ARIZONA APPELLATE DECISIONS 1977-78: Part II

CONTENTS

I. COMMERCIAL LAW

A. HOLDERS IN DUE COURSE AND THE INTERSTATE LAND SALES ACT

Public policy requires that the transfer of negotiable instruments be facilitated,[1] since these instruments represent money and are intended to pass from hand to hand as freely as money.[2] To achieve this transferability, the purchaser's title cannot be impugned as long as he paid a valuable consideration for the instrument and acted in good faith.[3] This is the holder in due course doctrine. The policy behind the doctrine is to protect one who takes a negotiable instrument for value, in good faith, and without notice of any defense or claim to it on the part of any person.[4] The Arizona Supreme Court has recently applied the doctrine to a transaction falling within the Interstate Land Sales Full Disclosure Act [Land Sales Act].[5]

Stewart v. Thornton[6] was an action for a declaratory judgment to determine the rights of a holder of a promissory note.[7] Defendant-appellee Thornton executed the note as partial consideration for the purchase of a lot from Cochise College Park, Inc. [College Park].[8] She simultaneously executed a mortgage by which the lot became security for payment of the note.[9] Two days after the execution of the note and

1. A negotiable instrument is a writing that (1) is signed by the maker, (2) contains an unconditional promise to pay a sum certain in money, (3) is made payable at a definite time, and (4) is payable to order or to bearer. Mecham v. United Bank, 107 Ariz. 437, 441, 489 P.2d 247, 251 (1971) (citing ARIZ. REV. STAT. ANN. § 44-2504(A) (1967); U.C.C. § 3-104(1)).

2. Mecham v. United Bank, 107 Ariz. 437, 441, 489 P.2d 247, 251 (1971); Herrick v. Edwards, 106 Mo. App. 633, 637, 81 S.W. 466, 467 (1904); Quanah, Acme & Pac. Ry. v. Wichita State Bank & Trust Co., 127 Tex. 407, 413, 93 S.W.2d 701, 704 (1936).

3. Corporacion Venezolana de Fomento v. Vintero Sales Corp., 452 F. Supp. 1108, 1119-20 (S.D.N.Y. 1978); Colby v. Bank of Douglas, 91 Ariz. 85, 88, 370 P.2d 56, 58 (1962); Quanah, Acme & Pac. Ry. v. Wichita State Bank & Trust Co., 127 Tex. 407, 413, 93 S.W.2d 701, 704 (1936).

4. *See, e.g.*, Wilson v. Gorden, 91 A.2d 329, 331 (D.C. 1952) (purchaser was a holder in due course even though it had purchased the note on the same day it was made and at an exceptionally large discount); Illinois Valley Acceptance Corp. v. Woodard, 159 Ind. App. 50, 58, 304 N.E.2d 859, 865 (1973) (defense of want of consideration not available against a holder in due course); Jenkins v. Evans, 31 App. Div. 2d 597, 598, 295 N.Y.S.2d 226, 228 (1968) (owner of a business could not raise against a holder in due course the defense that business checks were not signed by the owner but by an authorized agent for the agent's personal debts). *See* ARIZ. REV. STAT. ANN. §§ 44-2532(A), -2535 (1967); U.C.C. §§ 3-302, -305; Boyd & Balentine, *Arizona's Consumer Legislation: Winning the Battle But. . . .*, 14 ARIZ. L. REV. 627, 632 (1972); Comment, *Consumer Protection Under the UCCC and the NCA—A Comparison and Recommendations*, 12 ARIZ. L. REV. 572, 586-87 (1970); "The Uniform Commercial Code and Holders in Due Course," 14 ARIZ. L. REV. 456, 458-59 (1972).

5. 15 U.S.C. §§ 1707-1720 (1976).

6. 116 Ariz. 107, 568 P.2d 414 (1977).

7. *Id.* at 108, 568 P.2d at 415.

8. *Id.*

9. *Id.*

purchase agreement, Thornton rescinded the transaction and recovered her down payment.[10] On that same day, however, College Park assigned her note and mortgage to plaintiff-appellant Stewart for two-thirds of the face value.[11] Stewart received the first ten monthly payments and became aware of the rescission only after payments ceased.[12] In Stewart's action for collection, Thornton asserted as an affirmative defense that she had not received a property report as required by section 1703(b) of the Land Sales Act,[13] and therefore her rescission of the transaction made the purchase agreement, note, and mortgage void.[14] The trial court held for Thornton, ruling that Stewart was not a holder in due course and that the note was subject to any defense Thornton could raise against College Park.[15] The court of appeals reversed.[16] On appeal, the Arizona Supreme Court vacated the decision of the court of appeals and affirmed the trial court's judgment.[17] The supreme court reasoned that since Stewart was charged with notice of the requirements of the Land Sales Act[18] and in view of the circumstances under which he purchased the note, he did not take it in good faith and thus was not a holder in due course.[19]

This casenote presents a brief overview of the Land Sales Act and explains the Uniform Commercial Code [U.C.C.] requirement that a holder in due course must have no notice of a claim or defense to a negotiable instrument. The U.C.C. concept of good faith, especially as it is expanded in *Stewart* to effectuate the consumer-protection purposes of the Land Sales Act, is treated in depth.

Interstate Land Sales Full Disclosure Act

The defense asserted against the holder in *Stewart* arose under the

10. *Id.*
11. *Id.*
12. *Id.* Thornton did not make those payments, and the record does not disclose who did. *Id.*
13. 15 U.S.C. § 1703(b) (1976) provides:
(b) Any contract or agreement for the purchase or leasing of a lot in a subdivision covered by this chapter, where the property report has not been given to the purchaser in advance or at the time of his signing, shall be voidable at the option of the purchaser. A purchaser may revoke such contract or agreement until midnight of the third business day following the consummation of the transaction, where he has received the property report less than forty-eight hours before he signed the contract or agreement, and the contract or agreement shall so provide.
14. 116 Ariz. at 108, 568 P.2d at 415.
15. *Id.* at 108-09, 568 P.2d at 415-16.
16. Stewart v. Thonton, 27 Ariz. App. 105, 109, 551 P.2d 95, 99 (1976). The court of appeals found that there was nothing to show that Stewart would have reason to know that the transaction had been rescinded, and that he was chargeable only with notice of the statute itself, not with knowledge of the facts constituting a violation of it. *Id.* at 108, 551 P.2d at 98.
17. 116 Ariz. at 108, 568 P.2d at 415.
18. Stewart was charged with notice of 15 U.S.C. § 1703(b) (1970) (amended 1974). 116 Ariz. at 109, 568 P.2d at 416.
19. 116 Ariz. at 110, 568 P.2d at 417.

Land Sales Act, which requires the seller of land to make certain disclosures regarding the property to be sold.[20] These disclosures are to be made in a statement of record filed with the Secretary of Housing and Urban Development.[21] In addition, the seller must include material disclosures in a property report, which is a physical description of the property. This property report is to be given to those who purchase the property from the developer.[22] The Act enumerates the disclosures that must be made and prescribes punishments for sellers who do not conform to its provisions.[23]

Congress intended the Land Sales Act to be a means of protecting buyers of land from fraud.[24] The Act's disclosure provisions were largely modeled on the Securities Act of 1933[25] and were intended to give the buyer sufficient information to formulate his own evaluation of the land.[26] Motivating these purposes was congressional concern that inexperienced buyers were being fraudulently induced to invest in questionable land deals and were losing large sums of money.[27] Congress determined that state and federal laws were inadequate to protect buyers and enacted the Land Sales Act to provide relief.[28]

The *Stewart* case dealt specifically with section 1703(b) of the Land Sales Act, which requires that a property report be furnished to the buyer.[29] That section gives the buyer three remedies if he does not receive a report. Where the buyer is not given a property report at any time before signing the purchase agreement, the agreement is voidable at his option.[30] Where the buyer receives the report less than forty-eight hours before signing the agreement, he may revoke the agreement within forty-eight hours after signing.[31] Finally, a provision that was

20. *See* 15 U.S.C. §§ 1701-1717 (1976).
21. *Id.* § 1704.
22. *Id.* §§ 1701, 1703.
23. *Id.* §§ 1705, 1707, 1709, 1717.
24. McCown v. Heidler, 527 F.2d 204, 207 (10th Cir. 1975); Husted v. Amrep Corp., 429 F. Supp. 298, 303 (S.D.N.Y. 1977). *See Report of the Comm. on Banking and Currency, U.S. Senate, to Accompany S.3497, Housing and Urban Development Act of 1968*, S. REP. No. 1123, 90th Cong., 2d Sess. 109 (1968) [hereinafter cited as *Report*].
25. 15 U.S.C. §§ 77a-77aa (1976).
26. *Report, supra* note 24, at 109. *See* Securities & Exch. Comm'n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963); Husted v. Amrep Corp., 429 F. Supp. 298, 303 (S.D.N.Y. 1977).
27. *Report, supra* note 24, at 109.
28. *Id.* The Act provides several remedies to the defrauded buyer. A seller may be liable to a buyer in a civil suit for the difference between the amount the buyer paid for the land and the reasonable cost of improvements to it. 15 U.S.C. § 1709 (1976). In addition, the seller may be liable for the least of the value of the property at the time suit was brought, the price at which the lot was sold before the suit, or the price at which the lot was sold after suit was brought but before judgment. *Id.* The noncomplying seller may also be fined up to $5,000, imprisoned not longer than five years, or both. *Id.* § 1717. Equitable relief in the form of rescission is also available to the buyer. *Id.* § 1703.
29. 15 U.S.C. § 1703(b) (1976), set out at note 13 *supra*.
30. *Id.*
31. *Id.*

deleted by amendment in 1974[32] allowed the parties to stipulate in the agreement that there could be no revocation.[33] While the Land Sales Act provided Mrs. Thornton with a defense, the holder in due course doctrine would normally prevent her from asserting her defense against a purchaser unless he either had notice of the defense or took her note in bad faith.[34] It is the court's treatment of these two conditions that makes *Stewart* significant.

Notice

Under the U.C.C., a person has "notice" of a fact when he has actual knowledge of it[35] or when, from all the facts and circumstances known to him at the time, he has reason to know that it exists.[36] This dual "actual knowledge or reason to know" standard has also been applied in case law.[37] Courts have declared that a showing that facts exist comprising an infirmity in or defense to an instrument is insufficient to constitute actual knowledge by the purchaser. The maker of the instrument must go further and prove that the holder had actual knowledge of those facts.[38] Under the second prong of this dual standard, notice may be imputed to a holder who had knowledge of circumstances which gave him reason to know that a defense or infirmity existed.[39] In Arizona, knowledge that an agreement is voidable in whole or in part is sufficient reason to know of an infirmity or defense.[40]

Normally, if no circumstances constituting actual knowledge or reason to know of a defense appear to the purchaser, he has no affirma-

32. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 812(c)(1), 88 Stat. 737 (codified at 15 U.S.C. § 1703(b) (1976)).

33. 15 U.S.C. § 1703(b) (1970) (amended 1974). Stewart was charged with knowing that since there was no such stipulation in Thornton's purchase agreement, the transaction might still have been revocable at the time he bought her note. Stewart v. Thornton, 116 Ariz. 107, 109, 568 P.2d 414, 416 (1977).

34. *See* ARIZ. REV. STAT. ANN. §§ 44-2532, -2535 (1967); U.C.C. §§ 3-302, -305.

35. ARIZ. REV. STAT. ANN. § 44-2208(25)(a) (Supp. 1978-79); U.C.C. § 1-201(25)(a).

36. ARIZ. REV. STAT. ANN. § 44-2208(25)(c) (Supp. 1978-79); U.C.C. § 1-201(25)(c).

37. Mecham v. United Bank, 107 Ariz. 437, 441-42, 489 P.2d 247, 251-52 (1971); Ellis v. First Nat'l Bank, 19 Ariz. 464, 470, 474, 172 P. 281, 283, 285 (1918); Stewart v. Thornton, 27 Ariz. App. 105, 108, 551 P.2d 95, 98 (1976), *rev'd*, 116 Ariz. 107, 568 P.2d 414 (1977); Kaw Valley State Bank & Trust Co. v. Riddle, 219 Kan. 550, 556, 549 P.2d 927, 933 (1976).

38. Ellis v. First Nat'l Bank, 19 Ariz. 464, 470, 474, 172 P. 281, 283, 285 (1918); Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 296 Minn. 130, 137-38, 207 N.W.2d 282, 287-88 (1973); Quanah, Acme & Pac. Ry. v. Wichita State Bank & Trust Co., 127 Tex. 407, 412, 93 S.W.2d 701, 704 (1936). *See* National Sec. Fire & Cas. Co. v. Mazzara, 289 Ala. 542, 546, 268 So. 2d 814, 817 (1972); Mecham v. United Bank, 107 Ariz. 437, 442, 489 P.2d 247, 252 (1971).

39. Mecham v. United Bank, 107 Ariz. 437, 441-42, 489 P.2d 247, 251-52 (1971); ARIZ. REV. STAT. ANN. § 44-2208(25)(c) (Supp. 1978-79); U.C.C. § 1-201(25)(c).

40. ARIZ. REV. STAT. ANN. § 44-2534(A)(2) (1967); U.C.C. § 3-304(1)(b). The supreme court in *Stewart* relied heavily on the fact that the note was sold within 48 hours of the signing of the agreement, during which time the agreement was voidable under 15 U.S.C. § 1703(b) (1976). *See* 116 Ariz. at 109, 110, 568 P.2d at 416, 417.

tive duty to inquire whether such circumstances exist.[41] This rule is based on the policy of facilitating the negotiability of commercial paper.[42] "To impose upon one who is offered commercial paper the duty of inquiring in each instance whether obligations have been satisfactorily performed by prior holders would so burden such transactions as to create insuperable impediments to the free exchange of negotiable paper, an indispensable part of modern business."[43]

The *Stewart* court, however, imposed a limited duty of inquiry upon a purchaser who knew of facts that would alert him to a possible defense.[44] The court held that "notice under the U.C.C. requires some inquiry if the purchaser has actual knowledge of facts which would apprise him of possible irregularities."[45] This inquiry may be required even in the absence of actual knowledge of an infirmity in the instrument that would give rise to a defense.[46] Thus, although a failure to inquire about a wholly unknown fact does not of itself constitute reason to know of a defense,[47] such failure to inquire becomes "reason to know" if the court determines that the purchaser refused to investigate facts that suggested an irregularity or defense to the instrument.[48] The court determined that the large discount on Thornton's note was a fact "sufficient to alert [Stewart] to a possible defense."[49] By the use of this language, the court seems to have imputed to Stewart reason to know of an infirmity in the note and thus to have disqualified him from holder in due course status on the basis of the notice requirement. The exact nature of the court's determination, however, is clouded by the court's using the language at the end of its discussion of good faith.[50] While the language itself suggests that the court relied for its holding on the notice requirement, its placement in the opinion suggests that the decision was based on an analysis of Stewart's lack of good faith.

41. Gerseta Corp. v. Wessex-Campbell Silk Co., 3 F.2d 236, 238 (2d Cir. 1924); Third Nat'l Bank v. Hardi-Gardens Supply, Inc., 380 F. Supp. 930, 941 (M.D. Tenn. 1974); Manufacturers & Traders Trust Co. v. Sapowitch, 296 N.Y. 226, 230, 72 N.E.2d 166, 168 (1947); Jaeger & Branch, Inc. v. Pappas, 20 Utah 2d 100, 103, 433 P.2d 605, 607-08 (1967).

42. *See* Mecham v. United Bank, 107 Ariz. 437, 441-42, 489 P.2d 247, 251-52 (1971); Jaeger & Branch, Inc. v. Pappas, 20 Utah 2d 100, 103, 433 P.2d 605, 607 (1967); ARIZ. REV. STAT. ANN. § 44-2202(B)(2) (Supp. 1978-79); U.C.C. § 1-102.

43. Jaeger & Branch, Inc. v. Pappas, 20 Utah 2d 100, 103, 433 P.2d 605, 607-08 (1967).

44. 116 Ariz. at 109, 568 P.2d at 416. *See* Jaeger & Branch, Inc. v. Pappas, 20 Utah 2d 100, 103, 433 P.2d 605, 607 (1967) (a purchaser who is aware of any fact that should alert him to a defense cannot ignore it).

45. 116 Ariz. at 109, 568 P.2d at 416 (citing Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 296 Minn. 130, 138, 207 N.W.2d 282, 288 (1973)).

46. *Id.*

47. *See* Third Nat'l Bank v. Hardi-Gardens Supply, Inc., 380 F. Supp. 930, 942 (M.D. Tenn. 1974); Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 296 Minn. 130, 138, 207 N.W.2d 282, 288 (1973); Manufacturers & Traders Trust Co. v. Sapowitch, 296 N.Y. 226, 230, 72 N.E.2d 166, 169 (1947).

48. Stewart v. Thornton, 116 Ariz. at 109, 568 P.2d at 416.

49. *Id.* at 110, 568 P.2d at 417.

50. *See id.*

Good Faith

The concepts of notice and bad faith are frequently blurred by the courts, such that one is often defined in terms of the other.[51] The distinction between the concepts may be maintained by keeping in mind that each is a separate requirement of holder in due course status, so that showing either notice or bad faith will defeat that status.[52]

Good faith is defined in the U.C.C. as "honesty in fact in the conduct or transaction concerned."[53] This is a subjective standard which takes into account only those facts known to the purchaser at the time he purchased the instrument.[54] The standard has even been held to exclude the necessity of observing reasonable commercial standards of due care.[55]

Facts known to the purchaser which do not constitute actual notice of a defense to the instrument, but which suggest the existence of a defense, are evidence of bad faith.[56] The rule has been stated by the courts that "neither knowledge of suspicious circumstances, nor doubts as to the genuineness of the title, nor gross negligence on the part of the taker either singly or together are sufficient to defeat the holder's recovery, *unless* amounting to proof of want of good faith."[57] The relationship between the standards of good faith and reason to know is evident in this formulation. Facts suggesting a defense may either constitute reason to know of a defense, under the U.C.C. notice requirement,[58] or

51. *See* Gerseta Corp. v. Wessex-Campbell Silk Co., 3 F.2d 236, 237-38 (2d Cir. 1924); Hollywood Nat'l Bank v. IBM Corp., 38 Cal. App. 3d 607, 613, 113 Cal. Rptr. 494, 497 (1974); Quanah, Acme & Pac. Ry. v. Wichita State Bank & Trust Co., 127 Tex. 407, 412, 93 S.W.2d 701, 704 (1936); Penney, *A Summary of Articles 3 and 4 and Their Impact in New York*, 48 CORNELL L.Q. 47, 60 (1962).

52. Penney, *supra* note 51, at 60. *See* U.C.C. § 3-302.

53. ARIZ. REV. STAT. ANN. § 44-2208(19) (Supp. 1978-79); U.C.C. § 1-201(19). *See* Third Nat'l Bank v. Hardi-Gardens Supply, Inc., 380 F. Supp. 930, 940 (M.D. Tenn. 1974); Hollywood Nat'l Bank v. IBM Corp., 38 Cal. App. 3d 607, 613, 113 Cal. Rptr. 494, 497 (1974); Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 296 Minn. 130, 136, 207 N.W.2d 282, 287 (1973); Riley v. First State Bank, 469 S.W.2d 812, 816 (Tex. Civ. App. 1971).

54. Corporacion Venezolana de Fomento v. Vintero Sales Corp., 452 F. Supp. 1108, 1119-20 (S.D.N.Y. 1978); Third Nat'l Bank v. Hardi-Gardens Supply, Inc., 380 F. Supp. 930, 941 (M.D. Tenn. 1974). A "subjective" standard means that if the purchaser acts in good faith, it does not matter that he does not act as a reasonably prudent person would. *See* cases cited note 53 *supra*.

55. Third Nat'l Bank v. Hardi-Gardens Supply, Inc., 380 F. Supp. 930, 941 (M.D. Tenn. 1974) (that bank might have exercised better judgment with respect to receiving notes as collateral for a loan did not constitute bad faith).

56. *See* Torosian v. Paulos, 82 Ariz. 304, 311-12, 313 P.2d 382, 387-88 (1957); Seaside Nat'l Bank v. Allen, 35 Ariz. 302, 306-08, 277 P. 68, 69-70 (1929); General Inv. Corp. v. Angelini, 58 N.J. 396, 403, 278 A.2d 193, 196-97 (1971). The "fraud" referred to in these cases is not equated with common law fraud, but is a phrase synonymous with bad faith.

57. Macklin v. Macklin, 315 Mass. 451, 455, 53 N.E.2d 86, 88 (1944) (emphasis added) (citing Fillebrown v. Hayward, 190 Mass. 472, 480, 77 N.E. 45, 46 (1906)). *See* Gerseta Corp. v. Wessex-Campbell Silk Co., 3 F.2d 236, 238 (2d Cir. 1924).

58. U.C.C. § 1-201(19). *See* Mecham v. United Bank, 107 Ariz. 437, 441-42, 489 P.2d 247, 251-52 (1971); Ellis v. First Nat'l Bank, 19 Ariz. 464, 474, 172 P. 281, 285 (1918); Kaw Valley State Bank & Trust Co. v. Riddle, 219 Kan. 550, 556, 549 P.2d 927, 933 (1976); ARIZ. REV. STAT. ANN. § 44-2208(25)(c) (Supp. 1978-79); U.C.C. § 1-201(25)(c).

evidence of a bad faith taking by the purchaser.[59]

Ordinary negligence or unwise business practice does not destroy a holder's good faith,[60] for a holder is not held to the standard of care or diligence imposed on a reasonably prudent person.[61] Moreover, since the standard of good faith is a subjective one, it requires that only facts of which the purchaser had actual knowledge be used in evaluating the purchaser's actions.[62] The test does not require the absence of any circumstances that would put a reasonably prudent holder on inquiry, but only honesty of intent.[63]

Bad faith may also be found in knowledge or willful ignorance of facts leading to a defense.[64] A failure to investigate suspicious circumstances may constitute bad faith where that lack of inquiry represents a deliberate intention to avoid knowledge under a belief that investigation would reveal a defense.[65] Bad faith will be imputed where "absence of inquiry under the circumstances amounts to an intentional closing of the eyes and mind to any defects in or defenses to the transaction."[66]

In *Stewart v. Thornton*, the Arizona Supreme Court ruled against the holder on the ground that bad faith could reasonably have been inferred from the circumstances of the purchase of the note. Specifically, the court listed three factors that showed bad faith. First, the promissory note was discounted one third. "That fact alone," the court noted, "is sufficient to alert a prospective purchaser to a possible defense."[67] Second, Stewart purchased the note within forty-eight hours

59. *See* cases cited at note 56 *supra*.

60. *See* Third Nat'l Bank v. Hardi-Gardens Supply, Inc., 380 F. Supp. 930, 940 (M.D. Tenn. 1974); Macklin v. Macklin, 315 Mass. 451, 455, 53 N.E.2d 86, 88 (1944); Manufacturers & Traders Trust Co. v. Sapowitch, 296 N.Y. 226, 229, 72 N.E.2d 166, 168 (1947).

61. *See* Gerseta Corp. v. Wessex-Campbell Silk Co., 3 F.2d 236, 238 (2d Cir. 1924); Quanah, Acme & Pac. Ry. v. Wichita State Bank & Trust Co., 127 Tex. 407, 412, 93 S.W.2d 701, 704 (1936); Riley v. First State Bank, 469 S.W.2d 812, 816 (Tex. Civ. App. 1971).

62. Ellis v. First Nat'l Bank, 19 Ariz. 464, 470, 474, 172 P. 281, 283, 285 (1918); Elbar Realty, Inc. v. City Bank & Trust Co., 342 Mass. 262, 274-75, 173 N.E.2d 256, 264 (1961); Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 480, 86 A.2d 201, 224, *cert. denied*, 344 U.S. 838 (1952); Quanah, Acme & Pac. Ry. v. Wichita State Bank & Trust Co., 127 Tex. 407, 412, 93 S.W.2d 701, 704 (1936).

63. Gerseta Corp. v. Wessex-Campbell Silk Co., 3 F.2d 236, 238 (2d Cir. 1924); Hollywood Nat'l Bank v. IBM Corp., 38 Cal. App. 3d 607, 613-14, 113 Cal. Rptr. 494, 497-98 (1974); Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 296 Minn. 130, 136, 207 N.W.2d 282, 287 (1973); Community Bank v. Ell, 278 Or. 417, 427-28, 564 P.2d 685, 691 (1977).

64. Otten v. Marasco, 353 F.2d 563, 565 (2d Cir. 1965); Chartered Bank v. American Trust Co., 47 Misc. 2d 694, 697, 263 N.Y.S.2d 53, 56 (Sup. Ct. 1965).

65. General Inv. Corp. v. Angelini, 58 N.J. 396, 403-04, 278 A.2d 193, 197 (1971).

66. *Id.* at 405, 278 A.2d at 197. Gross carelessness may be equated with willful ignorance as a ground for finding bad faith. *See* Third Nat'l Bank v. Hardi-Gardens Supply, Inc., 380 F. Supp. 930, 941 (M.D. Tenn. 1974); Chartered Bank v. American Trust Co., 47 Misc. 2d 694, 696, 263 N.Y.S.2d 53, 55 (Sup. Ct. 1965); Community Bank v. Ell, 378 Or. 417, 427-28, 564 P.2d 685, 691 (1977).

67. 116 Ariz. at 110, 568 P.2d at 417.

of the time it was made,[68] which is within the buyer's statutory rescission period.[69] Finally, the court ruled that Stewart could have ascertained from the sales agreement in the possession of the seller that Thornton had not received the requisite property report.[70] By considering two of these factors, *Stewart* broke new ground in commercial paper law.

The *Stewart* court found bad faith on Stewart's part even though he had no actual knowledge that Thornton had not received the required property report.[71] This factor is a departure from prior Arizona law. The Arizona Supreme Court had previously held that if actual notice could not be shown, the defendant must at least prove "*knowledge* of such facts that [the holder's] action in taking the instrument amounted to bad faith."[72] According to this rule, only what the purchaser actually knew is relevant to a determination of good faith.[73] Unless the holder purchased in bad faith, any knowledge he had of merely suspicious circumstances was immaterial, even if those circumstances, fairly pursued, would have led him to a discovery of a defect in or defense to the instrument.[74] *Stewart*, however, imposed a duty of inquiry on the purchaser of a negotiable instrument to investigate suspicious circumstances, on peril of being treated as a bad faith purchaser.[75] This break with the common law of commercial paper may be explained by the court's implementation of the consumer-protection

68. *Id.*

69. *See* 15 U.S.C. § 1703(b) (1976). Stewart was charged with notice of the statute. 116 Ariz. at 109, 568 P.2d at 416.

70. 116 Ariz. at 109-10, 568 P.2d at 416-17.

71. *Id.*

72. Ellis v. First Nat'l Bank, 19 Ariz. 464, 470, 474, 172 P. 281, 283, 285 (1918) (emphasis added). *Cf.* Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 480, 86 A.2d 201, 224, *cert. denied*, 344 U.S. 838 (1952) (applying same rule).

73. Ellis v. First Nat'l Bank, 19 Ariz. 464, 470, 474, 172 P. 281, 283, 285 (1918). *See* Financial Credit Corp. v. Williams, 246 Md. 575, 584, 299 A.2d 712, 716 (1967); Elbar Realty, Inc. v. City Bank & Trust Co., 342 Mass. 262, 274-75, 173 N.E.2d 256, 264 (1961); Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 480, 86 A.2d 201, 224, *cert. denied*, 344 U.S. 838 (1952).

74. Ellis v. First Nat'l Bank, 19 Ariz. 464, 470, 474, 172 P. 281, 283, 285 (1918); Quanah, Acme & Pac. Ry. v. Wichita State Bank & Trust Co., 127 Tex. 407, 412, 93 S.W.2d 701, 704 (1936); Riley v. First State Bank, 469 S.W.2d 812, 816 (Tex. Civ. App. 1971).

75. 116 Ariz. at 110, 568 P.2d at 417. The court stated: "By examining the written sales agreement in possession of the seller of the note, Stewart could have ascertained that Mrs. Thornton had not inspected the lot or received a property report pursuant to § 1703(b)." *Id.* The court found that neither the note, mortgage, nor written sales agreement indicated that Thornton had received a property report or inspected the lot. *Id.* at 109-10, 568 P.2d at 416-17. The lack of such evidence is significant because at the time the agreement was executed, § 1703(b) provided that a purchaser might specifically waive his 48-hour revocation authority. 15 U.S.C. § 1703(b) (1970) (amended 1974). A waiver could have been accomplished if Thornton had received, read, and understood the property report, inspected the lot prior to concluding the agreement, and acknowledged this by her signature. The court charged Stewart with knowledge that such acknowledgement was required in the purchase agreement if Thornton had received the report less than 48 hours before she signed the agreement. 116 Ariz. at 109-10, 568 P.2d at 416-17. The court seems to conclude that because there was no such acknowledgement in Thornton's purchase agreement, and thus no evidence that she had received the report, Stewart was required to ascertain whether a report had in fact been received, in order to purchase the note in good faith. *See id.*

policy underlying the Land Sales Act.[76]

Another aspect in which *Stewart* modified the law regarding commercial paper is the first factor it listed as showing bad faith. The court held that the one-third discount on the promissory note was sufficient in itself to alert a prospective purchaser to a possible defense.[77] The general rule has been that as long as the consideration is not merely nominal or a pretense, inadequacy of the purchase price is not of itself sufficient to charge the purchaser with awareness of a possible defense.[78] While a large discount may be considered as evidence of bad faith, by itself such evidence may be insufficient to defeat the holder in due course status of the purchaser. For example, in *Anderson v. Lee*,[79] the court held that although an offer to sell a note at a thirty-three percent discount is a circumstance to be considered in determining the buyer's lack of good faith, it is not of itself sufficient to raise an inference that the instrument is tainted.[80] A large discount on a note may be insufficient to establish the purchaser's bad faith even if the discount is combined with other significant factors.[81] In *Wilson v. Gorden*,[82] the court determined that the evidence was insufficient to show bad faith where the note was sold at a thirty-two percent discount on the same day it was made, and the purchaser had supplied the seller-payee of the note with blank forms for the sales contract that was the basis for the note.[83] Not only was the large discount of itself insufficient, but it was not even the determining factor when combined with other circumstances.[84]

Thus, by placing independent significance upon a large discount rate, *Stewart* is a departure from the general rule. Such a departure is

76. The *Stewart* court noted that its holding is tailored to conform with Congress' intent to prohibit land fraud. 116 Ariz. at 110, 568 P.2d at 417. *See* Husted v. Amrep Corp., 429 F. Supp. 298, 303 (S.D.N.Y. 1977); *cf.* Securities & Exch. Comm'n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186, 195 (1963) (Investment Advisers Act of 1940, which empowers the courts to enjoin any practice operating as a fraud or deceit upon a client, was enacted to substitute full disclosure for policy of caveat emptor); General Inv. Corp. v. Angelini, 58 N.J. 396, 408-09, 278 A.2d 193, 199 (1971) (cited provisions of the U.C.C. reveal a strong purpose to protect the homeowner signing a repair contract).

77. The court stated: "In the instant case, the note was not purchased for full value. It was discounted one-third. That fact alone is sufficient to alert a prospective purchaser to a possible defense." 116 Ariz. at 110, 568 P.2d at 417.

78. Phoenix Safety Inv. Co. v. Michaels, 20 Ariz. 32, 36, 176 P. 587, 589 (1918); Friedman v. Short, 201 Ark. 723, 728-29, 147 S.W.2d 11, 13 (1941); Anderson v. Lee, 103 Cal. App. 2d 24, 27, 228 P.2d 613, 615-16 (1951); Financial Credit Corp. v. Williams, 246 Md. 575, 584, 229 A.2d 712, 716 (1967).

79. 103 Cal. App. 2d 24, 228 P.2d 613 (1951).

80. *Id.* at 27, 228 P.2d at 615-16.

81. Wilson v. Gorden, 91 A.2d 329, 330 (D.C. 1952).

82. 91 A.2d 329 (D.C. 1952).

83. *Id.* at 330.

84. *Id.* The trial court had found that the plaintiff was not a bona fide holder in due course and was not an innocent purchaser for value, and rendered judgment for the defendants. *Id.* at 329. The appellate court, however, reversed on the ground that the evidence presented was "not sufficient in law to defeat plaintiff's claim as a holder in due course." *Id.* at 330.

justified, however, by current commercial practices.[85]

Despite the validity of its result, the case presents a problem due to the court's ambiguous language in dealing with the discount. Once a purchaser has been "alert[ed] . . . to a possible defense,"[86] is purchasing the instrument equal to taking it in bad faith, even without the other factors present in *Stewart*? While the language of the opinion seems to suggest this, such a rule is a sharp break with prior decisions. Prior Arizona courts and courts of other jurisdictions have considered even a very large discount to be only *evidence* of bad faith, insufficient to support that determination without more.[87] The *Stewart* court's innovation may have arisen from a policy of protecting the consumer through the Land Sales Act.

Conclusion

The Arizona Supreme Court in *Stewart* attempted to preserve the commercial concept of negotiability while simultaneously implementing the intent of Congress to eliminate fraudulent land sale transactions. *Stewart v. Thornton* makes some new inroads in the law of commercial paper. The court has imposed on the purchaser of a negotiable instrument the responsibility of investigating suspicious circumstances surrounding its sale. Although this duty is not a new one, the court extended it by stating that an unusually large discount is in itself sufficient to alert a prospective purchaser to a possible defense to the instrument. The decision implies that a purchaser who has little or no actual knowledge of the transaction that gave rise to the negotiable instrument can no longer be assured of status as a bona fide purchaser. These innovations, however, must be taken with a caveat. The court in *Stewart* formulated its decision with a view to carrying out congressional intent in the Land Sales Act to eliminate fraud in land sales. Consequently, the case may be narrowly limited to that context. Future cases will determine whether the court's reasoning will be more widely applied.

85. In current business practice, notes are seldom sold at a discount greater than two percent. Interview with David Saenz, Southern Regional Manager for First National Bank of Arizona, in Tucson, Arizona (Apr. 11, 1979). In addition, examining a land purchase agreement is considered important in determining the financial standing of the maker of a note secured by real estate. *Id.* Thus, although earlier case law had deemed very large discounts insufficient to show bad faith on the part of the purchaser, *see* text & notes 79-84 *supra*, it appears that the *Stewart* court in its contrary holding recognized the realities of modern commercial practice, *see* 116 Ariz. at 110, 568 P.2d at 417.

86. 116 Ariz. at 110, 568 P.2d at 417.

87. *See* Lentz v. Landers, 21 Ariz. 117, 128, 185 P. 821, 825 (1919); Phoenix Safety Inv. Co. v. Michaels, 20 Ariz. 32, 36, 176 P. 587, 589 (1918); Financial Credit Corp. v. Williams, 246 Md. 575, 584, 229 A.2d 712, 716 (1967); Elbar Realty, Inc. v. City Bank & Trust Co., 342 Mass. 262, 274-75, 173 N.E.2d 256, 264 (1961); Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 482, 86 A.2d 201, 224, *cert. denied*, 344 U.S. 838 (1952); Quanah, Acme & Pac. Ry. v. Wichita State Bank & Trust Co., 127 Tex. 407, 412, 93 S.W.2d 701, 704 (1936).

B. Measure of Damages for Carrier's Failure to Collect on COD Shipments: The Estoppel Evasion

Customarily, the duty of a carrier who transports goods COD is to collect the amount due and return the payment to the consignor.[1] Absent fraud or ratification on the part of the consignor,[2] liability attaches to the COD carrier who delivers the goods without receiving the amount to be collected.[3] Considerable inconsistency has attended courts' attempts to establish the proper measure of damages for a COD carrier's failure to collect. While some courts hold the COD carrier liable for the value[4] of the goods delivered,[5] other courts have held the carrier responsible for the price stipulated[6] in the COD contract.[7] Concomitant with the issue of damages is the question of what, if any, defenses are available to the COD carrier to reduce its liability.[8] A number of jurisdictions, including Arizona, have not yet touched upon these matters. However, in a recent case, *Cermetek, Inc. v. Butler Avpak, Inc.*,[9] the Ninth Circuit Court of Appeals considered the measure of damages for a carrier's failure to collect on COD shipments, as a matter of first impression under California law.[10]

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1. The letters COD are the initials of the words "collect on delivery." Where goods intrusted to a carrier are marked COD, the price of the package will be collected on delivery and transmitted to the consignor. American Merchants' Union Express Co. v. Schier, 55 Ill. 140, 148 (1870); United States Express Co. v. Keefer, 59 Ind. 263, 267-68 (1877); Collender v. Dismore, 55 N.Y. 200, 206, 14 Am. Rep. 224, 228 (1873).

2. *See* Bond Rubber Corp. v. Oates Bros., Inc., 136 Conn. 248, 251-52, 70 A.2d 115, 117 (1949); Callaway & Truitt v. Southern Ry., 126 Ga. 192, 194, 55 S.E. 22, 23 (1906); Chaning v. Riddle Aviation Co., 203 Misc. 844, 847, 119 N.Y.S.2d 552, 554-55 (Mun. Ct. 1953); Herrick v. Gallagher, 60 Barb. 566, 579 (N.Y. 1871).

3. Railway Express Agency, Inc. v. McAdams, 191 Ark. 118, 121, 85 S.W.2d 730, 732 (1935); Meyer v. Lemcke, 31 Ind. 208, 209 (1869); Anthony v. American Express Co., 188 N.C. 407, 410, 124 S.E. 753, 755 (1924).

4. Use of the word "value" refers to the cost of the goods to the consignor.

5. *E.g.*, Murray v. Warner, 55 N.H. 546, 550, 20 Am. Rep. 227, 229 (1875); Tooker v. Gormer, 2 Hilton Rep. 71, 75 (N.Y.C.P. 1858); Dolezal v. Cleveland, Canton & Columbus Motor Freight Co., 2 Ohio Op. 423, 427, 429 (Mun. Ct. 1935); *see* Prentice v. Union Pac. R.R., 28 Wash. 2d 212, 216-17, 182 P.2d 41, 43 (1947). *But see* Joseph Mogul Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 23, 159 N.E. 708, 709 (1928).

6. Use of the term "price stipulated" refers to the COD amount or the price to the consignee.

7. *See, e.g.*, Barnhart v. Henderson, 147 Neb. 689, 703, 24 N.W.2d 854, 862 (1946); Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 23, 159 N.E. 708, 709 (1928); Herrin Transp. Co. v. Robert E. Olson Co., 325 S.W.2d 826, 828 (Tex. Civ. App. 1959).

8. *See* National Van Lines, Inc. v. Rich Plan Corp., 385 F.2d 800, 803 (5th Cir. 1967); Dolezal v. Cleveland, Canton & Columbus Motor Freight Co., 2 Ohio Op. 423, 429 (Mun. Ct. 1935).

9. 573 F.2d 1370 (9th Cir. 1978).

10. Although the issues raised in *Cermetek* were characterized by the Ninth Circuit as "matters of first impression in California," *id.* at 1377, the court was not completely lacking in California law to follow. An early unreported California district court case, Jeffts v. Wells, Fargo & Co., 1 C.L.J. 210 (1862), had previously confronted a number of the issues raised in *Cermetek*. In *Jeffts*, the seller sent three cases of limes COD to Goldstine. Wells, Fargo failed to collect the amount due upon delivery, and the seller lost his money when Goldstine became insolvent. Judg-

In December 1974, Cermetek executed eight COD contracts with Butler Avpak, a freight forwarder, to ship electronic parts from Cermetek in California to Digital Time Products in New York.[11] According to its tariff,[12] Avpak's obligation on COD shipments was to collect the full COD amount in cash, certified check, or money order.[13] Avpak breached the contracts by delivering the goods to Digital in return for checks. When these checks were subsequently dishonored by Digital, Avpak stopped payment on its outstanding checks to Cermetek.[14] Therefore, Cermetek had not been paid for six of the eight shipments and the deficiency totaled $23,163.00.[15] Before the action against Avpak was initiated by Cermetek, Avpak brought suit against Digital in New York and obtained a default judgment for the entire amount of the dishonored checks.[16] Cermetek filed suit against Avpak on the theory that Avpak had breached its contract by failing to collect the stipulated COD amount.[17] The district court rendered summary judgment for Cermetek for the full COD price on the basis of unjust enrichment.[18]

On appeal, Avpak asserted that there were two contractual limitations of liability,[19] and that even without these limitations the proper

ment was rendered for the seller against the carrier, but the reasoning supporting the California court's holding was never recorded.

11. Cermetek, Inc. v. Butler Avpak, Inc., 573 F.2d 1370, 1372 (9th Cir. 1978).

12. A tariff is a statement of the carrier's system of rates, charges, regulations, routes, and associated rules, filed with a public regulatory agent to inform the potential shipper that it will furnish certain services under certain conditions for stated prices. *See* Union Pac. R.R. v. Higgins, 223 F. Supp. 396, 401 (D.N.D. 1963); Turoff v. Eastern Airlines, Inc., 129 F. Supp. 319, 321 (N.D. Ill. 1955); Bernard v. United States Aircoach, 117 F. Supp. 134, 138 (S.D. Cal. 1953). A valid tariff forms a part of the shipment contract and is binding on the parties. *See* Cermetek, Inc. v. Butler Avpak, Inc., 573 F.2d 1370, 1372 (9th Cir. 1978).

13. Cermetek, Inc. v. Butler Avpak, Inc., 573 F.2d 1370, 1373 (9th Cir. 1978).

14. *Id.* at 1372. Avpak had accepted Digital's company checks for all the shipments and then issued its own company checks for the COD amounts due Cermetek. *Id.* at 1373.

15. *Id.* at 1372. Since Cermetek had received and cashed one check from Avpak for two of the shipments, payment on those two shipments was not contested. *Id.* at 1373.

16. *Id.* at 1374. At the time of the Ninth Circuit decision, however, Avpak had not yet obtained payment on the judgment. *Id.*

17. *Id.* at 1372. Avpak removed the action from California superior court to the district court on the basis of diversity of citizenship. *Id.* at 1374.

18. Since Avpak had received a default judgment against Digital for the full amount of the checks, the district court concluded that to award Cermetek anything less would result in unjust enrichment to Avpak. *Id.* at 1375.

19. In accordance with its tariff, Avpak asserted these limitations of liability: a $50.00 limitation of liability on goods shipped, and a $5,000.00 limit beyond which COD service would not be provided. *Id.* at 1372-73 n.2, 1373 n.5. Under the liability on goods shipped limitation, Avpak's total liability for each shipment forwarded was not to exceed $50.00 unless the declared value of the goods exceeded that amount. If the shipper desired further coverage or the declared value of the goods shipped was higher than the minimum $50.00 insurance coverage, an additional transportation charge was assessed. *Id.* at 1372. Transportation and insurance charges, therefore, were dependent on the declared value of the goods. Cermetek failed to declare the value of the goods for insurance purposes; therefore, the declared value was assessed at $50.00. *See id.* at 1372-73. Since the tariff formed a part of the shipment contract, Avpak argued that Cermetek was precluded from recovering any more than $50.00 on each shipment. The Ninth Circuit rejected this argument and affirmed the district court's findings that the $50.00 limitation of liability was inextricably tied to the carriage portion of the COD contract. *Id.* at 1373. The $50.00 declared value

amount of damages depended upon factual issues as to the collectibility of the COD amount and the value of goods delivered.[20] Although stating that the judgment of the district court could be affirmed solely on the basis of unjust enrichment, the court of appeals emphasized that there were more important "alternative reasons for affirming."[21] On the basis of these alternative reasons, the court ruled that a carrier may not reduce its liability below the COD amount by showing a lesser value of the goods or uncollectibility of the COD price.[22] In addition, the court concluded that a COD carrier who breaches its consignment contract by accepting other than cash is estopped from denying it received payment and is therefore liable for the amount stated in the contract.[23]

This casenote will focus on the merits of the court's alternative reasons by briefly examining the nature and duties of a COD carrier and the measure of damages for carrier's failure to collect. The soundness of the court's decision on the questions of uncollectibility and defective goods as factors limiting the consignor's recovery will then be considered. Finally, the propriety of the court's application of the doctrine of estoppel as an alternative means of assessing damages against the carrier will be discussed.

The COD Carrier and Measure of Damages for Failure to Collect

A COD contract is generally utilized by the consignor "because he either does not trust the buyer or he does not intend to advance credit."[24] A consignor who employs the COD method indicates that he

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did not limit the risk of failure to perform the COD obligation to collect since only the transportation and insurance charges were based on the declared value of the goods. The COD fees, on the other hand, were based on the amount to be collected and were therefore the consideration for the COD service and separate from the other charges. *See id.* at 1374-75. *See also* Justin v. Delta Motorline, Inc., 43 So. 2d 53, 58 (La. App. 1949). For a similar conclusion under a different factual setting, see Ontra v. Automobile Ins. Co., 44 N.Y.S.2d 838, 840 (Mun. Ct. 1943).

Concerning the $5,000.00 limitation, Avpak's governing tariff was clear that COD service would not be provided on shipments where the amount to be collected on delivery exceeded $5,000.00. Two of Cermetek's shipments exceeded that amount. 573 F.2d at 1375. Avpak asserted that since those amounts exceeded its tariff restrictions, Cermetek was prevented from recovering anything as to those two shipments. Again, the Ninth Circuit affirmed the lower court's decision that unjust enrichment would ensue if Cermetek was limited to a recovery of $5,000.00 each on the two shipments since Avpak had obtained judgment for the full amounts. *Id.*

20. 573 F.2d at 1372. Avpak further argued on appeal that it should be allowed to assert, as a setoff, a prior debt owed by Cermetek to Digital. *Id.* at 1372. The court rejected Avpak's claim to a setoff noting that Avpak had not obtained an assignment of this debt, and that a setoff for prior debts cannot be accepted by a COD carrier instead of cash or to reduce the full cash payment due on the COD amount. *Id.* at 1382.

21. *Id.* at 1376. One might properly question the "alternative reasons" advanced by the court since the trial court judgment could have been affirmed on the basis of unjust enrichment alone. *Id.* The court of appeals has apparently unnecessarily imposed new law where a simple affirmation would have sufficed.

22. *Id.* at 1382.

23. *Id.*

24. *Id.* at 1379.

wants liquid assets for his goods. Use of this method assures that the carrier cannot make an absolute delivery without collecting the stated amount.[25] Therefore, the carrier who enters into a COD contract acts both as a bailee to transport the goods and as an agent to collect the price.[26]

As bailee, the carrier assumes all the common law duties imposed upon the common carrier to receive the goods,[27] transport them within a reasonable time,[28] exercise care and diligence during the course of transportation,[29] and deliver the goods.[30] As an agent to collect, the carrier undertakes to deliver the goods only upon collection of the COD price and, thereafter, to remit that amount to the consignor.[31] The common law does not impose upon the common carrier any obligation to act as the collection agent of the consignor.[32] Such an obligation arises only by contract, but once the duty is assumed, the COD carrier is held to a strict compliance with its undertaking.[33] Absent an agreement to the contrary, the COD carrier, as a collection agent, must accept cash and nothing else,[34] and becomes liable for delivery of a

25. National Van Lines, Inc. v. Rich Plan Corp., 385 F.2d 800, 802 (5th Cir. 1967); Crown Displays, Inc. v. Calore Freight Sys., Inc., 115 R.I. 483, 485, 348 A.2d 373, 374 (1975).

