A STANDARD OF REASONABLENESS: CONSTRAINING MANDATORY ARBITRATION CLAUSES IN EMPLOYMENT AGREEMENTS

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I. INTRODUCTION

The Supreme Court recently reaffirmed its commitment to honoring arbitration clauses found in employment agreements. In *Rent-A-Center v. Jackson*,[1] the Court reiterated its belief that arbitration agreements in the employment context should not be treated differently than similar agreements found in any commercial contract. The *Rent-A-Center* result was not surprising. In recent years, the Supreme Court has faced the issue of mandatory arbitration agreements numerous times, and in virtually every case, favored arbitration.

The *Rent-A-Center* plaintiff, Antonio Jackson, originally filed suit in federal court, claiming racial discrimination and retaliation. Jackson's employer moved to dismiss the action and compel arbitration, citing the arbitration clause found within Jackson's employment agreement. The agreement provided for arbitration of all disputes arising out of Jackson's employment with Rent-A-Center, including claims for discrimination.[2] The agreement also provided that:

> [T]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.[3]

Jackson opposed the motion on the ground that the arbitration agreement was unconscionable and therefore not enforceable. Rent-A-Center responded that the court could not hear Jackson's unconscionability claim because Jackson had expressly agreed that the arbitrator would have exclusive authority to resolve any dispute about the enforceability of the

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[1] Rent-A-Center, West, Inc. v Jackson, 130 S. Ct. 2772 (2010).

[2] *Id*. at 2775.

[3] *Id*.

agreement. In the end, the Supreme Court sided with Rent-A-Center. The Court found that, to have a court hear a claim of unconscionability, a plaintiff must establish that the provision delegating questions of arbitrability to an arbitrator is unconscionable.[4]

Following *Rent-A-Center*, it seems certain that all challenges to the fairness of mandatory arbitration clause terms will be decided not by courts, but by arbitrators. The arbitrators themselves will decide whether the arbitration process is flawed.[5] The *Rent-A-Center* decision means that the law places virtually no constraints on employers in their use of mandatory arbitration clauses in standard employment agreements. Within a few years, most employment agreements will contain broad arbitration provisions.

These arbitration clauses will reach all statutory claims. As seen below, statutes govern numerous aspects of employment. These statutes, defining the duties and responsibilities of the employer, resulted from public concern. Thus, before consigning all employment claims to private processes, we should ask whether relegating the resolution of employment claims to arbitration is a good idea. Are the public interests being satisfied "when public laws are enforced in the private fora?"[6]

In favoring arbitration clauses in employment agreements, the Supreme Court has relied on general contract principles.[7] Essentially, the Court has found that if an employee has agreed to have his statutory discrimination heard in a private forum, then that employee should stick with the deal.[8]

However, relying on general contract principles to decide a matter involving the employment relationship is disingenuous. In fact, referring to the standard employment agreement as a traditional contract requires some imagination. Numerous areas of the employment relationship are not subject to contract. The employment relationship is heavily constrained by public law. The majority of the duties and obligations of an employment relationship are furnished by statute. An employment agreement, for the most part, only memorializes the employment relationship. The most important aspects of the employment relationship—occupational safety and health, minimum wage, overtime pay, discrimination—exist independently and cannot be waived in contract.

In essence, the employment relationship exists on a continuum. At one end of the spectrum lie those areas that are solely governed by contract. At the other end of the spectrum lie those rights that are granted by statute. The

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[4] *Id*. at 2780.
[5] *Id*. at 2778.
[6] Harry T. Edwards, *Where Are We Heading With Mandatory Arbitration Of Statutory Claims In Employment?,* 16 GA. ST. U. L. REV. 293, 295 (1999).
[7] *Rent-A-Center*, 130 S. Ct. at 2776.
[8] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) ("[H]aving made the bargain to arbitrate, the party should be held to it.").

current judicial approach is to treat arbitration agreements as if they were a topic to be governed solely by contract principles. In contrast, many would argue that mandatory arbitration agreements should be banned outright, i.e., placed outside the scope of contract.[9]

In this paper, I argue that one option does not have to exist to the exclusion of the other. In fact, under my approach, arbitration agreements should fall somewhere along the middle of this continuum. There is precedent for my approach. There is a particular aspect of the employment relationship that, while open to contract, is still subject to constraints imposed by the law. A noncompete agreement permits an employee to contract with his employer to not work for a competitor following the termination of the employment relationship. This right to contract away the right to compete is, however, narrowly construed by the court system. A court may not enforce a noncompete agreement unless the agreement meets a standard of reasonableness. I propose that this same analysis be applied to arbitration agreements. It is my position that a pre-dispute, mandatory arbitration agreement should not be enforced unless it meets certain requirements that together make the agreement reasonable.

In Part II of this paper, I discuss the problems created by the use of mandatory arbitration clauses in employment agreements. Part III examines the fallacy behind applying general contract principles to arbitration agreements in the employment context. In Part IV, I outline a legislative proposal to constrain the use of arbitration as a means of resolving employment disputes. My proposed legislative solution is designed to address the concerns raised by the continued use of mandatory arbitration clauses in employment agreements.

II. THERE ARE PROBLEMS WITH ARBITRATION CLAUSES IN EMPLOYMENT AGREEMENTS

A. *Tension Exists Between the Employment Relationship and Arbitration*

A tension exists between mandatory arbitration agreements and employment relationships. The source of the tension lies in the nature of the disputes heard in arbitration. In an ordinary commercial arbitration proceeding, the issues addressed stem from the contract itself. In the arbitration of employment disputes, it is much more likely that the dispute stems from alleged violation of a right granted by statute. Courts have

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[9] *See infra* Lisa Blomgren Bingham & David Henning Good, *A Better Solution to Moral Hazard in Employment Arbitration: It Is Time to Ban Predispute Binding Arbitration Clauses*, 93 MINN. L. REV. HEADNOTES 1 (2009).

struggled with this tension. In fact, the Supreme Court, when first facing the question of arbitration of employment rights found that an employee's agreement to an arbitration process did not waive any rights to pursue statutory claims in court.[10]

Courts struggled with similar issues in addressing mandatory arbitration in the commercial contracts. Over the years, the mandatory arbitration agreement has gone from pariah to favored status. Prior to passage of the Federal Arbitration Act (FAA) in 1925, the judicial system often exhibited resentment toward arbitration.[11] The idea of a private court system seemed wrong – how could a judicial system work if the parties were able to contract their way out of it?[12] In an effort to combat judges' hostility to arbitration agreements and the resulting privatization of disputes, Congress created a statutory scheme designed to overcome judicial resistance to arbitration.[13] The FAA required courts to enforce arbitration agreements—to compel parties to arbitration, where an arbitration agreement existed, and to enforce arbitral awards. The FAA represented the first step to a national policy favoring arbitration.[14] The drafters of the FAA intended the legislation to put arbitration agreements on the same footing as other contracts.[15] To that end, section 2 of the FAA, the "primary substantive provision of the Act,"[16] states that arbitration agreements in contracts involving commerce are "valid, irrevocable, and enforceable."[17] Section 2 further requires courts to enforce them according to their terms,[18] "save upon such grounds as exist under law or in equity for the revocation of any contract."[19]

The FAA also made suitable provisions for judicial enforcement of arbitral awards. The FAA permits a party to seek enforcement of arbitration agreements in federal court. The FAA provides that petitions to compel arbitration may be brought before "any United States district court which, save for such agreement, would have jurisdiction under title 28 . . . of the

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[10] Alexander v. Gardner-Denver, 415 U.S. 36 (1974).
[11] Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 516 (2009).
[12] Jonathan A. Marcantel, *The Crumbled Difference Between Legal And Illegal Arbitration Awards: Hall Street Associates And The Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597, 600 (2009).
[13] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204 (2006).
[14] Preston v. Ferrer, 552 U.S. 346, 128 S. Ct. 978 (2008) (quoting Southland Corp. v. Keating, 104 S. Ct. 852, (1984)).
[15] Marcantel, *supra* note 12, at 602.
[16] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
[17] Validity, Irrevocability, and Enforcement of Agreements to Arbitrate, 9 U.S.C. § 2 (2006).
[18] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).
[19] 9 U.S.C. § 2.

subject matter of a suit arising out of the controversy between the parties."[20] The FAA provided a method for prevailing parties to file a motion for confirmation of the award by a federal court, and an opportunity for judicial review to confirm, vacate, or modify arbitration awards. The FAA forms, for the most part, a single federal law of arbitration and preempts state arbitration laws to the extent those laws conflict with the FAA.[21]

B. *The Attitude Toward Arbitration in Employment Has Changed*

The FAA does not refer to employment agreements or to arbitration in the employment context. Arbitration first entered the employment relationship through the collective bargaining process. The Supreme Court, in *Textile Workers Union v. Lincoln Mills*,[22] stated that federal courts could enforce arbitration clauses contained in collective bargaining agreements. The *Lincoln Mills* decision was not based on interpretation of the FAA. Instead, the Court based its holding on Section 301 of the Labor-Management Relations Act of 1947.[23] The *Lincoln Mills* decision left open the question as to what courts would say about the use of mandatory arbitration agreements in non-union employment relationships.

In 1964, Congress enacted Title VII, which prohibited employment discrimination on the basis of race, color, religion, sex, and national origin.[24] Later federal statutes extended legal protection to age,[25] pregnancy,[26] and disability.[27] These employment rights were gained not through the collective bargaining process, but instead through statute. At the same time state courts proved willing to test the edges of the employment-at-will doctrine.[28] Employers reacted to this new wave of litigation by including in their employment agreements arbitration clauses prescribing mandatory arbitration in the event of a statutory claim.

Initially, the Supreme Court indicated that, outside of collective bargaining, it would not favor waiver of employment rights in an arbitration agreement. In *Alexander v. Gardner-Denver Co.*, [29] the Court found that an employee's arbitration of a just-cause claim under a labor agreement did not

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[20] *Id.*
[21] Allied-Bruce Terminex Co. v. Dobson, 513 U.S. 265, 281 (1995) (holding that Section 2 of the FAA preempts state law making written pre-dispute arbitration agreements unenforceable).
[22] 353 U.S. 448, 458 (1957).
[23] *Id*. at 458.
[24] 42 U.S.C. § 2000 (2006).
[25] Age Discrimination in Employment Act, 29 U.S.C. § 621-34 (2006).
[26] Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006).
[27] Americans with Disability Act, 42 U.S.C. §§ 12101-213 (2009).
[28] Richard A. Bales, *How Can Congress Make a More Equitable Federal Arbitration Act*, 113 PENN ST. L. REV. 1081 (2009).
[29] 415 U.S. 36 (1974).

prevent subsequent litigation of the employee's statutory discrimination claim. In *Alexander*, the same facts underlay both the plaintiff's statutory and common law claims. The Court stated that by agreeing to arbitration of contract rights, a party could not waive her right to a judicial forum to hear her statutory claims. "Mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver."[30]

The *Alexander* court disagreed with the notion of an arbitration proceeding as a substitute forum for the resolution of statutory employment claims. "We are also unable to accept the proposition that the petitioner waived his cause of action under Title VII . . . we think it clear that there can be no prospective waiver of an employee's rights under Title VII."[31] The Court went on to note, "waiver of these rights would defeat the paramount congressional purpose behind Title VII."[32] The Court distrusted the arbitration process to handle such weighty claims, as it cited "the informality of arbitral procedures, the lack of labor arbitrators' expertise on issues of substantive law, and the absence of written opinions."[33]

Thus, in the first test of the arbitration clause in a non-union employment agreement, the Supreme Court found that an arbitration provision could not prevent a plaintiff from asserting his statutory rights. In declining to support the use of the arbitration clause, the *Alexander* court recognized that an employee making a claim under Title VII has asserted a statutory right separate from the arbitration process. If a decision in arbitration is "based solely upon the arbitrator's view of the requirements of enacted legislation, rather than on an interpretation of the collective-bargaining agreement, the arbitrator has exceeded the scope of the submission, and the award will not be enforced. Thus the arbitrator has authority to resolve only questions of contractual rights."[34]

Over time, the Supreme Court's opinion regarding arbitration changed. In a series of cases the Court altered its opinion of arbitration and "reversed a longstanding presumption that employment claims were exempt from the FAA."[35] In these cases, referred to now as the *Mitsubishi Trilogy*,[36] the Court enforced arbitration agreements that extended to antitrust, securities,

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[30] *Id*. at 52.
[31] *Id*.
[32] *Id*. at 51.
[33] *Id*. at 56-58.
[34] *Id*. at 52-54.
[35] Kenneth F. Dunham, *Great Gilmer's Ghost: The Haunting Tale of the Role of Employment Arbitration in the Disappearance of Statutory Rights in Discrimination Cases*, 29 AM. J. TRIAL ADVOC. 303, 307 (2005).
[36] Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

and racketeering laws. The Court stated, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[37]

But the biggest question remained whether the rights granted under Title VII and other anti-discrimination statutes could be consigned to arbitration. In *Gilmer v. Interstate/Johnson Lane Corp*.,[38] the Court reversed its stance and found that employment disputes arising out of statutory claims were an appropriate area for arbitration. In *Gilmer*, the Supreme Court held that the FAA permitted an employer to require a non-union employee to arbitrate, rather than litigate, a federal age discrimination claim. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[39] According to the Court, objections of unconscionability and procedural unfairness could be addressed on a case-by-case basis. The Court decided that employment arbitration agreements would be enforced absent "the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract."[40]

Nevertheless, despite the *Gilmer* decision, at least some doubt remained regarding the applicability of the FAA to employment agreements. An argument existed that the text of the FAA itself precluded the application of the statute to employment disputes. The FAA specifically excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Given the historic broad interpretation of 'interstate commerce,' presumably most workers would be excluded from the Act's coverage, if this statement were applied literally.

The Supreme Court confronted this issue in *Circuit City Stores, Inc. v. Adams*[41] and found that the FAA's proscription of the Act's application should be read narrowly. In *Circuit City*, the plaintiff signed an employment agreement containing a mandatory arbitration clause. When an employment dispute arose, the trial court compelled arbitration. The Ninth Circuit overturned, stating that the FAA did not apply to employment disputes. The Supreme Court disagreed. In *Circuit City*, the Court held that the limiting text of the FAA was directed only to transportation workers.[42] For all other employees, claims arising out of statutory violations could be consigned to

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[37] *Mitsubishi Motors*, 473 U.S. at 626-27.
[38] 500 U.S. 20 (1991).
[39] *Id*. at 26.
[40] *Id*. at 33
[41] 532 U.S. 105 (2001).
[42] *Id*. at 109 ("We now decide that the better interpretation is to construe the statute, as most of the Courts of Appeals have done, to confine the exemption to transportation workers.").

arbitration. Following *Circuit City*, employers could routinely include arbitration clauses in employment agreements subject only to general contract defenses.

C. *Arbitration in the Employment Context Must be Carefully Monitored*

At this point, one may question why mandatory arbitration in the employment context is a problem. Employees retain their right to general contract defenses—most importantly the defense of unconscionability. Nevertheless, there are a number of policy reasons that support the notion that mandatory arbitration clauses in the employment agreement be limited. Any of these practical issues would justify the decision to limit arbitration of employment disputes.

First, the decision to arbitrate employment disputes is often made on a unilateral basis. No opportunity exists for employees to provide input regarding the functioning of the arbitration process. Instead, employers create arbitration systems "with no employee input, often in secret, and then spring the procedure on employees."[43] Employees are not provided with guidance on arbitration, either the concept or the actual procedure.[44] It is highly likely that employees are unfamiliar with the judicial process and are therefore uncertain as to the meaning of selecting arbitration as the final means of dispute resolution.[45] Because of this lack of knowledge, the employee "is in no position to bargain or shop for a better term."[46]

Agreement to any arbitration proceeding should be knowing and voluntary.[47] Voluntariness, however, will likely mean something different in the employment context than in a commercial setting. Some courts have noted that agreements to employment arbitration may often be considered involuntary, because arbitration clauses are included in standard form employment agreements.[48] Employees are presented with the agreement on "a take it or leave it, and be fired/not hired, basis."[49] Employees "must either

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[43] *See* Martha Halvordson, *Employment Arbitration: A Closer Look*, 64 J. MO. B. 174 (2008) and cites therein.
[44] *Id*. at 174.
[45] David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 56.
[46] *Id*. at 56.
[47] *See, e.g.*, Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832-33 (4th Cir. 1986); K.M.C. Co. v. Irving Trust, 757 F.2d 752, 756 (6th Cir. 1985); Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977).
[48] Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 57-58 (1997).
[49] Marcantel, *supra* note 12 at 613.

'agree' to waive their right to litigate and use the ... arbitration procedure or lose their jobs."[50]

Finally, there is a question as to whether private arbitration schemes are equipped to deal with statutory claims. Employment discrimination remains a problem—laws aimed at eliminating employment discrimination have not solved America's discrimination problems. White women and minorities of both sexes remain not only behind white males, "but have regressed recently in wages, representation in management, and representation in jobs in line for promotion to management."[51] While equal opportunity in employment may have improved since passage of Title VII, underlying problems remain and the statistics are clear. These statistics cannot simply be explained by facially neutral factors.[52]

Whatever the cause of the continued lag in employment statistics, whether the problem lies with the statute or its enforcement model,[53] mandatory private arbitration, as it is currently practiced, is not the answer. The process of shunting employment discrimination claims off to private arbitration panels, with non-standardized procedures, questions of fairness, questions of due process, and a complete lack of transparency, seems certain to perpetuate the problem of employment discrimination.

