St. Mary's Law Journal

Volume 3 | Number 2 Article 20

12-1-1971

When a Specific Governmental Function Is Carried out by Heavily Subsidized Private Firms or Individuals Whose Freedom of Decision-Making Has, by Contract and the Reserved Governmental Power of Continuing Oversight, Been Circumscribed Substantially More Than That Generaly Accorded an Independent Contractor, the Coloration of State Action Fairly Attaches - As Far as These Tenants Were Concernced, the Landlord Could Not Evict Them for Exercising Their First Amendment Rights.

Lawrence E. Noll

upon their nature, are often considered to be invitations to make an offer, and not themselves an offer.[48]

Lately there has been much concern over protecting the "individual", which, undoubtedly, is as it should be. This is evidenced by the advancements in such fields as equal protection, equal opportunity and, of course, consumer protection. The instant case reflects this concern in its policy of protecting consumers from unfair practices. Allowing class actions based on fraud will provide a remedy for wrongs which otherwise would go unredressed because the small amount of each individual's claim would make separate actions economically impractical. In these situations a consumer class action for fraud would provide the consumer with judicial protection.

> Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society.[49]

John E. Murphy

LANDLORD AND TENANT—FIRST AMENDMENT—WHEN A SPECIFIC GOVERNMENTAL FUNCTION IS CARRIED OUT BY HEAVILY SUBSIDIZED PRIVATE FIRMS OR INDIVIDUALS WHOSE FREEDOM OF DECISION-MAKING HAS, BY CONTRACT AND THE RESERVED GOVERNMENTAL POWER OF CONTINUING OVERSIGHT, BEEN CIRCUMSCRIBED SUBSTANTIALLY MORE THAN THAT GENERALLY ACCORDED AN INDEPENDENT CONTRACTOR, THE COLORATION OF STATE ACTION FAIRLY ATTACHES. AS FAR AS THESE TENANTS WERE CONCERNED, THE LANDLORD COULD NOT EVICT THEM FOR EXERCISING THEIR FIRST AMENDMENT RIGHTS. *McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971).

Appellees were tenants in a private corporation-owned apartment complex in South Boston constructed on urban renewal property and operated under the National Housing Act.[1] They were threatened with

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[48] *See, e.g.*, People v. Gimbel Bros. Inc., 115 N.Y.S.2d 857, 858 (Ct. Spec. Sess. City of N.Y. 1952): "Advertisement does not constitute an offer of sale but is solely an invitation to customers to make an offer to purchase." *But see* Lefkowitz v. Great Minneapolis Surplus Store, Inc., 86 N.W.2d 689, 691 (Minn. 1957): "[W]here the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract." 1 A. CORBIN, CONTRACTS § 25 (1963): "It is quite possible to make a definite and operative offer to buy or sell goods by advertisement in a newspaper. . . . It is not customary to do this however, and the presumption is the other way. . . . Such advertisements are understood to be mere requests to consider and examine and negotiate, and no one can reasonably regard them otherwise unless the circumstances are very plain and clear." *See also* O'Keefe v. Lee Calan Imports, Inc., 262 N.E.2d 758, 759 (Ill. Ct. App. 1970). Most jurisdictions consider such an advertisement as a mere invitation to make an offer, unless the circumstances indicate otherwise.

[49] Vasquez v. Superior Court of San Joaquin County, 484 P.2d 964, 968 (Cal. 1971).

[1] National Housing Act, 12 U.S.C. § 1715*l*(d)(3) (Supp. V, 1970).

eviction by their landlord as a result of their "associational activities" on behalf of their fellow tenants in organizing and presenting claims to the landlord,[2] to administrative agencies, and to the courts. Appellees brought suit under 42 U.S.C. § 1983[3] to enjoin the eviction. The question posed was whether the landlord, though not an ostensible agent of the state, had such a relationship with the state that his activities took on the color of law, thereby becoming the state action necessary to sustain the allegation of fourteenth amendment deprivation.[4] The district court enjoined the eviction. Held—*Affirmed.* When a specific governmental function is carried out by heavily subsidized private firms or individuals whose freedom of decision-making has, by contract and the reserved governmental power of continuing oversight, been circumscribed substantially more than that generally accorded an independent contractor, the coloration of state action fairly attaches. As far as these tenants were concerned, the landlord could not evict them for exercising their first amendment rights.