26. National Van Lines, Inc. v. Rich Plan Corp., 385 F.2d 800, 802 (5th Cir. 1967); Barnhart v. Henderson, 147 Neb. 689, 700, 24 N.W.2d 854, 861 (1947); Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 22, 159 N.E. 708, 709 (1928); Crown Displays, Inc. v. Calore Freight Sys., Inc., 115 R.I. 483, 485, 348 A.2d 373, 374 (1975); Herrin Transp. Co. v. Robert E. Olson Co., 325 S.W.2d 826, 827 (Tex. Civ. App. 1959). *See generally* 2 R. HUTCHINSON, A TREATISE ON THE LAW OF CARRIERS § 726, at 810 (3d ed. 1906).

27. *E.g.*, Missouri Pac. Ry. v. Tucker, 230 U.S. 340, 347 (1913); Cowden v. Pacific Coast S.S. Co., 94 Cal. 470, 479, 29 P. 873, 875 (1872); Burlington Transp. Co. v. Hathaway, 234 Iowa 135, 137, 12 N.W.2d 167, 169 (1943).

28. *See, e.g.*, Chicago & Alton R.R. v. Kirby, 225 U.S. 155, 164 (1912); Southern Pac. Co. v. Loden, 19 Ariz. App. 460, 464, 508 P.2d 347, 351 (1973); Langley v. Pacific Gas & Elec. Co., 41 Cal. 2d 655, 661, 262 P.2d 846, 850 (1953).

29. *E.g.*, Inland Waterways Shippers Ass'n, Inc. v. Mississippi Valley Barge Line Co., 194 F. Supp. 818, 822 (E.D. Mo. 1960), *aff'd*, 289 F.2d 374 (8th Cir.), *cert. denied*, 368 U.S. 876 (1961); Beard & Sons v. Illinois Cent. Ry., 79 Iowa 518, 520-21, 44 N.W. 800, 801 (1890); Bobzein v. New York Cent. R.R., 187 App. Div. 767, 771, 176 N.Y.S. 407, 410 (1919).

30. *E.g.*, North Pa. R.R. v. Commercial Bank, 123 U.S. 727, 733-34 (1887); Long Island Ry. v. United States, 374 F. Supp. 1124, 1127 n.2 (S.D. Ga. 1974); Compania Cubana De Aviacion, S.A. v. Comfort-Craft, Inc., 120 So. 2d 48, 50 (Fla. App. 1960).

31. *See* Young v. Santa Fe Trail Transp. Co., 179 Kan. 678, 681, 298 P.2d 235, 237 (1956); Justin v. Delta Motorline, Inc., 43 So. 2d 53, 55 (La. App. 1949); cases cited at note 25 *supra*.

32. National Van Lines, Inc. v. Rich Plan Corp., 385 F.2d 800, 802 (5th Cir. 1967); Young v. Santa Fe Trail Transp. Co., 179 Kan. 678, 681, 298 P.2d 235, 237 (1956); Barnhart v. Henderson, 147 Neb. 689, 700-01, 24 N.W.2d 854, 861 (1947); Crown Displays, Inc. v. Calore Freight Sys., Inc., 115 R.I. 483, 485, 348 A.2d 373, 374 (1975); A. DOBIE, HANDBOOK ON THE LAW OF BAILMENTS AND CARRIERS § 143, at 430 (1914); R. HUTCHINSON, *supra* note 26, § 728, at 811.

33. *See* National Van Lines, Inc. v. Rich Plan Corp., 385 F.2d 800, 802 (1967); Justin v. Delta Motorline, Inc., 43 So. 2d 53, 55 (La. App. 1949); Nuside Metal Prod., Inc. v. Eazor Express, Inc., 189 Pa. Super. 593, 599, 152 A.2d 275, 279 (1959).

34. *See, e.g.*, Federal Reserve Bank v. Malloy, 264 U.S. 160, 165 (1924); Willer v. Railway Express Agency, Inc., 86 A.2d 104, 107 (D.C. 1952); Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 22, 159 N.E. 708, 709 (1928). Even when the carrier is authorized to accept payment in a form other than cash, the courts generally require the carrier to comply strictly with the express terms of the COD contract. Thus, where a COD carrier is authorized to accept a personal check as payment, it is liable for the acceptance of a post-dated check. S. B. Penick & Co. v. Triple "M" Transp. Co., 131 N.J.L. 114, 116, 34 A.2d 898, 899-900 (1943). Where authorization to

shipment without receiving payment for the stipulated COD amount.[35]

Breaches of the two separate duties undertaken by the COD carrier call for different measures of damages.[36] For breach of its duty as bailee, the carrier is liable, as in the case of any misdelivery, for the value of the goods at the time and place that delivery should have been made.[37] For the breach of the duty as a collection agent of the consignor, courts have adopted conflicting theories for the assessment of damages.

In a number of cases, courts have held that a carrier's failure as agent to collect constituted a conversion.[38] Under this tort concept, the proper measure of damages is the value of the goods shipped.[39] The more prevalent view,[40] as represented by *Joseph Mogul, Inc. v. C. Lewis Lavine, Inc.*,[41] is that a carrier's failure to collect invokes contractual instead of tort liability so that, prima facie, the amount of damages is the COD contract price.[42] Although the ability of the COD carrier to lessen its damages has been questioned,[43] the majority of cases have indicated that a carrier liable to a consignor for failure to collect may prove circumstances that would reduce or minimize damages.[44] Excepting *Cermetek* and those cases characterizing the failure to collect as

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accept a certified check in lieu of cash is given, the carrier must satisfy itself tht the instrument is genuine and is liable for the acceptance of a forgery. Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 22-23, 159 N.E. 708, 709 (1928).

35. *See* Bond Rubber Corp. v. Oates Bros., Inc., 136 Conn. 248, 251, 70 A.2d 115, 117 (1949); Chaning v. Riddle Aviation Co., 203 Misc. 844, 845, 119 N.Y.S.2d 552, 553-54 (Mun. Ct. 1953). Where the carrier has tendered the goods and demanded payment and the consignee has subsequently refused to accept or pay for the shipment, the carrier has completed his COD contractual obligations and thereafter holds the goods as a warehouseman only. Hasse v. American Express Co., 94 Mich. 133, 135, 53 N.W. 918, 919 (1892); Simon v. Universal Carloading & Distrib. Co., 1 N.Y.S.2d 249, 251-52 (Mun. Ct. 1938).

36. *See* cases cited at note 26 *supra*.

37. Barnhart v. Henderson, 147 Neb. 689, 703, 24 N.W.2d 854, 862 (1947); Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 22, 159 N.E. 708, 709 (1928); Chaning v. Riddle Aviation Co., 203 Misc. 844, 845, 119 N.Y.S.2d 552, 553-54 (Mun. Ct. 1953).

38. *See, e.g.*, Murray v. Warner, 55 N.Y. 546, 550, 20 Am. Rep. 227, 229 (1875); Blaisdell v. American Ry. Express, 56 N.D. 870, 874, 220 N.W. 634, 635 (1928). *But see* Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 21-22, 159 N.E. 708, 709 (1928). Those courts that have characterized the carrier's delivery of goods without collecting the price as a conversion have allowed no reduction of the carrier's liability, perceiving such an action as the surrendering of a security without authority. *See* Meyer v. Lemcke, 31 Ind. 208, 209 (1869); Blaisdell v. American Ry. Express, 56 N.D. 870, 874, 220 N.W. 634, 635-36 (1928); R. HUTCHINSON, *supra* note 26, § 727, at 811.

39. *See* cases cited at note 38 *supra*.

40. *See* Cermetek, Inc. v. Butler Avpak, Inc., 573 F.2d 1370, 1377, 1379 (9th Cir. 1978); National Van Lines, Inc., v. Rich Plan Corp., 385 F.2d 800, 803 (5th Cir. 1967); Rolla Produce Co. v. American Ry. Express, 205 Mo. App. 646, 650, 226 S.W. 582, 583 (1920).

41. 247 N.Y. 20, 159 N.E. 708 (1928).

42. *Id.* at 23, 159 N.E. at 709.

43. National Van Lines, Inc. v. Rich Plan Corp., 385 F.2d 800, 803 (5th Cir. 1967). The ability of the carrier to lessen the consignor's recovery has been questioned because, absent a showing of uncollectibility, exactly what the carrier could show to thwart recovery is unclear. *Id.*

44. *See* Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 23-24, 159 N.E. 708, 709-10 (1928); Dolezal v. Cleveland, Canton & Columbus Motor Freight Co., 2 Ohio Op. 423, 428 (Mun. Ct. 1935); Herrin Transp. Co. v. Robert E. Olson Co., 325 S.W.2d 826, 828 (Tex. Civ. App. 1959).

a conversion,[45] no case has ever denied the COD carrier's opportunity to mitigate its damages.[46]

In *Mogul*, a COD carrier accepted a forged certified check for goods shipped to a buyer subsequently found to be insolvent. The New York court perceived the position of the COD carrier to be similar to that of an agent for collection of commercial paper.[47] The court reasoned that for breach of its duty in the collection of the price, the carrier is liable, as any other collection agent, for whatever could have been collected had its duty been fulfilled.[48] Accordingly, the *Mogul* court held that although the measure of damages for a shipper's claim against a carrier is prima facie the COD amount, such amount was not a debt or liquidated claim but measured by the actual loss.[49] The holding that the COD amount is not a debt is consistent with the notion that the carrier's liability is contractual[50] because the contract measure of damages is generally the actual loss sustained by reason of the breach.[51] Hence, the carrier may prove that collection of the COD amount would not have been reasonably possible.[52] If uncollectibility is proven, the measure of recovery is the intrinsic value of the goods since this is the actual loss incurred by the shipper.[53] Conversely, the court in *Cermetek*, labeling *Mogul* as an aberration, denied the COD carrier any opportunity to decrease its damages from the COD amount by showing uncollectibility or a lesser value of the goods shipped.[54]

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45. *See* text & note 38 *supra*.

46. *See* National Van Lines, Inc. v. Rich Plan Corp., 385 F.2d 800, 803 (5th Cir. 1967).

47. 247 N.Y. at 23, 159 N.E. at 709.

48. *Id. Mogul* has been cited approvingly by later cases. *See* National Van Lines, Inc. v. Rich Plan Corp., 385 F.2d 800, 803 (5th Cir. 1967); Willer v. Railway Express Agency, Inc., 86 A.2d 104, 107 (D.C. 1952); Justin v. Delta Motorline, Inc., 43 So. 2d 53, 57 (La. App. 1949); Barnhart v. Henderson, 147 Neb. 689, 703, 24 N.W.2d 854, 862 (1945); Okin v. Railway Express Agency, 134 N.J.L. 85, 87, 44 A.2d 896, 896-97 (1945); Crown Displays, Inc. v. Calore Freight Sys., Inc., 115 R.I. 483, 486, 348 A.2d 373, 375 (1975); Herrin Transp. Co. v. Robert E. Olson Co., 325 S.W.2d 826, 827 (Tex. Civ. App. 1959).

49. 247 N.Y. at 23, 159 N.E. at 709. The COD amount will ordinarily be the actual loss sustained by the consignor. Yet, upon breach of the COD contract by the carrier, the COD amount does not become a debt or liquidated claim and the actual loss must be proved by the consignor. This amount of actual loss may differ in amount from the COD price when uncollectibility is proven. See text & notes 51-54 *infra*.

50. *See* cases cited at note 40 *supra*.

51. *See, e.g.*, Ross v. Frank W. Dunne Co., 119 Cal. App. 2d 690, 700, 260 P.2d 104, 109 (1953); Lambert v. Durallium Prod. Corp., 364 Pa. 284, 287, 72 A.2d 66, 67 (1950); South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960). *See also* Pletz v. Christian Herald Ass'n, Inc., 486 F.2d 94, 97 (5th Cir. 1973); A to Z Rental, Inc. v. Wilson, 413 F.2d 899, 908 (10th Cir. 1969). *Contra*, D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.1, at 786 (1973).

52. 247 N.Y. at 24, 159 N.E. at 710. The *Mogul* court concluded that the carrier, under the circumstances, had effectively rebutted the prima facie amount of damages and established uncollectibility of the COD amount. The court reasoned that a consignee who issued a forged check would not have paid cash. *Id.* at 23, 159 N.E. at 710.

53. *Id.* at 24, 159 N.E. at 710. *See* text & note 35 *supra*.

54. Cermetek, Inc. v. Butler Avpak, Inc., 573 F.2d 1370, 1377 (9th Cir. 1978).

The Claims of Uncollectibility and Defective Goods

In order to lessen its loss, Avpak asserted "that the COD amount was uncollectible at the time the goods were delivered and that the actual value of the goods was substantially below the COD price."[55] Avpak attempted to create an inference that the COD amount was uncollectible by calling attention to the dishonored checks, the unsatisfied default judgment against Digital, and an affidavit filed by Avpak alleging that Digital's assets had been seized by the Internal Revenue Service.[56] The Ninth Circuit ruled that the "mere fact that a single check bounced does not create an inference that Digital could not have paid the COD price."[57] Nor did the seizure of Digital's assets by the Internal Revenue Service warrant the conclusion that no assets would be returned.[58]

The court may have properly concluded that Avpak had not sufficiently rebutted the prima facie contract measure of damages. But instead of ruling against Avpak on that basis, the court declined to follow *Mogul* and disallowed the defense of uncollectibility altogether.[59] According to the Ninth Circuit, the *Mogul* court misconceived the role of the carrier and diluted the carrier's liability.[60] Apparently, the primary reason for the court of appeals' decision was to correct this error in *Mogul* by disallowing the claims of uncollectibility and defective goods and, thereby, engrafting upon the carrier an added incentive to fulfill its COD commitment.[61] The court stated that its ruling will help ensure that the carrier will take the proper steps to obtain payment or seek the return of misdelivered goods.[62] The *Cermetek* decision is written to protect the seller,[63] but the Ninth Circuit apparently misunderstood the import of *Mogul*, which was simply an attempt to measure contract damages by the actual loss suffered.[64]

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55. *Id.* at 1376.
56. *Id.*
57. *Id.* at 1377.
58. *Id.*
59. *Id.* at 1379. The rejection of the claim of uncollectibility by the Ninth Circuit would appear contrary to the district court's view on that issue: "The law in C.O.D. cases is that the carrier may attempt to show only the fact that the amount of the C.O.D. was uncollectible from the consignee . . . ." Cermetek, Inc. v. Butler Avpak, Inc., Civ. No. 75-1796, slip op. at 6 (D. Cal., Jan 23, 1976), *aff'd*, 573 F.2d 1370 (9th Cir. 1978).
60. *See* 573 F.2d at 1378, 1380.
61. *Id.* at 1380.
62. *Id.*
63. *See id.* at 1379.
64. The Ninth Circuit paraphrased the *Mogul* rules as follows: "*Joseph Mogul, Inc.* states that if the amount collectible is less than the C.O.D. amount, the shipper can obtain only actual damages, i.e., the amount which could have been collected if the duty had been fulfilled, not necessarily the value of the goods." *Id.* at 1376. Apparently the Ninth Circuit erroneously inferred from *Mogul* that if the amount collectible was less than the value of the goods, the carrier could reduce his damages below that value, but *Mogul* in no instance stated that recovery could be any less than the value of the goods delivered.

According to *Mogul*, the measure of damages is prima facie the COD amount.[65] The carrier may reduce the extent of its liability, however, by showing that there was no "reasonable probability" that the COD amount could have been collected.[66] Where uncollectibility is proven, the shipper's actual loss can be no greater than the value of the goods, since the carrier's duty, had he performed it, would have been to reject the check, refuse delivery, and either return the goods to the shipper or await the shipper's instructions on the disposition of the goods.[67] Thus, *Mogul* was not an attempt to dilute the COD carrier's liability for failure to collect, but was an effort to ascertain the appropriate measure of damages based on the actual loss suffered. Although, at first glance, the Ninth Circuit's desire to hold the carrier accountable for the performance of its contract is reasonable, the rejection of the defense of uncollectability denies the carrier an actual measure of damages for the loss sustained.[68] Since the majority rule is to measure damages by the actual loss suffered,[69] it should apply to enable the carrier to demonstrate the consignor's actual loss.[70]

As stated previously, the policy behind the Ninth Circuit's "better rule" denying the claim of uncollectibility is to provide the carrier with an incentive to fulfill COD obligations.[71] This incentive seems to take the form of a penalty, for two reasons. First, the claim of uncollectibility applies only to those situations where there exists no reasonable probability that the COD amount could have been collected at the time the goods were delivered.[72] Thus, a general presumption of collectibility is established upon delivery, and that presumption must be rebutted to assert the defense.[73] To disallow the possible defense of uncollectibility permits the consignor to recover more than he would have received if the COD amount was uncollectible and the carrier had performed its duty and returned the merchandise.[74]

The second reason why the denial of the uncollectibility defense seems punitive is that under certain factual situations, the defense is justified and equitable. An example is provided by an application of the rule set forth in *Cermetek* to the facts in *Mogul*. Applying the

65. 247 N.Y. at 23, 159 N.E. at 709.
66. *Id.* at 24, 159 N.E. at 710.
67. *See* note 53 *supra*.
68. 573 F.2d at 1377.
69. See text & note 51 *supra*.
70. National Van Lines, Inc. v. Rich Plan Corp., 385 F.2d 800, 803 (5th Cir. 1967).
71. *See* 573 F.2d at 1380. See text & notes 24-25 *supra*.
72. Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 24, 159 N.E. 708, 710 (1928).
73. *See id.*; Dolezal v. Cleveland, Canton & Columbus Motor Freight Co., 2 Ohio Op. 423, 429 (Mun. Ct. 1935).
74. Alice v. Taca Int'l Airlines, S.A., 243 La. 97, 106, 141 So. 2d 829, 832 (1962). Of course, this argument assumes that the consignor does not have a readily available alternative buyer for the goods.

Cermetek rule, the only reasonable conclusion is that the consignor in *Mogul* would be entitled to the full COD amount instead of the value of the goods. This result would be required even though the consignee, who issued a forged check, would not have paid cash, thus rebutting any presumption of collectibility.[75] This conclusion would be reached since, like the company checks in *Cermetek*, acceptance of a certified check was not an authorized mode of payment under the consignment contract in *Mogul*.[76] Under this factual situation, disallowance of the claim of uncollectibility as a means of reducing the carrier's liability would punish the carrier's inability to perceive the perpetration of the fraud.[77]

Defective Goods Claim

Avpak asserted that the electronic parts shipped by Cermetek to Digital were defective and, therefore, Cermetek should recover only the value of the defective goods.[78] The Ninth Circuit concluded that Avpak had no interest in the alleged defects in the merchandise and no standing to raise the issue.[79] The rationale for the court's conclusion was twofold. First, Avpak was paid a fee based on the COD price of the goods, not their actual worth.[80] Therefore, Avpak was not harmed if the defects made the goods worth less than the original price.[81] Second, the court wished to protect the seller from losing both the contract price and the goods where the carrier asserts that the goods were defective after it has failed to collect the COD amount and after the consignee has disposed of the goods.[82] The court's reason for safeguarding the seller from the carrier's claim of alleged defects was to enforce the reasonable commercial expectations of the parties entering into a COD contract.[83] As mentioned before, the seller using the COD method indicates that he wants liquid assets and not a contract claim against a distant buyer, or a dispute over the market value of the goods shipped upon the carrier's default.[84] Clearly, the consignor could be substan-

75. *See* Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 23, 159 N.E. 708, 710 (1928).

76. *Id.* at 22-23, 159 N.E. at 709.

77. However, one may consider it to be a legitimate burden to place on a carrier who assumes the responsibility of the COD contract and accepts payment in an unauthorized form.

78. 573 F.2d at 1376. There was some evidence that Digital had complained about the quality of the electronic parts. *Id.* at 1373. Cermetek notified Digital to return any defective parts for refund or replacement, but no parts were ever returned and no subsequent action had been taken by Digital on the claim of defective goods. *Id.*

79. *Id.* at 1380.

80. *Id.*

81. *Id.*

82. *Id.* at 1379.

83. *Id.*

84. *See id.*

tially harmed if the carrier were allowed to decrease its damages by showing a lesser value of the goods shipped. If the court of appeals had allowed Avpak to assert such a claim, Cermetek would have been exposed to double liability because Digital as the buyer of the goods would be able to assert the same claim.[85] Futhermore, if such a remedy were permitted, the carrier would have an incentive to abandon the duty owed to its principal and take the side of the buyer by claiming the goods were defective.[86] For these reasons, the court concluded that the contracts between the seller and buyer, and between the seller and carrier were separate.[87] The carrier's duties under its COD contract were immaterial to the contractual relationship between the consignor and consignee,[88] and, therefore, the carrier had no standing to assert the defense.[89]

For the above reasons, the Ninth Circuit denied the COD carrier an opportunity to lessen its damages from the amount stated in the consignment contract by showing either a lesser value of the goods or uncollectibility. Yet, in order to further support these conclusions, the court added an additional line of reasoning.

The Estoppel Evasion

The court of appeals expressed dissatisfaction with the *Mogul* court's analogy of the COD carrier to a collection agent for commercial paper.[90] According to the Ninth Circuit, the analogy was erroneous and, therefore, did not support the *Mogul* court's conclusion as to the proper measure of damages for a carrier's failure to collect.[91] The court of appeals proposed what it saw as a closer analogy by applying the reasoning found in an early California case, *Wagner v. Wedell*.[92]

In *Wagner*, the defendant, Wedell, had a first mortgage on chattels to secure a $1,500.00 note. Wagner had a second mortgage for $1,000.00 on the same property. Upon default by the mortgagor, the plaintiff assigned his mortgage to Wedell for purposes of foreclosure.

85. Brief for Appellee at 25, Cermetek, Inc. v. Butler Avpak, Inc., 573 F.2d 1370 (9th Cir. 1978).

86. 573 F.2d at 1380.

87. *Id.*

88. For discussions both for and against the carrier's ability to assert the contractual relationship of the consignor and consignee, *compare* Stearns v. Grand Trunk Ry., 148 Mich. 271, 274, 111 N.W. 769, 770 (1907) (carrier may assert contractual relationship of consignor and consignee), *with* Okin v. Railway Express Agency, 24 N.J. Misc. 8, 10, 44 A.2d 896, 897 (1945) (carrier may not assert contractual relationship of consignor and consignee), *and* Dolezal v. Cleveland, Canton & Columbus Motor Freight Co., 2 Ohio Op. 423, 427 (Mun. Ct. 1935) (carrier may not assert contractual relationship of consignor and consignee).

89. 573 F.2d at 1380.

90. *Id.* at 1378, 1381. *See* Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 23-24, 159 N.E. 708, 709-10 (1928).

91. 573 F.2d at 1378, 1381.

92. 3 Cal. App. 274, 85 P. 126 (1906).

In return, Wedell promised to pay Wagner $1,000.00 out of the proceeds of the foreclosure sale. Although he did not promise, the plaintiff stated that he would bid enough to cover both mortgages at the sale. Instead of selling at a foreclosure sale, Wedell procured title from the mortgagor and had both mortgages satisfied of record. He then resold the property receiving $1,000.00 in cash and two notes for $2,850.00 in his favor. The plaintiff, having no knowledge of the resale, subsequently sued for money had and received.[93]

The California court noted that "Wedell had not promised in writing to sell at a foreclosure sale and even though Wagner had not promised to bid a sufficient amount to cover both mortgages,"[94] an agency relationship was created binding the defendant to act for the interest of his principal in taking "all lawful means for the recovery of said note" and to not act adversely to him.[95] Stating that the plaintiff had a right to rely on a judicial sale before being deprived of his security without payment, the court ruled that the defendant was estopped from saying that the notes were not money.[96] For that reason he was liable for the money had and received.[97]

By applying the reasoning found in *Wagner*, the Ninth Circuit concluded that the role of the COD carrier was more closely akin to an agent with authority to sell than to the agent for collection analogy used in *Mogul*.[98] The court reasoned that in both *Wagner* and *Cermetek* the defendants were agents with authority to sell items of intrinsic value for cash but not otherwise.[99] The court distinguished the agent for collection who was only "selling" the satisfaction of a debt, since the notes to be collected had no intrinsic value.[100] Using the agent with authority to sell analogy, the court of appeals felt justified in applying the estoppel principle used against the agent for sale in *Wagner* to the COD carrier in *Cermetek*.[101] Hence, the court ruled that "a carrier who contracts to either collect cash on delivery or put the goods at the shipper's disposal is estopped to deny receiving cash when a company check is accepted from the buyer."[102] Apparently, the only significance of the analogy to *Wagner* is the court's desire to apply the doctrine of estoppel so as to make the issue regarding defective goods

93. *Id.* at 276-77, 85 P. at 126-27.
94. *Id.*
95. *Id.* at 277-78, 85 P. at 127.
96. *Id.* at 278, 85 P. at 127.
97. *Id.*
98. 573 F.2d at 1381.
99. *Id.*
100. *Id.* at 1382.
101. *Id.*
102. *Id.*

irrelevant.[103] The defective goods issue is made irrelevant because the carrier is deemed to have received cash when payment is accepted in a form not authorized and thereby becomes responsible to its principal for the money received.[104] Therefore, the fashioning of estoppel by the Ninth Circuit effectively evades, in an alternative manner, the issue of the carrier's ability to reduce its damages.

The use of estoppel to evade the issue of the carrier's ability to limit damages would appear to have a limited application. In both *Wagner* and *Cermetek*, estoppel was applied to situations where the agent for sale had accepted payment in a form not authorized and was subsequently prohibited from denying that such payment was not cash.[105] The use of estoppel, then, would not come into play where a COD carrier had collected nothing upon delivery.[106] In addition, uncertainty exists as to whether the use of estoppel would be permitted in situations where the COD carrier had recovered the goods from the consignee after a default in payment and tendered the goods back to the consignor.[107] Return of the goods after a default in payment was precisely the duty the court wished to impose upon the carrier by rejecting the defenses of uncollectibility and defective goods.[108] The court in *Cermetek* expressly declined to resolve such problems, but did note that a tender of recovered goods back to the shipper may be an exception to its rule.[109]

Conclusion

The court's decision in *Cermetek* was intended to instill in the COD carrier the inducement to fulfill its COD commitments. The purpose of the COD contract is to protect the seller from losing both the contract price and the goods at the same time. The court's rejection of the defenses of defective goods and uncollectibility was meant to ensure that the carrier requests proper payment or returns goods. In seeking to instill a sense of loyalty upon the COD carrier, as agent to the shipper, the court shunned the majority rule which measures damages

103. *See id.* at 1381.

104. *See also* Wagner v. Wedell, 3 Cal. App. 274, 280, 85 P. 126, 128 (1906).

105. *See* Cermetek, Inc. v. Butler Avpak, Inc., 573 F.2d at 1382; Wagner v. Wedell, 3 Cal. App. at 278, 85 P. at 127.

106. Although estoppel would not apply under such circumstances, the rationale of *Cermetek* in general would appear to deny the carrier any claim of defectiveness or uncollectibility. See text & note 101 *supra*.

107. *See* 573 F.2d at 1380, 1381; National Van Lines, Inc. v. Rich Plan Corp., 385 F.2d 800, 803 (1967).

108. 573 F.2d at 1380.

109. *Id.* at 1381. But the court mentioned that this exception would only give rise to the seller's duty to mitigate by reselling the goods. *Id; see* National Van Lines, Inc. v. Rich Plan Corp., 385 F.2d 800, 803 (1967). The effect on the carrier under this exception would be that its liability to the shipper would result only in a minimal amount of damages.

by the actual loss. This rejection may have the effect under certain circumstances of awarding the shipper more than he would have received had the contract been fulfilled. Although the claim of defective goods may be properly disallowed on the basis that the carrier lacks standing to assert it, the denial of the claim of uncollectibility may result under certain circumstances in undeserved gains to the shipper.

II. CRIMINAL LAW

A. THE CLASSIFICATION OF AN OPEN-END OFFENDER ON PROBATION

In *State v. Risher*,[1] the Supreme Court of Arizona was confronted with the issue of whether a defendant found guilty of an "open-end" offense,[2] may be placed on probation for a period of time longer than the maximum sentence for a misdemeanor and nonetheless have the offense classified as a misdemeanor after successfully completing the probationary period.[3] The defendant, Scott Edward Risher, pursuant to a plea agreement, pled no contest to a charge of aggravated battery,[4] "open-end," committed upon his wife. The court accepted the plea and placed the defendant on five years probation, with four months incarceration in the county jail as a condition of such probation.[5] The trial court stated that the court would designate the open-end offense a misdemeanor at the successful completion of the probationary period.[6]

On appeal, the Arizona Court of Appeals held that for purposes of changing the classification of an open-end offense from that of a felony to a misdemeanor,[7] probation was a sentence,[8] and the length of the probation period determines the classification of the offense.[9]

The Arizona Supreme Court vacated the court of appeals decision and held that except for the purpose of determining the time for appeal, probation is not a sentence.[10] The court concluded that an open-end

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1. 117 Ariz. 587, 574 P.2d 453 (1978).

2. An "open-end" offense is one which may be treated as a misdemeanor or a felony depending upon the sentence imposed. *Id.* at 588, 574 P.2d at 454.

3. *Id.*

4. At the time Risher was charged, the punishment for aggravated battery was contained in ARIZ. REV. STAT. ANN. § 13-245(B) (Supp. 1977) (current version at ARIZ. REV. STAT. ANN. § 13-1204 (1978)) which provides:

> B. Aggravated . . . battery shall be punished by a fine of not less than one hundred nor more than two thousand dollars, or by imprisonment in the county jail not to exceed one year, or both, or by imprisonment in the state prison for not less than one nor more than five years.

5. 117 Ariz. at 588, 574 P.2d at 454.

6. *Id.*

7. ARIZ. REV. STAT. ANN. § 13-103 (Supp. 1973) (current version at ARIZ. REV. STAT. ANN. §§ 13-105, 601, 602 (1978)) [hereinafter referred to as the classification statute] provides:

> A. A felony is a crime or public offense which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor.
>
> B. When a crime or public offense punishable by imprisonment in the state prison is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a sentence imposing a punishment other than imprisonment in the state prison.

8. 117 Ariz. 594, 597, 574 P.2d 460, 463 (Ct. App. 1977).

9. *Id.*

10. 117 Ariz. at 589, 574 P.2d at 455. The supreme court recognized that in State v. Fuentes, 113 Ariz. 285, 285, 551 P.2d 554, 554 (1976) they held that probation is a sentence. But in *Risher* the court explicitly limited the *Fuentes* rationale to "the determination of the time for appeal" for purposes of ARIZ. R. CRIM. P. 31.3. 117 Ariz. at 589, 574 P.2d at 455.

ARIZ. R. CRIM. P. 31.3 provides:

> The notice of appeal shall be filed with the clerk of the trial court within 20 days after the entry of judgment and sentence, except that:

offense is deemed a felony unless otherwise designated.[11] In the court's opinion, the statute allowing a trial court to place a defendant on probation[12] only serves to establish the length of the probationary period and does not control the designation of the crime.[13] Consequently, the supreme court reinstated the original imposition of a felony period of probation on the defendant with the promise of a misdemeanor designation of the offense at the successful completion of the probationary period.[14]

In this casenote, the court of appeal's decision in *Risher* will be examined, followed by an analysis of the supreme court's decision. The reasons for the disparate, though not irreconcilable, results will be analyzed. An examination of the jurisdictional aspects of probation will be undertaken, and the proper initial premise for determination of the dispute in *Risher* will be suggested and followed through to its logical conclusion.

Court of Appeals Decision

The court of appeals in *Risher* determined that the term "sentence" has different meanings when used in the classification[15] and probation[16] statutes.[17] Initially, the court of appeals recognized that the term "sentence" has two conceptual usages. First, the Arizona Rules of Criminal Procedure provide that " 'sentence' can denote 'the pronouncement by the court of the penalty imposed upon the defendant after a judgment of guilty.' "[18] In this respect probation, if granted, is the pronouncement of the court and hence a sentence.[19] The second

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a. A notice of cross-appeal may be filed within 20 days after service of the appellant's notice of appeal; and

b. A notice of delayed appeal shall be filed within 20 days after service of an order granting a delayed appeal under Rule 32.1(f).

11. 117 Ariz. at 589, 574 P.2d at 455.

12. ARIZ. REV. STAT. ANN. § 13-1657 (Supp. 1976) (current version at ARIZ. REV. STAT. ANN. §§ 13-901 to 903 (1978)) [hereinafter referred to as the probation statute] provides:

A. If it appears that there are circumstances in mitigation of the punishment or that the ends of justice will be subserved thereby, the court may, in its discretion, place the defendant upon probation in the manner following:

1. The court may suspend the imposing of sentence and may direct that suspension continue for such period of time, *not exceeding the maximum term of sentence which may be imposed, and upon such terms and conditions* as the court determines, and shall place such person on probation. . . .

(emphasis added).

13. 117 Ariz. at 589, 574 P.2d at 455.

14. *Id.* at 590, 574 P.2d at 456.

15. ARIZ. REV. STAT. ANN. § 13-103 (Supp. 1973) (current version at ARIZ. REV. STAT. ANN. §§ 13-105, 601, 602 (1978)).

16. ARIZ. REV. STAT. ANN. § 13-1657 (Supp. 1976) (current version at ARIZ. REV. STAT. ANN. §§ 13-901 to 903 (1978)).

17. *See* 117 Ariz. at 597, 574 P.2d at 463.

18. *Id., quoting* ARIZ. R. CRIM. P. 26.1 (emphasis in original).

19. 117 Ariz. at 597, 574 P.2d at 463. *But see* Comment to ARIZ. R. CRIM. P. 26.1 which provides that the "term sentence . . . does include probation even though in most cases, under

use of the term "sentence" connotes the actual penalty of fine or imprisonment prescribed by the criminal statute involved.[20] It is in this sense that the probation statute refers to the power of the court to " 'suspend the imposing of *sentence* [penalty imposed by statute] . . . for such period of time, not exceeding the maximum term of sentence [imprisonment].' "[21]

Consequently, the court of appeals asserted that the only logical interpretation of the word "sentence" in the applicable section of the classification statute, when it is used to ascertain whether the open-end offense will be a misdemeanor or a felony, is that "it means the *pronouncement* of the penalty to be invoked."[22] Under this rationale, if the pronouncement is probation, it qualifies as a sentence other than imprisonment in the state prison.[23] It is then necessary to look to the provisions of the probation statute to determine whether the term of probation is consistent with a felony or a misdemeanor classification. The result of this analysis is that an open-end offense will remain classified as a felony until such time as a misdemeanor sentence is actually imposed or when the imposition of sentence is suspended and a probationary period consistent with a misdemeanor sentence is granted.[24]

Applying this reasoning to the facts, the court of appeals concluded that when the trial court placed the defendant on five years probation, the court, for the purposes of the classification statute, "sentenced" the defendant to a felony conviction.[25] The supreme court

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ARIZ. REV. STAT. ANN. § 13-1657(A) (Supp. 1972), imposition of sentence must be suspended in order to place a person on probation."

20. 117 Ariz. at 597, 574 P.2d at 463. *See* ARIZ. REV. STAT. § 13-1642(A) (1956) (current version at ARIZ. REV. STAT. ANN. § 13-4001 (1978)) (which equated sentence with the imposition of punishment prescribed) (repealed by ch. 201, § 251, 1978 Ariz. Sess. Laws).

21. 117 Ariz. at 597, 574 P.2d at 463 (brackets and emphasis in original).

22. *Id.* (emphasis in original).

23. *Id.* The court of appeals did not confront one of the logical consequences of this determination. If probation qualifies, for purposes of ARIZ. REV. STAT. ANN. § 13-103(B) (Supp. 1973) (current version at ARIZ. REV. STAT. ANN. §§ 13-105, 601, 602 (1978)), as a sentence imposing a punishment other than imprisonment in the state prison, then the argument could be made that probation alone is sufficient to change the classification of the offense from a felony to a misdemeanor. *See* classification statute, *supra* note 6. However, this proposition would create two untenable results. On one hand, it would eliminate the discretionary rehabilitative tool of probation used with an open-end felony offender. It would also allow a court to suspend a one year probationary period for an open-end misdemeanor offender, assuming a violation of the conditions of probation, and enable that court to then impose a felony sentence. The court of appeals, by not embracing the argument that probation alone automatically classifies the offense as a misdemeanor, probably is responding to three factors. These factors are the conspicuous absence of the consideration of probation in the classification statute, the desire to render a logically consistent solution to this problem, and a recognition of Chief Judge Froeb's dissenting remarks in *Risher* with respect to the basic idea of the open-end offense as "a discretionary tool which will motivate the offender to rehabilitate himself." 117 Ariz. at 599, 574 P.2d at 465.

24. 117 Ariz. at 597, 574 P.2d at 463; *see* State v. Raffael, 113 Ariz. 259, 263, 550 P.2d 1060, 1064 (1976); State v. Vineyard, 96 Ariz. 76, 79, 392 P.2d 30, 33 (1964).

25. 117 Ariz. at 597, 574 P.2d at 463. Perhaps, more accurately, the court's conclusion can be interpreted as saying that the trial court intended to maintain the felony classification, automatically provided for by statute, by imposing a period of probation that could only be indicative of a

arrived at the opposite conclusion.

Supreme Court Decision

The supreme court decision in *Risher* embraces the court of appeals dissenting opinion of Judge Froeb.[26] By concluding that the probation statute only serves to establish the measure of the probationary period and is unrelated to the classification of the crime, the supreme court accepted the position that the classification of a crime is unrelated to probation in an open-end setting. The court thus recognized an implied power in the trial court to designate the classification of an open-end offense as other than a felony any time probation is granted.[27]

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felony sentence, while simultaneously using its discretion to attempt to rehabilitate the defendant. If the defendant's probation were revoked prior to the expiration of the probationary period, he could be sentenced to the maximum allowable period of five years in the state prison. Recognizing that the trial court was probably "under the good faith impression that it possessed the power to subsequently designate the defendant's crime as a misdemeanor and that this may have entered into the court's consideration in rendering sentence," the court of appeals remanded the case for resentencing in accordance with its opinion. *Id.* at 597-98, 574 P.2d at 463-64.

26. *See, id.* at 589, 574 P.2d at 455. The supreme court in *Risher* particularly accepted Judge Froeb's conclusion that ARIZ. REV. STAT. ANN. § 13-1657 (Supp. 1976) (current version at ARIZ. REV. STAT. ANN. §§ 13-901 to 903 (1978))

> operates to do nothing more than fix a maximum period for which the defendant must remain under probation supervision. While the *measure* of this period is established by the potential felony imprisonment which could be imposed, it bears no closer relationship to an actual sentence. To say that the fixing of the probationary term designates the crime as a felony and at the same time eliminates the possibility of a future misdemeanor sentence and possible incarceration in the county jail as punishment goes beyond the words of A.R.S. § 13-1657, as amended, (Supp. 1976). Such an argument engrafts consequences upon the use of A.R.S. § 13-1657, as amended, (Supp. 1976), which appear to me are plainly not there.

117 Ariz. at 589, 574 P.2d at 455 (citing State v. Risher, 117 Ariz. 594, 598, 574 P.2d 460, 464 (Ct. App. 1977) (Froeb, J., dissenting)) (emphasis in original).

27. 117 Ariz. at 589, 574 P.2d at 455. The supreme court in *Risher* arrives at this conclusion through convoluted analysis. Initially, the court asserts that it need not classify an open-end offender until after successful completion of or revocation of probation. *Id.* The court then recognizes, however, that there is a presumptive classification of open-end offenses: "it remains a felony unless and until a court in its discretion imposes a sentence of imprisonment in the county jail for not to exceed one year. . . ." *Id.* However, this presumptive classification was taken from a series of open-end offense cases where probation was not a factor. *See* State v. Raffaele, 113 Ariz. 259, 263, 550 P.2d 1060, 1064 (1976); State v. Vineyard, 96 Ariz. 76, 79, 392 P.2d 30, 33 (1964); State v. Gutierrez, 82 Ariz. 21, 24, 307 P.2d 914, 916 (1957), *cert. denied*, 355 U.S. 17 (1957). The court recognized that to literally apply the presumptive classification rule to an open-end offense where probation was granted would result in illogical consequences. Specifically, any time probation is granted and successfully completed, a judge would be required to then impose some fine or jail term upon the rehabilitated offender in order to confer misdemeanant status upon him. 117 Ariz. at 589, 574 P.2d at 455. The court further concluded that the legislature could not have intended such a requirement to flow from its enactment of the classification statute. *Id.*

To prevent this unintended result, the supreme court inferred that "an open-end offense shall be deemed a felony unless and until otherwise designated." *Id.* The authority of the trial court to designate the crime at this stage, though not specifically provided for by statute or rule, is, according to the majority of the supreme court and Judge Froeb, "implied under the circumstances." *Id.* 117 Ariz. at 599, 574 P.2d at 465 (Froeb, J., dissenting). However, the authority to classify an open-end offense has been recognized by the Arizona judiciary as a non-delegated legislative power:

> Under the express authority of the legislature, the court is vested with power, in its discretion, to fix the punishment by imprisonment in the county jail and again by the express provisions of the act, the legislature declares that where a judge does impose such punishment, that *after judgment*, the offense shall be deemed to be a misdemeanor. The

The problem with the supreme court's analysis is determining the source of the judicial power to classify open-end sentences.[28] The

legislature, not the court, has fixed the character of the offense, therefore, there is no delegation of legislative authority.

State v. Gutierrez, 82 Ariz. 21, 24, 307 P.2d 914, 916 (1957), *cert. denied*, 355 U.S. 17 (1957) (emphasis in original).

Prior legislative history and case law recognized that the classification of a crime, where the degree of the offense is determined by the court, must come at a specific time.

Under the 1956 Rules of Crim. Proc., the trial court would have been required to determine the degree of an offense of which a defendant was guilty before accepting a guilty plea and rendering judgment and sentence. Although the new rules contain no comparable provisions, we feel that the judgment of the trial court should be clear and nonambiguous and it is still necessary for the court to specifically find the "degree of the offense."

State v. McClarity, 27 Ariz. App. 571, 575, 557 P.2d 170, 174 (1976) (citations omitted).

28. The classification of a crime as either a felony or a misdemeanor is regulated by statute in Arizona. The former classification statute, ARIZ. REV. STAT. ANN. § 13-103 (Supp. 1973), has been superseded by ARIZ. REV. STAT. ANN. § 13-105 (1978), the applicable portions of which are as follows:

11. "Felony" means an offense for which a sentence to a term of imprisonment to the custody of the department of corrections is authorized by any law of this state.

. . . .

16. "Misdemeanor" means an offense for which a sentence to a term of imprisonment other than to the custody of the department of corrections is authorized by any law of this state.

For classification purposes, ARIZ. REV. STAT. ANN. § 13-601 (1978) is now applicable. This section provides that, for the purpose of sentence, felonies are classified into six classes, the most serious being a Class 1 felony, and misdemeanors are classified into three classes, the most serious being a Class 1 misdemeanor. After an offense is classified into one of the applicable nine classes of felony or misdemeanor, either ARIZ. REV. STAT. ANN. § 13-701 (1978) (sentence of imprisonment for felony) or ARIZ. REV. STAT. ANN. § 13-707 (1978) (sentence of imprisonment for misdemeanor) comes into play to determine the term of imprisonment, as follows:

§ 13-701. Sentence of imprisonment for felony.

A. A sentence of imprisonment for a felony shall be a definite term of years and the person sentenced, unless otherwise provided by law, shall be committed to the custody of the department of corrections.

B. Except as provided in § 13-604 the term of imprisonment for a felony shall be determined as follows for a first offense:

1. For a class 2 felony, seven years.
2. For a class 3 felony, five years.
3. For a class 4 felony, four years.
4. For a class 5 felony, two years.
5. For a class 6 felony, one and one-half years.

§ 13-707. Sentence of imprisonment for misdemeanors.

A sentence of imprisonment for a misdemeanor shall be for a definite term to be served other than a place within custody of the department of corrections. The court shall fix the term of imprisonment within the following maximum limitations:

1. For a class 1 misdemeanor, six months.
2. For a class 2 misdemeanor, four months.
3. For a class 3 misdemeanor, thirty days.

The new provisions of the criminal code require initial classification upon conviction according to the specific offense. For example, Risher was convicted of the open-end offense of aggravated battery. This statute is now encompassed by ARIZ. REV. STAT. ANN. § 13-1204 (1978) which provides in part:

A. A person commits aggravated assault if such person commits assault defined in § 13-1203 under any of the following circumstances:

1. If such person causes serious physical injury to another.
2. If such person uses a deadly weapon or dangerous instrument.

. . . .

8. If such person commits the assault while the victim is bound or otherwise physically restrained or while the victim's capacity to resist is substantially impaired.

B. Aggravated assault pursuant to subsection A, paragraph 1 or 2 of this section is a

supreme court in *Risher* does not rely on express authority in finding that the trial court may properly declare the defendant a misdemeanant. Rather, it defers to Chief Judge Froeb's dissent in the court of appeals' decision in *Risher*.[29]

Judge Froeb recognized that this problem must be attacked in a "logical sequence."[30] His embarking point was the question: "when does the law provide that an open-end offense must be designated as either a felony or a misdemeanor?"[31] Initially, he posited that the classification statute "merely instructs us that *when* a sentence is imposed, its effect is to designate the crime as either a misdemeanor or a felony at that point."[32] Judge Froeb ignored the explicit mention in the classification statute that the offense is deemed a felony *until* a "sentence other than imprisonment in the state prison is imposed."[33] He also ignored the majority's argument distinguishing the two conceptual uses of the term sentence in the probation statute.[34] Instead, he examined the probation statute on its face alone, and concluded that probation cannot be a sentence because it is actually suspension of the imposition of sentence.[35]

This analysis fails to identify the source of power authorizing a court to designate a crime as a misdemeanor at the successful completion of the felony probation period. Consequently, Judge Froeb asserted that "the authority of the trial court to designate the crime at this stage, while not specifically provided for by statute or rule, is *implied* under the circumstances."[36] Judge Froeb bolstered this argument by pointing out the "untenable and illogical" results that would follow if the court could not classify an offense at the successful completion of an open-end offender's probationary period.[37] The inability of the

class 3 felony. Aggravated assault pursuant to subsection A, paragraphs 3, 4, 5, 6, 7 or 8 of this section is a class 6 felony.

Consequently, Risher would have been convicted of a certain class of felony with the resultant sentence specifically set out by the legislature.

29. 117 Ariz. at 589-90, 574 P.2d at 455-56.

30. 117 Ariz. at 598, 574 P.2d at 464.

31. *Id.*

32. *Id.* at 598-99, 574 P.2d at 464-65.

33. ARIZ. REV. STAT. ANN. § 13-103(B) (Supp. 1973) (current version at ARIZ. REV. STAT. ANN. §§ 13-105, 601, 602 (1978)).