III. THE SUPREME COURT ERRED IN RELYING ON CONTRACT PRINCIPLES

A. *The Employment Relationship is Unique*

The employment relationship represents "one of the most complex and important relationships in modern society."[54] The employment relationship,

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[50] Halvordson, *supra* note 43, at 174.

[51] Marcia L. McCormick, *The Truth Is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193 (2009). "Black women, for example, earn sixty-three percent of what white men earn, and Latina women earn only fifty-two percent of what white men earn. . . . Additionally, the number of women of all colors in corporate officer posts and in the pipeline for those posts at Fortune 500 companies has fallen in the past two years. Women of color make up just two percent of those corporate officer posts." *Id*. at 194.

[52] *Id*. at 194.

[53] The continuing problem may be a result of ineffectual enforcement by the Equal Employment Opportunity Commission. Many have criticized the effectiveness of the agency. Perhaps, as some claim, the problem lies with the ability of the EEOC to create accountability on the part of those making employment decisions. "The current model, with the EEOC writing compliance guidelines, encouraging mediation and occasionally acting as prosecutor, is not working." *Id*. at 194-95.

[54] Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 351. (2008)

like the employment agreement that memorializes it, is almost inherently asymmetrical. The agreement is not the result of a bargain struck between equals.[55] The majority of employees are not able to change any terms of the employment agreement, including the arbitration clause.[56] The employer need not pay any additional consideration for the arbitration agreement; courts routinely construe continued employment as adequate consideration.[57] Employers have sole control of all documents, agreements, policies and other terms of the employment relationship.[58]

In a commercial contract, the parties may agree to arbitrate disputes arising out of the subject matter of the contract. The contract will contain the rights and obligations of the parties, and the arbitration agreement provides the forum that will adjudicate disputes related to those rights and obligations. The employment agreement is different. In the employment agreement, the arbitration clause is "immaterial to the core of the transaction."[59] While the employment agreement may contain provisions regarding salary and benefits, the employer has likely not insisted on a mandatory arbitration agreement to resolve disputes about salary and benefits. Instead, the employer intends to obtain the employee's consent to submit future statutory claims to an arbitration proceeding.

Historically, courts have viewed the employment relationship as a matter of contract, a "private economic relationship."[60] The modern employment agreement is, however, a contract only in the broadest sense of the word. The employment agreement may contain terms and conditions of employment, but those terms and conditions are subject to, and constrained by, external law. The rights and duties of the parties to the employment agreement are much more likely to be defined by statute, or by the common law, than by the employment agreement.[61]

For instance, Title VII and similar antidiscrimination statutes impose severe limitations on employers not only in the making of employment agreements, but in all aspects of employment and employment decisions.[62] But discrimination laws are only one aspect of the extensive regulation of employment by legislation. There are numerous other examples of state

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[55] *Id*. at 370.
[56] *Id*.
[57] *See, e.g.,* McNaughton v. United Healthcare Servs., Inc., 728 So.2d 592 (Ala. 1998) ("an employer's providing continued at-will employment is sufficient consideration to make an employee's promise to his employer binding."); *See also* Mattison v. Johnston, 152 Ariz. 109, 112 (Ct. App. 1986) ("the continuation of employment for a substantial period of time establishes consideration").
[58] Fineman, *supra* note 54, at 380.
[59] Schwartz, *supra* note 45, at 56.
[60] McCormick, *supra* note 51, at 194.
[61] *Id*.
[62] *Id*.

control over the employment relationship. Hours and wages, two of the key elements of any employment relationship, are restricted by statute. An employee may not contract to work for less than the minimum wage, or agree to work overtime without the statutorily mandated pay addendum.[63] The workers' compensation scheme prohibits negligence suits against one's employer.[64] Occupational health and safety is a matter of government regulation, not of individual contractual choice.[65] Social Security and federal income tax withholding are matters governed by statute, not by contract.[66] The time and manner of wage payments is subject to state statute, not contract.[67]

B. *Arbitration of Employment Disputes Creates Unique Issues*

To a large extent, "employment law consists of the competing paradigms of rights and contract."[68] This conflict between the aspects of employment that are governed by contract and those governed by public law is a constant source of tension. The employment relationship is, in one sense, based in contract: an individual agrees to work for an employer, and certain terms of that work, e.g., salary or benefits, will be dictated by the agreement, whether implicit or express.[69] But the contract relationship occurs within boundaries. Numerous external laws limit the contract relationship. These external laws acknowledge rights and grant entitlements. These laws limiting contract rights within the employment relationship are present for public policy purposes, designed to serve the public interest and values.[70]

In *Gilmer*, the Court noted that the purpose of the FAA "was to place arbitration agreements on the same footing as other contracts."[71] In favoring arbitration agreements, the Supreme Court has relied on general contract principles, i.e., because the parties made an agreement to arbitrate, they "should be held to it."[72] According to this line of thought, parties must arbitrate their employment-related claims because they agreed to arbitrate

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[63] Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq (2006).
[64] *See e.g.,* Ward v. Bechtel Corp., 102 F.3d 199, 203 (5th Cir. 1997)(The Texas Worker's Compensation Act "provides the exclusive remedy for injuries sustained by an employee in the course of his employment as a result of his employer's negligence.").
[65] Occupational Safety and Health Act, 29 U.S.C. §§ 651 et seq (2006).
[66] *See, e.g.*, Ram v. Blum, 533 F. Supp. 933 (S.D.N.Y. 1982).
[67] *See, e.g.*, California Labor Code § 207 (2010).
[68] Cynthia Estlund*, Between Rights and Contract: Arbitration Agreements and Noncompete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 380 (2006).
[69] *Id*.
[70] *Id*.
[71] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991).
[72] *Id*. at 26 (quoting Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

their claims. But citing traditional contract principles to support arbitration is a disingenuous. As we have seen, the modern employment agreement is only tangentially related to traditional notions of contract. Common law traditions, as well as numerous state and federal statutes bind up the employment agreement. Although employment may be construed as a contractual relationship, the ability of the parties to contract is severely constricted in the employment relationship.

The employment relationship is a hybrid entity, in that current employment law is dictated as much by statute as it is by the terms of the employment agreement. The employment-at-will doctrine provides the foundation for modern employment law. Overlaying the employment-at-will doctrine with rights created a system that is neither contractual nor rights-based.

IV. THE EMPLOYMENT ARBITRATION AGREEMENT SHOULD BE CONSTRAINED

A. *Precedent Exists for Limiting the Ability of the Parties to Contract to Arbitration Terms*

I propose that the ability of the parties to enter into an arbitration agreement be limited. This is not a revolutionary position, for limiting the ability of the parties to contract to arbitration terms has already occurred. Arbitration terms are currently constrained in three ways: the language of the FAA, state contract law, and by the language of the statute underlying the dispute.

First, the FAA itself limits the effect of the arbitration agreement. While the FAA expressly states that arbitration agreements "shall be valid, irrevocable, and enforceable," the Act permits courts to modify or vacate arbitration awards. Sections 10 and 11 provide the grounds for vacatur and modification.

Section 10 of the Act permits a court to vacate an arbitration award under certain conditions:

(a) Where the award was procured by corruption, fraud, or undue means;
(b) Where there was evident partiality or corruption by the arbitrators;
(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the

> controversy, or of another misbehavior by which the rights of any party have been prejudiced or;
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> (d) Where the arbitrators exceeded their power or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.[73]

Under section 11, the grounds for modifying or correcting an award include "evident material miscalculation," "evident material mistake," and "imperfect[ions] in [a] matter of form not affecting the merits."[74] Together these provisions protect the parties and provide base line requirements of fairness.[75]

As noted previously, the FAA also permits arbitration agreements to be challenged upon any basis that would permit a contract to be challenged. Thus, the Act preserves the right of the parties to challenge the arbitration agreement "upon grounds as exist at law or in equity for the revocation of any contract.[76]

Finally, there is another limitation on the rights of parties to agree to arbitration terms. The Supreme Court has, indirectly at least, indicated that arbitration terms must meet a certain standard of fairness. In *Gilmer*, the Court held that a valid arbitration agreement, an agreement that was to decide statutory claims, must permit the plaintiff to "effectively vindicate" his substantive statutory rights.[77] Effective vindication would seem to mean that the agreement must maintain the same rights and remedies that substantive law would provide to the plaintiff.[78] The parties may waive the forum in which to hear the dispute; they may not waive the substantive law applying to the dispute.[79]

The changes that I propose are therefore consistent with established law. It is not a question of changing the law regarding the unlimited freedom of employers to demand that their employees agree to arbitrate disputes based on any possible term. Instead, all I suggest is altering the extent to which the law will restrain the parties.

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[73] 9 U.S.C. § 10 (2006).
[74] 9 U.S.C. § 11 (2006).
[75] *See* 9 USC §10(a) (containing the grounds for vacatur of arbitration awards).
[76] 9 USC § 2. Thus, parties may still bring claims based on any ground that would allow a party to challenge a contract. In the arbitration sense, this ground is unconscionability. Parties have often challenged arbitration clauses on the basis of unconscionability, and this was the basis that the plaintiff in *Rent-A-Center* used.
[77] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).
[78] *Id*.
[79] *Id*.

B. *Mandatory Arbitration Does Not Have to be Banned*

While I argue for constraint, I do not suggest that arbitration agreements be banned outright. Others would disagree. Many have proposed the absolute elimination of pre-dispute, mandatory arbitration in the employment context.[80]

> [Banning arbitration] rescues public law that has been put at risk by the unchecked growth of mandatory arbitration. It regulates the "wild west" processes creative counsel are designing to manage risk on behalf of their clients. It brings us back from almost two decades of a laissez faire, failed approach to balancing the great value of binding arbitration with the potential for its abuse in the hands of the economically powerful.[81]

Nor is the movement to prohibit arbitration agreements in the employment relationship merely academic. The proposed federal Arbitration Fairness Act, which first surfaced in 2007, was defeated, and again considered in 2009, prohibited most pre-dispute arbitration agreements between companies and individuals.[82] The proposed statute was sweeping, prohibiting the use of arbitration agreements in "employment, consumer or franchise disputes, as well as disputes arising under statutes intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power."[83] In such matters, the parties would be limited to post-dispute arbitration agreements.

Broad proposals that would eliminate all mandatory arbitration agreements are not the solution.[84] There is no need to ignore the potential benefits of arbitration. Arbitration has its advantages. Arbitration is meant to remedy a system weighed down with cost and delay, and it may lead to the resolution of claims at lower cost and with greater speed. Litigating a typical employment case can range from $5,000 to more than $ 200,000, while the average cost of arbitrating an employment dispute is $20,000, including

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[80] Bingham, *supra* note 9.
[81] *Id*. at 2-3.
[82] Arbitration Fairness Act of 2007, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s1782is.txt.pdf (July 12, 2011).
[83] Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against The Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 269 (2008).
[84] The proposed legislation would invalidate arbitration in many contexts, including presumably disputes in the securities industry. The new law would apply not only prospectively, to end the use of such agreements, following its enactment, but also to "any dispute or claim that arises on or after" the enactment date. Presumably arbitration agreements that have been in place for years, and may have been fairly negotiated, would be rendered unenforceable by the bill. *Id*.

attorneys' fees. Furthermore, a typical case that goes to trial lasts for months, and may even go on for years if appealed, while arbitrations can take as little as a few days.[85] The private nature of the arbitration forum might also appeal to employees as well as employers. An employee reluctant to air his grievances in public may prefer a forum that provides protection from public embarrassment. Potential plaintiffs may see some comfort in the privacy protections of the arbitration process.[86]

C. *The Noncompete Agreement is an Example of a Contractual Right that is Limited*

Rather than eliminating pre-dispute arbitration agreements, I propose that the ability of the parties to enter into arbitration agreements be constrained. The law would continue to permit employers to insist on arbitration agreements, but subject to certain limitations. We must develop the means to constrain arbitration agreements in a way that permits the continued use of such agreements, while at the same time addressing the problems caused by the agreements.

These reforms must take place on the federal level. Putting such constraints into law will require Congress to act. It is clear from recent precedent that the Supreme Court is "enamored with arbitration"[87] and is unlikely to tolerate any restriction on the use of arbitration agreements. The Supreme Court has consistently ruled that the FAA preempts state laws that are aimed at arbitration agreements.[88] State legislatures may not act in a way that limits or otherwise restrain agreements to arbitrate. Federal courts have routinely construed the FAA so as to prevent encroachment by state law.[89] Without Congressional action, there is simply no way to change the law of arbitration. It has become clear that "the FAA, as the Supreme Court has interpreted it lately, is the problem and not the solution."[90]

Fortunately, precedent exists for how the law could address the constraint of contractual rights. Arbitration agreements resemble—in effect if not in form—another type of clause often found in employment agreements. The covenant not to compete, known more familiarly as the noncompete agreement, inhabits a shadow area in the employment

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[85] Halvordson, *supra* note 43, at 178.
[86] *See* Rutledge, *supra* note 83, at 267.
[87] Bales, *supra* note 28, at 1086.
[88] *See* Thomas Carbonneau, THE LAW AND PRACTICE OF ARBITRATION xix (2d ed. 2007), cited in Bales, *supra* note 28, at 1085; *see also* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).
[89] Bales, *supra* note 28, at 1085; *see also* Doctor's Assocs. v. Cassorotto, 517 U.S. 681, 687 (1996) ("Congress precluded states from singling out arbitration provisions for suspect status.").
[90] Bingham, *supra* note 9, at 1.

relationship, a middle ground between areas governed by contract terms and those areas subject to rights granted by the law. [91]

A noncompete agreement is "an agreement, generally part of a contract of employment or a contract to sell a business, in which the covenantor agrees for a specific period of time and within a particular area to refrain from competition with the covenantee."[92] The noncompete agreement is known by other names, most notably as a "covenant not-to-compete," a "restrictive covenant," or a "non-compete clause."[93] These terms are interchangeable and all refer to an employment contract or provision purporting to limit an employee's power upon leaving his or her employment, to compete in the market in which the former employer does business.[94]

Like arbitration agreements, noncompete agreements are not meant to punish the employee.[95] Instead, they are meant to protect the employer from unfair competition.[96] Non-compete agreements arguably protect an employer's customer base, trade secrets, and other information vital to its success. From this perspective, noncompete agreements encourage employers to invest in their employees. An employer does not wish to invest in an employee only to see the employee take the skills acquired, or the company's customers, to another employer. Logically, the employer will invest more in the employee if measures are in place to guard against the employee's movement to a competitor.

The non-compete agreement is an example of an agreement that falls somewhere between right and contract. The noncompete agreement resembles a contract—terms dictated by agreement, supported by consideration. But, in fact, the language of the noncompete agreement does not necessarily bind parties. Unless the agreement meets a standard of reasonableness, and is constrained in several important areas, courts will refuse to enforce this "contractual" agreement. The law restricts the scope of the noncompete agreement because society has decided that fundamental issues of fairness are at stake. The issues surrounding the noncompete agreement are so important that it may only be waived under certain conditions.

As with arbitration agreements, Courts traditionally viewed noncompete agreements with disfavor, believing that the agreements contravened public

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[91] Estlund, *supra* note 68, at 379.
[92] BLACK'S LAW DICTIONARY 364 (6th ed. 1990).
[93] As no substantive difference exists among the names, this article refers to such covenants as "noncompete agreements."
[94] Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 917 (W. Va. 1982).
[95] *See* Superior Gearbox Co. v. Edwards, 869 S.W.2d 239, 247 (Mo. Ct. App. 1993).
[96] William M. Corrigan & Michael B. Kass, *Non-Compete Agreements and Unfair Competition - An Updated Overview*, 62 J. Mo. B. 81 (2006).

policy.[97] In time, just as with arbitration agreements, courts grew more accepting of the agreement.[98] Nevertheless, the court system did not embrace the noncompete agreement with the same fervor as it has attached to the mandatory arbitration agreement. Instead, the law continues to restrict the use of noncompetes agreements for any purpose other than for legitimate business purposes.[99] To ensure the purpose is legitimate, the law requires that a valid noncompete agreement meet a reasonableness requirement.[100]

The reasonableness requirement for noncompete agreements is designed to balance the interests of all entities affected by the: the employer, the employee, and society as a whole. Each entity has an interest to be protected. The employee wishes to preserve his mobility; the employer wishes to protect itself from unfair competition; and society wishes to balance its interest in employed workers with a system that provides incentives for the development and training of employees. With such varied interests at hand, a noncompete agreement must be drafted in such a way as to satisfy all interested parties.

To satisfy the reasonableness requirement, the law requires that the employer establish a reason for the noncompete agreement other than preventing the employee from competing with his former employer.[101] Moreover, establishing the existence of a legitimate business interest to be protected is merely the threshold step that an employer must meet to create an enforceable agreement.[102] The scope of the noncompete agreement must not be greater than the business interest at stake.[103] Almost all courts apply a similar standard of reasonableness in deciding whether to enforce a noncompete agreement.[104]

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[97] Michael Garrison & John Wendt*, The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 112-13 (2008).
[98] *Id*. at 114.
[99] *See, e.g.*, Allen, Gibbs, & Houlik v. Ristow, 94 P.3d 724 (Kan. Ct. App. 2004); *See also* M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137 (2003). McDonald notes that among the recognized protectable interests for employers are:

(1) to protect trade secrets and confidential information of the company;
(2) to protect customer goodwill developed for the company (customer relationships);
(3) to protect overall business goodwill and assets that have been sold (noncompetes used in the sale of a business);
(4) to protect unique and specialized training;
(5) for situations in which the employer has contracted for the services of an individual of unique value because of who they are (e.g., performers, professional athletes); and
(6) for pinnacle employees in charge of an organization.