As definitive and restrictive as Mr. Justice Bradley's language in the *Civil Rights Cases*[5] appears to be, courts have refused to be confined to a narrow interpretation of state action. Various activities performed by private individuals, private corporations, and private clubs have been found to be action by the state or for the state, and as such have been found to be amenable to the fourteenth amendment.[6] In *Evans v. Newton*, Mr. Justice Douglas aptly stated the problem:

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[2] McQueen v. Druker, 438 F.2d 781 n.1 (1st Cir. 1971). "During the pendency of this litigation one of the two named landlord-defendants died. We shall therefore refer to the sole appellant as 'landlord' as a matter of convenience."

[3] Civil Rights Act (April 20, 1871) § 1, 42 U.S.C. § 1983 (1964):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceedings for redress.

[4] Mr. Justice Bradley pronounced the guidelines for establishment of fourteenth amendment deprivation in the Civil Rights Cases, 109 U.S. 3, 11, 3 S. Ct. 18, 21, 27 L. Ed. 835, 839 (1883), when he stated that:

> [i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. . . . It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.

Appellees contend that the fourteenth amendment is applicable to the landlord's actions.

[5] *Id.*

[6] Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed.2d 373 (1966) (state action was present in the operation of a private park); Marsh v. Alabama, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946) (state action occurred when company-owned town prohibited distribution of religious materials on its streets); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) (state action was present when president and dean of students of a private university regulated demonstrations and disciplined certain students for failure to comply with regulations); Hawkins v. North Carolina Dental Society, 355 F.2d 718 (4th Cir. 1966) (state action was present when dental society selected state dental officials); Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938, 84 S. Ct. 793, 11 L. Ed.2d 659 (1964) (hospital's participation in Hill-Burton program made its

> What is "private" action and what is "state" action is not always easy to determine. [Citations omitted.] Conduct that is formally "private" may become so entwined with governmental policies or so impregnated with governmental character as to become subject to the constitutional limitations placed upon state action.[7]

What appears to be a necessary concomitant in any case is that the state action inflicted the injury and not the private action.[8]

In *Burton v. Wilmington Parking Authority*,[9] a case involving alleged state action on the part of a private restaurateur-lessee, the Supreme Court grappled with the problem of when private action becomes state action. The Court held that whenever a state or local government becomes *significantly* involved in private conduct then that private conduct becomes state action.[10] In discussing the degree of involvement which would be considered *significant*, the Court stated:

> [T]o fashion and apply a precise formula for recognition of state responsibility . . . is "an impossible task" . . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.[11]

In order to arrive at state action in private conduct, "a sifting of facts and weighing of circumstances" must be done. A true sifting and weighing can be accomplished by analyzing the relationship between the state and the private interests, and by analyzing the particular function performed by the private interests.[12]

The search for a sufficient nexus between the state and private activity that will brand the private action as state action has produced several terms descriptive of the state's involvement. In one instance, the nexus between the state and the private activity was termed to have been "insinuated."[13] Thus, the private restaurateur could not discriminate against patrons on the grounds of race because such action was state action prohibited by the fourteenth amendment. In another instance, the state's relationship with the operation of a private park was

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action state action when it discriminated against petitioner); Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962) (city's ownership of a possibility of reverter to a private golf course was sufficient to make the discriminatory practices of the management state action).

7 382 U.S. 296, 299, 86 S. Ct. 486, 488, 15 L. Ed.2d 373, 377 (1966).

8 Burton v. Wilmington Parking Authority, 365 U.S. 715, 721, 81 S. Ct. 856, 860, 6 L. Ed.2d 45, 50 (1961); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968); Grossner v. Trustees of Columbia University, 287 F. Supp. 535, 546 (S.D.N.Y. 1968).

9 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed.2d 45 (1961).

10 *Id.*

11 *Id.* at 722, 81 S. Ct. at 860, 6 L. Ed.2d at 50.

12 *See* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1105, 1119 (1960).

