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RECENT DEVELOPMENTS

AFFIRMATIVE ACTION: An Equal Protection Challenge to Court-imposed Remedial Hiring Quotas

In *United States v. Paradise*,¹ the United States Supreme Court held that a court-ordered one-black-for-one-white promotion quota, when it was imposed to remedy a long history of racial discrimination by a state, did not violate the equal protection clause of the fourteenth amendment. The controversy began in 1972 when the NAACP brought suit against the Alabama Department of Public Safety to enjoin the Department’s racially discriminatory hiring practices. These practices had served to completely exclude blacks from employment by the Department. The district court found the Department in violation of the equal protection clause of the fourteenth amendment and ordered affirmative relief.² The subsequent history of this litigation provides the justification for the Supreme Court’s holding. Consequently, a full discussion of this history is necessary to the understanding of the case.

The Department had engaged in various practices designed to frustrate the relief ordered by the district court.³ These practices brought the parties back into court several times in the eleven years prior to the order that brought the parties before the Supreme Court. The order appealed from was a result of the Department’s failure to meet the terms of a consent decree that had been approved by the district court in 1981.⁴ In that decree, the Department agreed to develop a promotion procedure that would not have an adverse effect on the promotion opportunities of black troopers.

In 1983 the Department had an immediate need to promote fifteen troopers to the rank of corporal but had failed to provide an acceptable promotion scheme. A promotion from its existing list of eligible candidates

2. The relief included a 50 percent hiring quota for black employees until their representation on the state trooper force equaled their proportional representation in Alabama’s population (25 percent). The Department was also ordered to develop nondiscriminatory personnel policies dealing with promotions, recruitment, testing, and training.
3. These practices included the institution of a hiring freeze to avoid the hiring goals set by the court, discriminatory treatment of blacks at the training academy, failure to promote blacks to higher ranks once they were hired, development of promotion standards that had an adverse impact on promotion opportunities for blacks, and delays in complying with the terms of consent decrees which had been approved by the court.
4. The 1981 consent decree was the second one dealing with the Department’s promotion practices. It was an affirmation of the terms of a 1979 consent decree the Department had failed to honor.

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would have excluded all blacks from advancement.\textsuperscript{5} In light of the Department's immediate need for officers and its failure to provide a non-discriminatory promotion policy, the court ordered the corporal positions to be filled by eight black and eight white officers.\textsuperscript{6}

The Supreme Court affirmed the order of the district court. Justice Brennan announced the judgment of the Court in a plurality opinion joined by three other Justices.\textsuperscript{7} The Court recognized that a heightened level of scrutiny applied to a court-ordered race-conscious remedy for racial discrimination. However, the Court deferred the determination of the appropriate standard because the current remedy survived even strict scrutiny. The relief was "narrowly tailored to serve a compelling governmental interest."\textsuperscript{8}

The order of the district court served a compelling public interest for two reasons. First, the government had a compelling interest in remedying discrimination by a state actor. The Department's history of completely excluding blacks from employment prior to the 1972 lawsuit and its failure to cooperate in the eradication of this discrimination created a need for affirmative action by the court.\textsuperscript{9} The absence of blacks from the upper ranks of the force was a direct result of the Department's past discriminatory practices. Consequently, the government had an interest in providing a remedy for the disparity in the upper ranks of the force in addition to the entry-level positions.

Second, the remedial action of the district court was also supported by the government's compelling interest in compliance with the judgments of its courts. The Department's history of frustrating the purposes of the district court's order justified action that would ensure such compliance.\textsuperscript{10}

The strict scrutiny analysis applied by the Court also demanded a "narrowly tailored" remedy. The Department's recalcitrance created the need for an easily enforced objective remedy. The quota provided such a remedy. The limited nature of the order also supported the Court's decision. The order required promotion of black officers only if they were qualified. It remained in effect only until the Department provided an acceptable promotion scheme of its own. This convinced the Court that the order was no greater in scope.

\textsuperscript{5} The court rejected the Department's offer to fill four of the fifteen positions with blacks, finding the one-to-one ratio necessary to overcome the present effects of the Department's past discriminatory practices.

\textsuperscript{6} The Court also ordered that promotions to higher ranks within the force follow the same proportions. The order was limited in both time and effect. It would only apply if black officers were qualified for the promotions, and it would remain in force only until the Department presented an acceptable promotion procedure to the court.

\textsuperscript{7} Justice Marshall, Justice Blackmun, and Justice Powell joined Justice Brennan's opinion. Justice Stevens concurred in the judgment. Justice O'Connor filed a dissenting opinion that was joined by Chief Justice Rehnquist and Justice Scalia. Justice White filed a separate dissenting statement.