[100] McDonald, *supra* note 99, at 143.
[101] Garrison, *supra* note 97, at 115.
[102] *Id*.
[103] *Id*. at 118.
[104] Garrison, *supra* note 97, at 117-18; *Reddy*, 298 S.E.2d at 910-11.

A noncompete agreement will be enforceable only "if the restraint imposed is not unreasonable, is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public."[105] Many states follow the test set forth in the Restatement (Second) of Contracts, which takes into consideration the following factors: (1) whether the restriction is greater than necessary to protect the business and goodwill of the employer; (2) whether the employer's need for protection outweighs the economic hardship which the covenant imposes on the departing party; and (3) whether the restriction adversely affects the interests of the public.[106]

Once a court determines that the noncompete agreement protects a legitimate business interest, it will then examine the agreement to ensure that it does not exceed the minimum restraint necessary to protect that interest.[107] Courts will enforce agreements only where they are "strictly limited in time and territorial effect and . . . [are] otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee."[108] To be enforceable, agreements must be reasonable in three ways: scope (referring to the subject matter of the agreement), duration, and geography.[109]

D. *Arbitration Agreements Should be Restrained by a Reasonableness Standard*

The law restricts contractual freedom for noncompete agreements. Society tolerates contractual restrictions because it recognizes the competing interests involved and attempts to balance them with the reasonableness standard. In a similar vein, the law should recognize competing interests in the use of mandatory arbitration clauses in the employment relationship. Because of the special nature of the employment relationship, society should not permit unlimited contractual freedom in regard to mandatory arbitration.

Currently, the law supports mandatory arbitration agreements. These agreements permit a waiver of rights provided by external law. Following *Rent-A-Center*, the court system has indicated that it is unwilling to examine questions regarding possible unconscionable aspects of the arbitration process, provided that the arbitration agreement assigns those questions to

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[105] W.R. Grace & Co. v. Mouyal, 422 S.E.2d 529, 531 (Ga. 1992) (quoting Rakestraw v. Lanier, 30 S.E. 735, 738 (Ga. 1898)).
[106] Restatement (Second) of Contracts § 188 cmt. a (1979).
[107] Garrison, *supra* note 97, at 117.
[108] Palmer & Cay, Inc., v. Marsh & McLennan Co., 404 F.3d 1297, 1303 (11th Cir. 2005).
[109] *See* UARCO Inc. v. Lam, 18 F. Supp. 2d 1116, 1121 (D. Haw. 1998) (noting parameters of reasonableness inquiry); *see also* Pinnacle Performance, Inc. v. Hessing, 17 P.3d 308, 311 (Idaho Ct. App. 2001) (explaining the three factors considered in a reasonableness inquiry).

the arbitrator. Arbitration agreements waive the right to litigate employment claims in court, and it is easy to visualize a process so unfair that it amounts to waiver of the underlying claims.

The solution is to introduce oversight to the arbitration agreement. Oversight could be accomplished by the use of a reasonableness standard. Under my proposal, courts should enforce mandatory arbitration clauses to the extent that the arbitration process is reasonable. Of course, "reasonableness" will require debate and forethought, but I would propose that the reasonableness standard should include the following.

1. The Arbitration Agreement Should Provide for Voluntariness

Arbitration of statutory demands without voluntary consent is not proper. Courts have described voluntariness the "bedrock justification" for the willingness to enforce mandatory arbitration agreements.[110] Therefore, the proposed reasonableness standard should provide some guarantee that the employee entered into the agreement voluntarily. The voluntariness requirement should not be difficult to meet.

I propose that the arbitration agreement be contained in a separate agreement, or at a minimum, require a separate signature line. This idea of separateness would establish that the arbitration clause that the employee is agreeing to is different from the normal terms and conditions found in an employment agreement. By separating the arbitration clause from the rest of the agreement, employees would have notice that the arbitration agreement should be considered separately from the rest of the document. Agreement to the arbitration clause could potentially have far greater consequences than any other term contained in the agreement, and therefore it is reasonable to insist on separate treatment. A separate document or signature line would provide some objective indications that the arbitration agreement was entered into knowingly and on a voluntary basis.

Alternatively, Congress could enact requirements of voluntariness using the standards found in the Older Workers Benefit Protection Act (OWBPA).[111] Congress enacted the OWBPA to protect the rights and benefits of older workers.[112] The OWBPA imposes strict requirements for waivers of ADEA rights and claims.[113] Under OWBPA, "an employee 'may not waive' an ADEA claim unless the employer complies with the statute."[114]

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[110] Armendariz v. Found. Health Psychcare Servs., Inc. 24 Cal.4th 83, 115 (2000).
[111] 29 U.S.C. §§ 621, 623, 626, 630 (2006).
[112] Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427 (1998).
[113] 29 U.S.C. §626(f) (2006); *see also Oubre*, 522 U.S. at 427 ("The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers").
[114] *Oubre*, 522 U.S. at 427.

To this end, OWBPA creates a series of prerequisites for 'knowing and voluntary' waivers. The eight mandatory elements for a knowing and voluntary waiver of ADEA claims are set forth in the OWBPA.[115]

2. The Arbitration Agreement Should Provide Guarantees of Due Process and Fairness

The main problem with arbitration process in the employment context is that the process is almost always asymmetrical. The employer is a repeat player, one that will see this particular arbitrator over and over, while the employee is only in it for one. Any proposed standard for reasonableness should include provisions for due process and fairness.

The Constitution guarantees due process. Where the law grants a right, included within that right is the notion of a remedy. The law should provide the opportunity to be heard by an impartial decision maker. This process providing for notice and an opportunity to be heard should be as nonwaivable as the underlying right itself. Otherwise, it would render the underlying right meaningless. Forcing an employee into an unfair arbitration process for a substantive legal claim arguably deprives her of property without due process of law.[116]

A due process protocol for arbitration must be developed. Fortunately, there have been private attempts to establish such a protocol.[117] A due process protocol must address certain key areas. First, due process guidelines should provide a guarantee of representation for the employee, or at least the ability to choose a representative. The guidelines would also provide for

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[115] The requirements are as follows:

1. The waiver must be written in plain English so that the employee can understand the agreement;
2. The waiver must specifically mention that the employee is giving up his or her claims under ADEA;
3. The waiver cannot waive rights that arise after date release is signed;
4. The employee must receive consideration of value above anything to which employee is already entitled;
5. The employee must be advised to consult with an attorney;
6. The employee must have at least 21 days to consider agreement;
7. The employee must have 7 days to revoke their acceptance of the agreement.
8. If the termination is part of a reduction in force or voluntary program that affects two or more employees, employee must be given at least 45 days to consider agreement and given a "release attachment" that has a list of those selected for the program (or termination) and those who are not. 29 U.S.C. §626(f)(1).

[116] Estlund, *supra* note 68, at 410.

[117] *See A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, http://www.ilr.cornell.edu/alliance/resources/Guide/Due_process_protocol_empdispute.html (1995).

some proportionate sharing of costs associated with the arbitration proceeding, to ensure that employees are not effectively prohibited from having their dispute heard. Another area of tension in the arbitration context is the availability of information sharing. Due process guidelines should provide a cost effective discovery procedure.

Arbitration qualification and selection is another potential topic area for the due process protocol. With quite complicated statutes involved, it will be important that the arbitration process provide for arbitrators who are skilled and knowledgeable. Similarly, selection of an arbitrator or panel will be an issue that should be included within the due process guidelines. Finally, a protocol should govern the arbitrator's scope of authority.

3. The Arbitration Agreement Should Provide for Openness

The common law system works in large part because it is designed to be flexible, to grow, to adapt to changing society. And the common law is able to do this because there are published decisions that filter throughout society, and the changes, even when not compelled by the power of precedent, have influence on other courts that face similar fact patterns.

A privatized legal system. however, cannot provide the same atmosphere for growth and change. Instead, virtually every decision rendered by an arbitrator is a walled garden, cut off from all but those parties involved in the decision. The American court system was not designed to function in this manner. Surely a system built on closed, opaque models cannot serve society as a whole

In its protocol describing the essence of a fair and enforceable arbitration agreement, the D.C. Circuit proposed written decisions. My legislative proposal would do the same – require a written decision for any arbitral award.

V. CONCLUSION

The employment agreement is not a contract in the usual sense of the word. Society has limited the ability of the parties to contract by superimposing public law onto the relationship. Therefore, the parties to an employment relationship are constrained in their ability to contract because society has decided that certain issues are too important to leave to the employer and employee.

Mandatory arbitration is one of those important issues. Consigning statutory claims like Title VII to private arbitration carries huge risks. As has been discussed herein, there is a potential for abuse that would make the

statutes meaningless by effectively depriving complainants of their right to litigate the dispute.

Nevertheless, arbitration carries important advantages. It could provide a simpler, less expensive, and more private forum for the resolution of disputes. The challenge that society faces lies is balancing the protections of the law against the advantages of arbitration. To create that balance, I believe that a standard of reasonableness be imposed on arbitration agreements. This standard of reasonableness should protect the interests of all parties: the employer, the employee, and society as a whole.

DOES THE SECURITIES EXEMPTION TO THE CLASS ACTION FAIRNESS ACT CREATE TOO MUCH UNCERTAINTY?

BRIAN ELZWEIG*

I. INTRODUCTION

In 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA)[1]. The primary justification of the PSLRA was to prevent abusive class-action securities litigation. The main form of abuse that Congress intended to prevent was strike suits, a class-action lawsuit where a company feels forced to settle a case regardless of actual wrongdoing in lieu of fighting a lengthy and expensive case.[2] However, the PSLRA did not have the desired effect. The Securities Act of 1933 (the 1933 Act) had a provision which allowed for both state and federal courts to have concurrent jurisdiction of cases brought under it.[3] There was no similar provision in the Securities Exchange Act of 1934 (the 1934 Act). To avoid less plaintiff friendly provisions of the PSLRA, attorneys found it easier to file claims under the 1933 Act and would ignore claims that were similar under the 1934 Act in order to litigate the claims in state courts. In 1996, to exacerbate the problem, the Supreme Court decided *Matsushita v. Epstein*.[4] *Matsushita* was a class-action case dealing with a securities fraud. The case only litigated violations of Delaware state law and did not include federal claims at all. The Supreme Court held that when there is a settlement of a class-action lawsuit in state court, and there is a federal action as well, that the state court settlement can have issue-preclusive effects on causes of action that have exclusive federal jurisdiction as long as they were from the same transaction or occurrence as the claims brought in state court. This was different than the approach that was taken by several courts of appeal, including the Ninth Circuit in *Matsushita*, which only would allow for issue preclusion if the

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[1] Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

[2] J. Tyler Butts, *Removal of Covered Class Actions Under SLUSA: The Failure of Plain Meaning and Legislative Intent as Interpretive Devises, and the Supreme Courts Decisive Solution*, 1 WM. & MARY BUS. L. REV. 169,174 (2010).

[3] 15 U.S.C. § 77u(a) (1934).

[4] Matsushita v. Epstein, 516 U.S. 367 (1996).

state claims were of the identical factual predicate to the federal action. This further encouraged state court litigation in securities class-action lawsuits.

In 1998, and in a further attempt to limit abuse in class action litigation, Congress amended the 1933 Act by passing the Securities Litigation Uniform Standards Act (SLUSA).[5] This amendment to the 1933 Act was intended to disallow litigating securities class action-claims in state courts; however the specific language of the statute only disallowed actions "based on the statutory or common law of any State."[6] This left an issue then for courts to decide whether federal issues (specifically cases brought under the 1933 Act) could still be brought in both federal and state courts. Then Congress, in 2005, passed the Class Action Fairness Act (CAFA).[7] The intent of CAFA was to force class-action litigation that has a national implication into federal courts by changing the jurisdictional requirements. However, CAFA specifically excluded coverage of class actions that were addressed in the SLUSA, which then still left a question open as to whether the '33 Act claims would still have concurrent jurisdiction in state and federal courts. Courts interpreting the issue have been split. The Supreme Court, in *Kircher v. Putnam Funds Trust,*[8] touched on the issue in *dicta,* but the issue is still unresolved. This Article examines *Matsushita v. Epstein* to identify the genesis of the problem, and then subsequent case law and statues examine the question of whether a securities class-action lawsuit based on the 1933 Act would have concurrent jurisdiction in both state and federal court.

II. IDENTIFYING THE PROBLEM

Congress has been concerned with the status of class-action litigation over the past two decades. Congress' concern was that class-action litigation was serving the class-action plaintiffs lawyers, while not doing much for the plaintiffs themselves. There were many strike suits, which many believed to be extortion of companies. In a strike suit, companies would rather settle a case than litigate on the merits to avoid the time and costs of litigation. These settlements often include a large fee for the plaintiff's attorneys, but may not include large settlements for the plaintiffs themselves.[9] Congress, as evidenced by the passage of the PSLRA (which will be discussed *infra*), was especially concerned with the state of affairs in securities class action litigation. The facts of *Matsushita v. Epstein*, a 1996 Supreme Court decision are illustrative of this problem.

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[5] Pub. L. No 105-353, 112 Stat. 3227 (1998) (codified in 15 U.S.C.).
[6] 15 U.S.C. § 77p(b) (2000).
[7] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in 28 U.S.C.).
[8] 547 U.S. 633 (2006).
[9] Butts, *supra* note 2, at 174.

A. *Class Actions in General*

A class action is one of the most frequently used methods for shareholders to enforce their rights against illegal corporate conduct.[10] It has been considered an appropriate mechanism because the alleged misconduct of the directors and officers tends to be the same from the perspective of each individual shareholder. Secondly, it is an economically viable option when the losses are spread over a large number of shareholders.[11]

For many years, class actions have been considered an effective way to deal with shareholder litigation. It helps many shareholders to litigate their claims while not overburdening the courts with numerous cases based upon a single transaction or occurrence.[12]

In recent years many problems have been surfacing with regard to class actions. Many abuses have been brought into the system by both sides of recent class action suits. Often attorneys can bring large class action suits against a defendant company where the individual harm to each shareholder is minimal.[13] This makes economically viable a lawsuit that would otherwise be worthless. These attorneys often obtain substantial settlements for the claim and thus large attorney's fees for the firm, but the individual class members receive little for the settlement of their claims.[14]

Further abuse that has surfaced in recent years is the "buy off" of plaintiffs' counsel.[15] This entails the defendant company actually paying an early settlement on the case that includes huge attorney's fees; the plaintiffs' attorneys, then in turn, settle the class action suit for pennies on the dollar. These settlements always include language that release the defendant company from all claims and liabilities from whatever event or transaction in which the litigation arose.[16] Unfortunately, in both cases, the small shareholder always loses, often receiving little or no money from the settlement of the suit. *Matsushita v. Epstein* and similar cases led to Congress taking action to end these abuses.

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[10] Stephen E. Morrissey, *State Settlement Class Actions That Release Exclusive Federal Claims: Developing a Framework for Multi Jurisdictional Management of Shareholder Litigation*, 95 COLUM. L. REV. 1765, 1765 (1995).
[11] *Id*.
[12] *Id.* at 1766.
[13] *Id*.
[14] *Id*.
[15] *Id*. at 1766.
[16] *Id*. at 1767.

B. *Matsushita v. Epstein*

On February 27, 1996 the United States Supreme Court handed down its decision in *Matsushita v. Epstein*.[17] This was the Court's answer to a case that was on appeal from the Ninth Circuit, which was titled *Epstein v. MCA*.[18] The case held the when there is a settlement of a class-action lawsuit in state court, and there is a federal action as well, that the state court settlement can have issue-preclusive effects on causes of action that have exclusive federal jurisdiction. The Supreme Court held that this would be true even if the state claims did not arise under the same set of operative facts, but only need to arise from the same transaction or occurrence. The day after the decision was handed down by the Supreme Court, the general reaction in the press was that this was a big victory for the securities industry.[19] The Court's decision in *Matsushita* enables cases in corporate friendly states, such as Delaware, to have a state tribunal decide how federal class-action suits are to be settled, and determine that states' "preclusion law in any manner they see fit within constitutional parameters."[20] This allows plaintiffs' attorneys to hurry a state court settlement, in a corporate friendly state. By doing this, the plaintiff never has a day in court, and the state court will already have decided the value of any federal claims.

The facts of the *Matsushita* case are very important. The facts are particularly illustrative in showing how this decision can hurt a small plaintiff. The case was settled in state court, with the plaintiffs receiving a very small amount of money, but the plaintiffs' attorneys receiving a significant amount (which would have been more if it had not been reduced by the court). In exchange for their settlement the plaintiffs were forced to give up their right to pursue the federal court action that was already pending. At this time, the plaintiffs were given the chance to opt-out of the class, but unless there was a whole other subclass that could be certified as a class themselves who wanted to opt-out and pursue the federal claims, the individual plaintiffs could not do this for lack of economic sense. They were then precluded from pursuing exclusively federal claims, the value of which was not included in the state-court settlement. The settlement agreement was judicially approved in the Delaware Chancery Court, and affirmed by the Delaware Supreme Court. If an individual plaintiff did not opt out, the settlement awarded the plaintiff between two and three cents per share and

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[17] *Matsushita*, 516 U.S. at 367.