34. See text & notes 18-21 *supra* for discussion of the court of appeals' interpretation of the two conceptual uses of the term sentence in the probation statute.

35. 117 Ariz. at 598, 574 P.2d at 464.

36. *Id.* at 599, 574 P.2d at 465 (emphasis added).

37. *Id.* Judge Froeb pointed out that since the offense is presumptively a felony, "no open-ended crime for which probation was given could ever be designated a misdemeanor, even though the term of probation was, for example, six months." *Id.* Judge Froeb recognized, however, that if probation were granted an open-end offender, revocation of probation and the imposition of a misdemeanor sentence would, pursuant to the classification statute, have the effect of designating the offense as a misdemeanor. *Id.* Judge Froeb did not think the criminal statutes involved should be read to mean "that the trial court is barred from granting probation when it wishes to designate the open-ended crime as a misdemeanor." *Id.*

court to designate the crime at the successful completion of the felony probation period would, he suggested, take away the rehabilitative tool of probation from the court.[38]

Judge Froeb refused to look to the term of probation as an indicator of the trial court's designation of the offense. Instead, he asserted that since the trial court can designate the crime as either a felony or a misdemeanor at the sentencing hearing when probation begins, there is no reason why the designation cannot be made at the termination of probation.[39]

The critical difference, therefore, between the supreme court and the court of appeals in their respective majority opinions in *Risher* is that the court of appeals considered the classification of an open-end crime to be inextricably linked to probation and sentencing, and the supreme court viewed the classification of open-end crimes to be within the trial court's broad discretion. Although this issue was a matter of first impression in *State v. Risher*, there are Arizona precedents regarding the court's power and jurisdiction over a defendant on probation.

Jurisdictional Aspects of Probation

The Arizona Supreme Court has recognized that at any time prior to the expiration of the probationary period, the trial court has jurisdiction to revoke the defendant's probation and sentence him.[40] However, expiration of probation requires the defendant's discharge.[41] This body of case law, interpreted in conjunction with the "absolute discharge" granted a defendant successfully completing his probationary period,[42]

38. *Id.*

39. *Id.*

40. Haney v. Eyman, 97 Ariz. 289, 292, 399 P.2d 905, 906-07 (1965). *Haney* presented the supreme court with a petitioner who had pled guilty to passing a bogus check. The trial court suspended imposition of a sentence of imprisonment for three years, pursuant to ARIZ. REV. STAT. ANN. § 13-1657 (Supp. 1956) (current version at ARIZ. REV. STAT. ANN. §§ 13-901 to -903 (1978)), and placed the petitioner on probation. Two years later the court revoked the probation and sentenced the petitioner for the crime of forgery, instead of the crime for which he had pled guilty, namely, passing a bogus check. By the time the petitioner was brought to court to be resentenced on the check charge, the three year probationary period, during which suspension of the petitioner's sentence could be revoked and petitioner sentenced on the check charge, had expired. Consequently, the court held that they had no jurisdiction over the petitioner to resentence him on the check charge. 97 Ariz. at 293, 399 P.2d at 907. This case illustrates the court's strict interpretation of the loss of jurisdiction over an individual whose term of probation has run out.

41. Pina v. State, 100 Ariz. 47, 48, 410 P.2d 658, 658 (1966). *See also* Rodgers v. State, 5 Ariz. App. 429, 430, 427 P.2d 563, 564 (1967). The supreme court in *Pina* relied on a series of cases holding that in order to impose a sentence on a defendant who was placed on probation after the suspension of his sentence, the suspension must be revoked and incarceration imposed before the probationary period terminates. *See* Haney v. Eyman, 97 Ariz. 289, 292, 399 P.2d 905, 906-07 (1965); *In re* Johnson, 53 Ariz. 161, 165-66, 87 P.2d 107, 109 (1939). Once that probationary period expires, absent revocation, the court loses jurisdiction over the individual for that crime even if the probation was for a period shorter than the possible maximum punishment for that crime. Brooks v. State, 51 Ariz. 544, 550, 78 P.2d 498, 500 (1938).

42. ARIZ. REV. STAT. ANN. § 13-1657(D) (Supp. 1976) (current version at ARIZ. REV. STAT. ANN. §§ 13-901 to 903 (1978)) provides:

compels the conclusion that a trial court has no jurisdiction over the defendant and no other authority to sentence or re-classify him after the successful completion of his probationary term and the resultant discharge.[43] Judge Froeb and the majority of the supreme court imply that this consideration must succumb to the "basic idea of the open-ended offense—namely to give the trial court a discretionary tool which will motivate the offender to rehabilitate himself."[44] This rationale is supported by the Rules of Criminal Procedure.[45] Various courts have also recognized that due to the uncertainty as to how rehabilitation is accomplished, substantial latitude must be given to trial courts.[46]

Although this argument has significant emotional appeal, at least one Arizona case has recognized that the concern for defendants' rights must be tempered with a concern "for the integrity of the judicial process and the proper judicial respect for legislative policies."[47] Perhaps in response to the extra-judicial powers asserted by the supreme court in *Risher*, and perhaps in an effort to temper strict statutory sentencing schemes, the legislature has undertaken the task of reconciling these principles.[48]

D. The court may at any time during the period of probation revoke or modify its order of suspension of imposition or execution of sentence. It may at any time, when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation warrants it, terminate the period of probation and discharge the person so held, and in all instances, if the court has not seen fit to revoke the order of probation and impose sentence or pronounce sentence, the defendant shall, at the end of the term of probation, be discharged by the court.

See also ARIZ. R. CRIM. P. 27.4: "Upon expiration or early termination of a term of probation, the court shall order the probationer to be discharged absolutely, and the clerk of the court shall promptly upon request furnish the probationer with a certified copy of the order of discharge."

43. Judge Froeb concurred with presiding Judge Donofrio in the majority opinion in State v. McClarity, 27 Ariz. App. 571, 557 P.2d 170 (1976), where the court recognized that the "Arizona courts have been zealous in protecting the legislature's prerogative of establishing sentencing procedures and we are reluctant to go against this general policy." *Id.* at 575, 556 P.2d at 174. *See* State v. Pakula, 113 Ariz. 122, 124-25, 547 P.2d 476, 478-79 (1976); State v. Miner, 113 Ariz. 56, 57, 546 P.2d 342, 343 (1976); State v. O'Donnal, 110 Ariz. 552, 554, 521 P.2d 984, 986 (1974); State v. Superior Court, 25 Ariz. App. 452, 453, 544 P.2d 276, 277 (1976).

44. 117 Ariz. at 599, 574 P.2d at 465 (Froeb, J., dissenting); *see* 117 Ariz. at 589, 574 P.2d at 455.

45. ARIZ. R. CRIM. P. 27.1 provides:

The sentencing court may impose on a probationer such conditions as will promote rehabilitation. In addition, the appropriate probation officer may impose on the probationer regulations which are necessary to implement the conditions imposed by the court and not inconsistent with them. All conditions and regulations shall be in writing, and a copy of them given to the probationer.

46. State v. Donovan, 116 Ariz. 209, 212, 568 P.2d 1107, 1110 (Ct. App. 1977). *See also* United States v. Consuelo-Gonzales, 521 F.2d 259, 262 (9th Cir. 1975).

47. State v. McClarity, 27 Ariz. App. 571, 576, 557 P.2d 170, 175 (1976).

48. The supreme court noted in *Risher* that after the court of appeals decision, the legislature revised ARIZ. REV. STAT. ANN. § 13-1657 to allow the trial court to place a misdemeanant on two years probation "even though the maximum term of sentence which may be imposed is up to one year or less." 117 Ariz. at 590 n.1, 574 P.2d at 456 n.1. *See* ARIZ. REV. STAT. ANN. § 13-1657 (Supp. 1957-1978). Furthermore, ARIZ. REV. STAT. ANN. § 13-1657 (Supp. 1957-1978) (current version at ARIZ. REV. STAT. ANN. §§ 13-901 to 903 (1978)) was revised so that an initial classification of the offense is necessary in order to mete out the proper probationary period. Absent such a classification, applicable periods of probation and/or a sentence would be impossible to deter-

In overview, although both the majorities of the court of appeals and the supreme court in *Risher* come to different conclusions, their analyses progress logically. The reason for the disparity lies in the choice of the critical controlling statute upon which each decision is premised. The court of appeals concluded that the classification statute controlled, whereas the supreme court concluded that the probation statute was the relevant authority. Thus, the proper resolution of the issue in *Risher* is contingent on the determination of the proper initial premise.

The Proper Statutory Premise

Justice Holohan, dissenting in *Risher*, suggested that the proper point of departure for the determination of the crucial issue should be a consideration of basic due process. He asserted that:

> It is basic due process that an accused be informed of the crime which forms the basis for the punitive action by the court. . . . The determination of guilt is incomplete until the specific offense is determined, and the designation of the offense as a felony or misdemeanor vitally affects the nature of the offense and the consequences attached to it.[49]

A fundamental principle of due process is that "a sentence must be certain, definite and consistent in all its terms, not ambiguous, and not open to any serious misapprehensions by those who must execute it."[50] This rule is critical where the offense can be punished by a wide range of sentences. In *Risher*, the sentence could conceivably range from a fine of one hundred dollars to five years imprisonment in the state prison.[51] The classification of the crime is essential to assure that the judgment or sentence conforms to the offense for which the accused has been convicted.[52] The confusion in *Risher* occurred when, instead of

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mine. Finally, to prevent future problems akin to the ones that arose in *Risher*, the legislature has set forth maximum periods of probation for each class of felony or misdemeanor in the revised criminal code. ARIZ. REV. STAT. ANN. § 13-902 (1978) provides:

A. Unless terminated sooner, probation may continue for the following periods:
   1. For a class 2, 3 or 4 felony, the term authorized by 13-701, subsection B.
   2. For a class 5 or 6 felony, three years.
   3. For a class 1 misdemeanor, three years.
   4. For a class 2 misdemeanor, two years.
   5. For a class 3 misdemeanor, one year.

49. 117 Ariz. at 590, 574 P.2d at 456.

50. State v. Burrell, 106 Ariz. 100, 103, 471 P.2d 712, 715 (1970); State v. Owen, 2 Ariz. App. 580, 582, 410 P.2d 698, 700 (1966); *see* Annot. 70 A.L.R. 1511, 1512 (1931); 24 C.J.S. *Criminal Law* § 1581 (1961).

51. *See* ARIZ. REV. STAT. ANN. § 13-245(B) (Supp. 1973) (current version at ARIZ. REV. STAT. ANN. § 13-1204 (1978)), set out in note 4 *supra*.

52. Although no Arizona decision has been rendered on this point in an open-end situation, the need to classify an open-end offense to assure that the sentence conforms to the offense for which the accused has been convicted may be fairly inferred. The Arizona Supreme Court recognized that a "court cannot render judgment or pronounce sentence for another or different offense." Haney v. Eyman, 97 Ariz. 289, 291, 399 P.2d 905, 907 (1965). *Haney* involved separate

imposing a sentence, the trial court chose to place the defendant on probation. Placing the defendant on probation for an open-end offense created problems of interpretation because on its face the classification statute[53] fails to consider probation.[54] Since the open-end offense was presumptively classified a felony,[55] the critical issue became whether probation qualifies as a "sentence imposing a punishment other than imprisonment in the state prison"[56] in order to reclassify the offense a misdemeanor. Whether or not probation qualifies to reclassify the open-end offense a misdemeanor hinges on the definition of "sentence" in the classification statute.

The only logical interpretation of the word "sentence" in the classification statute is that it means the pronouncement of the penalty invoked. This conclusion is based on three factors. The first is the failure of the courts and the legislature to adequately distinguish between the two conceptual usages of the word "sentence" as applied in the statutes, criminal rules, and case law.[57] Second is the principle, well settled in Arizona, that a court loses jurisdiction over an individual at the completion of that individual's probationary period.[58] The third factor requiring this conclusion is the classification statute's apparent failure to consider the fact of probation.[59] The correctness of interpreting the word "sentence" in the classification statute as the pronouncement of the penalty invoked is further supported by the due process notion explicit within the probation statute: a person should not be required to endure probation for a longer period than the period of confinement

offenses rather than classification of an open-end offense, but the rationale applies to the open-end situation because if the classification of an open-end offense is undetermined, the offender may impermissibly be required to endure probation for a longer period than the period of confinement prescribed for the offense of which he was convicted. *See* State v. Pakula, 113 Ariz. 122, 124, 574 P.2d 476, 478 (1976). Therefore, it is critical in the open-end situation to classify the offense so as to render the correct judgment or pronounce the proper sentence. The presumptive classification of an open-end offense as a felony assures that the judiciary and the offender have guidance and fair notice as to the crime involved and the sentence that can result regardless of whether or not the classification is retained.

53. ARIZ. REV. STAT. ANN. § 13-103(B) (Supp. 1973) (current version at ARIZ. REV. STAT. ANN. §§ 13-105, 601, 602 (1978)).

54. 117 Ariz. at 596, 574 P.2d at 462. The rationale could have been adopted by the court of appeals that for the purpose of the classification statute, probation, if considered "a sentence imposing a punishment other than imprisonment in the state prison," *was* considered in the statute. Instead, the court of appeals embraced the theory of this argument but rejected the notion that the legislature considered it when drafting the statute. 117 Ariz. at 596, 574 P.2d at 462. Therefore, adopting the court of appeals' view requires the imposition of judicial interpretation on an otherwise explicit statute.

55. *See* ARIZ. REV. STAT. ANN. § 13-103(B) (Supp. 1973) (current version at ARIZ. REV. STAT. ANN. §§ 13-105, 601, 602 (1978)) set out in note 7 *supra*.

56. *Id.*

57. See text & notes 18-21 *supra* for discussion of the court of appeals' interpretation of the two conceptual uses of the term "sentence" in the probation statute.

58. See text & notes 42-50 *supra* for a discussion of the jurisdictional aspects of probation.

59. *See* ARIZ. REV. STAT. ANN. § 13-103 (Supp. 1973) (current version at ARIZ. REV. STAT. ANN. §§ 13-105, 601, 602 (1978)).

prescribed for the offense of which he was convicted.[60] Adhering to this line of analysis, the presumptive classification of an open-end offense as a felony may be changed to that of a misdemeanor by the imposition of a period of probation not in excess of that allowed for misdemeanor incarceration.[61] This allows the court to use the discretionary tool of probation in an attempt to motivate the offender to rehabilitate himself.

Conclusion

In addressing these problems, the supreme court considered the probation statute controlling, and since that statute provides that "probation is not a sentence but rather a feature of the suspension of imposition of sentence,"[62] the court concluded that probation was not a sentence for purposes of reclassifying an open-end offense. The court did note, however, that the Rules of Criminal Procedure indicate that sentencing includes probation.[63] The court also recognized that probation is a sentence for determination of the time for appeal.[64]

The supreme court, however, would not go one step further, as the court of appeals did, and recognize that for purposes of the probation statute the term "sentence" had two meanings.[65] Finding the classification statute the critical factor in the *Risher* case, the court of appeals was not stymied by the definition of probation in the probation statute. Rather, the court recognized the lack of consistency in the legislative use of the term "sentence," and concluded that probation could, in certain circumstances, qualify as a sentence other than imprisonment in the state prison. This would overcome the presumptive classification of an open-end offense as a felony, altering the designation of the offense to that of a misdemeanor.[66]

The choice of the probation statute as controlling led the supreme

60. *See* State v. Pakula, 113 Ariz. 122, 124, 547 P.2d 476, 478 (1976).

61. 117 Ariz. at 597, 574 P.2d at 463.

62. 117 Ariz. at 588, 574 P.2d at 454. *See also* State v. Pitts, 26 Ariz. App. 390, 392, 548 P.2d 1202, 1204 (1976); State v. Van Meter, 7 Ariz. App. 422, 428, 440 P.2d 58, 64 (1968); *In re* Application of Johnson, 5 Ariz. App. 125, 126, 423 P.2d 896, 897 (1967).

63. *See* ARIZ. R. CRIM. P. 26.1; Comment to ARIZ. R. CRIM. P. 26.1, set out in note 19 *supra*.

64. 117 Ariz. at 589, 574 P.2d at 455. See note 10 *supra*.

65. See text & notes 18-21 *supra* for discussion of the court of appeals' interpretation of the two conceptual uses of the term sentence in the probation statute.

66. Perhaps the most precise holding of the majority opinion of the court of appeals in *Risher* is that when a trial court grants probation to an individual convicted of an open-end offense that is less than or equal to the maximum allowable probationary period for a misdemeanor, the trial court has exhibited an intent to classify the offense as a misdemeanor. 117 Ariz. at 597, 574 P.2d at 463. However, the presumptive classification of the open-end offense as a felony still remains until the successful completion of the misdemeanor probation period because prior to the completion period the court retains jurisdiction over the offender and has the authority to revoke probation and sentence the offender to imprisonment in the state prison. ARIZ. REV. STAT. ANN. § 13-1657(D) (Supp. 1976) (current version at ARIZ. REV. STAT. ANN. §§ 13-901 to 903 (1978)).

court in *Risher* down a path strewn with illogical and untenable results. Determining that probation was not a sentence for the purpose of reclassifying an open-end offense as a misdemeanor, the court was compelled to enlarge the discretion of the trial court in the areas of probation and the classification for the open-end offender.

The court of appeals, however, recognized that definitional ambiguities created a gray area in the classification of an open-end offender placed on probation. By relying on basic notions of due process and logical statutory construction, the court of appeals refused to substantially enlarge the discretion of the trial court, instead attempting to operate within the framework provided by the legislature. The legislature has since revised the statutes that were at work in the *Risher* decisions.[67] The result is a legislative compromise of the positions taken by the two courts, highlighting the interrelationship of the different levels of the judiciary and the legislature in developing understandable, functional, goal-oriented laws.

67. *See* note 28 *supra.*

B. DEFENDANTS' RIGHTS IN SUBMISSIONS ON THE RECORD

In Arizona and California, a criminal adjudicatory process whereby a defendant allows the court to determine the question of guilt on the basis of a stipulated record is known as a submission.[1] A valid submission requires the waiver of important constitutional rights.[2] Courts have viewed some submissions as equivalent to guilty pleas,[3] although the defendants have nominally pled not guilty.[4] Arizona courts have held that a defendant whose submission is deemed to be "tantamount to a guilty plea" is entitled to full disclosure[5] of the rights being waived.[6] However, a defendant whose submission is determined not to be the equivalent of a guilty plea is entitled only to certain due process safeguards.[7] In *State v. Cantu*,[8] the Arizona Court of Appeals questioned whether the distinction between a submission that is tantamount to a guilty plea and one that is not should continue to determine

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1. A submission differs from a bench trial in that, in addition to the jury trial waiver, the prosecution and defendant waive the right to present evidence other than the stipulated record. State v. Crowley, 111 Ariz. 308, 310, 528 P.2d 834, 836 (1974); *In re* Mosley, 1 Cal. 3d 913, 924, 464 P.2d 473, 479, 83 Cal. Rptr. 809, 815 (1970).

2. State v. Gaines, 113 Ariz. 206, 207, 549 P.2d 574, 575 (1976). The court must at least inform the defendant in a submission case that he waives his right to a jury trial and that the issue of guilt will be decided solely on the basis of the stipulated record. *Id.* See text & notes 33-37 *infra*.

3. *See* State v. Woods, 114 Ariz. 385, 387-88, 561 P.2d 306, 308-09 (1977); State v. Crowley, 111 Ariz. 308, 310, 528 P.2d 834, 836 (1974); State v. Cantu, 116 Ariz. 432, 435, 569 P.2d 862, 865 (Ct. App. 1977); People v. Levey, 8 Cal. 3d 648, 651, 504 P.2d 452, 454, 105 Cal. Rptr. 516, 518 (1973); *In re* Mosley, 1 Cal. 3d 913, 924-25, 464 P.2d 473, 479, 83 Cal. Rptr. 809, 815 (1970).

4. In a submission, the defendant's plea is "not guilty." *See* State v. Crowley, 111 Ariz. 308, 310, 528 P.2d 834, 836 (1974).

5. In Arizona, the trial judge need not personally inform the defendant of the rights he waives by submitting the case as long as the defendant is aware of the waiver. State v. Garcia, 115 Ariz. 535, 536, 566 P.2d 683, 684 (1977); State v. Eliason, 25 Ariz. App. 523, 528, 544 P.2d 1124, 1129 (1976). Thus, where the word "disclose" is used in the text it is not presumed that the court must inform the defendant of his rights, but merely that the court must be satisfied that the defendant is sufficiently aware of his rights to make a knowing and intelligent waiver.

6. State v. Woods, 114 Ariz. 385, 388-89, 561 P.2d 306, 309-10 (1977); State v. Crowley, 111 Ariz. 308, 310, 528 P.2d 834, 836 (1974). The rights which must be disclosed are derived from Boykin v. Alabama, 395 U.S. 238, 243 (1969). For a discussion of the *Boykin* requirements in regard to a guilty plea, see "The Role of the Attorney-Client Privilege when Challenging the Validity of a Guilty Plea," 19 ARIZ. L. REV. 602, 604 (1977) [hereinafter cited as *Guilty Plea*]. The *Boykin* requirements which a defendant must waive to insure that a guilty plea is made voluntarily and intelligently are: (1) the privilege against self-incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers. 395 U.S. at 243. The defendant must also be aware of the range of possible sentences. *Id.* See text & note 22 *infra*.

The phrase "tantamount to a guilty plea" is often used by the Arizona courts to signify a submission that is the practical equivalent of a guilty plea. *See* State v. Woods, 114 Ariz. 385, 387, 561 P.2d 306, 308 (1977); State v. Gaines, 113 Ariz. 206, 207, 549 P.2d 574, 575 (1976); State v. Cantu, 116 Ariz. 432, 432-33, 569 P.2d 862, 862-63 (Ct. App. 1977). The phrase originated in *In re* Mosley, 1 Cal. 3d 913, 924 & n.9, 464 P.2d 473, 479 & n.9, 83 Cal. Rptr. 809, 815 & n.9, *cert. denied*, 400 U.S. 905 (1970).

7. State v. Gaines, 113 Ariz. 206, 207, 549 P.2d 574, 575 (1976). The due process safeguards of *Gaines* are less protective of the defendant than the rights derived from *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). *See* 113 Ariz. at 207, 549 P.2d at 575.

8. 116 Ariz. 432, 569 P.2d 862 (Ct. App. 1977).

the procedural safeguards provided defendants.[9]

Gilbert Cantu was charged with two counts of selling heroin.[10] He submitted the question of guilt to the court on the basis of reports by the police department, chemists, and the grand jury minutes.[11] Three days later, the court found him guilty on one count and sentenced him to ten years probation and commitment to the department of corrections for one year.[12] Cantu appealed, asserting that his submission on the record was the practical equivalent of a guilty plea, and therefore the failure of the trial judge to inform him of the possible range of sentence constituted reversible error.[13] The court of appeals agreed, citing *State v. Woods*[14] and *State v. Garcia*,[15] and remanded the case for a determination of whether the defendant was aware of the possible range of sentence.[16] In reaching that decision, however, the court cast serious doubt on the submission procedures followed in Arizona.

This casenote will examine the Arizona law regarding defendants' rights in submissions. Initially, the present distinction between those submissions which are the practical equivalent of a guilty plea and those which are not will be considered with specific focus on how this distinction affects defendants' rights. The rationale behind this distinction and its application to real cases will then be critically analyzed. Finally, the suggestion of the *Cantu* court that the *Boykin* disclosures apply to all submissions will be discussed. The casenote will conclude that such a procedure would reduce the burdens placed on trial and

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9. *Id.* at 432, 569 P.2d at 862.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. 114 Ariz. 385, 561 P.2d 306 (1977). The *Woods* court stated:

> In State v. Crowley . . . we held that when a submission on transcripts or other materials amounts to a guilty plea, compliance with the requirements of Boykin v. Alabama . . . . is necessary. In State v. Hooper . . . we stated that *Boykin* mandated that the record must reflect that a guilty plea was intelligently made. We concluded that this required that the defendant must be advised of the maximum sentence.

Id. at 388, 561 P.2d at 309 (citations omitted). *Woods* additionally held that when a submission is the practical equivalent of a guilty plea ARIZ. R. CRIM. P. 17.2(b) is applicable. *Id.* at 389, 561 P.2d at 310. Rule 17.2(b) requires that the defendant be informed of the possible range of sentence. See note 31 *infra*.

15. 115 Ariz. 535, 566 P.2d 683 (1977). The court in *Garcia* found that the submission was tantamount to a guilty plea. *Id.* at 536, 566 P.2d at 684. It went on to state:

> The rule in Arizona is that when a submission is tantamount to a guilty plea:
>
> > "Due process requires that the trial court make a record similar to that required by Boykin v. Alabama . . . to determine if the decision to submit the case on the preliminary hearing transcript was freely, intelligently, and voluntarily made." State v. Crowley . . . .
>
> Thus, it must affirmatively appear on the record that the defendent was aware of this right to remain silent and of the range of possible sentence.

Id. (citations omitted).

16. State v. Cantu, 116 Ariz. 432, 435, 569 P.2d 862, 865 (Ct. App. 1977).

appellate judges while insuring adequate protection of defendants' rights.

The Law of Submissions

The difficulty with the law of submissions arises because the Arizona courts have viewed some, but not all, submissions as tantamount to a plea of guilty.[17] The full protection of *Boykin v. Alabama*[18] and Rule 17.2 of the Arizona Rules of Criminal Procedure is available to those defendants whose submissions are viewed as the practical equivalent of guilty pleas.[19] *Boykin* demands that before a guilty plea can be accepted, there must be an "affirmative showing that it was intelligent and voluntary."[20] To assure that the guilty plea is entered into intelligently and voluntarily, *Boykin* requires an affirmative waiver of the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers.[21] Although not specifically enumerated in *Boykin*, disclosure of the possible range of sentence has been generally determined to be required by *Boykin*[22] and is required in Arizona.[23]

In *State v. Crowley*,[24] the Arizona Supreme Court determined that the due process clause requires the defendant to make an intelligent and voluntary decision to submit a case that is "tantamount to a guilty plea."[25] In order to establish the voluntary and intelligent nature of the

17. *Compare* State v. Woods, 114 Ariz. 385, 388, 561 P.2d 306, 309 (1977); State v. Crowley, 111 Ariz. 308, 311, 528 P.2d 834, 837 (1974); *and* State v. Cantu, 116 Ariz. 432, 435, 569 P.2d 862, 865 (Ct. App. 1977) *with* State v. Gaines, 113 Ariz. 206, 207, 549 P.2d 574, 575 (1976); *and* State v. Payne, 110 Ariz. 506, 508, 520 P.2d 1130, 1132 (1974).

18. 395 U.S. 238 (1969).

19. *See, e.g.*, State v. Woods, 114 Ariz. 385, 389, 561 P.2d 306, 310 (1977); State v. Crowley, 111 Ariz. 308, 311, 528 P.2d 834, 837 (1974); State v. Cantu, 116 Ariz. 432, 435, 569 P.2d 862, 865 (Ct. App. 1977).

20. 395 U.S. 238, 242 (1969). *See generally Guilty Plea, supra* note 6, at 602 n.7.

21. 395 U.S. at 243.

22. *Boykin* requires that the defendant have "a full understanding of what the plea connotes and of its consequences." *Id.* at 244. A majority of the federal circuits construed former FED. R. CRIM. P. 11 (1966) (amended 1974), containing the above phrase from *Boykin*, to mean that a defendant must be advised of the possible range of sentence before a guilty plea could be accepted. Jones v. United States, 440 F.2d 466, 467-68 (2d Cir. 1971); Young v. United States, 433 F.2d 626, 628 (10th Cir. 1970); Marshall v. United States, 431 F.2d 355, 358 (7th Cir. 1970); Berry v. United States 412 F.2d 189, 192 (3d Cir. 1969); Durant v. United States, 410 F.2d 689, 691 (1st Cir. 1969); Combs v. United States, 391 F.2d 1017, 1017 (9th Cir. 1968); James v. United States, 388 F.2d 453, 456 (5th Cir. 1968); Pilkington v. United States, 315 F.2d 204, 210 (4th Cir. 1963).

23. ARIZ. R. CRIM. P. 17.2, *quoted* at note 31 *infra*. In State v. Hooper, 107 Ariz. 327, 329, 487 P.2d 394, 396 (1971), the court stated:

> We think the decision [Boykin v. Alabama], by the use of the word "intelligent," must have been intended to be the equivalent of that part of Federal Rule 11 which requires that the federal judge determine that a plea is made with an understanding of the "consequences of the plea."
>
> . . . "[C]onsequences of the plea" have been held to mean that a defendant is required to have been advised of the highest range of sentence before pleading.

Id.

24. 111 Ariz. 308, 528 P.2d 834 (1974).

25. *Id.* at 311, 528 P.2d at 837.

submission, the *Crowley* court held that the trial court must make a record similar to that required by *Boykin*.[26] The trial judge must make sure the defendant knows that he has waived the right to trial by jury, the right to testify in his own behalf, and the right to present evidence other than the stipulated record.[27] Additionally, the trial court must determine that the defendant realizes that the issue of guilt will be solely determined by the court on the basis of the submitted record.[28] The judge must also conclude that the defendant knows he has waived the right against self-incrimination[29] and knows the possible range of sentence before the submission can be accepted.[30] The Arizona Supreme Court has held that Arizona Rule of Criminal Procedure 17.2,[31] which requires that the judge inform the defendant of the range of sentence and the constitutional rights which he foregoes by pleading guilty, applies to submissions amounting to guilty pleas.[32]

In *State v. Gaines*,[33] the Arizona Supreme Court rejected the contention that full *Boykin* and *Crowley* rights applied to all submissions.[34] The court held that a submission which is not "tantamount to a guilty plea" must only comport with the requirements of due process, not *Boykin*.[35] The record need only show that the defendant knowingly

26. *Id.*
27. *Id.*
28. *Id.*
29. *See id.* This requirement is said to originate with *Crowley*, although it was first enunciated in State v. Garcia, 115 Ariz. 535, 536, 566 P.2d 683, 684 (1977). State v. Malone, 117 Ariz. 488, 490, 573 P.2d 888, 890 (Ct. App. 1977). The justification for applying the right against self-incrimination to submission proceedings was enunciated in People v. Levey, 8 Cal. 3d 648, 652, 504 P.2d 452, 455, 105 Cal. Rptr. 516, 520 (1973).
30. State v. Woods, 114 Ariz. 385, 388-89, 561 P.2d 306, 309-10 (1977). In State v. Encinas, 117 Ariz. 165, 571 P.2d 662 (1977), the court stated that advising defendants of the range of sentence was not a new requirement:

> It is our opinion that *Woods* did not announce a new rule; it merely made clearer the rule previously announced in *Crowley*. *Crowley* held that *Boykin* applied to submissions which were tantamount to a guilty plea. Previously, we had held that a guilty plea could not be intelligent or voluntary under *Boykin* unless the defendant had been advised of the maximum range of sentence. State v. Hooper . . . . *Woods* merely combined the holdings of *Hooper*, *Crowley* and, of course, *Boykin*.

Id. at 167, 571 P.2d at 664 (citations omitted).
31. ARIZ. R. CRIM. P. 17.2 provides:

> Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court, informing him of and determining that he understands the following:
> a. The nature of the charge to which the plea is offered;
> b. The nature and range of possible sentence for the offense to which the plea is offered, including any special conditions regarding sentence, parole, or commutation imposed by statute;
> c. The constitutional rights which he foregoes by pleading guilty or no contest, including his right to counsel if he is not represented by counsel; and
> d. His right to plead not guilty.

32. State v. Woods, 114 Ariz. 385, 389, 561 P.2d 306, 310 (1977).
33. 113 Ariz. 206, 549 P.2d 574 (1976).
34. *Id.* at 207, 549 P.2d at 575.
35. *Id.*

waived his right to a jury trial[36] and knew that the issue of guilt would be decided by the court on the submitted record.[37]

Although both *Gaines* and *Crowley* relied on the due process clause to determine the procedure necessary for a submission to be validly executed,[38] their interpretation of what due process requires was markedly divergent.[39] This divergence can only be justified if there is an intrinsic difference between guilty-plea submissions and other submissions. In an effort to find such a difference, the Arizona courts have delved beyond the form of the defendant's submission into its effect by considering whether the stipulated record offers the defense some expectation of acquittal.[40] If so, *Gaines* and its limited disclosure requirements apply.[41] If, however, the submission is the equivalent of a guilty plea, *Boykin* and *Crowley* apply.[42] Thus, the major distinction between the two types of submission is the practical effect of each.

The question remains whether this distinction justifies the existence of two different sets of disclosure requirements.[43] The effect of the different sets of requirements is that an individual with a reasonable expectation of acquittal is entitled to a lesser degree of procedural protection than an individual who does not harbor such an expectation, even though both have attempted to submit their cases.[44] The defendant, by submitting the question of guilt on the basis of a stipulated record, gives up the same rights he would waive by a guilty plea regardless of whether the submission has the practical effect of a guilty plea.[45] Compliance with *Boykin* and *Crowley* in all submissions is nec-

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36. *Id.*

37. *Id.* Thus, in those submissions that are not the practical equivalent of a guilty plea, the trial court need not inform the defendant of the range of sentence or find a knowing waiver of the right against self-incrimination, the right to testify on his own behalf, and the right to present evidence not included in the stipulated record. *See* text & notes 27-30 *supra.*

38. State v. Gaines, 113 Ariz. at 207, 549 P.2d at 575; State v. Crowley, 111 Ariz. at 311, 528 P.2d at 837.

39. See cases cited at note 38 *supra.*

40. *See* State v. Woods, 114 Ariz. 385, 388, 561 P.2d 306, 309 (1977); State v. Payne, 110 Ariz. 506, 508, 520 P.2d 1130, 1132 (1974).

41. State v. Woods, 114 Ariz. 385, 387, 561 P.2d 306, 308 (1977).

42. *Id.* at 388, 561 P.2d at 309.

43. Had the defendant known of those rights not formally disclosed, he may have made an initial determination not to enter a submission. By retaining the distinction, the courts refuse to insure the defendant whose submission is not tantamount to a guilty plea the full procedural safeguards designed to elicit a voluntary and intelligent decision to submit.

44. *See* Bunnell v. Superior Court, 13 Cal. 3d 592, 531 P.2d 1086, 119 Cal. Rptr. 302 (1975). The court in *Bunnell* stated:

> The procedural contexts in which the *Boykin* requirements were first enunciated and in which they have since been found either expressly applicable or appropriate though not compelled . . . have tended to obscure the fact that the objectives of those requirements . . . are no less important when the defendant surrenders all or substantially all of those rights by a submission [which is not tantamount to a guilty plea].

Id. at 604, 531 P.2d at 1094, 119 Cal. Rptr. at 310 (citations omitted).

45. State v. Cantu, 116 Ariz. 432, 434, 569 P.2d 862, 864 (Ct. App. 1977); Bunnell v. Superior Court, 13 Cal. 3d 592, 604, 531 P.2d 1086, 1094, 119 Cal. Rptr. 302, 310 (1975). The *Cantu* court noted its difficulty in distinguishing "the stated requirements of due process on a submission

essary to insure that the defendant waives his rights voluntarily and intelligently, since the rights are waived by the fact of submission, not by the ultimate resolution of the question of guilt.

Practical Problems of the Present Structure

Even if one assumes that the rationale underlying the *Gaines-Crowley* distinction is grounded in logic, the practical problems appellate and trial judges confront in applying it are inordinately great.[46] The trial judge confronted with a submission must determine if it is essentially identical to a guilty plea.[47] A submission is the practical equivalent of a guilty plea if the stipulated record is "more than sufficient to support a finding of guilty."[48] Where the defense has an expectation that a trial judge might not find the defendant guilty, however, the submission is not the practical equivalent of a guilty plea.[49] *State v. Woods*[50] attempted to clarify which submissions were, in effect, guilty pleas by approving guidelines used in California prior to 1975.[51] *Woods* stated that a submission is not tantamount to a guilty plea where: (1) the documentary record contains extensive cross-examination of prosecution witnesses and defense evidence;[52] or (2) the facts are undisputed, but counsel desires to question the significance accorded them;[53] or (3) the record contains extensive cross-examination and the defendant denies guilt under oath.[54] Because none of the enumerated examples was applicable to the case before it, however, the *Woods* court determined the nature of the submission on the basis of a "totality of the circumstances" approach.[55] This approach is a restatement of the old test; a submission is tantamount to a guilty plea when the stipulated record is sufficient to support a guilty verdict.[56]

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which is not tantamount to a guilty plea from those set forth in *Crowley* as being required when the submission is tantamount to a guilty plea." 116 Ariz. at 434, 569 P.2d at 864.

46. State v. Cantu, 116 Ariz. 432, 434-35, 569 P.2d 862, 864-65 (Ct. App. 1977). The court stated that application of the *Gaines-Crowley* distinction to actual cases creates more problems than it solves. *Id.* at 435, 569 P.2d at 865.

47. *Id.* at 434, 569 P.2d at 864.

48. State v. Crowley, 111 Ariz. 308, 310, 528 P.2d 834, 836 (1974); State v. Chagnon, 115 Ariz. 178, 180, 564 P.2d 401, 403 (Ct. App. 1977).

49. *See* State v. Payne, 110 Ariz. 506, 507-08, 520 P.2d 1130, 1131-32 (1974).

50. 114 Ariz. 385, 561 P.2d 306 (1977).

51. *Id.* at 387-88, 561 P.2d at 308-09. Bunnell v. Superior Court, 13 Cal. 3d 592, 601, 531 P.2d 1086, 1092, 119 Cal. Rptr. 302, 308 (1975), held that full *Boykin* rights are applicable to all submissions. For a discussion of *Bunnell*, see text & notes 70-77 *infra*.

52. 114 Ariz. at 387-88, 561 P.2d at 308-09, (quoting *In re* Mosley, 1 Cal. 3d 913, 924-25 n.9, 464 P.2d 473, 479 n.9, 83 Cal. Rptr. 809, 815 n.9, *cert. denied*, 400 U.S. 905 (1970)).

53. *Id.* at 387-88, 561 P.2d at 308-09.

54. *Id.* at 388, 561 P.2d at 309 (citing People v. Hobbs, 10 Cal. App. 3d 831, 832-33, 89 Cal. Rptr. 123, 124 (1970)).

55. *Id.* at 388, 561 P.2d at 309. Although there was extensive cross-examination, the defense "neither argued the legal significance of the facts nor presented any defensive evidence," so none of the three guidelines adopted by the court applied. *Id.*

56. *Id.* The *Woods* court noted that the "totality of the circumstances shows this proceeding

The *Woods* clarification, though beneficial, still leaves the trial judge with a troublesome problem of determining the nature of the submission from the factual disposition of the case,[57] unless the submission comes within the ambit of one of the three categories listed in *Woods*.[58] Therefore, the distinction which requires a preliminary review of the record to determine guilt[59] should be abolished by renouncing *Gaines* and applying *Crowley* to all submission cases.[60]

The second practical problem in applying the *Gaines-Crowley* distinction is the time at which the nature of the submission is determined. No matter whether the nature of the submission is determinable by the specific factors in *Woods*, or by a "totality of the circumstances" approach, the determination must be made by the trial judge at the time of submission because the defendant must be informed of his rights at that time.[61] The *Cantu* court noted from its judicial experience that an adequate review of the record to determine the nature of the submission could require several days.[62] Thus, the trial judge must give the appropriate warnings at the time of submission without knowledge as to whether the record contains sufficient evidence to constitute a submission tantamount to a guilty plea.[63] The cautious judge has no realistic choice but to give full *Boykin* and *Crowley* warnings to all defendants who submit cases in order to have a record which will be held valid on appeal.[64]

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was not in any sense a trial, and the record, when fairly read, offers no hope that there could be an acquittal." *Id.* In *Cantu*, the court relied on *Woods* for the proposition that the *Crowley* warnings must be given even when the defense has a reasonable hope of acquittal. 116 Ariz. at 434, 569 P.2d at 864. This conclusion is unsupported by the *Woods* language. *See* 114 Ariz. at 388, 561 P.2d at 309. If the submission does not come within one of the three enumerated categories, the trial court must apply a "totality of the circumstances" approach to determine if the defendant has hope for acquittal. *Id.*

57. *See* State v. Cantu, 116 Ariz. at 434, 569 P.2d at 864. The procedure followed in some superior courts of Pima County, Arizona, is to give full *Crowley* rights independent of the nature of the plea in all submissions. Interview with William E. Druke, Presiding Criminal Judge, Superior Court of Arizona, Pima County (Apr. 25, 1979). To the extent this policy is followed across the state, the troublesome problems of determining the nature of a submission are minimized. However, the trial judge's policy of informing the defendant of his full *Crowley* rights emphasizes the unworkability of the guilty-not guilty distinction. In fact, it may be argued that the *Gaines-Crowley* distinction should be removed in order to make the law of submissions consonant with reality in the trial courts.

58. *See* 114 Ariz. at 387-88, 561 P.2d at 308-09.

59. State v. Cantu, 116 Ariz. at 435, 569 P.2d at 865.

60. In Bunnell v. Superior Court, 13 Cal. 3d 592, 605, 531 P.2d 1086, 1094, 119 Cal. Rptr. 302, 310 (1975), the court held that the guilty-not guilty distinction should be removed by applying full *Boykin* rights to all submissions because it was unworkable. This was done in spite of the fact that the procedures adopted by *Woods* to distinguish submissions had been used in California up until *Bunnell*. *Id.*

61. State v. Cantu, 116 Ariz. 432, 434, 569 P.2d 862, 864 (Ct. App. 1977).

62. *Id.*

63. *Id.*

64. *Cantu* provides an example of what may happen when the trial judge merely informs the defendant of the requirements imposed by *Gaines*. The fact that Cantu was acquitted on one count possibly indicates that Cantu had some expectation of acquittal on both, and thus the Court of Appeals' labelling of the submission as tantamount to a guilty plea may not have been factually

The Solutions of Cantu and Bunnell

The *Cantu* court proposed that all defendants who submit cases should be entitled to the full protection of *Boykin*.[65] This step was suggested to alleviate the trial judge's problems in determining the nature of a submission.[66] Despite this proposal, however, the court felt bound to follow prior Arizona Supreme Court decisions applying the "tantamount to a guilty plea" distinction.[67] Therefore, the actual holding in *Cantu* is a narrow one. The court merely ruled that the defendant's submission was the equivalent of a guilty plea and remanded the case to the trial court to determine if the defendant was aware of the range of possible sentence.[68] The dicta of the opinion, however, is persuasive in urging the abolition of the guilty-not guilty distinction and in its stead requiring trial courts to apply Rule 17.2, *Boykin*, and *Crowley* in all submissions.[69]

A position similar to that suggested in *Cantu* has been adopted in California. *Bunnell v. Superior Court*[70] required the application of full *Boykin* rights to all submissions.[71] Several reasons were given by the *Bunnell* court for its holding, but foremost among them was a desire to relieve the burden on trial judges of determining in advance whether the stipulated record was in fact tantamount to a plea of guilty.[72] Equally important was the need to insure that defendants are fully aware of all rights that are relinquished by a submission.[73]

Bunnell required that in all submissions the defendant be informed of and understand the nature of the charges against him.[74] The record must reflect that the defendant had been advised of, and had expressly waived, the right to a jury trial, the right to confront and cross-examine

required. The trial judge, by not giving *Crowley* warnings, allowed the possibility of an appeal and consequent reversal.

65. 116 Ariz. at 435, 569 P.2d at 865.

66. *Id.* at 433, 569 P.2d at 863.

67. *Id.*

68. *Id.*

69. *Id.* The court stated, "[w]e agree with Chief Justice Cameron's dissent in *Gaines* that whether a submission is or is not tantamount to a guilty plea is difficult to determine and that *Crowley* should apply to either case." *Id.* at 434, 569 P.2d at 864. In his dissenting opinion in State v. Gaines, 113 Ariz. 206, 549 P.2d 574 (1976), Chief Justice Cameron advocated following *Crowley* in all submissions to "avoid confusion and create a better record when reviewed for compliance with Boykin v. Alabama." *Id.* at 208, 549 P.2d at 576.

70. 13 Cal. 3d 592, 531 P.2d 1086, 119 Cal. Rptr. 302 (1975).

71. *Id.* at 605, 531 P.2d at 1095, 119 Cal. Rptr. at 311.

72. *Id.* Another stated reason for the *Bunnell* ruling was to remove the appellate courts' burden of ascertaining by examination of the record whether a submission is, in effect, a guilty plea. *Id.*

73. *Id.* at 604, 531 P.2d at 1094, 119 Cal. Rptr. at 310. If the submission is not tantamount to a guilty plea, the judge need not inform the defendant of his right against self-incrimination, the possible range of sentence, or his right to testify on his own behalf. But these rights are waived by the submission, and under *Burnell* the defendant must be informed of all rights relinquished by a submission. *See* text & notes 43-45 *supra*.

74. 13 Cal. 3d at 604, 531 P.2d at 1904, 119 Cal. Rptr. at 310.

witnesses, and the right against self-incrimination.[75] The defendant must also be advised of the possible range of sentence and any other direct consequences of conviction.[76] Finally, where the defendant does not contest guilt through legal argument before the court, he must be apprised of the probability of conviction.[77]

The solution proposed in *Cantu*,[78] along with the California approach in *Bunnell*, would eradicate the practical problems confronted by judges seeking to apply the guilty-not guilty distinction to submissions.[79] In addition, the rationale for making the defendant's procedural rights independent of the nature of the submission is logical. The defendant relinquishes essentially the same rights regardless of the practical effect of the submission.[80] The submission itself must be voluntarily and intelligently made,[81] and compliance with the *Cantu* suggestion would insure this result. The adoption of these standards would also end confusion in this area of the law[82] and present an adequate record when examined on review.[83]

Conclusion

The *Cantu* court's recommendation that the full protection of *Boykin* and *Crowley* should be extended to all submissions should be the law in Arizona. The law of submissions as it now stands, with the amount of procedural protection dependent upon the court's determination of whether or not the submission is tantamount to a guilty plea, is logically unsound and difficult to apply. These infirmities demand interment of the guilty-not guilty distinction.