\textsuperscript{8} Paradise, 55 U.S.L.W. at 4216 (quoting the opinion of Powell, J., in Wygant v. Jackson Bd. of Educ., 105 S. Ct. 1842, 1846 (1986)).

\textsuperscript{9} Id.

\textsuperscript{10} Id. at 4217.
than was required to remedy the Department’s failure to comply with its prior obligations.

This case follows the reasoning of another recent Supreme Court affirmative action decision, *Sheet Metal Workers Association, Local 28 v. EEOC.*\(^{11}\) *Sheet Metal Workers* upheld a hiring quota in a Title VII case. The quota was imposed on the union only after the union’s disregard of previous court orders to pursue nondiscriminatory hiring policies had risen to the level of contempt of court. The union’s obstinacy convinced the Court that the imposition of a hiring quota was the only way to ensure compliance with the judgment of the court.

*Paradise* could have been distinguished from *Sheet Metal Workers.* The Supreme Court seemingly has been more willing to tolerate race-conscious relief under Title VII than under the fourteenth amendment.

The Court allowed a private employer to voluntarily institute a racial quota for admission to a training program in *Steelworkers v. Weber.*\(^{12}\) In that case the employer was instituting an affirmative action program to alleviate the effects of a previously segregated workplace. The effects of this prior discrimination could arguably have subjected the employer to suit under Title VII. The remedial nature of the affirmative action plan justified its race-consciousness.

However, a similar attempt to alleviate racial disparity in the work force was found to be a violation of equal protection in *Wygant v. Jackson Board of Education.*\(^{13}\) In *Wygant* a collective bargaining agreement with the teachers union called for a separate seniority list for teachers hired under the Board’s affirmative action plan. This would have protected the job security of the minority teachers. The Supreme Court found the plan a violation of the fourteenth amendment because it interfered with the vested seniority rights of innocent nonminority teachers. Since there had been no official finding of past discrimination by the school board, the nonminority teachers could not be presumed to be the beneficiaries of past discrimination.

*Paradise* and *Sheet Metal Workers* can both be distinguished from the above case. The Court-ordered remedies in *Paradise* and *Sheet Metal Workers* were in response to proven racial discrimination. As such, the race-based relief was not an attempt by private parties to deal with imagined or presumed illegality. Instead, these remedies were ordered by the federal courts. The courts are charged with the duty of interpreting and applying the law. Consequently, the courts are more qualified to determine if the existence of racial imbalance in the work force is a violation of either the fourteenth amendment or Title VII.

The decisions of the United States Supreme Court in *Paradise* and *Sheet Metal Workers* have created a narrow class of cases in which racial quotas may be used. These cases involve not only proven discrimination but also re-

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quire a failure of less restrictive remedies. When an employer has been found guilty of racial discrimination and has failed to remove racial barriers, the barriers will be removed by the courts.

**CIVIL RIGHTS: Housing Discrimination**

In *California Federal Savings & Loan Association v. Guerra*, a federally chartered savings and loan association brought an action for a declaration that section 12945(b)(2) of California’s Fair Employment and Housing Act (FEHA) is inconsistent with and preempted by Title VII of the 1964 Civil Rights Act. The association was also seeking an injunction against its enforcement. The FEHA is a comprehensive statute that prohibits discrimination in employment and housing.

The provision of the statute at issue applies to employers who are subject to Title VII and requires these employers to provide female employees an unpaid pregnancy disability leave of up to four months. This section has been interpreted by California’s Fair Employment and Housing Commission to require that employers reinstate an employee returning from a pregnancy leave to the job she previously held, unless that job is no longer available because of business necessity.

The action arose when California Federal Savings & Loan Association’s leave policy was challenged. This leave policy permits an employee with three months of service to take unpaid leaves for reasons which, among others, include disability and pregnancy. Although an attempt is made to return an employee to a similar position, the association reserves the right to terminate an employee when no similar position is available upon the employee’s return. A qualified female employee took pregnancy leave in January 1982. Upon notification of her desire to return in April, the association advised that her job had been filled and no similar positions were available. She filed a complaint with the Fair Employment and Housing Commission, but the association brought this declaratory action prior to the hearing before the commission.