[18] Epstein v. MCA, 50 F.3d 644 (9th Cir. 1995). As will be discussed, *infra,* Matsushita was added as a defendant late in the process.

[19] For example, *see* Martha M. Canan, *Justices Say State Court Settlements Can't Be Reopened,* The Bond Buyer, February 28, 1996.

[20] Luther Zeigler & Scott L. Winkelman, *Honoring State Class Action Settlement,* Law & Business Insights, April 1996, at 2.

the value of the federal claims would never have been taken into the value of the settlement.[21]

1. The Facts of *Matsushita*

In 1990, MCA Inc. was acquired by Matsushita Electrical Co. Ltd. ("Matsushita") for $6.1 billion. Matsushita made a tender offer of the $71 per share for MCA common stock. This $71 per share consisted of $66 in cash and $5 worth of stock in an MCA spinoff television station known as WWOR-T.V.

Lew Wasserman was MCA's chief executive officer and chairman. He owned 4,953,927 common shares of MCA stock. At $71 per share this is a value of $351,728,817.[22] Wasserman did not wish to tender his shares at the tender offer price since his tax basis in each share was only 3 cents per share. In an attempt to circumvent the capital gains aspect of the Internal Revenue Code, Wasserman engaged in a separate agreement entitled the "Capital Contribution and Loan Agreement" with Matsushita.[23]

This agreement would allow Wasserman to engage in a tax free exchange[24] of his stock for preferred stock in a subsidiary that is wholly owned by Matsushita called "MEA Holdings."[25] The agreement further recited that Matsushita would contribute 106% of the tender price multiplied by 4,953,927 shares of stock to fund MEA Holdings.[26] This would guarantee that the preferred stock that Wasserman held in MEA Holdings would pay a dividend of 8.75% annually. All of this was secured by letters of credit. The stock would be redeemable either by the death of Mr. or Mrs. Wasserman but not before at least five years had passed from the date of the transaction. At the date of the transaction Wasserman was already 77 years old.[27] Upon the death of Mr. or Mrs. Wasserman, their basis in the stock would step up to fair market value.[28]

At the time of the tender offer, Sidney Sheinberg was MCA's chief operating officer. He was the owner of 1,178,635 shares of common stock in MCA. He exchanged all his shares at the tender offer. He received $71 per share totaling approximately $83,754,085.[29]

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[21] The settlement occurred in a time when the federal claims were dismissed by the District Court. They were later given new validity on appeal.
[22] *Epstein*, 50 F.3d at 647.
[23] *Id*.
[24] I.R.C. § 351(A), 26 U.S.C. § 351 (A) (1994).
[25] *Epstein*, 50 F.3d at 648.
[26] *Id*.
[27] *Id*.
[28] *Id.*
[29] *Id*.

Sheinberg was given an additional $21 million dollars by Matsushita two days after the tender offer was completed. Sheinberg and Matsushita claim it was in exchange for Sheinberg's unexercised stock options.[30]

2. The Federal Law

In 1986 the Securities Exchange Commission promulgated Rule 14d-10 in order to help clarify that Section 14(d)(7) of the Williams Act Amendments to the Securities Exchange Act of 1934 contains a best price requirement that applies to all holders. The relevant part of the Rule 14d-10 provides:

> (A) No bidder shall make a tender offer unless:
> (1) [T]he tender offer is open to all security holders of the class of securities subject to the tender offer; and
> (2) [T]he consideration paid to any security holder pursuant to tender offer is the highest consideration paid to any other security holder during such tender offer.
>
> (c) Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, provided that:
> (1) [S]ecurity holders are afforded equal rights to elect among each of the types of consideration offered; and
> (2) [T]he highest consideration of each type paid to any holder is paid to any other security holder receiving that type of consideration.

3. The Wasserman Transaction

In 1990, Matsushita contacted MCA's financial advisor expressing an interest in a friendly takeover of MCA and further expressing a desire to retain Wasserman and Sheinberg for at least five years.[31] Wasserman and Matsushita entered into the Capital Contribution and Loan Agreement on November 26, 1990. Matsushita agreed to create a subsidy called "MEA Holdings" and Wasserman agreed to exchange his stock in MCA for preferred stock in MEA Holdings.[32]

The Wasserman transaction was an intricate part of Matsushita's tender offer. The transaction subjected the agreement to Rule 14d-10, because it gave Wasserman a greater value for his stock than the other shareholders in

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[30] *Epstein*, 50 F.3d at 648.
[31] *Id.*
[32] *Id.* at 647-48.

the following ways. Initially, if the conditions of the tender offer were not satisfied, then both Wasserman and Matsushita could back out of the agreement.[33] Second, the timing of the performance of the agreement was controlled by the tender offer. The agreement went into effect immediately after the tender offer.[34] Third, the price of the tender offer controlled how much Matsushita would contribute to MEA Holdings. The agreement stated that Matsushita would contribute 106% of highest price paid times the number of Wasserman stock.[35] Finally, the tender price controlled the redemption price of Wasserman's stock used in the agreement.[36]

On November 26, 1990, Matsushita announced its tender offer of $71 per share. The tender offer was open until 12:01 a.m. December 29, 1990. Ninety-one percent of the common stock was tendered and by 12:05 a.m. December 29, 1990. Matsushita paid for the stock and closed the tender offer. At 1:25 a.m. on December 29, 1990, Matsushita and Wasserman executed the Capital Contribution and Loan Agreement.[37] On January 3, 1991, MCA was totally merged into Matsushita.[38]

The question is whether Wasserman received greater compensation for his shares during the tender offer or whether he received a form of compensation not offered to other shareholders during the tender offer.[39]

It is clear that Wasserman received compensation that was different than that offered to other shareholders. Since it was of a different type of consideration, there is a strong possibility that it was greater in value than the consideration offered other shareholders.

4. The Sheinberg Payment of Twenty-One Million Dollars

Sheinberg was MCA's chief operating officer. He tendered his 1,179,635 shares for $71 per share. If the tender offer succeeded, Matsushita would instruct MCA to pay Sheinberg $21 million.[40] The tender offer did succeed and Sheinberg received the $21 million dollar payment.[41]

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[33] *Id.* at 648.
[34] *Id*. at 656.
[35] *Id*. at 648.
[36] *Epstein*, 50 F.3d at 656.
[37] *Id*. at 654.
[38] *Id*.
[39] Matsushita claimed that the Wasserman transaction does not fall under the Rule because it was executed after the tender offer was closed. Even though it is not really relevant to the thesis of this paper, the Ninth Circuit's expression of this is surely correct. The statute has been long interpreted to serve the purpose of the Act. In defining the "tender offer period" the court held that "to serve the purposes of the Williams Act, there is a need for flexibility in fashioning a definition of a tender offer." *Id*. at 656.
[40] *Id*. at 657.
[41] *Id*.

The other shareholders contend that it was a premium of $17.80 per share over what they were offered per share. Matsushita claims that it was a purchase of Sheinberg's stock options and to compensate Sheinberg for changing his employment contract with MCA.[42] Unfortunately, there is no evidence that Sheinberg possessed any stock options or that he was in line to receive any stock options before November 25, 1990, the evening of the tender offer.[43]

5. Shareholders Claim a Violation of Delaware Law

The plaintiff shareholders made several claims that Wasserman and Sheinberg violated Delaware State Law. They contended that Wasserman and Sheinberg violated their fiduciary duty of care.[44] They claimed that the fiduciary duty of care was violated when the directors failed to maximize shareholder value upon the change of corporate control.

The shareholders further claimed that the directors breached their duty of candor.[45] They claimed the directors breached this duty by failing to disclose the merger packages offered to the Wasserman and Sheinberg.[46]

The final state law claim made by the plaintiffs was that the directors breached their duty of loyalty by making preferential deals for themselves as part of the tender offer to the detriment of the other shareholders.[47]

6. The Difference between the Federal Law and the Delaware Law

Delaware law, unlike the federal law, does not prohibit control premiums during a tender offer.[48] A control premium will permit one shareholder to receive more or different consideration during a tender offer than another shareholder. In fact "Rule 14d-10 was promulgated precisely to prohibit practices that Delaware permits."[49] It should be noted that in the Ninth Circuit:

> Matsushita makes no attempt to argue that any of the [federal] claims of the...plaintiffs share any predicate facts in common with the claims that formed the basis of the Delaware class action. Instead, Matsushita rests its preclusion argument solely on the fact

[42] *Epstein*, 50 F.3d at 657.
[43] *Id*.
[44] *Id.* at 665.
[45] *Id*.
[46] *Id.*
[47] *Epstein*, 50 F.3d at 665.
[48] *Id*.
[49] *Id*.

> that the claims arose out of the same transaction--Matsushita's acquisition of MCA.[50]

The legal theory underlying the federal claim is that Matsushita breached a duty to shareholders that is imposed on tender offerors by federal securities laws. The relevant factual inquiry is whether Wasserman and Sheinberg received greater consideration than other MCA shareholders during the tender offer.

> The gravamen of the state class action is that MCA directors breached their fiduciary duty of care to MCA as imposed by Delaware law....*The question[s] [of] whether the MCA directors took the steps...to assure maximum shareholder value[,] and whether or not the directors breached their fiduciary duty [of candor] by failing to make disclosures, [are] completely distinct from the question [of] whether Matsushita violated the Williams Act by extending preferential treatment to some of the shareholders in making the tender offer.*[51]

This is vitally important, because this is where the split in the circuits was created, and why the Supreme Court decided to grant *certiori*.[52]

In previous cases where the Circuit Courts have allowed a state court settlement to release exclusive federal claims, they were claims that not only arose from the same transaction as the state claims, but arose from the same factual predicate as well. The First Circuit dealt with this precise issue in *Nottingham Partners v. Translux*.[53] This was another case dealing with both federal and Delaware securities laws violations, and then a Delaware settlement. In *Nottingham Partners*, a claim was brought under §14a-9 of the Securities Exchange Act of 1934 for failure to disclose negotiations for sale of many of its holdings of theaters in a proxy solicitation.[54]

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[50] *Id*.

[51] *Id*. (emphasis added). This shows that the facts were not at issue in the first two state claims. The Ninth Circuit concedes that "The third state claim [for breach of duty of loyalty] by making preferential arrangements for themselves as part of the tender offer, and that Matsushita aided and abetted the MCA defendants in this breach. At first glance, this claim appears to be in the same ball park as the Rule 14d-10 claim. However, although this state claim is no doubt artfully drafted to resemble the 14d-10 claim, there is in fact no Delaware statutory or common law rule that prohibits a shareholder from obtaining the best deal for himself as part of a change of corporate control. *Thus, adjudication of the claim would not have raised a question of fact whether Wasserman of Sheinberg received preferential treatment from Matsushita.*" (emphasis added).

[52] Matsushita v. Epstein, 516 U.S. 367, 373 (1996).

[53] Nottingham Partners v. Translux, 17 F.3d 1553 (1st Cir. 1994).

[54] *Id*. at 1554.

State claims were later filed in Delaware state court which included, *inter alia*, a failure to disclose claim for the same negotiation on the same proxy solicitation.[55] This case settled in the Delaware state court action, and part of the settlement order authorized the release all of the federal claims.[56] In this case, however, the claims that were released arose from the identical factual predicate. In other words, the preclusive effect of the settlement included facts that were actually before the tribunal unlike in *Matsushita,* where only the fact that the cases arose from the same transaction was considered. The value of the federal claims was never litigated in *Matsushita*.

The Third Circuit also dealt with this issue in *Grimes v. Vitalink Communications Corp.*[57] This case was brought originally in the Eastern District of Pennsylvania after yet another Delaware settlement. The federal claims involved the "breach of fiduciary duty, [violations of the] Securities and Exchange Act, and Fraud [which] were claims released in the Delaware settlement."[58] The District Court approved the settlement stating that it was proper "where, as here, the federal securities claims in the release stemmed from the same nucleus of operative fact, the release could validly be used as a defense to the former in federal court."[59] The Third Circuit then affirmed this judgment without mentioning the identical factual predicate.

The split in the Circuit because of the Ninth Circuit "fashioned a test [in *Epstein v. MCA*], where the preclusive force of a state settlement judgment is limited to those claims 'that could...have been extinguished by the issue preclusive effect of an adjudication of the state claims.'"[60]

7. Moving Through the Courts

On September 26, 1990, actions were commenced in Delaware Court claiming MCA's board of directors had failed to properly discharge the duties that they owed to the shareholders. Obviously, because there would have been no jurisdiction, no federal claims were alleged in state court.

On December 3, 1990, in response to information gained through the required SEC filing, which was dated November 30, 1990, Epstein filed a class action suit against Matsushita in the District Court for the Central

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[55] *Id*. at 1555.
[56] *Id*.
[57] 17 F.3d 1553, (3d Cir. 1994), *cert. den*. 115 S.Ct. 480 (1994).
[58] Grimes v. Vitalink Commc'n Corp., 1993 U.S. Dist. LEXIS 3653, at *8 (E.D. Pa. 1993).
[59] *Id*. at *10.
[60] Matsushita v. Epstein, 516 U.S. 367, 372 (1996) (quoting Epstein v. MCA, 50 F.3d 644, 665 (9th Cir. 1995)).

District of California.[61] Epstein held shares of MCA's stock in an individual retirement account at the time of the tender offer.[62]

This was the first time that anyone challenged the tender offer under the federal laws and the first time that the petitioner's name appeared as parties in any litigation relating to the transaction. The federal complaint alleged that Matsushita violated Rules 14d-10 and 10b-13.[63] The plaintiffs assert Matsushita violated the Rules by treating Wasserman and Sheinberg in a preferential way during a tender offer. This type of preferential treatment violates the "all-holder best-price" rule by not treating all the shareholders the same.[64]

These federal claims came exclusively under the jurisdiction of the federal court.[65] Epstein sought to have the class certified so that he could have a class action in the federal court and thus represent all of MCA's shareholders.[66]

A few days after the federal class made an attempt at certification, the Delaware plaintiffs added Matsushita as a defendant. They also included additional claims against MCA and its directors. These claims alleged that corporate assets were wasted by exposing the corporation to liability by violating rules 10b-13 and 14d-10, and thereby exposed them to liability.[67] The plaintiffs also claimed that MCA failed to make disclosures about the takeover and that directors Wasserman and Sheinberg breached their duties as directors through insider trading and by negotiating deals with Matsushita.[68] It was further alleged that the directors conspired, aided and abetted with Matsushita in connection with the merger, in direct violation of the Delaware laws prohibiting such behavior.[69]

On December 17, 1990, the Delaware parties proposed an agreed-upon settlement to the Delaware Vice-Chancellor. The agreement provided for a payment of $1,000,000 to counsel, a modification in the corporate charter, and a release of all federal and state claims arising out of the tender offer.[70]

On April 22, 1991, the settlement was rejected by the Vice-Chancellor because there was no monetary benefit at all to the class members and the value of the federal claims were proposed in the release. Also, the "generous payment" of counsel fees amounting to almost $1,000,000 "conferred no

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[61] *Matsushita*, 516 U.S. at 373.
[62] *Epstein*, 50 F.3d at 669.
[63] 17 C.F.R. § 240, 14d-10; 17 CFR § 240.10b-13 (1994).
[64] *Id*.
[65] 15 U.S.C. § 78aa.
[66] *Epstein*, 50 F.3d at 668.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*. at 669.

benefits on the members of the class."[71] The Vice-Chancellor stated that the state law claims were "at best, extremely weak and, therefore, of little or no value."[72] "The only claims which have any substantial merit are the claims...in the California Federal suit that were not asserted in this action."[73] Once the settlement was rejected for more than a year, the Delaware lawsuit lay dormant for longer than one year.

The federal litigation was actively pursued within the months from April 1991 to September 1992. This is evidenced by over 300 docket entries.[74] In the Delaware case there were no docket entries within the same time frame. In separate rulings, the Epstein plaintiffs were first denied by the district court in a motion for class certification and then, subsequently, in a motion for partial summary judgment. On April 15, 1992, a final judgment was entered by the district court. The district court dismissed the complaint.[75] Epstein appealed to the Ninth Circuit Court of Appeals.

