Panel Decisions: Are They Admissible as Evidence in Federal Diversity Proceedings?*, 26 ARIZ. L. REV. 191 (1984).
7. The court could determine the reasonableness of attorneys' fees. ARIZ. REV. STAT. ANN. § 12-568 (1976).
8. Evidence of the health-care provider's insurance was inadmissible. ARIZ. REV. STAT. ANN. § 12-569 (1976).

in medical malpractice cases was repealed.[40] To replace it, the legislature enacted A.R.S. § 12-564.[41] In addition, § 12-502, which provides that the statute of limitations shall be tolled during the period of a plaintiff's legal disability, was overridden.[42] Section 12-564(D) of the new statute removed this protection in cases involving minor plaintiffs.[43] Patients whose cases arose because foreign objects were left in their bodies were given the benefit of the discovery rule,[44] as were patients who were unable to discover their injuries because of the misrepresentation or other fraudulent behavior of the health care provider.[45] For all other plaintiffs, the statute of limitations was reduced from six to three years from the date of injury.[46]

Section 12-564(A), the statute of limitations portion of the medical malpractice statute, was drafted to clearly indicate the legislature's intent to eliminate the discovery rule for the most common category of malpractice claimants, those injured through the negligence of medical personnel.[47] In Arizona, as in other states,[48] the discovery rule was seen as a significant factor in the medical malpractice crisis because it was viewed as creating an extended period of liability.[49] The legislative response, possibly drawing support from the *Landgraff* opinion, was to simply eliminate the discovery rule altogether.

The new Medical Malpractice Act went into effect on February 27, 1976. Since that time there have been repeated attacks on virtually all of its provisions, from the constitutionality of the statutes of limitations them-

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40. Subsections of B and C of ARIZ. REV. STAT. ANN. § 12-542 (1971) were eliminated. For the text of these subsections, see *supra* note 25.

41. For the text of ARIZ. REV. STAT. ANN. § 12-564, see *supra* note 4.

42. ARIZ. REV. STAT. ANN. § 12-502 (1984).

> A. If a person entitled to bring an action other than those set forth in article 2 of this chapter is at the time the cause of action accrues either under eighteen years of age or of unsound mine, the period of such disability shall not be deemed a portion of the period limited for commencement of the action. Such person shall have the same time after removal of the disability which is allowed to others.
>
> B. If a person entitled to bring an action other than those set forth in article 2 of this chapter is at the time the cause of action accrues imprisoned, the period of such disability shall exist only until such time as the person imprisoned discovers the right to bring the action or with the exercise of reasonable diligence should have discovered the right to bring the action, whichever occurs first, and such person shall have the same time after the disability ceases to exist which is allowed to others.

43. ARIZ. REV. STAT. ANN. § 12-564(D), *supra* note 4. In Barrio v. San Manuel Div. Hosp. for Magma Copper Co., 143 Ariz. 101, 692 P.2d 280 (1984), the supreme court held ARIZ. REV. STAT. ANN. § 12-564(D) (1976) unconstitutional. The court pointed out that children are prohibited from bringing actions in their own name. Rather, they must rely on adults to file suit on their behalf. Since such adult action is not guaranteed to occur, the statute does not provide a reasonable alternative to the child and permits the cause of action to be lost before it can be brought. This, the court said, violates article 18, section 6, of the Arizona Constitution. *See supra* note 30 for the wording of this section. Thus the court held that "[t]he provisions of the tolling statute, A.R.S. § 12-502, which apply to all other actions and claims of minors, are applicable to medical malpractice actions." *Id.* at 107, 692 P.2d at 286.

44. ARIZ. REV. STAT. ANN. § 12-564(B) (1976).

45. ARIZ. REV. STAT. ANN. § 12-564(C) (1976).

46. ARIZ. REV. STAT. ANN. § 12-564(A) (1976).

47. *See supra* note 4.

48. *See, e.g.*, Anderson v. Wagner, 79 Ill. 2d 295, 305-09, 402 N.E.2d 560, 564-66 (1980).

49. DeBoer v. Brown, 138 Ariz. 178, 181, 673 P.2d 922, 925 (Ct. App. 1983).

selves[50] to the forms and procedures of the medical liability review panel.[51]

Accrual Under the Revised Statute

Injury Occurs Upon Adverse Effect

Russo, Landgraff, and *Mayer* each involved a situation in which the injury occurred at the time of the negligence. The Arizona courts had not

50. *See* Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984) and Barrio v. San Manuel Div. Hosp. for Magna Copper Co., 143 Ariz. 101, 692 P.2d 280 (1984).

51. Daou v. Harris, 139 Ariz. 353, 678 P.2d 934 (1984) (holding the superior court did not lose jurisdiction to enter a default judgment even though the matter had not been referred to the panel); Phoenix Gen. Hosp. v. Superior Court, 138 Ariz. 504, 675 P.2d 1323 (1984) (holding that while it is mandatory for a litigant to appear at the panel hearing, it is not required that he present evidence or argue the case); Barclay v. Jones, 127 Ariz. 282, 619 P.2d 1059 (1980) (holding that each malpractice case must be submitted to a review panel and thus acts of a special court commissioner prior to such referral were void); Barnet v. Superior Court, 124 Ariz. 467, 605 P.2d 445 (1979) (holding that a separate decision must be rendered on each charge of malpractice).

The earliest and most comprehensive challenge to the Act came nineteen months after its passage when the Arizona Supreme Court decided Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977). *Eastin* attacked three main areas of the new statutes: 1) the abolition of the collateral source rule, 2) the creation of the medical liability review panel, and 3) the requirement that the party losing before the panel post a bond as a requirement for further litigation.

The collateral source rule excludes from evidence any benefits which the plaintiff may have received from any source collateral to the defendant and prohibits reduction in damages by any amounts which may have been received. *Id.* at 583, 570 P.2d at 751. In contrast, the 1976 Act allows the defendant to introduce evidence of any such benefits the plaintiff has already received or will receive in the future, and permits the information to "be accorded such weight as the trier of fact chooses to give it." ARIZ. REV. STAT. ANN. § 12-565(B) (1976). The court found that since the statute treated all members of the class of malpractice litigants alike, the statute was a reasonable legislative response to the problems health-care providers were experiencing in obtaining malpractice insurance. *Eastin v. Broomfield,* 116 Ariz. at 583, 570 P.2d at 751.

ARIZ. REV. STAT. ANN. § 12-565(A) (1976) also permits the plaintiff to introduce evidence of his cost in obtaining these collateral benefits, and whether or not the provider of the benefits has a lien on any damages award the plaintiff may recover. The *Eastin* court found that since it was not certain that juries would reduce the damages by any collateral benefits which the plaintiff had already received or might receive in the future, the law did not represent an impermissible limitation on damages under article 18, section 6, of the Arizona Constitution. *See supra* note 30.

Predictably, the *Eastin* court also rejected the plaintiffs' due process and equal protection arguments. While agreeing that the law did create a class of claimants who, alone among all tort claimants, were excluded from the benefits of the collateral source rule, the court nevertheless held the statute was not so arbitrary and capricious as to represent a denial of due process or equal protection. Eastin v. Broomfield, 116 Ariz. at 583, 570 P.2d at 75.

The second prong of attack was directed at the creation of a medical liability review panel. The court quickly disposed of the argument that the panel was a usurpation of the right to trial by jury. The court pointed out that the decision of the panel was not binding, and was nothing more than a rebuttable item of evidence for the trier of fact to consider and give whatever weight it found appropriate. *Id.* at 580, 570 P.2d at 748. The justices gave even shorter shrift to the plaintiffs' argument that introduction of the panel's findings was a judicial comment on the evidence, noting that the judge who sits on the panel may not preside at the subsequent trial. *Id.* at 581-82, 570 P.2d at 749-50. As to the argument that the panel unconstitutionally invaded an area reserved to the judiciary, the court pointed out that the panel's power stops short of the ability to enter and enforce a judgment. Thus, the court found no encroachment. *Id.* at 582, 570 P.2d at 750.

Finally, the plaintiffs in *Eastin* argued that the requirement set forth in ARIZ. REV. STAT. ANN. § 12-567(I-J) (1976) that the party who lost at the panel hearing must post a bond prior to proceeding with the litigation (or suffer dismissal of his claim) was violative of article 2, section 13 of the Arizona Constitution. *See supra* note 28. The court agreed with this argument and struck down the bond—not because it singled out malpractice litigants for discriminatory treatment, but, instead, because the statute only gave the court the power to reduce the bond in appropriate cases, not to eliminate it. *Eastin,* 116 Ariz. at 585-86, 570 P.2d at 753-54. Thus, the only practical effect of *Eastin* was that the legislature removed that portion of ARIZ. REV. STAT. ANN. § 12-567 when the statute was amended in 1982.

yet been faced with a case of "delayed injury" under A.R.S. 12-564(A) or any of its predecessors. That case arose in *DeBoer v. Brown*.[52]

In August, 1976, the plaintiff in *DeBoer* consulted a dermatologist who diagnosed a lesion as a common wart. In April, 1989, over three years later, the lesion was properly diagnosed as a malignant melanoma, a virulent form of skin cancer. There was no question that the defendant physician had misread the slide he had prepared. The trial court denied the defendant's motion for summary judgment, based on its finding that A.R.S. § 12-564 did not provide a reasonable time within which the malpractice action against the physician could be brought, and was thus an unconstitutional denial of due process.[53]

The Arizona Supreme Court avoided the constitutional issue and the question of the discovery rule, but focused instead upon the date of injury, which was still undefined even by the new statute.[54] The evidence before the court was that the "wart" had remained dormant for a period following the initial misdiagnosis, and its cells had not begun to proliferate internally until some time in 1979. The complaint was filed in September, 1981. The court noted that the term "date of injury" was carried over from the predecessor of A.R.S. § 12-564.[55] That predecessor statute, in turn, had been adopted from a California statute, and the cases construing that statute were found persuasive.[56] Citing to those cases, the supreme court held for the first time that an injury occurs when the patient experiences an adverse effect from the malpractice.[57] Since there was no adverse effect to the *DeBoer* plaintiff until the lesion began to change in 1979, his 1981 lawsuit was, therefore, timely. The court pointedly mentioned that it was not faced with a situation in which the adverse effect of the misdiagnosis had occurred more than three years prior to the filing of the complaint.[58] This was, however, exactly the situation facing the court in *Kenyon v. Hammer*.

Discovery Rule Reinstated

In *Kenyon v. Hammer*, Mrs. Kenyon was injured at the time of failure to administer the RhoGAM. At this point, her ability to give birth to healthy children was compromised, and the cause of action accrued.[59] Since

52. 138 Ariz. 168, 673 P.2d 912 (1983). The facts of *DeBoer* are set out 138 Ariz. at 169, 673 P.2d at 913.

53. *Id.* at 169, 673 P.2d at 913.

54. *See supra* note 4 for the text of ARIZ. REV. STAT. ANN. § 12-564(A) (1976).

55. *Id.* 138 Ariz. at 171, 673 P.2d at 915. The statute to which the court was referring was ARIZ. REV. STAT. ANN. § 12-542(B) (1971). *See supra* note 25.

56. *DeBoer v. Brown*, 138 Ariz. at 171, 673 P.2d at 915 (1983).

57. *Id.* at 170, 673 P.2d at 914. Specifically, the court held:

> [T]he "injury" is not the mere undetected existence of the medical problem at the time the physician misdiagnosed or failed to diagnose it. Nor is the "injury" the mere continuance of the same problem in substantially the same state or the leaving of the patient "at risk" of developing a more serious condition. Rather, the "injury" is the development of the problem into a more serious condition which poses greater danger to the patient or which requires more extensive treatment.

Id. Interestingly, the court chose the narrower of the two interpretations of *Landgraff, see supra* note 32, and limited *Landgraff* to foreign body cases. 138 Ariz. at 170 n.2, 673 P.2d at 914 n.2.

58. 138 Ariz. at 171, 673 P.2d at 915.

59. 142 Ariz. at 69, 688 P.2d at 967.

Mrs. Kenyon was injured more than five years before suit was filed,[60] there was no question the statute of limitations had run. As a result, the court had to either order dismissal of the action or examine the law for constitutional infirmities. It chose the latter course.

The *Kenyon* court was confronted with the same issue which appeared in *Landgraff*,[61] that is, whether a cause of action can be lost before the plaintiff knows it exists. By focusing only on the class of malpractice plaintiffs, the *Landgraff* court had found no constitutional violation of equal protection.[62] The *Kenyon* court, however, focused first on the class of tort claimants in general and found that A.R.S. § 12-564 singled out medical malpractice plaintiffs for less favorable treatment.[63] Persons with negligence claims against professionals other than health care providers were given the benefit of the discovery rule.[64] Thus, the court concluded, it was not the nature of the claim, but the identity of the defendant which determined the differential treatment.[65]

The court was also concerned with what it termed the "internal discrimination" of the statute in that each of its subsections provides a different treatment for different types of malpractice plaintiffs.[66] Finally, the court expressed its concern over the fact that the tolling provisions of other statutes were not applicable to medical malpractice plaintiffs.[67]

Although the court determined that the statute was discriminatory in regard to plaintiffs in medical malpractice actions, this discrimination in and of itself does not render the statute unconstitutional. Unless a statute imposes a special burden on a "suspect class" or impinges upon a "fundamental right," the legislature may regulate in an uneven manner so long as there is a legitimate state interest which is furthered by the legislative classification.[68] If, however, the class is suspect or the right is fundamental, the court must find a compelling state interest which can only be served by the regulation under attack.[69] The *Kenyon* court found that malpractice plaintiffs

60. The Kenyons' first child was born on July 10, 1972. The second child was stillborn on April 26, 1978. Suit was filed against Dr. Hammer on April 30, 1979. *Id.* at 71, 688 P.2d at 963.

61. *See supra* notes 27-34 and accompanying text.

62. 26 Ariz. App. at 55, 546 P.2d at 32.

63. 142 Ariz. at 76, 688 P.2d at 968.

64. Such claims are treated under the general two-year statute of limitations imposed by ARIZ. REV. STAT. ANN. § 12-542 (1976) and are subject to the discovery rule. *See* Sato v. VanDenburgh, 123 Ariz. 225, 599 P.2d 181 (1979) (discovery rule applies to accountant malpractice); Long v. Buckley, 129 Ariz. 141, 629 P.2d 557 (Ct. App. 1981) (discovery rule applies to attorney malpractice). *See also* Amfact Distribution Corp. v. Miller, 138 Ariz. 152, 673 P.2d 792 (1983) (in legal malpractice cases arising during the course of litigation, the statute of limitations does not begin to run until the plaintiff has been damaged, *i.e.*, the appeal process has either been completed or abandoned).

65. 142 Ariz. at 77, 688 P.2d at 969.

66. *Id.*

67. *Id.* For example, ARIZ. REV. STAT. ANN. § 12-501 (1956) tolls the statute of limitations when the defendant is absent from the state. Also, ARIZ. REV. STAT. ANN. § 12-502 (1984) tolls the statute for minors, incompetents and prisoners. *See supra* notes 42-43. It should be noted that ARIZ. REV. STAT. ANN. § 12-502 was amended in 1984, at which time the disability of imprisonment was deemed to end when the prisoner discovered or reasonably should have discovered his right to bring an action. Ch. 350, § 1, 1984 Laws.

68. A suspect class is generally one based on either race or religion. A fundamental right is one guaranteed by the Constitution. *Kenyon*, 142 Ariz. at 78-79, 688 P.2d at 970-71.

69. *Id.*

were not a suspect class.[70] The court, however, reviewed the debates of the constitutional convention[71] and was convinced that the Arizona Constitution meant exactly what it said: the right to pursue a cause of action is fundamental.[72]

The strict scrutiny test requires that the state have a compelling interest which is served by the legislation and that the legislation be necessary to further that interest. The defendant in *Kenyon* maintained that the medical malpractice insurance crisis of the 1970s had created a compelling state interest in reducing the number of medical malpractice suits. Noting that the dramatic increase in malpractice insurance premiums impacted primarily on physicians' economic status, the court found no compelling state interest in providing relief for that group of persons at the cost of depriving another group of its right to litigate.[73] The only state interests the court could identify were those of reducing the cost of medical care and increasing its availability; the court found that the Medical Malpractice Act had done neither.[74] The statute abolishing the discovery rule could not withstand the strict scrutiny test.[75] The court imposed the *Mayer* discovery rule[76] on the three-year statute of limitations contained in A.R.S. § 12-564(A).[77]

The Scope of Kenyon

Perhaps the most interesting question to arise from *Kenyon* is what effect the opinion will have on the other "statute of repose" in effect in the state, Arizona Revised Statutes section 12-551, dealing with products liability. That statute provides that in strict liability actions, the statute of limitations shall expire twelve years from the date the product was first sold.[78] Not only does this law allow the statute of limitations to run before the injury is discovered, it also allows it to run before the injury even occurs. To date the Arizona Supreme Court has not dealt with the problem, and it is of course conjecture to attempt to predict the court's reaction when faced with such a case. However, much of the reasoning of *Kenyon* is applicable. Given the provision of the Arizona Constitution which prohibits the abrogation of a cause of action, and the *Kenyon* court's holding that "abolition of a

70. *Id.* at 79, 688 P.2d at 971.

71. *Id.* at 80-81 n.9, 688 P.2d at 972-73 n.9.

72. *Id.* at 83, 688 P.2d at 975. The concurrence in *Kenyon* would not have engaged in an equal protection analysis and would have held simply that in view of article 18, section 6, *supra* note 30, any law abrogating the right to pursue a cause of action for personal injuries was in and of itself unconstitutional. *Id.* at 87-88, 688 P.2d at 979-80 (Hays, J., specially concurring).

73. 142 Ariz. at 84, 688 P.2d at 976.

74. *Id.* at 84-85, 688 P.2d at 976-77. Implicit in this holding is the court's recognition of the fact that elimination of the discovery rule has not been shown to reduce medical costs or increase medical services.

75. *Id.* at 87, 688 P.2d at 979.

76. *See supra* notes 22-26 and accompanying text.

77. 142 Ariz. at 87, 688 P.2d at 979.

78. ARIZ. REV. STAT. ANN. § 12-551 (1978) reads as follows:

> A product liability action as defined in § 12-681 shall be commenced and prosecuted within the period described in § 12-542, except that no product liability action may be commenced and prosecuted if the cause of action accrues more than twelve years after the product was first sold for use or consumption, unless the cause of action is based upon the negligence of the manufacturer or seller or a breach of an express warranty provided by the manufacturer or seller.

cause of action before injury has occurred, and thus before the action could have been brought, is abrogation . . . ,"[79] it is unlikely that the strict products liability statute of limitations will survive when challenged.[80]

Summary

Marking another step in the history of interaction between the courts and the legislature on the subject, the Arizona Supreme Court in *Kenyon v. Hammer* held that the portion of the Medical Malpractice Act of 1976 which eliminated the discovery rule was a violation of article 2, section 13, of the Arizona Constitution. In so doing, the court properly found it was a denial of equal protection for a medical malpractice plaintiff to lose a cause of action before it could have been known the claim existed. While the question of when a plaintiff knew or should have known of the existence of the claim remains a question to be decided on a case-by-case basis, adoption of the discovery rule correctly salvages those rare cases of delayed injury which the statute would have eliminated. It is anticipated that a similar result will occur when the court is confronted with a challenge to that portion of the products liability statute of limitations which prohibits maintenance of a cause of action in strict liability more than twelve years after the date of first sale of the defective product.