The association argued that the Pregnancy Discrimination Act of 1978 (PDA), which specifies that sex discrimination prohibited by Title VII includes discrimination on the basis of pregnancy, preempts the state statute. The U.S. Supreme Court disagreed. The Court recognized that a federal statute may preempt a state statute in one of three ways. First, Congress may expressly provide that state law is preempted by the federal statute. Second, congressional intent to preempt may be inferred from a comprehensive regulatory scheme that leaves no room for supplementary state regulation.

4. 107 S. Ct. at 687.
6. 107 S. Ct. at 689.
Third, a state statute is preempted by a federal statute when a conflict exists that makes compliance with both impossible. In this case the Court found that the 1964 Civil Rights Act, which encompasses the PDA, expressly provides that state laws be preempted only if they conflict with federal law. Therefore, in order to determine whether Title VII, as amended by the PDA, preempts a state statute requiring employers to provide leave and reinstatement to employees disabled by pregnancy, the Court first examined whether the two statutes were in conflict.

The association argued that the PDA prohibits an employer from giving the preferential treatment to pregnant employees required by the California statute. However, the Court found that, in passing the PDA, Congress intended to overcome past discrimination based on pregnancy, not prohibit preferential treatment. In other words, Congress intended the PDA to provide a floor for pregnancy disability benefits, rather than a ceiling. California employers are not required to preferentially treat pregnancy disability and are free to give comparable protection to other disabilities. The Court held, therefore, that the California statute is not preempted by Title VII, as amended by the PDA, because it is not inconsistent with the purposes of the federal statute and does not require an act that is unlawful under Title VII.

This holding means that states may choose to impose minimum requirements for pregnancy disability that result in preferential treatment of pregnant women provided the statute does not prohibit the employer from instituting comparable benefits for employees disabled for other reasons.

**CIVIL RIGHTS: School Board of Nassua County v. Arline**

Gene Arline was hospitalized in 1957 for tuberculosis. When the disease became inactive, she became an elementary schoolteacher. She taught over the next twenty years. In the years 1977 and 1978, she had a relapse and was suspended from teaching. She was discharged at the end of the 1978-79 school year because of the continued recurrence of the disease.

After being denied administrative relief, she brought suit in federal district court alleging a violation of section 504 of the Rehabilitation Act of 1973. The district court found that Ms. Arline did not meet the definition of a

7. *Id.*
8. *Id.* at 693-94.


2. 29 U.S.C. § 706(7)(B) (1982) defines "handicapped individual" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." Department of Health and Human Services regulations define "physical impairment" to mean, *inter alia,* any physiological disorder affecting the respiratory system and defines "major life activities" to include working.
handicapped person under the statute. In the alternative, the court found that she was not "qualified" to teach school. The court of appeals reversed and held that a contagious disease qualifies as a handicap within the meaning of the statute. The court remanded for further findings of fact as to whether the respondent was "otherwise qualified" as a teacher.²

The U.S. Supreme Court affirmed and held that a person with the contagious disease of tuberculosis may be considered a handicapped person within the meaning of section 504.³ The case was remanded for a finding of whether Arline was "otherwise qualified" as a teacher. The Court found that Arline met the definition of a handicapped person that had been expanded by a 1974 amendment.⁴ The definition was expanded to deter "discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all'".⁵

Arline's tuberculosis established a record of impairment and qualified her as a handicapped individual within the meaning of the statute. In the dissent, Justices Rehnquist and Scalia argued that the Court extended the definition of a handicap beyond the plain meaning of the statute and that a condition imposed on federal funds must be expressed unambiguously.⁶

The petitioner claimed that Arline was discharged not because of her handicap but because of the health threat to others. The Court refused to allow a handicap in the nature of a contagious disease to be distinguished from other handicaps because it would allow the employer to use the distinction to justify discriminatory treatment. The contagious disease and the handicap are the same condition and should not be considered separately.⁷ A different interpretation would allow the label "contagious" to be sufficient grounds to terminate one's employment. If this were allowed, a determination in light of medical evidence would never be made. By considering such a disease a handicap, the Court forces employers to evaluate the condition with objective medical evidence. A contagious disease should not remove a person from the protection of section 504. If, however, the condition does pose a severe threat to others, the employee would not be considered "otherwise qualified" and may be terminated.