75. *Id.*
76. *Id.*
77. *Id.*
78. See text & note 65 *supra*.
79. If the trial judge reads full *Boykin* rights to all defendants who submit their cases, he will not have to determine the issue of guilt as a preliminary to accepting the submission.
80. *See* State v. Crowley, 111 Ariz. 308, 310, 528 P.2d 834, 836 (1974); State v. Cantu, 116 Ariz. 432, 434, 569 P.2d 862, 864 (Ct. App. 1977); Bunnell v. Superior Court, 13 Cal. 3d 592, 602, 531 P.2d 1086, 1092, 119 Cal. Rptr. 302, 308 (1975).
81. State v. Crowley, 111 Ariz. 308, 311, 528 P.2d 834, 837 (1974).
82. State v. Gaines, 113 Ariz. 206, 208, 549 P.2d 574, 576 (1976) (Cameron, C.J., dissenting).
83. *Id.*

III. EMPLOYMENT LAW

A. POTENTIAL EXCEPTIONS TO THE EMPLOYMENT-AT-WILL RULE IN ARIZONA

Most employees in this country are employed for an indefinite period of time or to do an indeterminate amount of work and are, therefore, subject to the employment-at-will rule.[1] This rule permits either the employer or employee to terminate the employment relationship at any time for any reason, for no reason, or even for a morally wrong reason.[2] Employees subject to such a rule typically are without any remedy in the event of an arbitrary or retaliatory discharge unless one can be derived from a statute.[3]

Contract law provides little relief to the terminable-at-will employee because of the lack of consideration.[4] Generally, the rule operates to make illusory the promises on both sides—the promise to work and the promise to employ.[5] Tort law is more flexible, but there are problems in proving ulterior motive or subjective intent.[6]

Because the rule does not bind either party, a technical equality is

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1. *See generally* Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118 (1976) (arguing the rule is an anomaly in American common law, inconsistent with principles of contract and master-servant). Professor Corbin describes the employment-at-will rule as an

> example of a unilateral contract in the form of an offered promise to pay for service to be rendered . . . for an indefinite period at a stated salary per day or month or year . . . . The employee is privileged to stop work at any time; the employer is bound by his promise to pay for service rendered, but has the power of revocation as to service not yet rendered.

1 A. CORBIN, CORBIN ON CONTRACTS § 70, at 292-93 (1963).

2. *See* Adair v. United States, 208 U.S. 161, 174 (1908); Payne v. Western & Atl. R.R., 81 Tenn. 507, 517 (1884); Annot., 62 A.L.R.3d 271, 273 (1975). In Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960), the court regrettably asserted that defendant's reprehensible conduct in discharging plaintiff because she was willing to serve as a trial juror could not be judicially restricted because the employment-at-will rule in effect in California permits discharge for any reason, "good, bad, or indifferent," and it makes no difference if the employer had a "bad motive" in so doing. *Id.* at 394, 6 Cal. Rptr. at 174.

3. *See, e.g.*, Mallard v. Boring, 182 Cal. App. 2d 390, 396, 6 Cal. Rptr. 171, 175 (1960); Jackson v. Minidoka Irr. Dist., 98 Idaho 330, 334, 563 P.2d 54, 58 (1977); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 253, 297 N.E.2d 425, 428 (1973); Geary v. United States Steel Corp., 456 Pa. 171, 184-85, 319 A.2d 174, 179-80 (1974). *See* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1410-15 (1967).

4. *See* Blades, *supra* note 3, at 1419-21. Professor Blades criticizes the technical application of the rules of consideration as foreclosing a realistic treatment of contract formation focusing on the reasonable expectations of the parties. The result is that while a promise not to discharge in bad faith might be implied, it would not be binding because not supported by consideration. *Id.* See discussion of the law of "satisfaction" contracts, note 30 *infra*, which may apply instead of the employment-at-will rule in some cases.

5. *See* 1 A. CORBIN, *supra* note 1, § 70, at 292-93. *See also* Blades, *supra* note 3, at 1419-21.

6. *See* Blades, *supra* note 3, at 1427-31.

attributed to the employer-employee relationship that belies the inequality of bargaining power between the parties.[7] Only recently have courts begun to recognize that the absolute application of the rule may lead to inequitable results in those cases where it shields abusive discharges[8] from legal attack.[9] The few exceptions to the rule had been narrowly defined legislative exceptions based on public interest[10] until the New Hampshire Supreme Court found a judicial exception based on bad faith.[11] The Arizona Court of Appeals considered these exceptions in *Larsen v. Motor Supply Co.*[12] The court implied that legislative policy may be construed to provide exceptions to the rule in the form of private causes of action in Arizona[13] but declined to adopt a common law bad faith exception.[14] Nevertheless, the language denying the common law action, read as a whole, seems to imply that in the absence of contrary precedent the court might have been willing to subject to judicial evaluation a company policy that may have been implemented in bad faith.

This casenote will analyze the statutory and common law causes of action to determine the circumstances under which a remedy is available to the terminable-at-will employee. In order to predict the application of the statutory cause of action in Arizona, the standard the *Larsen* court suggested as a basis for invoking this exception is evaluated with reference to particular types of statutes. Finally, the common law bad faith cause of action is examined as an action in tort and contract. Although this action was held precluded by precedent, it is

7. There is equality to the extent that both parties have an equal power to sever the employment relationship, an incident referred to as constituting a failure of "mutuality of obligation." *See* Blades, *supra* note 3, at 1419. The technical nature of the equality provided by the employment-at-will rule is well illustrated in Coppage v. Kansas, 236 U.S. 1, 17 (1915), where the Supreme Court indicated that freedom of contract is enjoyed by the parties when either may terminate at will but acknowledged that "inequalities of fortune" were a necessary result.

8. Professor Blades coined the term "abusive discharge" and outlined the parameters which could give this term legal meaning. *See* Blades, *supra* note 3, at 1413.

9. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974) (common law bad faith exception to the employment-at-will rule recognized); *cf.* Becket v. Welton Becket & Assocs., 39 Cal. App. 3d 815, 821, 114 Cal. Rptr. 531, 537 (1974) (standard announced for evaluating appropriateness of statutes to be used in implying wrongful discharge causes of action); Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 190, 344 P.2d 25, 28 (1959) (cause of action for wrongful discharge implied from perjury statute); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 253, 297 N.E.2d 425, 428 (1973) (wrongful discharge cause of action derived from workmen's compensation statute).

10. *See, e.g.*, Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 190, 344 P.2d 25, 28 (1959) (statute prohibiting perjury construed to prevent discharge of employee for refusing to commit perjury); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 253, 297 N.E.2d 425, 428 (1973) (workmen's compensation statute prevents discharge of employee for filing a workmen's compensation claim).

11. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974). See text & notes 50-54, 66-68 *infra*.

12. 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977).

13. *Id.* at 508, 573 P.2d at 908. *See* text & notes 25-47 *infra*.

14. 117 Ariz. at 509, 573 P.2d at 909. *See* text & notes 48-77 *infra*.

shown that the opinion can nevertheless be read to reveal a willingness to apply a moderate bad faith standard to the appropriate case. The casenote will conclude that such a standard is not necessarily precluded by earlier case law.

Larsen involved two employees of Motor Supply who refused to submit to a "new company policy."[15] The new policy was a requirement that all employees consent to take a "psychological stress evaluation test."[16] The appellants orally consented to take the test but ultimately were not tested because they refused to sign the standardized consent form provided by the company administering the tests.[17] For refusing to consent, the appellants were fired.[18] They brought suit and the trial court granted summary judgment for the employer.[19] By characterizing employer administration of the tests as essentially a "new company policy," the court of appeals indicated that it had no alternative but to uphold the employment-at-will rule.[20]

In upholding the employer's action, the court stated that in an employment-at-will contract, "[e]ither party may terminate the contract at

15. 117 Ariz. at 509, 573 P.2d at 909.

16. *Id.* at 507, 573 P.2d at 907. A psychological stress evaluation test is similar to a lie detector test, but it is performed by analyzing voice recordings of the person being tested. "By noting certain frequencies which tend to appear when a person is lying, the test administrators are able to detect untruthful answers to questions." *Id. But see The Use of Polygraphs and Similar Devices by Federal Agencies: Hearings Before the Subcomm. of the House Comm. on Government Operations*, 93d Cong., 2d Sess. 301 (1974) [hereinafter cited as *Hearings*] (report of Joseph F. Kubis) (psychological stress evaluations may be no more accurate than random guessing). *See also* Note, *The Psychological Stress Evaluator: Yesterday's Dream—Tomorrow's Nightmare*, 24 CLEV. ST. L. REV. 299, 306 (1975).

A general rule to be derived from labor arbitration decisions is that lie detectors should not be used on a large scale, as in *Larsen*, but only as a possible last resort after substantial circumstantial evidence of wrongdoing has provided the basis for a formal accusation against an employee. General Am. Transp. Corp. v. United Steelworkers Local 1133, 31 Lab. Arb. & Disp. Settl. 355, 356 (1958); Allen Indus., Inc. v. Local 986, UAW, 26 Lab. Arb. & Disp. Settl. 363 (1956). *See* Hermann, *Privacy, The Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73, 94-95 (1971).

17. 117 Ariz. at 509, 573 P.2d at 909. The consent form provided in part:

> I, ————————, having applied for employment with ————————, do hereby voluntarily, without duress, coercion, threats or promises of reward or immunity, agree to an Interview procedure with Taitte and Associates, Inc. utilizing the Dektor PSE-1 for Psychological Stress Evaluation. This Interview and Evaluation shall be for the purpose of verifying my background as stated in my employment application and/or in verbal statements I may make to Taitte and Associates, Inc., and is in connection with my seeking employment with ————————.

See Brief for Appellee at 3, Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977). The appellants alleged that they agreed to submit to the psychological stress evaluation test, Brief for Appellant at 4, but they refused to sign the consent form for the following reasons: (1) it purported to be a "request" by the appellants for the test instead of by the employer; (2) it purported to portray the appellants as having voluntarily made the request without coercion when in fact they were advised that their refusal to execute the document would result in their discharge; (3) it released Motor Supply and the testing company of all liability; and (4) it untruthfully represented that the test was not a requirement or condition of employment. *Id.* at 9-10.

18. 117 Ariz. at 509, 573 P.2d at 909. This appears to be the only reason for the appellants' discharge.

19. *Id.* at 507, 573 P.2d at 907.

20. *See id.* at 509, 573 P.2d at 909.

any time for any reason."[21] Despite this result, *Larsen* is significant for its language implying that an employer's power to discharge terminable-at-will employees might be limited by certain exceptions.[22] The two basic exceptions referred to by the court have different legal underpinnings. One must be judicially implied from the terms of a statute,[23] while the other is based on the common law concept of bad faith.[24]

Statutory Exceptions to the Employment-at-Will Rule

While generally approving the employment-at-will rule, the court in *Larsen* impliedly recognized that the rule may not confer upon an employer an unbridled right to discharge an employee regardless of the circumstances.[25] The court acknowledged that "[s]ome jurisdictions have carved small exceptions to the general rule,"[26] and then indicated what types of exceptions might be available in Arizona.[27]

In one of the cases cited in *Larsen*, *Petermann v. International Brotherhood of Teamsters, Local 396*,[28] an employee was instructed by his employer to commit perjury before a state legislative committee.[29] The employee told the truth, however, and was consequently discharged.[30] The California appeals court stated that "to more fully ef-

21. *Id.* at 507, 573 P.2d at 907. The latest announcement of the rule by the Arizona Supreme Court was in Builders Supply Corp. v. Shipley, 86 Ariz. 153, 341 P.2d 940 (1959): "[W]here a contract for personal services contains no time limit it may be terminated by either party, thus leaving the parties free to enter into a new contract with different terms for the same services." *Id.* at 155, 341 P.2d at 941. Unlike some other jurisdictions, Arizona does not expressly allow a right to terminate for a "bad motive," *see* Mallard v. Boring, 182 Cal. App. 2d 390, 394, 6 Cal. Rptr. 171, 175 (1960), or "for [a] cause morally wrong," *see* Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884).

22. 117 Ariz. at 508 & n.1, 573 P.2d at 908 & n.1.

23. *Id.* at 508, 573 P.2d at 908. *See* text & notes 25-47 *infra*.

24. 117 Ariz. at 508, 573 P.2d at 908. *See* text & notes 48-77 *infra*.

25. 117 Ariz. at 508, 573 P.2d at 908. After discussing exceptions based on public policy in cases from other jurisdictions, the court observed that no similar public policy was applicable to the facts in *Larsen* which would require damages for the appellants' discharge. *Id.* at 508, 573 P.2d at 908. The court noted, however, that the question could arise under certain Arizona statues. *Id.* at 508 & n.1, 573 P.2d at 908 & n.1. See text & notes 39-44 *infra*.

26. 117 Ariz. at 508, 573 P.2d at 908. *See* Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 253, 297 N.E.2d 425, 428 (1973). In both of these cases the plaintiffs' discharges were "retaliatory." In *Petermann*, the discharge was for refusing to commit perjury, 174 Cal. App. 2d at 187, 344 P.2d at 26; in *Frampton*, it was for asserting a workmen's compensation claim, 260 Ind. at 250, 297 N.E.2d at 426.

27. 117 Ariz. at 508 n.1, 573 P.2d at 908 n.1.

28. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

29. *Id.* at 187, 344 P.2d at 26.

30. *Id.* The opinion reveals that this was the sole reason for the discharge. On the day before the hearings, Petermann's employer had informed him that "his work was highly satisfactory." *Id.* The court concluded that this raised the issue of the defendant's good faith because Petermann had initially alleged that the duration of his employment was to continue for as long as his work was satisfactory. *Id.* The court indicated that sufficient indicia of a satisfaction contract were in evidence to present a jury question. *Id.* The satisfaction contract is actionable because both consideration requirements are met. *See* J. MURRAY, MURRAY ON CONTRACTS, §§ 73-79, at 142-61 (2d rev. ed. 1974); 9 S. WILLISTON, WILLISTON ON CONTRACTS § 1017, at 133 (3d ed. 1967).

The *Petermann* court may be inconsistent to the extent it regarded the plaintiff as subject to

fectuate the state's declared policy against perjury,"[31] the employer's generally unlimited discharge powers would be circumscribed by arming the employee with a civil cause of action derived from a statutory provision enjoining perjury.[32]

In *Frampton v. Central Indiana Gas Co.*,[33] an employer was denied the right to discharge an employee in retaliation for the employee's filing a workmen's compensation claim.[34] As in *Petermann*, the Indiana court created a private cause of action.[35] The action was based on a workmen's compensation statute which "creates a *duty* in the employer to compensate employees for work-related injuries . . . and a *right* in the employee to receive such compensation."[36]

The *Larsen* court may have indicated its approval of *Petermann* and *Frampton* by pointing to examples of Arizona statutes that could provide exceptions to the general rule of terminability-at-will under a public policy standard.[37] The *Larsen* court stated that the basic standard for such a cause of action is that "the public policy [be] evidenced by either a criminal statute or a statute designed to specifically protect the rights of the employee vis-à-vis the employer."[38]

The court of appeals' approval of a cause of action implied by statute is suggested in a footnote where the court proposes that the question of whether public policy would be advanced by allowing dam-

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both the employment-at-will rule, 174 Cal. App. 2d at 185, 344 P.2d at 26, and the rule regarding satisfaction contracts, *id.* at 187, 344 P.2d at 28, because a failure of consideration prevents contract formation under the former rule but not under the latter. *See* 9 S. WILLISTON, *supra* § 1017, at 133; Blades, *supra* note 3, at 1419-21. The finding of a satisfaction contract was therefore not necessary to the court's holding that the employment-at-will rule can be limited by judicial remedies inferred from a statute. It merely provided an alternative ground for the decision. Thus the *Petermann* rule of inferring a civil cause of action from a perjury statute should be equally applicable in the case where a satisfaction contract is not present.

Because of the possibility of a satisfaction contract in an apparently at-will relationship, the understanding between the parties should be closely scrutinized. In *Larsen*, the allegation was made that the employer had stated to Larsen, "you do a good job and we'll take care of you and you take care of us." Brief for Appellee at 16, Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977). This statement could be interpreted as an understanding that the contract was to continue as long as the appellants' work remained satisfactory. If the understanding constitutes consideration, Larsen should have had an action for breach of contract. 9 S. WILLISTON, *supra*, § 1017, at 133.

31. 174 Cal. App. 2d at 189, 344 P.2d at 27.

32. *Id.* at 186, 344 P.2d at 27. CAL. PENAL CODE § 118 (West 1970) proscribes the commission of perjury. Soliciting the commission of perjury is also a crime. *Id.* § 653f.

33. 260 Ind. 249, 297 N.E.2d 425 (1973).

34. *Id.* at 252, 297 N.E.2d at 428.

35. *Id.*

36. *Id.* at 251, 297 N.E.2d at 427 (emphasis in original).

37. 117 Ariz. at 508 n.1, 573 P.2d at 908 n.1.

38. *Id.* at 508, 573 P.2d at 908 (citing Becket v. Welton Becket & Assocs., 39 Cal. App. 3d 815, 821, 114 Cal. Rptr. 531, 537 (1974)). This language is in agreement with several California cases. *See, e.g.*, Montalvo v. Zamora, 7 Cal. App. 3d 69, 76, 86 Cal. Rptr. 401, 408 (1970); Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 797, 13 Cal. Rptr. 769, 773 (1961); Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959).

ages for termination could arise under certain Arizona statutes unrelated to the facts in *Larsen*.[39] The Arizona statutes offered as examples by the court deal with voting,[40] jury duty,[41] and national guard duty.[42] Notably, each of these statutes is "designed to specifically protect the rights of the employee vis-à-vis the employer."[43] Because the court suggested these employee-protection statutes in implying a cause of action for wrongful termination of employment, the court would likely accept general criminal statutes as well.[44]

Since Arizona has no statute regulating the use of polygraphs by employers,[45] the first part of the court's opinion, requiring statutory evidence of public policy as a prerequisite to a cause of action, precludes any argument concerning either the advisability of such tests[46] or the use of consent forms.[47] *Larsen* may suggest, however, a "bad faith"

39. 117 Ariz. at 508 n.1, 573 P.2d at 908 n.1.

40. ARIZ. REV. STAT. ANN. § 16-897 (1975).

41. *Id.* § 21-236 (Supp. 1978-79).

42. *Id.* §§ 26-167, -168 (Supp. 1978-79).

43. 117 Ariz. at 508, 573 P.2d at 908 (quoting Becket v. Welton Becket & Assocs., 39 Cal. App. 3d 815, 821, 114 Cal. Rptr. 531, 534 (1974)). The Arizona statutes mentioned by the *Larsen* court protect the employees rights by making it a misdemeanor for an employer to dismiss or in any way penalize an employee for engaging in the protected functions. *See* statutes cited notes 40-42 *supra*.

44. That the court listed only these more specific types of statutes should not imply the exclusion of general criminal statutes because the rationale of *Petermann*, involving a general perjury statute, was discussed favorably by the *Larsen* court. 117 Ariz. at 508, 573 P.2d at 908.

The standard for a statutory cause of action apparently does not reach statutes that prescribe right-duty relationships between particular individuals outside of the employment relationship. For example, in Becket v. Welton Becket & Assocs., 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974), the court considered all possible remedies available to an associate and shareholder in an architectural firm who had been discharged from his position for bringing suit against the firm. The associate brought suit in his capacity as co-executor of the estate of the deceased owner of all the shares of stock of the firm. The defendant who had discharged him was likewise co-executor of the estate. The plaintiff was relying on statutes which prescribed the rights and duties of executors, but the court denied relief because such statutes are not designed to protect the rights of the employee vis-à-vis the employer. *Id.* at 821, 114 Cal. Rptr. at 537.

45. In 1976, 15 states had laws regulating the use of lie detectors by private employers. Comment, *Privacy: The Polygraph in Employment*, 30 ARK. L. REV. 35, 37 (1976). Three states prohibited the tests altogether whereas the other twelve would permit an employee to "consent" to the test. *Id.* at 40-41. Many of the statutes authorize fines for a violation while others allow both fines and jail terms. Hermann, *supra* note 16, at 99.

46. The primary argument in favor of polygraph tests is that they assist an employer by indicating the character of prospective employees and facilitating the detection of employee theft and dishonesty. *See generally* R. FERGUSON, THE POLYGRAPH IN PRIVATE INDUSTRY 5-6, 208, 254-96 (1966). However, these alleged capabilities may be entirely illusory in the face of information indicating poor reliability of lie detector tests. *See Hearings, supra* note 16, at 225. Even if there is some truth in the claims advanced by proponents of the tests, the costs to society may not be worth the gains. Privacy is often seriously invaded regardless of whether the test is covertly or overtly administered. Comment, *supra* note 45, at 38. The questions that are asked during the testing session delve into the most intimate details of a person's life, such as sexual habits, religious preferences, marital life, childhood background, political beliefs, and racial attitudes. *See generally* R. FERGUSON, *supra* at 117-51, 296-301.

47. The employer's use of the consent form in this case might not be effective as a valid consent primarily because it is not voluntary—the employee either consents or loses his job. *Cf.* Pipefitters Local 562 v. United States, 407 U.S. 385, 438-42 (1972) (political donations by union members are a result of free choice only when those solicited may decline without loss of job or union membership). *See also* A. WESTIN, PRIVACY AND FREEDOM 240 (1967); Comment, *supra* note 45, at 40.

exception to the terminable-at-will rule.

Judicial Recognition of a Bad Faith Exception

After discussing statutory exceptions to the employment-at-will rule, the *Larsen* court considered the possibility of a common law cause of action for damages where the discharge was "arbitrary and retaliatory."[48] Citing *Geary v. United States Steel Corp.*[49] and *Monge v. Beebe Rubber Co.*,[50] the court observed that some judicial recognition has been accorded this non-statutory cause of action.[51] These two cases illustrate that the common law cause of action for wrongful discharge can be based on two theories, tort[52] or contract,[53] with the underlying theory in each being bad faith.[54]

The Tort Action. In *Geary*, the action was brought in tort, the plaintiff seeking compensatory and punitive damages for his allegedly retaliatory discharge.[55] As in *Larsen*, the broad question before the *Geary* court was whether "to impose judicial restrictions on an employer's power of discharge" in the absence of a statutory or contractual provision from which a cause of action might otherwise be implied.[56] The *Geary* majority denied the cause of action, rejecting the plaintiff's tort-based rationale.[57] Nevertheless, the court qualified the rejection with language that could operate to establish such a cause of

48. 117 Ariz. at 508, 573 P.2d at 908.
49. 456 Pa. 171, 319 A.2d 174 (1974).
50. 114 N.H. 130, 316 A.2d 549 (1974).
51. 117 Ariz. at 508, 573 P.2d at 908.
52. The *Geary* majority recognized that an action for wrongful discharge may be analogized to other tort actions. 456 Pa. at 177, 319 A.2d at 177. Justice Roberts, dissenting in *Geary*, asserted that tort law would be uniquely suited for such an action. *Id.* at 182, 319 A.2d at 185.
53. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974). See Blades, *supra* note 3, at 1419-21, for an analysis of the technical difficulties associated with bringing the action in contract.
54. *See* Monge v. Beebe Rubber Co., 114 N.H. at 133, 316 A.2d at 551; Geary v. United States Steel Corp., 456 Pa. at 174, 319 A.2d at 175. Bad faith is a broad concept that has been variously defined. "In its simplest form, [it] implies breach of faith, wilful failure to respond to plain, well-understood statutory or contractual obligations." NLRB v. Knoxville Pub. Co., 124 F.2d 875, 883 (6th Cir. 1942). If something is "done dishonestly" it is done in bad faith. Potoczny v. Dydek, 192 Pa. Super. 550, 560, 162 A.2d 70, 75 (1960). Bad faith is not simply bad judgment or negligence, but a dishonest purpose or some moral obliquity, implying conscious doing of wrong. Spiegel v. Beacon Participations, Inc., 297 Mass. 398, 416, 8 N.E.2d 895, 907 (1937).
55. 456 Pa. at 172, 319 A.2d at 174. Geary, a salesman, had advised his employer that a certain product being sold was unsafe and constituted a serious danger to anyone who used it. *Id.* Geary asserted that his concern was in the best interests of both the public and his employer but that because of his concern he was summarily discharged without notice. *Id.*
56. *Id.* at 173, 319 A.2d at 176.
57. *Id.* at 177, 319 A.2d at 180. The *Geary* majority emphasized that no court in its jurisdiction had "ever recognized a non-statutory cause of action for an employer's termination of an at-will employment relationship." *Id.* at 172, 319 A.2d at 175. "Absent a statutory or contractual provision to the contrary, the law has taken for granted the power of either party to terminate an employment relationship for any or no reason." *Id.* at 173, 319 A.2d at 176.

action under certain circumstances.[58]

If *Larsen* can be read as rejecting only the contractual cause of action, *Geary* is worth analyzing because it discusses the possibility of tort actions in employment-at-will contracts.[59] The *Geary* majority emphasized that a "specific intent on the part of the defendant to cause harm to the plaintiff must be alleged to make out a cause of action."[60] In applying this principle to the case before it, the court found nothing in the record to indicate the plaintiff was fired for the "specific purpose of causing him harm, or coercing him to break any law or otherwise to compromise himself."[61] This finding, among others, was a reason for the court's denial of the cause of action, implying that an action might have been allowed if a specific intent to harm had been shown.

Although this implication is weakened by the court's concern over allowing such an action without a statutory or contractual underpinning,[62] it is strengthened by other important language in *Geary*. The court stated that "where the complaint itself discloses a *plausible and legitimate* reason for terminating an at-will employment relationship and no clear mandate of public policy is violated thereby, an employee at will has no right of action against his employer for wrongful discharge."[63] This qualifying element of the holding implies that a discharge based on implausible or illegitimate motives may be actionable.[64] If this is a proper reading of the language, it heralds a trend away from the classic formulation of the employment-at-will rule that bad faith discharges will not give rise to any liability. Based upon the language of *Geary* and the implications of *Larsen*, it may be possible to conclude that in Arizona a bad faith discharge, without at least the color of legitimacy, may justify an award in tort.[65]

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58. *Id.* at 177, 319 A.2d at 180. See text and note 60 *infra*.

59. Tort may be a more jurisprudentially acceptable basis for a bad faith exception than contract. See Blades, *supra* note 3, at 1419-27 (discussing both forms of the action).

60. 456 Pa. at 174, 319 A.2d at 177.

61. *Id.* at 175, 319 A.2d at 178.

62. *Id.* at 173, 319 A.2d at 176.

63. *Id.* at 177, 319 A.2d at 180 (emphasis added). The *Geary* court seemed to recognize that there could be reasons which are not plausible or legitimate, but which do not amount to violations of specific statutes or common law principles. *Id.* at 174, 319 A.2d at 177. This is judicial recognition of the notion that a distinction can be made between the "reasonable demands of an employer and those which are overreaching." *See* Blades, *supra* note 3, at 1406.

64. These motives may be classified as bad faith or overreaching where the employer's coercion bears "no reasonable relationship to the employment." *See* Blades, *supra* note 3, at 1406. Such conduct is often intended to cause the employee to sacrifice his professional integrity for the material well-being of the employer. *Id.* at 1406-10. When these motives result in discharge or discrimination it can be referred to as retaliatory conduct because the employee is punished for failing to respond. See note 26 *supra*. It is conceivable that even a purely arbitrary discharge might be impermissible as not for a plausible or legitimate reason. Justice Roberts, dissenting in *Geary*, argued for a cause of action that would redress this type of conduct. 456 Pa. at 182, 319 A.2d at 185.

65. Assuming that a cause of action for damages is allowed, the damages could be based on relatively objective criteria. The damages should consist of the economic expenses associated with

The Contract Action. A different cause of action for wrongful discharge, one based on contract, was announced in the New Hampshire Supreme Court's landmark decision of *Monge v. Beebe Rubber Co.*[66] *Monge* held that "termination by the employer of a contract of employment at will which is 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."[67] By this reasoning, a common law exception to the general employment-at-will rule has been introduced, based specifically on bad faith, malice, or retaliation.[68]

The *Monge* bad faith rationale was expressly rejected in *Larsen*.[69] The Arizona court perceived *Monge* to conflict with the employment-at-will rule established by the Arizona Supreme Court in *Builders Supply Corp. v. Shipley*.[70] However, the *Larsen* court could have adopted a limited bad faith standard that would arguably be consistent with *Builders Supply*.[71] There appears in *Larsen* language which seems to utilize such a standard to rule against the plaintiffs: "*On the facts of this case*, we see no reason to circumscribe an employer's right to terminate an employee for his refusal to follow company policy."[72] This language suggests a standard for evaluating bad faith that accepts the rule of *Builders Supply* except in cases, unlike *Larsen*, where the facts show malicious or arbitrary action.[73]

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finding new employment, the loss of earnings during that period, and the differential loss of earnings, if any, between the income from the new employment and that from the previous employment. *See* Blades, *supra* note 3, at 1413. The discharged employee would probably be under an obligation to mitigate such damages. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941) (appropriate to deduct from backpay award money the worker could have earned during the backpay period). Besides economic losses, an additional element of damages flows from the "stigma and mental anguish which normally accompany being fired." See Blades, *supra* note 3, at 1413. This last element of damages, however, could only be sought under a tort cause of action for wrongful discharge and could not be an element of a contractual cause of action for damages. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 552 (1974).

66. 114 N.H. 130, 316 A.2d 549 (1974).

67. *Id.* at 133, 316 A.2d at 551.

68. Malice and retaliation may be considered variations of the generic term "bad faith." *See* note 54 *supra*.

69. 117 Ariz. at 509, 573 P.2d at 909. The court stated: "*Monge* does not represent the law in Arizona. In our opinion, our Supreme Court would extend the rule in *Builders Supply Corp. v. Shipley* . . . to exclude the application of a 'bad faith' exception to employment contracts of an indefinite term." *Id.* Even though *Larsen* did not adopt a bad faith standard, it used the standard to facilitate its decision. Perhaps the court was hinting that if it were not bound by the supreme court's rule in *Builders Supply*, it would be willing to recognize a limited bad faith exception.

70. *Id.* at 508, 573 P.2d at 908 (citing 86 Ariz. 153, 341 P.2d 940 (1959)). In *Builders Supply*, the court stated that employment-at-will agreements "may be terminated by either party." 86 Ariz. at 155, 341 P.2d at 941.

71. *See* text & notes 78-90 *infra*.

72. 117 Ariz. at 509, 573 P.2d at 909 (emphasis added).

73. Reading this statement in conjunction with a preceding suggestion that if bad faith will be shown at all it will be through "specific facts" rather than "general allegations," *id.*, implies the court's anticipation that some set of facts evidencing bad faith could justify limiting the employment-at-will rule.

Assuming the *Larsen* court might apply such a standard, it would require the plaintiff to go beyond general allegations; he must "advance . . . specific facts showing bad faith."[74] In addition, it appears that an employee may have a duty to negotiate alternative procedures,[75] which indicates that had the court adopted a bad faith standard it might have been a limited one.[76] The plaintiffs in *Larsen* did not allege such facts, nor did they attempt to negotiate a better procedure. Thus they could not have recovered under a bad faith theory even if one were available.[77]

Distinguishing Builders Supply

The *Larsen* court cited *Builders Supply* as requiring its rejection of the bad faith cause of action.[78] However, there are two reasons why *Builders Supply* need not have deterred the court from establishing a bad faith exception to the employment-at-will rule. First, a limited bad faith exception does not significantly conflict with the rule at all, since the rule as phrased in *Builders Supply* is set forth in terms that fail to mention, as some versions of the rule do, that discharge is permitted even for reasons that are morally wrong.[79] It would be a justifiable change to say that the employer can still discharge at will with the limit

74. *Id.* For example, the plaintiffs' assertion that signing the consent form would have been "subscribing to falsehoods which would be offensive to reasonable traditional moral principles" and that "their discharge in retaliation for refusing to sign a morally offensive document" did not show bad faith. *Id.* at 508, 573 P.2d at 908. This "specific facts" requirement is similar to the specific intent requirement in *Geary*. See text & notes 60-64 *supra*. Since bad faith requires a relatively high degree of culpability, *see* note 54 *supra*, specific facts would be necessary to show direct evidence of employer bad faith with respect to the consent form.

75. 117 Ariz. at 509, 573 P.2d at 909.

76. Assuming that a bad faith discharge begins with employer overreaching or bad faith conduct, met by employee resistance which results in retaliatory discharge, see Blades, *supra* note 3, at 1406-10, a broad bad faith standard would at least require proof that discharge resulted from resistance to overreaching conduct. But under such a broad standard, employee resistance amounting to a general defiance might suffice with the focus concentrating on the nature of the employer's conduct. The standard implied in *Larsen*, however, suggests a duty on the employee to affirmatively propose acceptable alternative procedures for effectuating company policy. 117 Ariz. at 509, 573 P.2d at 909. The appellants in *Larsen* failed to carry out this duty because they did not "attempt to correct the consent form, suggest a substitute, or negotiate a different procedure. They simply refused to sign the consent form . . . ." *Id.* Under this view, the duty imposed on the employee must be satisfied before the employer's duty not to discharge in bad faith may be activated. If the employer then continues to pursue a bad faith policy and discharges the employee, it will be more likely that the employee can "advance the specific facts" required to support his claim of bad faith. *See id.*

77. *See* 117 Ariz. at 509, 573 P.2d at 909.

78. *Id.*

79. *See* Builders Supply Corp. v. Shipley, 86 Ariz. 154, 155, 341 P.2d 940, 941 (1959). The Arizona rule as described in *Builders Supply* does not expressly permit bad faith termination. See note 21 *supra*. Furthermore, the court of appeals' statement that the supreme court would probably *extend* the rule to exclude the application of a bad faith exception to employment-at-will contracts, 117 Ariz. at 509, 573 P.2d at 909, could be interpreted to mean that the present rule does not necessarily include bad faith as a valid reason for terminating employment. Therefore, it could be argued that the *Builders Supply* rule would not be diluted by granting a bad faith cause of action.

that he may not discharge for a bad faith reason. This principle is realistic and reasonable, and has been recognized in another context.[80]

The other reason that *Larsen* could have established a bad faith exception is that the facts in *Builders Supply* do not provide a satisfactory basis for denying a bad faith rationale. *Builders Supply* did not involve the employment-at-will relationship present in *Larsen*. Instead, the plaintiff in *Builders Supply* was an independent contractor.[81] The fact that the contract in both cases was "at-will" is only a superficial similarity that should not be the basis for controlling the outcome in *Larsen*. Instead, a distinction between the cases should be made based on the differences between independent contractors and employees. Independent contractors enjoy the right to control their own work performance.[82] This, among other characteristics,[83] distinguishes them as self-employed business people. Employees, however, are subject to employer supervision and are accountable not only for final results but also the means by which they accomplish their work.[84] Thus a greater opportunity may be presented for the employee to be subjected to employer overreaching or bad faith.[85]

The major factor that makes employer bad faith possible is inequality of bargaining power,[86] to which both independent contractors and employees are exposed.[87] Nevertheless, our national labor policy,

80. The prima facie tort concept provides that a bad or ulterior motive is actionable if damage is done to another's property or trade "without just cause or excuse." Sundowner, Inc. v. King, 95 Idaho 367, 368-69, 509 P.2d 785, 786-87 (1973); Mogul Steamship Co. v. McGregor, Gow & Co., 23 Q.B.D. 598, 613 (C.A. 1889). This basic principle has been reaffirmed in cases analogous to employer bad faith. *See, e.g.*, Norton v. Randolph, 176 Ala. 381, 390, 58 So. 283, 286 (1912); Barclay v. Abraham, 121 Iowa 619, 622, 96 N.W. 1080, 1083 (1903). *See* Blades, *supra* note 3, at 1421-27.

81. The plaintiff in *Builders Supply* was an "independent trucker" licensed by the Arizona Corporation Commission to haul brick and concrete block for the defendant manufacturer. 86 Ariz. at 154, 341 P.2d at 941. In Fry v. Industrial Comm'n, 26 Ariz. App. 140, 546 P.2d 1149 (1976), the court distinguished an independent contractor from an employee as one who "represents the will of his employer only as to the result of his work and not as to the means by which it is accomplished." *Id.* at 141, 546 P.2d at 1150. The court went on to state that the characteristics of an independent contractor are determined by the "right to control" test and that "[t]he critical factor is not the actual exercise of the supervision and control but the existence of the right to do so." *Id.* at 142, 546 P.2d at 1151.

82. RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958). *See also* Fry v. Industrial Comm'n, 26 Ariz. App. 140, 140-41, 546 P.2d 1149, 1150-51 (1976).

83. *See generally* Fry v. Industrial Comm'n, 26 Ariz. App. 140, 546 P.2d 1149 (1976) (such other characteristics may include a personal financial investment, leasing of business assets, and income based on profits).

84. *See* Fry v. Industrial Comm'n, 26 Ariz. App. 140, 141, 546 P.2d 1149, 1150 (1976).

85. *See* Blades, *supra* note 3, at 1406-10.

86. A majority of the Supreme Court in Coppage v. Kansas, 236 U.S. 1 (1915), upheld the employment-at-will rule by striking down a state statute forbidding an employer from discharging an employee for union activities. The majority believed that the doctrine of freedom of contract as manifested in the employment-at-will rule required this result and the recognition of an inequality of bargaining power as a legitimate incident to it. *Id.* at 17. Mr. Justice Holmes maintained in dissent, however, that "equality of bargaining position [is the point] at which freedom of contract begins." *Id.* at 27.

87. *See* Builders Supply Corp. v. Shipley, 86 Ariz. 153, 156, 341 P.2d 940, 941 (1959).

as expressed in the National Labor Relations Act, excludes independent contractors from the protections accorded employees.[88] Perhaps implicit in this exclusion is a recognition of the status of an independent contractor as similar to that of any other self-employed business person.[89] It is therefore more likely, since they have to assume and be prepared to deal with business risks, that independent contractors will be better able to cope with employer bad faith than an employee, who is generally much more dependent on his employer.[90] For these reasons, *Builders Supply* may be distinguishable from *Larsen*. If so, the limited bad faith standard inchoate in the *Larsen* opinion could be activated to redress the reasonable but frustrated expectations of employees while at the same time preserving all of the desirable aspects of the employment-at-will rule.

Conclusion

The court in *Larsen v. Motor Supply Co.* has suggested an exception to the employment-at-will rule by acknowledging that a cause of action for wrongful discharge may be derived from certain statutes. The decision can be fairly read to propose a standard which requires that the cause of action be derived from a criminal statute or a statute designed to protect the rights of the employee.

The court declined to adopt a common law bad faith exception to the employment-at-will rule. However, the emphatic rejection of this common law action is belied by the court's evaluation of the allegations against the employer. This evaluation, combined with the court's conclusion that bad faith was not evidenced by the facts in this case, suggests the possible utilization of a bad faith standard in situations in which bad faith is evident.

The court felt that earlier case law expressing the employment-at-

88. 29 U.S.C. § 158 (1976).

89. With the Taft-Hartley Amendments, the National Labor Relations Act was transformed from an instrument designed to promote the rights of labor exclusively to one more concerned than ever before with equality of bargaining power. *See* A. COX, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 88-94 (8th ed. 1977). The amendments specifically excluded independent contractors from the protections of the Act, but little was said in the legislative history other than "independent contractors can in no sense be considered to be employees." *See* H.R. REP. NO. 510, 80th Cong., 1st Sess., *reprinted in* [1947] U.S. CODE CONG. SVC. 1138.

90. *See* J. GALBRAITH, AMERICAN CAPITALISM 114 (2d ed. 1956). "Because of his comparative immobility, the individual worker has long been highly vulnerable to private economic power." *Id. See also* Blades, *supra* note 3, at 1405 (if "every employee could go from job to job with complete ease, there would be little need to provide other means of escape from the improper exertion of employer pressure."). This may provide another reason to give greater protection to an employee than to an independent contractor. An example of the ability of independent businessmen to control their business risks is the trade association. Thus the National Association of Automobile Dealers obtained substantial protection for wrongfully disenfranchised dealers by strong lobbying for the Federal Automobile Dealer Franchise Act of 1956. 15 U.S.C. §§ 1221-1225 (1976).

will rule precluded adoption of a bad faith exception. The precedent might be distinguishable, however, because it involved an independent contractor instead of an employee. If so, the limited bad faith standard abstracted as an interpretation of the opinion could have future utility by giving effect to reasonable employee expectations while at the same time acknowledging all justifiable applications of the employment-at-will rule.

IV. PROPERTY LAW

A. THE CLASSIFICATION OF DISABILITY RETIREMENT BENEFITS: COMMUNITY PROPERTY TEST OR PERSONAL INJURY ANALOGY?

Community property states have recently been faced with the problem of classifying disability retirement benefits.[1] These benefits are property rights that the community receives once a spouse retires as a result of injury.[2] They are analogous to retirement benefits since the spouse receives payments only after employment has been discontinued.[3] The wage earner receives disability retirement benefits partly because he has worked a specific number of years in conformance with his employment contract and partly because of his disability.[4] Retirement benefits, however, are received solely because the employee complies with employment contract terms.[5] The factor distinguishing these two types of benefits is that the wage earner receives disability retirement benefits after involuntarily retiring because of disability.[6]

Most community property states classify disability retirement benefits by employing a standard test that considers the source of property acquisition.[7] Benefits originating prior to the marriage or acquired by

1. *See* Van Loan v. Van Loan, 116 Ariz. 272, 273-74, 569 P.2d 214, 215-16 (1977); Provinzano v. Provinzano, 116 Ariz. 571, 573, 570 P.2d 513, 515 (Ct. App. 1977); *In re* Marriage of Loehr, 13 Cal. 3d 465, 466, 531 P.2d 425, 426, 119 Cal. Rptr. 113, 114 (1975); Guy v. Guy, 98 Idaho 205, 206, 560 P.2d 876, 877 (1977); Busby v. Busby, 457 S.W.2d 551, 552 (Tex. 1970).

2. There are several types of disability benefits, two of which are the most common. First, social security benefits accrue if the individual eligible for these benefits has worked in a gainful or compensatory job, has a mental or physical disability which has lasted for at least twelve months, or if death is expected to result from the disability. *See* 42 U.S.C. § 416 (i) (1) (1976); Gilbert, *The Social Security Disability Claims Process*, 55 MICH. ST. B.J. 322, 322 (1976). Second, worker's compensation benefits can be received if the employee has been killed or injured "by accident arising out of and in the course of his employment." ARIZ. REV. STAT. ANN. § 23-1021 (A) (1971). In order for the employee to be eligible for these benefits, the employee must be within the provisions of the worker's compensation act and/or covered by insurance in the state compensation fund. The employee and the employee's dependents may receive compensation. *Id.*

3. *See* Flowers v. Flowers, 118 Ariz. 577, 578, 578 P.2d 1006, 1007 (Ct. App. 1978); 10 U.S.C. § 1201 (1976); Interview with Virginia Hash, Attorney, in Tucson, Arizona (September 1978); Note, *Military Retirement Benefits as Community Property: New Rules from the Supreme Court?*, 24 BAYLOR L. REV. 235, 238 (1972).

4. *See* Van Loan v. Van Loan, 116 Ariz. 272, 273, 569 P.2d 214, 215 (1977). In *Herring v. Blakeley*, 385 S.W.2d 843, 846 (Tex. 1965), the court stated that retirement benefits were manifestly additional compensation for faithful and continuous services. In *Kirkham v. Kirkham*, 335 S.W.2d 393, 394 (Tex. Civ. App. 1960), the court stated that retirement pay is an earned property right which accrues by reason of years of service. *See also* Comment, *The Employee's Retirement Income Security Act of 1974—The Spouse's Interest or Non-Interest in a Community Property Asset*, 12 CAL. W.L. REV. 560, 567 (1976).

5. *See In re* Marriage of Brown, 15 Cal. 3d 838, 846, 544 P.2d 561, 566, 126 Cal. Rptr. 633, 638 (1976).

6. Flowers v. Flowers, 118 Ariz. 577, 580, 578 P.2d 1006, 1009 (Ct. App. 1978).

7. *See In re* Estate of Messer, 118 Ariz. 291, 292, 576 P.2d 150, 152 (Ct. App. 1978); Neely v.

means not attributable to community effort are considered separate property; otherwise they are presumed to be community property.[8] This is in accordance with the general rule that interests earned by community labor or industry or acquired by the expenditure of community property are considered community property,[9] and benefits acquired by either spouse before marriage, after marriage, or by gift, devise, or descent are considered separate property.[10] Yet some states utilize alternative tests, and the test employed by a particular state significantly affects the classification of disability retirement payments.[11]

Courts have difficulty classifying disability retirement benefits because of their similarity to pure disability benefits and simple retirement benefits,[12] and because of their compensatory nature, which makes them similar to personal injury awards.[13] Arizona courts follow the majority rule and classify retirement and pension benefits as community or separate property by studying how the benefits were ac-

Neely, 115 Ariz. 47, 51, 563 P.2d 302, 306 (Ct. App. 1977); Suter v. Suter, 97 Idaho 461, 465, 546 P.2d 1169, 1173 (1976); Burdick v. Pope, 90 Nev. 28, 28, 518 P.2d 146, 146 (1974); Marquez v. Marquez, 85 N.M. 470, 472, 513 P.2d 713, 715 (1973); Key v. Cascade Packing Co., 19 Wash. App. 579, 582, 576 P.2d 929, 932 (1978).

8. *See* cases cited in note 7 *supra*.

9. *See* Provinzano v. Provinzano, 116 Ariz. 571, 572, 570 P.2d 513, 514 (Ct. App. 1977) (disability and retirement benefits); Everson v. Everson, 24 Ariz. App. 239, 243, 537 P.2d 624, 628 (1975) (pension benefits); *In re* Freeburn's Estate, 97 Idaho 845, 848-49, 555 P.2d 385, 388-89 (1976); Beam v. Beam, 18 Wash. App. 444, 450, 569 P.2d 719, 725 (1977); ARIZ. REV. STAT. ANN. § 25-211 (1976).

10. *See* Provinzano v. Provinzano, 116 Ariz. 571, 572, 570 P.2d 513, 514 (Ct. App. 1977) (disability and retirement benefits); Everson v. Everson, 24 Ariz. App. 239, 243, 537 P.2d 624, 628 (1975) (pension benefits); *In re* Freeburn's Estate, 97 Idaho 845, 848-49, 555 P.2d 385, 388-89 (1976); Beam v. Beam, 18 Wash. App. 444, 450, 569 P.2d 719, 725 (1977); ARIZ. REV. STAT. ANN. § 25-213 (1976).

11. For example, the test used by the Arizona Court of Appeals in *Flowers* was to classify disability retirement benefits by analogizing them to personal injury awards, which are treated as community property in Arizona. 118 Ariz. at 579, 578 P.2d at 1008. California courts also analogize disability retirement benefits to personal injury damages, but with a different result. *See In re* Marriage of Jones, 13 Cal. 3d 457, 464, 531 P.2d 420, 425, 119 Cal. Rptr. 108, 113 (1975). This is because California classifies the right to personal injury awards as separate property. *Id.* at 462, 531 P.2d at 424, 119 Cal. Rptr. at 112. Payments received during the marriage, however, are considered community property because they take the place of income. *Id.* The reason for this position is that the portion of damages in the award for injuries personal to the spouse cannot be apportioned in California; therefore the entire cause of action is treated as community property in order to protect the community's interest in the cause of action. Washington v. Washington, 47 Cal. 2d 249, 253-54, 302 P.2d 569, 573-74 (1956). When the marriage terminates after the cause of action accrues, the community interest is eliminated and the damages are classified as separate property. *Id.*

12. Judge Jacobson, concurring in *Flowers*, considered the problem to be the distinction between disability benefits and semi-retirement disability benefits. 118 Ariz. at 579, 578 P.2d at 1008. *See* discussion at notes 39-40 *infra*.