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79. *Kenyon,* 142 Ariz. at 74, 688 P.2d at 966 (1984).

80. The *Kenyon* court cited with approval Heath v. Sears Roebuck & Co., 123 N.H. 522, 525, 464 A.2d 288, 293-94 (1983) for the proposition that a statute of repose in product liability cases had no substantial relationship to a reduction in insurance rates and subsequent price reductions to the consumer. 142 Ariz. at 86. 688 P.2d at 978. For an opposing view, see Note, *Product Liability Statutes of Repose as Conflicting with State Constitutions: The Plaintiffs are Winning,* 26 ARIZ. L. REV. 363 (1984).

VI. PROPERTY LAW

ARIZONA RECOGNIZES IMPLIED RESTRICTIVE COVENANTS: *SHALIMAR ASSOCIATION V. D.O.C. ENTERPRISES, LTD.*

> [F]or if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.[1]

Shalimar Association v. D.O.C. Enterprises, Ltd.[2] *(Shalimar)* holds that "implied restrictive covenants"[3] may be imposed on purchasers of realty. The Arizona Court of Appeals, Division One, affirmed the trial court's finding that the buyers of a golf course located within a subdivision were purchasers with notice and were therefore bound by certain implied restrictions imposed on the golf course.

The facts leading to this litigation are not uncommon. A proposal is made by the original developer or by a new owner to change the use of property retained for a particular purpose. This attempted change is challenged by the homeowners within the subdivision because of the adverse impact it will have on these homeowners.[4] The facts of *Shalimar*[5] follow this pattern. Shalimar Estates is a residential subdivision in Tempe, Arizona, featuring a golf course surrounded by residential lots. At the time the subdivision was platted, restrictions were imposed on the lots but not on the golf course itself, which was shown on the plat map as "Tract A." The sales presentations to potential lot buyers, beginning in the early 1960s, included the representation that the golf course existed for the benefit of the homeowners within the subdivision and would continue to exist until the year 2000. The prospective purchasers were further told that the restrictions on both the golf course and the lots could be extended an additional 25 years, to the year 2025.

In 1979, a group of experienced Canadian real estate investors purchased the golf course with the intention of developing it. The home-

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1. Tulk v. Moxhay, 41 Eng. Rep. 1143, 1144 (Ch. 1848). The court held, for the first time, that equity would grant an injunction to enforce an equitable servitude when a subsequent purchaser took with notice. For an in-depth discussion of servitudes, from historical beginnings to proposed simplification, see Symposium issue, 55 S. CAL. L. REV. 1177 (1982).

2. 142 Ariz. 36, 688 P.2d 682 (Ct. App. 1984). The Arizona Supreme Court denied Appellants' Petition for Review on September 18, 1984.

3. The Arizona Court of Appeals uses the phrase "implied restrictive covenants" and notes that other courts have used different words to describe these same interests: "equitable easements, implied easements, equitable servitudes, implied equitable servitudes, implied grants, implied restrictive covenants, and rights arising by estoppel." *Id.* at 43, 688 P.2d at 689. *See, e.g.*, Bradley v. Frazier Park Playgrounds, 110 Cal. App. 2d 436, 443, 242 P.2d 958, 962 (1952) (equitable easement); Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co., 77 N.M. 730, 735, 427 P.2d 249, 253 (1967) (implied easement); Putnam v. Dickinson, 142 N.W.2d 111, 121 (N.D. 1966) (easement by implication and representation).

4. Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1242-43 (1982), states that courts are more likely to recognize informal servitudes if a party has invested money or labor in reliance on representations made to him. In *Shalimar*, the homeowners relied on representations concerning the golf course in their decision to purchase lots and build homes at that location. 142 Ariz. at 39, 688 P.2d at 685.

5. *Id.* at 37-40, 688 P.2d at 683-86.

owners brought suit to enjoin the development and to have the court impose an implied restriction on the golf course.

The trial court found that the investors had actual or constructive notice of the restricted use of the golf course[6] and thus were bound by an implied restrictive covenant. In affirming the lower court's decision, the court of appeals distinguished *Shalimar* from *Werner v. Graham*,[7] an early California case which forms the basis of existing Arizona law on this subject.

Werner v. Graham *Distinguished*

There are two separate and distinct lines of cases involving implied real convenants. *Werner* and its progeny, relied on by the investor-appellants, mandate a formal writing in order to create an equitable servitude.[8] A second group of cases[9] recognizes this type of interest with a less-rigid adherence to formalities. A leading case within this second group is *Ute Park Summer Homes Association v. Maxwell Land Grant Co.*,[10] relied on by the homeowner-appellees.

In *Shalimar*, the Canadian investors claimed that the doctrine set out in *Werner* was controlling. In *Werner*, the plaintiff homeowner sought to avoid the imposition of restrictions on his lot by defendants, other lot owners.[11] The plaintiff's predecessor in title had acquired the lot from Marshall, the original owner and developer, by quitclaim deed, and the plaintiff had received his lot with no deed restrictions. Marshall had recorded a subdivision plat and within three years had sold most of the lots. All were subject to similar restrictions. The similarities indicated that Marshall had a general development plan in mind. He also had told every buyer that the deeds given to all other buyers contained the same restrictions.

The *Werner* court first concluded that there was neither privity of contract nor privity of estate between the plaintiff and the defendants. It then decided that in order to effectively create mutually enforceable servitudes on land, the intent of both the grantor and the grantee must be incorporated into the deed between the parties. In addition, the court required that the dominant tenement be expressly identified in the instrument.[12]

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6. *Id.* at 40, 688 P.2d at 686. *See infra* notes 24-40 and accompanying text.

7. 181 Cal. 174, 183 P. 945 (1919).

8. *See infra* notes 11-16 and accompanying text.

9. *See, e.g.*, Bradley v. Frazier Park Playgrounds, 110 Cal. App. 2d at 443, 242 P.2d at 962 (property owners entitled to "equitable easement" even though written conveyance did not grant such rights); Putnam v. Dickinson, 142 N.W.2d at 121 (lot buyers acquired easement by implication and representation); Cree Meadows, Inc. (NSL) v. Palmer, 68 N.M. 479, 485, 362 P.2d 1007, 1011 (1961) ("The fee of the golf course area is owned by the plaintiff, but plaintiff's use thereof must be subordinated to the extent of the easement in favor of the owners of any of the property in the subdivision.").

10. 77 N.M. 730, 427 P.2d 249 (1967), *first appeal*, 83 N.M. 558, 494 P.2d 971 (1972), *second appeal*. The earlier case was an appeal by homeowners of a summary judgment granted in favor of the developer. The New Mexico Supreme Court reversed the summary judgment and remanded the action to the lower court for trial. The later case was an appeal by the developer after the trial court, on remand, entered judgment for the homeowners. The New Mexico Supreme Court affirmed the injunction against the developer in the second appeal. *See infra* notes 18-21 and accompanying text.

11. The facts of *Werner* are set forth 181 Cal. at 177-79, 183 P. at 946-47.

12. *Id.* at 180-82, 183 P. at 947-49. The California Supreme Court refused to recognize equitable servitudes under the *Werner* facts. At least one critic has suggested that the intent of both

The *Werner* doctrine was adopted by the Arizona Supreme court in 1962 in *Palermo v. Allen*[13] and was recently reaffirmed by the court of appeals in *Colonia Verde Homeowners Association v. Kaufman*.[14] In *Palermo*, the property involved was not a platted subdivision and there was no general plan of development. Under these facts, the court held that the restrictions were personal to the grantor.[15] The *Colonia Verde* court held that lot owners were subject to certain restrictions because of the doctrine of judicial estoppel, even though the restrictions were recorded after the buyers purchased their lot.[16] As the *Shalimar* court noted, neither case is factually similar to *Shalimar*.[17]

The homeowners in *Shalimar*, relying on *Ute Park*, argued that *Werner* was distinguishable and therefore should not apply. In *Shalimar*, lot owners were seeking to impose restrictions on property retained by the developer and subsequent owners, and not on other subdivision lots. Similarly, in *Ute Park*, homeowners were seeking to enjoin the developer from selling land without the use restriction they had relied on when they purchased their lots and built their homes. The subject land was an open area labeled "golf

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Marshall and the lot buyers *was* to impose mutually-enforceable restrictions on all lots within the subdivision. *See* Burby, *Land Burdens in California: Equitable Land Burdens*, 10 S. CAL. L. REV. 281, 287-92 (1937).

The *Werner* doctrine has been criticized for denying the existence of equitable servitudes in California. *See, e.g.*, French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1279 n.98 (1982). "By insisting that the land to be benefited be described, California has prevented recognition of the implied reciprocal servitude." The articles goes on to say, "The most likely explanation is that the decisions reflect judicial hostility to servitudes. This hostility is evident in *Werner v. Graham*." *Id.* at 1285 n.132. *See also* Note, *Covenants and Equitable Servitudes in California*, 29 HASTINGS L.J. 545 (1978); Comment, *Equitable Servitudes: A Rule of Property in Need of a Rule of Reason*, 10 PAC. L.J. 905, 909, 917 (1979) (describes the *Werner* doctrine as outdated, "manifestly unjust" and "a procedural anomaly that no longer furthers public policy regarding land use"); Rowe v. May, 44 N.M. 264, 101 P.2d 391 (1940); Cheatham v. Taylor, 148 Va. 26, 138 S.E. 545 (1927). *But see* Casenote, *Equitable Servitudes: Some New Reasons for an Old Rule*, 65 CALIF. L. REV. 438, 450 (1977).

13. 91 Ariz. 57, 369 P.2d 906 (1962). In *Palermo*, the owner of 140 acres sold parcels of 10, 20, 30, and 60 acres to various parties over a 19-year period. The conveyance of 30 acres was unrestricted. The other conveyances included restrictions, but they were not the same in every instrument. In only one conveyance had the owner bound herself to insert similar restrictions in subsequent conveyances. *Id.* at 71, 369 P.2d at 916.

The Arizona Supreme Court, relying on *Werner*, stated that the deed must refer to a general plan or mention that the covenants were meant to inure to the benefit of other lot owners. If the deed does not expressly state this, the covenants are deemed to benefit only the original grantor. *Id.* at 68, 369 P.2d at 912-13. The *Palermo* court held that the covenants recited in the various conveyances were personal to the grantor. Therefore, the plaintiffs, subgrantees of one of the 10-acre tracts, were not bound by the restrictions imposed by the defendants, a group including subgrantees of original grantees and one of the original grantees. *Id.* at 73, 369 P.2d at 917.

14. 122 Ariz. 574, 596 P.2d 712 (Ct. App. 1979). The homeowners association brought an action to enforce certain restrictions against the Kaufmans, lot owners within the subdivision. The Kaufmans claimed that the restrictions did not apply to their lot because the lot was acquired before any restrictions were recorded for that portion of the subdivision. The court found that the Kaufmans had actual notice of the restrictions, based on language in the construction contract and in the certificate of dedication in the recorded plat. *Id.* at 576, 596 P.2d at 714. More importantly, the court noted, the Kaufmans had previously brought an action against another lot owner and were successful in enforcing provisions of the restrictions against their neighbor. *Id.* at 577, 596 P.2d at 715. After affirming Arizona's commitment to *Werner, id.*, the court bound the Kaufmans to the restrictions because of the doctrine of judicial estoppel. *Id.* at 578, 596 P.2d at 716.

15. 91 Ariz. at 73, 369 P.2d at 917.

16. 122 Ariz. at 577-78, 596 P.2d at 715-16.

17. 142 Ariz. at 41-42, 688 P.2d at 687-88.

course" on the plat map.[18] The New Mexico Supreme Court affirmed the trial court's injunction prohibiting the defendant-developer from transferring the property free of the restriction.[19]

The *Shalimar* court followed *Ute Park* rather than *Werner* because a basic ingredient in the *Werner* doctrine was absent in *Shalimar*: mutuality among lot owners.[20] In *Werner*, lot owners were attempting to impose implied servitudes on the property of other lot owners within a subdivision. The *Werner* court discussed at length "mutual equitable servitudes . . . in

18. The plat map in *Ute Park* was never recorded; the *Shalimar* plat was recorded but no restrictions were placed on "Tract A." This difference, however, has no impact in either case on the homeowners' reliance on representations made to them regarding the open areas.

19. 83 N.M. at 561, 494 P.2d at 974. The New Mexico court held, inter alia, that the parol evidence rule does not bar evidence of oral statements and representations made by the developer, and that the Statute of Frauds is not applicable in this situation. *Id.* at 560-61, 494 P.2d at 973-74.

In *Shalimar*, the Arizona Court of Appeals considered several issues, including the investors' claim that imposing an implied restriction on the golf course property violated both the parol evidence rule and the Statute of Frauds. The parol evidence rule is defined in J. MURRAY, MURRAY ON CONTRACTS, § 105 (2d rev. ed. 1974), at 226-27:

> The [parol evidence] "rule" may be stated as follows: if the parties to a transaction have embodied that transaction either in whole or in part, in a single memorial, such as a writing or writings, and if they have come to regard that memorial as the final expression of their intentions as a whole, or of a part thereof, then all other utterances that have taken place in connection with that trnsaction, prior to or contemporaneous with the making of the memorial, are immaterial for the purpose of determining what the terms of the transaction are or at least so much of it as is embodied in the memorial.

The *Shalimar* court concluded that the parol evidence rule was inapplicable because the equitable restriction to be imposed did not "vary an integrated written contract for the sale of an interest in real property." 142 Ariz. at 43, 688 P.2d at 689. According to Comment, *supra* note 12, at 911, California is the only jurisdiction that does not allow the use of extrinsic evidence to identify the benefited (dominant) estate of an equitable servitude.

> The Arizona Statute of Frauds, ARIZ. REV. STAT. ANN. § 44-101(6) (1967) provides in part: No action shall be brought in any court in the following cases unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereunto lawfully authorized:
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> . . . .
>
> 6. Upon an agreement for leasing for a longer period than one year, or for the sale of real property or an interest therein.

Considering this statute, the *Shalimar* court held that both estoppel and part performance took the implied restriction out of the Statute of Frauds, 142 Ariz. at 42, 688 P.2d at 688. The court cited 5 POWELL ON REAL PROPERTY § 671, at 60-20 (1980): "It would not be fair, under such circumstances, to permit the grantor (*or the grantor's successors taking with notice*) to raise the absence of a writing as a defense." 142 Ariz. at 42, 688 P.2d at 688 (emphasis provided by the court). Part performance, specifically the actions of the former golf course owners consistent with the developer's representations, also served to make the Statute of Frauds inapplicable. 142 Ariz. at 42, 688 P.2d at 688. Comment, *supra* note 12, at 914, states that, unlike California, many jurisdictions have imposed enforceable burdens despite the lack of a writing that would satisfy the Statute of Frauds.

The Arizona Court of Appeals also briefly discussed the issue of economic frustration, stating that there were no changed circumstances frustrating the original purpose of the restriction that would warrant voiding them. 142 Ariz. at 45, 688 P.2d at 691. It is well-established that a change in profitability alone is not enough to void the restrictions. *See, e.g.*, Murphy v. Gray, 84 Ariz. 299, 327 P.2d 751 (1958); Continental Oil Co. v. Fennemore, 38 Ariz. 277, 299 P. 132 (1931); West Alameda Heights Homeowners Ass'n v. Board of County Comm'rs, 169 Colo. 491, 458 P.2d 253 (1969).

Finally, the court considered the investors' argument that the restrictions should exist only for a reasonable time. The trial court had ruled that the restrictions were to be effective until the year 2000 with a possible 25-year renewal. The court of appeals concluded that the trial court had properly imposed a duration that equalled that of the restrictions placed on the subdivision lots. The court reiterated the purchasers' duty to inquire, noting they would have learned of the duration. 142 Ariz. 46, 688 P.2d at 692; *see infra* notes 29-45 and accompanying text.

20. *Shalimar*, 142 Ariz. at 41, 688 P.2d at 687.

favor of each parcel as against all the others."[21]

The court of appeals, denying *Werner's* applicability in *Shalimar*, focused on the *Werner* court's discussion of mutuality.[22] *Shalimar*, said the Arizona court, did not compromise Arizona's commitment to *Werner* because *Shalimar* lacked the mutuality element.[23]

The Notice Requirement

The Arizona Court of Appeals, having found that *Werner* did not prevent the imposition of an implied restriction in this situation, next discussed the issue of notice. The court considered various facts and documents[24] and concluded that the real estate investors had notice of the use restriction imposed on the golf course.[25] They, therefore, were not bona fide purchasers without notice.[26]

The court of appeals agreed with the trial court's finding that the investors had a "duty to inquire"[27] based on information they possessed at the time of their purchase. The appeals court noted that any inquiry of the original developer or the individual homeowners prior to the purchase would have revealed the restricted use of the golf course property.[28]

The investors claimed that their duty to inquire was satisfied by a check of the documents recorded in the County Recorder's Office of Maricopa

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21. *Werner*, 181 Cal. at 183, 183 P. at 949.

22. *Shalimar*, 142 Ariz. at 41-42, 688 P.2d at 687-88.

23. *Id.*

24. The facts and documents included the recorded plat and restrictions for the many Shalimar subdivisions, brochures, and other sales materials filed with the Arizona Department of Real Estate, and representations made to lot buyers, both orally and in the sales materials given to them. In addition, the first offers made by the investors to the then-owner Hill were rejected by Hill because the sale was contingent on verification that the golf course was not subject to any restrictions. The investors had actually visited the subdivision and had seen the homes built around the golf course. In addition, City of Tempe officials had stated to the investors that any development would be strongly opposed by the homeowners. *Id.* at 39-40, 45, 688 P.2d at 685-86, 691.

25. *Id.* at 45, 688 P.2d at 691.

26. *Id.* In Cheatham v. Taylor, 148 Va. 26, 34, 138 S.E. 545, 547 (1927), the court commented:

> It is not necessary, in order to sustain the equitable remedy, that there should be any privity of either estate or contract, if it clearly appears that the restriction was created for the plaintiffs, among others, or their grantor, and that the defendants had notice, actual or constructive, of the restriction.