In considering whether a person is otherwise qualified, a court should consider:

(1) the nature of the risk (how the disease is transmitted), (2) the duration of the risk (how long is the carrier infectious), (3) the severity of the risk (what is the potential harm to third parties)

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² School Bd. of Nassua County v. Arline, 772 F.2d 759, 764-65 (11th Cir. 1985).
⁵ Arline, 107 S. Ct. at 1126-27 (quoting Southeastern Community College v. Davis, 442 U.S. 397, 405-06 n.6 (1979)).
⁶ Id. at 1132.
⁷ Id. at 1130.
and (4) the probabilities the disease will be transmitted and cause varying degrees of harm.8

The Court did not state absolutely that every contagious disease is a handicap. Indeed, the Court distinguished the present case from a case that may concern an AIDS (Acquired Immune Deficiency Syndrome) victim.9 With its holding the Court merely places a higher burden on the employer who wishes to terminate a handicapped employee. This is the type of protection that the Rehabilitation Act was designed to provide.

COMMERCIAL TRANSACTIONS: A Bank’s Right to Stop Payment on a Cashier’s Check

A cashier’s check is a bill of exchange1 drawn by a bank upon itself.2 When a cashier’s check is issued, the bank sells the check to the customer.3 The customer, referred to as the purchaser or remitter, then negotiates the check to a third party, who presents the check to the issuing bank for payment.

A cashier’s check is a negotiable instrument,4 and, therefore, its legal status is governed by articles 3 and 4 of the Uniform Commercial Code (UCC).5 Although courts recognize the important commercial purpose of the cashier’s check,6 not all agree on the legal significance or consequences of the cashier’s check under the UCC. Generally, courts are reluctant to allow banks to stop payment on a cashier’s check. Courts take this position

8. Id. at 1131 (quoting Brief for American Medical Association as American Curiae at 19).
9. Id. at 1128 n.7.
because forcing a bank to honor all cashier's checks serves a public policy of favoring the ready acceptance of cashier's checks in the marketplace. 7

The Oklahoma Court of Appeals has recently had an opportunity to address the issue of stop payment orders on a cashier's check in New Covenant Community Church v. Federal National Bank & Trust Co. 8 In New Covenant, the defendant, Federal National Bank, issued a cashier's check on June 30, 1982, in the amount of $325,000 to the New Covenant Church and Living Way Church, as payees. Living Way negotiated the cashier's check to the New Covenant Church. On July 1, 1982, the New Covenant Church deposited the check in its account at Penn Square Bank in Oklahoma City. Upon learning of Penn Square's demise on July 2, 1982, both New Covenant Church and Living Way demanded that Federal National Bank stop payment on the cashier's check. The bank informed them it could not stop payment. When the check was presented to the bank for payment, the bank honored the check.

In its suit against the bank for actual and punitive damages, the New Covenant Church contended that as the owner of the check, it had the right to order the manner of payment. Additionally, the church argued that it maintained the right, as principal, to revoke its agent's authority to collect the item on its behalf. The church further asserted that when the bank paid the cashier's check contrary to the order of its owner (the church), the bank breached its contractual obligations under UCC section 3-413(1)9 and converted the church's property under UCC section 3-419(1).10 Further, the church contended that UCC section 4-403,11 relied upon by the bank, is inap-

7. In general, see Lawrence, supra note 5, where the author suggests that the UCC should be amended to accommodate the appropriate role of cashier's checks and certified checks so that there are no defenses against those instruments other than forgery and alteration. It is contended that businessmen plan commercial transactions with specificity and care. Therefore, it is important that rules are certain in this area and that the bargained-for allocation of risk will be respected by the courts. If the rule were otherwise, however, expectations should conform so that there would be uniformity and certainty. As such, bank checks would still obviate the risk of dishonor associated with personal checks.


9. U.C.C. § 3-413(1) states: "(1) The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement or as completed pursuant to Section 3-115 on incomplete instruments."

10. U.C.C. § 3-419(1) states:

(i) An instrument is converted when
(a) a drawee to whom it is delivered for acceptance refuses to return it on demand; or
(b) any person to whom it is delivered for payment refuses on demand either to pay or to return it; or
(c) it is paid on a forged indorsement.

11. U.C.C. § 4-403 states:

(i) A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item described in Section 4-303.
applicable as it applies only where a bank customer, with an account at the bank, writes a personal check payable on said account.

Relying on the principle announced in *Yukon National Bank v. Modern Builders Supply, Inc.*, the Oklahoma Court of Appeals summarily dismissed the church’s arguments, stating that as a general rule, neither a bank nor a bank’s customer may order a stop payment on a cashier’s check. The court reasoned that the drawee bank’s signed engagement to honor the draft was contemporaneous with its act of issuing the check. Thus, any stop payment order from the church that came after the date of issuance came after the check was accepted and violated the provisions of section 4-303(1)(a).