13 Burton v. Wilmington Parking Authority, 365 U.S. 715, 725, 81 S. Ct. 856, 862, 6 L. Ed.2d 45, 52 (1961); *see* Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924, 77 S. Ct. 680, 1 L. Ed.2d 719 (1957).

deemed to have been "entwined" so that the discriminatory acts of the officials managing the park were state acts prohibited by the fourteenth amendment.[14] However, in one case, "intertwining" was the term used in attempting to discover the relationship the state had with a private university, but yet, no state action was present when the university brought disciplinary action against certain students who had disrupted the campus.[15] The challenged disciplinary actions were not reviewable because "the receipt of money from the State is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government."[16]

The state may be "insinuated," "entwined" or "intertwining" in its relationship with the private activity, yet this type of a relationship may not be determinative of the issue of state action. *Dorsey v. Stuyvesant Town Corporation*[17] is particularly illustrative of this fact. Eminent domain was used to acquire the land necessary for building a complex to house 25,000 people. This project was a cooperative effort between the city and Stuyvesant Town, a subsidiary of the Metropolitan Life Insurance Company. The company's plans were subject to the approval of the city; its profits, dividends, and power to dispose of the property were regulated by state law. A partial tax exemption was even granted for the completion of the project. There was obvious state involvement in this case, yet the court held that it was not sufficient enough to change the private character of the corporation's actions into state action when it refused to lease apartments to Negroes.

The function a private activity is performing should also be analyzed when "sifting facts and weighing circumstances" so as to arrive at state action on the part of the private activity. There are cases[18] which seem to establish the principle that there are constitutional limits set on the activities of private organizations which exercise a governmental function.

The governmental or public function theory[19] as a basis for holding

14 Evans v. Newton, 382 U.S. 296, 299, 86 S. Ct. 486, 488, 15 L. Ed.2d 373, 377 (1966).

15 Grossner v. Trustees of Columbia University, 287 F. Supp. 535, 548 (S.D.N.Y. 1968).

16 *Id.* at 547. *Accord*, McGuane v. Chenango Court, Inc., 431 F.2d 1189, 1190 (2d Cir. 1970); Johnson v. Levitt & Sons, 131 F. Supp. 114, 116 (E.D. Pa. 1955).

17 87 N.E.2d 541 (N.Y. 1949), *cert. denied*, 339 U.S. 981, 70 S. Ct. 1019, 94 L. Ed. 1385 (1950).

18 Marsh v. Alabama, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946), wherein a privately-owned company town was prohibited from impairing rights of freedom of religion and press because the town was performing the functions of a municipality. *Accord*, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed.2d 603 (1968); Smith v. Allwright, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944) (wherein action taken by the Texas Democratic Party was state action because of the comprehensive regulation and supervision of the primary by the state and the governmental function served by the primary); Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F.2d 212 (4th Cir. 1945) (wherein a privately-endowed library which received operating funds from the city and state was performing a governmental function and its action in regard to petitioner was state action).

19 Coleman v. Wagner College, 429 F.2d 1120, 1121 (2d Cir. 1970). "A not uncommon

seemingly private activities amenable to the fourteenth amendment has been relied upon in several cases to impress constitutional restrictions on the actions of private individuals or corporations.[20] In *Smith v. Holiday Inns of America, Inc.*,[21] the state was found to be significantly involved in the operation of the motel when it was challenged for its refusal to accommodate the petitioner. The property upon which the motel was built was acquired through urban renewal proceedings. The basic plan for the motel, its financing, execution of the planning, and the continuing supervision of it were found to be actions under authority of the state urban renewal laws. It was also found that the motel was fulfilling a public purpose by improving the aesthetic qualities and public convenience of the area surrounding the Tennessee capitol.[22]

In the 1968 case of *Colon v. Tompkins Square Neighbors, Inc.*,[23] the court found that the denial of access to housing on the basis that applicants were on welfare was a denial of equal protection of the law. The privately-owned apartment complex to which the petitioner sought admission was constructed on urban renewal property. The court relied heavily on the significant involvement between the state and the private landlord in operating the complex under the National Housing Act.[24] The court did not, however, discuss the existence of a governmental function.

In the *McQueen* case,[25] the court found significant state involvement

method of establishing the presence of state action is to show that a private organization has undertaken to perform functions peculiarly 'public' in nature and traditionally entrusted to the state." Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1100 (1960). "A function can be public or governmental either because it bears a peculiar relationship to sovereignty, as does voting, or because it serves the public generally and government has chosen to engage in it."

20 Marsh v. Alabama, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946); *accord*, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed.2d 603 (1968); Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F.2d 212 (4th Cir. 1945). *Contra*, Dorsey v. Stuyvesant Town Corporation, 87 N.E.2d 541 (N.Y. 1949), *cert. denied*, 339 U.S. 981, 70 S. Ct. 1019, 94 L. Ed. 1385 (1950), a case which held that even though a private firm received state assistance through the powers of eminent domain and taxation it was not performing a public function in providing housing for 25,000 people.

21 336 F.2d 630 (6th Cir. 1964).

22 *Id.* at 635.