See also MacEwen v. Peterson, 102 Ariz. 209, 212, 427 P.2d 527, 530 (1967) ("A person who fails to exercise due diligence to avail himself of information which is within his reach is not a bona fide purchaser"); Reichman, *supra* note 4, at 1225: "A person should not 'be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased' " (citation omitted). Comment, *supra* note 12, at 907, suggests that "the holding in *Tulk* demonstrates that the fundamental basis for enforcement of servitudes is the inability of the purchaser to assert the defense of a bona fide purchaser; indeed, the enforcement of the burden has been termed the doctrine of notice." (footnotes omitted).

27. *Shalimar*, 142 Ariz. at 44, 688 P.2d at 690. In Rase v. Castle Mountain Ranch, Inc., 631 P.2d 680, 685 (Mont. 1981), the court, citing *MacEwen*, 102 Ariz. 209, 427 P.2d 527, stated:

> [W]hen someone purchases land under circumstances which suggest outstanding equities in third parties, there is imposed on purchaser a duty to make reasonable investigation as to the existence of outstanding claims against the property, and one who fails to use due diligence to ascertain the facts within his reach is not an innocent purchaser.

See also Luke v. Smith, 13 Ariz. 155, 108 P. 494 (1910), *aff'd*, 227 U.S. 379 (1913); Turner v. Brocato, 206 Md. 336, 111 A.2d 855 (Ct. App. 1955); Sanborn v. McLean, 233 Mich. 227, 206 N.W.496 (1925).

28. *Shalimar*, 142 Ariz. at 44, 688 P.2d at 690.

County. They relied on *Neal v. Hunt*[29] for this premise. In *Neal*, the purchaser, Hunt, had no notice other than a statement made to him by his seller that Neal, the former owner, "had some claim to water rights on the ranch."[30] The court found that Hunt, a subsequent purchaser, had neither constructive notice, since there was nothing recorded regarding the alleged right, nor actual notice, since a physical inspection of the land would not have given him notice of Neal's water rights.[31]

The *Shalimar* court conceded that similarities in *Shalimar* and *Neal* in that neither buyer would be charged with constructive notice solely on the basis of recorded documents.[32] The court then enumerated the various other factors that supported the homeowners' claim of notice.[33] This list included the investors' physical inspection of the property and their knowledge of the recorded plat and lot restrictions, which referred to the golf course several times. The court thus enforced the implied restriction based on the finding that the investors had adequate notice of its existence.

What is Adequate Notice?

The "duty to inquire" imposed on the *Shalimar* investors is not new in Arizona. As early as 1910, the Supreme Court of the Territory of Arizona imposed such a duty on purchasers in *Luke v. Smith*.[34] In *Luke*, purchasers at an execution sale were held to have been "put upon inquiry, and by diligence could have ascertained . . . the rights . . . in the premises."[35] The Arizona Supreme Court discussed the notice issue in a later case, *Davis v. Kleindienst*,[36] and concluded: "The law seems to be settled that a person who fails to exercise due diligence to avail himself of information which is within his reach is not a bona fide purchaser."[37]

It is clear from these decisions that a purchaser who has notice of another's competing claim or alleged interest in the subject property must satisfy the "duty to inquire" imposed by the Arizona courts. However, there is no clear indication of how far this duty extends. In *Luke*, the purchaser was found to be on notice as to an existing contract when a complaint on the

29. 112 Ariz. 307, 541 P.2d 559 (1975). The facts of *Neal* are set forth 309-10, 541 P.2d at 561-62.

30. *Id.* at 310, 541 P.2d at 562.

31. *Id.* at 311, 541 P.2d at 563.

32. *Shalimar*, 142 Ariz. at 44, 688 P.2d at 690.

33. *See supra* note 24 and accompanying text.

34. 13 Ariz. at 162-63, 108 P. at 496-97 (1910), *aff'd*, 227 U.S. 379 (1913). The facts of the case are set forth 13 Ariz. at 158-59, 108 P. at 494-95. Although *Luke v. Smith* involved an execution sale and creditors rights, and not restrictive covenants, the court stated the general rule regarding notice:

> Where one has notice of a fact affecting property which he seeks to purchase, which puts him upon inquiry, he is chargeable with the knowledge which the inquiry, if made, would have revealed; and one is put upon inquiry of notice of a claim which is inconsistent with the title he seeks to obtain, and must exercise due diligence to ascertain the facts upon which the claim is based.

Id. at 162, 108 P. at 496.

35. *Id.* at 163, 108 P. at 497.

36. 64 Ariz. 251, 169 P.2d 78 (1946). This was an action for reformation of deed and to quiet title. The facts are set forth 64 Ariz. at 253-55, 169 P.2d at 79-80.

37. *Id.* at 258, 169 P.2d at 83.

contract was filed. The court thus charged him with knowledge of the terms of the contract.[38] In *Davis*, the defendant had examined the county records and personally inspected the land. Finding nothing, he claimed to have had no notice, either actual or constructive, of the plaintiff's claims to the property.[39] The court, however, noted that the attorney for the common grantor had told the defendant what property the plaintiff had purchased. Based on this, the court held that the defendant was not a bona fide purchaser without notice.[40]

In 1983 the Arizona Court of Appeals stated in *U.S. Fiduciary Corporation v. Loma Vista Associates*:[41] "Whether due inquiry was made is a question of fact."[42] In that case, the purchaser examined all the documents in the chain of title, went to two county offices for information regarding zoning and sewers, and discussed certain related matters with a title company.[43] The appeals court found the purchaser's efforts insufficient to fulfill the duty to inquire because the purchaser never directly asked his seller about the parcel in question.[44]

It seems clear, then, that the *Shalimar* investors should have spoken with the original developer and/or some of the homeowners to ascertain the basis of their expectations regarding the golf course.[45] Based on the reported opinions, it appears that checking the County Recorder's records is insufficient to satisfy the duty to inquire imposed on subsequent purchasers.[46] However, these opinions offer little affirmative guidance to a party trying to fulfill this requirement.

Conclusion

In *Shalimar Association v. D.O.C. Enterprises, Ltd.*, the Arizona Court of Appeals recognized the right of homeowners, in limited situations, to impose implied restrictive covenants on property. When a developer has made representations to lot buyers that property retained will be used for a specific purpose, the use of that property cannot later be changed either by the developer or a successor in interest who takes with notice.

This decision is important for the protection it gives to homeowners who have relied on their seller's representations. It also indicates that Ari-

38. 13 Ariz. at 163-64, 108 P. at 497.

39. 64 Ariz. at 255, 169 P.2d at 80.

40. *Id.* The court's conclusion that Davis was not a bona fide purchaser was also based on the requirement that a bona fide purchaser be a purchaser for value. The quitclaim deed given to Davis recited a reconsideration of one dollar. The court stated: "This would not be a valuable consideration within the law relating to bona fide purchasers. The second or warranty deed received by defendant, which recites a consideration of $1000, was not executed . . . until long after . . . defendant had full knowledge and notice of plaintiff's claim to the property." *Id.* at 257, 169 P.2d at 82.

41. 138 Ariz. 464, 675 P.2d 724 (Ct. App. 1983).

42. *Id.* at 468, 675 P.2d at 728, *citing* 8 THOMPSON ON REAL PROPERTY § 4326, at 451 (1963).

43. 138 Ariz. at 468, 675 P.2d at 728.

44. *Id.*

45. The investors maintained that they did not speak with the original developer or any of the golf course staff at the request of the seller, Hill. According to appellants, Mr. Hill said he did not want his staff to know of the possible sale. Brief for Appellant at 2, Shalimar Association v. D.O.C. Enterprises, Ltd., 142 Ariz. 36, 688 P.2d 682 (Ct. App. 1984).

46. *See supra* notes 34-44 and accompanying text.

zona courts will grant an equitable remedy in certain situations, in order to avoid the harsh result that *Werner* would otherwise dictate. The unanswered question regarding the extent of a purchaser's duty to inquire will be determined by the facts of each case, rather than by a well-defined general rule.

Sharon Horlings

VII. TORT LAW

A. GOVERNMENTAL LIABILITY FOR INJURIES CAUSED BY OPEN AND OBVIOUS DANGERS

In *Beach v. City of Phoenix*,[1] the Arizona Supreme Court held that a municipality's liability for injury to a pedestrian caused by an obvious defect[2] in a public sidewalk is a negligence issue to be decided by a jury. In *Beach*, the minor plaintiff stepped into the street to avoid a fallen tree blocking the sidewalk and was struck by a passing automobile. Beach sued the city alleging that it was negligent in not correcting or warning of the sidewalk's dangerous and defective condition. The trial court awarded summary judgment to the city, holding that the city's duty was no greater than that of a landowner to an invitee; the city therefore owed no duty to Beach because the tree presented an open and obvious danger.[3] The court of appeals affirmed.[4]

The Arizona Supreme Court rejected the contention that a city's duty to maintain its public ways is limited by the rules governing liability of landowners and reversed.[5] The court held that the question is not whether the city's duty to a pedestrian is that of a landowner to an invitee, but whether the city was negligent in performing its duty by failing to remedy an obvious defect.[6] The court emphasized that a municipality's duty to users of its public ways[7] does not change according to the circumstances surrounding an

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1. 136 Ariz. 601, 667 P.2d 1316 (1983). The facts of *Beach* are set forth 136 Ariz. at 602, 667 P.2d at 1317.

2. A municipality's liability for injuries occurring upon its public ways must be based upon a showing of a defect in construction or otherwise. *See* 19 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 54.11, at 31 (3d ed. 1967). McQuillin defines a defect as "anything that may be expected to interfere with the safe use of a public way by travelers making the proper use thereof, and exercising ordinary care for their own safety." *Id.* § 54.15, at 43. The Arizona Supreme Court defines a defect as anything which renders the public way unsafe or inconvenient for ordinary use. City of Phoenix v. Williams, 89 Ariz. 299, 304, 361 P.2d 651, 655 (1961).

No all-encompassing rule can be developed to determine whether a defect sufficient to form the basis of actionable negligence exists in a particular case. Instead, each case must be viewed in terms of its particular facts. If reasonable persons could differ on whether a particular condition constitutes an actionable defect, the question is to be resolved by the jury. Only when a defect is so slight that reasonable people could not differ on whether the municipality was negligent in failing to correct it, is the question one of law for the court. City of Phoenix v. Camfield, 97 Ariz. 316, 321, 400 P.2d 115, 118 (1965); City of Phoenix v. Weedon, 71 Ariz. 259, 264, 226 P.2d 157, 160 (1950).

3. The landowner is held to a standard of ordinary care only if he has expressly or impliedly "invited" a person onto his land. Even as to the invitee, the landowner is not liable for an injury caused by a condition which is open and obvious. The landowner may expect that the invitee will protect himself from such dangers. *See* W. PROSSER & W.P. KEETON, THE LAW OF TORTS §§ 57-62 (5th ed. 1984).

4. Beach v. City of Phoenix, 137 Ariz. 1, 2, 667 P.2d 1327, 1328 (Ct. App. 1983).

5. *Beach*, 136 Ariz. at 602, 667 P.2d at 1317. Many states have abolished the landowner rules in all cases. *See* Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Pickard v. Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Rowland v. Christen, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); *see generally* Annot., 22 A.L.R. 4th 294 (1983); 32 A.L.R. 3d 508 (1970). Although the movement to abolish the landowner rules was quite strong in the 1970s, it has recently halted quite abruptly. This may signal a "renewed appreciation for the considerations behind the traditional duty limitations toward trespassing adults. . . ." W. PROSSER & W.P. KEETON, *supra* note 3, § 62 at 433-34.

6. 136 Ariz. at 604, 667 P.2d at 1319.

7. The term "public way" is generally used when referring to streets, highways, or sidewalks.

injury. Instead, those circumstances are for the jury to consider in determining whether the municipality breached its duty to the injured pedestrian.

The court in *Beach* rejected the landowner rules, which would limit municipal liability for injuries to users of public ways and instead adopted a pure negligence approach. The paramount right of the public to use the public ways outweighed the policy considerations supporting limitation of the municipality's duty. Treatment of the open and obvious danger rule as one involving negligence rather than duty, as noted in *Beach*, is significant as Arizona moves into a comparative negligence system.

The Duty Owed to Users of the Public Way

A municipality can be liable for injuries arising from a defect if the municipality caused the defect,[8] if it had actual or constructive notice of the defect,[9] or if an improvement was defective when made.[10] However, a municipality is not an insurer of public safety.[11] A municipality is liable to a person injured by a defect in a public way only upon a showing of negligence.[12] Such a showing requires proof that: (1) the city owed a duty to the plaintiff; (2) the city breached this duty; and (3) the plaintiff's injury was proximately caused by the city's breach of duty.[13] Of these, the issue of whether the city owed a duty to the plaintiff has had the greatest impact on municipal liability in Arizona.[14]

In most states, the common-law or statutory duty of the municipality to use reasonable care in the maintenance of its streets is held to apply equally to sidewalks. *See* E. MCQUILLIN, *supra* note 2, § 54.35 at 80-81 and cases cited therein. In Arizona, the same rules of liability apply whether the case involves a street, highway, or sidewalk. Arizona State Highway Dept. v. Bechtold, 105 Ariz. 125, 129, 460 P.2d 179, 183 (1969) (applying duty of reasonable care to "streets and highways"); *Weedon*, 71 Ariz. at 263, 226 P.2d at 160 (defining "defect" or "streets for sidewalk"); Dillow v. City of Yuma, 55 Ariz. 6, 8, 97 P.2d 535, 536 (1940) (applying duty of reasonable care to "streets and sidewalks"); Jensen v. Maricopa County, 22 Ariz. App. 27, 28, 522 P.2d 1096, 1097 (1974) (discussing municipal duty of reasonable care as to "public ways").

8. Vegodsky v. City of Tucson, 1 Ariz. App. 102, 109, 399 P.2d 723, 730 (1965).

9. *Williams*, 89 Ariz. at 304, 361 P.2d at 655.

10. City of Phoenix v. Clem, 28 Ariz. 315, 327, 237 P. 168, 171 (1925). *See also* Wisener v. State, 123 Ariz. 148, 150, 598 P.2d 511, 513 (1979).

11. *Weedon*, 71 Ariz. at 263, 226 P.2d at 160; *Clem*, 28 Ariz. at 327, 237 P. at 171.

12. Recent legislation regarding governmental liability does not greatly affect the liability of public entities for injuries to users of public ways. ARIZ. REV. STAT. ANN. §§ 12-820 to -823. Under ARIZ. REV. STAT. ANN. § 12-820.02 (1984), the qualified immunity enjoyed by public entities for failure to discover violations of law involving property is specifically limited to property other than that owned by the public entity.

ARIZ. REV. STAT. ANN. § 12-820.02(A)(1) (1984) may now provide an affirmative defense for a public entity if the defect in the public way is shown to arise out of the plan or design for construction, maintenance, or improvement of the public way. However, the statute requires a warning of unreasonably dangerous hazards. In addition, the definitional section, ARIZ. REV. STAT. ANN. § 12-820 (1984), specifically excludes "ordinary repair or upkeep" from the definition of "maintenance."

13. Nicoletti v. Westcor, 131 Ariz. 140, 142, 639 P.2d 330, 332 (1982); Morris v. Ortiz, 103 Ariz. 119, 121, 437 P.2d 652, 654 (1968).

14. In Arizona, municipalities owe users of their public ways the care required of an ordinarily prudent person in keeping their public ways reasonably safe for travel. *Clem*, 28 Ariz. at 327, 237 P. at 171. However, the municipal duty has at times been said to be limited to "ordinary, usual and customary" travel. E. MCQUILLIN, *supra* note 2, § 54.11a, at 33. In addition, the duty has been limited to users "exercising ordinary care and caution," City of Phoenix v. Mayfield, 41 Ariz. 537, 547, 20 P.2d 296, 300 (1933); or to those making "lawful" use of the public way, City of Phoenix v. Lopez, 77 Ariz. 146, 150, 268 P.2d 322, 325 (1954). This reasoning is, however, questionable in light

In Arizona, principles borrowed from the landowner rules have limited liability by restricting the duty owed by municipalities to users of their public ways.[15] Generally, if the landowner rules are applied, the user of a public way is considered a "public invitee." This status would apply to any user who reasonably believes the way to be public.[16] As to this user, a landowner owes the duty to keep the premises reasonably safe.[17] The landowner rules, however, act to limit liability in two ways. First, the landowner's duty extends only to the scope of the invitee's invitation. If the invitee stays or strays beyond the invitation, the landowner's duty toward the invitee changes.[18] As applied to a municipality, this limitation means the public is not invited to use the unimproved portions of the public way, and the municipality has no duty to make those portions safe. Thus, the municipality is not liable for injuries that occur on the unimproved portion[19] or that occur as a result of obstructions on the unimproved portion.[20]

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of later developments in the area. *See* State v. Cress, 22 Ariz. App. 490, 493, 528 P.2d 876, 879 (1975); Collins v. Maricopa County, 15 Ariz. App. 354, 356, 488 P.2d 991, 993 (1971). The court in *Cress* rightly noted that the conduct of the user of a public way had no place in determining the duty of the municipality to that user. Instead, the user's conduct gives rise to the jury question of contributory negligence. 22 Ariz. App. at 493, 528 P.2d at 879.

15. The landowner rules have not been explicitly adopted in Arizona for use in the area of municipal liability. Principles of landowner rules, however, have been adopted. *See infra* notes 18, 19, 23 and accompanying text.

16. Olsen v. Macy, 86 Ariz. 72, 74, 340 P.2d 985, 987 (1959).

17. Perbost v. San Marino Hall-School for Girls, 88 Cal. App. 2d 796, 199 P.2d 701 (1949); Hanson v. Spokane Valley Land & Water Co., 58 Wash. 6, 107 P. 863 (1910); *see generally* Annot., 44 A.L.R. 3d 355 (1972).

18. *Nicoletti*, 131 Ariz. at 143, 639 P.2d at 333; W. PROSSER & W.P. KEETON, *supra* note 3, § 61 at 424-25.

19. Rush v. City of Globe, 56 Ariz. 530, 533, 109 P.2d 841, 842 (1941). For a full discussion of the rule announced in *Rush*, see Herndon v. Salt Lake City, 34 Utah 65, 95 P. 646 (1908).

20. In the past, municipal duty did not extend to obstructions on the unimproved portion of the public way which obscured vision during use of the improved portion. Boyle v. City of Tucson, 115 Ariz. 106, 107, 563 P.2d 905, 906 (1977); Hildalgo v. Cochise County, 13 Ariz. App. 27, 28, 474 P.2d 34, 35 (1970).