It is submitted that *New Covenant, as well as Yukon, miss the real issue. Even if a cashier’s check may be deemed accepted on issuance, section 3-418 of the UCC establishes that acceptance is only final in favor of a party who is a holder in due course or one who in good faith has changed his position in reliance on payment.* The question then is not whether the bank has the authority to stop payment on the cashier’s check, but whether the bank has a legal defense to liability on the check. By issuing the check, the bank is primarily liable on the instrument as drawer even if not acceptor. Therefore, the purchaser or holder of the check never had a right to stop payment because it is not the purchaser’s check. Where the bank denies liability, however, because it has a legal defense to liability on the check, the issue to

(2) An oral order is binding upon the bank only for fourteen calendar days unless confirmed in writing within that period. A written order is effective for only six months unless renewed in writing.

(3) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer.

12. *686 P.2d 307 (Okla. Ct. App. 1984).* This opinion of the Oklahoma Court of Appeals has been specifically authorized by the Oklahoma Supreme Court for publication and therefore is to be accorded precedential value.

13. *New Covenant Community Church, 734 P.2d at 1320.*

14. U.C.C. § 4-303(1)(a) provides:

(1) Any knowledge, notice or stop-order received by, legal process served upon or setoff exercised by a payor bank, whether or not effective under other rules of law to terminate, suspend or modify the bank’s right or duty to pay an item or to charge its customer’s account for the item, comes too late to so terminate, suspend or modify such right or duty if the knowledge, notice, stop-order or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the bank has done any of the following:

(a) accepted or certified the item;

(emphasis added).

15. U.C.C. § 3-418 (1982).


The greatest danger of using stop payment language when dealing with cashier’s checks is that courts will interpret the rule that payment cannot be stopped as requiring a court to grant summary judgment against a bank in all cases without an inquiry into the status of the holder or the claims of the purchaser of the cashier’s check.
be decided is whether the asserted defense is good under sections 3-305 or 3-306.17

The better reasoned approach looks not at the bank's obligation to pay its cashier's check and avoid liability as drawer or acceptor but at whether the bank has a good defense to payment. This focusing on the bank's defenses to liability as opposed to its obligations to pay is supported when compared to a bank giving cash in exchange for a personal check and the payee has not changed his position. Because a bank could recover the cash it has paid under mistake of fact, a bank should be entitled to refuse payment on its own cashier's check issued under the same circumstances.

Courts have followed various approaches in determining a bank's ability to stop payment on cashier's check. The Oklahoma Court of Appeals in the New Covenant and Yukon cases held as a matter of law that a cashier's check is accepted when issued and, thus, any stop payment comes too late. In so holding, the court apparently ignored the UCC as enacted in Oklahoma,18 as well as the many cases allowing a bank to stop payment for fraud and failure of consideration.

The New Covenant court reaches its result by focusing on the wrong issues. The question that faces courts dealing with stop payment of a cashier's check is not whether a bank has the authority to stop payment on the cashier's check, but whether a bank has a good defense to payment. The validity of such defenses are governed by the UCC. The approach taken by the New Covenant court entirely fails to even recognize the issue.

CRIMINAL PROCEDURE: Maryland v. Garrison—Plugging a Hole

Left by Leon.

The exclusionary rule has been under attack since it was initiated. In the words of one constitutional scholar: "Fifteen to twenty years ago, it was thought that a criminal should go free only if the constable really messed up, instead of just blundering. Today, that's what it's come down to: if rights are violated, they really have to violate them [before the criminal goes free]."19 In recent years, the rule has lost its bite, tooth by tooth. One of the more recent examples of the deterioration is Maryland v. Garrison.2 There, the Supreme Court held that a search warrant that described a place to be searched more broadly than necessary because of a policeman's mistake of fact is not invalid under the fourth amendment as long as the mistake was reasonable.

17. U.C.C. §§ 3-305 and 3-306 deal with claims and defenses that are good against a holder in due course and a non-holder in due course, respectively.

1. Address by Yale Kamisar, "Will the Landmark Due Process Cases of the Warren Court Survive the Rehnquist Court?, University of Oklahoma Law School Enrichment Series (Mar. 26, 1987) [hereinafter Kamisar Address].
In *Garrison* police obtained a warrant to search "the premises known as 2036 Park Avenue third floor apartment." Police claimed their investigation indicated that the entire floor was one single apartment, when in fact the floor was divided into two apartments. This belief resulted in police officers uncovering contraband in Garrison's apartment, which was not the apartment the police were supposed to be searching. Shortly after the contraband was found, the police officers discovered their mistake and discontinued the search.