13. This difficulty was present in *Flowers* where the appeals court stated that it could not distinguish disability retirement benefits from personal injury damages. 118 Ariz. at 579, 578 P.2d at 1008. Because a personal injury award in cases factually similar to *Flowers* would have been community property, *see* Heimke v. Munoz, 106 Ariz. 26, 27, 470 P.2d 107, 108 (1970); Delozier v. Smith, 22 Ariz. App. 136, 138, 524 P.2d 970, 972 (1974), the court held that disability retirement benefits were likewise community property. 118 Ariz. at 579, 578 P.2d at 1008. *Contra, In re* Marriage of Jones, 13 Cal. 3d 457, 464, 531 P.2d 420, 425, 119 Cal. Rptr. 108, 113 (1975) (disability pay classified as separate property because of similarity to personal injury awards).

quired.[14] Arizona courts do not, however, follow the majority in the classification of disability retirement benefits.

In *Flowers v. Flowers*,[15] the Arizona Court of Appeals considered whether a divorcee was entitled to share her former husband's future disability retirement benefits when the husband had not been entitled to those benefits until after the petition for dissolution had been filed, but before the divorce was final.[16] The disability retirement benefits in *Flowers* were a category of benefits not dealt with previously by the Arizona appellate courts.[17] Holding that the benefits were community property, the court affirmed the trial court's decree according to the wife a one-half interest in the benefits.[18] The court labeled these benefits community property by using a test that analogized them to personal injury damage awards.[19]

This casenote will discuss the Arizona Court of Appeals' treatment of the two major issues in *Flowers*: (1) whether disability retirement benefits were properly held to be community property; and (2) whether the wife was entitled to share in disability retirement benefits when the disability occurred after the dissolution petition was filed. In the course of this discussion, Arizona community property law will be considered in order to provide a background against which the reasoning of the court of appeals in *Flowers* can be analyzed.

Arizona Community Property Law

For purposes of community property law, assets are acquired in two ways. Property that has come to the community through the earnings, labor, or community consideration of either spouse during marriage is considered property acquired by onerous title.[20] Property acquired by a spouse prior to the marriage or by gift, devise, or descent

14. In Van Loan v. Van Loan, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977), the court held that military retirement benefits could be considered community property or separate property depending on how such benefits were acquired. *See also* Provinzano v. Provinzano, 116 Ariz. 571, 572, 570 P.2d 513, 514 (Ct. App. 1977).

15. 118 Ariz. 577, 578 P.2d 1006 (Ct. App. 1978).

16. *Id.* at 578, 578 P.2d at 1007.

17. Arizona courts have previously discussed the classification of disability benefits and retirement benefits. *See* Van Loan v. Van Loan, 116 Ariz. 272, 273-74, 569 P.2d 214, 215-16 (1977); Provinzano v. Provinzano, 116 Ariz. 571, 573, 570 P.2d 513, 515 (Ct. App. 1977). Pension interests were dealt with in Everson v. Everson, 24 Ariz. App. 239, 244, 537 P.2d 624, 629 (1975). Another type of benefit, however, that Judge Jacobson labeled as the semi-retirement disability benefit, 118 Ariz. at 580, 578 P.2d at 1009, had not been dealt with prior to *Flowers*.

18. Mrs. Flowers was awarded a one-half interest in the disability retirement benefits arising from her husband's employment payable by the United States Civil Service Commission, the vested contributions in the United States Civil Service Retirement System arising from her husband's employment, and the benefits, if any, under a union group policy. 118 Ariz. at 578, 578 P.2d at 1007.

19. *Id.* at 579, 578 P.2d at 1008.

20. *Id.* at 577, 578 P.2d at 1006.

is property acquired by lucrative title.[21] Property acquired by lucrative title is classified as the separate property of the recipient spouse, and property acquired by onerous title is usually considered community property.[22] Arizona community property law relating to the disposition of separate and community property is determined by statutes[23] that are in accordance with these rules.[24]

The appeals court in *Flowers* likened future disability retirement benefits to personal injury damages and held that these benefits are community property because of their compensatory nature.[25] The rationale for this rule is that the damages compensate the injured wage earner's family for the loss of earning capacity and that the earnings are generally community property.[26] The *Flowers* court found that disability retirement benefits serve this same compensatory purpose,[27] and that such benefits should be distributed in the same manner as personal

21. *Id.*

22. *Id.* at 581, 578 P.2d at 1010 (Jacobson, J., concurring). *See* ARIZ REV. STAT. ANN.§ 25-211 (1976), which provides: "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, is the community property of the husband and wife." ARIZ. REV. STAT. ANN § 25-213 (1976) states: "All property, real and personal, of each spouse, owned by such spouse before marriage, and that acquired afterward by gift, devise or descent, and also the increase, rents, issues and profits thereof, is the separate property of such spouse." Exceptions to the rule enuciated in the statutes are found in Arizona case law. *See* Franklin v. Franklin, 75 Ariz. 151, 155, 253 P.2d 337, 341 (1953) (commingled funds are community property unless the presumption can be overcome by clear and satisfactory evidence); Lincoln Fire Ins. Co. v. Barnes, 53 Ariz. 264, 268, 88 P.2d 533, 537 (1939) (presumption that all property acquired during marriage is community can be overcome by contrary intent of the parties); Rundle v. Winters, 38 Ariz. 239, 245, 298 P. 929, 935 (1931) (income from separate property managed by a spouse is community property to the extent that the amount is attributable to the spouse's efforts); Neely v. Neely, 115 Ariz. 47, 51, 563 P.2d 302, 306 (Ct. App. 1977) (presumption that property acquired during marriage is community property rebutted by evidence that a party has made a gift of his interest in the community property); Nelson, v. Nelson, 114 Ariz. 369, 371, 560 P.2d 1276, 1278 (Ct. App. 1976) (profits of a business classified in accordance with whether they are the result of individual toil and application of the spouse or the inherent qualities of the business); Jizmejian v. Jizmejian, 16 Ariz. App. 270, 272, 492 P.2d 1208, 1210 (1972) (character of movables as separate or community is determined by the laws of the matrimonial domicile at the time of the acquisition, and separate property retains its separate character).

23. ARIZ. REV. STAT. ANN. §§ 25-211, -213 (1976). See discussion at note 22 *supra.*

24. *See* Nace v. Nace, 104 Ariz. 20, 22, 448 P.2d 76, 78 (1968) (court looks to source of property acquisition); Kingsbery v. Kingsbery. 93 Ariz. 217, 222, 379 P.2d 893, 898 (1963) (nature of property is fixed at acquisition); Mortensen v. Knight, 81 Ariz. 325, 331, 305 P.2d 463, 469 (1956) (earnings of the spouses are community property); Flynn v. Allender, 75 Ariz. 322, 324, 256 P.2d 560, 562 (1953) (means of acquisition determines the status of the property); Shaw v. Greer, 67 Ariz. 223, 225, 194 P.2d 430, 432 (1948) (earnings during marriage are community property).

25. 118 Ariz. at 579, 578 P.2d at 1008. In Kenyon v. Kenyon, 5 Ariz. App. 267, 269-70, 425 P.2d 578, 581-82 (1967), the court held that the personal injury damages of either spouse are community property. Personal injury damages have been considered community property since 1926 when the Arizona Supreme Court held that personal injury awards were compensatory in nature. Pacific Constr. Co. v. Cochran, 29 Ariz. 554, 555, 243 P. 405, 406 (1926). Awards for personal injuries are not, however, expressly included under ARIZ. REV. STAT. ANN. § 25-211 (1976). *See also* Heimke v. Munoz, 106 Ariz. 26, 27, 470 P.2d 107, 108 (1970); Dawson v. McNaney, 71 Ariz. 79, 84, 223 P.2d 907, 912 (1950); Delozier v. Smith, 22 Ariz. App. 136, 138, 524 P.2d 970, 972 (1974).

26. 118 Ariz. at 579, 578 P.2d at 1008.

27. *Id.*; *cf.* Guerrero v. Guerrero, 18 Ariz. App. 400, 402, 502 P.2d 1077, 1079 (1972) (to the extent social security disability benefits take the place of past earnings, they are community property).

injury awards.[28]

The reasoning in *Flowers* is somewhat inconsistent with that adopted earlier in *Provinzano v. Provinzano*,[29] where the Arizona Court of Appeals indicated that future disability and retirement benefits were community property.[30] In *Provinzano*, the court reversed the trial court's finding that the entire community interest in disability and retirement benefits belonged to the husband.[31] The *Provinzano* court relied on *Van Loan v. Van Loan*,[32] where the Arizona Supreme Court dealt with the classification of pension benefits. The *Van Loan* court held that to the extent such a property right is earned through community effort, it is properly divisible by the court upon divorce.[33] Since the court of appeals relied on *Provinzano* for its decision in *Flowers*,[34] that community property analysis should apply to disability retirement benefits as well. Thus, it was inconsistent for the *Flowers* court to analogize personal injury awards to disability retirement benefits when *Provinzano* held that disability and retirement benefits should be analyzed according to Arizona community property law.

Distinguishing Classes of Monetary Awards

The personal injury analogy should not have been applied to the disability retirement benefits in *Flowers* because of the dissimilarity of these benefits to personal injury damages. Although the court of appeals in *Flowers* stated that it could not rationally distinguish personal injury damages awarded during marriage from disability retirement benefits,[35] a distinction clearly exists. Personal injury damages are accorded special treatment in Arizona and are classified as community property when received during marriage regardless of their source.[36] They are monetary awards given after one has received a judgment in a civil proceeding.[37] These awards, unlike retirement and disability benefits, are not part of an employment contract and are not based on past

28. 118 Ariz. at 579, 578 P.2d at 1008.

29. 116 Ariz. 571, 570 P.2d 513 (Ct. App. 1977). The main issue in this case was not whether the disability and retirement benefits could be considered community property, but whether the trial court had equitably distributed these community assets upon marriage termination. The appeals court affirmed the trial court's determination that the benefits were community property. *Id.* at 572 n.1, 570 P.2d at 514 n.1.

30. *Id.* at 572, 570 P.2d at 514; see note 29 *supra*.

31. 116 Ariz. at 575, 570 P.2d at 516.

32. 115 Ariz. 272, 569 P.2d 214 (1977).

33. *Id.* at 274, 569 P.2d at 216.

34. 118 Ariz. at 578-79, 578 P.2d at 1007-08.

35. *Id.* at 579, 578 P.2d at 1008. *Contra, In re* Marriage of Jones, 13 Cal. 3d 457, 462, 531 P.2d 420, 424, 119 Cal. Rptr. 108, 112 (1975).

36. *See* notes 25-26 *supra*.

37. Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA*, 25 U.C.L.A. L. Rev. 417, 422-23 (1978).

employment services.[38] They are derived from a source not funded by the community effort.

Although both disability retirement payments and personal injury awards take the place of the wage earner's wages,[39] this similarity is not a legitimate justification for classifying disability retirement benefits in the same way as personal injury damages. Such a classification disregards the fact that disability retirement benefits accrue partly because the spouse has earned the right to receive them through years of employment service.[40] Thus, classifying disability retirement benefits as community property without ascertaining their source would unjustly give to the community interests of the spouse earned prior to the marriage.

The danger in comparing personal injury damages to disability retirement benefits is well illustrated by Judge Jacobson's special concurrence in *Flowers* where he states that the primary concern should be whether a property right has been acquired by onerous or lucrative title.[41] He states that "pure disability benefits" may be separate property if they represent "a societal responsibility" and are, therefore, acquired by lucrative title.[42] According to Judge Jacobson, the benefits in *Flowers* were "semi-retirement disability payments" and should be presumed community property in the absence of evidence showing that they were acquired by lucrative title.[43] Clearly, a comparison with personal injury awards is unnecessary.

Pension plans are similar to disability retirement and semi-disability retirement plans because they are based upon duration of employment and are part of the employee's employment contract. In classifying pension benefits as community or separate property, the courts of both Arizona[44] and California[45] look to the nature of the

38. *Cf. In re* Marriage of Brown, 15 Cal. 3d 838, 846, 544 P.2d 561, 566, 126 Cal. Rptr. 633, 638 (1976) (employee could enforce his right to pension either under traditional contract principles of offer, acceptance, and consideration or under the doctrine of promissory estoppel).

39. 118 Ariz. at 579, 578 P.2d at 1008. *See* discussion and cases cited at notes 25-27 *supra*.

40. 118 Ariz. at 581, 578 P.2d at 1010.

41. *Id.* Judge Jacobson reasoned that before disability benefits were classified as community or separate assets their mode of acquisition must be determined. *Id.*

42. *Id.* at 582, 578 P.2d at 1011. Judge Jacobson reasoned that:

> [worker's] compensation benefits and service connected disability payments are received, not as the result of past labors and thus "earned", but rather by society's decision, through the legislative process, that work related injuries and their results are a societal responsibility, rather than an individual responsibility. In this sense they are acquired by lucrative title rather than onerous title and as such are separate property.

Id.

43. Judge Jacobson stated that semi-retirement disability benefits are based in part on the length of service and in part on the type of percentage of disability. These benefits can be separate property if based upon labor prior to marriage. *See id.* at 581, 578 P.2d at 1010; discussion and cases cited at note 2 *supra*.

44. *See* Neal v. Neal, 116 Ariz. 590, 593, 570 P.2d 758, 761 (1977); Everson v. Everson, 24 Ariz. App. 239, 244, 537 P.2d 624, 629 (1975).

45. *See In re* Marriage of Brown, 15 Cal. 3d 838, 841, 544 P.2d 564, 565, 126 Cal. Rptr. 633,

funding source.[46] If a portion of the plan is earned during marriage, that portion is classified as community property; if not, it is classified as separate property.[47] Since disability retirement benefits are partially acquired by onerous title,[48] spousal and community interests would be protected if the benefits were categorized in compliance with general Arizona community property law, depending upon the manner of their acquisition by the community.[49] The key to deciding what interests belong to the spouse as separate property or to the community is whether the property has been acquired by onerous or lucrative title.[50] The majority opinion in *Flowers*, by analogizing disability retirement benefits to personal injury awards, represents a confusing and unnecessary departure from general community property law principles.

Timing the Duration of the Marriage

The second issue decided in *Flowers* was whether the wife was entitled to share in her husband's disability retirement benefits even though the husband was not entitled to the benefits until after the dissolution petition was filed.[51] The trial court determined that the disability retirement benefits were community property, and the court of appeals affirmed.[52] The husband argued that since his disability did not occur until after the dissolution petition was filed, the benefits were his separate property.[53] This contention was based on *Painter v. Painter*,[54] a case from New Jersey, a non-community property jurisdiction.

The *Painter* court held that the phrase "property acquired during the marriage"[55] meant property acquired prior to the filing of the di-

634 (1976); Phillipson v. Board of Administration, 3 Cal. 3d 32, 45,473 P.2d 765, 773, 89 Cal. Rptr. 61, 69 (1970).

46. *See* Everson v. Everson, 24 Ariz. App. 239, 244, 537 P.2d 624, 629 (1975); Miller v. State, 18 Cal. 3d 794, 814, 557 P.2d 970, 973-74, 135 Cal. Rptr. 386, 389-90 (1977); Odea v. Cook, 176 Cal. 659, 661-62, 169 P. 366, 368-69 (1917); City of Aurora v. Hood, — Colo. —, —, 570 P.2d 246, 247 (1977); Bowen v. Statewide City Emp. Retirement Sys., 72 Wash. 2d 397, 399, 433 P.2d 150, 152 (1967).

47. See cases cited at notes 45-46 *supra*.

48. 118 Ariz. 577, 182, 378 P.2d 1006, 1010 (Ct. App. 1978).

49. In Neal v. Neal, 116 Ariz. 590, 570 P.2d 758 (1977), for example, the Arizona Supreme Court held that retirement pay is compensation for past services and is to be divided in proportion to which the fund was furnished by community or separate labor respectively. *Id.* at 590-93, 570 P.2d at 758-61. In Everson v. Everson, 24 Ariz. App. 239, 537 P.2d 624 (1975), a divorce case dealing with distribution of the property upon dissolution, the court stated that the husband's pension and profit-sharing benefits were to be distributed as community or separate property depending upon the respective proportions earned during coverture. *Id.* at 244, 537 P.2d at 629.

50. 118 Ariz. at 582, 578 P.2d at 1011 (Jacobson, J., concurring).

51. *Id.* at 579, 578 P.2d at 1008.

52. *Id.*

53. *Id.* at 578-79, 578 P.2d at 1008-09.

54. 65 N.J. 196, 320 A.2d 484 (1974).

55. The relevant Arizona statute also contains this language. *See* ARIZ. REV. STAT. ANN. § 25-211 (1976).

vorce complaint.[56] The *Painter* court stated that if assets were eligible for distribution until final adjudication on the matter, a bifurcated trial would be needed in most cases to determine distributable property at the dissolution trial and at the time of final judgment.[57] The husband in *Flowers* asked the court of appeals to follow this New Jersey rule which would result in his benefits being classified as separate property because they did not vest until after the dissolution petition was filed.

The Arizona court rejected the *Painter* court's reasoning. The court in *Flowers* stated that many divorce complaints filed in Arizona never proceed to a final decree,[58] and that it would be impractical to follow New Jersey law because if the date of the filing were determinative of all future community property rights, legal uncertainties and great inequities would result.[59] The Arizona court reasoned that as long as the marriage is legally intact the legal system should not step in to distribute assets since it is not certain that dissolution will ever occur.[60]

Another reason for the court's ruling was that Arizona case law had established that the marital community existed, with its rights and obligations, until the decree of dissolution is final.[61] In light of this case law and statutory language[62] commanding that property acquired "during the marriage" be presumed community in nature, the appeals court ruled that the date of the divorce decree, and not the date of the petition, is controlling. This ruling makes the disability retirement benefits in *Flowers* community property.

Conclusion

The Arizona Court of Appeals in *Flowers* held that disability re-

56. 65 N.J. at 207, 320 A.2d at 495. The parties to the suit were divorced on March 14, 1972, and the trial court distributed the assets according to the newly amended statute, N.J. STAT. ANN. § 2A 24-23 (West 1971). 65 N.J. at 206, 320 A.2d at 494. The distribution was challenged primarily on the constitutionality of the amended statute and the method of interpretation utilized by the court. *Id.* at 199, 320 A.2d at 487. The court interpreted the statute to mean that the period of acquisition was to terminate not on the day the judgment of divorce is granted, but on the day the complaint is filed. *Id.* at 207, 320 A.2d at 495. The court did not feel compelled to comply with community property law on that issue, since New Jersey was not a community property state and the court discerned no intent on the part of the legislature to import the doctrines of community property law. *Id.* at 217, 320 A.2d at 495.

57. Painter v. Painter, 196 N.J. 207, 320 A.2d 484, 495 (1974).

58. 118 Ariz. at 579, 578 P.2d at 1008.

59. *Id.* The court did not state what those inequities and uncertainties were. The *Painter* court, however, foresaw one of the problems that its holding would create—the fraudulent practice of parties not fully disclosing their assets. Painter v. Painter, 65 N.J. 196, 207, 320 A.2d 484, 495 (1974). The court felt, however, that discovery proceedings would take care of this problem. *Id.*

60. 118 Ariz. at 579, 578 P.2d at 1008.

61. *Id.*; *See* Guerrero v. Guerrero, 18 Ariz. App. 400, 401-02, 502 P.2d 1077, 1078-79 (1972); Rodiek v. Rodiek, 9 Ariz. App. 213, 215-16, 450 P.2d 725, 727-28 (1969).

62. *See* ARIZ. REV. STAT. ANN. §§ 25-211, -213 (1976); notes 22-24 *supra*.

tirement benefits are community property by analogizing them to personal injury damages. Since disability retirement benefits are distinguishable from personal injury damages they should never have been compared. Arizona case and statutory law dictates that disability retirement benefits should be distributed according to how the community acquired them. In addition, the court in *Flowers* held that property acquired after the dissolution petition is filed is eligible for distribution upon final dissolution. This holding is in conformity with Arizona law that the marriage exists together with its rights and obligations until it has been legally terminated.

V. REMEDIES

A. CONSEQUENTIAL DAMAGES FOR MENTAL DISTRESS CAUSED BY BREACH OF CONTRACT FOR SALE OF PROPERTY

Arizona's Uniform Commercial Code [U.C.C.] provides three types of damages which a buyer may recover for the seller's nondelivery or repudiation of contract.[1] The buyer is entitled to recover the difference between the contract price and the market price of the goods at the time he learned of the breach,[2] incidental damages,[3] and consequential damages.[4]

The question of damages for mental distress under the U.C.C. was raised in the case of *Mobile Home Sales Management, Inc. v. Brown*.[5] In that case, the buyers of a mobile home sought to revoke acceptance of the home when the seller failed to perform repairs on the unit.[6] In addition to getting the sales contract cancelled, the buyers were awarded both incidental and consequential damages for the seller's breach.[7] While discussing the appropriate damages, the court indicated that the reference to "injury to person" in the statutory definition of consequential damages[8] permits recovery for mental or emotional distress accompanied by physical impact.[9] The court refused to decide whether such damages would be appropriate in the absence of physical impact[10] but indicated in dicta its willingness to endorse such a recovery,[11] despite the common practice of not awarding damages for mental

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1. ARIZ. REV. STAT. ANN. § 44-2392(A) (1967):
Subject to the provisions of this article with respect to proof of market price (§ 44-2402), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this article (§ 44-2394), but less expenses saved in consequence of the seller's breach.
2. *Id.*
3. *Id.* Incidental damages are defined as those damages reasonably incurred in the inspection, receipt, transportation, and care and custody of those goods rightfully rejected. *Id.* § 44-2394(A).
4. *Id.* § 44-2392(A). Consequential damages are defined as follows:
1. Any loss resulting from general or particular requirements and needs which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise: and
2. Injury to person or property proximately resulting from any breach of warranty.
Id. § 44-2394(B).
5. 115 Ariz. 11, 562 P.2d 1378 (Ct. App. 1977).
6. *Id.* at 13, 562 P.2d at 1380.
7. *Id.*
8. ARIZ. REV. STAT. ANN. § 44-2394(B)(2) (1967).
9. 115 Ariz. at 18, 562 P.2d at 1385.
10. *Id.* at 19, 562 P.2d at 1386.
11. *Id.* at 18, 562 P.2d at 1385.

distress caused by breach of contract.[12]

This casenote will discuss whether, as a measure of consequential damages, a buyer may recover for mental distress[13] unaccompanied by physical harm caused by breach of contract or warranty. The general trend toward increased protection for mental well-being will first be examined. An analysis will be made of those factors in contract cases which support recovery for mental anguish. Next, recovery for mental distress caused by breach of contract for sale of property will be discussed. Finally, after an analysis of contract cases which have allowed recovery for mental distress unacompanied by physical harm, there will be a discussion of the implications and arguments in support of such recovery.

Increased Protection of Mental Well-Being

Since the beginning of the century, American law has given increased protection to the interest in freedom from emotional distress.[14] Both tort and contract law allow recovery for mental anguish,[15] although the chief development of the remedy has been witnessed in tort,[16] where recovery for infliction of mental distress gained early recognition in assault cases.[17] Notwithstanding this early start, the law has been slow to afford independent legal protection to peace of mind.[18] Not until the 1920's was infliction of mental distress, independent of other torts, a basis for action.[19] While this change in the law indicates an increased awareness of and protection for mental well-being, it also suggests an undetermined future. The legal limits of the protection of mental peace are as yet uncharted.[20]

12. See text & notes 69-73 *infra*.

13. Mental or emotional distress has many synonyms. The following have at one time or another been used to indicate or describe emotional distress: mental suffering, mental anguish, and mental or nervous shock. *See* Crisci v. Security Ins. Co., 66 Cal. 2d 425, 433, 426 P.2d 173, 178, 58 Cal. Rptr. 13, 18 (1967).

14. *See* Kaufman v. Western Union Tel. Co., 224 F.2d 723, 728 (5th Cir. 1955); Kline v. Kline, 158 Ind. 602, 605, 64 N.E. 9, 10 (1902); Brown v. Crawford, 296 Ky. 249, 253, 177 S.W.2d 1, 3 (1944); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 49 (4th ed. 1971); Note, *Damages for Mental Suffering Caused By Insurers: Recent Developments in the Law of Tort and Contract*, 48 NOTRE DAME LAW. 1303, 1303 (1973).

15. For a discussion of recovery for mental distress in tort and contract, see D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 7.3, at 528, § 12.3, at 798 (1973).

16. See Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1049-58 (1936).

17. *See* Smith v. Newsam, 84 Eng. Rep. 722, 722 (K.B. 1674); Kline v. Kline, 158 Ind. 602, 605, 64 N.E. 9, 10 (1902); Brown v. Crawford, 296 Ky. 249, 253, 177 S.W.2d 1, 3 (1944); Ross v. Michael, 246 Mass. 126, 129, 140 N.E. 292, 293 (1923); W. PROSSER, *supra* note 14, § 10, at 38.

18. W. PROSSER, *supra* note 14, § 12, at 49; 11 S. WILLISTON, WILLISTON ON CONTRACTS § 1341, at 214 (3d ed. 1968). Independent protection means that a plaintiff may seek recovery for mental distress without showing that such distress was caused or predicated upon physical injury. *See* Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 121 (Me. 1970).

19. *See generally* Emmke v. DeSilva, 293 F. 17, 21 (8th Cir. 1923); Boyce v. Greeley Square Hotel Co., 228 N.Y. 106, 112, 126 N.E. 647, 650 (1920); Magruder, *supra* note 16, at 1049-58.

20. *See* W. PROSSER, *supra* note 14, § 12, at 50.

It is in contract law where the future of recovery for mental distress may witness the greatest change. Under common law, no recovery was permitted for mental suffering alone.[21] Supportive of this general rule was the same rationale which for years had been used to deny recovery in tort for negligent infliction of emotional distress: mere mental pain and anxiety are too vague for legal redress where there exists no injury to person or property.[22]

Recovery for mental distress in contract encounters two barriers not present in tort—the pecuniary nature of the transaction and the source of the defendant's duty. The vast majority of contract actions essentially revolve around pecuniary matters.[23] The parties to the contract are seeking economic gain and considerations of mental felicity are, at best, only incidental. Consequently, before recovery may be granted for mental distress in contract cases, it must be shown that a breach of contract has resulted in mental suffering which was a foreseeable or direct result of the breach.[24]

Another difference between tort and contract pertains to duty. In tort, duty is imposed upon the parties by law.[25] In contract, duty is a function of agreement between the parties.[26] Parties to a contract, for example, may agree to include mental well-being as an object of damages. In such a case, recovery for mental distress will be allowed since it was within the contemplation of the parties when the contract was made.[27] A defendant in a tort action, however, has no such opportunity to define his liability. His duty is a function of law; it is independent of agreement between the parties.[28]

In most cases, then, tort liability for mental distress will exceed contract liability because the former is a function of law and not depen-

21. *See* Southern Express Co. v. Byers, 240 U.S. 612, 615 (1916) ("long recognized" common law rule prohibiting recovery for "mere" mental pain). See D. DOBBS, *supra* note 15, § 12.4, at 810-20, for a discussion of those factors limiting recovery for mental distress in contract cases.

22. Kaufman v. Western Union Tel. Co., 224 F.2d 723, 728 (1955); Gatzow v. Buening, 106 Wis. 1, 20, 81 N.W. 1003, 1009 (1900).

23. Note, *Recovery for Mental Suffering from Breach of Contract*, 32 NOTRE DAME LAW. 482, 482 (1957).

24. *See* Westervelt v. McCullough, 68 Cal. App. 198, 208-09, 228 P. 734, 738 (1924). *McCullough* held that damages for emotional distress could be recovered for breach of contract on the ground that certain contracts foresee or contemplate that such damages may arise from their breach. The case involved an agreement to provide a home and personal care for the aged plaintiff, and the court held that the "comfort, happiness or personal welfare" of the plaintiff was within the contemplation of the parties when the contract was made. *Id.*

25. W. PROSSER, *supra* note 14, § 53, at 324.

26. D. DOBBS, *supra* note 15, § 12.3, at 805.

27. That the parties to a contract contemplated mental distress from a breach is sufficient to satisfy the proximate cause requirement. *See* Rogowicz v. Taylor & Gray Inc., 498 S.W.2d 352, 356 (Tex. Civ. App. 1973). *See also* Tuohey, *Negligent Infliction of Emotional Distress from a Breach of Contract: Jarchow v. Transamerica Title Insurance Co.*, 8 SW. U.L. REV. 655, 660 (1976).

28. *See* D. DOBBS, *supra* note 15, § 12.3, at 805.

dent on agreement of the parties.[29] Unless the parties have contractual liability for a remote and unforeseeable type of damage, the commercial nature of contract actions will often result in limited liability for infliction of mental distress.[30] Such limits are less frequently encountered in tort, since duty may be superimposed on the tortfeasor by the court.[31]

To facilitate analysis of contract recovery for mental distress, contracts are often divided into two classes, commercial and personal.[32] This distinction is based primarily on the nature or purpose of the contract and the foreseeability of mental anguish.[33] Commercial contracts are essentially for pecuniary advantage.[34] Recovery for mental anguish is often denied in actions upon such contracts because mental well-being is not usually contemplated by the parties.[35]

Personal contracts, however, have as an identifiable component the mental or emotional felicity of at least one of the parties. That is,

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29. According to Lord Reid in Koufos v. Czarnikow Ltd., 3 All E.R. 686 (H.L. 1967) (The Heron II):

> The modern rule in tort is quite different and it imposes a much wider liability. The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it; and there is good reason for the difference. In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party's attention to it . . . . In tort, however, there is no opportunity for the injured party to protect himself in that way, and the tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage . . . .

Id. at 691-92.

30. *See* D. DOBBS, *supra* note 15, § 12.3, at 804.

> [I]t is clear that what is "foreseeable" in a tort case may not be "foreseeable" in a contract case, and a defendant may find himself liable for a given item of damage on the ground that it is foreseeable where he is sued for tort, but not liable for the same item of damage where he is sued in contract.

Id. See also Johnson v. Atlantic Coastline R.R., 140 N.C. 574, 577, 53 S.E. 362, 363 (1906).

31. D. DOBBS, *supra* note 15, § 12.3, at 804.

32. *See* Westervelt v. McCullough, 68 Cal. App. 198, 208, 228 P. 734, 738 (1924); Lewis v. Holmes, 109 La. 1030, 1034, 34 So. 66, 67 (1903); Mitchell v. Shreveport Laundries, 61 So. 2d 539, 541 (La. Ct. App. 1952); Lamm v. Shingleton, 231 N.C. 10, 14, 55 S.E.2d 810, 813 (1949); Note, *supra* note 23, at 482; Note, *supra* note 14, at 1303-04; 26 DRAKE L. REV. 212, 214 (1976-77).

33. Certain types of contracts significantly involve personal feelings and emotions. It is foreseeable that if such a contract is breached, mental distress is likely to occur. *See* Westervelt v. McCullough, 68 Cal. App. 198, 208, 228 P. 734, 738 (1924). For a discussion of the foreseeability problem in contract cases, see text & notes 66-70 *infra.*

34. *See* Pfeffer v. Ernst, 82 A.2d 763, 764 (D.C. 1951); Lamm v. Shingleton, 231 N.C. 10, 14, 55 S.E.2d 810, 813 (1949). According to the court in *Lamm*, "[c]ontracts are usually commercial in nature and relate to property or to services to be rendered in connection with business or professional operations." *Id.* The thesis of this casenote is obviously at issue with the *Lamm* court's conclusion that contracts relating to property are commercial. Nonetheless, the case does illustrate the fact that commercial contracts are, in the main, concerned with business or pecuniary undetakings.

35. *See* RESTATEMENT OF CONTRACTS § 341 (1932):

> In actions for breach of contract, damages will not be given as compensation for mental suffering, except where the breach was . . . of a contract to render a performance of such a character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than mere pecuniary loss.

Id.

they involve personal feelings, and mental suffering is likely to result upon a breach.[36] It is the personal contract breach for which courts in contract actions most frequently award damages for mental distress.[37] Examples of contracts within this class are engagements to marry,[38] contracts between carriers or innkeepers and passengers or guests,[39] contracts for the carriage and disposition of human bodies,[40] and contracts for delivery of a death notice.[41] In a California Supreme Court decision, *Crisci v. Security Insurance Co.*,[42] insurance contracts were added to the list.[43]

As evidenced by *Crisci*, contract law has been interpreted to afford increased protection to the interest of mental well-being.[44] The *Crisci* court allowed recovery for hysteria and attempted suicide which a policyholder experienced after the insurer refused to settle out of court and a judgment was entered against the policyholder far in excess of her coverage.[45]

Crisci is significant because it marks the first time that a court found an insurance contract to be "personal."[46] Assuming *Crisci* repre-

36. Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957), illustrates the distinction between commercial and personal contracts. In that case, a physician breached a contract to perform a Caesarian section. The court, in holding for the plaintiff, found the contract to be personal, to concern life, death, mental concern, or solicitude. *Id.* at 471, 84 N.W.2d at 824. A breach of such contract, the court concluded, would inevitably and foreseeably result in mental distress. *Id.* Consequently, damages for mental distress resulting from the breach were recoverable. *Id.* at 475, 84 N.W.2d at 826.

37. *See* RESTATEMENT OF CONTRACTS § 341 (1932), *quoted* at note 35 *supra*.

38. *See, e.g.*, Simons v. Busby, 119 Ind. 13, 16, 21 N.E. 451, 452 (1888); Coolidge v. Neat, 129 Mass. 146, 149 (1880); Kendall v. Dunn, 71 W. Va. 262, 264, 76 S.E. 454, 455 (1912); *see* 5 A. CORBIN, CORBIN ON CONTRACTS § 1076, at 430-31 (1964).

39. *See, e.g.*, Emmke v. De Silva, 293 F. 17, 21 (8th Cir. 1923); Gebhart v. Public Serv. Coord. Transp., 48 N.J. Super. 173, 181, 137 A.2d 48, 52 (1957); Aaron v. Ward, 203 N.Y. 351, 357, 96 N.E. 736, 738 (1911); De Wolf v. Ford, 193 N.Y. 397, 406, 86 N.E. 527, 531 (1908).

40. *See, e.g.*, Meyer v. Nottiger, 241 N.W.2d 911, 921 (Iowa 1976); Lamm v. Shingleton, 231 N.C. 10, 14, 55 S.E.2d 810, 813 (1949); Gadbury v. Bleitz, 133 Wash. 134, 136, 233 P. 299, 300 (1925).

41. *See* Western Union Tel. Co. v. Crowley, 158 Ala. 583, 587, 48 So. 381, 382 (1909); 5 A. CORBIN, *supra* note 38, § 1076, at 435. According to Corbin, the largest class of cases dealing with damages for mental suffering for nonwilfull breach of contract consists of actions against telegraph companies for failure to make prompt and correct delivery of a message that concerns illness, death, or burial. *Id.* § 1076, at 435. However, according to D. DOBBS, *supra* note 15, § 12.3, at 805-06, "where the message did not in itself give clear notice that mishandling would cause special damages, courts . . . did not permit recovery even of commercial losses." Those courts which have allowed recovery required that the message show on its face that mental anguish or injury was likely to result from mishandling. Kerr S.S. Co. v. Radio Corp. of America, 245 N.Y. 284, 288, 157 N.E. 140, 141 (1927); Newsome v. Western Union Tel. Co. 153 N.C. 153, 155, 69 S.E. 10, 11 (1910).

42. 66 Cal. 2d 425, 426 P. 2d 173, 58 Cal. Rptr. 13 (1967).

43. *Id.* at 433, 426 P. 2d at 179, 58 Cal. Rptr. at 19. See discussion of *Crisci* in Note, *supra* note 14, at 1303-05.

44. *See* Tuohey, *supra* note 27, at 655. *See also* Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 948, 122 Cal. Rptr. 470, 484 (1975).

45. "Liability," the court stated, "is imposed not for a bad faith breach of the contract but for failure to meet the duty included within the implied covenant of good faith and fair dealing." 66 Cal. 2d at 430, 426 P. 2d at 177, 58 Cal. Rptr. at 16.

46. *See* Note, *supra* note 14, at 1304. According to the *Crisci* court:

[P]laintiff did not seek by the contract involved here to obtain a commercial advantage

sents the future with respect to recovery for emotional distress caused by breach of contract,[47] then perhaps all that need be shown is that the principal intention of the contract was to secure a measure of emotional comfort, happiness, or personal esteem.[48] If the evidence supports such a finding, the issue of foreseeability may be resolved in the plaintiff's favor and recovery allowed.[49]

Another category of contracts with a personal rather than commercial emphasis is contracts for the sale of property.[50] The *Brown* case involved this type of contract.

Mental Distress Following Breach of Contract for Sale of Property

Mobile Home Sales Management, Inc. v. Brown[51] provides an appropriate factual perspective from which to analyze the question of mental distress following a breach of contract for the sale of property. The Browns purchased a mobile home for use as their personal dwelling. When the home was delivered they discovered certain defects. After repeated attempts to have the seller correct the defects were unsuccessful, the Browns notified the seller that the contract was considered breached. They revoked acceptance of the mobile home, cancelled their purchase agreement, and demanded the return of their purchase price together with damages.[52]

With respect to the issue of consequential damages for mental distress caused by the breach, the court's holding in *Brown* is of particular interest. The applicable statute provides that consequential damages resulting from a seller's breach include injury to persons proximately resulting from any breach of warranty.[53] Although the typical personal

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but to protect herself against the risks of accidental losses, including the mental distress which might follow from the losses. Among the considerations in purchasing liability insurance . . . is the peace of mind and security it will provide in the event of an accidental loss . . . .

66 Cal. 2d at 434, 426 P.2d at 179, 58 Cal. Rptr. at 19.

47. For a discussion of changes in the law with respect to damages for mental distress in contract cases, see Tuohey, *supra* note 27.

48. *See* discussion of Louisiana statutory support for this hypothesis in note 77 *infra*.

49. There may be recovery for mental distress even if a contract is not personal or mental distress is not foreseen. *See* D. DOBBS, *supra* note 15, § 12.4, at 820. In such cases, however, there must be either physical injury to the party bringing suit or the behavior of the defendant must be wanton and reckless. *See* 5 A. CORBIN, *supra* note 38, § 1076, at 427. When damages for mental distress are predicated on bodily injury, however, the action is nearly always considered in tort. Bushnell v. Bushnell, 103 Conn. 583, 586, 131 A. 432, 435 (1925); 5 A. CORBIN, *supra* note 38, § 1076, at 427; RESTATEMENT OF CONTRACTS § 341 (1932).

50. Several Louisiana cases have allowed recovery for mental distress caused by breach of contract to convey real property. *See, e.g.*, Arquembourg v. Bourque, 243 So. 2d 92 (La. Ct. App. 1971); Melson v. Woodruff, 23 So. 2d 364 (La. Ct. App. 1945), discussed in note 77 *infra*.

51. 115 Ariz. 11, 562 P.2d 1378 (Ct. App. 1977).

52. *Id.* at 13, 562 P.2d at 1380.

53. ARIZ. REV. STAT. ANN. § 44-2394(B)(2) (1967). That recovery is predicated on breach of warranty rather than breach of contract does not negate the important distinction between personal and commercial contracts. The consequence of predicating recovery on breach of warranty

injury action allows recovery for physical and mental pain and suffering,[54] *Brown* involved only a breach of contract.[55] Nevertheless, the court held that "it is possible in a case based on the U.C.C. where there is injury to a person, to recover the same kind of damages" as are awarded in tort actions.[56] "We hold," the court concluded, "that the intent of the statute was to cover such damages."[57]

The personal injuries alleged in *Brown* consisted of physical discomfort and illness "suffered as a result of the lack of air-conditioning, heating and the other defective conditions which existed in the home."[58] Although the court did not specifically address the question of recovery for mental distress independant of physical injury,[59] two statements in the opinion are revealing in that regard.

Discussing the similarities between tort and contract law on the issue of physical and mental injuries, the court stated that the intent of the U.C.C. was to extend recovery to both physical and mental pain and suffering.[60] The court gave the clear impression, although refusing to address the issue directly, that it was willing in contract suits to award damages for mental distress, independent of physical injury, to the same degree as in tort suits.[61] This line of reasoning is significant for two reasons. First, it demonstrates quite clearly that the court identified *Brown* as a suit in contract, not tort, thereby avoiding the problem of meshing tort and contract law in such a fashion as to fail to identify specifically the wrong for which damages are awarded.[62] Second, the court stated that recovery may be had in U.C.C. cases for mental, as well as physical, pain and suffering.[63] The intent of the U.C.C., according to the court, is to cover both physical and mental injury,[64] thereby opening the door to recovery in contract for mental

is to add a second requirement to that already set out for personal contracts. That is, mental distress must be shown to be a foreseeable consequence of breach when the contract is entered into and such distress must be caused by breach of warranty.

54. 115 Ariz. at 18, 562 P.2d at 1385.

55. *Id.* at 13, 562 P.2d at 1380.

56. *Id.* at 18, 562 P.2d at 1385.

57. *Id.*; *see* ARIZ. REV. STAT. ANN. § 44-2394 (1956).

58. 115 Ariz. at 18-19, 562 P.2d at 1385-86.

59. *Id.* at 19, 562 P.2d at 1386. "We do not pass upon whether damages for mental or emotional distress or for pain and suffering are recoverable in the absence of the showing of a physical impact." *Id.*

60. *Id.* at 18, 562 P.2d at 1385.

61. *Id.* The court stated:

> In the typical personal injury action compensation may be awarded for physical and mental pain and suffering. Logically, it is possible in a case based on the U.C.C. where there is injury to a person, to recover the same kind of damages. We hold that the intent of the statute was to cover such damages.

Id.

62. *See, e.g.*, Austro-American S.S. Co. v. Thomas, 248 F. 231, 233 (2d Cir. 1917); RESTATEMENT OF CONTRACTS § 341, Comment *a* (1932); 5 A. CORBIN, *supra* note 38, § 1076, at 425.

63. 115 Ariz. at 18, 562 P. 2d at 1385.

64. *Id.*

distress independent of physical injury.

The court raised the issue of whether it is possible for mental anguish or injury, without accompanying physical injury, to constitute "injury to persons" recoverable under the statutory provision.[65] While the court refused to decide the issue,[66] its refusal does not exclude such a recovery, since the question was left for subsequent cases. Having held, however, that the intent of the U.C.C. is to cover the same kind of damages as are compensable in typical personal injury actions,[67] the court appeared to support recovery for independent mental distress.[68]

In Support of Recovery for Damages for Mental Distress Caused by Breach of Contract for Sale of Property

As a general rule one may not recover for special damages caused by breach of contract unless such injury was anticipated as a necessary and natural consequence of the breach.[69] This general principle was articulated in *Hadley v. Baxendale*,[70] which held that special damages are not recoverable except in two situations: first, where they arise naturally, "according to the usual course of things," from the breach;[71] and second, if they were within the contemplation of the parties when the contract was made.[72] Obviously, the operation of this general principle of recovery has acted to limit recovery for contract damages. Many courts following *Hadley* have refused "to award special damages, even when such damages seemed clearly normal and expectable."[73]

In *Brown*, however, if the contract is seen as personal, then the damages for mental distress were within the contemplation of the parties. Assuming the parties recognized at the outset that the mobile

65. *Id.* at 19, 562 P.2d at 1386 (construing ARIZ. REV. STAT. ANN. § 44-2394(B) (1956)).

66. *Id.*

67. *Id.* at 18, 562 P.2d 1385.

68. *Id.* In Musij v. Blaylock-Smith Mobile Homes, 13 Ariz. App. 378, 476 P.2d 899 (1970), factually similar to *Brown*, the court was presented with an opportunity to address this very question. The court, however, avoided the issue by finding the mental distress not proximately caused by the breach of warranty. *Id.* at 380, 476 P.2d at 901.

69. Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S 540, 544 (1903); Exton Drive-In, Inc. v. Home Indem. Co., 436 Pa. 480, 489, 261 A.2d 319, 324 (1970); Keystone Diesel Engine Co. v. Irwin, 411 Pa. 222, 224, 191 A.2d 376, 378 (1963).

70. 156 Eng. Rep. 145 (Ex. 1854). In that case, which involved a miller's suit against a carrier for failure to make prompt delivery for repairs of a broken millshaft, the court refused to allow recovery for loss of profits during the delay period. *Id.* at 151; *see* discussion of the case in D. DOBBS, *supra* note 15, § 12.3, at 803-05 (1973); 37 OHIO ST. L.J. 153, 155-58 (1976).

71. 156 Eng. Rep. 145, 151 (Ex. 1854). According to the *Hadley* court:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself . . . .

Id.

72. *Id.*

73. D. DOBBS, *supra* note 15, § 12.3, at 805.

home was being purchased for use as a personal dwelling and that the buyers were therefore emotionally concerned that their new home be satisfactory, the issue of foreseeability is resolved in favor of the Browns. Alternatively, if the contract was merely commercial and mental distress was at best an unlikely result of breach, then the *Hadley* test is not satisfied and recovery for mental distress will be denied.

Expanding on the *Hadley* rationale, some courts have concluded that one is not liable for special damages unless he agreed, at least tacitly, to assume the risk of those particular damages, or foresaw mental distress as a likely consequence of breach of contract when the contract was entered into.[74] This application of *Hadley* is unduly restrictive. Carried to its conclusion, this reasoning would only allow special damages for mental distress caused by breach of contract if the conditions constituting the breach existed when the contract was made.[75]

An alternative to this narrow approach is to recognize that certain contracts by their nature involve emotional felicity to such a degree that a breach may give rise to emotional distress. This type of foreseeability is most evident in personal, as opposed to commercial, contracts. The challenge for future plaintiffs seeking to recover damages for mental distress will be to convince the court that the principal object of the contract was personal satisfaction, not pecuniary gain.[76]

Such a challenge is not insurmountable, at least when the property is a personal dwelling as it was in *Brown*. Most purchasers or residential dwellings probably do not seek pecuniary gain as their sole objective. Under such circumstances, it should not be difficult to foresee mental anguish resulting from breach of contract to convey.[77]

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74. *See, e.g.*, Hawkins v. Delta Spindle, 245 Ark. 830, 836, 434 S.W.2d 825, 828 (1968). An example of a limitation on special damages is Rogowicz v. Taylor & Gray, Inc., 498 S.W.2d 352 (Tex. Civ. App. 1973), which involved a claim for recovery for mental suffering experienced when the foundation of the plaintiff's new home became defective. The court denied recovery, stating that the mental anguish must have been within the contemplation of the defendant at the time the contract was made. *Id.* at 355-56. Since the court found nothing in the pleadings suggesting that the foundation was defective at the time of the sale, it was unable to rule that the defendant "knew or should have known the foundation might become defective in the future." *Id.*

75. The application of the *Hadley* principle in *Rogowicz*, see note 74 *supra*, illustrates the great reluctance of courts to award damages for mental distress in contract actions. Not only must mental distress be foreseeable, but some indication of the parties' intent to consider the prospect of mental harm subsequent to breach is apparently required. 498 S.W.2d at 356. If *Rogowicz* requires foreseeability of mental distress to be manifest in physical defects existing at contract formation, *Hadley* has been extended to foreclose recovery even in those cases where the nature of the contract is personal and mental distress is foreseeable. Such a narrow application of *Hadley* would limit recovery to those cases alone where physical defects existed at the time of contract formation. This would undoubtedly serve to deny recovery in numerous cases where defects or breach occurred subsequent to formation of the contract.