Hildago established this rule in Arizona. There, the court flatly stated the lack of duty without further explanation. 13 Ariz. App. at 28, 474 P.2d at 35. The cases the court relied upon provide an explanation of the rule. In Owens v. Town of Boonesville, 206 Miss. 345, 346, 40 So. 2d 158, 159 (1949), high grass, weeds, and bushes obscured vision at an intersection, resulting in injuries. The court noted that railroads had been held liable for injuries at crossings caused by obscured vision but, relying on the absence of duty as to unimproved portions of the public way, the court declined to be the first to hold a municipality liable in these circumstances. In Barton v. King County, 18 Wash. 2d 573, 574, 139 P.2d 1019, 1020 (1943) (quoting from a prior edition of E. MCQUILLIN, *supra* note 2), the court found that since there was no invitation to use an unimproved portion of the roadway, there was no duty of the highway authority to remove vegetation upon that unimproved portion which obscured vision.

Coburn v. City of Tucson, 143 Ariz. 50, 691 P.2d 1078 (1984) is the most recent case involving municipal liability for the obstruction of vision at an intersection. In *Coburn*, the Arizona Supreme Court, noting the tendency to confuse the concepts of "duty" and "standard of conduct," restructured the analysis in this line of cases. Relying on *Beach*, the court held that the duty of the municipality remains constant and does not change according to the circumstances of the case. The municipal duty is to conform to the recognized standard of conduct, that is, to keep its public ways reasonably safe for travel. Therefore, the question in the vision obstruction cases is not whether there is a municipal duty, but whether failure to remove the obstruction is conduct which falls below the standard of care, thus breaching the duty.

The holding in *Coburn* is consistent with the ordinary rules of negligence. The concept of duty, at least in the area of municipal liability for injuries to users of the public way, is not to be considered on a case-by-case basis. *Coburn* is also consistent with a discernible trend in recent cases from other jurisdictions allowing the liability of highway authorities for damages caused by a failure to maintain the vegetation near intersections and railroad crossings. *See* Belleair v. Taylor, 425 So. 2d 669 (Fla.

Second, a landowner is not liable to an invitee injured by an open and obvious danger.[21] The rationale of this rule is that people who encounter the dangerous condition are expected to take care of themselves.[22] A considerable amount of confusion has arisen in the landowner cases concerning whether this limitation on liability is a function of a limited duty or a finding that the duty of care has not been breached.[23] In the area of municipal liability, the Arizona courts have traditionally approached the issue in terms of a limitation on duty.[24]

These limitations on landowner liability are based on the policy of allowing the landowner the free use of his land.[25] Balanced against this policy is the public's right to use the public way. Arizona courts in the past have viewed the use of public ways as a privilege and not a right when a governmental entity was involved.[26] As a privilege, the public's use was not sufficient to overcome the limitations on municipal duty created by the landowner principles. The limitations were aimed at limiting excessive municipal liability.[27] Further, the privilege to use the public way was outweighed by the policy of deference to legislative decision-making.[28]

Prior to *Beach*, the Arizona courts changed the relative weights of these competing considerations. The fear of excessive governmental liability was replaced by a well-established public policy holding governmental bodies accountable for their negligence.[29] In addition, the Arizona courts recognized that the use of public ways was a right, and prior case law describing such use as a mere privilege was overruled.[30]

The Landowner Rules do not Limit Municipal Duty

In *Beach v. City of Phoenix*, the public's paramount right to use public

Dist. Ct. App. 1983); Hurst v. Board of Comm'rs, 446 N.E.2d 347 (Ind. Ct. App. 1983); Oroz v. Board of County Comm'rs, 575 P.2d 1155 (Wyo. 1978); *see generally* Annot., 22 A.L.R. 4th 624 (1983).

21. *Beach*, 136 Ariz. at 603, n.1, 667 P.2d at 1318, n.1; Dougherty v. Montgomery Ward, 102 Ariz. 267, 269, 428 P.2d 419, 421 (1967).

22. Cummings v. Prater, 95 Ariz. 20, 27, 386 P.2d 27, 31 (1963).

23. Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629, 631 (1952). *See also* Keller v. Holiday Inns, Inc., 105 Idaho 649, 671 P.2d 1112 (1983) for a discussion of the area in a common-law state.

24. Slavin v. City of Tucson, 17 Ariz. App. 16, 18, 495 P.2d 281, 288 (1972); Rodgers v. Ray, 10 Ariz. App. 119, 126, 457 P.2d 281, 288 (1969).

25. W. PROSSER & W.P. KEETON, *supra* note 3, § 57 at 386.

26. Goodwin v. Superior Court, 68 Ariz. 108, 115, 201 P.2d 124, 128 (1948) (use of the public ways considered a "mere privilege" in a case involving revocation of a driver's license).

27. *Hildalgo*, 13 Ariz. App. at 28, 474 P.2d at 35.

28. *Boyle*, 115 Ariz. at 108, 563 P.2d at 907 ("The question of whether a highway authority should be obligated to expend public funds to maintain an unobstructed view at intersections is one properly addressed to the legislature."); *Rodgers*, 10 Ariz. App. at 125, 457 P.2d at 287 ("there is no duty which will give rise to a liability for *failing* to exercise the legislative power to *regulate* traffic, by posting signs or otherwise") (emphasis in original).

29. The substantive defense of governmental immunity has been abolished in Arizona. Stone v. Arizona Highway Comm'n, 93 Ariz., 284, 381 P.2d 107 (1963). The parameters of duty owed by governmental entities are ordinarily co-extensive with those owed by others. Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982).

30. Schecter v. Killingsworth, 93 Ariz. 273, 280, 380 P.2d 136, 140 (1963) ("this court recognizes that the use of the public highways is a right which all qualified citizens possess, subject, of course, to reasonable regulation under the police power of the sovereign").

ways is given precedence over the landowner rules' limitation on municipal liability. The court stated that ordinary rules of negligence are to be applied to all cases involving injuries which result from defects in the public way. The surrounding circumstances, including an obvious obstruction, bear on the question of whether the municipality breached its duty of ordinary care; these same circumstances are not considered when determining whether a duty is owed.[31] The obvious danger does not "end" the municipality's duty; it only alerts the public user to the need for ordinary care. However, the user's conduct has no bearing on the municipality's duty. The user's failure to use ordinary care gives rise only to a question of contributory negligence — which is for the jury to decide.[32] If reasonable people could differ on whether a foreseeable danger exists for the public users under the circumstances of a particular case, the question is one of negligence to be decided by the jury and is not one of duty to be decided by the court.

In *Beach*, the Arizona Supreme Court points to the complete abolition of the landowner rules in other states to support its decision. The court cites *Rowland v. Christen*,[33] in which the California Supreme Court noted that the landowner rules often do not reflect the major policy factors upon which immunity from tort liability should be based.

Traditionally, the main policy considerations that supported limiting a municipality's duty were fear of excessive liability and the desire not to encroach on the legislative function.[34] In *Ryan v. State*,[35] the Arizona Supreme Court rejected the argument that applying ordinary negligence rules to governmental wrong-doing would lead to excessive governmental liability. The court also noted that the legislature's initiative in providing for governmental insurance indicated an acceptance of ordinary rules of negligence in determining governmental liability.[36]

The Arizona Supreme Court does not favor "special rules of tort nonliability or immunity."[37] This is especially true in the area of governmental wrong-doing.[38] Where the government controls the only means by which the public may pursue its activities, strict adherence to the landowner rules is not appropriate, since it is forseeable that the public may encounter the dangers rather than forego the right to use the public way.[39] Indeed, the

31. 136 Ariz. at 603, 667 P.2d at 1318.

32. *Id.* at 604, 667 P.2d at 1319.

33. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). *See generally* Annot., 22 A.L.R. 4th 294 (1983).

34. *See supra* notes 26-27 and accompanying text.

35. 134 Ariz. 308, 656 P.2d 596 (1982).

36. *Id.* at 310, 656 P.2d at 599. *See generally* Casenote, *Governmental Tort Immunity Revisited*: Ryan, v. State, 25 ARIZ. L. REV. 1081 (1983). In Stone v. Arizona Highway Comm'n, 93 Ariz. at 393; 381 P.2d at 111, the court observed that the doctrine of sovereign immunity was judicially created and could therefore be abolished by the court without infringing on the legislative function. The same argument supports rejecting the judicially created landowner rules in the area of municipal liability.

37. Ontiveros v. Borak, 136 Ariz. 500, 512, 667 P.2d 200, 212 (1983). In abolishing the common-law doctrine of tavern owner nonliability, the court thoroughly discusses the concept of duty and the various policy reasons for limiting duty. The court cites cases involving governmental liability to illustrate its distaste for rules of tort nonliability or immunity.

38. The unfairness and hardship caused by not allowing an individual to recover in a case of governmental wrong-doing is discussed in *Stone*, 93 Ariz. at 387-88 & n.1, 381 P.2d at 109 & n.1.

39. *See* RESTATEMENT (SECOND) OF TORTS § 343A comments f & g (1965). A possessor of

court has recognized that foregoing use of the public way would significantly hinder a person's pursuit of a livelihood and enjoyment of life.[40]

Special rules that restrict liability by narrowing the defendant's duty run counter to state policy that strongly favors jury decision-making when liability is to be limited on the basis of the plaintiff's conduct.[41] Whether a duty is owed to a particular plaintiff is a decision for the court.[42] If no duty is owed, there is no question of liability for the jury.[43] However, the Arizona Constitution provides that the jury should decide the issue of contributory negligence in every case.[44] To the extent that a municipality's duty to the user of the public way is limited based on the user's want of ordinary care, this constitutional provision is avoided.[45]

The distinction between characterizing the issue as contributory fault or as a limitation on duty has a great impact as Arizona moves into a comparative negligence system.[46] Under the prior system, contributory negligence was an absolute bar to recovery if the jury chose to apply it.[47] Apart from the jury's role, it therefore made little difference to the final outcome whether the issue was one of limited duty or contributory negligence; there

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land is not relieved of liability where he can foresee that an invitee will be injured by a dangerous condition notwithstanding the open and obvious nature of such a condition. Such a foreseeable injury might arise when it can be expected that they invitee will "encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." Johnson v. Tucson Estates, Inc., 140 Ariz. 531, 534, 683 P.2d 330, 333 (Ct. App. 1984). The RESTATEMENT (SECOND) OF TORTS § 343A (1965) states that in such a case the fact of the known or obvious danger should be considered in terms of contributory negligence and would not be conclusive in determining the duty of the landowner.

40. *Schecter*, 93 Ariz. at 280, 380 P.2d at 383.

41. Heimke v. Munoz, 106 Ariz. 26, 28, 470 P.2d 107, 109 (1970); Layton v. Rocha, 90 Ariz. 369, 370, 368 P.2d 444, 445 (1962).

42. W. PROSSER & W.P. KEETON, *supra* note 3, § 37 at 236.

43. *Id.* However, most cases involving municipal liability for defects in a public way are decided by the trier of fact. *Williams*, 89 Ariz. at 304, 361 P.2d at 655 (whether public way was defective, whether city had notice of the defect, and whether city was negligent were questions for the jury); City of Phoenix v. Brown, 88 Ariz. 60, 66, 352 P.2d 754, 758 (1960) (question of constructive notice of defect to city is for jury); Cobb v. Salt Rivery Valley Water User's Ass'n, 57 Ariz. 451, 458, 114 P.2d 904, 907 (1941) (cause of injury is jury question); Town of Flagstaff v. Gomez, 23 Ariz. 184, 194, 202 P. 401, 404 (1921) (proximate cause of injury is jury question).

44. ARIZ. CONST. art. XVIII, § 5 provides: "The defense of contributory negligence or of assumption of the risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." The purpose of this provision was "to modify the common law by making the jury, rather than the court, the sole arbiter of the existence or nonexistence of contributory negligence." Alabam Freight Lines v. Phoenix Bakery, 64 Ariz. 101, 112, 166 P.2d 816, 822 (1946).

45. A jury is permitted to find in favor of a plaintiff even though the court would have found the plaintiff was contributorily negligent or had assumed the risk. In other words, "the court cannot find as a matter of law that the legal defenses of contributory negligence or assumption of the risk exist." Brannigan v. Raybuck, 136 Ariz. 513, 518, 667 P.2d 213, 218 (1983). *See also Heimke*, 106 Ariz. at 30, 470 P.2d at 111 ("The trial court cannot direct a verdict even though the plaintiff's negligence is undisputed, and the trial court must not, directly or indirectly, tell the jury that it shall return a verdict compatible with the law of contributory negligence as declared by the court.").

46. The Arizona Legislature established a comparative negligence system in 1984. *See* ARIZ. REV. STAT. ANN. §§ 12-2501 to -2509. For a discussion of this area in a common-law state, see *Keller*, 105 Idaho at 653-57, 671 P.2d at 1116-120.

47. While it is clear that the jury may choose to apply or not apply the defense of contributory negligence, *Heimke*, 106 Ariz. at 28, 470 P.2d at 109, the Arizona Constitution did not change the common law as to the effect of the doctrine of contributory negligence once applied. *Alabama Freight Lines*, 64 Ariz. at 112, 166 P.2d at 822. If the jury applies the doctrine, this would prevent a verdict for the plaintiff. *See* 5 Recommended Arizona Jury Instructions (Negl.) (1974), entitled *Contributory Negligence.*

was no liability. But under a comparative negligence system, the difference could define the outcome. If it is contributory fault for a plaintiff to knowingly encounter an obvious danger, the plaintiff, at a minimum, will be allowed to recover an appropriately reduced amount in the comparative negligence system. If, under such circumstances, the defendant's duty "ended" there could be no liability and the effect would be to re-establish the absolute bar of the common law contributory negligence system.[48]

Scope of the Decision

In *Beach*, the Arizona Supreme Court recognizes the public's paramount right to use the public ways.[49] The court stated that the public ways are held in trust by the municipality for the public's use.[50] This unique position must be considered when determining the scope of the *Beach* decision.

Generally, the rules concerning public ways which are applied to municipalities, are equally applicable to the State.[51] It follows then that *Beach* should apply to all public ways. However, it is less certain whether the decision applies to other property held by a governmental unit.[52]

In *Beach* the court recognizes that when government land is held open to the public, the government may expect the public to enter upon that land "pursuing a right of entry and use to which they are entitled."[53] The court found this "obviously applicable to the public's use of public buildings."[54] It may be, then, that government land held open to the public is held in "trust" for the public's use, and the same policy arguments that support rejecting the landowner rules for public ways also support their abolition for other governmental land.

In the past, however, the landowner rules have been applied to municipal buildings without question by the lower courts.[55] It may be that the government's relationship with users of public ways differs from its relationship with users of public buildings. If public buildings are found not to be held in "trust" by the government, *Beach* may not be applicable.

The court's "trust" analysis of public ways may limit the holding of *Beach* to governmental entities.[56] However, the analysis of the general rule of nonliability for open and obvious dangers in the broad terms of "duty"

48. Under the common-law system, contributory negligence is an absolute bar to recovery, and the court can find its existence as matter of law thus preventing a jury's determination of the issue. *Keller*, 105 Idaho at 656, 671 P.2d at 1119; W. PROSSER & W.P. KEETON, *supra* note 3, § 65 at 461.

49. 136 Ariz. at 602, 667 P.2d at 1317.

50. *Id.* at 603, 667 P.2d at 1318.

51. *Wisener*, 123 Ariz. at 150, 598 P.2d at 513.

52. It is somewhat uncertain whether the duty of a municipality to maintain its public ways is on the same footing as its duty to maintain and operate other municipal properties. In City of Phoenix v. Anderson, 65 Ariz. 311, 180 P.2d 219 (1947), the Arizona Supreme Court cited cases involving public ways to establish the duty owed by a city to users of a public pool. In Parness v. City of Tempe, 123 Ariz. 460, 600 P.2d 764 (1979), the Arizona Court of Appeals cited cases involving private landowners to establish a city's duty to users of a public recreation center.

53. 136 Ariz. at 603, n. 1, 667 P.2d at 1318, n. 1.

54. *Id.*

55. *Parness*, 123 Ariz. at 462, 600 P.2d at 766.

56. 136 Ariz. at 603, 667 P.2d at 1318 ("the duty of the City if not merely that of the landowner to an invitee").

and "negligence" may apply to areas beyond governmental liability.[57] In the past, the Arizona Supreme Court has consistently described the open and obvious danger rule in terms of nonliability rather that as a rule affecting duty.[58] The policy of favoring jury decision-making gives strong support to describing the open and obvious danger rule in terms of negligence, rather than duty, especially with Arizona's adoption of a comparative negligence system.

James L. Conlogue

57. In *Coburn*, 143 Ariz. at 52, 691 P.2d at 1080, the Arizona Supreme Court implies that its analysis of the difference between "duty" and "standard of conduct" in the context of municipal liability is inapplicable to general negligence cases.

58. *See*, Smedburg v. Simons, 129 Ariz. 375, 378, 631 P.2d 530, 533 (1981); Warfield v. Shell Oil, 106 Ariz. 181, 184, 472 P.2d 50, 53 (1970); *Daugherty*, 102 Ariz. at 271, 419 P.2d at 423; Moore v. Southwest Sash & Door Co., 71 Ariz. 418, 422, 228 P.2d 993, 995 (1951).

B. *Insurance Company of North America v. Pasakarnis*: THE NEW EMERGENCE OF THE "SEAT BELT DEFENSE"

During the early 1960s a majority of states enacted legislation requiring that new automobiles be equipped with seat belts.[1] Those statutes did not mandate that drivers and passengers use seat belts,[2] yet defendants in automobile tort litigation began claiming that a plaintiff's failure to use an available seat belt barred or reduced damages.[3] The defendants based their claims on a number of theories and met with varying degrees of success.[4]

In *Insurance Company of North America v. Pasakarnis*[5] the plaintiff, Richard Pasakarnis, sustained injuries in an accident entirely caused by John Menninger. Menninger ran a stop sign and collided with Pasakarnis' jeep. Pasarkanis did not have his seat belt fastened. He was thrown from his vehicle and sustained lower back injuries. In its answer to Pasakarnis' complaint, the defendant insurance company alleged that Pasakarnis was negligent in failing to use his safety belt and that his recovery should be reduced in proportion to the degree his negligence caused his injuries.

Pasakarnis filed a motion to strike the affirmative defense. Based upon a 1966 Florida appellate court decision that rejected a similar pleading,[6] the trial court granted the motion.[7] The case thus went to the jury without evidence of seatbelt nonuse and the jury found for Pasakarnis. The defendant appealed. The appellate court affirmed, following earlier Florida decisions.[8] The Florida Supreme Court, however, reversed. The court decided evidence of nonuse of an available, fully functional seat belt may be used to demonstrate failure to minimize damages to the extent the damages were caused by seat belt nonuse.[9]

Florida has joined a small but slowly growing number of jurisdictions that have accepted the "seat belt defense."[10] This casenote discusses the "seat belt defense" in light of the *Pasakarnis* decision and its possible effect in Arizona.

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1. *See* J. KIRCHER, THE SEAT BELT DEFENSE (Defense Research Institute Monograph Sept. 1967).