Speaking for a 6-3 majority, Justice Stevens said the requirement that a warrant must "particularly describe" the place to be searched must be judged "in light of the information available to [the officers] at the time they acted." Noting that the validity of the warrant must be assessed on the basis of information the officers should disclose to the magistrate, the Court agreed with the lower Maryland courts that "the warrant, insofar as it authorized a search that turned out to be ambiguous in scope, was valid when it issued." Turning to the validity of the warrant and the scope of its execution, the Court noted that "[w]hile the purposes justifying a police search strictly limit the permissible extent of the search, the Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." The Court turned for guidance to *Hill v. California,* which concerned the validity of an arrest of a man named Miller based on the mistaken belief that he was Hill. Probable cause to arrest Hill existed, and Miller was in Hill's apartment. The Court said that the underlying rationale of *Hill,* that an officer's reasonable mistake did not invalidate a valid arrest, "is equally applicable to an officer's reasonable failure to appreciate that a valid warrant described too broadly the premises to be searched." The key is reasonableness, Justice Stevens said, and here the facts available to the officers at the time suggested they were in the right place.

The exclusionary rule has been in effect in federal cases since *Weeks v. United States* and was applied to the states in *Mapp v. Ohio.* Without such a rule, the fourth amendment would be only "a form of words, valueless and undeserving of mention in a perpetual character of inestimable human liberties." The rule's major thrust was deterrence of police misconduct.

3. Id. at 1015.
4. Id. at 1017.
5. Id. at 1018.
6. Id.
9. Id.
12. Id. at 655.
Since *Weeks*, the rule has come under constant attack. It was downgraded from one declared to be "part and parcel" of the fourth amendment\(^\text{14}\) to a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."\(^\text{15}\)

The significance of this is obvious. One cannot easily create exceptions to constitutional mandates; however, judicially created remedies, especially generally unpopular ones, are easily circumvented. This is demonstrated in *United States v. Leon*,\(^\text{16}\) where the Court upheld evidence uncovered by a facially valid warrant whose affidavit was later shown to lack probable cause. The Court reasoned that to exclude the evidence would not further the causes of the exclusionary rule: deterring police misconduct. The Court, balancing the costs and benefits of applying the exclusionary rule, held that a long as the officers' reliance on the warrant was "objectively reasonable," excluding the evidence as a sanction for improper police conduct was inappropriate.\(^\text{17}\) Although the source of dispute in *Leon* and *Garrison* was an inaccurate warrant, it was generally thought that fourth amendment violations concerning the execution of a warrant are unaffected by *Leon*. This is indicated by the majority's caution that its discussion "assumes, of course, that the officers properly executed the warrant and searched only those places for those objects that it was reasonable were covered by the warrant."\(^\text{18}\) *Garrison* plugs that hole.

Taking the teeth out of the exclusionary rule raises many concerns. The rule is not complicated: if the search violates a person's rights the evidence is inadmissible. The problem lies not with the rule, but with those who unsuccessfully attempt to bend the rule without breaking it. Allowing good faith exceptions merely encourages attempts to further bend the rule. In the words of Professor Kamisar, police "still don't know what they can do. All questions would remain unanswered, and no one would care [about the fourth amendment] anymore, because the evidence will come in anyhow."\(^\text{19}\) Balancing costs against benefits becomes more difficult because one balances easily apparent costs (the grinning dope peddler walking out) against the more intangible principles of the Bill of Rights.\(^\text{20}\) Reasonableness by the officer is no solution, as was made clear by Justice Blackmum's dissent in *Garrison*. The better solution would be the one offered by Professor Kamisar: "If the fourth amendment is complicated, simplify it; don't [mess] around with the exclusionary rule."\(^\text{21}\)

As a practical matter, prosecutors arguing for admissibility of the evidence in similar situations would be well advised to argue that the officers were act-

\(^\text{14}\) *Mapp*, 367 U.S. at 651.
\(^\text{17}\) *Id.* at 926.
\(^\text{18}\) *Id.* at 918 n. 19.
\(^\text{19}\) Kamisar Address, *supra* note 1.
\(^\text{20}\) *Id.*
\(^\text{21}\) *Id.*
ing in good faith. Defense attorneys, on the other hand, should argue that the principles behind the rule are not furthered by admitting the evidence. Appeals courts agreeing with defendants will, of course, base their decisions on the state constitution, making certain that the opinion contains a plain statement that the decision rests on adequate and independent state grounds.\(^{23}\) that the decision rests on adequate and independent state grounds.\(^{23}\)

**INDIAN LANDS:** Bingo in Indian Country—A Matter of Tribal Concern

Bingo is now an acceptable method by which Indians on Indian lands may meet the federal government's goal of tribal self-sufficiency and economic independence of tribal members.\(^1\) In *California v. Cabazon Band of Mission Indians*,\(^2\) the Indians were conducting bingo games open to the public on reservation lands. California and Riverside County sought to apply to the tribes a state statute and a local ordinance governing the operation of bingo games. The games were open to the public and played predominantly by non-Indians. The games were a major source of employment for tribal members, and the profits were the tribe's sole source of income.