After the notice of appeal was filed, a second settlement agreement was proposed by Matsushita and the Delaware parties. This agreement of October 22, 1992 stated that a $2,000,000 settlement fund would be afforded for the shareholders. This would be approximately 2 to 3 cents per share before the payment of legal fees and court related costs. Counsel for the Delaware class requested $691,000 in legal fees. For this meager amount the class plaintiffs would agree to release:

> all claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, and any rules or regulations promulgated thereunder, or otherwise) . . . in connection with or that arise now or hereafter out of [tender offer] including without limitation the claims asserted in the California Federal Actions.[76]

The second proposal included an opt-out provision which encouraged the Vice-Chancellor to approve the settlement.[77] He stated "[i]t is in the best interest of the class to settle this litigation and the terms of the settlement are

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[71] *In re* MCA, Inc. Shareholders Litigation., 598 A.2d 687, 695 (Del. Ch. 1991).
[72] *Id.* at 694.
[73] *Id*. at 696.
[74] *Id*.
[75] *Id*.
[76] Matsushita v. Epstein, 516 U.S. 367, 371-72 (1996) (original citations omitted).
[77] The fact that the settlement now had an opt-out provision seemed to be as important to the Vice-Chancellor as the fact that there was money added to the settlement, as this was an objective test of the Due Process burden, and not a subjective one, like valuation of the claim. The original settlement might have been approved if it had the opt-out, without giving any monetary gain to the class members at all.

fair and reasonable--although the value of the benefit to the class is meager."[78] The recovery of 2 to 3 cents per share was considered adequate even if only barely to be found to be consideration for a proposed settlement. Since the federal claims were dismissed in the District Court, the Vice-Chancellor felt they would now have almost no economic value and if the shareholders felt there was value in the federal claims then the second agreement had an opt-out provision for such a shareholder.[79] The Vice-Chancellor stated that "suspicions abound" but "objectors have offered no evidence of any collusion" so he declined to reject the settlement on mere suspicions of collusion.[80] He did decide to reduce the counsel fees from $691,000 to $250,000.[81]

In a very brief opinion the Delaware Supreme Court affirmed the Court of Chancery. After the appeal was filed, and before the Ninth Circuit made a decision the Delaware parties entered into the negotiated settlement. A notice was sent to the shareholders stating that the settlement would include substantial monetary benefits to former MCA shareholders.[82]

The Ninth Circuit then listened to arguments from Matsushita that the Delaware class action settlement barred any federal claims Epstein had. The Court of Appeals held that the state courts lacked plenary power to extinguish exclusively federal claims.[83] Only if there was "identical factual predicate" between the federal and state claims could the state court subsume the federal claim whose exclusivity rests in the federal court.[84] The same transaction test that was urged by Matsushita was not enough to change the Ninth Circuit's view. The state claims and the federal securities claims turned on different operative facts; thus they could not have been extinguished by the issue preclusive effect of the Delaware settlement.[85] The Ninth Circuit then declared that the Delaware decree "exceeded the jurisdiction of the state court and, therefore, is not entitled to full faith and credit."[86]

The Ninth Circuit further held that to redress rule 14d-10 violations, a private right of action may be maintained. The court reversed the district court's disposition of dismissing the matter finding that Matsushita violated rule 14d-10 by not offering to other shareholders that which was paid to

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[78] In re MCA, Inc. Shareholders Litigation., 598 A.2d 687, 687 (Del. Ch. 1991).
[79] Epstein v. MCA, 50 F.3d 644, 660 (9th Cir. 1995).
[80] *Id*.
[81] *Id*.
[82] *Matsushita*, 516 U.S. at 371.
[83] Epstein v. MCA, 50 F.3d. at 662.
[84] *Id*.
[85] *See* discussion involving Nottingham Partners v. Translux, and Grimes v. Vitalink*, supra* §§ II. B. 5. and II. B. 6.
[86] *Matsushita*, 50 F.3d, at 665.

Wasserman. The Ninth Circuit held summary judgment on liability for the plaintiffs and remanded for a determination of damages. Regarding the Sheinberg payment of $21,000,000, the Ninth Circuit vacated Matsushita's summary judgment and remanded to the district court for a determination on whether the payment was solely for Sheinberg to tender his shares.[87]

The "Full Faith and Credit Instruction," as the court indicates, requires the forum to decide whether the preclusive effect of the judgment rendered would be effective in the rendering court.[88] The Ninth Circuit did not evaluate whether the Delaware judgment had preclusive effect through Delaware state's preclusion law. The Supreme Court remanded the case to decide that issue.[89]

The requirements of the Fourteenth Amendment's Due Process Clause are the yardstick by which we measure the state law's preclusiveness of judgments. "A state may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment."[90]

In *Matsushita*, the preclusive effect of the Delaware settlement was challenged because it was argued that the constitutionally required representation was inadequate and the Vice-Chancellor never inquired into the adequacy of representation. The Epstein plaintiffs stated that the Delaware counsel did not vigorously press their interests or the interests of the class in negotiating the meager settlement. They felt the Delaware representatives undervalued the federal claims only to acquire a fast settlement awarding high attorney's fees. These federal claims could only be settled in the Delaware Court, but not properly litigated there. The Epstein plaintiffs claimed that it was not their burden of proof to produce evidence to prove the charges of collusion even though suspicions of collusion were present. Although the Ninth Circuit addressed the merits of the Epstein plaintiff's contentions, the Supreme Court would not. The Supreme Court claimed that these arguments could be aired upon remand. Justice Stevens stressed the importance of procedural due process protection through adequate representation in class action lawsuits. That due process includes those class action lawsuits that are resolved by settlement.

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[87] *Id*.
[88] *See* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 (1982); and *see also* Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 381 (1985).
[89] *See Marrese*, 470 U.S. at 386-387; *see also* Migra v. Warren City Sch. Dist. Bd. of Ed., 465 U.S. 75, 87 (1984) ("Prudence...dictates that it is the District Court, in the first instance, not this Court, that should interpret Ohio preclusion law and apply it.").
[90] *Kremer*, 456 U.S. at 482.

8. Full Faith and Credit Arguments

The Full Faith and Credit Act mandates "judicial proceedings" of any state "shall have the same full faith and credit in every court within the United States...as they have by law or usage in the courts of such state...from which they are taken."[91] Unless a state court judgment satisfies the requirements of the Fourteenth Amendment's due process clause, the state court judgment will not be entitled to full faith and credit.[92] Adequate representation is one of the most important due process ingredients that must be supplied in a class action setting to bind absent class members.[93]

Marrese v. American Academy of Orthopaedic Surgeons[94] shows a framework for deciding whether a state court judgment can preclude an exclusively federal action. A federal court must first look to the rendering state's law and ascertain whether the judgment would bar the claim or issue in that state court system. If so, then the federal court must decide whether "as an exception to Section 1738, it should refuse to give preclusive effect to the state court judgment."[95]

> When a state court settlement of a class action releases all claims which arise out of the challenged transaction and is determined to be fair and to have met all due process requirements, the class members are bound by the release or [by] the doctrine of issue preclusion. Class members cannot subsequently litigate again the claims barred by the settlement in the federal court.[96]

The Supreme Court assumed that the Delaware settlement was "fair, reasonable, and adequate and in the best interest of...the settlement class and that notice to the class was in full compliance with...the requirements of due process."[97] Since the Delaware Chancery Court approved of the settlement, and the Delaware Supreme Court affirmed it, the Supreme Court felt the Delaware settlement complied with due process requirements. The court was also persuaded that the due process requirements were adhered to because the Chancery Court rejected the first settlement proposal, partially because it did not contain an opt-out provision. The Chancery Court stated that it rejected

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[91] 28 U.S.C. § 1738.
[92] *Kremer*, 456 U.S. at 482-83.
[93] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808-12 (1985); Prezant v. De Angelis, 636 A.2d 915, 922-24 (Del. 1994).
[94] 470 U.S. 373 (1985).
[95] *Id*. at 383.
[96] *In re* MCA, Inc. Shareholders Litigation., 598 A.2d 687, 691 (Del. Ch. 1991).
[97] *In re* MCA, Inc., Shareholders Litigation., C.A. No. 11740 (Feb. 22, 1993).

the settlement proposal because it felt that it was grossly unfair and a great deprivation of due process.[98]

The respondents were part of both the state and federal claims and they did not opt-out of the state settlement. They claimed that if the settlement adhered to the due process requirements they would be bound by the judgment and precluded from pursuing further litigation in the federal court as per the agreement. However, the respondents claimed that they were inadequately represented and therefore they did not consent to the terms of the agreement and, in fact, they were actually misled about the terms. They claimed that due process requires "that the named plaintiff at all times must adequately represent the interests of the absent class members."[99] The respondents further argued that even though they did not opt-out of the settlement class they did not consent to being inadequately being represented and thus did not consent to the terms of the agreement.[100]

The Supreme Court turned a deaf ear to the arguments of the respondents and to the reasoning of the Ninth Circuit and ruled that the judgment would have preclusive effect under Delaware law. The Supreme Court, satisfied with this, moved to the second step in the *Marrese* analysis. The second step in the analysis is to ask whether the exclusive jurisdiction granted to the federal courts for suits arising under the Exchange Act is overcome by the Full Faith and Credit Clause as it applies to state court settlement proceedings. If it is, then a state court proceeding may have a preclusive effect upon an exclusively federal claim. Since there is no explicit language of a repeal of Section 1738 by Section 27 then, if there is any modification of the Full Faith and Credit Clause by Section 27, it must be implied. *Marrese* states "the general question is whether the concerns underlying a particular grant of exclusive jurisdiction justify a finding of an implied repeal of Section 1738."[101] "Resolution of this question will depend on the particular federal statute as well as the nature of the claim or issue involved in the subsequent federal action...the primary consideration must be the intent of Congress."[102] In order to find an implied repeal, there must be "irreconcilable conflict" between the two federal statutes.[103]

Section 27 provides that "the district courts of the United States...shall have exclusive jurisdiction...of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and

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[98] *See In re* MCA, 598 A.2d at 692.
[99] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).
[100] Matsushita v. Epstein, 516 U.S. 367, 371 (1996).
[101] Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 386 (1985).
[102] *Id*.
[103] *Kremer* 456 U.S. at 468 (1982) (*quoting* Radzanower v. Touche Ross & Co., 426 U.S. 148 (1978)).

regulations thereunder."[104] Section 27 and Section 1738 "do not pose an either or proposition."[105]

> They can be reconciled by reading Section 1738 to mandate Full Faith and Credit of the state court judgments incorporating global settlements providing the rendering court had jurisdiction over the underlying suit itself and by reading section 27 to prohibit state courts from exercising jurisdiction over suits arising under the Exchange Act.[106]

Further, the Court reasoned that "[s]ettlement of state court litigation has been held to defeat a subsequent federal action if the settlement was intended to apply to claims in exclusive federal jurisdiction as well as other claims...These rulings are surely correct."[107]

There is nothing in the wording of Section 27 that "remotely expresses any Congressional intent to contravene the common law rules of preclusion or to repeal the express statutory requirements of...28 U.S.C. § 1738."[108] Congress's intent to provide Exchange Act claims in exclusive federal forum for adjudicating those suits is clear. There is no evidence of any Congressional intent to prevent either individuals or class action litigants from voluntarily releasing Exchange Act claims in a judicially approved settlement. We also can find no evidence that Congress wished to override "the principals of comity and repose embodied in Section 1738" suggested in the language of Section 27.[109]

The Supreme Court in *Matsushita* did presume that Congress intends "to achieve greater uniformity of construction and more effective and expert application of that law" by passing Section 27.[110] By allowing state courts to create settlements and releases of Exchange Act claims neither policy of uniformity or expert application of the law is threatened. The state court judges will only evaluate the overall fairness of the settlements by generally applying their own good business judgment. This will leave the interpretation of the federal security laws to the judges who are experts in the field. "There is no danger that state court judges who are not fully expert in federal

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[104] 15 U.S.C. § 78aa.
[105] Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992).
[106] Matsushita v. Epstein, 516 U.S. 367, 385 (1996).
[107] *Id*., citing CHARLES A. WRIGHT, ARTHUR R. MILLER, AND EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4470 at 688-89 (1981).
[108] Allen v. McCurry, 449 U.S. 90, 97-98 (1980).
[109] *Kremer* 456 U.S. at 463 (1982).
[110] Murphy v. Gallagher, 761 F.2d 878, 885 (2d Cir. 1985).

security law will say definitely what the Exchange Act means and enforce legal liabilities thereunder."[111]

By satisfying the second step of the *Marrese* analysis the Supreme Court found that Section 1738 was not repealed by Section 27 of the Exchange Act. This further fortified the Supreme Court's position that the Delaware settlement was entitled to full faith and credit in the federal system. This essentially disallowed the plaintiffs to bring pursue their claims in the federal court.

III. THE FIRST CONGRESSIONAL ACTION: THE PSLRA

While the *Matushita* case was progressing, Congress decided that action needed to be taken. Congress in 1995 passed the Private Securities Litigation Reform Act (PSLRA).[112] The PSLRA was designed to reduce the amount of securities class action litigation, at least in federal court.[113] Congress had three concerns that that led to the passage of the PSLRA. First, Congress believed that the system in place to pursue private securities actions made it too easy to file non-meritorious claims and that it was too easy to file securities class actions (even in cases without wrongdoing).[114] There was concern that any drop in securities prices on the market could lead to a class-action lawsuit being brought against the issuer, without examining the merits of the action.[115] Second, Congress was concerned that many non-meritorious claims were being brought. There was concern that these class actions may be settled to avoid discovery and trial costs and out of fear of the "large theoretical damages in open-market securities fraud cases, which exacerbated the reluctance of defendants to risk an adverse jury verdict."[116] Thirdly, Congress was concerned that the threat of class-actions would have a chilling effect on the disclosure of forward-looking information, which is helpful to the investing public.[117]

To remedy these perceived problems Congress, through the PSLRA, attempted to make a more open process in federal securities class actions. Congress made both substantive and procedural changes.

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[111] Epstein v. MCA, 50 F.3d 644, 674 (9th Cir. 1995); *see also* Polk v. Good, 507 A.2d 531, 535 (Del. 1986).
[112] Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in 15 U.S.C.).
[113] Michael A. Perino, *Fraud and Federalism: Preempting State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273 (1998).
[114] *Id*. at 290.
[115] *Id*.
[116] *Id*. at 291.
[117] *Id*. at 292.

> Substantive rights changed by the PSLRA include the requirement that plaintiffs plead scienter with particularity, a provision extending the safe harbor for forward-looking statements, a limitation on damages, and the elimination of joint and several liability for violations charged under theories of recklessness, negligence, or strict liability in favor of a proportionate liability scheme.[118]

In addition the PSLRA also changed procedural rights for class actions securities. Among other things, it capped attorney's fees to a reasonable percentage of the class recovery and changed the way settlements were presented to class members, giving them more of a say in the outcome. Perhaps most importantly, it also gave a presumption to the courts that the person who has the largest financial stake in the outcome of the legislation should be the lead plaintiff and class representative.[119] This reduces the chances of having a professional plaintiff as the lead plaintiff. A professional plaintiff is one who has a small stake in the outcome, but would work in concert with the counsel to settle a case in terms that may not be as favorable to the rest of the class.

Congress' obvious intent in passing the PSLRA was to reduce the amount of strike suits and create higher standards for securities related class actions. Congress, however when enacting the PSLRA, did not change the jurisdictional provisions that were provided for in the 1933 Act or in the 1934 Act. The 1933 Act specifically provides that both the state and federal courts have concurrent jurisdiction in actions brought under the act. The 1933 Act provides that "[n]o cases arising under the [1933 Act] and brought in any State court of competent jurisdiction shall be removed to any court of the United States." [120] No such provision was provided for in the 1934 Act. Not amending the jurisdictional requirements in the PSLRA lead to the unintended consequences. After the PSLRA was enacted, there was a great rise in securities cases brought in state courts instead of federal courts.[121] Plaintiff's attorneys would couch what could be federal claims in terms of state claims such as breaches of fiduciary duties to avoid the heightened requirements of the PSLRA. Also there was a rise of cases under the 1933 Act that were brought in state courts as well. These claims would be filed in plaintiff friendly states and the preclusive effects of *Matsushita v. Epstein*

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[118] Eugene Zelensky, *New Bully on the Class Action Block: Analysis of Restrictions on Securities Class Actions Imposed by the Private Securities Litigation Reform Act of 1995*, 73 NOTRE DAME L. REV. 1135, 1136 (1998) (original citations omitted).
[119] *Id*. at 1137.
[120] 15 U.S.C. § 77u(a) (1934).
[121] *See generally* Michael A. Perino, *Fraud and Federalism: Preempting State Securities Fraud Causes of Action*, *supra* note 113.

would still allow for settlements to extinguish 1934 Act claims.[122] The PSLRA ended up having little effect in Congress goal of creating higher standards in Securities Class Actions.

IV. THE SECOND CONGRESSIONAL ACTION: THE SLUSA

Soon after, Congress attempted to fix the loophole that it created in the PSLRA by enacting the Securities Litigation Uniform Standards Act of 1998 (SLUSA).[123] Of primary importance the SLUSA provided that:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—
>
> (1) [A]n untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) [T]hat the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.[124]

A covered class action is one where damages are sought by 50 or more people,[125] and a covered security is one that is traded on a national exchange.[126] In addition, the SLUSA states that any "covered class action brought in any state court involving a covered security . . . shall be removable to the Federal district court in which the action is pending."[127]

These sections, by disallowing state claims of fraud in securities class-actions of 50 or more people, makes the 1934 Act's fraud provisions the exclusive remedy for claims of fraud of exchange listed securities. Congress' intent was to prevent state court claims being used to preempt the intent of the PSLRA.[128] This effectively ended factual scenarios similar to the one in *Matsushita v. Epstein*. No longer could a case be brought under a state's anti-fraud provisions as the plaintiffs did in that case. This ended much of the forum shopping that was going on previous to the SLUSA and

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[122] *Id*.
[123] Pub. L. No 105-353, 112 Stat. 3227 (1998) (codified in scattered sections of 15U.S.C.)
[124] 15 U.S.C. § 77p (b) and 15 U.S.C. §78bb(f)(3).
[125] 15 U.S.C. § 78bb(f)(5)(B).
[126] 15 U.S.C. § 77r(b).
[127] 15 U.S.C. § 77p(c).
[128] Matthew O'Brien, *Choice of Forum in Securities Class Actions: Confronting "Reform" of the Securities Act of 1933*, 28 REV. LITIG. 845 (2009).

also ended a scenario in which a state class-action settlement *brought under a state law claim*, could have a preclusive effect on a concurrent federal claim.