2. New York State, however, has recently enacted a mandatory seat belt use law. *See* N.Y. VEHICLE & TRAFFIC LAW § 1229-C (McKinney 1984).

3. *See, e.g.*, Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966); Cierpesz v. Singleton, 247 Md. 215, 230 A.2d 629 (Ct. App. 1967); Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (Ct. App. 1967).

4. *See infra* notes 13-35 and accompanying text.

5. 451 So. 2d 447 (Fla. 1984). The facts of *Pasakarnis* are set forth 451 So. 2d at 449-50.

6. Brown v. Kendrick, 192 So. 2d 49 (Fla. Dist. Ct. App. 1966). Subsequent to *Brown*, Florida courts decided a number of other seat belt cases. Most of these decisions rejected the "seat belt defense." *See* McLeod v. American Motors Corp., 723 F.2d 830 (11th Cir. 1984); Woods v. Smith, 296 F.Supp. 1128 (D.C. Fla. 1969); Selfe v. Smith, 397 So. 2d 348 (Fla. Dist. Ct. App. 1981). Some courts, however, left the seat belt question open. *See* Quin v. Millard, 358 So. 2d 1378 (Fla. Dist. Ct. App. 1978).

7. 451 So. 2d at 449.

8. 425 So. 2d 114 (Fla. Dist. Ct. App. 1983).

9. 451 So. 2d at 449.

10. *See, e.g.*, Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E. 2d 329 (1968); Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967); Spier v. Barker, 35 N.Y.2d 444, 363 N.Y.S.2d 916, 323 N.E.2d 164 (1974).

*The Seat Belt Defense Pre-*Pasakarnis

Florida decisions prior to *Pasakarnis* had rejected all manifestations of the seat belt defense.[11] Those decisions were in accordance with the majority rule that failure to wear a seat belt neither bars nor reduces damages.[12] The jurisdictions rejecting the defense have done so based on four criteria.

First, defendants have argued that failure to wear a seat belt[13] is negligence per se.[14] Courts have rejected this defense unanimously.[15] As stated by the *Pasakarnis* court, "[B]ecause Florida does not by statute require the use of available seat belts, we reject the rule that failure to wear a seat belt is negligence per se as have the majority of jurisdictions."[16] New York State, however, which recently adopted legislation requiring seat belt use, has expressly provided that nonuse is evidence of negligence and may be used to mitigate damages.[17]

Second, defendants have alleged that failure to use an available seat belt is contributory negligence.[18] A number of courts have rejected this argument solely because seat belt nonuse does not cause the accident; nonuse only causes a portion of the injury.[19] According to those courts, the plaintiff must be partially responsible for the accident in order for the doctrines of contributory or comparative negligence to apply.[20] There is doubt, however, as to whether this is a correct formulation of the law of contributory negligence; some courts have specifically stated that all that is necessary is that contributory negligence cause part of the injury.[21]

Third, courts have held that seat belt nonuse is not a failure to minimize damages[22] because the action of seat belt use occurs before an accident,

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11. *See supra* note 6.

12. The author has collected 161 "seat belt defense" cases. While the majority have rejected the defense, *see, e.g.*, Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968), a significant portion of the cases have accepted some version of the defense. *See, e.g.*, Truman v. Vargas, 80 Cal. Rptr. 373, 275 Cal. App. 2d 976 (1969). A number of cases left the issue undecided. *See, e.g.*, Britton v. Doehring, 286 Ala. 498, 242 So. 2d 666 (1970). The most often-cited decisions rejecting the defense are: Remington v. Arndt, 28 Conn. Supp. 289, 259 A.2d 145 (Conn. 1969); Lipscomb v. Dimiani, 226 A.2d 914 (Del. Super. Ct. 1967); Brown v. Kendrick, 192 So. 2d 49 (Fl. Dist. Ct. App. 1966); Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969); Miller v. Haynes, 454 S.W.2d 293 (Mo. Ct. App. 1970); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968); Carnation Co. v. King Son Wong, 516 S.W.2d 116 (Tex. 1974).

13. The term seat belt, as used in this Casenote, means various lap belts, shoulder harnesses, and other car passenger safety devices.

14. *Pasakarnis*, 451 So. 2d at 453.

15. The author has collected 161 seat belt cases and not one court has recognized the negligence per se defense.

16. 451 So. 2d at 453. *See, e.g.*, Brown v. Kendrick, 192 So. 2d 49 (Fla. Dist. Ct. App. 1966); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968).

17. *See* N.Y. VEHICLE & TRAFFIC LAW, § 1229-C (McKinney 1984). "Non compliance with the provisions of this statute shall not be admissible as evidence in any civil action in regard to liability but may be introduced into evidence in mitigation of damages."

18. *Pasakarnis*, 451 So. at 453.

19. See cases cited note 16.

20. *Miller*, 160 S.E.2d at 73.

21. According to W. Page Keeton, contributory negligence is concerned with the cause of the injury, not the accident W. PROSSER & W. P. KEETON, THE LAW OF TORTS §65, at 456 (5th ed. 1984). *See also* Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967). Arizona courts are in accord with PROSSER. *See, e.g.*, Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983); Mcdonald v. Eichenauer, 77 Ariz. 252, 269 P.2d 1057 (1954).

22. The term "minimize damages" is used to represent "avoidable consequences" and "mitiga-

while normally one must minimize damages subsequent to an accident.[23] Those courts have concluded, therefore, that the plaintiff's actions prior to the accident are irrelevant when determining failure to minimize damages.[24] Legal scholars, however, generally agree that this approach by the courts is not a correct interpretation of the doctrine of minimization of damages.[25]

Finally, some courts faced with claims of failure to minimize damages or contributory negligence have rejected those claims because, as a matter of law, a reasonable person would not necessarily wear a seat belt.[26] The application of both contributory negligence and minimization of damages depends on the defendant proving that the plaintiff acted unreasonably under the circumstances in providing for the protection of his or her own interests.[27] Some courts refer to this reasonable person standard as a duty.[28] While duty or the reasonable care standard is normally a jury question, if conduct has clearly either violated or not violated the standard of care, courts may rule as a matter of law.[29]

In seat belt cases some courts have ruled as a matter of law on the basis of two criteria. First, there is no community standard requiring a motorist to wear a seat belt.[30] Second, a person is not required to anticipate the negligence of others, and therefore, the reasonable person need not "buckle up" to guard against a potential, but presently unknown, tortfeasor.[31] Other courts, including *Pasakarnis*, have held that reasonableness under the circumstances is a jury question and may not be ruled on as a matter of law.[32]

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tion of damages." These terms describe the doctrine that "denies recovery for any damages that could have been avoided by reasonable conduct on the part of the plaintiff." *See* W. PROSSER & W.P. KEETON, THE LAW OF TORTS § 65, at 458 (5th Ed. 1984).

23. *See, e.g.*, Fields v. Volkswagon of America, Inc., 555 P.2d 48 (Okla. 1976); Carnation v. King Son Wong, 516 S.W.2d 116 (Tex. 1974); Selgado v. Commercial Warehouse Co., 88 N.M.579, 544 P.2d 719 (Ct. App. 1975).

24. *Selgado*, 88 N.M. at 90, 544 P.2d at 721, *Fields*, 555 P.2d at 62, *Carnation*, 516 S.W.2d at 117.

25. W. PROSSER & W.P. KEETON § 65, at 459 (5th ed. 1984).

> [C]ourts have apportioned the damages holding that the plaintiff's recovery should be reduced to the extent they have been aggravated by his own antecedent negligence. This may be the better view, unless we are to be place an artificial emphasis upon the moment of impact, and the pure mechanics of causation.

Id.

26. *See, e.g.*, Taplin v. Clark, 6 Kan. App. 2d 66, 69, 626 P.2d 1198, 1201 (1981); Carnation Company v. Kong Son Wong, 516 S.W.2d 116, 117 (Tex. 1974).

27. W. PROSSER & W.P. KEETON § 65, at 458 (5th ed. 1984). "Both doctrines [avoidable consequences and contributory negligence] rest upon the same fundamental policy of making recovery depend upon the plaintiff's proper care for the protection of his own interests, and both require of him only the standard of the reasonable person under the circumstances." *Id.*

28. Nash v. Kamrath, 21 Ariz. App. 530, 533, 521 P.2d 161, 163 (1974); Taplin v. Clark, 6 Kan. App. 2d at 69, 626 P.2d at 1201.

29. W. PROSSER & W.P. KEETON § 37, at 237 (5th ed. 1984).

30. *See Nash*, 21 Ariz. App. at 533, 521 P.2d at 163; *Taplin v. Clark*, 6 Kan. App. at 70, 626 P.2d at 1202.

31. *See, e.g.*, Hampton v. State Highway Comm'n. 209 Kan. 565, 578, 498 P.2d 236, 249 (1972). Some earlier decisions also referred to seat belts causing injuries. As a result of lap belt technological improvements, this argument seems moot today. *See Nash*, 21 Ariz. App. at 553, 521 P.2d at 163.

32. *See* Truman v. Vargas, 80 Cal. Rptr. 373, 275 Cal. App. 976 (1969); Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967). New York now provides for this defense by statute. *See supra* note 17 and accompanying text. *See also* Chrysler Corp. v. Tollorvich, 580 P.2d 1123 (Wyo. 1978) (dicta seems to accept failure to mitigate defense).

Some courts rejecting the "seat belt defense" have, however, recognized its use if the driver or passenger knows of some "special circumstance" which warrants seat belt use[33] or if failure to wear an available seat belt is part of the cause of the accident.[34] These exceptions are rarely utilized.

Five jurisdictions have legislatively outlawed the seat belt defense.[35] While the majority of jurisdictions have rejected the defense, a number of jurisdictions are either undecided or in a state of flux.[36] Some jurisdictions have rejected the seat belt defense only in the appellate courts.[37] Other jurisdictions have rejected the seat belt defense in strict products liability litigation, but have recognized the defense in negligence actions.[38]

Rationale for the Court's Decision

In *Pasakarnis* the defense claimed, and was prepared to demonstrate, that failure to use a seat belt caused the plaintiff's injuries.[39] In response to Pasakarnis' objection that this defense was a legislative matter, the court stated it had the right and the duty to keep the law "fair and realistic" as technology and society change. It then analogized juridicial recognition of the seat belt defense to judicial acceptance of contribution among joint tortfeasors.[40]

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33. Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968). This defense might entail knowledge of a particular bad driver or a defective door. The knowledge, however, must be very specific and not just a general knowledge that driving without a seat belt may be dangerous.

34. *See* Kington v. Camden, 19 Ariz. App. 361, 507 P.2d 700 (1973); Curry v. Moser, 89 A.D.2d 1, 454 N.Y.S.2d 311 (1982). This defense might entail losing control of the vehicle prior to the accident because of seat belt nonuse and actually causing the accident. According to the *Pasakarnis* court, this situation might be a basis of liability. If a driver loses control of a vehicle and causes an accident which may have been prevented by use of a seat belt, not only may the driver's damages be reduced, but she may also be sued. *See Pasakarnis*, 452 So. 2d at 453.

35. IOWA CODE ANN. § 321.445 (West 1984-85); ME. REV. STATE. ANN. tit. 29 § 1368(a) (Supp. 1973); MINN. STAT. ANN. § 169.685 (West 1985) (Minnesota also has a statute requiring bus drivers to wear seat belts, MINN. STAT. ANN. § 169.44(9) (West 1985); TENN. CODE ANN. § 55-9-214(a) (Rep. Vol. 1980); *Va. Code* § 46.1-309.1(b) (Repl. Vol. 1980). In these jurisdictions, the provision outlawing the seat belt defense has been attached to the statute requiring installations of seat belts in new automobiles.

36. Ten jurisdictions without any case law on the subject are Hawaii, Idaho, Kentucky, Nevada, New Hampshire, Rhode Island, South Dakota, Utah, Vermont, and West Virginia. Jurisdictions remaining undecided include: Alaska, *see* Spruce Equip. Co. v. Maloney, 527 P.2d 1295 (Ala. 1974) (case leans towards accepting the failure to mitigate defense); Alabama, *see* Britton v. Doehring, 286 Ala. 498, 242 So. 2d 666 (1970); Connecticut, *see* Remington v. Arndt, 28 Conn. Supp. 289, 259 A.2d 145 (Ct. App. 1969); Georgia, *see* Crowe v. Harrell, 122 Ga. App. 7, 176 S.E.2d 190 (1970); Massachusetts, *see* Breault v. Ford Motor Co., 364 Mass. 352, 305 N.E.2d 824 (1973); Nebraska, *see* Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976); and Ohio, *see* Robert v. Bohn, 26 Ohio App. 2d 50, 269 N.E.2d 53 (1971), *rev'd on other grounds*, 279 N.E.2d 878 (1972).

37. These jurisdictions include: Arizona, *see* Nash v. Kamrath, 21 Ariz. App. 530, 521 P.2d 161 (1974); Delaware, *see* Lipscomb v. Diamini, 226 A.2d 914 (Del. Super. 1967); Louisiana, *see* Benson v. Seagraves, 445 So. 2d 187 (La. App. 1984), *cert. denied*, 447 So. 2d 1071 (La. 1984); Michigan, *see* Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969); Missouri, *see* Miller v. Haynes, 454 S.W.2d 293 (Mo. App. 1970) (the Missouri Supreme Court had one opportunity to decide on the seat belt defense but it declined to do so. *See* Brown v. Byran, 419 S.W.2d 62 (Mo. 1967)).

38. *See* Vizzini v. Ford Motor Co., 569 F.2d 754 (3d Cir. 1977); Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976); Horn v. General Motors Corp., 17 Cal. 3d 359, 131 Cal. Rptr. 78, 551 P.2d 398 (1976).

39. 451 So. 2d at 449.

40. *Id.* at 452.

The court opted to follow a New York decision[41] that permitted the introduction of evidence to establish that the plaintiff would have minimized damages by wearing a seat belt.[42] Stating that automobile collisions are foreseeable and that evidence of the effectiveness of safety belts is unequivocal, the Florida court held that the jury may consider whether the plaintiff exercised due care by failing to use a seat belt.[43] The court rejected the theory that evidence of seat belt nonuse constitutes negligence per se, since the Florida legislature had never mandated seat belt use.[44] It also rejected the contributory negligence argument, since failure to wear a seat belt did not cause the accident.[45] Further, the court held that if the plaintiff's nonuse was unreasonable, the jury could consider such failure as evidence in assessing the plaintiff's damages.[46] Therefore, the doctrine of minimization of damages or avoidable consequences is available in Florida if the plaintiff was not wearing a seat belt when injured.

The decision made it clear, however, that in order to reduce damages, the defendant must demonstrate that "failure to use a seat belt was unreasonable under the circumstances and that there was a casual relationship between the injuries sustained by the plaintiff and the plaintiff's failure to buckle up."[47] The Florida court rejected the majority rule that, due to community standards and the right to assume that others will not be negligent, as a matter of law a reasonable person would not necessarily wear a seat belt.[48] The door was left open for a plaintiff to show seat belt nonuse as evidence of liability. The court specifically stated seat belt nonuse can be used to show liability in favor of a tort victim only when nonuse is the provimate cause of the accident.[49] The circumstances of that occurrence are, however, quite rare.

The notion that there is a duty to wear or that it is unreasonable for a plaintiff not to wear a seat belt was rejected by the dissent. Justice Shaw pointed out that only fourteen percent of the public use seat belts despite the publicity of their safety.[50] He felt the issue was better left to the legislature. In fact, the Florida legislature had specifically precluded seat belt evidence in child restraint cases.[51]

Additionally, the dissent stated that the majority misinterpreted the minimization of damages or avoidable consequences doctrine. Justice Shaw noted that the doctrine of contributory negligence applies to a plaintiff's conduct prior to the accident, and the rule of avoidable consequences applies to conduct after the accident.[52]

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41. Spier v. Barker, 363 N.Y.S.2d 916, 323 N.E.2d 164 (1974).
42. 451 So. 2d at 453.
43. Id.
44. *See supra* notes 16 and 17 and accompanying text.
45. This interpretation of the law may not be correct. *See supra* note 23.
46. 451 So. 2d at 454.
47. *Id.*
48. *Id.*
49. *Id.*; *see also supra* note 32 and accompanying text.
50. 451 So. 2d at 455 n.3 (Shaw, J., dissenting).
51. *Id.*
52. *Id.* at 456. *But see supra* note 27 and accompanying text. *See* ARIZ. REV. STAT. ANN. § 12-2505(A)(1984).

Scope of the Case

Courts, including the *Pasakarnis* court, are careful to distinguish between minimization of damages and contributory negligence. However, in light of most jurisdictions' acceptance of comparative negligence, the difference seems moot. Under a comparative negligence scheme, if the plaintiff is contributorily negligent, damages are reduced by the percentage that the resulting injury reflects the plaintiff's negligence.[53] Therefore, if the plaintiff fails to wear a seat belt, only damages for that portion of the injury resulting from nonuse will be deducted from eventual recovery. Similarly, under a minimization of damages rule, if the jury decides the plaintiff failed to act reasonably by failing to use a seat belt, only that portion of damages related to nonuse will be deducted.[54] The analysis, failure to act as a prudent person would under the circumstances, is the same under either comparative negligence or the minimization of damages rule.[55]

Minimization of damages is probably a more appropriate label than comparative negligence. When there are separable injuries as opposed to one single injury—as courts have stated there necessarily are in seat belt cases—the minimization of damages rule applies.[56]

Problems with Implementation

Florida courts may find the seat belt defense more difficult to implement than it was to recognize. In *Caizzeno v. Volkswagenwerk A.G.*[57] the Second Circuit Court of Appeals found that the jury did not understand how to reduce damages. *Caizzeno* was a second-collision case. A design defect allegedly caused injuries beyond what should have occurred in this automobile accident.[58] The jury found that twenty-five percent of the plaintiffs' injuries were caused by seat belt nonuse. The plaintiffs had alleged that a design defect by the defendant caused their ejectment from vehicle.[59] However, the injuries from the second collision, the ejectment, were caused almost entirely by the failure to wear a seat belt. Therefore, the jury verdict was inconsistent with the evidence. Unless juries correctly apply the seat belt defense, appellate courts may be forced to reverse and remand numerous decisions.

As the *Caizzeno* decision implicitly indicates, both courts and juries are

53. Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967) (a seat belt decision in a comparative negligence state).

54. Carazzo v. Volkswagenwerk A.G., 647 F.2d 241 (2d Cir. 1981).

55. *See supra* note 27.

56. *See supra* note 23 and accompanying text. *See also* W. PROSSER & W.P. KEETON § 65, at 459 (5th ed. 1984). "It is suggested, therefore, that the doctrine of contributory negligence and avoidable consequences are in reality the same, and that the distinction which exists is rather one between damages which are capable of assignment to separate causes, and damages which are not."

57. 647 F.2d 241 (2nd Cir. 1981).