These games of chance now have the stamp of approval of the United States Supreme Court, at least in states where all gambling is not prohibited by criminal statutes.\(^3\) The Court held that where a state seeks to enforce a law within an Indian reservation under the authority of Public Law 83-280\(^4\)


3. The Court indicates that because California had other state-sanctioned gambling, control over Indian lands must be regulatory, rather than criminal or prohibitionary, in nature. *Id.* at 4227.
4. Codified at 18 U.S.C. § 1162(a) (1982), which provides in pertinent part:
   
   Each of the States . . . listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed . . . to the extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . ., and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State.

   The Organized Crime Control Act, 18 U.S.C. § 1955 (1982), provides in pertinent part:
   
   (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
   
   (b) As used in this section—
   
   (1) "Illegal gambling business" means a gambling business which—
   
   (i) is a violation of the law of a State or political subdivision in which it is conducted,
and that law is regulatory in nature rather than prohibitionary, the state authority has been preempted by operation of federal law.

This ruling has special significance for Oklahoma and its Indian population. In 1985 the state of Oklahoma sought injunctions against the Quapaw and Seneca-Cayuga tribes' operation of bingo games in Indian country. After the tribes prevailed in the trial court, the two cases were consolidated on appeal. The Oklahoma Supreme Court ruled in State v. Seneca-Cayuga Tribe⁴ that state regulation of bingo games conducted in Indian country was permissible to the extent that the activity affected non-Indians and Indians who are nonmembers of the self-governing unit.

Justice Opala, writing for the court, found the distinction between “regulatory” and “prohibitionary” state laws unpersuasive as applied to bingo.⁵ Under the analysis in Cabazon, Oklahoma's regulation of bingo games would undoubtedly be considered regulatory because not all gambling is prohibited by state law.⁶ This leads to the inevitable conclusion that Oklahoma statutory regulation of bingo games on Indian lands is preempted by federal law.

The impact of California v. Cabazon Band of Mission Indians on states such as Oklahoma who have Indian territory within their boundaries may be significant where all gambling is not strictly prohibited. Sovereign Indian governments now have the opportunity to use a natural resource—tribal lands—for gambling operations, free of state regulation, which might well ensure economic independence both for ruling bodies and members of their respective tribes.

**PLEADING:** Stating a Compulsory Counterclaim in a Separate Action*⁷

Section 2013(A) of title 12, Oklahoma Statutes, which is the same as Federal Rule of Civil Procedure 13(a), provides that a claim which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim is a compulsory counterclaim that must be asserted in the pending action. If the counterclaim is not asserted and a judgment on the merits is

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5. 711 P.2d 77 (Okla. 1985).
6. Id. at 90.

* This recent development should be considered with the article Fraser, Counterclaims, Cross-Claims and Third-Party Claims Under the Oklahoma Pleading Code, 39 Okla. L. REV. 1 (1986).
rendered in the pending action, the counterclaim is barred; it cannot be asserted in a subsequent action.¹

The United States Supreme Court has stated that Federal Rule 13(a) "was designed to prevent multiplicity of actions and to achieve resolution in a single law suit of all disputes arising out of common matters."² Therefore, to hold that a counterclaim, which arose out of the transaction or occurrence that is the subject matter of the opposing party's claim, could be asserted subsequently would frustrate the purpose of the federal rule. For the same reason, to avoid the inconvenience and expense to the parties, the court, and the witnesses, the federal courts hold that a claim and a counterclaim that arise out of the same transaction or occurrence should not be litigated in different courts.³ If both claims are litigated concurrently, the first judgment that is rendered may be asserted as res judicata in the other action.⁴

Where a claim is asserted in a federal court and another claim that should have been asserted as a compulsory counterclaim under Federal Rule 13(a) is asserted in another court (federal, state, or foreign), the first action filed should be litigated absent a showing of the balance of convenience in favor of litigating the subsequent action, or a showing of any special circumstances in favor of the second action.⁵ Therefore, the party who objects to the maintenance of the second action should seek to have it dismissed or stayed until the first action is disposed of.⁶