Congress, however, did not completely close the loophole. Congress did not address part of the jurisdictional issue that was provided for in the 1933 Act. While it became clear that securities class actions based on state law claims could no longer be brought in state courts, the concurrent jurisdiction and non-removal provisions that were provided for under the 1933 Act was not addressed. A question was then left open as to whether a *federal law claim*, brought under the 1933 Act, could still be brought in the state courts. This led to a split in the circuits as to whether all 1933 Act claims must be removed to federal court.[129] The First and Seventh Circuits support a narrow interpretation of the law. These courts stated that the SLUSA removal provisions were specific, as to what was removable to federal court, which the SLUSA specifically states are state claims. Since SLUSA was silent about federal claims that were allowed to be brought in the states courts under the 1933 Act, these claims were allowed to stay in state courts.[130] The Third, Fourth and Sixth Circuits took the opposite approach. Theses courts interpreted SLUSA's removal provision broadly, "attempting to do what they believe Congress was unable to achieve thorough statute alone."[131] These courts stated that it was the intent of Congress to have all federal actions be brought forth in Federal court and that SLUSA preempted the provisions of the 1933 Act that allowed for concurrent jurisdiction.[132] The Second, Fifth and Ninth Circuits were inconstant in their interpretation of the removal provision of SLUSA, sometimes taking the narrow approach and sometimes taking the broad approach to interpretation.[133] The Supreme Court, in *Kricher v. Putnam Funds Trust*[134] noted in *dictum* that it would interpret the provision narrowly, and allow Congress to decide if they wanted to amend the 1933 Act's concurrent jurisdiction. However, since this was in dictum some courts have subsequently still use the broad interpretation.[135]

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[129] For a full analysis of how the circuits courts approached the 1933 Act claims after the enaction of the SULSA, *see generally*, J. Tyler Butts, *Removal of Covered Class Actions Under SLUSA: The Failure of Plain Meaning and Legislative Intent as Interpretive Devises, and the Supreme Courts Decisive Solution*, *supra* note 2.
[130] *Id*.
[131] *Id*. at 176.
[132] *Id*. at 176-78.
[133] *Id*. at 178-82.
[134] Kricher v. Putnam Funds Trust 547 U.S. 633 (2006).
[135] *Id*. at 194-96.

V. THE THIRD CONGRESSIONAL ACTION: CAFA

Congress' most recent attempt at major class action reform was the Class Action Fairness Act of 2005 (CAFA).[136] The intent was to "expand federal jurisdiction over class action lawsuits,"[137] and to put class-action lawsuits that have national interest take place in federal courts. While addressing class-action lawsuits that were brought in state court to avoid federal litigation in general, securities class actions were specifically (and curiously) excluded from the provisions of CAFA.[138] Congress did not want "to disturb the carefully crafted framework" of jurisdiction over securities claims established in the SLUSA.[139] However, this carefully crafted framework is left unclear as to how this provision should be interpreted, leaving uncertainty as to whether a class action alleging 1933 Act claims could be brought in state courts.[140]

VI. WOULD THE NINTH CIRCUIT'S APPROACH UNDER *MATSUSHITA V. EPSTEIN* HAVE OBVIATED THE NEED FOR THE CONGRESSIONAL ACTIONS?

Ironically, if the Supreme Court in *Matsushita v. Epstein* had adopted the approach that the Ninth Circuit had taken in that case, Congress may not have had to make three attempts to fix the problem of strike suits in securities class action litigation. The Ninth Circuit recommended that state settlements could only have a preclusive effect on federal settlements if the federal and state claims arise from the identical factual predicate. This is instead of the Supreme Court approach which only requires the settlement of the claims that arise out of the same transaction or occurrence. Had the Ninth Circuit test been adopted by the Supreme Court, then strike suits would become less frequent. Plaintiffs would only be able to settle claims that were basically identical to those that were brought in the state court. Federal claims, which were not under the identical factual predicate to the state one, would still be able to be further litigated even if there was a settlement of the state claim.

This is the proper approach for several reasons. First, the federal government by not allowing most securities class actions in state courts

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[136] Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in 28 U.S.C.).
[137] Jeffery T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action Under the Federal Securities Laws*, 55 AM. U. L. REV. 621, 622 (2006).
[138] *Id*.
[139] *Id*. at 625, citing S. Rep. No.1109-14, at 50 (2005) (citation in original).
[140] There is controversy as to whether CAFA would cover any security class actions that did not meet the definition of a covered security under the SLUSA and CAFA. For a detailed analysis of this see O'Brien, *supra* note 128.

eliminates important states rights. Congress seems to assert that only federal courts can be fair and objective in a securities class action lawsuit. The states are not allowed to enforce their own securities and corporate governance laws as they can with other areas. States, however, would still be allowed to enforce state issues through the class action mechanism as that state sees fit under the Ninth Circuit approach. Allowing the states the ability to enforce their rights is an important goal, as the states should be able to protect investors from frauds occurring within their state. It appears that congress has taken the approach, by enacting the PLSRA and the SLUSA, that the *only* way investors and securities companies can have fairness in class action litigation is to have the case proceed in federal court. Individual states have had fair securities class action cases for years, and the approach of the federal legislation eliminates this important state remedy.

Secondly, the Ninth Circuit approach would eliminate many or most strike suits. Plaintiff's attorneys would no longer try to find weaker state claims and force a settlement on all claims arising under the same occurrence. Since the "occurrence" has been broadly interpreted by the courts, settlements that arise under relatively weaker claims could be used to settle all claims even if there are stronger federal claims yet to be litigated. States could then decide if they wanted to adopt more stringent requirements in allowing securities class-action lawsuits to be filed. The individual states could adopt provisions similar to the provisions of the PSLRA to lessen the chance of strike suits occurring within their jurisdiction. One comment suggests a "sound in fraud standard" for removal to federal courts of 1933 Act claims.[141] The basis of this approach is that if a case is premised on allegations of fraud, then the 1933 Act claim would have to be litigated in federal court. If not it would allow the claim to remain in state court. Since most securities class-actions arise out of fraudulent transactions, taking a sound in fraud approach would still disallow most securities class actions to take place in state courts. While this would solve some of the confusion and pleading problems with the 1933 Act claims, it still eliminates the ability of a state to protect its laws through the class action mechanism when it comes to securities. Again, this would be making an assumption that a state court could not fairly hear a securities class action.

VII. CONCLUSION

Congress has now attempted three separate acts, the PSLRA, SLUSA and CAFA to try to end strike suits in the securities industry. The primary focus of all of these acts was to have heightened pleading requirements and

[141] Cook, *supra* note 137, at 679.

focusing on bringing cases in Federal courts. This was in an attempt to remedy the result of cases such as *Matsushita v. Epstein*, in which suits were brought in state courts that were presumed to be plaintiff friendly, and then force a settlement on all claims. However, it seems that Congress, instead of focusing on eliminating strike suites, instead focused more on how to get securities class action cases into federal court. These acts however left uncertainty as to what cases were removable to federal court, especially in claims brought in state courts under the 1933 Act. They also ignore the rights of the states to use class actions as a mechanism for enforcement of the states securities laws and corporate governance laws. Perhaps the focus of the three acts has been incorrect. Instead of focusing on getting litigants into federal courts, the focus might better have been on not allowing the settlements in the first place. Had the Ninth Circuit approach in *Matsushita v. Epstein* been adopted by the Supreme Court (that settlements in state actions could only be used to settle federal actions where they were of the identical factual predicate), much of the legislation would have been unnecessary. Instead, the Supreme Court allowed for a preclusive effect on the settlement of federal claims by settling state claims if they were form the same transaction or occurrence. The ability to bring a successful strike suit that would settle all claims would be greatly diminished if the federal claims were left intact. Companies would not feel that they needed to settle the minor claims in the state courts and could focus on the claims that were not identical in federal court. Also, plaintiff's attorneys would be less likely to bring these claims if they knew that they did not have the leverage to get a large settlement without having to focus on the more important claims that were not from the identical factual predicate.

DISCHARGEABLE OR NOT DISCHARGEABLE: DOES AN INTENTIONAL BREACH OF CONTRACT FALL WITHIN *WILLFUL AND MALICIOUS* UNDER SECTION 523(A)(6) OF THE BANKRUPTCY CODE?

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I. INTRODUCTION

Even though a decade has passed since the Supreme Court decided the case of *Kawaauhau v. Geiger*,[1] confusion still exists between the various federal jurisdictions as to the meaning of *willful and malicious* under § 523(a)(6) of the Bankruptcy Code when addressing contractual breach.[2] The Supreme Court was successful in defining *willful and malicious* in matters involving tortious conduct; however, the decision did not abate the conflict among the various jurisdictions in matters involving contract. The Supreme Court's opinion left too much room for interpretation on one particular issue: Can the injuries resulting from a breach of contract without a separate tortious act be considered *willful and malicious*?

Historically, courts have interpreted the *willful and malicious injury* of § 523(a)(6) as those damages caused solely as the result of a debtor's intentionally tortious behavior. However, since the *Geiger* case, this interpretation has been expanded by some courts to include "willful and malicious injury" caused by a breach of contract even in the absence of an accompanying tort. For example, in 2003, the Fifth Circuit Court of Appeals held that damages resulting from a breach of a contract can be considered *willful and malicious* if the breaching debtor intended to injure the non-breaching party.[3] In that case, the Fifth Circuit did not require the presence of separate tortious conduct to prevent discharge under § 523(a)(6).

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[1] Kawaauhau v. Geiger, 523 U.S. 57 (1998).

[2] 11 U.S.C. § 523(a)(6) (2006); *see* 11 U.S.C §101(15) (2006) (An entity is "a person, estate, trust, governmental unit, and the United States trustee.").

[3] *In re* Williams, 337 F.3d 504, 510 (5th Cir. 2003).

In sharp contrast, the Ninth Circuit and other lower federal courts continue to hold that a breach of contract must be accompanied by the commission of a legally recognized tort in order to meet the standard of *willful and malicious* under § 523(a)(6).[4] This paper explores the language and context of § 523(a)(6) as it is being applied in Bankruptcy contract cases. This paper also analyzes the federal circuit split and contrasting interpretations of the Code Section and the legal concerns about adapting such a broader interpretation of § 523(a)(6).

II. HISTORY OF THE *WILLFUL AND MALICIOUS* INJURY EXCEPTION TO DISCHARGE

Considerable changes in the U.S. bankruptcy law(s) have taken place since the original enactment of the goals and philosophies of the bankruptcy process. The first federal bankruptcy law was enacted in 1800 and was considered a creditor's remedy. Under the Bankruptcy Act of 1800, only merchants were eligible debtors and only involuntary bankruptcy was permitted.[5] Additionally, a discharge could only be obtained with the approval of the bankruptcy commissioners and two-thirds in number and value of the creditors holding debts of "at least fifty dollars."[6] There were provisions for exceptions to discharge, but only on three basic grounds: 1) the debtor failing to disclose a fictitious claim, 2) a one-time gambling loss of fifty dollars or a loss of three hundred dollars in the twelve months preceding bankruptcy, or 3) debts owed to the federal government or any of the states.[7]

The Bankruptcy Code was amended in1841 and the changes brought new protection and rights to debtors by allowing them to file voluntary bankruptcy petitions.[8] Under the Bankruptcy Act of 1841, as long as the debtor complied with the process and provisions of the Act and obtained the consent of a majority of his creditors, he would receive a discharge. The statute only excepted from discharge debts arising from "defalcation as a public official" and fiduciary obligations. The courts also retained the previously recognized exception for debts due to the federal government or any of the states.[9]

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[4] *In re* Jercich, 238 F.3d 1202 (9th Cir. 2001); *In re* Best, No. 03-5098; 2004 U.S. App. LEXIS 13773 (6th Cir. 2004).
[5] *See* Bankruptcy Act of 1800, §1.
[6] *Id*. at § 36.
[7] *See id*. at § 37.
[8] *See* Bankruptcy Act of 1841, § 9.
[9] *Id*. at § 1; *see generally* Michael D. DeFrank, *An Ineffective Escape Hatch: The Textualism Mistake in Geiger*, 16 BANKR. DEV. J. 467 (2000) (Discussion of the history of the bankruptcy discharge in Section II).

When Congress again reformed the Bankruptcy Code in 1898, it recognized that the discharge of indebtedness not only freed the individual debtor, but ultimately benefitted all of society. Commentator Michael DeFrank wrote of the "social utility" theory of discharge:

> The social utility justification for discharge posits that discharging obligations of individuals hopelessly in debt benefits society as a whole. Discharge frees the debtor from past debts and encourages her to resume a productive role in society.[10]

For the first time, the goals of the Bankruptcy Act included macro social utility and individual rehabilitation of the debtor. Under the Act of 1898, discharge became a reward for the "honest but unfortunate debtor."[11] The reward of discharge did come with certain restrictions. Specifically, the Act created exceptions from discharge for debts resulting from morally and ethically unacceptable behavior, as discharging such debts was not seen as likely to restore the debtor to social utility.[12] These nondischargeable debts included those incurred as a result of a "willful and malicious injury."[13]

The passage of the Bankruptcy Code in 1978 was the culmination of the bankruptcy reform effort of the 1970s. At that time, the Commission on the Bankruptcy Laws of the United States reviewed various proposals, but ultimately kept the "willful and malicious injury" exception intact. The notes from the Commission indicate that the *willful and malicious* exception was not substantially changed from prior law. Additionally, none of the draft statutes made or suggested a change in the *willful and malicious* exception, suggesting that Congress intended no substantive changes in this area.[14]

A brief review of the evolution of bankruptcy law over nearly 100 years illustrates the relative stability of this policy: Section 17(a)(2) of the Act of 1898 provided that "(a) discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as ... (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another."[15] In

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[10] DeFrank, *supra* note 9, at 469.
[11] *See id*.
[12] *See* Bankruptcy Act of 1898, § 17(a) ("A discharge in bankruptcy shall release the bankrupt from all of his provable debts, except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity.").
[13] *Id*. at § 17(a)(2).
[14] DeFrank, *supra* note 9, at 478-79.
[15] Pub. L. No. 171, 55th Cong., § 17(a)(2) (July 1, 1898).

1970, the "willful and malicious injury" provision was shifted to § 17(a)(8), which excepted from discharge "liabilities for willful and malicious injuries to the person or property of another other than conversion."[16] Non-dischargeability of liability for conversion was retained and remains in today's bankruptcy code.[17]

III. THE U.S. SUPREME COURT INTERPRETS THE "WILLFUL AND MALICIOUS INJURY" LANGUAGE OF SECTION 523(A)(6) IN *KAWAAUHAU V. GEIGER*

Prior to the Supreme Court's *Geiger* decision in 1998, two approaches to interpreting § 523(a)(6) developed in the lower courts: the *special malice* test and the *implied malice* test. The *special malice* test required an actual, subjective intent of the debtor to injure the creditor. Similar to the *specific intent* in criminal law, special malice requires the actor to not only intend to commit the act leading to injury, but to intend the consequences of that act—the injury itself.[18] The *implied malice* test was described in *Tinker v. Colwell* as: "a deliberate or intentional act in which the debtor knows his act would harm the creditor's interest and proceeds in the fact of the knowledge."[19] The *Tinker* Court held that this knowledge may be inferred by the debtor's conduct.[20]

In 1998, in order to attempt to resolve the split among courts as to the interpretation of *willful and malicious* under § 523(a)(6) of the Code, the U.S. Supreme Court granted certiorari in *Kawaauhau v. Geiger*.[21] The facts of *Geiger* are relatively simple. Plaintiff Kawaauhau sought medical attention from defendant Dr. Geiger for a foot injury. Dr. Geiger diagnosed Mrs. Kawaauhau and admitted her to the hospital to reduce the risk of infection. Dr. Geiger prescribed oral penicillin, even though he knew that the most effective treatment was intravenous penicillin.[22] Dr. Geiger testified that he knew that the proper standard of care under the circumstances was intravenous administration of penicillin, but that he prescribed the medication orally in response to Mrs. Kawaauhau's desire to keep the cost of

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[16] Pub. L. No. 91-467, § 6, 84 Stat. 991 (1970).
[17] The provisions of § 17(a)(2) and § 17(a)(8) were recombined in § 523 (a)(6) of the Code. 124 Cong.Rec. H 11,096 (Sept. 28, 1978); S 17,413 (Oct. 6, 1978).
[18] *See* Grand Piano & Furniture Co. v. Hodges, 4 B.R. 513 (Bankr. W.D. Va. 1980); *See also* Coffing v. Burdick, 65 B.R. 105 (Bankr. N.D. Ind. 1986)(adopting a variation of the special malice test including a "totality of the circumstances").
[19] Tinker v. Colwell, 193 U.S. 473 (1904).
[20] *See id*.
[21] Kawaauhau v. Geiger, 523 U.S. 57 (1998).
[22] *Id*. at 59.

treatment to a minimum.[23] Dr. Geiger then went out of town, leaving Mrs. Kawaauhau in the care of two other doctors. The two doctors immediately switched Mrs. Kawaauhau to intravenous penicillin and decided that she should be transferred to an infectious disease specialist. When Dr. Geiger returned, he canceled the transfer and discontinued all antibiotics believing that the infection had subsided. Mrs. Kawaauhau's condition subsequently deteriorated, and she was forced to have her leg amputated below the knee.[24]

Based on Dr. Geiger's admission that he knew the proper standard of care and intentionally departed from it, the Kawaauhaus won a medical malpractice judgment against him in federal district court, which was affirmed by the Ninth Circuit Court of Appeals.[25] Shortly thereafter, Dr. Geiger, who carried no malpractice insurance, relocated to Missouri and filed for bankruptcy protection under Chapter 7.[26] The Kawaauhaus alleged that Dr. Geiger was not able to discharge the malpractice debt because the judgment gave rise to a debt for *willful and malicious* injury.[27] The bankruptcy court agreed that the debt was nondischargeable, holding that Dr. Geiger's treatment was so far below the standard level of care that it could be categorized as *willful and malicious* conduct.[28]

The district court affirmed the decision, but the Eighth Circuit Court of Appeals reversed. The Eighth Circuit held that the proper standard to determine the *willfulness* of Dr. Geiger's conduct was whether he intended to cause the consequences of his actions, or at least believed that the substandard care would result in the consequence of amputation of Mrs. Kawaauhau's leg.[29] The Court held that for the debt to be dischargeable, the victim must prove an actual intent to injure. The Court further explained that in order for the debtor's action to be found *willful and malicious*, the debtor either desired to cause the consequences of his act or subjectively believed that injury was a substantial certainty.