76. The plaintiff must demonstrate that the parties to the contract foresaw when the contract was made that mental distress would occur upon a breach. See text & note 27 *supra*.

77. Two Louisiana cases support this thesis. *See* Arquembourg v. Bourque, 243 So. 2d 92 (La. Ct. App. 1970); Melson v. Woodruff, 23 So. 2d 364 (La. Ct. App. 1970). In *Arquembourg*, the plaintiff-buyer and his wife lived at a leprosarium. The plaintiff's wife was understandably anxious to move into a private dwelling. When the defendant-seller failed to convey the property on

Conclusion

For years, fear of fraudulent claims blocked tort recovery for emotional distress unaccompanied by physical injury.[78] Despite such fear, however, tort law has witnessed increased protection for freedom from emotional distress. Expanded recovery for mental anguish indicates recognition of the validity of such claims.

In contract, similar fears have also prevented recovery for mental distress caused by breach of contract. Expansion of the scope of personal contracts, however, makes it easier to demonstrate that the contracting parties foresaw the possibility of mental distress. Even when a contract is for sale of real property or a mobile home, mental distress caused by breach of contract is foreseeable, particularly if the sale involves a personal dwelling.

Although the court in *Brown* did not decide the question of recovery of damages for mental distress independent of physical impact or injury, it strongly suggested in dicta that such a recovery may be allowed under Arizona's Uniform Commercial Code. If a plaintiff can demonstrate that his principal objective in entering the contract was personal satisfaction, then nonpecuniary damages should be recoverable.

a specified date, the plaintiff sued. 243 So. 2d at 93. In addition to a pecuniary recovery, the court awarded damages for "inconvenience, mental anguish and disappointment." *Id.* Similarly, in *Melson*, the court found that a contract for sale of a house was personal, not commercial. 23 So. 2d at 366. Having as its object "the gratification of some intellectual taste and convenience," the contract was not an investment or for pecuniary gain, but primarily for the purpose of securing a home for the buyers. *Id.* These cases were predicated not upon the U.C.C. but a Louisiana statute which specifically provides for damages for mental distress when a contract involved "some intellectual enjoyment." LA. CIV. CODE ANN. art. 1934 (West 1977).

78. Crisci v. Security Ins. Co., 66 Cal. 2d 425, 434, 426 P.2d 173, 179, 58 Cal. Rptr. 13, 18 (1967).

VI. TORT LAW

A. PUBLIC OFFICIAL IMMUNITY IN ARIZONA—THE GRIMM CASE

Under the doctrine of quasi-judicial immunity[1] a public official is immune from civil liability if he is negligent while performing a "discretionary" act, but is subject to liability if he is negligent while engaged in a "ministerial" one.[2] In *Grimm v. Arizona Board of Pardons & Paroles*[3] this doctrine was abolished in Arizona.[4]

In *Grimm*, the Arizona Board of Pardons and Paroles [parole board] released Mitchell Thomas Blazak from the Arizona State Prison prior to the expiration of his sentence. Shortly thereafter, on December 15, 1973, Blazak shot and killed John Grimm and seriously injured Robert Bennett while robbing the Brown Fox Tavern in Tucson, Arizona. Blazak was subsequently convicted and sentenced to death for this murder.[5] Grimm's wife and Bennett brought suit against the parole board and certain of its members alleging that, based upon Blazak's criminal background and mental health record,[6] the defend-

1. The use of the adjective "quasi-judicial" suggests that the doctrine is somehow related to that of judicial immunity. But the two doctrines have a different historical origin. Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 263, 564 P.2d 1227, 1230 (1977). For a general discussion of the two doctrines, see Note, *Quasi-Judicial Immunity: Its Scope And Limitations In Section 1983 Actions*, 1976 DUKE L.J. 95.

2. The distinction between the terms "discretionary" and "ministerial" is one "that has never been drawn in a way fully or satisfactory to explain the consequences, as regards immunity for error, of the distinction." Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 297 (1937). *See generally* Moore v. Industrial Comm'n, 24 Ariz. App. 324, 327, 538 P.2d 411, 414 (1975); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 220, 359 P.2d 457, 462, 11 Cal. Rptr. 89, 94 (1961).

3. 115 Ariz. 260, 564 P.2d 1227 (1977).

4. The court in *Grimm* did not explicitly discard the discretionary/ministerial dichotomy. It merely held that the absolute immunity previously granted to public officials for their discretionary acts was abolished. 115 Ariz. at 266, 564 P.2d at 1233. Arguably, the decision did not affect the liability of a public official for his "ministerial" duties and the dichotomy may still be valid in this respect. The court's action, however, sufficiently emasculated the traditional understanding of the dichotomy to render its old form meaningless, and any vestige of it must be viewed in light of the court's holding.

5. State v. Blazak, 114 Ariz. 199, 200, 560 P.2d 54, 55 (1977). For a discussion of connected matters, see Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977); Bennett v. Estate of Baker, 27 Ariz. App. 596, 557 P.2d 195 (1976); "Criminal Demands: An Exception to the Duty of a Business Proprietor to Act Reasonably to Protect his Patrons," 19 ARIZ. L. REV. 696 (1977); The Arizona Daily Star, Nov. 16, 1978, at 1, col. 1; *id.*, Dec. 17, 1978, at 1, col. 2.

6. Blazak had a long criminal record dating back to 1961 when, while still a minor, he served a term for burglary in the Fort Grant Industrial School. In 1964 he was sentenced to prison for burglary and the following year was returned to prison for a parole violation. Early in 1967 he was arrested for marijuana possession, and later that year was again arrested for marijuana possession, armed robbery, and assault with intent to kill. 115 Ariz. at 262, 564 P.2d at 1229. Following his second arrest in 1967, Blazak was given an extensive series of psychiatric evaluations conducted by eight different psychiatrists. Statements taken from the various reports of these eight psychiatrists reveal that Blazak was "an extremely dangerous person who should not be free in society until some major psychological changes take place." *Id.* at 263, 564 P.2d at 1230. They allege that he was a "paranoid schizophrenic" whose psychosis prevented him from "distinguishing between right and wrong" and from "controlling his conduct," *id.*, that he had "never made an adequate adjustment to society for any prolonged period" and was "unlikely to change," *id.*, and that he had "a definite potential for violence." *Id.*

ants should be held liable for gross negligence or recklessness in releasing Blazak in violation of their statutory duty.[7]

The trial court in granting the defendants' motion for summary judgment dismissed the plaintiffs' complaint.[8] The appeals court affirmed on the grounds that the parole board and its members were immune from liability.[9] The supreme court affirmed the dismissal of plaintiffs' action against the parole board, though not because it was immune from liability, but because the plaintiffs had failed to fulfill the statutory requirements authorizing a suit against the state in tort.[10] The supreme court next considered the plaintiffs' remaining claim against the individual members of the parole board. Instead of automatically invoking the doctrine of quasi-judicial immunity, long accepted in Arizona,[11] the court examined the rationale behind the rule.[12] The court concluded that, although the rationale was supportive of absolute judicial immunity, it did not support absolute immunity for public officials.[13] It held that "absolute immunity for public officials in their discretionary functions acting in other than true judicial proceedings is not required and, indeed, is improper."[14] It further reasoned that "public needs are best served by a qualified rather than absolute immunity for parole board members in relation to their parole decisions."[15]

In order to determine whether the parole board members were protected by this qualified immunity, the court looked to the circumstances surrounding the parole of Blazak.[16] It turned both to Arizona's

7. 115 Ariz. at 262, 564 P.2d at 1229. ARIZ. REV. STAT. ANN. § 31-412 (1968), which sets forth the criterion for release on parole, provides as follows:

> If it appears to the board of pardons and paroles from a report by the department of corrections, or upon the application by the prisoner for a release on parole, that there is reasonable probability that the applicant will live and remain at liberty without violating the law, then the board may authorize the release of the applicant upon parole.

8. 115 Ariz. at 262, 564 P.2d at 1229.

9. Grimm v. Arizona Bd. of Pardons & Paroles, 26 Ariz. App. 591, 592, 550 P.2d 637, 638 (1976), *rev'd*, 115 Ariz. 260, 564 P.2d 1227 (1977).

10. 115 Ariz. at 263, 564 P.2d at 1230. The court dismissed the claim against the parole board because the plaintiffs had not fulfilled the requirement of having a claim disallowed prior to bringing the action. *Id.* ARIZ. REV. STAT. ANN. § 12-821 (1956), which contains this requirement, provides in part: "Persons having claims on contract or for negligence against the state, which have been disallowed, may on the terms and conditions set forth in this article, bring action thereon against the state and prosecute the action to final judgment."

11. *See, e.g.*, White Mountain Apache Indian Tribe v. Shelly, 107 Ariz. 4, 7, 480 P.2d 654, 657 (1971); Wilson v. Hirst, 67 Ariz. 197, 199, 193 P.2d 461, 462 (1948); Industrial Comm'n v. Superior Court, 5 Ariz. App. 100, 105, 423 P.2d 375, 380 (1967).

12. 115 Ariz. at 264-65, 564 P.2d at 1231-32.

13. In the court's opinion, only two of ten reasons traditionally advanced as justification for judicial immunity justify official immunity—to "[p]revent undue influence from the threat of suit which could discourage fearless independent action" and to "[a]void deterring competent people from taking office." *Id.* at 264, 564 P.2d at 1231. The court took the view that "[i]t is clear that the policy reasons for official immunity are much weaker than for judicial immunity. Thus logic requires a lesser immunity . . . ." *Id.* at 265, 564 P.2d at 1232.

14. *Id.*

15. *Id.*

16. *Id.* at 266, 564 P.2d at 1233.

private/public duty test[17] and to the *Restatement (Second) of Torts*[18] to decide whether the board members had owed the plaintiffs a duty.[19] It concluded that "members of the State Board of Pardons and Paroles owe a duty to individual members of the general public when the Board decides to release on parole a prisoner with a history of violent and dangerous conduct toward his or her fellow human beings."[20] The standard of care owed by the board members in this situation is gross negligence or recklessness.[21] The court remanded the case for a determination whether the release of Blazak had violated this standard.[22]

This casenote will analyze the meaning of the term "qualified immunity." The court's use of the term is ambiguous and various interpretations will be offered presenting points of confusion. The casenote will also examine the present status of *Grimm* in light of the subsequent legislative reaction, which appears to have established a general standard for judging public official liability in tort.[23] Finally, the casenote will assess the court's application of the private/public duty test. Its application in *Grimm* raises serious questions about its usefulness as a means of determining liability, and as a result, it will be recommended that the test be rejected in future decisions as an unnecessary and unwarranted return to a form of governmental immunity that has long been abrogated in Arizona. Before these issues are addressed, a short background of the doctrine of quasi-judicial immunity will be presented.

Background of Quasi-Judicial Immunity

The doctrine of quasi-judicial immunity refers to the immunity en-

17. The general rule governing the private/public duty test is that for a public official or agency to be liable at all, there must be a duty owed to the plaintiff specifically, because if the duty is owed to the public generally, "a breach of that duty is a public, not an individual, injury and can be redressed only by some form of public prosecution." *Id.* See text & notes 120-47 *infra*.

18. The court looked to RESTATEMENT (SECOND) OF TORTS § 319 (1965), which provides that "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

19. 115 Ariz. at 267, 564 P.2d at 1234.

20. *Id.* The court reached this conclusion based on the position that the board members, by voluntarily assuming responsibility for a highly dangerous person who could be paroled only by the board's action, had narrowed their duty to the general public to one owed to the plaintiffs individually. *Id.* See text & notes 132-37 *infra* for criticism of this position.

21. 115 Ariz. at 267, 564 P.2d at 1234.

22. *Id.* at 270, 564 P.2d at 1237. The Arizona Supreme Court reversed and remanded the case for the trial court to determine whether the members of the parole board had been grossly negligent or reckless in Blazak's release. *Id.* However, before the lower court could rule on the matter, the plaintiffs agreed to settle out of court in exchange for the release of the parole board members from further liability. Information taken from the files of the attorney for plaintiffs, John G. Stompoly.

23. The Arizona state legislature enacted a number of amendments to ARIZ. REV. STAT. ANN. § 41-621 (1977) which involved the personal liability of state officers, agents, or employees. For a discussion of one of these amendments, see text & notes 116-19 *infra*.

joyed by officials of the executive branch and of other nonlegislative, nonjudicial administrative positions.[24] The term "quasi-judicial immunity" is actually just one term among many, including "official immunity," "discretionary immunity," and the "discretionary function exception," that refer to the general notion that a public official is immune from liability when he exercises a "discretionary" function.[25] The doctrine originated in the ancient maxim "the King can do no wrong,"[26] and has evolved into a rule applicable to public officials.[27]

Over the years, the doctrine of quasi-judicial immunity has, through twisted logic, become almost equated with the traditional absolute immunity of judges.[28] But the two doctrines have different historical roots.[29] The use of the prefix "quasi" refers merely to the presence of a discretionary element similar to that involved in a judicial determination and has practically no similarity to judicial procedure.[30]

Arizona initially adopted the quasi-judicial immunity doctrine in *Wilson v. Hirst*.[31] There the court extended the absolute immunity afforded judges to other public officials who perform a judicial-like function while acting in a quasi-judicial capacity.[32] Thus, from the beginning, the doctrine was intimately linked with judicial immunity in Arizona, and the court in *Grimm* was forced to look to the underlying reasons supporting the doctrines to demonstrate that they were in fact distantly related.[33]

The classical articulation of the quasi-judicial immunity doctrine was stated by Judge Learned Hand:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its

24. Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 264, 564 P.2d 1227, 1231 (1977).

25. *See, e.g., id.* at 263, 564 P.2d at 1230. The doctrine of quasi-judicial immunity is more properly referred to as "public official" immunity which public officials enjoy while performing discretionary functions. *Id.*

26. *Id.* at 264, 564 P.2d at 1231.

27. *Id.*

28. *Id.* For a discussion of judicial immunity, see Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549 (1978).

29. 115 Ariz. at 263, 564 P.2d at 1230.

30. Jennings, *supra* note 2, at 276 n.51.

31. 67 Ariz. 197, 193 P.2d 461 (1948).

32. *Id.* at 201, 193 P.2d at 464.

33. 115 Ariz. at 264, 564 P.2d at 1231.

> outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.[34]

This statement supports the court's conclusion in *Grimm* that the primary reasons for the acceptance of the doctrine are to "[p]revent undue influence from the threat of suit which could discourage fearless independent action," and to "[a]void deterring competent people from taking office."[35]

The modern trend among the states has been to grant more, not less, immunity to public officials,[36] and the reason for this may be found in the history of governmental immunity. The doctrines of sovereign and municipal immunity have been traced to different roots in England.[37] The American courts initially approved of the doctrines,[38] but the common law values upon which the doctrines were based became increasingly subject to attack.[39] Many courts began to find exceptions to the doctrines in order to circumvent the harshness resulting from their strict application.[40] At the same time, the doctrines were criticized for being unjust in allowing the government to act with impunity towards its citizens.[41]

In response to the discontent, many courts abolished absolute immunity for the state and lesser governmental entities and substituted a

34. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949). *See* Johnson v. State, 69 Cal. 2d 782, 790, 447 P.2d 352, 358, 73 Cal. Rptr. 240, 246 (1968).

35. 115 Ariz. at 264, 564 P.2d at 1231.

36. *Id.*

37. The doctrine of sovereign immunity, which refers to the immunity enjoyed by the state itself, began with the personal prerogatives of the King of England, and, notwithstanding the American Revolution, became firmly fixed in America's judicial tradition. Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 388, 381 P.2d 107, 109 (1963). The doctrine of municipal immunity, which refers to the immunity enjoyed by lesser governmental entities such as cities and counties, is traced back to the case of Russell v. Men of Devon, 100 Eng. Rep. 359 (K. B. 1788). *See* Stone v. Arizona Highway Comm'n, 93 Ariz. at 388, 381 P.2d at 109.

38. The American courts first adopted the doctrine of municipal immunity in Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812). Later, the United States Supreme Court in Kawananakoa v. Polyblank, 205 U.S. 349 (1907), gave its reason for accepting the doctrine of sovereign immunity. Justice Holmes stated that "[a] sovereign is exempt from suits, not because of any formal conception or absolute theory, but on the logical and practical ground that there can be no legal right against the authority that makes the law on which the right depends." *Id.* at 353.

39. The underlying theory of the doctrine of sovereign immunity in common law was that "the King can do no wrong." Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 388, 381 P.2d 107, 109 (1963). *See generally* Comment, *Governmental Immunity in Arizona—The Stone Case*, 6 ARIZ. L. REV. 102 (1964). The reason traditionally given for the doctrine of municipal immunity was that "it is better that an individual should sustain an injury than the public should suffer an inconvenience." 93 Ariz. at 388, 381 P.2d at 109. Professor Borchard, in discussing the history of the doctrine of sovereign immunity, termed its acceptance in the United States as "one of the mysteries of legal evolution. Admitting its application to the sovereign and its illogical ascription as an attribute of sovereignty generally, it is not easy to appreciate its application to the United States." Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924-25).

40. *See, e.g.*, Chapman v. State, 104 Cal. 690, 696, 38 P. 457, 458 (1894) (loss due to neglect of harbor officials held to be grounded in breach of contract and not upon the officials' negligence); Woodmen v. State, 127 N.Y. 397, 401, 28 N.E. 20, 21 (1891) (implied consent by the state to be sued).

41. *See, e.g.*, Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670 (1917); Maguire, *State Liability for Tort*, 30 HARV. L. REV. 20 (1916).

new immunity distinction based upon governmental functions.[42] Under this new distinction, if the governmental entity was engaged in a "governmental" function at the time of the tortious act it was cloaked with immunity, but if it was performing a "proprietary" function it was subject to liability.[43]

This new distinction proved facile in theory but difficult to apply. There was uncertainty over which functions were "governmental" and which "proprietary."[44] Some activities involved aspects of each, and there was some question whether immunity or liability should govern.[45] The various decisions were inconsistent; some held an activity to be "governmental" while others held the same activity to be "proprietary."[46] The distinction became more of a labeling device than reasoned support for a decision,[47] and soon came under attack.[48]

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42. *See, e.g.*, State v. Sharp, 21 Ariz. 424, 427, 189 P. 631, 631 (1920); Howard v. City of Worcester, 153 Mass. 426, 428, 27 N.E. 11, 11 (1891); Supler v. School Dist., 407 Pa. 657, 660, 182 A.2d 535, 537 (1962). The theory underlying this distinction is that government serves a dual function: one function involves the voluntary act of governing, the other involves a proprietary interest in which the government may be held liable in tort. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957).

43. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957).

44. *See* Frederick v. City of Columbus, 58 Ohio St. 538, 549, 51 N.E. 35, 37 (1898) ("It is not always a simple matter to determine to which class of the duties of a municipal corporation a given case belongs"). "It is hard to see in these cases anything but an arbitrary application of the distinction between government and corporate functions, uninfluenced by any consideration of reason." Note, *The Liability of a Municipality for Torts*, 20 COLUM. L. REV. 772, 774 (1920).

45. *See, e.g.*, Spaur v. City of Pawhuska, 172 Okla. 285, 287, 43 P.2d 408, 409 (1935), where the court held that the maintenance and repair of streets and sewers is proprietary, but the cleaning of them is governmental.

46. *See* Pleasants v. Greenboro, 192 N.C. 820, 821, 135 S.E. 321, 323 (1926), where the court held the use of a building was for a dual purpose: one governmental, the other proprietary. *Compare* City of Hattiesburg v. Geigor, 118 Miss. 676, 687, 79 So. 846, 847 (1918) (fireman injured due to negligence of fire chief, but no liability imposed because running a fire department is a governmental function) *with* Walters v. City of Carthage, 36 S.D. 11, 14, 153 N.W. 881, 882 (1915) (plaintiff injured from unsafe condition of a fire station, but was allowed recovery because municipality was engaged in a proprietary function).

47. *See* Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919), where the court held the city liable for injuries to a plaintiff run down by a fire engine. The court strained against previous decisions which had held that the maintenance of a fire department was a governmental function, *id.* at 160-61, 126 N.E. at 73, but justified its finding of liability by reasoning that the engine was engaged in a proprietary function at the time of the accident. *Id.* at 169-70, 126 N.E. at 76. *See also* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 214, 359 P.2d 457, 458, 11 Cal. Rptr. 89, 90 (1961) (to find liability courts "expanded the area of the state's proprietary activities"); Sides v. Cabarrus Memorial Hosp., Inc., 287 N.C. 14, 22, 213 S.E.2d 297, 302 (1975) (even though an activity has been denoted a governmental function in prior decisions, it does not follow that it will be denoted such in future decisions).

48. Professor Borchard, a most denunciatory commentator of the governmental/proprietary distinction, condemned it for resting "not on rational and substantial, but on antiquated and technical grounds," with courts eager to "seek artificial methods of escape from its implications." Borchard, *supra* note 39, at 24. He faulted the distinction for forcing courts to "classify particular acts of state agents as governmental or corporate," *id.* at 129, and complained that "[d]isagreement among the courts as to many customary municipal acts and functions may almost be said to be more common than agreement and the elaboration of the varying jusifications for their classifications is even less satisfying to any demand for principle in the law." *Id.* His major objection to the distinction was that the

> individual citizen is left to bear almost all the risks of a defective, negligent, perverse or erroneous administration of the State's functions, an unjust burden which is becoming graver and more frequent as the Government's activities become more diversified and as

Because of this critical commentary and other developments[49] there has been a growing trend among the states to abolish the distinction.[50] Yet, though the states have become willing to permit suits against the state and lesser governmental entities in tort, they have not been as willing to allow them against the individual governmental officials who act within their official capacities.[51] Thus, while the trend is for greater liability of the state and lesser governmental entities, it is for greater immunity for the public officials while they are engaged in "discretionary" acts.[52]

The court in *Grimm* declared that this expansion of immunity for public officials has occurred "in the context of logical inconsistencies and often with only cursory reasoning."[53] Quasi-judicial immunity is not a constitutionally guaranteed right, but a matter of public policy, and thus, the expansion or contraction of the doctrine is within the power of each state to determine.[54] Regarding this power, the state must take into account two competing public policies. First, the injured plaintiff should have a remedy for the wrongdoing caused by the public official.[55] Second, immunity should be granted only when and at the level necessary to assure that the official is not discouraged from "fearless independent action," and that people will not be deterred from taking office for fear of threat of suit.[56] To achieve the proper balance, the court in *Grimm* held that the official will no longer be

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we leave to administrative officers an even greater degree the determination of the legal relations of the individual citizen.

Id. at 1.

49. Major developments included the case of Bernadine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945) (court construing New York's Court of Claims Act as a legislative waiver of all governmental tort immunity); the enactment of the Federal Tort Claims Act, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C. (1976)) (permitting suits against the federal government for torts); the case of Hargrove v. Town of Cocoa Beach, 90 So. 2d 130 (Fla. 1957) (stimulating a state movement to abrogate immunity for governmental entities); and the stinging reproach by Justice Traynor in Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961), where he called governmental immunity an anachronism without rational basis existing only by the force of inertia.

50. *See, e.g.*, Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 392, 381 P.2d 107, 112 (1963); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 219, 359 P.2d 457, 461, 11 Cal. Rptr. 89, 94 (1961); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133 (Fla. 1957). *See also* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.00, at 823 (Supp. 1970); Harley & Wasinger, *Governmental Immunity: Despotic Mantle or Creature of Necessity*, 16 WASHBURN L.J. (1976); Zale, *Judicial Abrogation of Governmental and Sovereign Immunity: A National Trend with a Pennsylvania Perspective*, 78 DICK. L. REV. 365, 368-70 (1973-74).

51. *See, e.g.*, Industrial Comm'n v. Superior Court, 5 Ariz. App. 100, 105, 423 P.2d 375, 380 (1967); Lipman v. Brisbane Elementary School, 55 Cal. 2d 224, 229, 359 P.2d 465, 467, 11 Cal. Rptr. 97, 99 (1961). "Because of important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious." *Id.*

52. *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 220, 359 P.2d 457, 462, 11 Cal. Rptr. 89, 94 (1961).

53. 115 Ariz. at 264, 564 P.2d at 1231.

54. *Id.*

55. *Id.* at 265, 564 P.2d at 1232.

56. *Id.* at 264, 564 P.2d at 1231.

protected by an absolute immunity under the doctrine of quasi-judicial immunity, but by a qualified immunity.[57] The problem is that the court failed to adequately define the term "qualified immunity," and it is this problem that will be taken up in the following section.

Qualified Immunity

There are two primary difficulties with the court's use of the term "qualified immunity." One difficulty is that the court employs a variety of terms such as "lesser immunity,"[58] "limited immunity,"[59] "partial immunity,"[60] and "qualified immunity,"[61] but does not attempt to distinguish between them. Ostensibly, the terms are to be treated as synonomous and the court's purpose in using different terms was merely to emphasize its holding that public officials are no longer protected by an absolute immunity for their discretionary acts.[62]

Assuming that the terms are synonomous, however, there is a greater difficulty in determining exactly what the court meant by the adjective "qualified."[63] The court found support for its holding that parole board members were entitled to a qualified immunity rather than an absolute immunity from various authorities.[64]

(1) *The Relevance of Wood v. Strickland*

The court looked first to the United States Supreme Court case of *Wood v. Strickland*.[65] This was the fourth in a series of Supreme Court decisions dealing with the scope of immunity protecting various types of governmental officials from liability for damages under 42 U.S.C. § 1983.[66] Earlier, the Supreme Court had held that legislators and judges were protected by an "absolute immunity."[67] It based this con-

57. *Id.* at 265, 564 P.2d at 1232.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. The court does not make clear whether this new immunity for public officials is categorical or one of degree. If it is the former then the various terms may be viewed as synonomous and are to be contrasted with absolute immunity. However, the court, by stating that the parole board members are protected by a qualified immunity in relation to their parole decisions, left open whether this statement implies that non-parole decisions or decisions made by other public officials are protected by some other degree of immunity, such as a "lesser," "limited," or "partial" immunity.
63. The adjectives "absolute" and "qualified" are somewhat misleading. An absolute immunity avoids liability regardless of the circumstances involved, whereas a qualified immunity acts as a type of legal defense and depends upon the circumstances. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1975).
64. 115 Ariz. at 265, 564 P.2d at 1232.
65. 420 U.S. 308 (1975).
66. *See id.* at 316.
67. Pierson v. Ray, 386 U.S. 547, 553-54 (1967) (judges); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (legislators).

clusion on the common law belief that to hold them civilly liable for their official acts "would contribute not to principled and fearless decision-making but to intimidation."[68] In contrast, because there was no like common law belief concerning public officials of the executive branch and of other nonlegislative and nonjudicial positions, they were never granted an absolute and unqualified immunity.[69] Thus, a policeman,[70] a member of a school board,[71] or even the chief executive officer of a state[72] has no absolute immunity. In contrast to the absolute immunity afforded the judge or legislator, which is granted "without regard to his purpose, motive, or the reasonableness of his conduct,"[73] the public official's immunity is "qualified" and depends upon the "good faith and the reasonableness of his behavior."[74]

There is some question whether the court in *Grimm* was referring to this "qualified good-faith immunity" standard in judging the decision to parole by the board members. One problem is that the court used a variety of terms to describe the type of immunity it was granting to public officials.[75] It is unlikely that the court would muddle the issue by using terms such as "limited," "lesser," and "partial" indiscriminately when the term "qualified" has a distinct meaning with reference to the type of immunity formulated in *Wood v. Strickland.*

A second problem in equating the qualified immunity standard in *Grimm* with that in *Wood v. Strickland* is that the Arizona Supreme Court established a standard of recklessness or gross negligence, but said nothing at all about "good faith."[76] It seems strange that the court would adopt the *Wood v. Strickland* standard and yet neglect to discuss this central feature.

A third and perhaps the major problem is that the qualified immunity doctrine enunciated in *Wood v. Strickland* originated from the same source as did the quasi-judicial or discretionary immunity doctrine.[77] The question arises whether the two doctrines refer to the same type of immunity granted to nonjudicial and nonlegislative public offi-

68. Pierson v. Ray, 386 U.S. at 554.
69. *Id.* at 555.
70. *Id.*
71. Wood v. Strickland, 420 U.S. at 318.
72. Scheuer v. Rhodes, 416 U.S. 232, 247 (1973).
73. Note, *supra* note 1, at 100.
74. *Id.*
75. See text & notes 58-62 *supra.*
76. "Good faith" in this standard concerns the motivation behind and the reasonableness of the public official's conduct. 420 U.S. at 318.
77. The United States Supreme Court in Wood v. Strickland, 420 U.S. at 318, quoted Scheuer v. Rhodes, 416 U.S. at 247-48, for the definition of the qualified good-faith immunity standard. The court in *Scheuer, id.* at 247, had taken the definition from Barr v. Matteo, 360 U.S. 564, 571-72 (1958). But the articulation in *Barr* was based on Judge Learned Hand's expression in Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *see* 360 U.S. at 571-72; text accompanying note 34 *supra.*

cials while acting within their official authority.[78] If so, it seems strange that the Arizona Supreme Court in *Grimm* would support its decision to abolish the quasi-judicial immunity doctrine by adopting the qualified immunity doctrine from *Wood v. Strickland*.[79]

(2) *The Policy/Operational Dichotomy*

Many state courts that initially adopted the doctrine of quasi-judicial immunity have become disenchanted with its practical application.[80] They see the doctrine as containing two fundamental problems. First, it is unjust to the injured plaintiff to be denied recovery merely because the public official was engaged in a "discretionary" activity at the time of the injury.[81] The second problem involves distinguishing between a "discretionary" act on the one hand and a "ministerial" act on the other.[82] Generally, the complaints against the quasi-judicial im-

78. As noted earlier, the term "quasi-judicial immunity" is just one of a number of terms which refer to the general notion that a public official is immune from liability when he exercises a "discretionary" function. See text & note 25 *supra*. Based upon their common origin, it may be reasonable to believe the terms "quasi-judicial immunity" and "qualified immunity" are synonymous.

79. The following discussion is an attempt to give a possible explanation of why the Arizona Supreme Court might have referred to *Wood v. Strickland* to support its holding abrogating absolute immunity for public officials in their "discretionary" acts. As was noted earlier, text & notes 27-33 *supra*, when Arizona initially adopted the doctrine of quasi-judicial immunity, it became confused with the doctrine of judicial immunity. Since the latter entailed absolute immunity for judges while engaged in the performance of their judicial functions, *see* Wilson v. Hirst, 67 Ariz. 197, 199, 193 P.2d 461, 463 (1948), it followed that a public official also had an absolute immunity while acting "*within his jurisdiction*," that is, within his discretion. *Id.* at 201, 193 P.2d at 464 (emphasis in original). The absolute immunity afforded the judge is granted "without regard to his purpose, motive, or the reasonableness of his conduct." Note, *supra* note 1, at 100. Thus, it stands to reason that when Arizona extended absolute immunity to public officials, they would also be protected regardless of motive. Wilson v. Hirst, 67 Ariz. at 201, 193 P.2d at 464. The United States Supreme Court had absolute judicial immunity in mind when it announced that public officials are only protected by a qualified immunity. Wood v. Strickland, 420 U.S. 308, 316-18 (1974). One possible explanation, then, of why the Arizona Supreme Court looked to *Wood v. Strickland* to support its abrogation of absolute immunity for public officials is that *Wood* was used to establish a qualified immunity standard for public officials on the federal level. It is important to keep in mind, however, that in *Wood*, the Supreme Court was contrasting qualified immunity to the absolute immunity enjoyed by judges. *Id.* Qualified immunity was defined by the Court in terms of the "scope of discretion" exercised by the public official. *Id.* at 318. Thus, the discretionary function exception at the federal level referred to this qualified good-faith immunity. *Id.* In Arizona, on the other hand, the quasi-judicial immunity doctrine was from the start associated with judicial immunity. Thus, the discretionary function exception in Arizona referred to an absolute immunity.

Assuming that the court in *Grimm* was adopting the *Wood v. Strickland* qualified immunity standard, it would not be inconsistent for the court to support its abolition of quasi-judicial immunity by adopting the doctrine in a different version. In effect, it was correcting Arizona's long misassociation of public official with judicial immunity and replacing it with the federal qualified immunity standard.

80. *See, e.g.*, State v. Abbott, 498 P.2d 712, 720 (Alas., 1972); Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 445, 551 P.2d 334, 357, 131 Cal. Rptr. 14, 29 (1976); Johnson v. State, 69 Cal. 2d 782, 793, 447 P.2d 352, 360, 73 Cal. Rptr. 240, 248 (1968); Rogers v. State, 51 Hawaii 293, 297, 459 P.2d 378, 381 (1969); Lewis v. State, 256 N.W.2d 181, 195 (Iowa 1977).

81. Johnson v. State, 69 Cal. 2d 782, 790, 447 P.2d 352, 358, 73 Cal. Rptr. 240, 246 (1968).

82. *Id.* at 798, 447 P.2d at 363, 73 Cal. Rptr. at 251. One problem is that an act may be both discretionary and ministerial. *Id.* at 788, 447 P.2d at 357, 73 Cal. Rptr. at 245. "The parole officer's duty might be classified as 'discretionary' . . . . It would be equally plausible, on the

munity standard resemble those raised against the old doctrine of immunity which distinguished between "governmental" and "proprietary" functions.[83] In response to the dissatisfaction, the courts have rejected the doctrine of quasi-judicial immunity, adopting a policy/operational distinction.[84] This distinction is based on *Dalehite v. United States*.[85] The United States Supreme Court in *Dalehite* held that, for purposes of attaching official immunity under the Federal Torts Claim Act,[86] it is unnecessary to define precisely where discretion ends, but it at least includes determinations made by officials in "establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion."[87] Emanating from this holding is the rule that public officials no longer have immunity for all of their "discretionary" decisions; it "is limited to decisions made at the *planning* rather than the *operational* level."[88]

A second authority used by the Arizona Supreme Court in *Grimm* to support its holding was the federal case of *Eastern Air Lines v. Union Trust Co.*,[89] which adopted the planning/operational distinction traceable to *Dalehite*.[90] Although the court in *Grimm* does not explicitly state that it was adopting this new distinction, there is language in the decision suggesting that this is what the court meant by the term "qualified immunity." The court states that immunity is granted "only for policy level functions" because there is a "need for fearless decision-making at that level."[91] It further says that society may "need courageous, independent policy decisions," but there is "great potential harm in allowing unbridled discretion."[92]

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other hand, to characterize the officer's duties as embracive of 'ministerial' elements prescribed by the law of torts." *Id.*

Another difficulty lies in differentiating between discretionary and ministerial decisions. "In drawing the line between the immune 'discretionary' decision and the unprotected ministerial act we recognize both the difficulty and the limited function of such distinction." *Id.* at 793, 447 P.2d at 360, 73 Cal. Rptr. at 248. "The major problem with this rule [discretionary/ministerial distinction] is the lack of an adequate standard for determining what is discretionary." Whant, *The Discretionary Function Exception to Government Tort Liability*, 61 MARQ. L. REV. 161, 168 (1977). "[T]he dichotomy between 'ministerial' and 'discretionary' is at the least unclear, and one may suspect that it is a way of stating rather than arriving at the result." Jaffe, *Suits Against Governments and Officials: Damage Actions*, 77 HARV. L. REV. 209, 218 (1963).

83. *See* text & notes 42-48 *supra*.

84. See cases cited at note 80 *supra*.

85. 346 U.S. 15 (1953). A review of the pertinent authority regarding the planning/operational distinction "must begin with Dalehite v. United States." Driscoll v. United States, 525 F.2d 136, 138 (9th Cir. 1975). Courts generally treat the planning/operational and policy/operational dichotomies as equivalent, but for an argument that there may be a difference, see K. DAVIS, *supra* note 50, § 25.08, at 846-49.

86. 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C. (1976)).

87. 346 U.S. at 36.

88. Driscoll v. United States, 525 F.2d 136, 138 (9th Cir. 1975) (emphasis in original).

89. 221 F.2d 62 (D.C. Cir.), *cert. denied*, 350 U.S. 911 (1955).

90. *Id.* at 76.

91. 115 Ariz. at 265, 564 P.2d at 1232.

92. *Id.* at 266, 564 P.2d at 1233.

The court's emphasis in fashioning a new qualified immunity standard for public officials was that the injured plaintiff should not be denied recovery merely because the official who caused the injury was engaged at the time in a discretionary duty.[93] At the time of the decision, the court was sensitive to one of two problems courts give for rejecting quasi-judicial immunity.[94] The second problem—how to distinguish between discretionary and ministerial acts—does not seem to receive much attention from the court. The court does declare that "there are no reliable criteria for judging a major policy decision,"[95] but in the main the court seems to compound rather than resolve the problem. One reason for this is that the court never expressly says whether the discretionary/ministerial distinction is abolished in Arizona. Courts that have adopted the policy/operational distinction[96] have tried to resolve the problem by treating all acts as "discretionary" and invoking immunity depending upon the level of discretion.[97] *Grimm* does not appear to do this. The court's holding dealt only with discretionary duties,[98] and in so doing may have worsened rather than aided the solution of the problem. Instead of having two categories—discretionary and ministerial—to fit the various actions of public officials, the court seems to be setting up three: the ministerial; the discretionary, giving rise to the qualified immunity, which the court may be comparing to operational level decisions; and the discretionary within "true judicial proceedings" giving rise to an absolute immunity, which the court may be comparing to planning or policy level decisions.[99]

There is another reason to believe that the court was adopting the policy/operational distinction in *Grimm*.[100] There seems to be a grow-

93. *Id.* at 265, 564 P.2d at 1232.
94. See text & notes 80-85 *supra*.
95. 115 Ariz. at 265, 564 P.2d at 1232.
96. *See* cases cited at note 80 *supra*.
97. *See, e.g.*, Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 445, 551 P.2d 334, 357, 131 Cal. Rptr. 14, 29 (1976) (virtually every public act admits of some element of discretion).
98. *See* 115 Ariz. at 265, 564 P.2d at 1232.
99. *Id.*
100. It is important to emphasize that the court never stated whether the parole board members' decision to parole Blazak was made at the planning or operational level, leaving doubt that it actually adopted this distinction. If the court did adopt this distinction, however, it must have believed the decision was made at the operational level because only a qualified immunity was granted. But even this conclusion differs from the position taken by other courts faced with fact situations similar to *Grimm*. The California Supreme Court, for example, held that the decision to parole "comprises the resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial reexamination." Johnson v. State, 69 Cal. 2d 782, 795, 447 P.2d 352, 361, 73 Cal. Rptr. 240, 249 (1968).

Assuming that the Arizona Supreme Court was adopting the policy/operational distinction, it may behoove the court to reconsider this decision. Not all courts that have considered the distinction have approved of it. The Oregon Supreme Court said the "fundamental difficulty with the planning/operational approach is that it is likely to become a mere labeling approach." Smith v. Cooper, 256 Or. 485, 502, 475 P.2d 78, 86 (1970). A recent federal district court case stated that the "lower court decisions since *Dalehite* do not comprise a particularly coherent body of law."

ing trend supportive of the distinction. It has been touted by Professor Davis as an answer to the practical difficulties inherent in the doctrine of quasi-judicial immunity.[101] It has been explicitly adopted by the United States Supreme Court,[102] by the Ninth Circuit Court of Appeals,[103] by a growing number of state courts,[104] by the Second Restatement of Torts,[105] and was even alluded to in an earlier Arizona decision involving governmental immunity.[106]

(3) *The Relevance of the Parole Statute*

The court's final authority in *Grimm* was found in the parole statute itself.[107] Under its guidelines, the board members are authorized to release the parole applicant, and thus, by inference, are not subject to civil liability, if it appears that there is a "reasonable probability" the

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Blessing v. United States, 447 F. Supp. 1160, 1172 (E.D. Penn. 1978). The confusion "may stem from the fact that the Court's planning/operational distinction, instructive as it may be on a theoretical level, can become exceedingly problematic when applied to concrete facts." *Id.* at 1173. "The frontier where planning ends and operations begin . . . is seldom sharply marked." *Id.* at 1173 n.19. "Thus, when put to the test, it is arguable that a dichotomy based on 'planning level' activities is not much more helpful in application than one simply based on 'discretion.'" *Id.*

These criticisms of the planning/operational distinction are the same as those leveled against the governmental/proprietary distinction, see text & notes 44-50 *supra*, and the discretionary/ministerial distinction. See note 82 *supra*. The problem stems, not from the particular dichotomy under discussion but from the nature of a dichotomy itself. A dichotomy requires some criterion or principle to differentiate between its categories. Courts have been using these immunity distinctions without the benefit of an adequate criterion to classify governmental functions, duties, and decisions. Naturally there has been confusion regarding their application and the result is an inconsistent body of case law.

Professor Prosser states that an immunity is granted by the courts for the protection of a particular status of defendants or interest. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 970. The focus by courts on whether a function of government is "governmental" or "proprietary," or whether a duty is "discretionary" or "ministerial," or whether a discretionary decision is made at the "planning" or "operational" level clouds the true issue. Should the particular governmental entity or public official be liable for tortious conduct which causes injury? Professor Borchard focused the discussion long ago when he questioned whether the injured individual citizen should bear the unjust burden of the tortious conduct of a public official. Borchard, *supra* note 39, at 1; see discussion at note 48 *supra*.

The Arizona Supreme Court should consider following the lead set by the New Mexico legislature which abolished all judicially-created dichotomies used to determine immunity or liability of governmental entities and officials. Liability of governmental officials is now based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty. N.M. STAT. ANN. § 5-14-2(B) (1977). The court should reexamine the need for any type of immunity for public officials. Public functions could be performed properly without officials being immune from liability for their torts. With a change in judicial policy, the legislature could provide a policy to indemnify officials. That solution would both adequately protect the official while engaged in official activities and compensate the injured victim. *See* 115 Ariz. at 266 n.4, 564 P.2d at 1233 n.4.

101. K. DAVIS, *supra* note 50, § 25.08, at 846-49.

102. Dalehite v. United States, 346 U.S. 15, 42 (1953).

103. Driscoll v. United States, 525 F.2d 136, 138 (9th Cir. 1975).

104. *See* cases cited at note 80 *supra*.

105. RESTATEMENT (SECOND) OF TORTS, Ch. 45A (Tent. Draft No. 19, 1973). *See* Brown v. Wichita State Univ., 219 Kan. 2, 38, 547 P.2d 1015, 1042 (1976) (concurring opinion). Arizona courts follow the RESTATEMENT (SECOND) OF TORTS in the absence of authority to the contrary. Barnum v. Rural Fire Protection Co., 24 Ariz. App. 233, 238, 537 P.2d 618, 623 (1975).

106. Patterson v. City of Phoenix, 103 Ariz. 64, 67, 436 P.2d 613, 616 (1968).

107. See ARIZ. REV. STAT. ANN. § 31-412 (1968), set out at note 7 *supra*.

applicant will remain at liberty without violating the law, even if it turns out that they guessed wrong.[108] It is difficult to distinguish this "reasonable probability" standard from that of common negligence.[109] It is unlikely that the court was referring to this statutory standard by the term "qualified immunity" since the doctrine applies to all public officials, not just to the parole board members.[110] The court did, however, appear to have been applying a negligence standard to the parole decision by the board members. The court stated that "we must now decide whether the qualified immunity properly enjoyed by officials such as parole board members allows liability under the circumstances of this case."[111] It then applied the private/public duty test,[112] established a standard of care of gross negligence or recklessness,[113] and remanded the case for a determination of whether the board members were liable,[114] without ever revealing whether the members were protected by the qualified immunity doctrine. An obvious question is whether the court may have been treating either this private/public duty test or the greater standard of care as the qualified immunity itself.[115]

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108. *Id.*

109. The basis of negligence is behavior involving unreasonable danger to others. The defendant's liability is judged in light of the possibilities apparent to him at the time he engages in the conduct, not later with knowledge of the consequences. The defendant does not guarantee that his behavior will not cause injury, only that, in light of the recognizable risk, the behavior is not unreasonable. *See* W. PROSSER, *supra* note 100, § 31, at 146. On the other hand, an immunity avoids liability, not because the defendant's conduct is not tortious, but because of his status. Thus, his conduct may be unreasonable or even obviously tortious, but courts grant him absolution from liability. *Id.* § 131, at 970. The "reasonable probability" standard in *Grimm* looks to the conduct and not the status of the parole board members, and in this respect resembles more a standard of negligence rather than one of immunity.

110. 115 Ariz. at 265, 564 P.2d at 1232.

111. *Id.* at 266, 564 P.2d at 1233.

112. *Id.*

113. *Id.* at 267, 564 P.2d at 1234.

114. *Id.* at 270, 564 P.2d at 1237.

115. The court stated that:

> We believe that a limited immunity for members of the Board of Pardons and Paroles with liability only for the grossly negligent or reckless release of a highly dangerous prisoner strikes the proper balance between the competing interests. The public has an interest in holding public officials responsible for outrageous conduct. The Board members have an interest in freedom from suit for reasonable decisions.

Id. at 267-68, 564 P.2d at 1234-35.

This language suggests the court's qualified immunity is equivalent to a gross negligence or recklessness standard of care. There is some difficulty with this conception. First, if the two phrases are equivalent, why didn't the court, when it rejected absolute immunity, merely hold that public officials will be liable in the future if they are grossly negligent or reckless? Why introduce confusion by adopting the term "qualified immunity" already having an established meaning which is different? See text & notes 63-79 *supra*. Second, this standard of care does not depend on the defendant's status, which is fundamental to the concept of immunity in the traditional sense. *See* W. PROSSER, *supra* note 100, § 131, at 970. Finally, the court stressed that it elected this standard of care under the alleged facts of the case. 115 Ariz. at 266, n.5, 564 P.2d at 1233 n.5. Perhaps the court would adopt a different standard of care, such as simple negligence, in a case involving a public official other than a parole board member. But logically, the same standard of care would apply, if it indeed was what the court meant by the use of the term "qualified immunity," since the doctrine applies to all public officials, not just to parole board members.

The court's decision to abrogate quasi-judicial immunity and replace it with a qualified immunity has far-reaching ramifications for every public official. Yet, from *Grimm*, an official does not know when he is immune from or subject to liability. He does not know whether he will be protected if he acts in "good faith," only for his policy level decisions, or only so long as his acts are not grossly negligent or reckless.

Legislative Response

The Arizona legislature responded to *Grimm* by providing that public officials will not be held personally liable for discretionary acts or omissions done in good faith without wanton disregard of their statutory duties.[116] This language seems to be consistent with both the *Wood v. Strickland* qualified good-faith immunity standard[117] and the establishment in *Grimm* of a recklessness standard of care.[118]

The statute covers "discretion" and does not distinguish acts done in a "pure judicial proceeding" from other discretionary acts, as the court had done in *Grimm*.[119] The legislation apparently prohibits absolute immunity of public officials regardless of the nature of the act involved, whether judicial-like or not. This solves one problem arising from *Grimm*: the court apparently need not consider three categories of official action, only the two traditional "ministerial" and "discretionary" categories. But the courts are again placed in the position of having to decide whether a given act is ministerial or discretionary in order to determine whether or not the statute applies. It is debatable whether the courts that have adopted the policy/operational distinction are correct in believing that the problems inherent in the ministerial/discretionary dichotomy may be avoided by the new distinction, but the debate appears moot in Arizona since the statute does not distinguish between policy and operational level decisions. There is no mention of levels of discretion at all. The courts must tolerate the problems of the ministerial/discretionary dichotomy.