Staying the second action is more appropriate than dismissing it so that the second action can be litigated if the first action fails other than on its merits.⁷

⁵ Columbia Plaza Corp. v. Security Nat'l Bank, 525 F.2d 620, 626 (D.C. Cir. 1975); Remington Products Corp. v. American Aerovap, Inc., 192 F.2d 872 (2d Cir. 1951). In SW Indus., Inc. v. Aetna Cas. & Sur. Co., 653 F. Supp. 631 (D.R.I. 1987), the court considered the convenience of the parties and the witnesses, the availability and custody of documents, and the applicable state law. The plaintiff in the second action argued that the forum selected by an insured should be selected over the forum selected by an insurer and that a damage action should be selected over an action for declaratory relief; but the court rejected both arguments. In addition, the court found that neither action would be more comprehensive than the other; in either, the court could hear all issues and could obtain jurisdiction over all interested persons.
If the second action is brought in another federal court, the second court may transfer the action to the court where the first action is pending so that the two actions may be consolidated. However, a transfer is not possible where the second action is brought in a state court or the court of a foreign country.

Where the second action is brought in another federal court, or the court of a foreign country, and the second court does not dismiss, stay, or transfer its action, the federal court where the first action is pending can enjoin the prosecution of the second action. If, however, the second action is asserted in a state court, the federal court is prohibited by the Anti-Injunction Statute from enjoining the second action.

[Federal] Rule 13(a) has been held not to create an express statutory exception to the proscriptions of § 2283 and, accordingly, a federal court is barred by § 2283 from enjoining a party from proceeding in state court on a claim that should have been pleaded as a compulsory counterclaim in a prior federal suit.

Therefore, the federal and the state actions may proceed concurrently.

Although generally only the first suit should be litigated, at times justice would be served if the second action were litigated instead of the first. Then, the second court should refuse to stay or dismiss its action, although


9. Warshawsky & Co. v. Arcata Nat'l Corp., 552 F.2d 1257 (7th Cir. 1977); National Equip. Rental, Ltd. v. Fowler, 287 F.2d 43 (2d Cir. 1961). The Fowler case states that the first court cannot order the second court to transfer the case pending before it to the first court. Id. at 46-47. That the second action was removed from a state court does not prevent the first court from enjoining its prosecution where the action cannot be remanded. Columbia Plaza Corp. v. Security Nat'l Bank, 525 F.2d 620, 629 n.64 (D.C. Cir. 1975). Accord Roth v. Bank of the Commonwealth, 583 F.2d 527, 536 n.5 (6th Cir. 1978).


11. Such injunctions should be granted sparingly. United States v. Davis, 767 F.2d 1025, 1038 (2d Cir. 1985). Also, generally the party objecting to the maintenance of the second action should seek relief in the second court before asking for an injunction from the first court. Exxon Corp. v. United States, 655 F.2d 1112, 1116 n.5 (Emer. Ct. App. 1981).


this may result in the controversy being litigated in two separate actions. To avoid this undesirable result, the first court may stay or dismiss its claim. Or, if both actions are brought in federal courts, the first court may transfer the original action to the second court so that the claims may be consolidated for trial. In at least one case the second court enjoined the first court from proceeding with the original claim.

Since section 2013(A) of the Oklahoma Pleading Code is the same as Federal Rule of Civil Procedure 13(a), the Oklahoma courts should follow the federal cases where a claim that should be asserted as a compulsory counterclaim in a pending action is asserted in a separate action. Therefore, ordinarily the court in which the counterclaim is brought, whether it is another Oklahoma court, a federal court, a court of another state, or a court of a foreign country, should generally stay or dismiss the action.

However, the second court cannot transfer the second claim to the Oklahoma court where the original action is pending. Even if the second action is brought in another Oklahoma court, it cannot be transferred to the first court because Oklahoma does not have a statute that authorizes actions to be transferred in the furtherance of justice. If the second action is brought in another Oklahoma court, a court of another state, or a court of a foreign country, ordinarily the court where the first action is brought can enjoin the prosecution of the second action. However, if the second action is brought in a federal court, the Oklahoma court cannot enjoin its prosecution. In exceptional situations, in the interest of justice, it may be desirable for the second court to hear both claims. Then, the first court should either stay or dismiss the first action, although a stay would be more appropriate than a dismissal.


21. The federal statute, 28 U.S.C. § 1404(a) (1982), provides that “for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”