58. The second-collision doctrine states that a manufacturer's liability for injuries proximately caused by defects is not limited to defects which cause injuries over and above that which would have occured from the accident, but for the defective design. *See* Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) (this doctrine is also referred to as crashworthiness). For example, in *Caiazzo*, the plaintiffs alleged that the door latch assembly system was faulty, which caused the doors to open during a collision, resulting in the plaintiff's ejection from the van. The defendant, Volkswagenwerk, therefore, was not potentially liable for causing the accident which was caused by a third party, but for exacerbating the injuries. 647 F.2d at 244.

59. 647 F.2d at 244.

loathe to reduce or deny recovery to plaintiffs who failed to use a seat belt. Decisions where damages are reduced or denied are rare even in jurisdictions that, in theory, have accepted the defense.[60]

Although comparative negligence schemes reduce the harshness of applying the seat belt defense, many states have modified, rather than pure comparative negligence schemes.[61] Under modified comparative negligence, there is a possibility that plaintiffs may be completely denied recovery. Wisconsin has such a modified plan.[62] In *Foley v. City of West Allis*[63] the Wisconsin court refused to completely bar recovery, even though the plaintiff's nonuse of the seat belt caused more than fifty percent of the plaintiff's injuries. This normally would have vitiated all recovery under Wisconsin law, but the court conceived a plan that was similar to minimization of damages. The *Foley* court held that the injuries caused by the initial accident and by the failure to use a seat belt were separable and apportioned damages accordingly.[64]

Florida courts may also be reluctant to completely deny a plaintiff recovery. Hypothetically, if a jury were to find that all of Pasakarnis' injuries were caused by his ejectment from his vehicle, then his damages would be zero or near zero. Thus, although adoption of comparative negligence and minimization of damages can alleviate the harshness of the seat belt defense, there remain situations which will deny the plaintiff the major portion of the potential recovery.[65]

Additionally, Florida courts may find that different juries variously interpret "reasonableness under the circumstances." If a jury consists of people who regularly use seat belts, it may find seat belt nonuse unreasonable, even though a relatively small portion of the populace uses seat belts.[66] Conversely, if the jury consists of seat belt nonusers, then it is unlikely to find nonuse unreasonable. Such inconsistency may disturb the courts.

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60. *See* Franklin v. Gibson, 138 Cal. App. 3d 340, 188 Cal. Rptr. 23 (1982); Polyard v. Terry, 148 N.J. Super. 202, 372 A.2d 378 (1977); Parise v. Fehnel, 267 Pa. Super. 79, 406 A.2d 345 (1979); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

In both California and New Jersey, jurisdictions that accepted the seat belt defense quite early, no decision has actually reduced damages despite much litigation. *See, e.g.*, Greyhound Lines, Inc., v. Superior Court, 3 Cal. App. 3d 356, 83 Cal. Rptr. 343 (1970), *cert. denied*, 400 U.S. 868 (1970); Franklin v. Gibson, 138 Cal. App. 3d 340, 188 Cal. Rptr. 23, (1982); Truman v. Vargas, 275 Cal. App. 2d 976, 80 Cal. Rptr. 373 (1969); Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967).

61. Arizona has adopted a pure comparative negligence scheme. *See* ARIZ. REV. STAT. ANN. § 12-2505 (1984-85).

62. *See* WIS. STAT. ANN. § 895.045 (West 1983). If plaintiff is more than 50 percent negligent, recovery is completely denied.

63. 113 Wis. 2d 475, 335 N.W.2d 824 (1983).

64. *Id.* at 480-84, 335 N.W.2d at 829-33.

65. If the plaintiff is denied damages this does not mean the plaintiff is actually the party who caused the injury. "[I]t becomes an anomaly to use the proximate cause requirements as a basis for denying even partial damages." W. PROSSER & W.P. KEETON § 42, at 276 (5th ed. 1984).

There is no doubt that the action of the defendant which caused the initial accident was a substantial factor in causing the resulting injury. It is equally clear that the plaintiffs in seat belt cases are foreseeable plaintiffs if the defendant drives negligently. The real issue is whether the plaintiff, as a reasonably prudent driver, should have worn a seat belt. This analysis goes toward the defendant's available defenses but not toward causation. The reasonable person standard is discussed *infra* notes 22-27 and accompanying text.

66. *See supra* note 50 and accompanying text.

Application in Arizona

Courts have applied Arizona law to the seat belt defense on four occassions. In the first decision, *General Motors Corp. v. Walden*,[67] the Tenth Circuit, applying Arizona law, admitted evidence of seat belt use in a strict liability case. The court permitted this evidence to establish product misuse, a viable defense to a strict product liability claim.[68]

The second decision is an Arizona case, *Kington v. Camden*,[69] a Division Two appellate decision. Seat belt evidence was permitted to show that nonuse may have caused the accident. This is not the classic seat belt defense, and the *Kington* court did not consider whether seat belt evidence could be used to show contributory negligence.[70]

The third and most important case is *Nash v. Kamrath*.[71] In *Nash*, the Division Two Arizona Court of Appeals rejected the seat belt defense. The court held that as a matter of law there is no duty to minimize damages by wearing a seat belt.[72] This decision was prior to Arizona's adoption of comparative negligence. If the court perceives no duty to wear a seat belt, however, then comparative negligence will also be unavailable to defendants.[73] Additionally, since the standard of duty of reasonableness is the same under the minimization of damages rule, that defense is also unavailable.[74]

The most recent Arizona case is *Cook v. Cook*.[75] In that case the defendant did not plead the seat belt defense. The Division One Court of Appeals, therefore, refused to rule on it; the question was not properly before the court.[76] Interestingly, the court did not cite the *Nash* opinion as authority for non-application of the seat belt defense in Arizona. It is conceivable that the division one court would consider the seat belt defense if properly raised.

In summary, seat belt evidence may be used in Arizona only to demonstrate the cause of the accident. Additionally, one federal court, applying Arizona law, has permitted the presentation of seat belt evidence. The Arizona Supreme Court and the Division One Court of Appeals have yet to rule on this issue.

The situation in Arizona bears a striking resemblance to Florida's situation prior to the *Pasakarnis* decision. As was the case in Florida, Arizona law is not completely settled. On the basis of the *Nash* decision, however, Arizona is counted among the states that reject the seat belt defense. It is

67. 406 F.2d 606 (10th Cir. 1969).

68. *Id.* at 609.

69. 19 Ariz. App. 361, 507 P.2d 700 (1973). In *Kington*, the driver lost control of her vehicle when she slid from behind the wheel. This event would not have occurred if she had fastened her seat belt.

70. 19 Ariz. App. at 365, 507 P.2d at 704.

71. 21 Ariz. App. 530, 521 P.2d 161 (1974).

72. Id. at 532-33, 521 P.2d at 163-64.

73. The court stated that drivers have the right to expect other drivers on the road to conduct themselves in a safe manner. The court also referred to evidence that seat belts sometimes cause injuries. *Id.* at 532, 521 P.2d at 164.

74. *Id.*. The court cites cases rejecting both contributory negligence and avoidable consequences.

75. 26 Ariz. App. 163, 547 P.2d 15 (1976).

76. *Id.* at 170, 547 P.2d at 22.

uncertain whether the trend towards acceptance of the defense in the ten years since the *Nash* decision will cause Arizona courts to reconsider *Nash*.

Evaluation of the Seat Belt Defense

The seat belt defense can be perceived as equitable. Certainly tortfeasors should not be liable for damage they do not actually cause. Furthermore, comparative negligence or minimization of damages doctrines mitigate the harshness of recognizing the defense. Under these doctrines, plaintiffs will be denied recovery only for injuries which are proven to be directly related to their own actions.

It is inequitable to reject the defense, as many courts have, on the ground that failure to wear a seat belt did not cause the accident, or that the plaintiff need not prepare for the negligence of another.[77] Defendants are often held liable even though their actions did not cause the accident, but only exacerbated the injuries. The most prominent example of such cases are the second-collision or crashworthiness decisions.[78] If defendants in second collision cases can be held responsible for causing injuries, but not for the accident, by analogy plaintiffs should be responsible if they cause their injury, but not the accident.

The most persuasive argument presented by courts rejecting the seat belt defense is that a reasonable person without knowledge of special circumstances would not necessarily wear a seat belt. Only by deviating from the reasonable person standard can plaintiffs' damages be reduced under a minimization of damages or contributory/comparative negligence theory.[79]

As pointed out by the dissent in *Pasakarnis*, only fourteen to fifteen percent of the American populace utilize seat belts despite more than twenty years of publicity as to their effectiveness.[80] Community custom bears heavily upon what constitutes reasonableness.[81] There have been circumstances, however, in which courts have found a particular group or industry's custom or practice negligent, though universally followed. In the famous case *The T.J. Hooper*,[82] the court found a tugboat operator negligent for not having a radio on board to learn of weather conditions, despite an industry custom

77. *See supra* notes 30 and 31 and accompanying text.

78. *See* Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Boln v. Triumph Corp., 350 N.Y.2d 644, 305 N.E.2d 769 (1973). *See also supra* note 58.

79. Jurisdictions that have changed from contributory to comparative negligence have not changed their stand on the seat belt defense, stating the reasonable person standard is the same under either analysis. *See, e.g.*, Taplin v. Clark, 6 Kan. App. 2d 66, 626 P.2d 1198 (1981); Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977).

80. 451 So. 2d at 455.

81. W. PROSSER & W.P. KEETON § 33, at 193.

> Since the standard is a community standard, evidence of the usual and customary conduct of others under similar circumstances is normally relevant and admissible, as an indication of what the community regards as proper, and a composite judgment as to the risks of the situation and the precautions required to meet them. Custom also bears upon what others will expect the action to do, and what, therefore reasonable care may require the actor to do, upon the feasibility of precausions. . . . If the actor does only what everyone else has done, there is at least an inference that the actor is conforming to the community's idea of reasonable behavior.

82. 60 F.2d 737 (2nd Cir. 1932) (L. Hand), *cert. denied*, 287 U.S. 662 (1932).

not to keep radios on the vessels. In *Shafer v. H.B. Thomas Co.*[83] a merchant with a swinging door on the premises was found to have negligently designed and installed a door, despite the fact that the design was a custom in the industry. This rationale, when analogized to the seat belt situation, would allow a jury to find the community standard unreasonable.

The T.J. Hooper and *Shafer* are, however, distinguishable from the seat belt situation. Those cases involved particular factions of society, tugboat operators and door manufacturers, that were made to conform to a more general societal definition of reasonableness. Conversely, society as a whole has established the custom of seat belt nonuse. When a jury decides that under the circumstances a reasonable person wears a seat belt, they are countervening the societal definition of reasonableness.

The *Nash* Court was correct in ruling that evidence of seat belt use is irrelevant, since as a matter of law a reasonable person would not necessarily were one. The *Pasakarnis* court overlooks the reasonableness question and its relation to custom. The court states that due to the evidence of seat belt effectiveness and the general awareness of potential automobile accidents, it may be unreasonable not to wear a seat belt. Yet society has this information and has generally chosen not to use seat belts. The courts should not enforce this standard upon society. That is clearly a legislative responsibility. The New York legislature has provided by statute that seat belt evidence may be introduced to show failure to minimize damages. Under those circumstances the seat belt defense is warranted.

Conclusion

In *Insurance Company of North America v. Pasakarnis*, the Florida Supreme Court recognized the seat belt defense. The court decided evidence of seat belt use may be presented by the defendant to demonstrate the plaintiff's failure to minimize damages. This decision is contrary to the general American case law, but joins a growing minority.

Arizona's direction with respect to the seat belt defense is uncertain. One Arizona appellate decision completely rejects the defense. The reasoning of that case is sound: a reasonable person in American society would not necessarily wear a seat belt, and therefore the plaintiff was not negligent in failing to wear one. The Arizona Supreme Court has yet to decide this issue. Until there is a change in the public's attitute toward seat belt use, Arizona should retain the majority rule.

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83. 53 N.J. Super. 19, 146 A.2d 483 (1958). *See also* Texas & Pac. R.R. Co. v. Pehymer, 189 U.S. 468 (1903) (Justice Holmes) (Court held what usually is done *may* be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence).

C. *GREEN ACRES TRUST V. LONDON*: TO WHAT EXTENT SHOULD ATTORNEYS BE PROTECTED BY COMMON LAW PRIVILEGES WHEN THEY DEFAME AN ADVERSARY VIA THE PUBLIC MEDIA?

In *Green Acres Trust v. London*,[1] the Arizona Supreme Court considered whether defamatory statements made by attorneys to a newspaper reporter are protected by a privilege when the communication concerns a proposed judicial proceeding.

Green Acres Trust arose out of statements made by attorneys representing the plaintiffs in a class action to be filed against Green Acres Trust.[2] A newspaper reporter, at the invitation of the lawyers, attended a meeting held to discuss a draft of the class-action complaint.[3] Based in part on the reporter's account of the meeting, the *Phoenix Gazette* published an article that unfavorably characterized the sales technique of Green Acres Trust, a corporation engaged in marketing funeral plans.[4] The article appeared on the same day that the class action complaint was filed.[5]

Green Acres Trust sued the representative members of the class and their lawyers for defamation. Neither the reporter nor her employer were named party defendants. The trial court entered summary judgment in favor of all the defendants. The court of appeals affirmed, finding that both an absolute and a qualified privilege to defame protected the lawyers.[6] Reversing the court of appeals, the Arizona Supreme Court held the attorneys were entitled to neither an absolute nor qualified privilege because a privileged occasion did not arise from the statements to the newsreporter.[7]

This Casenote examines the nature and scope of an attorney's absolute and qualified privilege to defame in Arizona and whether such a privilege extends to communications made prior to the formal commencement of a civil judicial proceeding. The applicability of the ABA Code of Professional Responsibility to the attorneys' communications in *Green Acres Trust* is also discussed. Finally, this Casenote analyzes the utility of common law privileges in the law of defamation.

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1. 141 Ariz. 609 , 688 P.2d 617 (1984).

2. The facts of *Green Acres Trust* are set forth 141 Ariz. at 611-12, 688 P.2d at 619-20.

3. The trial court found that the meeting of the lawyers and the reporter was private. The reporter received a draft of the unfiled complaint and discussed the case with at least one lawyer. *Green Acres Trust*, 141 Ariz. at 611, 688 P.2d at 619.

4. Phoenix Gazette, Mar. 8, 1976, at A1, col. 1.

5. The complaint against Green Acres Trust alleged violations of the Consumer Fraud Act, the Securities Act, and prearranged funeral plan legislation. *See* People *ex rel.* Babbitt v. Green Acres Trust, 127 Ariz. 160, 618 P.2d 1086 (Ct. App. 1980). The *Gazette* article alleged that Green Acres Trust defrauded people, deliberately violated state laws, and intentionally inflicted emotional distress on its customers.

6. Green Acres Trust v. London, 142 Ariz. 12, 27, 688 P.2d 658, 673 (Ct. App. 1984). The Arizona Court of Appeals found the oral and written statements referred to in the complaint pertinent to the judicial proceeding and applied an absolute privilege. *Id.*

7. *Green Acres Trust*, 141 Ariz. at 619, 688 P.2d at 627. *See also infra* note 87 and accompanying text.

Absolute Privilege

The defense of absolute privilege[8] to defame allows the defendant to escape civil liability for otherwise actionable conduct. The privilege is recognized when the defendant acts to further some important societal interest that outweighs the plaintiff's interest in avoiding unredressed injury to his reputation.[9] An absolute privilege is available only to participants in judicial proceedings, legislative proceedings, and certain official proceedings of executive officers.[10] The rationale for the privilege is that participants in government processes must be able to communicate freely to best serve the public interest.[11] Defamatory matter published in a judicial proceeding by the judge, judicial officer, juror, witness, party, or counsel may be absolutely privileged.[12] The extensive protection of the privilege encourages parties in a judicial proceeding to seek or to make "full disclosure of all pertinent information within their knowledge."[13] An attorney is protected by an absolute privilege because the threat or fear of reprisals in the form of defamation lawsuits could interfere with the duty of representation owed to the client, and hence, could impede the effective administration of justice.[14]

In Arizona, an absolutely privileged occasion to defame exists after a complaint has been filed in a judicial or quasi-judicial proceeding if the attorney's defamatory communication connects with, bears on, or relates to the subject of inquiry.[15] However, a stricter standard applies when an attorney's defamatory communication is made prior to filing the complaint. A pre-

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8. [P]rivileges, in the broader and more technical meaning, are of four classes: (1) privileged occasions on which the immunity afforded is absolute, (2) privileged occasions on which the immunity is defeasible, (3) the publication of official reports, records . . . of interest to the public, and (4) 'fair' comment upon questions of literary, artistic, scientific, and political interest. As a matter of usage, . . . the courts and text writers have employed the word 'privilege' with reference to but two classes of these solutions, namely, those which depend primarily upon the occasion for the defamatory language . . . .

1 F. HARPER & F. JAMES, THE LAW OF TORTS, § 5.21 at 419-20 (1956); *see also* W. PROSSER & W.P. KEETON, THE LAW OF TORTS, § 114, at 815 (5th ed. 1984).

9. Sierra Madre Dev., Inc. v. Via Entrada Townhouses Ass'n, 20 Ariz. App. 550, 553, 514 P.2d 503, 506 (1973) (citing Veeder, *Absolute Immunity in Defamation*, 9 COLUM. L. REV. 463, 477-78 (1909); *see also* PROSSER AND KEETON, *supra* note 8, at 815.

10. Ross v. Duke, 116 Ariz. 298, 569 P.2d 240 (1976); W. PROSSER & W.P. KEETON, *supra* note 8, at 816-23.

11. F. HARPER & F. JAMES, *supra* note 8, at 421.

12. Sierra Madre Dev. Inc. v. Via Entrada Townhouses Ass'n, 20 Ariz. App. 550, 514 P.2d 503 (1973) (defamatory statements contained in pleadings may be absolutely privileged); Todd v. Cox, 20 Ariz. App. 347, 512 P.2d 1234 (1973) (defendant's affidavit testimony for use on motion for new trial is absolutely privileged); Stewart v. Fahey, 14 Ariz. App. 149, 481 P.2d 519 (1971) (a party to a judicial proceeding may assert a defense of absolute privilege); *see also* Veeder, *supra* note 9, at 474-77.

13. F. HARPER & F. JAMES, *supra* note 8, at 424.

14. *Id.* at 427; Veeder, *supra* note 9, at 477-78.

15. *Sierra Madre*, 20 Ariz. App. at 553-54, 514 P.2d at 505-07. In Todd v. Cox, 20 Ariz. App. 347, 349, 512 P.2d 1234, 1236 (1973), the Arizona Court of Appeals held that an absolute privilege is available if the defamatory statements have some relation to the judicial proceedings, even though they may not strictly constitute evidence.