23 294 F. Supp. 134, 137, 138 (S.D.N.Y. 1968).

> The fact that Haven Plaza Apartments has been constructed on a designated urban renewal site, is financed by an FHA-insured mortgage, that the managing corporation, Tompkins Square, is the recipient of certain tax exemptions granted by the City as well as certain rent supplement subsidies and other forms of financial assistance from City, State and Federal authorities, . . . and that the daily operations are *ultimately* supervised by both the New York City Housing and Development Administration and the Federal Housing Administration . . . , pursuant to Tompkins Square's Disposition Agreement with the City of New York and Regulatory Agreement with the FHA, . . . indicates that there exists sufficient and continuing government participation and involvement in the project so as to bring any discriminatory operational practices within the gambit of constitutional prohibition.

24 National Housing Act, 12 U.S.C. § 1715*l*(d)(3) (Supp. V, 1970). *See also* Housing Act of 1949, 42 U.S.C. §§ 1455, 1457, 1460(c)(4) (Supp. V, 1970).

25 438 F.2d 781 (1st Cir. 1971).

in the operations of the private landlord's apartment complex, and in addition found that the landlord was performing a governmental function. The court said that its ". . . scrutiny of the landlord-state relationship indicates far less privateness in the landlord's enterprise, far more of a governmental function, and 'a good deal more' than receipt of governmental financial help."[26]

Significant state involvement was not difficult to find in the *McQueen* case. The Redevelopment Authority, which had acquired the property through its urban renewal program, sold the property to the defendant. Federal laws require that when disposing of such property, the local urban renewal authority must place restrictions on its use in order to insure that it will be used according to approved urban renewal plans or for low or moderate income housing.[27] The Redevelopment Authority required the landlord by a lengthy agreement to [sic] ". . . adhere to many standards governing the physical plant;[28] . . . limitations on rental agreements as to amount, duration, and increases; admissions policies;[29] . . . management;[30] [and] . . . transfer of title . . . ."[31]

What distinguishes this case from the *Colon* case is the emphasis the court places on the governmental or public function performed by the landlord in determining the presence of state action. This governmental or public function theory consists of two related but narrowly defined

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26 *Id.* at 783.

27 Housing Act of 1949, 42 U.S.C. §§ 1455, 1457, 1460(c)(4) (Supp. V, 1970); *see* MASS. ANN. LAWS ch. 121, §§ 26LL, 26QQ, 26YY (1965).

28 McQueen v. Druker, 438 F.2d 781, 783 (1st Cir. 1971) "(*e.g.*, prior approval for construction, improvements and demolition, a minimum investment in works of art, facilities for the handicapped, equal employment opportunity)." *See* National Housing Act, 12 U.S.C. § 1715*l*(d)(3) (Supp. V, 1970); Housing Act of 1949, 42 U.S.C. §§ 1450-65 (Supp. V, 1970); MASS. ANN. LAWS ch. 121, §§ 26LL, 26QQ, 26YY (1965).

29 *Id.* at 783, "(e.g., income levels of applicants, priority to four classes of displaced persons and four classes of commercial occupants, and allowing the Boston Housing Authority to select tenants for 10 per cent of the residential units)." *Id.* at 783 n.6:

> By subsequent agreement . . . this commitment was raised to a maximum option of 25%. . . . In addition, the City of Boston granted the landlord a concessionary tax rate of 15% of income. Both of these arrangements decreased the landlord's risk of non-payment of rents, the former by assuring the landlord of at least 25% of his rents each month without recourse to collection efforts, and the latter by pegging his tax obligations to rents actually received.

See National Housing Act, 12 U.S.C. § 1715*l*(d)(3) (Supp. V, 1970); Housing Act of 1949, 42 U.S.C. §§ 1450-65 (Supp. V, 1970); MASS. ANN. LAWS ch. 121, §§ 26LL, 26QQ, 26YY (1965).

30 *Id.* at 784, "(e.g., use solely in accordance with the South End Urban Renewal Plan, consultation with BRA 'with respect to its rental program, including preparation of advertising matter, brochures, leases, establishment of rental offices, and all aspects of said program which relate to or have an effect upon the selection of tenants', . . .)." *See* National Housing Act, 12 U.S.C. § 1715*l*(d)(3) (Supp. V, 1970); Housing Act of 1949, 42 U.S.C. §§ 1450-65 (Supp. V, 1970); MASS. ANN LAWS ch. 121, §§ 26LL, 26QQ, 26YY (1965).