116. ARIZ. REV. STAT. ANN. § 41-621(G) (1977) provides:
G. A state officer, agent or employee, except as otherwise provided by statute, is not personally liable for an injury or damage resulting from his act or omission in a public official capacity where the act or omission was the result of the exercise of the discretion vested in him if the exercise of the discretion was done in good faith without wanton disregard of his statutory duty.

117. *See* text & notes 65-79 *supra.*

118. *See* text & notes 108-15 *supra.*

119. *See* 115 Ariz. at 265, 564 P.2d at 1232; text & notes 96-99 *supra.*

Private/Public Duty Test

The private/public duty test[120] developed in Arizona in relation to governmental immunity. The first Arizona case to officially adopt the rule of sovereign immunity was *State v. Sharp*,[121] where the court stated:

> [I]t is well settled by the great weight of authority that the state, in consequence of its sovereignty, is immune from prosecution in the courts and from liability to respond in damages for negligence, except in those cases where it has expressly waived immunity or assumed liability by constitutional or legislative enactment.[122]

This decision was the law in Arizona until it was overruled in *Stone v. Arizona State Highway Commission*.[123] In *Stone* the court explicitly abolished sovereign immunity declaring that:

> We are of the opinion that when the reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold that it must be discarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled.[124]

Subsequently, in *Veach v. City of Phoenix*,[125] the court expressly abrogated municipal immunity, and in *Patterson v. City of Phoenix*,[126] it ruled that a governmental entity may be held liable under the doctrine of respondeat superior for the tortious acts committed by its officials acting within their official capacity.

The movement by the court towards a greater scope of governmental liability in the *Stone-Veach-Patterson* trilogy was checked in *Massengill v. Yuma County*.[127] The court agreed that the earlier decisions had "in the most unquestionable terms relegated that archaic doc-

120. *See* T. COOLEY, A TREATISE ON THE LAW OF TORTS § 300, at 385 (4th ed. 1932):

> The rule of official responsibility, then, appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public of public prosecution. On the other hand, if the duty is a duty to an individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. The failure of a public officer to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its nonperformance.

Id.

121. 21 Ariz. 424, 189 P. 631 (1920).

122. *Id.* at 426, 189 P. at 631.

123. 93 Ariz. 384, 381 P.2d 107 (1963). For a discussion of this case, see Comment, *Governmental Immunity in Arizona—The Stone Case*, 6 ARIZ. L. REV. 102, 103 (1964).

124. 93 Ariz. at 387, 381 P.2d at 109.

125. 102 Ariz. 195, 196, 427 P.2d 335, 336 (1967).

126. 103 Ariz. 64, 68, 436 P.2d 613, 617 (1968).

127. 104 Ariz. 518, 520-21, 456 P.2d 376, 378-79 (1969). For an early discussion of the effects and possible limitation of *Massengill*, see "Duty of Public Officials," 12 ARIZ. L. REV. 229, 232-39 (1970).

trine [of governmental immunity] to the dustheap of history,"[128] but maintained that they thereby had not relieved "claimants of the responsibility of establishing all the elements of actionable negligence."[129] Liability for damages will not arise where the public entity owes a duty to the public in general; there must be a specific duty owing to the injured individual.[130] This private/public duty dichotomy is qualified by the provision that if there is a "special relationship" existing between the official and the plaintiff, the official can narrow a public duty into a special one owing to the plaintiff.[131]

The court in *Grimm* used this private/public duty test, but its application raises serious doubt about its usefulness as a means of determining liability of a public official. The court held that the parole board members had narrowed their public duty into one owing specially to the plaintiffs.[132] It is difficult to understand, however, how the duty owed the plaintiffs differed from that owed to any other member of the general public. The board members made no specific promises or representations to the plaintiffs,[133] nor were they under court order to look out for the plaintiffs' safety.[134] Furthermore, the board members never had control over the plaintiffs' actions that created the conditions causing their injuries.[135] The court admitted that the private duty could also "logically be viewed as one owed to the public in gen-

128. 104 Ariz. at 521, 456 P.2d at 379.

129. *Id.* at 523, 456 P.2d at 381. The components of actionable negligence are "a duty owed to the plaintiff, a breach thereof and injury proximately caused by such breach." *Id.* at 521, 456 P.2d at 379.

130. *Id.*

131. The court in Duran v. City of Tucson, 20 Ariz. App. 22, 509 P.2d 1059 (1973), identified three situations in which a public official may owe a duty to an individual specifically. First, there are certain governmental activities which provide services and facilities, such as highways, which are used by the public; the failure to properly monitor these services or facilities may give rise to a private cause of action against those officials responsible. *Id.* at 25, 509 P.2d at 1062. Second, certain governmental acts are performed which parallel those by ordinary citizens, such as the operation of a motor vehicle, for which liability may follow if done in a negligent manner. *Id.* Finally, there are situations where conduct by a public official may narrow a public duty into one owed specially to an individual. *Id.* Regarding this last situation, the court in Ivicevic v. Town of Glendale, 26 Ariz. App. 460, 549 P.2d 240 (1976), ruled that a public official may narrow a public duty into one owed specially to the plaintiff where a "specific relationship" exists between them which gives rise to a particular duty on the part of the official to exercise reasonable care. *Id.* at 462, 549 P.2d at 242.

132. The court ruled that the parole board members had narrowed their duty to the plaintiffs by "assuming parole supervision over, or taking charge of, a person having dangerous tendencies." 115 Ariz. at 267, 564 P.2d at 1234.

133. *See* McGeorge v. City of Phoenix, 117 Ariz. 272, 277, 572 P.2d 100, 105 (Ct. App. 1977) (public official may create a "special relationship" by making specific promises or representations to an individual in a situation which would create justifiable reliance).

134. *See id.* (public official may create "special relationship" if he has control over the plaintiff which creates the injury).

135. The court in *McGeorge* cited two cases as examples of a public official exercising control over the actions of the plaintiff which affirmatively creates the condition causing him injury. *Id.* First, in Gardner v. Village of Chicago Ridge, 128 Ill. App. 2d 157, 160-63, 262 N.E.2d 829, 831-32 (1970), the plaintiff, victim of a previous assault, was brought by police to identify his three assailants. Because of the carelessness of the police, one of the assailants was able to break loose and again attack the plaintiff. In a second case, Smullen v. City of New York, 28 N.Y.2d 66, 68-69,

eral."[136] The purpose of the test is to determine public official liability, but if the duty can be logically viewed as either public or private, of what utility is the test? The court still needs another standard in order to decide which duty is paramount in a given case.[137]

The Supreme Courts of Alaska and Minnesota have recognized that the private/public duty test is really just another form of absolute immunity.[138] The Alaska court held that the state should be treated as a private litigant and should be liable to persons foreseeably injured by its negligent acts or omissions.[139] The court rejected the private/public duty test because it shields the public official from liability and makes the establishment of a duty more difficult when the state is the defendant.[140]

The Minnesota Supreme Court, after reviewing a number of cases in which the private/public duty test had been used, rejected it because the court could find no consistent thread in the cases.[141] It followed the Alaska court in resting the question of duty on the foreseeable risk of serious harm.[142]

The New Mexico legislature has recognized the inherent unfairness and inequity in demanding a greater showing of evidence to establish a duty if the defendant is a public rather than a private litigant.[143] In response, it has abolished all artificial categories traditionally used to determine official immunity, and now bases official liability upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty.[144]

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268 N.E.2d 763, 764, 320 N.Y.S.2d 19, 20 (1971), a city inspector directed an individual to climb down into an open trench, whereupon it collapsed, killing him.

136. 115 Ariz. at 267, 564 P.2d at 1234.

137. The private/public duty test appears to be nothing more than another judicially-created dichotomy for the purpose of fixing governmental liability, and thereby suffers from the same shortcomings as the other dichotomies that courts have adopted. See discussion at note 100 *supra.*

138. Adams v. State, 555 P.2d 235, 241-44 (Alaska 1976); Lorshbough v. Township of Buzzle, — Minn. —, —, 258 N.W.2d 96, 100-02 (1977). The Alaska Supreme Court stated that "we consider that the 'duty to all, duty to no-one' [private/public duty] doctrine is in reality a form of sovereign immunity . . . ." Adams v. State, 555 P.2d at 241.

139. 555 P.2d at 242.

140. *See id.*

141. Lorshbough v. Township of Buzzle, — Minn. —, —, 258 N.W.2d 96, 102 (1977).

142. The court ruled that

> [t]he principle is that a governmental unit owes a particular individual a duty of care when its officer or agent, in a position and with authority to act, has or should have had knowledge of a condition that violates safety standards prescribed by statute or regulation, and that presents a risk of serious harm to the individual or his property. When such serious injury is reasonably foreseeable, the governmental unit has a duty to exercise reasonable care for the individual's safety.

Id. at 102.

143. *See* N.M. STAT. ANN. § 5-14-2(A) (1976-77).

144. *Id.* § 5-14-2(B) provides:

> The Tort Claims Act (5-14-1 to 5-14-20.3) shall be read as abolishing all judicially-created categories such as "governmental" or "proprietary" functions and "discretionary" or "ministerial" acts previously used to determine immunity or liability. Liability for acts or omissions under the Tort Claims Act (5-14-1 to 5-14-20.3) shall be based upon

Arizona courts take the position regarding litigation involving a private defendant that "[w]hether or not there is a duty on the part of the defendant to protect the plaintiff from the injury of which he complains is based on foreseeability."[145] The Arizona Supreme Court should consider following the example set by the Alaska Supreme Court and reexamine whether the difference in standards used to establish a duty, depending upon whether there is a public or private defendant, can any longer be justified.

The *Grimm* decision emphasizes the problems inherent in the private/public duty test.[146] The court should reject the test as yet another judicially-created dichotomy that perpetuates absolute immunity and leaves the injured plaintiff to bear the burden of the government's tortious conduct. As the court has repeatedly stated, when the reason for a rule no longer exists, the rule itself should be abandoned.[147]

Conclusion

The only thing certain from the *Grimm* decision is that public officials are no longer protected by an absolute immunity under the doctrine of quasi-judicial immunity. It is likely that the statute recently enacted merely supports the court's adoption of a qualified immunity doctrine. Unfortunately, the court did not clarify exactly what it meant by the term "qualified immunity" and the statute leaves it still in doubt.

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the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty.

145. Rager v. Superior Coach Sales & Serv., 111 Ariz. 204, 210, 526 P.2d 1056, 1062 (1974).

146. There are three basic problems inherent in the private/public duty test. First is the lack of an adequate criterion for determining just what duties are private and what duties are public. Second is the fact, as noted in *Grimm*, 115 Ariz. at 267, 564 P.2d at 1234, that a duty may logically be viewed as one owing to specific individuals and the public in general so it is unclear whether liability or immunity should apply. Finally, it is unclear when a public duty becomes narrowed to one owing specially to an individual.

147. Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 266, 564 P.2d 1227, 1233 (1977); Stone v. Arizona State Highway Comm'n, 93 Ariz. 384, 387, 381 P.2d 107, 109 (1963).

VII. WATER LAW

A. DUTY TO OPERATE AND MAINTAIN THE ARIZONA CANAL DURING STORMS

Intense rainstorms inundate parts of Arizona during the summer months causing severe drainage problems[1] and sometimes resulting in extensive property damage in the populated areas of the state.[2] Water retention structures—reservoirs, artificial ponds, ditches, and particularly irrigation canals—bear an intimate relationship to the summer storms as they often intersect or otherwise interact with storm runoff waters.[3] The activities and responsibilities of the operators of these structures are, quite naturally, affected by the summer storms. Until recent years, however, duties as to construction, maintenance, and operation of water retention structures had never been precisely delineated by the Arizona courts.[4]

The need for a judicial examination of the negligence standard governing the activities of the operators of water retention structures was underscored by the Arizona Supreme Court's rejection of strict liability theories in *Ramada Inns v. Salt River Valley Water Users' Association*.[5] In that case, the court held that the water users' association could not be strictly liable for the construction, operation, and maintenance of the Arizona Canal,[6] but declined the opportunity to discuss in any detail operative negligence principles.[7]

Two recent cases, *Salt River Valley Water Users' Association v. Giglio*[8] and *Markiewicz v. Salt River Valley Water Users' Association*,[9] for-

1. *See generally* Weston, *Gone with the Water—Drainage Rights and Storm Water Management in Pennsylvania*, 22 VILL. L. REV. 901 (1977); Note, *Flood Control and Arizona*, 1973 L. & SOC. ORDER 919.

2. *See generally* Salt River Valley Water Users' Ass'n v. Giglio, 113 Ariz. 190, 549 P.2d 162 (1976); Ramada Inns v. Salt River Valley Water Users' Ass'n, 111 Ariz. 65, 523 P.2d 496 (1974); Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. 329, 576 P.2d 517 (Ct. App. 1978).

3. *See generally* Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. 329, 332-33, 576 P.2d 517, 520-21 (Ct. App. 1978).

4. Several Arizona cases involved flooding or overflows of water retention structures, yet failed to provide explicit guidance in the resolution of this issue either because they determined liability based upon negligent disposition of "ordered water," *see* Salt River Valley Water Users' Ass'n v. Blake, 53 Ariz. 498, 500-02, 90 P.2d 1004, 1005-06 (1939); Salt River Valley Water Users' Ass'n v. Arthur, 51 Ariz. 101, 102-03, 74 P.2d 582, 583-84 (1937); Salt River Valley Water Users' Ass'n v. Delaney, 44 Ariz. 544, 545, 39 P.2d 625, 626 (1934); Salt River Valley Water Users' Ass'n v. Stewart, 44 Ariz. 119, 120, 34 P.2d 400, 401 (1934); text & notes 48 *infra*, or did not base liability on negligence. Schlect v. Schiel, 76 Ariz. 214, 218-20, 262 P.2d 252, 254-55 (1953); Maricopa County Mun. Water Conserv. Dist. No. 1 v. Warford, 69 Ariz. 1, 13, 206 P.2d 1168, 1174 (1949); Maricopa County Mun. Water Conserv. Dist. No. 1 v. Roosevelt Irr. Dist., 39 Ariz. 357, 361, 6 P.2d 898, 900-01 (1932); Green Reservoir Flood Control Dist. v. Willmath, 15 Ariz. App. 406, 410, 489 P.2d 69, 73 (1971); Kirkpatrick v. Butler, 14 Ariz. App. 377, 380, 483 P.2d 790, 793 (1971).

5. 111 Ariz. 65, 523 P.2d 496 (1974).

6. *Id.* at 68, 523 P.2d at 499.

7. *Id.* at 67, 523 P.2d at 498.

8. 113 Ariz. 190, 549 P.2d 162 (1976).

9. 118 Ariz. 329, 576 P.2d 517 (Ct. App. 1978).

mulate readily discernable legal duties to which the operators of the Arizona Canal must adhere in disposing of storm runoff.[10] Though the operators' duties established in *Giglio* and *Markiewciz* are grounded in the familiar standard of reasonableness,[11] both cases provide guidelines which ultimately amount to step-by-step precautionary and procedural rules.[12]

Giglio and *Markiewicz* were factually similar; in both cases severe rainstorms had swollen the Arizona Canal with runoff. Although the Salt River Valley Water Users' Association [the Association] initiated its storm control procedures, the canal was unable to handle the increased volume, and great quantities of flood water poured through breaches in the canal causing property damage to homeowners.[13]

In *Giglio*, three possible acts of negligence were alleged by the homeowners: the Association took too long to "dump"[14] the canal; it failed to provide spillways to relieve pressure on the canal's banks during storm conditions; and its construction of a demossing bridge restricted the flow of water in the canal, adding to its velocity and turbulence and thereby contributing to the formation of breaks in the canal.[15] The Arizona Supreme Court held that the trial court did not err in denying the Association's motion for a directed verdict and found that the evidence was sufficient to support the jury's finding of negligence.[16]

In *Markiewicz*, the homeowners alleged that the Association was negligent by providing inadequate diversion facilities and failing to reinforce the south bank of the canal.[17] The appellate court reversed the trial court's directed verdict for the Association and held that a reasonable juror might conclude that the Association was negligent and that such negligence was the proximate cause of the homeowners' dam-

10. *See* Salt River Valley Water Users' Ass'n v. Giglio, 113 Ariz. at 198-203, 549 P.2d at 169-74; Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. at 335-39, 576 P.2d at 523-27.

11. Salt River Valley Water Users' Ass'n v. Giglio, 113 Ariz. at 199, 549 P.2d at 171; Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. at 336, 576 P.2d at 524.

12. *See* Salt River Valley Water Users' Ass'n v. Giglio, 113 Ariz. at 199-201, 549 P.2d at 171-73; Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. at 335-38, 576 P.2d at 524-27.

13. Salt River Valley Water Users' Ass'n v. Giglio, 113 Ariz. at 94, 549 P.2d at 166; Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. at 333, 576 P.2d at 521.

14. "Dumping" refers to the process by which no more stored water is permitted to enter the canal and diversion facilities are opened to remove water from the canal. Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. at 332, 576 P.2d at 520. This process is also known as "drawing down."

15. 113 Ariz. at 200-02, 549 P.2d at 172-74.

16. *Id.* at 202, 549 P.2d at 174.

17. 118 Ariz. at 335, 576 P.2d at 523. The homeowners also contended that the Association diverted the flow of a natural watercourse and consequently should be held strictly liable for the resulting damage. *Id.* at 334-35, 576 P.2d at 522-23. The court rejected this claim on the authority of Ramada Inns v. Salt River Valley Water Users' Ass'n, 111 Ariz. 65, 523 P.2d 496 (1974).

ages.[18]

Although *Giglio* and *Markiewicz* resolved several issues,[19] this casenote is limited to an examination of the Association's duty of care when confronted with heavy storm runoff. Initially, a sketch of the issues raised when operators of water retention structures are confronted with storm activity is presented to serve as a backdrop against which to examine the standard of care announced in *Giglio* and *Markiewicz*. The Arizona courts' basis for imposing a duty upon the Association to exercise reasonable care in disposing of flood waters will then be discussed. Finally, since the Arizona courts failed to fully articulate the source of the Association's duty and to ground it on precedent that compels the result achieved, alternate justifications will be offered.

Duties of Operators of Water Retention Structures

The owner or operator of an irrigation ditch or canal is under a duty to exercise reasonable care in its construction, maintenance, and operation.[20] The operator is liable for injuries caused by the breaking,[21] leakage,[22] or overflow[23] of the ditch or canal resulting from his negligence. The general rule is that water retention structures should be designed to withstand heavier than ordinary in-flow,[24] but most

18. 118 Ariz. at 338-39, 576 P.2d at 526-27.

19. The *Giglio* court also discussed the issues of whether the Association is merely an agent of the United States and thus immune from suit, 113 Ariz. at 195-96, 549 P.2d at 167-68, and whether the builder of the subdivision damaged by the flooding was liable for building homes on a floodplain without proper precautionary measures. *Id.* at 205, 549 P.2d at 177. These two issues were also presented to the *Markiewicz* court which disposed of them by following *Giglio*. 118 Ariz. at 334, 576 P.2d at 522. The *Markiewicz* court also addressed issues involving strict liability, *id.*, and whether the suit could properly be brought as a class action, *id.* at 340, 576 P.2d at 528.

20. *See, e.g.*, Salt River Valley Water Users' Ass'n v. Stewart, 44 Ariz. 119, 120, 34 P.2d 400, 401 (1934); Charvoz v. Bonneville Irr. Dist., 120 Utah 480, 482-85, 235 P.2d 780, 782-83 (1951); Taylor Ditch Co., Inc. v. Casey, 520 P.2d 218, 222-23 (Wyo. 1974). Though the *Giglio* court reaffirmed the reasonableness standard as the proper gauge to determine negligence, 113 Ariz. at 199, 549 P.2d at 171, that standard is flexible. Since the "Association has a relatively sophisticated telemetry supervisory control system which enables it to electronically monitor the water level in the canal," *id.*, the court may have demanded a higher duty of care than otherwise would have been imposed absent the sophisticated equipment. This assumption is nowhere explicitly stated by the court, but the sophistication of the storm control equipment alone would seem to demand a higher standard of "reasonableness." *See* Dougherty v. California-Pacific Util. Co., 546 P.2d 880, 882 (Utah 1976); Erickson v. Bennion, 28 Utah 2d 371, 374, 503 P.2d 139, 140-41 (1971).

21. Freed v. Inland Empire Ins. Co., 154 F. Supp. 855, 857-58 (D. Utah 1957); Brizendine v. Nampa Meridian Irr. Dist., 97 Idaho 580, 582-83, 548 P.2d 80, 82-83 (1976); Charvoz v. Bonneville Irr. Dist., 120 Utah 480, 481-82, 235 P.2d 780, 781-82 (1951); Clarke v. Icicle Irr. Dist., 72 Wash. 2d 201, 202-06, 432 P.2d 541, 542-44 (1967).

22. *See* Parada v. United States, 420 F.2d 493, 495 (5th Cir. 1970); Laurence v. West Side Irr. Dist., 233 Cal. App. 2d 532, 533-40, 42 Cal. Rptr. 357, 359-65 (1965); Furrer v. Talen Irr. Dist., 258 Or. 494, 500, 516-17, 466 P.2d 605, 616 (1971); Robillard v. Selah-Moxee Irr. Dist., 54 Wash. 2d 582, 583-84, 343 P.2d 565, 565-66 (1959).

23. Salt River Valley Water Users' Ass'n v. Blake, 53 Ariz. 498, 502-04, 90 P.2d 1004, 1007-09 (1939); Casey v. Nampa & Meridian Irr. Dist., 85 Idaho 299, 301-02, 379 P.2d 409, 410 (1963); Dougherty v. California-Pacific Util. Co., 546 P.2d 880, 883 (Utah 1976); Holland v. Columbia Irr. Dist., 75 Wash. 2d 302, 305, 450 P.2d 488, 489-91 (1969).

24. *See, e.g.*, Southern Pacific Co. v. City of Los Angeles, 5 Cal. 2d 545, 547-49, 55 P.2d 847, 849 (1936); Riddle v. Chicago R.I. & P. Ry., 88 Kan. 248, 251-52, 128 P. 195, 197 (1912); Heck-

courts ascribe limits to this duty so that when in-flow is not reasonably foreseeable, breaks in the structure do not constitute a breach of the duty.[25] Assuming that the retention device does not break, a second consideration becomes important: whether the operator must "draw down"[26] the water level in the structure in order to accommodate excess in-flow or simply allow the excess to pass over the structure's wall. This issue is most often raised with regard to reservoir dams.[27] Reservoir operators are usually not required to intercept as much runoff as possible. Rather, the duty owed is to maintain the structural integrity of the dam and to pass over the "natural flow" of storm runoff.[28] This duty has been expressed as one which demands only that the operator not make flooding worse, as would occur in the event of breaks in the device; no affirmative duty to alleviate flooding caused by the natural flow of runoff is imposed.[29]

The Duty Standard of Giglio and Markiewicz

The Arizona Canal, built in 1883,[30] is an elevated, open, earthen-banked irrigation canal,[31] lying between the McDowell Mountains and the Salt River in the Phoenix area.[32] When the canal was built the surrounding area was sparsely settled, but it has developed into highly populated residential and commercial districts in Scottsdale and Phoenix.[33] The canal alters the natural drainage of the area and during storms causes rainwater to collect north of the canal.[34]

In order to facilitate its primary goal of allocating water to its members, the Association has undertaken some storm control procedures.[35] Despite such procedures, the runoff from severe storms can be

aman v. Northern Pac. Ry., 93 Mont. 363, 377-78, 20 P.2d 258, 262 (1933); Charvoz v. Bonneville Irr. Dist., 120 Utah 480, 485-87, 235 P.2d 780, 783 (1951). *But see* Geuder, Paeschke & Frey Co. v. City of Milwaukee, 147 Wis. 491, 498-99, 133 N.W. 835, 839 (1911).

25. *See, e.g.*, Curtis v. Dewey, 93 Idaho 847, 849, 475 P.2d 808, 810 (1970); Charvoz v. Bonneville Irr. Dist., 120 Utah 480, 485-87, 235 P.2d 780, 784 (1951); Trout Brook Co. v. Willow River Power Co., 221 Wis. 616, 623-26, 267 N.W. 302, 305-06 (1936).

26. See note 14 *supra*.

27. Key Sales Co. v. South Carolina Elec. & Gas Co., 290 F. Supp. 8, 23-24 (D.S.C. 1968) (collecting cases); Ireland v. Henrylyn Irr. Dist., 113 Colo. 555, 557-59, 160 P.2d 364, 366 (1945); Baldwin Processing Co. v. Georgia Power Co., 112 Ga. App. 92, 98-100, 143 S.E.2d 761, 766-67 (1965); Iodice v. State, 303 N.Y. 740, 741, 103 N.E.2d 348, 349 (1951); Trout Brook Co. v. Willow River Power Co., 221 Wis. 616, 626-27, 267 N.W. 302, 306 (1936).

28. *See* cases cited at note 27 *supra*.

29. *Id.*

30. Salt River Valley Water Users' Ass'n v. Giglio, 113 Ariz. 190, 192, 549 P.2d 162, 164 (1976).

31. Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. 329, 332, 576 P.2d 517, 520 (Ct. App. 1978).

32. Salt River Valley Water Users' Ass'n v. Giglio, 113 Ariz. 190, 194, 549 P.2d 162, 166 (1976).

33. *Id.* at 193, 549 P.2d at 165.

34. Ramada Inns, Inc. v. Salt River Valley Water Users' Ass'n, 111 Ariz. 65, 66, 523 P.2d 496, 497 (1974).

35. Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. at 332, 576 P.2d at 520. The nature and purpose of the storm control procedures the Association employs were the source

so great that it exceeds the canal's capacity to contain it and overflows the higher south bank of the canal.[36]

The injured homeowners in *Markiewicz* claimed that the Association breached its duty by maintaining inadequate diversion facilities and failing to strengthen the south bank of the canal.[37] Analyzing this claim, the court described the perimeters of the Association's duty. First, the Association is obliged to maintain the canal in good operating condition.[38] This duty of maintenance includes responsibility for the ordinary flow of irrigation water and anticipation of storm waters.[39] It also demands that the Association keep the canal free of structures which could impede and alter the flow of canal water.[40] Second, the Association must operate the canal so that it may receive the greatest amount of storm drainage without bursting or overflowing.[41] This duty consists of dumping the canal when storm runoff is expected.[42] Third, to prevent breakage, the Association may have to install spillways and other diversion facilities at positions where storm waters drain into the canal.[43]

According to the *Markiewicz* court, whether a failure to properly maintain or construct diversion facilities constitutes negligence is dependent on several factors: quantity of runoff that can be reasonably expected, the capacity of existing diversion facilities, the cost of new spillways, and the feasibility of acquiring rights-of-way for new spillways.[44] These general rules of liability were derived, in part, from the

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of controversy throughout the *Giglio* case. Homeowners argued that the Association had assumed flood control responsibilities while the Association contended that its storm control activity was merely designed to safeguard the irrigation system itself. 113 Ariz. at 198, 549 P.2d at 170. This controversy was also reflected in appellee's and appellant's briefs in *Markiewicz*. Brief for Appellant at 54-63, Brief for Appellees at 55-59, Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. 329, 576 P.2d 517 (Ct. App. 1978).

36. Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. at 332, 576 P.2d at 520. When water overflows the earthen bank, there is a propensity for the bank to erode or breach. *Id.* To prevent this, the Association installed spillways—concrete covered notches—at points along the south bank to allow water to spill out of the canal before the bank is overflowed and reinforced a portion of the canal's bank.

37. *Id.* at 337, 576 P.2d at 525.

38. *Id.* at 336, 576 P.2d at 524.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* The court also ruled that a duty to make capital improvements to increase the canal's carrying capacity would be inconsistent with the canal's recognized status as a natural watercourse. The court stated that landowners should expect periodic overflows since the Association owes them a duty to use reasonable care only to "minimize the destructive effect of desert storms," but the duty does not demand a further expansion of flood control capacity. *Id.* Capital improvements, when necessary, are to be directed to the maintenance of the canal's structural integrity. *Id.* at 336-37, 576 P.2d at 524-25.

Arizona Supreme Court's decision in *Giglio*, decided two years prior to *Markiewicz*.

In *Giglio*, the court announced that the Association is under a duty to exercise reasonable care in disposing of excess runoff of floodwater.[45] This broad standard was reduced to more precise guidelines in *Markiewicz*.[46] While the Association's specific responsibilities are now established with precision, no underlying, consistent justification for their imposition has been advanced. Consequently, the basis and rationale the courts employed in formulating the Association's duty must be traced and examined.

The Basis of the Duty

In concluding that the Association may be liable for negligence in disposing of excess storm water, the *Giglio* court cited prior Arizona cases determining the Association's liability for damage proximately caused by its negligent operation and maintenance of the canal system.[47] None of the cases cited, however, involved disputes arising in the storm runoff context,[48] and thus are not direct authority for the proposition that the Association may be liable for the negligent disposition of ordered water when combined with storm runoff.[49] The validity of that proposition has a direct bearing on two of the responsibilities imposed on the Association by the court. Clearly, the duty to guard against overflow or breaching resulting from obstruction is more rigorous when storm waters enter the canal because, as in *Giglio*, the restraining effect of a bridge on canal water is compounded by runoff. Similarly, preventing breaches is obviously more difficult when the water level is elevated.

The *Giglio* court, in determining the Association's breach of duty, also seemed to rely on section 45-204 of the Arizona Revised Statutes.[50]

45. 113 Ariz. at 199, 200, 549 P.2d at 171, 172.

46. *See* text & notes 38-43 *supra*.

47. 113 Ariz. at 198-99, 549 P.2d at 170-71 (citing Salt River Valley Water Users' Ass'n v. Blake, 53 Ariz. 498, 499-502, 90 P.2d 1004, 1006-07 (1939); Salt River Valley Water Users' Ass'n v. Arthur, 51 Ariz. 101, 103-04, 74 P.2d 582, 583 (1937); Salt River Valley Water Users' Ass'n v. Stewart, 44 Ariz. 119, 120-23, 34 P.2d 400, 401 (1934)).

48. The cases cited in *Giglio* concerned damage caused by "ordered water"—water intentionally released into the canal. *See* cases cited at note 47 *supra*.

49. *But see* Anderson v. Pleasant Grove Irr. Co., 26 Utah 2d 420, 421-22, 490 P.2d 897, 898 (1971) (liability for runoff for failure to close headgate); West Union Canal Co. v. Provo Bench Canal & Irr. Co., 116 Utah 128, 131-32, 208 P.2d 1119, 1122-23 (1949) (same).

50. 113 Ariz. at 99, 549 P.2d at 171 (quoting ARIZ. REV. STAT. ANN. § 45-204 (1974)). Section 45-204 provides:

> A person owning or controlling a canal, flume or other means for carrying water from a stream or water supply to lands for irrigation of the lands, shall not contract to carry more water than the canal, flume or other means is estimated to carry at any one time, whether the contract is made for measured time or acreage quantity. Such person shall keep the canal, flume or other means in good repair and condition so that it will carry the full amount of water contracted to be carried or delivered.

The court did not expressly ground the Association's breach of duty on this statute. Rather, the

A fair reading of that statute and an inspection of prior case law construing it yield the conclusion that the court in *Giglio* engaged in a highly inventive construction. The statute merely prohibits irrigation operators from making contracts for delivery of more water than their canals can deliver, and its facial intent does not readily import tort liability at all.[51] Indeed, an examination of earlier judicial constructions of the statute fails to reveal any interpretation similar to that reached by the court in *Giglio*.[52] Therefore, the court's statutory authority for the imposition of the Association's storm control responsibilities falls subject to the same criticism that undermines the court's common law authority: its applicability is questionable.

Neither the prior cases nor the statute cited by the court in *Giglio* establish the proposition that the Association is under a duty to empty the canal in anticipation of storm runoff. Such a duty would seem to conflict with the common law rule that operators of artificial water structures are not required to draw down the water level of the structure to absorb storm runoff.[53] Thus, the result reached by the court is not soundly supported.

The support for the *Markiewicz* result is also suspect because it reveals an inconsistent application of an inapposite doctrine.[54] The court in *Giglio* ruled that the Association's duty may include the installation of spillways where necessary to ensure the canal's structural integrity,[55] rejecting the defense that the canal was a natural watercourse for all purposes.[56] This element of the Association's duty was reiterated in *Markiewicz*, where the court held that the Association may be required to make capital improvements to reduce the possibility of breaching.[57] Yet the *Markiewicz* court refused to impose an obligation of increasing the carrying capacity of the canal by capital improvements, stating that such a requirement would be inconsistent with the canal's recognized status as a natural watercourse.[58] The *Markiewicz*

court cited the statute and testimony from the trial, and then determined the breach of duty without further reference to the statute. 113 Ariz. at 199, 200, 549 P.2d 171, 172.

51. See note 50 *supra*.

52. *See* Gould v. Maricopa Canal Co., 8 Ariz. 429, 431-35, 76 P. 598, 600-03 (1904); Salt River Valley Canal Co. v. Van Fossen, 76 P. 1126 (Ariz. 1904); Salt River Valley Canal Co. v. Slosser, 76 P. 1125 (Ariz. 1904); Marlar v. Maricopa Canal Co., 76 P. 1125 (Ariz. 1904).

53. See text & notes 27-29 *supra*.

54. The "natural watercourse" doctrine, originating in the context of water rights, was first misapplied to a tort action in Ramada Inns, Inc. v. Salt River Valley Water Users' Ass'n, 111 Ariz. 65, 67, 523 P.2d 496, 498 (1974). For a discussion of the inapplicability of this doctrine and a prediction that it would not provide a clear resolution of the issues in a tort action, see "Strict Liability and the Arizona Canal: The Natural Watercourse Evasion," 17 ARIZ. L. REV. 895, 897-902, 908 (1975) [hereinafter cited as "Natural Watercourse"].

55. 113 Ariz. at 200-01, 549 P.2d at 172-73.

56. *Id.* at 204, 549 P.2d at 176.

57. 118 Ariz. at 336, 576 P.2d at 524.

58. *Id.*

court failed to adequately explain why the canal's status as a natural watercourse is asserted for the purpose of refusing to impose an obligation to increase its carrying capacity, but is not asserted to deny the obligation to make alterations to assure the canal's structural integrity.[59] Despite this inconsistency and the quality and paucity of authority marshalled by the *Giglio* and *Markiewicz* courts, the results achieved in the cases are probably supportable on alternate grounds.

The Duty to Maintain the Canal in Good Operating Condition

Giglio and *Markiewicz* established three specific duties under the general rule that the Association is obliged to maintain canals in good operating condition.[60] Though these specific duties all bear directly on the duty to maintain the canal's structural integrity, the following discussion will treat each as a discrete element of the Association's generalized duty of care in order to more fully develop the applicable common law principles.

The duty to prevent breaching. As noted earlier, the foreseeability of storm runoff is the limiting factor for liability of the operator of a water retention structure.[61] Neither *Giglio* nor *Markiewicz*, in formulating the Association's duty to prevent breaching, proceeded under the type of rigorous foreseeability analysis that has engaged a considerable amount of judicial energy in other jurisdictions.[62] This omission is probably appropriate in *Giglio* because there the storm was estimated to be of a one hundred year return frequency.[63] Generally, a storm must be at least twice that magnitude in order to qualify as an event that could not be reasonably foreseeable.[64] Further, the Association was apprised of the storm's severity in time to initiate measures that could have lessened the damage that resulted.[65] Thus, unforeseeability

59. The *Markiewicz* court's distinction between carrying capacity and structural integrity is somewhat suspect. Since a breach would obviously decrease the amount of water the canal could hold, capital improvements to ensure the canal's structural integrity are directly related to the canal's carrying capacity.

60. See text & notes 38-43 *supra.*

61. *See* text & notes 20-25 *supra.*

62. *See, e.g.*, Kunz v. Utah Power & Light Co., 526 F.2d 500, 504 (9th Cir. 1975); Key Sales Co. v. South Carolina Elec. & Gas Co., 290 F. Supp. 8, 28-29 (D.S.C. 1968); Diamond Springs Lime Co. v. American River Constrs., 16 Cal. App. 3d 581, 597-99, 94 Cal. Rptr. 200, 207-08 (1971); Barr v. Game, Fish & Parks Comm'n, 30 Colo. App. 482, 485-89, 497 P.2d 340, 343-44 (1972); Dougherty v. California-Pacific Util. Co., 546 P.2d 880, 881-82 (Utah 1976); Charvoz v. Bonneville Irr. Dist., 120 Utah 480, 484-86, 235 P.2d 780, 783 (1951). *See generally* Boozer v. Arizona County Club, 102 Ariz. 544, 547, 434 P.2d 630, 633 (1968); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31, at 146 n.84 (4th ed. 1971); Casson, *Limits of Foreseeability*, 120 NEW L.J. 157 (1970); Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961); RESTATEMENT (SECOND) OF TORTS § 290, Comment e (1965).

63. 113 Ariz. at 194, 549 P.2d at 166.

64. Davis, *The Duties and Rights of Operators of Water Retention Structures*, 57 NEB. L. REV. 319, 327 (1978).

65. 113 Ariz. at 200, 549 P.2d at 172.

does not appear to have been a viable defense in *Giglio*.

Since the storm in *Markiewicz* was characterized as a five hundred year return frequency event,[66] the issue of foreseeability would seem to have been directly implicated. The court noted, however, that the canal had breached at the same location on previous occasions,[67] thereby severely undermining the argument that the damage involved was unforeseeable. Consequently, though neither the *Giglio* nor the *Markiewicz* courts discussed the duty to prevent breaching in terms of foreseeability, the results achieved would seem to be consistent with those achieved under a foreseeability analysis. Such an analysis would perhaps have provided a clearer guide to the rationale behind the decisions.

Although landowners near the canal have a right to rely on the canal's structural integrity,[68] whether that right is absolute or qualified has probably not been resolved. Most courts ascribe limits to the duty to design water retention structures to prevent breaching,[69] yet recent formulations of duty and foreseeability standards suggest that such limits are quite remote.[70]

The duty to keep the canal free from obstructions. In *Giglio*, a demossing bridge restricted the flow of water through the canal and contributed to the pressure on the canal's banks.[71] The court held that the bridge was partially responsible for the breaks that occurred and found the Association negligent in maintaining the potential obstruction.[72] Earlier Arizona cases had established the principle that the Association was under a duty to keep the canal free from obstructions, yet did so only in fact situations in which the obstruction caused the flooding of water intentionally maintained in the canal.[73] The breaching precipitated by the obstruction in *Giglio*, however, occurred after storm runoff had entered the canal.[74] Therefore, the principles announced in those earlier cases were not directly applicable to *Giglio*.

The court's treatment of the demossing bridge issue is entirely dependent on its statement that the Association is responsible for all

66. 118 Ariz. at 333, 576 P.2d at 521.
67. Id. at 337, 576 P.2d at 525.
68. *Id.* at 336, 576 P.2d at 524.
69. *See* text & note 25 *supra*.
70. *See* Diamond Springs Lime Co. v. American River Constrs., 16 Cal. App. 3d 581, 597-99, 94 Cal. Rptr. 200, 206-08 (1971); Barr v. Game, Fish & Parks Comm'n, 30 Colo. App. 482, 488-89, 497 P.2d 340, 343-44 (1972); Dougherty v. California-Pacific Util. Co., 546 P.2d 880, 881-82 (Utah 1976).
71. 113 Ariz. at 201, 549 P.2d at 173.
72. *Id.* at 201-02, 549 P.2d at 173-74.
73. *See* cases cited note 47 *supra*.
74. 113 Ariz. at 200-01, 549 P.2d at 172-73.

water that enters its system.[75] The prior Arizona cases provide little direct support for this holding, since they both involved overflows of water intentionally released into the canal. This distinction is significant because it is more difficult to control storm runoff than ordered water.[76]

Case law from other jurisdictions is instructive. In reservoir overflow cases, even courts that impose no duty to reduce water levels in anticipation of heavy rains still require operators to not make the flooding worse, as would occur where the retention structure breaches.[77] These cases are more applicable than the cases cited in *Giglio*, since they involved storm runoff, not mere ordered water. Thus, the court could have reached the same result using more applicable authority.

The duty to institute capital improvements. As a necessary incident to the duty to prevent breaching, *Markiewicz* announced that the Association would be required to make certain capital improvements.[78] The imposition of this responsibility, however, was held to be limited to capital improvements directly bearing on the maintenance of the canal's structural integrity. The *Markiewicz* court refused to extend the obligation to require an increase in the canal's carrying capacity.[79] Such an obligation, the court noted, would be inconsistent with the canal's recognized status as a natural watercourse. Consequently, the Association need only operate the canal within its design capacity.[80] Arguably, however, since the court found that the canal's bank reinforcement and diversion facilities were inadequate to withstand the flood and decided that the Association was bound to institute capital improvements to remedy those inadequacies,[81] the Association *was* obliged to increase the canal's design capacity—at least insofar as design capacity increases the canal's structural integrity. Further, although *Markiewicz* found canal enlargement to be inconsistent with the canal's status as a natural watercourse,[82] the duty to institute capital improvements to maintain the canal's banks would seem no less inconsistent.

Perhaps much of the possible confusion generated by the issue of capital improvements would dissolve if the court had not labelled the

75. *Id.* at 199, 549 P.2d at 171.
76. *See* Davis, *supra* note 64, at 319-24.
77. *See* cases cited at note 27 *supra*; Davis, *supra* note 64, at 321-25.
78. Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. at 336-39, 576 P.2d at 524-27.
79. The court stated that "[t]o hold otherwise would ignore the statement in *Giglio* that 'the canal is not a flood control device.' " *Id.* at 336-37, 576 P.2d at 524-25.
80. *Id.*
81. *Id.* at 336-39, 576 P.2d at 525-26.
82. *Id.* at 336-37, 576 P.2d at 524-25.

canal a natural watercourse. The ambiguity of the term is demonstrated in *Giglio*,[83] which rejected the canal's status as a natural watercourse in negligence cases.[84] In *Markiewicz*, however, the court acted contrary to *Giglio*'s admonition[85] and invoked the talismanic term natural watercourse in refusing to impose an obligation on the Association to expand the canal's carrying capacity.[86] Instead of labelling the canal a natural watercourse, the Arizona courts could have simply elaborated on the reliance factors that appear to be the underpinnings of the appellation.[87] Since both *Giglio* and *Markiewicz* emphasized that homeowners south of the canal had a right to rely on the continued structural integrity of the canal's south bank,[88] the court could have circumvented ambiguity and justified the distinction between capital improvements to increase carrying capacity and capital improvements to guarantee structural integrity by elaborating upon reliance factors. Capital improvements to ensure structural integrity should be justified solely upon the proposition that homeowners south of the canal have a right to rely on the canal's structural integrity. Conversely, since the canal is not a flood control device, the homeowners have no right to rely upon canal enlargement, nor can they suggest that they moved there with the expectation that the canal would be enlarged. This justification is not only more manageable than recourse to the term natural watercourse, but would also obviate the need to resort to expeditious legal fiction.[89]

The Duty to Draw Down

The duty to reduce the water level in the canal in anticipation of heavy storm runoff has no precedent in Arizona law. Indeed, analogy to reservoir cases would suggest that there is no duty to draw down.[90] Although the Association contended in *Markiewicz* that it engaged in the draw down technique only as a storm control measure to prevent

83. "That the canals may be treated as a natural watercourse for some purposes [strict liability] does not mean that they will be treated that way for all purposes [negligence]." 113 Ariz. at 204, 549 P.2d at 176.

84. *See id.*

85. *Id. See* note 83 *supra.*

86. Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. at 336, 576 P.2d at 524.

87. *See* "Natural Watercourse," *supra* note 54, at 898-902.

88. Salt River Valley Water Users' Ass'n v. Giglio, 113 Ariz. at 198-99, 549 P.2d at 170-71; Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. at 336-37, 576 P.2d at 524-25.

89. *See* "Natural Watercourse," *supra* note 54, at 898-902.

90. *See* Key Sales Co. v. South Carolina Elec. & Gas Co., 290 F. Supp. 8, 23-24 (D.S.C. 1968) (collecting cases); Ireland v. Henrylyn Irr. Dist., 113 Colo. 555, 557-58, 160 P.2d 364, 366 (1945); Baldwin Processing Co. v. Georgia Power Co., 112 Ga. App. 92, 98-100, 143 S.E.2d 761, 766-67 (1965); Iodice v. State, 303 N.Y. 740, 740, 103 N.E.2d 348, 348 (1951); Trout Brook Co. v. Willow River Power Co., 221 Wis. 616, 626-27, 267 N.W. 302, 306 (1936).

breaches,[91] the reasoning employed by the court implies that the draw down technique is a flood control device. The facts in *Markiewicz* presented a situation where the canal was swollen to its upper limits, and the court specifically decided that portions of the canal should be reinforced or otherwise safeguarded by adequate diversion facilities.[92]

Since the duty to prevent breaching exists where the canal is so swollen that it overflows, the duty to draw down is thus arguably only a complement to the duty to provide adequate bank reinforcement and diversion facilities. It would seem, however, that the duty to draw down fulfills a broader function than storm control activity designed to protect the system's structural integrity; the draw down technique seems to serve independently as a flood control measure.[93]

Further, even though the Association's duty to maintain and construct diversion facilities and reinforce the canal's banks where necessary is an aspect of its duty to maintain the canal's structural integrity, the *Markiewicz* court confused the source of that duty by referring to the canal as a natural watercourse. A more comprehensive statement of the source of the Association's duty would go far in untangling this confusion.

Courts have long held operators of water retention structures liable for negligently releasing or storing water to the detriment of nearby property owners.[94] Most courts, though, have noted that the operators of irrigation systems or reservoirs are not insurers,[95] thereby raising the implication that no affirmative duty to prevent flooding caused by storm runoff attaches. A line of California cases extends the duty principle further, however, holding that once operators maintain a pattern of water diversion on which property owners are induced to rely, the operators are under a duty to maintain the diversion.[96] Those cases,

91. Brief for Appellees at 55-59, Markiewicz v. Salt River Valley Water Users' Ass'n, 118 Ariz. 329, 576 P.2d 517 (Ct. App. 1978).

92. 118 Ariz. at 337-39, 576 P.2d at 525-27.

93. Perhaps most illustrative of the flood control nature of the draw down technique is a comparison of that function with the rationale for the court's rejection of a duty to institute capital improvements to increase carrying capacity. The court clearly implied that the obligation to increase carrying capacity is a full-scale flood control duty, incompatible with the Association's legally sanctioned, though more limited, storm control duties. *Id.* at 336-37 & n.5, 576 P.2d 524-25 & n.5. Yet the draw down duty is nothing, if not a technique designed to increase the canal's capacity to dispose of storm runoff. Consequently, the court's language suggests that the draw down technique is an aspect of flood control.