Many jurisidictions have formulated the standard that the statements must relate to the subject of inquiry: a communication that is material, relevant, or pertinent to the case at bar is absolutely privileged. McCarthy v. Yempuku, 678 P.2d 11 (Hawaii Ct. App. 1984); Massengale v. Lester, 402 S.W.2d (Ky. Ct. App. 1966), *cert. denied*, 385 U.S. 1019 (1967); Stryker v. Barbers Super Markets, 81 N.M. 44, 462 P.2d 629 (1969); Passon v. Spritzer, 419 A.2d 1258 (Pa. Super. 1980).

In Louisiana, relevancy of the defamatory matter is not enough. An absolute privilege attaches

complaint communication is absolutely privileged if the content, manner, and recipient *all* bear some relationship to the proceeding.[16]

In *Green Acres Trust* the court did not address whether the content and manner of the attorneys' communications were related to the proposed proceeding. Instead, the court focused on the fact that the recipient of the communication, the newspaper reporter, lacked a sufficient connection to the proposed class action.[17] Therefore, the court noted, granting an absolute privilege for the lawyers' statements to the reporter would not serve public policy.[18]

An attorney's defamatory communications to the news media, prior to filing a complaint, generally will not meet the *Green Acres Trust* test for absolute privilege;[19] however, an exception may exist where the news media is a potential party to that litigation and, therefore, has an interest in the proceeding. *Johnston v. Cartwright*,[20] an Eighth Circuit opinion, is one example of this exception. There, a business placed an advertisement in a newspaper, which defamed a labor union and a union official. The attorney who represented both the business and the newspaper made a statement to the newspaper which was published the following day. This action resulted in the union official bringing a defamation suit against the attorney. The Eighth Circuit assumed that the newspaper had a stake in the attorney's comments collateral to its business of supplying news to the public.[21] Further, the court noted that the newspaper had reasonably anticipated a libel action based on the advertisement, and the attorney's statements in that regard asserted a potential defense on behalf of his client.[22] Therefore, the court allowed the privilege reasoning that the content, manner, and recipient of the information all were related to an imminent judicial proceeding.[23]

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only if the publication is based on probable cause and is not malicious. Sabine Tram Co. v. Jurgens, 143 La. 1092, 79 So. 872 (1918); *see also* Annot., 38 A.L.R. 3d 272 (1971).

16. *Green Acres Trust*, 141 Ariz. at 614, 688 P.2d at 622 (citing Asay v. Hallmark Cards, Inc., 594 F.2d 692 (8th Cir. 1979)). The defendants in *Green Acres Trust* relied on RESTATEMENT (SECOND) OF TORTS § 586 (1976) for finding an absolute privilege:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communication preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

17. 141 Ariz. at 615, 688 P.2d at 623.

18. *Id.*

19. *See* Asay v. Hallmark Cards, Inc., 594 F.2d 692 (8th Cir. 1979) (an attorney's communication to the media is not ordinarily sufficiently related to a judicial proceeding to constitute a privileged occasion); Kennedy v. Cannon, 229 Md. 92, 182 A.2d 54 (1962) (court held no absolute privilege for defense attorney who stated to the newspaper that his client in a rape prosecution contended that prosecutrix consented to the sexual advances). W. PROSSER & W.P. KEETON, *supra* note 8, at 820, states that comments made to newspapers are not an element of a judicial proceeding and are not absolutely privileged.

20. 355 F.2d 32 (8th Cir. 1966). The facts of *Johnston* are set forth at 33-35.

21. *Id.* at 37. *See also* Asay v. Hallmark Cards, Inc., 594 F.2d 692, 698 (8th Cir. 1979).

22. *Johnston*, 355 F.2d at 38.

23. *Id.* at 37. *Johnston* may be an extreme case because neither the attorney nor his clients were aware that a proposed judicial proceeding would be initiated against them. The court, however, felt the imminency of the litigation justified the press conference. 355 F.2d at 37; *Cf.* RESTATEMENT (SECOND) OF TORTS § 586 quoted *supra* note 16.

In *Sierra Madre*, 20 Ariz. App. at 554, 514 P.2d at 507, the court said if a party is made the subject of a suit for defamation, all doubts as to the connection of the statement to the subject of inquiry should be resolved in his favor. The court in *Green Acres Trust* concluded that the Eighth

The existence of a privileged occasion is a question of law[24] and is determined by the balancing of individual and societal interests. Accordingly, the *Green Acres Trust* decision ensures a high degree of judicial supervision and control in the application of an absolute privilege to communications made prior to filing a complaint.[25] The court cited, with approval, cases where statements made by attorneys to non-media recipients, prior to initiation of a judicial proceeding, were held absolutely privileged.[26] Using these cases as guidelines, the *Green Acres Trust* court noted that it did not reject recognition of an absolute privilege for all pre-complaint defamatory statements made by an attorney.[27]

The cases recognizing an absolute privilege for an attorney's statements regarding a proposed proceeding are based on two criteria. First, the statements must be made in good faith and must relate to the proposed proceeding.[28] Second, society's interest in the effective and efficient administration of justice, which requires attorneys to zealously represent their client's interests, must overcome the defamed individual's interest in her reputation.[29]

Circuit's attempt to distinguish *Johnston*, on the basis of the newspaper's interest in preventing its exposure to legal liability, from *Asay*, where no such interest was present, was "irreconcilable." 141 Ariz. at 614 n.2, 688 P.2d at 622 n.2. The Arizona court declined to follow *Johnston*.

24. Drummon v. Stahl, 127 Ariz. 122, 618 P.2d 616 (Ct. App. 1980) (question may be raised in a motion for summary judgment), *cert. denied*, 450 U.S. 967 (1980); *Sierra Madre*, 20 Ariz. App. at 552, 514 P.2d at 505 (question may be properly raised in a motion to dismiss); *see also* RESTATEMENT (SECOND) OF TORTS § 619 (1976).

25. In Mills v. Denny, 245 Iowa 584, 63 N.W.2d 222 (1954), the Iowa Supreme Court noted that only after the proceedings have been formally initiated does the judge have the control and supervision necessary to punish, discipline, as well as remove from the record, the defamatory statements of those who go beyond the limits of courtroom propriety.

26. *Green Acres Trust*, 141 Ariz. at 615, 688 P.2d at 623.

27. *Id.* (citing the RESTATEMENT (SECOND) OF TORTS § 586).

28. *See, e.g.*, Smith v. Suburban Restaurants, Inc., 374 Mass. 528, 531, 373 N.E.2d 215, 218 (1978). In Ascherman v. Natanson, 23 Cal. App. 3d 861, 865, 100 Cal. Rptr. 656, 659 (C.A. 1st Dist. 1972), the court stated that "[an] absolute privilege in both judicial and quasi-judicial proceedings extends to preliminary conversations and interviews between a prospective witness and an attorney" if the attorney's questions are made in good faith and in some way are related to a pending or contemplated action.

29. The following cases involve defamatory communications made by an attorney of record, prior to filing a complaint, where an absolutely privileged occasion was found because the intent of the statement was to efficiently administer justice: Sriberg v. Raymond, 370 Mass. 105, 345 N.E.2d 882 (1976) (letter sent in reference to anticipatory breach of contract); Chard v. Galton, 277 Or. 109, 559 P.2d 1280 (1977) (intent of counsel's defamatory letter to insurer that the insured was driving while intoxicated was to effect a settlement for a potential personal injury claim); *see also* Petty v. General Accident Fire & Life Assurance Corp., 365 F.2d 419 (3rd Cir. 1966) (negotiation of a settlement is thought of as part of the judicial proceeding, even prior to initiation of the proceeding).

The following cases involve defamatory statements made by counsel, prior to initiation of judicial or quasi-judicial proceedings, where an absolutely privileged occasion was found because the attorney's intent was to effectively secure justice for his client: Youmans v. Smith, 153 N.Y. 214, 47 N.E. 265 (1897) (attorney's list of questions prepared in anticipation of litigation and communicated to a third party held absolutely privileged); Zirn v. Cullom, 187 Misc. 241, 63 N.Y.S.2d 439 (1946) (defamatory statement made in answer to the complaint in a prior suit is absolutely privileged in the present case). *But see* Robinson v. Home Fire & Marine Ins. Co., 244 Iowa 1084, 59 N.W.2d 776 (1953) (qualified privilege is appropriate for preliminary conversations between an attorney and prospective witness relative to a contemplated action); Timmis v. Bennett, 352 Mich. 355, 89 N.W.2d 748 (1958) (defamatory letter sent to witnesses and potential witnesses concerning a contemplated lawsuit was held not absolutely privileged because the letter was not part of a judicial proceeding); *see also infra* notes 44-50 and accompanying text.

Qualified Privilege

The defense of absolute privilege is applied within narrow and ascertainable limits.[30] A court can determine by direct observation whether a participant is entitled to a privilege to defame during a judicial proceeding. In contrast, determining when an occasion is entitled to a qualified privilege is cumbersome because the common law requires a court to weigh competing interests based upon the unique facts of each case.[31] Like the absolute privilege, courts have recognized a qualified privilege to defame in situations where a communicant seeks to vindicate or advance an important interest.[32] However, the qualified privilege is applicable only to communications that are (1) made in good faith upon a subject matter in which the communicating party has an interest or a legal, moral, or social duty to communicate, and (2) made to a person having a corresponding interest or duty.[33] This application of qualified privilege is consistent with the general theory of privilege in defamation: that some communications are so vital to society that the social interest outweighs the injury to the defamed person.[34]

In *Green Acres Trust*, the court applied a two-pronged test[35] to determine whether a qualified privilege existed. First, the court asked whether a privileged occasion arose.[36] If so, the second step was to determine whether the occasion for the privilege was abused.[37] The attorneys in *Green Acres Trust* asserted the qualified privileges of protection of the interest of the recipient or a third person, common interest, and reports of public proceedings.[38] The supreme court held that no privileged occasion arose when the

30. Jones, *Interest and Duty in Relation to Qualified Privilege*, 22 MICH. L. REV. 437, 438 (1924).

31. *Id.* at 438.

32. W. PROSSER & W.P. KEETON, *supra* note 8, at 825.

33. M. NEWELL, SLANDER AND LIBEL, 391, 416 (4th ed. 1924); Jones, *supra* note 30, at 444; W. PROSSER & W.P. KEETON, *supra* note 8, at 825; Note, *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 924 (1956); *see* RESTATEMENT (SECOND) OF TORTS §§ 594-98 (1976). *See also* Connor v. Timothy, 43 Ariz. 517, 521, 33 P.2d 293, 294 (1934).

34. Note, *Conditional Privilege in Tennessee*, 30 TENN. L. REV. 569, 570 (1963).

35. *Green Acres Trust*, 141 Ariz. at 616, 688 P.2d at 624. This test was first applied in Arizona in Roscoe v. Schoolitz, 105 Ariz. 310, 312, 464 P.2d 333, 336 (1970).

36. The existence of a qualified privilege is a question of law. When a communication is found to be privileged, the burden shifts to the plaintiffs to prove an abuse of the privilege to the trier of fact. Phoenix Newspapers, Inc. v. Choisser, 82 Ariz. 271, 312 P.2d 150 (1957); Broking v. Phoenix Newspapers, 76 Ariz. 334, 264 P.2d 413 (1953); Note, *Privileged Defamation*, 22 VA. L. REV. 642, 646 (1936).

37. Unlike an absolute privilege, a qualified privilege can be lost by the defendant's abuse. The privileged occasion may be abused by the defendant's actual malice. Antwerp Diamond Exch. v. Better Business Bureau, 130 Ariz. 523, 528, 637 P.2d 733, 783 (1981) (adopting RESTATEMENT (SECOND) OF TORTS § 600); Note, *supra* note 33, at 930-31; RESTATEMENT (SECOND) OF TORTS §§ 604-05 (1976). Actual malice is defined as knowledge that a statement is false or reckless disregard of whether it is true or false. New York Times v. Sullivan, 376 U.S. 254 (1964).

38. PROSSER categorizes five occasions of common law qualified privilege according to the interests that are protected: interest of the publisher, interest of others, common interest, communication to one who may act in the public interest, and fair comment on matters of public interest. W. PROSSER & W.P. KEETON, *supra* note 8, at 825-31. To those five privileged occasions, the RESTATEMENT (SECOND) OF TORTS §§ 597 and 598A (1976) adds two additional categories: the interest of a member of the speaker's immediate family or of the immediate family of the recipient or of a third person, and communications by those inferior public officials who have not been held to be entitled to an absolute privilege.

The privilege of fair reporting of public meetings is a special privilege because it does not rely on

attorneys communicated the contents of the complaint to the newspaper reporter.[39]

Protection of the Interest of the Recipient or Third Person

The courts have recognized a qualified privilege for communications made for the protection of the interests of others.[40] In the case of defamatory matter published for the protection of the recipient or a third person, the policy for extending qualified protection is that some decent social conduct, which outweighs competing interests, deserves to be privileged.[41] The rationale behind this privilege is that honest communication of some misinformation should be protected in order to insure the availability of correct information to those who may require it.[42]

The privilege is clearest, according to Prosser and Keeton, when a definite legal relationship exists between the communicant and the person for whose benefit the remark is made,[43] as in the attorney-client relationship. The leading case on the privilege of attorneys to protect the interests of their clients is *Kruse v. Rabe*.[44] In *Kruse*, the attorney loudly advised his client in a public place about the business integrity of a real estate broker.[45] The New Jersey Supreme Court found the occasion privileged, but held that the occa-

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the occasion giving rise to the communication. The two-pronged test was not applied to this privilege, in *Green Acres Trust*. W. PROSSER & W.P. KEETON, *supra* note 8, at 836-37.

39. 141 Ariz. at 617, 688 P.2d at 625. The supreme court did not address the issue of whether the privilege was abused. The supreme court vacated the court of appeals' decision holding that the privilege applied to protection of the interest of the recipient or third person because the attorney's "publication [was] . . . within the generally accepted standards of decent conduct," and the information concerned an important interest of the reporter probing purported fraud. 142 Ariz. 12, 25, 688 P.2d 658, 671 (1984).

The court of appeals relied on the RESTATEMENT (SECOND) OF TORTS § 595 (1976) which states,

> (1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important interest of the recipient or a third person, and
>
> (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.
>
> (2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that
>
> (a) the publication is made in response to a request rather than volunteered by the publisher or
>
> (b) a family or other relationship exists between the parties.

The supreme court found as a matter of law that no duty existed between the attorney and the newsreporter. Therefore, no privileged occasion arose. 141 Ariz. at 617, 688 P.2d at 625.

40. *See* PROSSER AND KEETON, *supra* note 8, at § 115.

41. F. HARPER & F. JAMES, *supra* note 8, at 435-36; Note, *supra* note 36, at 643; *see also* RESTATEMENT (SECOND) OF TORTS, *Conditional Privilege, Scope Note* at 258 (1976).

42. *See* Note, *supra* note 36, at 645.

43. W. PROSSER & W.P. KEETON, *supra* note 8, at § 115; *see also* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 304 (1980); RESTATEMENT (SECOND) OF TORTS § 595 comment (f) states: "[A qualified privilege] is applicable to . . . an attorney in making communications either to his principal, beneficiary or client, or to a third person, if the communication is made in a reasonable effort to protect the interest that is entrusted to him."

44. 80 N.J.L. 378, 79 A. 316 (1910).

45. *Id.* at 381, 79 A. at 317.

sion was abused by excessive publication.[46]

The first Arizona case to consider the application of the qualified privilege to a communication intended to protect the interest of a third party also involved defamatory matter published by an attorney. In *Ross v. State*,[47] the attorney-defendant was prosecuted for criminal libel and asserted the defense of qualified privilege. The libelous matter was contained in an affidavit that he prepared which alleged that he and several citizens were engaged in fixing the 1938 gubernatorial election. The affidavit was notarized and delivered to another attorney who was involved in a separate lawsuit concerning the election results.[48] The court in the libel action held that the attorney-defendant did not have an interest in the election contest case, nor was he prompted by "a moral or social duty" to impart the information to the other attorney.[49] *Ross* is distinguishable from *Kruse* in that the *Ross* attorney spoke on his own initiative and not for the purpose of advancing a client's interest in an attorney-client relationship.

The principal difficulty in determining whether the privilege to protect the interests of others exists is found in those cases where the speaker claims a moral or social duty to make the defamatory communication.[50] The existence of a duty depends largely on the relationship between the speaker and the recipient.[51] The Arizona case of *Roscoe v. Schoolitz*[52] illustrates this point. In *Roscoe*, the defendant, a private investigator, published a report in the course and scope of a good faith agency relationship with the plaintiff's spouse. Based on this relationship and the fact that the recipient requested the report, the Arizona Supreme Court found a proper occasion for applying the qualified privilege for the protection of interests of others.[53]

In *Green Acres Trust*, the supreme court concluded that the attorneys' communications to the news reporter were not in response to any moral or social duty, but rather were contrary to the ABA Code of Professional Re-

46. *Id.* at 381, 79 A. at 316. The court stated that confidential information given by an attorney to a client should be done in private and not in the newspaper. *Id.* at 317.

47. 54 Ariz. 396, 96 P.2d 285 (1939). The facts in *Ross* are set forth at 54 Ariz. at 398-99, 96 P.2d at 286-87.

48. The court held this was sufficient publication. *Id.* at 401, 96 P.2d at 287. The defendant asserted that because the affidavit was attached to the complaint in the separate election action, he was entitled to a privilege to defame in a judicial proceeding. The court disagreed and held that attaching the affidavit to the complaint did not change its character as an extra-judicial *ex parte* statement. *Id.* at 403, 96 P.2d at 287-88.

49. *Id.* at 402, 96 P.2d at 288.

50. R. SACK, *supra* note 43, at 304.

51. *Id.* For example, courts generally conclude that the qualified privilege to protect the interests of others, based on a social or moral duty, exists to warn a present, prospective, or past employer of the character or conduct of an employee. Swanson v. Speidel Corp., 110 R.I. 335, 293 A.2d 307 (1972) (prospective employer); Brown v. Prudden-Winslow Co., 195 App. Div. 419, 186 N.Y.S. 350 (1921) (past employer). The other factor recognized as important in finding the existence of a social or moral duty is that the information was requested by the recipient, rather than being volunteered by the communicant. RESTATEMENT (SECOND) OF TORTS, § 595 comment on subsection (2)(j) (1976).

52. 105 Ariz. 310, 464 P.2d 333 (1970). The facts in *Roscoe* are set forth 105 Ariz. at 311-13, 464 P.2d at 334-35.