31 *Id.* at 784, "(e.g., compliance with any 'conditions . . . the Authority may find desirable in order to achieve and safeguard the purposes of the Massachusetts Housing Authority Law, and the Plan.')." *See* National Housing Act, 12 U.S.C. § 1715*l*(d)(3) (Supp. V, 1970); Housing Act of 1949, 42 U.S.C. §§ 1450-65 (Supp. V, 1970); MASS. ANN. LAWS ch. 121, §§ 26LL, 26QQ, 26YY (1965).

doctrines.[32] One branch of this theory concerns areas of activity accessible to the general public but which are privately owned.[33] The other branch of this theory is based on cases such as *Terry v. Adams*,[34] *Smith v. Allwright*,[35] and *Evans v. Newton*,[36] wherein a private concern has undertaken to assist the state in the performance of a governmental function. This case falls within the latter theory, that is, the landlord of this apartment complex is performing a public or governmental function by:

> . . . helping the state realize its specific priority objective of providing for urban renewal displacees and its more general goal of providing good quality housing at rents which can be afforded by those of low and moderate income. The stronger posture of government supervision present in this case is not unrelated to the fact that the government has chosen to attract the participation of private persons in carrying out a specific governmental purpose. . . . Here the function, while perhaps not so traditionally governmental as parks, fire or police services, or libraries, is today one of the major concerns of most cities of substantial size. And to the performance of that function by the landlord, governmental authority contributes significant operational surveillance.[37]

The court concludes:

> . . . at *least* when a *specific governmental function* is carried out by heavily subsidized private firms or individuals whose freedom of decision-making has, by contract and the reserved governmental power of continuing oversight, been circumscribed substantially more than that generally accorded an independent contractor, the coloration of state action fairly attaches.[38]

In such a situation, it is fair and reasonable to hold an individual subject to the same duties of observing constitutional rights as are imposed on a governmental unit; consequently, ". . . the landlord may not evict because of the exercise by the tenants of their First Amendment Rights."[39]

The court in the *McQueen* case, as already mentioned, found significant state involvement in the operation of the apartment complex plus the fulfillment of a specific governmental function. These two factors

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32 Powe v. Miles, 407 F.2d 73, 80 (2d Cir. 1968).
33 Marsh v. Alabama, 326 U.S. 501, 502, 508, 66 S. Ct. 276, 277, 279, 90 L. Ed. 265, 266, 269 (1946); *accord*, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 325, 88 S. Ct. 1601, 1612, 20 L. Ed.2d 603, 616 (1968).
34 345 U.S. 461, 469, 73 S. Ct. 809, 813, 97 L. Ed. 1152, 1160 (1953).
35 321 U.S. 649, 664, 64 S. Ct. 757, 765, 88 L. Ed. 987, 997 (1944).
36 382 U.S. 296, 302, 86 S. Ct. 486, 490, 15 L. Ed.2d 373, 378 (1966).
37 McQueen v. Druker, 438 F.2d 781, 784 (1st Cir. 1971).
38 *Id.* at 784. (Emphasis added.)
39 *Id.* at 785.

made the landlord's actions the state action necessary to be the subject of fourteenth amendment restrictions. The court's emphasis on the governmental function performed by the landlord in this case is the first time that providing low cost housing for urban renewal displacees and those of low and moderate income has been termed to be a governmental function.[40] This case extends the state action doctrine into another seemingly private area of activity.[41] If the state is significantly involved in the private activity, and the private activity is performing a governmental function, then "associational activities" are protected by the first and fourteenth amendments.

Lawrence E. Noll

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40 It has been argued before that the builders of private housing, subdividers and developers included, perform an essentially governmental function which should be subject to the same constitutional restraints as the government itself. This theory was urged in Ming v. Horgan, No. 97130, Super. Ct., County of Sacramento, Cal., June 23, 1958, 3 Race Rel. L. Rep. 693, 697, 698 (1958), but relief was granted on other grounds.

41 Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347, 355 (1963). "Further extension [of the doctrine] actually would be in the direction of moving to the coverage of persons who do not purport to be governmental officials but are nevertheless fulfilling a function which is to some extent governmental." The author also maintains that:

> [t]he sun is setting on the concept of state action as a test for determining the constitutional protection of individuals through developments concerning "color of state law;" . . . private groups and organizations [are] becoming sufficiently oriented to public concern to justify public control, and . . . state action is so permeating that it is present in virtually all cases.

Id. at 389.