Justice Ginsberg, writing on behalf of a unanimous Supreme Court, addressed the issue of whether § 523(a)(6) covers "acts, done intentionally, that cause injury or only acts done with the actual intent to cause injury."[30] The Court concluded that the word *willful* in the statute modifies the word *injury*, indicating that nondischargeability requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Justice Ginsburg reasoned that if Congress had intended § 523(a)(6) to include debts

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[23] *Id*.
[24] *Id*.
[25] *In re* Geiger, 172 B.R. 916, 919 (Bankr. E.D. Mo. 1994).
[26] *Geiger*, 523 U.S. at 59-60.
[27] *Id*.
[28] *Id*.
[29] *In re* Geiger, 113 F.3d 848, 852-853 (8th Cir. Mo. 1997).
[30] *Geiger*, 523 U.S. at 61.

arising from unintentionally inflicted injuries, it would have used the phrase "willful acts that cause injury" or the additional words *reckless* or *negligent* to modify *injury* in § 523(a)(6).[31]

The court analogized that the requirement of the actor to subjectively intend the consequences of his act to the Restatement (Second) of Torts' definition of an intentional tort. Justice Ginsburg noted that the phrase *willful and malicious*, as used historically, "triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts."[32] The Court noted that the definition of *intentional tort* in the Restatement required that the actor intend the consequences of her act, rather than merely intending the act itself.[33]

In *Geiger,* the Court followed a broad interpretation of the discharge exception, encompassing a "wide range of situations in which an act is intentional, but injury is unintended, i.e., neither desired nor in fact anticipated by the debtor."[34] Writing for the majority, Justice Ginsburg provided various illustrations, which included the following:

> The Kawaauhuas' more encompassing interpretation could place within the expected category a wide range of situations in which an act is intentional, but injury unintended… Every traffic accident stemming from an initial intentional act – for example, intentionally rotating the wheel of an automobile to make a left-hand turn without first checking oncoming traffic – could fit the exception. *A 'knowing breach of contract' could also qualify*… A construction so broad would be incompatible with the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed'.[35]

Clearly, the Court felt obligations arising from knowing, but non-malicious, breaches of contract should be dischargeable in bankruptcy. This interpretation harkened back to the "social utility" rationale embodied in the Bankruptcy Act of 1898, which excluded from discharge only those debts arising from socially or ethically unacceptable practices.[36] The Court also held that to accept a broad interpretation that § 523(a)(6) excepted debts from discharge even in the absence of proof to injury would possibly render meaningless other sections of the Code. Examples cited by the Court

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[31] *Id*.
[32] *Id*. at 62.
[33] *Id*.
[34] *Id*.
[35] *Id*. (emphasis added).
[36] *See* Bankruptcy Act of 1898, § 17(a).

included § 523(a)(9) (excepting damages caused by drunk driving) and § 523(a)(12) (the exception to maintain capital at federal depository institutions).[37] In all, the Court chose to interpret the phrase *willful and malicious* narrowly, adopting a specific intent standard. Since then, however, various lower courts have tested broader interpretations that would prohibit discharge of contractual debts less intentionally incurred.

IV. CIRCUITS APPLYING SECTION 523(A)(6) TO DEBTS ARISING FROM DAMAGES CAUSED BY BREACH OF CONTRACT

A. *Fifth Circuit – In Re Williams*

After the Supreme Court issued its opinion on the *willful and malicious* standard in *Geiger,* many considered the controversy surrounding the application of the language of § 523(a)(6) to be settled. However, this proved to be somewhat overconfident when the Fifth Circuit Court of Appeals issued its 2003 decision in *In re Williams*.[38] The *Williams* decision did not address the meaning of the terms *willful* and *malicious*, but rather the application of § 523(a)(6) to debts incurred as a result of a breach of contract. This approach was contrary to the historical application of the exception only being applied to tortious behavior.[39] The Fifth Circuit in *Williams* broke from previous interpretations to explicitly find that damages caused by a willful and malicious injury as the result of a breach of contract, with no accompanying tort, could also be excepted from discharge under § 523(a)(6).[40]

The debtor in *Williams* was an independent electrical contractor who hired non-union electricians.[41] The local electrician's union targeted Williams by sending union electricians to apply for work with Williams without telling him of their status.[42] After Williams unknowingly hired some of the union applicants, they began demanding wage and benefit increases,

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[37] *Geiger*, 523 U.S. at 62.

[38] *In re* Williams, 337 F.3d at 504.

[39] *See infra* Section IV. A simple breach of contract does not cause an injury that may be excepted from discharge, however an intentional breach of contract accompanied by willful and malicious tortious conduct may be excepted. See *In re* Riso, 978 F.2d 1151 (9th Cir. 1992); Matter of Haynes, 19 B.R. 849 (Bankr. E.D. Mich. 1982); I*n re* Colclazier, 134 B.R. 39 (Bankr. W.D. Okla. 1991) (holding that exception to discharge will be granted under Code 523 (a)(6) only upon finding of an independent, willful tort); *In re* Hallahan, 78 B.R. 547 (Bankr. C.D. Ill. 1987), *aff'd*, 936 F.2d 1496 (7th Cir. 1991).

[40] *See In re Williams*, 337 F.3d at 511-13.

[41] *Id*. at 506.

[42] The *Williams* Court cited Williams' brief in defining the Union practice of "salting," which he described as occurring when Union workers conceal their Union membership when applying for non-union jobs, then demanding union-level wages and benefits. *Id*.

and ultimately went on strike when Williams refused. Williams eventually agreed to enter into a collective bargaining agreement (CBA) with the International Brotherhood of Electrical Workers Local 520 for one project.[43] The CBA required Williams to use the Union hall as the "sole and exclusive source of referral of applicants for employment."[44] Upon having alleged problems with the Union employees, however, Williams terminated some of them and hired some non-union electricians to complete a project.[45] The Union filed a successful complaint for violations of the CBA, and Williams entered an Agreed Final Judgment and Decree, which was approved and entered by the U.S. District Court for the Western District of Texas.[46] The Decree required Williams to use only Union electricians on all of his commercial projects and to allow an audit of Williams's records to determine past compliance with the CBA.[47]

When Williams violated the Decree by hiring non-union electricians for a subsequent commercial project, the District Court found he had willfully and purposely violated the Decree and held him in contempt.[48] After a court-ordered audit revealed Williams had breached the terms of the original CBA, the court ordered him to pay $155,855.39 in restitution.[49] The Court further awarded the Union $106,911.43 in damages (plus attorney fees) in the contempt action.[50]

A few weeks after the District Court's judgment, Williams and his wife filed for bankruptcy protection. When the Williams received an Order of Discharge under Chapter 7, the Union filed a complaint seeking to except its judgments under § 523(a)(6).[51] The U.S. Bankruptcy Court for the Western District of Texas found that both of Williams's debts to the Union – the $155,855.39 judgment for his breach of the CBA and the $106,911.43 judgment for violation of the Agreed Judgment and Decree – were excepted from discharge because they represented *willful and malicious* injuries to the Union.[52] Williams appealed the District Court's decision to the Fifth Circuit Court of Appeals, arguing that the U.S. Supreme Court had interpreted §

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[44] *Id*. at 507.
[45] Williams claimed to have at least one of the union employees was found asleep at the jobsite, and on one occasion, Union electricians left the construction site and spent the afternoon at a topless bar. *Id*.
[46] *In re Williams*, 337 F.3d at 507.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 508.
[52] *Id*.

523(a)(6) as requiring tortious conduct to except debts from discharge in *Geiger*.[53]

The Fifth Circuit began its analysis in *Williams* by noting that *Geiger* had defined *willful and malicious* injuries as "acts done with the actual intent to cause injury, but exclude[ing] intentional acts that cause injury."[54] The *Williams* Court also pointed out that *Geiger* had in fact included knowing breaches of contract among the examples of intentional acts causing unintended injuries.[55] By using the example of "a knowing breach of contract," the *Williams* Court recognized that the *Geiger* opinion did not reject the proposition that a debt arising from an intentional breach of contract constitutes *willful and malicious* injury under § 523(a)(6).[56] However, the *Williams* Court did not read *Geiger* as foreclosing the possibility that one may intentionally, and with motive to cause harm, breach a contract, and thus create a *willful and malicious* injury.[57]

The *Williams* Court cited two previous Fifth Circuit decisions, *Texas v. Walker*[58] and *In re Miller*,[59] for the proposition that a breach of contract alone may result in an intentional or substantially certain injury, thus satisfying the *willful and malicious* standard. Ironically, neither the *Walker* nor *Miller* decisions actually excluded a debt from discharge under § 523(a)(6). They simply indicated in dicta that it was possible to create a *willful and malicious* injury solely as a result of the breach of contract.[60]

The underlying facts of *Walker* and *Miller* help shed some light on the Fifth Circuit Court's analysis in *Williams.* In *Walker*, the debtor signed an employment agreement with his employer, the University of Texas, which included a provision requiring him to turn over to the University certain professional fees he might receive.[61] During his employment, Dr. Walker received considerable fees covered by the employment contract, but failed to remit them to the University.[62] Dr. Walker filed for bankruptcy protection and the University claimed the failure of Walker to remit the fees constituted a breach of his employment agreement and a *willful and malicious* injury, which should be excluded from discharge. The Court found that although Walker's keeping the fees was intentional, he lacked sufficient understanding of the employment agreement to willfully and maliciously cause the

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[53] *Id*.
[54] *In re Williams*, 337 F.3d at 509 (quoting *Geiger,* 118 S.Ct. at 977).
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] Texas v. Walker*,* 142 F.3d 813 (5th Cir. 1998).
[59] *In re* Miller*,* 156 F.3d 598 (5th Cir. 1998).
[60] *Walker*, 124 F.3d at 823; *In re Miller*, 156 F.3d at 606.
[61] *Walker*, 124 F.3d at 813.
[62] *Id*. at 815.

University harm and thus allowed the discharge.[63] The *Walker* Court noted, however,

> [I]f a factfinder were to decide that [the debtor] knew of his obligations under the… contract… then [a factfinder] might also find that [the debtor] knowingly retained his professional fees in violation of the [contract], an act which he knew would necessarily cause the University's injury. This, in turn, could result in a finding of 'willful and malicious' injury.'[64]

Thus, as the Fifth Circuit later noted in *Williams,* a bare breach of contract may create a *willful and malicious* injury if committed with the requisite specific intent.[65]

The *Williams* Court cited *Miller* for the idea that the knowledge and intent of the debtor is more important than the type of conduct in establishing a *willful and malicious* injury. In *Miller,* the court did not decide the § 523(a)(6) issue but instead remanded the case for a determination of the defendant's intent or objective certainty to cause injury, holding that his actions could have been *willful and malicious* under § 523(a)(6) if they were "at least substantially certain to result in injury."[66]

The *Williams* Court interpreted *Miller's* decision to remand the case as suggesting that the determination of the debtor's mental state in causing an injury was the penultimate decision regarding dischargeabilty under § 523(a)(6).[67] Thus, *Williams* held that regardless of where the debtor's behavior fell into accepted legal categories, discharge under § 523(a)(6) depended on the "knowledge and intent of the debtor at the time of the breach, *rather than whether conduct is classified as a tort or falls within another statutory exception*."[68] Thus, in the Fifth Circuit, a breach of contract alone may constitute a *willful and malicious* injury given the appropriate proof of intent.

There is one anomalous, unreported Fifth Circuit case, *In re Deasy,* on this issue in which the court held that an intentional breach of contract without a separate intent to injure did not qualify as *willful* under § 523(a)(6).[69] The Court reviewed a creditor's claim that the debtor had caused him a *willful and malicious* injury by failing to pay his realtor's commission

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[63] *Id*. at 824.
[64] *Id*.
[65] *Id*. at 510.
[66] *In re Miller*, 156 F.3d at 606.
[67] *In re Williams*, 124 F.3d at 510.
[68] *Id*. (emphasis added).
[69] Cotton v. Deasy (*In re* Deasy*),* 2002 U.S. Dist. LEXIS 17851, 2002 WL 31114061 *6 (N.D. Tex. 2002), *aff'd, In re* Deasy*,* 66 Fed.Appx. 526, 2003 WL 21018189 (5th Cir. 2003).

as agreed.[70] Debtor Deasy had contracted with real estate broker Neal Cotten to pay him five percent of the sale price of his property if it sold before the end of April 1986.[71] Deasy subsequently found a buyer on his own and signed a real estate contract on February 3rd with the closing set for May 1, 1986, one day after Cotten's listing ended.[72] Cotten filed suit in state court and obtained a judgment for his unpaid commission of $146,336.34.[73] When Deasy filed for bankruptcy protection, Cotten contested the dischargeabilty of the debt, claiming Deasy had caused a *willful and malicious* injury.[74]

In a short opinion, issued shortly before the *Williams* decision was published, the Fifth Circuit construed *Geiger* as "explicitly reject[ing] a construction of 'willful' under which a breach of contract could qualify [under § 523(a)(6)]."[75] The Court also cited a post-*Geiger*, Ninth Circuit case as authority for the proposition that an intentional breach of contract can be excepted from discharge *only* when accompanied by willful, tortious conduct.[76] Since Deasy did not commit any tort along with the breach of contract, the Court held his debt could not be excepted from discharge as a matter of law.[77] Ironically, the *Deasy* Court also cited *Miller* (the same case cited a few months later in *Williams*) as support for its interpretation of *Geiger.*[78] The Fifth Circuit's apparent reversal of stance in the short time between the two opinions may explain why the *Deasy* opinion is not reported.

B. *Tenth Circuit – Sanders v. Vaughn*

The Tenth Circuit Court of Appeals has addressed this issue once in an unpublished opinion *Sanders v. Vaughn (In re Sanders).*[79] In that case, Plaintiff Sanders hired attorney Vaughn on a contingent fee basis to assist him in an attempt to recover tax refunds from previous years from the Internal Revenue Service (IRS) .[80] Vaughn secured a power of attorney from Sanders and negotiated a refund of approximately $30,000.[81] Before the IRS mailed the refund check, however, Sanders sent them a letter indicating that

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[70] *In Re Deasy*, 2002 WL 31114061, at *2-4.
[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] *In Re Deasy*, 2002 WL 31114061, at *6.
[76] *See infra* Section IV.
[77] *In re Deasy*, 2002 WL 31114061 at *7-8.
[78] *Id*. at *6.
[79] *In re* Sanders, 210 F.3d 390 (Table): 2000 U.S. App. LEXIS 5763(10th Cir. 2000)(full text).
[80] *Id*. at *2.
[81] *Id*.

he was revoking Vaughn's power of attorney and that the check should be sent directly to him (Sanders).[82] In March of 1995, the IRS mailed the refund check to Sanders, care of Vaughn.[83] Sanders then filed a Taxpayer Statement Regarding Refund form, informing the IRS that he did not receive the check.[84] The IRS stopped payment on the first check mailed to Vaughn and issued a replacement check to Sanders, who cashed it and informed Vaughn that he did not owe Vaughn anything since he had terminated their agreement.[85] Vaughn filed suit against Sanders in Oklahoma state court and obtained a judgment based on Sanders' failure to pay the contingency fee. Shortly thereafter, Sanders filed for bankruptcy protection, and Vaughn instituted an adversarial action under § 523(a)(6) seeking to have the debt declared non-dischargeable. The trial court held that "because this was an act deliberately intended to harm Vaughn by avoiding his contractual right to the contingent fee it was willful and malicious under 11 U.S.C. § 523(a)(6), thereby exempting Sanders' debt to Vaughn from discharge."[86]

Sanders appealed, arguing (1) the trial court committed an error of fact in finding he possessed the requisite intent to harm Vaughn, and (2) the U.S. Supreme Court expressly excluded breaches of contract from § 523(a)(6) in *Geiger*.[87] The Tenth Circuit Court of Appeals declined to overturn the trial court's finding of fact regarding Sanders' intent, finding it was not clearly erroneous.[88] The Court then turned to Sanders' interpretation of *Geiger,* calling it a "misreading" of the opinion.[89] According to the *Sanders* court, nothing in *Geiger* suggests the Supreme Court intended "to immunize debtors under § 523(a)(6) for willful and malicious breaches of contract."[90] Instead, it said *Geiger* simply stands for the proposition that a debtor must intend to cause an injury, not just commit an intentional act that causes an injury. Finding *Geiger* was silent on the application of § 523(a)(6) to contract breaches, the *Sanders* Court looked to the Fifth Circuit's *Walker* opinion for guidance.[91] The *Walker* decision (at least in dicta) allowed for the possibility that breaches of contract could constitute *willful and malicious* injuries given the requisite proof of intent. Applying this reasoning to the

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[82] *Id*.
[83] *Id*. at *3.
[84] *In re Sanders,* 2000 U.S. App. LEXIS 5763 at *3.
[85] *Id*.
[86] *Id.* at *4.
[87] *Id*.
[88] The Court commented on the trial court's finding, "the bankruptcy court determined that Sanders's proffered explanations for his actions were not credible. The trial court stated, 'Frankly, it looked like Sanders figured out he was going to get these refunds, about $30,000, (and thought) well, before I get them, I'm going to beat the lawyer out of his fees.'" *Id*. at *6.
[89] *In re Sanders*, 2000 U.S. App. LEXIS 5763 at *8.
[90] *Id.*
[91] *Id*.

facts in *Sanders,* the Tenth Circuit affirmed the district court's ruling that Sanders's deliberate breach constituted a *willful and malicious* injury under § 523(a)(6).[92] Had the *Sanders* decision been published, it would represent a direct precedent in the Tenth Circuit for allowing an intentional breach of contract, without accompanying tortious behavior, to satisfy the *willful and malicious*.