53. *Id.* at 313, 464 P.2d at 336. The court noted that the plaintiff's spouse who requested the information from the private investigator had an important interest in the facts concerning her husband. *Id.*

sponsibility which governs the ethical conduct of lawyers.[54] Specifically, ethical tenet DR 7-107(G) forbids an attorney's from holding an extra-judicial press conference which might hamper the fairness of a proceeding or inflict unnecessary harm on an adversary.[55] Even though the reporter requested the information, the court found that the potential unnecessary harm to the opponent outweighed the value of the interest that the attorneys sought to protect.[56] Accordingly, the court found no qualified privilege on these facts.[57]

If the relationship between a reporter and an attorney raises a moral, social, or legal duty to protect the interest of a third person, DR 7-107(G) requires inquiry into whether the defamation might cause unnecessary harm to the adversary, or mar the fairness of the adjudication.[58] The attorney who makes a defamatory remark to the media may find the statement is, by definition, unnecessarily harmful to the adversary and a violation of DR 7-107(G). In this instance, the two-pronged analysis for occasions entitled to a qualified privilege may be inapplicable to defamatory communications made to the media by attorneys on behalf of their clients.

Common Interest

Communications among members of a group, which affect their mutual interests, may also be qualifiedly privileged.[59] This privilege is broadly based on the rationale that people are entitled to communicate with their associates about matters in which they share pecuniary interests.[60] Courts also

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54. 141 Ariz. at 617, 688 P.2d at 625.

55. The supreme court stated, "the lawyer defendants had a duty not to participate in the press conference, . . . when it was obvious that widespread publication would result which might interefere with the opposing party's opportunity for a fair trial." *Id.* at —, 688 P.2d at 625.

DR 7-107(G) Trial Publicity provides in pertinent part:

> (G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means or public communication and that relates to:
>
> (1) Evidence regarding the occurrence or transaction involved.
>
> (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
>
> (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
>
> (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
>
> (5) Any other matter reasonably likely to interefere with a fair trial of the action.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G) (1979).

The Model Rules of Professional Conduct replaced the Model Code of Professional Responsibility in Arizona on February 1, 1985. The Model Rules adopt the standard of "substantial likelihood of materially prejudicing an adjudicative proceeding" to describe impermissible attorney conduct. 17A ARIZ. REV. STAT. ANN. SUP. CT. RULES, Rule 42, ER 3.6, Trial Publicity (West Supp. 1985).

56. *Green Acres Trust*, 141 Ariz. at 617, 688 P.2d at 625. Statements to reporters are not generally entitled to any more protection than statements made to other citizens of the community. *Compare* Antwerp Diamond Exch. v. Better Business Bureau, 130 Ariz. 523, 637 P.2d 733 (1981), *infra* notes 64-67 and accompanying text.

57. 141 Ariz. at 617, 688 P.2d at 625.

58. *Id.*

59. W. PROSSER & W.P. KEETON, *supra* note 8, at 828-29; Note, *supra* note 33, at 925.

60. R. SACK, *supra* note 43, at 311.

extend this privilege to members of groups who share a common interest of a non-pecuniary character.[61]

In Arizona, the qualified privilege for common interest of a pecuniary nature was applied in *Antwerp Diamond Exchange v. Better Business Bureau*.[62] The defendant, Better Business Bureau, published a report about Antwerp Diamond Exchange in the newspaper.[63] The Arizona Supreme Court found statements in the report defamatory, but held the occasion privileged because the "statements [were] made in the course of supplying information to the public pursuant to [the defendant's] worthy consumer protection function."[64] The court applied the second prong of the qualified privilege test and found the evidence sufficient to present a question of fact as to whether the privileged occasion had been abused by a reckless disregard for the truth.[65]

In *Green Acres Trust* the court held that the attorneys and the reporter did not share a common interest.[66] The court noted "it may be true in a loose sense that the reporter and the lawyer shared a 'common interest' in the plight of the elderly," but this kind of interest is insufficient to form a "common undertaking" that deserves a qualified privilege.[67] The present and potential members of the class of plaintiffs suing Green Acres Trust were similarly found not to be commonly interested.[68]

The court in *Antwerp Diamond Exchange* focused on the relationship between the communicant and the recipient, who served as a conduit for information to the public, and found the occasion privileged. In *Green Acres Trust*, the court focused on the relationship between the attorneys and the reporter, but failed to recognize the newsreporter as the initial link in providing consumer protection information. Since the attorneys and the reporter did not share a common interest, the communications were not privileged.

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61. A common interest qualified privilege has been applied to social organizations. *See* Aspell v. American Contract Bridge League of Memphis, 122 Ariz. 399, 595 P.2d 191 (Ct. App. 1979) (qualified privilege of common interest applies to the disciplinary proceedings of a voluntary association where the subject of the communication is a member of the association). *See also* educational organizations: Dobbyn v. Nelson, 2 Kan. App. 358, 579 P.2d 721 (1978); labor unions: Zito v. American Fed. of Musicians, 60 A.2d 967, 401 N.Y.S.2d 979 (1978); religious associations: Stewart v. Gerig, 64 N.M. 270, 327 P.2d 333 (1958); and professional associations: Avins v. White, 627F.2d 637 (3d Cir. 1980), *cert. denied*, 449 U.S. 982 (1980).

62. 130 Ariz. 523, 637 P.2d 733 (1981).

63. *Id.* at 526, 637 P.2d at 736. Antwerp Diamond Exchange brought suit for libel, violation of consumer and credit reporting acts, and tortious interference with business relationships.

64. *Id.* at 528, 637 P.2d at 735. It has been said that "[e]very person has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose." Wettach, *Recent Developments in Newspaper Libel*, 13 MINN. L. REV. 21, 35 (1928). *See also* M. NEWELL, *supra* note 33, at § 477; F. POLLOCK, THE LAW OF TORTS, at 319 (12th ed. 1894).

65. 130 Ariz. at 528, 637 P.2d at 738 (adopting RESTATEMENT (SECOND) OF TORTS § 600).

66. 141 Ariz. at 618, 688 P.2d at 626. "We fail to see how the lawyer . . . enjoyed any special relationship with the newspaper reporter." *Id.*

67. *Id.* The holding is in line with the view the "mere color of lawful occasion and pretense of justifiable end cannot shield from liability a person who publishes and circulates defamatory matter." Johnson v. Hager, 148 Kan. 461, 463, 83 P.2d 621, 622 (1938).

68. 141 Ariz. at 618, 688 P.2d at 626.

Reports of Official Proceedings or Public Meetings

The policy behind the fair reporting privilege[69] originates from the precepts of free speech found in a democracy.[70] These principles demand protection for news that informs a self-governing people.[71] Three theories support the fair reporting privilege.

The first, the "supervisory" theory, applies to communications concerning official public or governmental proceedings and enables the public to investigate official conduct.[72] To allow the principle of public supervision to operate, courts have extended the privilege of fair reporting to legislative,[73] executive,[74] administrative,[75] and judicial proceedings.[76] The theory presumes that the public can act on the communications and control the course of government through election, appointment, or impeachment.

The second theory, the "information" theory, applies to some official reports and in some jurisdictions to reports of public, nongovernmental meetings.[77] This theory is based on the principle that society's interest in information of particular importance, information which attracts the citizenry's attention to general disputes, overcomes a person's interest in reputation.[78] Arizona is in the minority of jurisdictions that extend this privilege to full, fair, and accurate reports of public, nongovernmental meetings at which matters of public concern are discussed.[79] In *Phoenix Newspapers v.*

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69. The RESTATEMENT formulation of the privilege is as follows: "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or fair abridgement of the occurrence reported." RESTATEMENT (SECOND) OF TORTS § 611 comment c (1976). The privilege is commonly exercised by the news media but is available to any person who relays information that is available to the general public. *Id.* This privilege is also known as the "record privilege," "reporter's privilege," or the "public eye doctrine." R. SACK, *supra* note 43, at 310.

70. Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U.L. REV. 469, 479 (1979).

71. *Id.* at 484-85.

72. *Id.* at 484.

73. Medico v. Time, Inc., 509 F. Supp. 268, 272-80, *aff'd* 643 F.2d 134 (3rd Cir. 1981) (report of possible unethical or criminal activity by a United States Congressman), *cert. denied*, 454 U.S. 836 (1981).

74. Brandon v. Gazette Publishing Co., 234 Ark. 332, 352 S.W.2d 92 (1961) (report to governor of official investigation).

75. Kinloch v. News and Observer Publishing Co., 314 F. Supp. 602, *aff'd* 427 F.2d 350 (4th Cir. 1970) (report of Alcohol Control Board held qualifiedly privileged), *cert. denied*, 403 U.S. 905 (1971).

76. Ronwin v. Shapiro, 657 F.2d 1071, 1075 (9th Cir. 1981 applying Arizona law) (Law Review Casenote of Arizona Supreme Court decision is qualifiedly privileged).

77. Sowle, *supra* note 70 at 484-85.

78. *Id.* at 484-87.

79. A qualified privilege has been extended to the following reports, found to be matters of public concern: public security, Coleman v. Newark Morning Ledger Co., 29 N.J. 357, 149 A.2d 193 (1959); morality, Pinn v. Lawson, 72 F.2d 742 (D.C. Cir. 1934) (church board); and corruption, Leininger v. New Orleans Item Publishing Co., 156 La. 1043, 101 So. 411 (1924) (corruption in courts). *See generally*, Phoenix Newspapers, Inc. v. Church, 103 Ariz. 682, 447 P.2d 840 (1968), *cert. denied*, 425 U.S. 908 (1976).

The RESTATEMENT (SECOND) OF TORTS § 611 also extends the privilege to "a report of any meeting, assembly or gathering that is open to the general public and is held for the purpose of discussing or otherwise dealing with matters of public concern." *Id.*, comment i.

Choisser,[80] the Phoenix Junior Chamber of Commerce invited candidates for local office to discuss election issues at a public meeting. A newspaper reported the candidates' discussion and this became the basis for a defamation action against the newspaper. The supreme court found the publication a fair interpretation of the language used at the meeting in reference to the plaintiff, but held the article libelous per se.[81] The qualified privilege of fair reporting was applied; because the meeting was open to the public, "the publication was of public interest and communicated by one whose right it was to inform the public."[82]

The third theory, the "agency" theory, advances the notion that a newsreporter is simply a replacement for actual public participation.[83] Any citizen can attend the meeting and observe what the reporter has described.[84] The agency rationale has been criticized because it does not explain why the public's interest in learning about a proceeding they do not attend outweighs the interest of the defamed person who suffers increased damage by the published report.[85]

In *Green Acres Trust* the court acknowledged that anyone may report what occurs at a public assembly, so long as the description is fair and accurate.[86] The court held, however, that since the press conference was "little more than a private meeting . . . there could not be a report of an official proceeding absent the existence of that proceeding."[87] The court also noted that the privilege of fair reporting of the contents of pleadings applies only after the pleadings are filed with the court.[88]

Constitutional Implications of the Green Acres Trust *Decision*

The court in *Green Acres Trust*, on the one hand, concluded that attorneys have a superceding ethical duty not to participate in a press conference on the contents of a complaint before its filing.[89] On the other hand, the court noted that once a pleading is filed with the court, anyone may report on what transpires at a public meeting where the pleading, an issue of public concern, is discussed.[90] However, not everyone who accurately reports such a discussion can be assured that their remarks will be qualifiedly privileged.

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80. 82 Ariz. 271, 312 P.2d 150 (1957). The facts in *Phoenix Newspapers* are set forth 82 Ariz. at 274-77, 312 P.2d at 150-53.

81. *Id.* at 276-77, 312 P.2d at 153.

82. *Id.* at 277, 312 P.2d at 154. *See* ARIZ. REV. STAT. ANN. § 12-653 (1956 & West Supp. 1983-84) for codification of this holding.

83. W. PROSSER & W.P. KEETON, *supra* note 8, at 836.

84. *Id.*

85. Sowle, *supra* note 70, at 484.

86. 141 Ariz. at 618, 688 P.2d at 626 (following RESTATEMENT (SECOND) OF TORTS § 611 comments c and i).

87. 141 Ariz. at 619, 688 P.2d at 627. *Compare* Mark v. Seattle Times, 96 Wash. 2d 473, 475, 635 P.2d 1081, 1083 (1981), *cert. denied*, 457 U.S. 1124 (1984), where a deputy prosecutor held a press conference and detailed allegations of fraud that were soon to be filed against Mark. The prosecutor distributed copies of the information that was to be filed and the affidavit of probable cause. The court held that the privilege of accurage reportage of judicial proceedings applies when fraud is a matter of public concern.

88. 141 Ariz. at 619, 688 P.2d at 627.

89. *Id.*

90. *Id.* at 618, 688 P.2d at 626.

An attorney must first analyze DR 7-107(G) to determine whether: (1) excessive publication is foreseeable, (2) the publication will impair the adversaries right to a fair trial, and (3) the defamatory publication will foreseeably cause unnecessary harm to the opponent.[91] Thus, the *Green Acres Trust* opinion is not entirely consistent.

The provision of the ABA Code of Professional Responsibility, DR 7-107(G),[92] relied on by the court in *Green Acres Trust*, has been held unconstitutional on first amendment grounds in the Fourth and Seventh Circuits.[93] Some of the arguments advanced for finding DR 7-107(G) an unconstitutional prior restraint of free speech[94] are similar to the arguments the attorneys used in seeking a qualified privilege in *Green Acres Trust*.

In *Chicago Council of Lawyers v. Bauer*,[95] the Seventh Circuit in dictum recognized that notable social problems may be intertwined in a civil lawsuit. A class of distressed plaintiffs may bring suit against a powerful institution chiefly to inform the public of the issue.[96] Such actions are often instituted for the public welfare on "a private attorney general theory."[97] The attorney representing the class of plaintiffs may be the most knowledgeable and skilled person to inform the public of the need for governmental corrective action.[98]

In *Hirschkop v. Snead*,[99] the Fourth Circuit noted in dictum that civil actions may involve questions of public concern, and prohibiting lawyers from addressing these problems is unwarranted because lawyers can educate the public about the controversy.[100] The court opposed the suggestion that since counsel is free to make comments after the case is concluded, the problem of prior restraint on free speech is relieved.[101] Under DR 7-107(G) speech may be restricted for years before a complaint is filed in a civil action. This restriction is contrary to first amendment protection of the timeliness of

91. See *supra* note 55.

92. *Id.* *See supra* note 55.

93. Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (Castle, J., dissenting). Although each circuit applied a different analysis for the limits imposed on attorneys in criminal cases, both circuits concluded DR 7-107(G) is an unconstitutionally vague prohibition on lawyers' comments in the investigation of or during civil litigation. *Chicago Council of Lawyers*, 522 F.2d at 257-59; *Hirschkop*, 594 F.2d at 373. *Accord* Shadid v. Jackson, 521 F. Supp. 85, 87 (E.D. Tex. 1981) (DR 7-107(G) is unconstitutional on its face and cannot be used to prevent an attorney of record in a civil case from exercising the protected right of free communication).

For an analysis of the *Chicago Council of Lawyers* and *Hirschkop* decisions, see Note, *A Constitutional Assessment of Court Rules Restricting Comment on Pending Litigation*, 65 CORNELL L. REV. 1106 (1980); Note, *Professional Responsibility—Trial Publicity—Speech Restrictions Must Be Narrowly Drawn*, 45 TEX. L. REV. 1158 (1976); Comment, *Professional Ethics and Trial Publicity: Another Constitutional Attack on DR 7-107—Hirschkop v. Snead*, 14 UNIV. RICH. L. REV. 213 (1979).

94. For a discussion of the leading case in the area of prior restraints see, Prettyman, *Nebraska Press Association v. Stuart: Have We Seen the Last of Prior Restraints on the Reporting of Judicial Proceedings*, 20 ST. LOUIS U.L.J. 654 (1976).

95. 522 F.2d at 257-59.

96. *Id.*

97. *Id.*

98. *Id.*

99. 594 F.2d at 373.

100. *Id.*

101. *Id.*

speech.[102]

The Arizona Supreme Court did not consider the applicability of the constitutional privilege in *Green Acres Trust*. The constitutional privilege derives from the United States Supreme Court decisions in *New York Times v. Sullivan*,[103] *Gertz v. Robert Welch, Inc.*,[104] and their progeny, which require a plaintiff to show some degree of fault on the part of the defendant to maintain a defamation case.[105] The Constitution requires that public figure plaintiffs prove actual malice with respect to the truth or falsity of a communication as part of their prima facie case of defamation.[106] Qualified privileges are defenses, and the issue of abuse of a qualified privilege will be determined only after the plaintiff has made out a prima facie case.[107] Since actual malice constitutes an abuse of a privileged occasion in Arizona,[108] the common law privileges are vestiges and have little utility in a defamation suit by public figure plaintiffs. The plaintiffs will prove or fail to prove actual malice in the case in chief, thus making the qualified privilege defense a nullity.[109]

The constitutional privilege is applicable in *Green Acres Trust* only if the plaintiff is a public figure. Arizona has not decided whether a business could become a public figure through commercial advertising.[110] Other jurisdictions have characterized a business entity as a limited purpose public figure when it conducts an advertising campaign through the public media for the purpose of influencing the public to buy its products.[111] This characterization is reasonable when a business has access to additional advertising channels to refute or respond to comments made against it.[112]

Conclusion

With the constitutionality of DR 7-107(G) in question, the *Green Acres Trust* decision that finds a superceding ethical duty for attorneys not to communicate with newsreporters prior to filing a complaint is attentuated. Under this holding, the duty not to communicate with a reporter prior to and during civil litigation, when the opposing party would be foreseeably harmed, effectively eliminates the defense of qualified privilege. Arizona will not recognize a qualified privilege even in situations where no reasonable

102. *Id.*
103. 376 U.S. 254 (1964).
104. 418 U.S. 323 (1974).
105. *See* W. PROSSER & W.P. KEETON, *supra* note 8, at 804-07.
106. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
107. *See supra* note 36.
108. *See supra* note 46.
109. W. PROSSER & W.P. KEETON, *supra* note 8, at 824-25.
110. Antwerp Diamond Exchange v. Better Business Bureau, 130 Ariz. 523, 637 P.2d 733 (corporation and its president conducting a mail and telephone solicitation campaign are not public figures). For a discussion of limited purpose public figures, see Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (1977).
111. Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3rd Cir. 1980); Bose Corp. v. Consumers Union of United States, Inc., 508 F. Supp. 1249 (D. Mass. 1981).
112. Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264. For a general discussion of the constitutional privilege and its potential application to non-media defendants, see Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc., *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975).

doubt exists as to the propriety of counsel speaking to the media about imminent litigation for the purpose of protecting a legitimate public interest.

Since the Constitution requires that the defendant be at fault in all defamation cases, one solution is to require the plaintiff to prove fault as to the truth of the communication; then, examination into the ephemeral area of qualified privileges is not needed. An alternative solution is to find the occasion privileged and to focus on the issues of abuse of the occasion or lack of full, fair, and accurate reportage.

Green Acres Trust provides predictability in the law of defamation, but either alternative would give attorneys the necessary latitude to protect the perceived interests of clients and society.

Stephen C. Yost