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Foreword

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FOREWORD

The Editors and Staff of the *Review* are pleased to present in Volume 22's last issue an eclectic assortment of Articles and student-written commentary. In our first Article, Professor William J. Rands studies the federal tax treatment of incorporations. The work provides tax counsel with a practical guide through this complex area, replete with clear hypothetical explanations as well as theoretical and policy discussions. Critically, the author perceives no major flaw in the system and its focal point, Internal Revenue Code section 351; indeed, he applauds this Code section as being uncharacteristically clear. Nevertheless, Professor Rands finds one aspect of section 351—non-recognition treatment for a shareholder who transfers property to a controlled corporation in exchange for debt securities—inconsistent with the Code's reorganization rules which consider a change in position from equity to debt a taxable event. Although inconsistent with the reorganization rules, the author urges that Congress only with great caution convert into a taxable event such a receipt of securities in an incorporation because incorporations then effectively would be taxed on a regular basis.

Our second Article considers California evidence law regarding expert testimony in child sexual abuse cases. The author, Professor Linda E. Carter, explores the current *Kelly-Frye* standard developed by the California Supreme Court. This standard holds that in any type of case a new scientific technique invoked by an expert witness must be generally accepted within the relevant scientific community to be admissible. In the child sexual abuse context, the community of behavioral psychologists must accept as valid any new diagnostic technique upon which an expert bases a determination that a child has been sexually abused. The author urges that the California courts reject exclusive reliance on the *Kelly-Frye* standard in child sexual abuse cases. In Professor Carter's view, the ability of experts to easily manipulate applications of psychological diagnostic techniques has yielded hopelessly inconsistent results as to their admissibility. The author urges that the courts adopt a more traditional, generalized evidentiary standard—one that downgrades the *Kelly-Frye* inquiry to being just one of several factors in the admissibility analysis.

Practitioner Michael B. Landau in our third Article examines the controversy over the colorization of renowned black-and-white motion pictures. The Article reviews the Copyright Act of 1976 as it may apply

to film colorization and discusses current attempts to resolve whether and to what extent a colorized movie may be copyrighted by the colorizer. The author concludes that present copyright law does not adequately address the issue of colorization and proposes amendments to the Copyright Act to clarify the status of colorized works.

In addition to these three Articles, we also present four student-written pieces in this issue. In the first of these, staff writer Jeffrey Farley Keller comments on civil aiding and abetting liability under SEC Rule 10b-5. The lower federal courts have developed a three-part test for determining liability for aiding and abetting primary violations of the federal securities laws. The elements include the presence of primary violation of the securities laws, knowledge of that crime, and assistance in the wrong. In the absence of a Supreme Court pronouncement on the test, however, the courts have diverged on the quanta of knowledge and assistance necessary for liability. The author proposes that the courts adopt a "sliding-scale, flexible-factor" analysis which for liability requires varying degrees of knowledge and assistance depending on factors such as the existence of a duty to disclose information. The author concludes that this test would provide flexible yet reliable guidance to courts and securities industry participants alike.

In his Comment staff writer Jeremy J.F. Gray examines the role implied contractual indemnity has played in allocating liability among multiple defendants. The doctrine is invoked when in the absence of an express indemnification clause a court implies into a contract the duty of one party to indemnify the other for damages paid out by the indemnified party as a result of the indemnitor's negligent performance of an express promise. The author argues that the adoption of comparative indemnity has rendered implied contractual indemnity obsolete. The author further argues that the doctrine thwarts the effective operation of statutes designed to encourage settlements because under existing statutes settling defendants remain vulnerable to indemnity suits by implied indemnitees. The Comment recommends that all jurisdictions eliminate implied contractual indemnity or, at the very least, bar non-settling defendants from invoking the doctrine to sue settling defendants. The author concludes by proposing specific amendments to New York and California statutes that include implied contractual indemnity among the causes of action barred against settling defendants.

In the first of two Notes in this issue, staff writer Tobin Lippert considers the California Supreme Court decision, *Moradi-Shalal v. Fireman's Fund Insurance Cos.* In that case, the court held that section 790.03 of the California Insurance Code does not provide third-party

claimants a private right of action for bad faith against insurance companies. The decision overruled *Royal Globe Insurance Co. v. Superior Court*, the 1979 landmark decision in which the same court had held that third-party claimants could indeed directly sue insurers for violations of the Insurance Code. The author examines in detail the court's policy-laden reasons for overruling *Royal Globe* as well as its treatment of the principles of stare decisis. The author discusses the wide-ranging implications of *Moradi-Shalal*, and concludes by recommending that the California Legislature reinstate the *Royal Globe* holding.

In the final piece in this final issue of Volume 22, staff writer Donna A. Golem analyzes *Phillips Petroleum Co. v. Mississippi*, a case in which the Supreme Court of the United States held that upon attaining statehood each state received title to all waterways and lands under water influenced by the tides. The effect of the decision is that a state can include within the property it holds in trust for the public all tidal waters and their underlying lands, whether or not navigable. The author believes that the Court's decision was unprecedented because never before had it ruled that states held title to inland, non-navigable waters. The author argues that the decision has great potential to upset the settled expectations of private landowners who under prior law had clear title to their inland, non-navigable waters whether or not influenced by the tide. The Note concludes by urging states not to adopt the *Phillips* Court's "ebb and flow" test to delineate the scope of their public trust lands, but instead to use the time-honored "navigability-in-fact" test. Alternatively, the author proposes that states limit their public trust holdings to clearly appropriate lands by carefully considering the purposes of holding lands in trust before declaring trust title.

The Editors