94. *See, e.g.*, Iceland v. Henrylyn Irr. Dist., 113 Colo. 555, 557-58, 160 P.2d 364, 365-66 (1950); Curtis v. Dewey, 93 Idaho 847, 849, 475 P.2d 808, 810 (1970); Dougherty v. California-Pacific Util. Co., 546 P.2d 880, 881-83 (Utah 1976); West Union Canal Co. v. Provo Bench Canal & Irr. Co., 116 Utah 128, 131-32, 208 P.2d 1119, 1122-23 (1949).

95. *See, e.g.*, Curtis v. Dewey, 93 Idaho 847, 849, 475 P.2d 808, 810 (1970); Dougherty v. California-Pacific Util. Co., 546 P.2d 880, 881-83 (Utah 1976); West Union Canal Co. v. Provo Bench Canal & Irr. Co., 116 Utah 128, 131-32, 208 P.2d 119, 1122-23 (1949). *See also* cases cited at note 27 *supra*.

96. People v. City of Los Angeles, 34 Cal. 2d 695, 697, 214 P.2d 1, 3 (1950); Natural Soda

however, did not arise in litigation regarding storm runoff.

A federal case, *Kunz v. Utah Power & Light Co.*,[97] did address the diversion issue in the flood context. The *Kunz* court noted that although the law does not require a person to act affirmatively to prevent harm to another unless he has himself precipitated the threatening condition, courts have carved out an exception to the rule. When a person voluntarily undertakes to assist another, he is required to exercise reasonable care to protect the other's interests.[98] The court then held that since the operator had voluntarily lowered the reservoir's water level in the past in anticipation of flooding, and since downstream landowners had come to rely on this practice, the operator must exercise reasonable care to lower the reservoir in anticipation of heavy spring drainage.[99] By analogy from the *Kunz* decision,[100] the Association's duty to draw down arguably arises by virtue of its previously undertaken practice of dumping the canal in anticipation of heavy storm activity.[101]

The courts' failure in *Giglio* and *Markiewicz* to ground the Association's responsibilities on the voluntarily assumed duty rule is particularly significant in light of earlier Arizona law applying that doctrine. In *City of Tucson v. Apache Motors*,[102] the Supreme Court of Arizona indulged in forceful dictum concerning voluntarily assumed duty, in a fact situation analagous to those present in *Giglio* and *Markiewicz*:

> It requires no citation of authority to sustain the proposition that

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Prods. Co. v. City of Los Angeles, 23 Cal. 2d 193, 196-98, 143 P.2d 12, 15-17 (1943); Smith v. East Bay Mun. Util. Dist., 122 Cal. App. 2d 613, 621, 265 P.2d 610, 616 (1954).

97. 526 F.2d 500 (9th Cir. 1975).

98. *Id.* at 503. *See* United States v. Lawter, 219 F.2d 559, 562 (5th Cir. 1955); Melbourne & Troy v. Louisville & N.R. Co., 88 Ala. 443, 444, 6 So. 762, 763 (1889); Thomas v. Studio Amusements, 50 Cal. App. 2d 538, 544, 123 P.2d 552, 555 (1942); RESTATEMENT (SECOND) OF TORTS §§ 323, 324A (1965). *See generally* W. PROSSER, *supra* note 62, § 56, at 344-48; Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DEPAUL L. REV. 30 (1951); Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951).

99. 526 F.2d at 503. The rule stated in *Kunz*, requiring the plaintiff's reliance, is not in exact accord with the Restatement rule. Under the Restatement formulation, reliance is a sufficient but not necessary condition for finding a voluntary assumption of duty. RESTATEMENT (SECOND) OF TORTS §§ 323, 324A (1965).

100. The viability of the analogy is accentuated by the arguably more complex techniques of draw down activities with reservoirs than exist with irrigation systems. *Cf.* Graham v. City of Springfield, 23 Ill. App. 3d 427, 428-29, 319 N.E.2d 252, 253-54 (1974) (operators liable for negligently utilyzing draw down technique). *See generally* Davis, *supra* note 64, at 323-25. It is arguable that *Kunz* is distinguishable from the Arizona cases in that in *Kunz* the defendant had actually volunteered flood control duties. *See* 526 F.2d at 503. The defendants in *Kunz*, however, had argued that the reservoir storage system was not intended to be a flood control project and that, consequently, they had not assumed a flood control duty. *Id.* Despite that contention, the court found that although flood control was not the defendant's primary duty it had voluntarily undertaken the draw down technique, which resulted in an assumption of duty. *Id.* The defendants in *Giglio* also argued that flood control duties were not assumed, 113 Ariz. at 198, 549 P.2d at 170, yet the court nonetheless imposed liability, *id.* at 201-02, 549 P.2d at 171-72. Furthermore, the *Markiewicz* court expressly stated that the Association had assumed some flood control responsibilities. 118 Ariz. at 336-37 n.5, 576 P.2d at 524-25 n.5. Thus, the only distinction between the cases is that the *Kunz* court was more explicit in its reliance on the voluntary assumption doctrine.

101. *See* 118 Ariz. at 332, 576 P.2d at 520.

102. 74 Ariz. 98, 245 P.2d 255 (1952).

> although no legal duty devolved upon the city of Tucson to construct the culverts here involved but having undertaken to do so, it was required to build culverts of sufficient size to adequately carry away all water accustomed to flow, or which may reasonably be anticipated to flow down such arroyo as a result of rains upon the watershed which it drained . . . .[103]

By avoiding a holding based on voluntary assumption of duty, the *Markiewicz* court avoided confusion that might have otherwise resulted. The dictum in *Apache Motors* runs counter to the express limitations on the Association's duty to institute capital improvements announced in a footnote in *Markiewicz*:[104]

> We reject the contention that because the Association undertook some storm control functions it automatically assumed full scale flood control duties. The *Giglio* court was aware of the Association's activities regarding storm control, and refused to find an assumption of flood control obligation. Moreover, for policy reasons, we decline to expand the scope of the Association's storm control duties, since this would discourage the use of irrigation facilities for any storm control at all.[105]

This language, beyond foreclosing the Association's responsibility to enlarge the canal's carrying capacity, reveals considerable inconsistency. Although the court refused to hold the Association to a flood control duty, the imposition of a duty to draw down the canal in anticipation of heavy storm runoff, unlike the duty to maintain the canal's structural integrity, is more readily construed as a flood control duty;[106] yet the last sentence of the footnote strongly suggests that there are storm control functions that operators could totally avoid. Although unclear, the footnote seems to indicate that the Association's duties were voluntarily assumed, and the court's reluctance to extend the

103. *Id.* at 106, 245 P.2d at 263. The court relied on its prior holding in City of Tucson v. O'Reilly Motor Co., 64 Ariz. 240, 168 P.2d 245 (1952). In that case, the city was held negligent for building drainage culverts which were inadequate to transport runoff. *Id.* at 244-45, 168 P.2d at 248. *See also* Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977) where the court stated that "[i]t is black letter tort law that while inaction is not normally a basis for liability, negligent performance of a duty voluntarily undertaken may be a basis for liability." *Id.* at 267, 564 P.2d at 1234.

104. *See* 118 Ariz. at 336-37, 576 P.2d at 524-25. The Association's responsibilities with regard to capital improvements are arguably not within the doctrine of voluntary assumption of duty. The Association had previously constructed diversion facilities and spillways and reinforced a portion of the canal's bank. Once this activity was undertaken and reliance was induced thereon, the Association was under a duty to maintain those devices and create new ones to ensure the system's structural integrity. *Id.* at 337, 576 P.2d at 525. The homeowners had a right to rely on the Association's previously undertaken measures designed to ensure the canal's structural integrity, but they could not situate themselves immediately south of the canal with the expectation that the canal would be enlarged. *See id.* at 336, 576 P.2d at 524. Since the Association had not previously attempted to enlarge the canal, it should not be held to a duty to engage in capital improvements designed to increase the canal's capacity. *Cf.* City of Tucson v. Apache Motors, 74 Ariz. 98, 106, 245 P.2d 255, 263 (1952) (duty devolves upon voluntary assumption).

105. 118 Ariz. at 336-37 n.5, 576 P.2d at 524-25 n.5.

106. *See* note 93 *supra*.

range of duty to include an activity—canal enlargement—not previously undertaken is consistent with the mechanics of voluntarily assumed duty. Yet *Giglio* premised the standard of care on statutory and common law, and *Markiewicz* neither expressly refuted that reasoning nor expressly adopted an assumption of duty rationale. Thus, it is unclear what role voluntary assumption will play in future litigation arising in regard to other irrigation projects. Consequently, operators of other irrigation canals may have to speculate as to the applicability of the *Giglio* and *Markiewicz* decisions.

That uncertainty, however, accentuates a broader ambiguity. The Arizona courts, particularly with regard to strict liability principles, seem to have carved a special niche for the Arizona Canal. The precedential value of *Giglio* and *Markiewicz* might be constricted by the canal's peculiar judicial status as a natural watercourse.[107] If so, the duty standards announced might be deemed inapplicable to the Arizona irrigation context generally.

Conclusion

Giglio and *Markiewicz* fully disclose the Association's duty to operate and maintain the Arizona Canal in storm conditions. Although the standard of reasonableness that the Association is bound to observe is now formulated with precision, neither court, particularly with regard to the duty to draw down, advanced justifications for that duty which adequately explain its source. Notwithstanding the courts' characterization of the canal as a natural watercourse, justification for the duty to maintain the canal's structural integrity could have been based on the less exotic and less confusing reliance factors. Furthermore, the doctrine of voluntary assumption of duty could be applied to explain the draw down duty. Yet, perhaps fearing that an express justification employing that doctrine would discourage irrigation operators from assuming storm control measures, the *Markiewicz* court explained the duty issue in other terms. Consequently, though the Association's precise duties are now established, the courts' insistence on defining the canal as a natural watercourse and their reluctance to acknowledge the function of voluntary assumption of duty render uncertain the applicability of the principles announced in *Giglio* and *Markiewicz* to litigation involving operators of other irrigation projects.

107. *See* "Natural Watercourse," *supra* note 54, at 897-902, 907-08 (arguing that the canal's status as a natural watercourse makes it unique).

VIII. WORKMEN'S COMPENSATION LAW

A. WORKMEN'S COMPENSATION: UNSCHEDULED AWARDS FOR SECOND INJURIES

The purpose of the Arizona workmen's compensation act[1] is to provide employees with compensation for earnings lost as a result of work-related injuries.[2] In principle, a worker is awarded compensation not for the injury or disease, but for the resulting disability.[3] In the case of certain injuries, awards are based on schedules.[4] Scheduled awards are contained in subsection B of section 23-1044, and cover the loss or loss of use of fingers, hands, arms, toes, feet, legs, sight, and hearing.[5] In the case of scheduled awards, the amount and duration of compensation are limited by statute.[6] Injuries not covered under sub-

1. ARIZ. REV. STAT. ANN. §§ 23-901 to -1081 (Supp. 1971-78).

2. Ossic v. Verde Cent. Mines, 46 Ariz. 176, 186-87, 49 P.2d 396, 400 (1935) (quoting State *ex. rel.* Munding v. Industrial Comm'n, 92 Ohio St. 434, 450, 111 N.E. 299, 303 (1915)), stated:

> The theory upon which the compensation law is based (which is now generally accepted) is that each time an employee is killed or injured there is an economic loss . . . [and] that the burden of this economic loss should be borne by the industry rather than by society as a whole.

3. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 57.10, at 10-2 (1976).

4. ARIZ. REV. STAT. ANN. § 23-1044(A)&(B) (Supp. 1971-78) provides in part:

> A. For temporary partial disability there shall be paid during the period thereof, for not to exceed sixty months, sixty-five per cent of the difference between the wages earned before the injury and the wages which the injured person is able to earn thereafter.
>
> B. Disability shall be deemed permanent partial disability if caused by any of the following specified injuries, and compensation of fifty-five per cent of the average monthly wage of the injured employee, in addition to the compensation for temporary total disability, shall be paid for the period given in the following schedule:
>
> 1. For the loss of a thumb, fifteen months.
> 2. For the loss of a first finger, commonly called the index finger, nine months.
> 3. For the loss of a second finger, seven months.
> 4. For the loss of a third finger, five months.
> 5. For the loss of the fourth finger, commonly called the little finger, four months.
> 6. The loss of a distal or second phalange of the thumb or the distal or third phalange of the first, second, third or fourth finger, shall be considered equal to the loss of one-half of the thumb or finger, and compensation shall be one-half of the amount specified for the loss of the entire thumb or finger.
>
> . . . .
>
> 21. For the partial loss of use of a finger, toe, arm, hand, foot, leg, or partial loss of sight or hearing, fifty per cent of the average monthly wage during that proportion of the number of months in the foregoing schedule provided for the complete loss of use of such member, or complete loss of sight or hearing, which the partial loss of use thereof bears to the total loss of use of such member or total loss of sight or hearing.
>
> 22. For permanent disfigurement about the head or face, which shall include injury to or loss of teeth, the commission may, in accordance with the provisions of § 23-1047, allow such sum for compensation thereof as it deems just, in accordance with the proof submitted, for a period not to exceed eighteen months.

5. *Id.* § 23-1044(B).

6. *See id.*; Gottsfield, *Workmen's Compensation—Conversion of Scheduled Award to Unscheduled*, 6 ARIZ. BAR J., March 1971, at 16, 17; *See also* 1 A. LARSON, *supra* note 3, § 58.00, at 10-28. If an injury has left the claimant with a permanent bodily impairment, compensation for a specified number of weeks is payable without regard to the presence or absence of wage loss during that period. Gottsfield, *supra*, at 17. Scheduled awards are made for injuries that come within ARIZ. REV. STAT. ANN. § 23-1044(B) (Supp. 1971-78) [hereinafter cited as subsection B]. The legislature has thus created a presumption that every loss enumerated in subsection B will

section B are covered by subsection C, D, E, and F.[7] These awards are referred to as "unscheduled" or "odd lot" awards.[8] In *Alsbrooks v. Industrial Commission*,[9] the Supreme Court of Arizona considered whether a previous disability alone, without a showing that it affected "earning capacity," was sufficient to convert a "scheduled" into an "unscheduled" award under the Arizona act.[10]

In *Alsbrooks*, Oris E. Alsbrooks, the petitioner, sustained an industrial injury to his left knee in 1972.[11] Alsbrooks had previously sustained two non-industrial injuries during World War II. One was a shrapnel wound to the right knee and the other was a lower back injury.[12] The hearing officer found that the industrial injury occurred in the course and scope of employment and entered an award for a scheduled injury.[13] The court of appeals set the award aside, holding that

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cause some permanent loss of earning capacity and has fixed the benefits to be paid because of that loss. *See* Ujevich v. Inspiration Consol. Copper Co., 42 Ariz. 276, 280, 25 P.2d 273, 275 (1933).

7. ARIZ. REV. STAT. ANN. § 23-1044(C)-(E) (Supp. 1971-78) provides:

> C. In cases not enumerated in subsection B of this section, where the injury causes permanent partial disability for work, the employee shall receive during such disability compensation equal to fifty-five per cent of the difference between his average monthly wages before the accident and the amount which represents his reduced monthly earning capacity resulting from the disability, but the payment shall not continue after the disability ends, or the death of the injured person, and in case the partial disability begins after a period of a total disability, the period of total disability shall be deducted from the total period of compensation.
>
> D. In determining the amount which represents the reduced monthly earning capacity for the purposes of subjection C of this section, consideration shall be given, among other things, to any previous disability, the occupational history of the injured employee, the nature and extent of the physical disability, the type of work the injured employee is able to perform subsequent to the injury, any wages received for work performed subsequent to the injury and the age of the employee at the time of injury.
>
> E. In case there is a previous disability, as the loss of one eye, one hand, one foot or otherwise, the percentage of disability for a subsequent injury shall be determined by computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury.

Subsection F states that the commission shall determine when the physical condition of the employee shall become permanent, for purposes of subsection C, and make an award based on the reduced monthly earning capacity. *Id.* § 23-1044(F). The commission's determination is then subject to change if there is a change in physical condition or a change in earning capacity. *Id.*

8. Generally, a successful "unscheduled" or "odd lot" award claimant receives 55% of the difference between his monthly wage before the accident and the amount representing his reduced monthly earning capacity resulting from disability. *Id.* § 23-1044(C). Unlike scheduled awards, an unscheduled award may continue indefinitely, ending only upon the death of the claimant. Gottsfield, *supra* note 6, at 17.

9. 118 Ariz. 480, 578 P.2d 159 (1978).

10. *Id.* at 481, 578 P.2d at 160. The successive injury problem arises because the combined effect of two physical disabilities is often greater than would be reflected by merely adding together the scheduled allowances for each injury. The loss of a leg, which would ordinarily mean only partial disability, results in total disability to the man who has already lost the other leg. Subsections D and E of § 23-1044 require the Industrial Commission to take previous disability into account when an award is made. ARIZ. REV. STAT. ANN. § 23-1044(D),(E) (Supp. 1971-78). These subsections reflect a recognition by the legislature that a second injury must be considered with a previous injury if a claimant is to be adequately compensated. 118 Ariz. at 481, 578 P.2d at 160.

11. 118 Ariz. at 481, 578 P.2d at 160.

12. *Id.*

13. *Id.*

Alsbrooks was entitled to an unscheduled award, even though evidence did not establish that he was suffering from an earning capacity disability.[14] The supreme court held that in order for a prior non-industrial injury to change a subsequent industrial injury from scheduled to unscheduled, the prior non-industrial accident must have resulted in an "earning capacity disability."[15] This holding overruled *Ross v. Industrial Commission*,[16] which had held that a mere showing of a previous disability converted a normally scheduled award into an unscheduled award.[17] In overruling *Ross*, the court returned to the reasoning of prior cases concerning an industrial injury that follows a non-industrial injury.[18] These cases distinguished between earning capacity disability and a disability having no effect upon the claimant's ability to work.[19]

This casenote will analyze *Alsbrooks* and its relationship to Arizona law regarding the compensability of industrial injuries that follow non-industrial injuries. The main focus will be on the reasons for conversion or non-conversion of awards from scheduled to unscheduled. In addition, the *Alsbrooks* ruling will be discussed in light of the purpose of Arizona's workmen's compensation act.

14. Alsbrooks v. Industrial Comm'n, 118 Ariz. 505, 509, 578 P.2d 184, 188 (Ct. App. 1977), *vacated*, 118 Ariz. 480, 484, 578 P.2d 159, 163 (1978). The decision of the court of appeals was based on the Arizona Supreme Court decision Ross v. Industrial Comm'n, 112 Ariz. 253, 540 P.2d 1234 (1975). *See* Alsbrooks v. Industrial Comm'n, 118 Ariz. at 505, 578 P.2d at 184. Ross was a welder who had lost the sight of one eye in a non-industrial accident. This type of accident creates a rebuttable presumption of a loss of earning capacity. Ronquillo v. Industrial Comm'n, 107 Ariz. 542, 544, 490 P.2d 423, 425 (1971). The hearing officer entered a scheduled award after evidence was presented that at the time of the industrial accident in which Ross lost his other eye, there was no loss of earning capacity due to the prior non-industrial injury. The court of appeals in *Ross* affirmed the scheduled award, finding that the evidence relating to Ross' earnings at the time of the accident was sufficient to rebut the presumption in favor of loss of earning capacity. Ross v. Industrial Comm'n, 22 Ariz. App. 209, 213, 526 P.2d 416, 420 (1974), *vacated*, 112 Ariz. 253, 540 P.2d 1234 (1975). The Arizona Supreme Court, however, set aside the scheduled award, finding that the "previous disability" language of § 23-1044(E) did not require the showing of a reduced earning capacity. Ross v. Industrial Comm'n, 112 Ariz. 253, 258, 540 P.2d 1234, 1238 (1975).

15. Alsbrooks v. Industrial Comm'n, 118 Ariz. 480, 482, 578 P.2d 159, 161 (1978).

16. Ross v. Industrial Comm'n, 112 Ariz. 253, 540 P.2d 1234 (1975). See discussion at note 14 *supra*.

17. 112 Ariz. at 255, 540 P.2d at 1236.

18. Alsbrooks v. Industrial Comm'n, 118 Ariz. 480, 483, 578 P.2d 159, 162 (1978). *See* Ronquillo v. Industrial Comm'n, 107 Ariz. 542, 544, 490 P.2d 423, 425 (1971); Wollum v. Industrial Comm'n, 100 Ariz. 317, 321, 414 P.2d 137, 140 (1966); Goodyear Aircraft Corp. v. Industrial Comm'n, 89 Ariz. 114, 118-19, 358 P.2d 715, 717-18 (1961); McKinney v. Industrial Comm'n, 78 Ariz. 264, 266, 278 P.2d 887, 888 (1955).

19. For example, in Ronquillo v. Industrial Comm'n, 107 Ariz. 542, 490 P.2d 423 (1971), the claimant suffered an industrial injury to his finger that resulted in an award for a 20% permanent partial disability. Three years later, the claimant suffered a second industrial injury to his left leg. The commissioner found that Ronquillo was entitled to a scheduled award. The court of appeals affirmed this finding, but the Supreme Court of Arizona reversed. In reversing, the court enunciated two presumptions: a conclusive presumption of loss of earning capacity arises when a scheduled award is followed by a second industrial injury; and a rebuttable presumption arises if the previous injury was non-industrial and would have been scheduled had it been industrially related. *Id.* at 544, 490 P.2d at 425. *See also* cases cited at note 18 *supra*.

Requirements for Converting a Scheduled Award into an Unscheduled Award

There are two main situations in which scheduled awards for injuries listed in subsection B will be converted into unscheduled awards.[20] The first situation is where a plaintiff proves that he received two or more scheduled injuries.[21] Conversion may also occur when an employee receives otherwise scheduled injuries from an industrial accident at a time when he was suffering from a pre-existing disability affecting his earning capacity.[22] Where there has been a prior scheduled award based upon an industrial injury, a subsequent injury carries a conclusive presumption that there has been an earning capacity disability.[23] This presumption is consistent with the reasoning behind scheduled awards.[24]

In the case of a prior non-industrially related injury that would have led to a scheduled award had it been industrially related, there is a rebuttable presumption that the prior injury had an effect on the

20. *See* Gottsfield, *supra* note 6, at 17. For a discussion of methods used in other states, see Custy, *The Second Injury Fund: Encouraging Employment of the Handicapped Worker in South Carolina*, 27 S.C.L. REV. 661, 663-81 (1976); Lefelt, *Toward a New Method of Awarding Compensation Benefits: Solving the Permanent Partial Problem in New Jersey*, 28 RUTGERS L. REV. 587, 595-615 (1975).

21. *See* Rodgers v. Industrial Comm'n, 109 Ariz. 216, 217, 508 P.2d 46, 47 (1973); Ossic v. Verde Cent. Mines, 46 Ariz. 176, 189, 49 P.2d 396, 401 (1935); All Star Coach, Inc. v. Industrial Comm'n, 26 Ariz. App. 3, 4, 545 P.2d 965, 966 (1976), *vacated on other grounds*, 115 Ariz. 335, 337, 515 P.2d 515, 517 (1977). When several scheduled injuries are received in the same accident the amounts are not just added together. The commission must consider the total picture of all the injuries and issue an award under subsection C. Ossic v. Verde Cent. Mines, 46 Ariz. 176, 181, 49 P.2d 396, 401 (1935).

22. McKinney v. Industrial Comm'n, 78 Ariz. 264, 266, 278 P.2d 887, 888 (1955). Every enumerated injury in subsection B is assumed to have caused some loss of earning capacity. Alsbrooks v. Industrial Comm'n, 118 Ariz. 480, 481, 578 P.2d 159, 160 (1978). The claimant normally has the burden to show affirmatively all essential elements necessary to sustain an award. Enyart v. Industrial Comm'n, 10 Ariz. App. 310, 314, 458 P.2d 514, 518 (1969). However, in the case of prior non-industrial injuries, there is a presumption in favor of loss of earning capacity. Ronquillo v. Industrial Comm'n, 107 Ariz. 542, 544, 490 P.2d 423, 425 (1971).

23. Ronquillo v. Industrial Comm'n, 107 Ariz. 542, 544, 490 P.2d 423, 425 (1971). In *Ronquillo*, the court held:

> where there is a prior scheduled industrially related injury, the Commission may not ignore the previous injury when the workman suffers a second industrial injury . . . . In the case of a prior non-industrially related injury which would have been a scheduled award had it been industrially related, there is a presumption that the prior injury had an effect on the earning capacity of the workman at the time of the second injury although this presumption can be overcome . . . .

Id. (citations omitted).

24. When a claimant receives a subsection B injury the compensation provided for in subsection B is automatically forthcoming. The legislature has thus decided that a loss of earning capacity results from each injury enumerated in subsection B. To later say that a claimant who receives a second subsection B injury has sustained no loss of earning capacity because of the prior subsection B injury would be anomalous. Where there is an industrially related injury following an earlier scheduled award, the subsequent injury can only result in an unscheduled award under subsection E. Alsbrooks v. Industrial Comm'n, 118 Ariz. 480, 483, 578 P.2d 159, 162 (1978). This rule applies even if the second injury is one that normally would merit compensation pursuant to subsection B. *See* Ronquillo v. Industrial Comm'n, 107 Ariz. 542, 544, 490 P.2d 423, 425 (1971); McKinney v. Industrial Comm'n, 78 Ariz. 264, 266, 278 P.2d 887, 888 (1955).

earning capacity of the workman at the time of the second injury.[25] The presumption in the case of prior non-industrial injuries can be overcome by a showing that the prior injury did not impair "earning capacity."[26] If no "earning capacity disability" is found, a scheduled award will be given, whereas, if the previous injury had resulted in an "earning capacity disability" then an unscheduled award would be entered.[27]

Until *Ross*[28] was decided in 1975, previous case law interpreted disability to mean an "earning capacity disability."[29] The court in *Ross* held that any physical impairment resulting from a prior non-industrial accident is a previous disability and results in a conversion to an unscheduled award under paragraph E.[30] Ross was a welder who had lost the sight of one eye in a non-industrial accident.[31] Under *Ronquillo*[32] this prior injury would have created a rebuttable presumption of loss of earning capacity.[33] The employer was able to introduce evidence at the hearing that Ross' earning capacity as a welder had not been impaired by the loss of sight in his left eye. So when the right eye was injured in an industrially related accident, the hearing officer entered a scheduled award, finding no prior loss of earning capacity.[34] The court of appeals affirmed the scheduled award but the supreme court set it aside, holding that the "previous disability" language of paragraph E did not re-

25. Ronquillo v. Industrial Comm'n, 107 Ariz. 542, 544, 490 P.2d 423, 425 (1971); Yanez v. Industiral Comm'n, 21 Ariz. App. 367, 369, 519 P.2d 220, 222 (1974). The court in *Yanez* found that a previous abdominal injury suffered in the armed forces would not have been scheduled, so no presumption arose. *Id.* at 369, 519 P.2d at 222.

26. Wollum v. Industrial Comm'n, 100 Ariz. 317, 325, 414 P.2d 137, 143 (1966); Goodyear Aircraft Corp. v. Industrial Comm'n, 89 Ariz. 114, 118-19, 358 P.2d 715, 717-18 (1961). The rebuttable presumption was overcome in both of these cases.

27. *See* Ronquillo v. Industiral Comm'n, 107 Ariz. 542, 544, 490 P.2d 423, 425 (1971).

28. 112 Ariz. 253, 540 P.2d 1234 (1975).

29. *Ross* was a departure from the view expressed in Ronquillo v. Industrial Comm'n, 107 Ariz. 542, 544, 490 P.2d 423, 425 (1971); Wollum v. Industrial Comm'n, 100 Ariz. 317, 321, 414 P.2d 137, 140 (1966); Goodyear Aircraft Corp. v. Industrial Comm'n, 89 Ariz. 114, 119, 358 P.2d 715, 718 (1961). *See also* McKinney v. Industrial Comm'n, 78 Ariz. 264, 266, 278 P.2d 887, 888 (1955). In Gibson v. Industrial Comm'n, 68 Ariz, 313, 317, 205 P.2d 588, 591 (1949), the court said: "The word 'disability' as used in our Compensation Act, does not mean disablement to perform the particular work petitioner was doing at the time of his injury, but refers to injuries which result in impairment of earning power generally." *Id.* at 316, 205 P.2d at 591 (quoting Sabich v. Industrial Comm'n, 39 Ariz. 266, 270, 5 P.2d 779, 780 (1931)).

30. Ross v. Industrial Comm'n, 112 Ariz. 253, 257, 540 P.2d 1234, 1238 (1975). That holding was a dramatic change from previous cases. As the supreme court noted in *Alsbrooks*, few people have escaped what could be classified under *Ross* as a "permanent physical disability." 118 Ariz. at 483, 578 P.2d at 162. Under *Ross* even the need to wear glasses could be considered a permanent physical disability. Alsbrooks v. Industrial Comm'n, 118 Ariz. 505, 509, 578 P.2d 184, 188 (Ct. App. 1977) (Jacobson, J., concurring), *vacated*, 118 Ariz. 480, 578 P.2d 159 (1978). Thus, the *Ross* case seemed to portend the virtual elimination of the distinction between scheduled and unscheduled awards. *Id.*

31. Ross v. Industrial Comm'n, 112 Ariz. 253, 254, 540 P.2d 1234, 1235 (1975).

32. Ronquillo v. Industrial Comm'n, 107 Ariz. 542, 543, 490 P.2d 423, 424 (1971).

33. See text & notes 25-27 *supra*. This presumption would make it easier for a claimant to receive the preferred unscheduled award rather than a scheduled award. *See* note 19 *supra*.

34. Ross v. Industrial Comm'n, 112 Ariz. 253, 254, 540 P.2d 1234, 1235 (1975).

quire the showing of a reduced earning capacity.[35]

In overruling *Ross*, the *Alsbrooks* court returned to the reasoning found in previous cases.[36] The *Alsbrooks* court held that when the statute says "disability," it means "earning capacity disability" even though the effect upon the worker's earning capacity may be minimal.[37] In so holding, the court seems to be in accord with the stated purpose of the workmen's compensation act; that is, to prevent a wage earner and his dependents from becoming public charges during the period of disability.[38] There is little chance that a person would not be able to support himself or his family if his earning capacity has not been impaired. If a person is making the same amount of money as in the past and the injury suffered does not create a danger of future loss of earnings, then the employee will not become a burden to the community. Therefore, as the court noted in *Alsbrooks*, a finding of an "earning capacity disability" should be a prerequisite to compensation.[39]

The problem faced by the court in *Alsbrooks* was much the same type of problem the court faced in *Ross*. In both cases the claimants had suffered prior non-industrial injuries that would have been scheduled had they been industrially related; the hearing officers had found

35. *Id.* at 255, 540 P.2d at 1236. *See* ARIZ. REV. STAT. ANN. § 23-1044(E) (Supp. 1971-78). The *Ross* court said subsection E did not make any reference to reduced monthly earning capacity. 112 Ariz. at 255, 540 P.2d at 1236. According to the court, subsection E only required that the percentage of disability caused by a subsequent injury be determined by computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability. *Id.* The court went on to say that only a showing of a previous disability was required for a claimant to be able to convert a normally scheduled award into an unscheduled award. The prior disability might or might not affect earning capacity. *Id.* The words "earning capacity" do not appear in the statute, and the court felt that they could not be read into it. *Id.* at 256, 540 P.2d at 1236-37.

36. *See, e.g.*, Ronquillo v. Industiral Comm'n, 107 Ariz. 542, 543, 490 P.2d 423, 424 (1971); Wollum v. Industrial Comm'n, 100 Ariz. 317, 319, 414 P.2d 137, 139 (1966); Goodyear Aircraft Corp. v. Industiral Comm'n, 89 Ariz. 114, 118-19, 358 P.2d 715, 717-18 (1961). In these cases the court stated that for workmen's compensation cases under § 23-1044, disability means "earning capacity disability." See text & note 29 *supra*.

37. Alsbrooks v. Industrial Comm'n, 118 Ariz. 480, 484, 578 P.2d 159, 163 (1978).

38. Powell v. Industrial Comm'n, 104 Ariz. 257, 261, 451 P.2d 37, 41 (1969); *see* ARIZ. CONST. art. 18, § 8; 1 A. LARSON, *supra* note 3, § 1.10, at 1-1, 1-2. If there is no loss of earning capacity there is little danger that a person will become a public charge. In Estrada v. Industrial Comm'n, 10 Ariz. App. 580, 461 P.2d 88 (1969), the court found that although the claimant was suffering from residual back pain related to an industrial injury, the injury did not create any disability for work. There was no loss of earning capacity, and since workmen's compensation laws do not provide compensation for mere pain and suffering, there could be no award under § 23-1044. *Id.* at 582, 461 P.2d at 90. Sims v. Industrial Comm'n, 10 Ariz. App. 574, 460 P.2d 1003 (1969) also illustrates the compatibility between disability when defined as "earning capacity disability" and the stated purpose of the workmen's compensation act. In *Sims*, a miner who suffered a back injury in the course of his employment was later able to return to work at a higher rate as a hoist man. *Id.* at 576, 460 P.2d at 1005. The court found no loss of earning capacity since Sims was able to earn as much or more as a hoist man than he could as a shaft miner. *See id.* at 578, 460 P.2d at 1007. No compensation was needed since there was no loss of earning capacity. *Id.* at 577, 460 P.2d at 1006. *But cf.* Ross v. Industrial Comm'n, 112 Ariz. 253, 257, 540 P.2d 1234, 1238 (1975) (court was to convert to unscheduled awards regardless of the loss of earning capacity).

39. Alsbrooks v. Industrial Comm'n, 118 Ariz. 480, 484, 578 P.2d 159, 163 (1978).

that the prior non-industrial injuries had not resulted in losses of "earning capacity"; and scheduled awards were given.[40] Problems arose in these cases because the hearing officers found that the prior injuries did not result in losses of "earning capacity." But in both *Alsbrooks* and *Ross*, the claimants had prior non-industrial injuries that made the subsequent injuries more debilitating than normal.[41] The court in both *Alsbrooks* and *Ross* seemed to recognize that unscheduled awards were the only means to compensate the claimants in these two cases adequately. Even though both claimants received unscheduled awards, the reasoning of the court in the two cases differed significantly.

In *Ross* the claimant had lost the sight in his left eye because of a non-industrial injury.[42] Later, Ross lost the sight in his right eye due to an industrial accident.[43] If compensation for the loss of Ross' right eye were given on a scheduled basis and he never regained sight in either eye, he would be totally blind and the compensation he would receive would be limited under section 23-1044(B) to twenty-five months.[44] The court in *Ross* apparently believed that if Ross received only a scheduled award the intention of the legislature would be thwarted.[45] The legislature intended that persons who suffered from certain previous disabilities would receive unscheduled awards for subsequent injuries.[46] The *Ross* court apparently felt that the best way to get the claimant an unscheduled award was to say that subsection E dealt with

40. *Id.*; Ross v. Industrial Comm'n, 112 Ariz. at 254, 540 P.2d at 1235.

41. In *Ross*, the petitioner was blind in one eye at the time of the industrial injury, 112 Ariz. at 254-55, 540 P.2d at 1235-36, and in *Alsbrooks* the petitioner was suffering from a knee injury and a lower back injury. 118 Ariz. at 481, 578 P.2d at 160. See Ossic v. Verde Cent. Mines, 46 Ariz. 176, 188, 49 P.2d 396, 401 (1935), where the court noted that the loss occasioned by two or more separate injuries may be much greater than the amount reached by merely adding together the losses presumed to be caused by each injury considered separately. The total picture of all the injuries must be considered.

42. 112 Ariz. at 254, 540 P.2d at 1235.

43. *Id.* at 255, 540 P.2d at 1236.

44. *See* ARIZ. REV. STAT. ANN. § 23-1044(B) (Supp. 1971-78). Under this section, compensation would be limited to 55% of the employee's average monthly wage, in addition to the compensation for temporary total disability, for the period given in the appropriate schedule. The schedule relevant to *Ross*, subsection 17, provides compensation for 25 months. *Id.* § 23-1044(B)(17). See note 4 *supra*.

45. *See* 112 Ariz. at 257, 540 P.2d at 1238.

46. *See* Ossic v. Verde Cent. Mines, 46 Ariz. 176, 189, 49 P.2d 396, 402 (1935); ARIZ. REV. STAT. ANN. § 23-1044(E) (Supp. 1971-78). The court in *Ossic* discussed the background of workmen's compensation acts in the United States, pointing first to the weaknesses of the common law and the fellow-servant doctrine. 46 Ariz. at 185-86, 49 P.2d at 400-01. The court then stated that the theory of workmen's compensation is to place the burden of an economic loss on industry, rather than on society as a whole. *Id.* at 186, 49 P.2d at 401. The legislature, noted the court, has realized that in successive injury cases, two plus two does not equal four. In adopting the language of § 23-1044(E), the legislature has allowed awards to be made on the basis of the whole picture, rather than adding amounts allowed for separate and distinct injuries. *Id.* at 189, 49 P.2d at 402. For a further discussion of the purposes of workmen's compensation, see 1 A. LARSON, *supra* note 3, § 1, at 1-1, 1-2; Note, *Developments in Workers' Compensation Law*, 53 J. URB. L. 755, 757 (1976); Note, *Workmen's Compensation: Florida Subsequent Injury Law*, 26 U. FLA. L. REV. 807, 807-10 (1974).

disabilities, but said nothing about earning capacity disabilities.[47]

Alsbrooks was the next case that the court heard concerning industrial injuries that follow non-industrial injuries. The hearing officer had entered a scheduled award apparently because the petitioner had no "earning capacity disability" at the time of the industrial injury.[48] The court of appeals stated that if *Ronquillo* were followed then the evidence supported a scheduled award,[49] but if the supreme court's decision in *Ross* were followed an unscheduled award must be given.[50] In a specially concurring opinion, Judge Jacobson pointed out that the *Ross* decision was a "sharp turn" in the case law, and that if it were followed, the legislature's enactments dealing with scheduled awards were for all practical purposes repealed.[51] The supreme court in *Alsbrooks* apparently recognized that if *Ross* were followed and the court of appeals decision in *Alsbrooks* affirmed, the problem of defining a disability for purposes of subsection E would be great.[52] This realization probably prompted the court's return to the prior line of cases defining disability as "earning capacity disability."[53]

If the court in *Alsbrooks* had only reinstated the scheduled award entered by the hearing officer, no account would have been taken of the prior non-industrial injuries.[54] The court went on to say, however, that to find that a forty percent permanent physical disability does not result in a disability for industrial labor is unreasonable.[55] The implication is that *Ronquillo* will be followed, but certain injuries must receive unscheduled awards regardless of whether there has been a reduction in a claimant's earnings. When, as in *Alsbrooks*, a claimant is suffering from a forty percent permanent disability an "earning capacity" loss will be presumed as a matter of law.[56]

Alsbrooks and Beyond

Apparently, the *Alsbrooks* court believed that some prior injuries

47. *See* Ross v. Industrial Comm'n, 112 Ariz. at 255, 540 P.2d at 1236. The court, per Justice Struckmeyer, stated that subsection E does not make reference to reduced monthly earning capacity. *Id.*

48. *See* 118 Ariz. at 481, 578 P.2d at 160.

49. Alsbrooks v. Industrial Comm'n, 118 Ariz. 505, 508, 578 P.2d 184, 187 (Ct. App. 1977), *vacated*, 118 Ariz. 480, 484, 578 P.2d 159, 163 (1978).

50. *Id.* at 509, 578 P.2d at 188.

51. *Id.* (Jacobson, J., concurring).

52. Alsbrooks v. Industrial Comm'n, 118 Ariz. 480, 483, 578 P.2d 159, 162 (1978).

53. *See id.*, where the court stated that return to *Ross* would, "in effect, do completely away with all scheduled injury awards."

54. *See* Alsbrooks v. Industrial Comm'n, 118 Ariz. 505, 506, 578 P.2d 184, 185 (Ct. App. 1977), *vacated*, 118 Ariz. 480, 484, 578 P.2d 159, 163 (1978). Oris Alsbrooks would have been left with two bad knees and an injured back, but only one award from the compensation fund for the injury to his left knee.

55. Alsbrooks v. Industrial Comm'n, 118 Ariz. at 484, 578 P.2d at 163.

56. *Id.*

are so severe that they must be deemed to result in earning capacity disabilities.[57] However, earlier cases were not so decisive as to when the court would consider a disability to be an earning capacity disability. Cases decided prior to *Alsbrooks* measured "earning capacity disability" mainly by post-injury earnings and did not consider the severity of the prior injuries.[58]

The court should develop the principle, on a case by case basis, that certain injuries are so severe that an earning capacity loss will be found when that injury is combined with another injury. Just as the court in *McKinney v. Industrial Commission*[59] found that the loss of a leg by a man working in industrial labor must have reduced the claimant's earning capacity,[60] it may find that certain other injuries are so severe that a loss of earning capacity for purposes of subsection E will be presumed.[61] When a person loses an eye in a non-industrial injury and later loses the other eye in an industrial injury, unless an earning capacity loss is found to have occurred from the first injury the worker would be compensated under subsection B.[62] The compensation in such a case would be inadequate.[63] This very fact situation caused the court a great deal of trouble with the language of subsection E and the

57. *See id. But see* Ross v. Industrial Comm'n, 112 Ariz. 253, 255, 540 P.2d 1234, 1236 (1975) (the previous loss of an eye, without more, was not enough to establish a "loss of earning power").

58. Ronquillo v. Industrial Comm'n, 107 Ariz. 542, 543, 490 P.2d 423, 424 (1971); Wollum v. Industrial Comm'n, 100 Ariz. 317, 319, 414 P.2d 137, 139 (1966). In these cases, the court looked to post-injury earnings almost exclusively. If a claimant was earning as much after the accident as before, the court would find no loss of earning capacity. In Woods v. Industrial Commission, 91 Ariz. 14, 368 P.2d 758 (1962), the claimant was paraplegic due to a non-industrial accident. He then suffered injuries to his fingers in an industrial accident. *Id.* at 15, 368 P.2d at 758. Woods was able to adapt and earn an average monthly wage equal to what he had previously earned. *Id.* at 16, 368 P.2d at 760. The commission found no "loss of earning capacity" and therefore did not enter an unscheduled award for the work-related accident. *Id.* The supreme court upheld the commission's findings. *Id.* Yet in McKinney v. Industrial Comm'n, 78 Ariz. 264, 278 P.2d 887 (1955), the court stated: "It seems extremely unrealistic to say that a man whose sphere of employment is industrial labor has no loss of earning power by the loss of a leg . . . ." *Id.* at 266, 278 P.2d at 888. So, in *Woods* the court held that a paraplegic had no loss of earning power, but in *McKinney* the court held that the loss of one leg must mean some loss of earning power. If Woods was to injure himself again, a scheduled award would follow according to the court's stated logic. The reason for this result is that a scheduled award is entered unless the previous injury resulted in a scheduled award or an "earning capacity disability." *Id.* at 265, 278 P.2d at 888. Thus, a scheduled award may be very inadequate when there is an industrial injury following a nonindustrial injury. Ossic v. Verde Cent. Mines, 46 Ariz. 176, 183, 49 P.2d 396, 402 (1935).

59. 78 Ariz. 264, 278 P.2d 887 (1955).

60. *Id.* at 266, 278 P.2d at 888.

61. The court in *Ross* said that, "it is unrealistic to say that a man who has lost an eye has no disability." 112 Ariz. at 256, 540 P.2d at 1237. The statement that the loss of an eye causes an earning capacity disability is but a short step from that position. The court in *Ross* was on the right track, but it made a mistake in discarding the requirement of an earning capacity loss in order to convert a normally scheduled award into an unscheduled award.

62. *See* 112 Ariz. at 255, 540 P.2d at 1237.

63. Compensation under subsection B would not take into account any previous disability caused by the prior injury. Yet, the difference in terms of disability between the loss of one eye and the loss of both eyes is tremendous. If a person loses one eye he or she may be able to function almost as before the loss. However, when the other eye is lost the previous injury is compounded and the person is permanently disabled. See discussion at note 10 *supra*.

phrase "earning capacity disability."[64] The court in *Ross* tried to solve the problem by allowing conversion to occur when there was a previous "disability."[65] This type of solution did not help since it only raised new issues and new problems.[66]

The court should openly recognize that certain injuries are so severe that when they are followed by another injury, the second injury should receive an unscheduled award. In this way, the court would be able to continue using the criteria it has set forth in other cases[67] and deviate only when there has been a prior injury that is so severe that some loss of earning capacity must have occurred. The court will not have to begin anew with criteria having no definite meaning. Earning capacity loss will be the touchstone that indicates whether or not conversion will occur, not "disability for work" as urged by the dissent in *Alsbrooks*.

Justice Struckmeyer, dissenting in *Alsbrooks*, asserted that unscheduled awards under subsection E are for "disabilities for work" and not just for "earning capacity disabilities."[68] If the court were to adopt such a reading very little would be solved and perhaps new problems would arise. The court would have to begin to define "disability for work" just as in the past it has had to define "earning capacity disability." As Justice Struckmeyer pointed out, workmen's compensation awards are given not for being hurt but for "disability for work" or, as the cases have often said, for loss of earning capacity.[69] The reason these terms have been used interchangeably is that the best way to measure a worker's "disability for work" is to quantify his loss of "earning capacity."[70] Instead of applying the term "disability for work" as Justice Struckmeyer suggests, the court should continue with the term "earning capacity disability" in determining whether to convert "scheduled" into "unscheduled" awards.

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64. *See* note 35 *supra*.

65. *See* 112 Ariz. at 255, 540 P.2d at 1237. Disability, as used by the court in *Ross*, covered almost any type of previous injury. *See* Alsbrooks v. Industrial Comm'n, 118 Ariz. 505, 509, 578 P.2d 184, 188 (Ct. App. 1977) (Jacobson, J., concurring), *vacated*, 118 Ariz. 480, 578 P.2d 159 (1978).

66. The problems arose when the court abandoned its past decisions and tried to begin anew. Defining just what a "disability" would be under *Ross* became a real problem. Must all disabilities be compensated? Are all people subject to some type of disability? These are the type of questions which must be answered when the court abandons precedent and embarks upon a journey down a heretofore untraveled road.

67. *See* cases cited at note 36 *supra*.

68. *See* Alsbrooks v. Industrial Comm'n, 118 Ariz. 480, 486-88, 578 P.2d 159, 165-67 (1978) (Struckmeyer, J., dissenting).

69. *Id.* at 487, 578 P.2d at 166.

70. *Id.*

Conclusion

The decision in *Alsbrooks* was a return to the pattern the court had established in the past. When a non-industrial injury is followed by an industrial injury that normally would receive a scheduled award, proof of a loss of earning capacity due to the prior non-industrial injury converts the normally scheduled award into an unscheduled award. In certain cases, the prior non-industrial injury might be so severe as to indicate by its very nature a loss of "earning capacity," thereby making conversion to an unscheduled award appropriate for the work-related injury. In this way, the courts should be able to grant an appropriate remedy in all cases where conversion of normally a scheduled award into an unscheduled award is at issue.