V. CIRCUITS REFUSING TO APPLY SECTION 523(A)(6) TO DEBTS ARISING FROM DAMAGES CAUSED SOLELY BY A BREACH OF CONTRACT

In contrast to the Fifth and Tenth Circuits decisions discussed above, other courts have adopted the traditional view of § 523(a)(6) as applying only to tortious behavior.

A. *Ninth Circuit – In Re Jercich*

The Ninth Circuit Court of Appeals has been the most consistent in its approach to the application of § 523(a)(6) to injuries caused by a breach of contract. Prior to *Geiger*, the Ninth Circuit held in *In re Riso*, holding, "[i]t is well settled that a simple breach of contract is not the type of injury addressed by § 523(a)(6)."[93] Since *Geiger*, the Court has remained consistent in this position, most recently addressing the issue in the 200l *In re Jercich* .[94]

In *Jercich*, the employee Petralia sued realtor Jercich in California state court for unpaid wages, statutory penalties relating to the non-payment of wages and punitive damages. Petralia was granted a judgment, with the trial court finding that Jercich had the means to pay Petralia, but instead used the funds personally.[95] The trial court found Jercich's refusal to be willful and "oppressive" under California statutory law, subjecting Jercich to additional penalties, including punitive damages.[96] After the judgment was entered, Jercich filed a bankruptcy petition and Petralia filed an adversarial proceeding seeking to have the judgment excepted from discharge under § 523(a)(6). The trial court found in favor of Jercich, holding that since the

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[92] *Id*.
[93] *In re* Riso, 978 F.2d 1151 (9th Cir. 1992), *See* also Barbachano v. Allen, 192 F.2d 836 (9th Cir. 1951); *In re* Akridge, 71 B.R. 151 (Bankr. S.D. Cal. 1987).
[94] *In re* Jercich, 238 F.3d 1202 (9th Cir. 2001).
[95] *Id*. at 1203-04.
[96] California's Civil Code allows for punitive damages where it is proven by clear and convincing evidence that the defendant has committed fraud, oppression or malice. California Civil Code § 3294.

state court did not find specifically that Jercich had the intent to cause Petralia harm, the specific-intent-like injury requirement of *Geiger* was not satisfied. The case was appealed to the Bankruptcy Appellate Panel (BAP), which affirmed the decision for Jercich, but for a different reason. The BAP held that where the debtor commits both a breach of contract and a tort, the resulting injury is not covered by § 523(a)(6) unless the tort is independent of the breach of contract. The BAP defined "independent" as conduct that would be tortious even in the absence of an agreement between the parties.[97]

The Ninth Circuit overturned both prior decisions, holding that no tort independent of a contract need exist to be subject to § 523(a)(6).[98] The *Jercich* court noted that tortious conduct related to the breach of the contract (such as interference with contractual relations, fraud, etc.) may constitute a willful and malicious injury. The court reasoned that requiring a tort separate from the existence of a contract would unduly limit one of the fundamental principles of bankruptcy—allowing the "honest but unfortunate debtor" a "fresh start."[99]

While finding that a separate tort distinct from the breach of contract did not need to exist, the Ninth Circuit was not willing to go as far as the Fifth Circuit's holding that a bare breach of contract may create a *willful and malicious injury* if committed with the requisite specific intent.[100] The *Jercich* court made it clear that tortious behavior must also be present. In its analysis, the court stated, "we therefore hold that to be excepted from discharge under § 523(a)(6), *a breach of contract must be accompanied by some form of tortious conduct* that gives rise to a 'willful and malicious injury.'"[101] Subsequent courts have seized on the highlighted portion above to use *Jercich* as authority for the position that some tortious conduct is necessary and that a bare breach of contract cannot create a willful and malicious injury under § 523(a)(6).[102]

B. *Sixth Circuit – In Re Best*

The Sixth Circuit (although an unpublished opinion) has also held a breach of contract cannot render a debt nondischargeable under § 523(a)(6). In *In re Best* debtor, Michael Best, was an orthopedic surgeon whose

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[97] *In re Jercich*, 238 F.3d at 1204 (citing *In Re Jercich*, 234 B.R. 747 (9th Cir. BAP 2000)).
[98] *Id*. at 1205.
[99] *Id*. at 1206.
[100] *In re Williams*, 124 F.3d at 510.
[101] *In re Jercich*, 238 F.3d at 1206.
[102] *In re* Picard*,* 339 B.R. 542, 555 (Bankr. D. Conn. 2006) ("However, a breach of contract unaccompanied by tortious conduct (*e.g.,* conversion of collateral) does not give rise to a Section 523(a)(6) nondischargeability claim."); *In re* Jacobs*,* 381 B.R. 128, 133(Bankr. E.D. Pa. 2008).

corporation conducted disability exams for worker's compensation claimants.[103] Plaintiff Anthony Steier invested $300,000 in the corporation but later sued, claiming Best had failed to honor a contract condition entitling him to the refund of his stock purchase price.[104] Steier obtained a judgment against Best for breach of contract, and Best filed a bankruptcy petition. Steier filed an adversarial action under § 523(a)(6), claiming Best had maliciously concealed his assets to prevent Steier from collecting on the judgment. The Bankruptcy Court granted summary judgment for Best and Steier appealed.[105]

The Sixth Circuit Court of Appeals affirmed the lower court's decision, holding Best's debt to be dischargeable.[106] The main issue resolved by the Court was whether the post-judgment activity of the debtor could qualify under the *willful and malicious injury* exception. The Sixth Circuit held that, under § 523(a)(6), the creditor has the burden of proving that it sustained an injury as a result of a willful and malicious act on the part of the debtor.[107] Since Best's actions (hiding assets to avoid execution of the judgment) occurred *after* the debt had been incurred, the concealment could not have caused or given rise to the judgment debt.

Creditor Steier also claimed Best's original failure to repay his investment constituted willful and malicious behavior in its own right.[108] The court ruled that Best's failure to pay Steier amounted to a breach of contract, but that "consistent with *Geiger*, we have held that *a breach of contract cannot* constitute the willful and malicious injury required to trigger Section 523(a)(6)."[109] Thus, the Sixth Circuit made clear that it interprets *Geiger* as rejecting a bare breach of contract as a willful and malicious injury. This decision seems to align the Sixth Circuit with the Ninth, in requiring that some sort of tortious conduct must accompany the breach of contract for it to fall under the exception of § 523(a)(6).

VI. LOWER COURT DECISIONS FROM CIRCUITS WITH NO CLEAR RULE REGARDING BREACH OF CONTRACT AND SECTION 523(A)(6)

Although no other federal Circuit Courts of Appeals have addressed this issue directly since *Geiger,* several district courts have. The lower court decisions in circuits not mentioned above generally follow the Ninth and

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[103] *In re* Best*,* No. 03-5098; 2004 U.S. App. LEXIS 13773 (6th Cir. 2004).
[104] *Id*.
[105] *Id*. at *2-4.
[106] *Id*.
[107] *Id*. at *4.
[108] *In re* Best, 2004 U.S. App. LEXIS 13773 at *8.
[109] *Id*. (emphasis added).

Sixth Circuits in requiring tortious behavior for a breach of contract to fall under the willful and malicious injury exception of § 523(a)(6). While bankruptcy and district court decisions have limited precedential value, it is significant that none seem to have taken the position of the Fifth and Tenth Circuits that a bare breach of contract can justify a discharge exception. The lower court decisions also demonstrate the need clarification when addressing *willful and malicious* contractual claims under § 523(a)(6).

A. *Lower Courts In The Second Circuit – Breach of Contract Alone insufficient*

The lower court opinions in the Second Circuit since *Geiger* have generally required a finding of independent tortious activity before excepting contractual damages from discharge.[110] The most recent decision on the issue, *In re Picard*, came from the U.S. Bankruptcy Court in the Central District of Connecticut in 2006.[111] In *Picard,* the debtor personally guaranteed repayment of credit extended to his company.[112] Piccard subsequently filed for bankruptcy under Chapter 7, seeking to discharge his personal obligation under the guarantee. The creditor alleged that prior to filing the bankruptcy petition, Piccard fraudulently transferred assets out of his bankruptcy estate making them unavailable to satisfy his debt.[113] The Court found the debtor had not committed any fraudulent transfers, and that his inability to perform on the guarantee was simply a breach of contract.[114] Citing several Ninth Circuit cases, including *Jercich,* the Court held, "a breach of contract unaccompanied by tortious conduct (e.g., conversion of collateral) does not give rise to a Section 523(a)(6) nondischargeability claim."[115]

B. *Lower Courts In The Third And Fourth Circuits – No Clear Rule*

The Third and Fourth Circuits each have lower court decisions regarding nondischargeability of debts arising from contract breaches. The

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[110] *In re* Mitchell, 227 B.R. 45 (Bankr. S.D.N.Y. 1998)(holding since the debtor failed to prove independent tortious activity, the breach of contract claim was outside the exception of Section 523(a)(6)); *In re* Radcliffe, 317 B.R. 581 (Bankr. D. Conn. 2004)(debt for breach of promise to repay loan discharged absent proof of tortious conduct was not willful and malicious conduct); *In re* Picard, 339 B.R. 542 (Bankr. D. Conn. 2006).

[111] *See In re Picard*, 339 B.R. at 542.

[112] *See id*.

[113] *See* i*d.*

[114] *Id*. at 554.

[115] *Id*. at 555 (citing *In re* Saylor, 108 F.3d 219 (9th Cir. 1997); *In re* Riso, 978 F.2d 1151 (9th Cir. 1992); 238 F.3d 1202 (9th Cir. 2001)).

U.S. Bankruptcy Court for the Eastern District of Pennsylvania, in the Third Circuit, seemingly adopted the position of the Ninth and other Circuits requiring tortious activity to accompany a breach of contract in *In re Jacobs*.[116] Without specifically adopting the rule in *Jercich* (requiring an accompanying tort in order to qualify under § 523(a)(6)), the *Jacob* court opined that some limiting principle was necessary to keep § 523(a)(6) from being overbroad.[117] It was unsuccessfully argued in *Jacob* that a debt arising from a deliberate decision to breach a contract almost always falls within the *willful and malicious* category, since the breaching party in most cases is substantially certain the breach will cause an injury to the non-breaching party.[118] In dismissing this argument, the *Jacob* Court held that such a broad interpretation of § 523(a)(6) was not what Congress intended. Citing *Riso* and *Jercich,* the Court stated, "the most obvious limiting principle would be the requirement that the creditor's injury be caused by 'tortious' conduct, not by breach of contract."[119] They concluded that such a limitation would be consistent with the U.S. Supreme Court's decision in *Geiger*.[120]

In the Fourth Circuit, one of lower court cases clearly followed the Ninth Circuit in requiring an intentional tort, but another issued an ambiguous decision that could be interpreted as allowing a breach of contract alone to constitute willful and malicious conduct. In *In re Heilman*, the U.S. Bankruptcy Court for the District of Maryland held that breaches of contract do not constitute a willful and malicious injury unless the conduct is also an intentional tort, such as conversion.[121] The court stated, "A mere technical conversion does not fall within the scope of Section 523(a)(6) either. A wrongful and intentional deprivation of another's property is required. Furthermore, Section 523(a)(6) requires that the nondischargeable debt arise out of a tort as opposed to a breach of contract."[122]

The U.S. Bankruptcy Court for the Eastern District of Pennsylvania employed similar reasoning but was less clear in its holding in *In re Harland*.[123] In that case, the Plaintiff argued that its claims were nondischargeable under § 523(a)(6) because the debtor was found to have deliberately and willfully breached his employment contract and covenant

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[116] *In re* Jacobs, 381 B.R. 128 (Bankr. E.D. Penn. 2008).
[117] *See* i*d*.
[118] *See id*. at 138.
[119] *Id*.
[120] *Id*.
[121] *In re* Heilman, 241 B.R. 137 (Bankr. D. Md. 1999) (citing *In re* Riso 978 F.2d 1151 (9th Cir. 1992)).
[122] *Id*. at 172. The Court also cited older, pre-*Geiger* cases, such as: *In re* Haynes*,* 19 B.R. 849 (Bankr. E.D. Mich.1982); Barbachano v. Allen*,* 192 F.2d 836 (9th Cir.1951); *but see* Rivera v. Moore-McCormack Lines, Inc*.,* 238 F.Supp. 233 (S.D.N.Y.1965).
[123] *In re* Harland, 235 B.R. 769 (Bankr. E.D. Pa. 1999).

not to compete by misappropriating confidential business information. The court cited for the proposition that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.[124] Applying the *Geiger* holding to the facts of *Harland*, the Court concluded:

> [T]he Debtor clearly acted intentionally, and his actions clearly resulted in injury to the Plaintiff. However, by the very terms of State Court's findings, the Debtor's intent was focused entirely on maximizing his personal financial interests, not intentionally harming the Plaintiff. The injury which resulted flowed from the Debtor's breaches of his contract, but there is no finding that it actually was a goal of the scheme he pursued, as opposed to the goal of benefitting himself. We must therefore hold that the instant record is insufficient to support the Plaintiff's claims under § 523(a)(6).[125]

While the court found insufficient evidence of specific intent to harm in that case, it did not foreclose the possibility that a breach of contract could result in a nondischargeable debt. The court rested its decision on the lack of evidence of intent, rather than the type of injury present, implying that had the debtor possessed the requisite intent when he breached the contract, the injury could be considered willful and malicious.[126]

C. *Lower Courts In The Seventh Circuit – Tort Required To Be Willful and Malicious*

In *In re Salvino,* the U.S. District for the Northern District of Illinois (in the Seventh Circuit) has directly addressed the question of whether a "bare" breach of contract, without any accompanying tortious behavior, could constitute a willful and malicious injury under § 523(a)(6).[127] The *Salvino* case arose from the sale of a company, WISH Holding, LLC (hereafter "Old Wish"), which operated numerous bariatric surgery centers around the country.[128] The business was created in 1992 and financed with accounts receivables, real estate and a personal guarantee from Doctors Salvino, one of the principle physicians at the surgery centers.[129] In 2005, Old Wish

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[124] *Id*. at 779.
[125] *Id*.
[126] *Id*.
[127] *See In re* Salvino, 2008 WL 182241 (N.D. Ill. 2008).
[128] *See id*.
[129] *See id*.

defaulted on its loans, and in an effort to repay the bank, raised money from new investors who formed an entity called WISH Acquisition LLC. During negotiations between Old Wish and WISH Acquisition, Dr. Salvino signed a employment agreement that included a five year commitment to stay with the company. Old Wish filed a Chapter 11 Bankruptcy case to facilitate WISH Acquisition's purchase of assets, but before the filing, Dr. Salvino sought alternative employment in violation of his agreement. On July 14, 2005, the Bankruptcy Court approved the sale of Old Wish's assets and WISH Acquisition agreed to amend Salvino's employment agreement. The amended agreement required Salvino to commit to WISH Acquisition for five years, and in exchange released him from his remaining $1.5 million guarantee. The employment agreement also included a liquidated damages provision requiring Salvino to pay damages of $1.5 million if he terminated the contract during the first year, with declining damages for a breach each year thereafter. Within seven days of the closing on the final sale, Dr. Salvino sought employment at John C. Lincoln Hospital, where he ultimately accepted a full time position. Shortly thereafter, Dr. Salvino and his wife filed for Chapter 7 bankruptcy, seeking a discharge of his personal debts, including the liquidated damages from his agreement with WISH Acquisition. WISH Acquisition filed a complaint with the Bankruptcy Court seeking to declare Salvino's debt nondischargeable under § 523(a)(6).[130]

The U.S. Bankruptcy Judge issued a memorandum decision in which he found Salvino's debt dischargeable since the injury was created solely by a breach of contract with no accompanying tort. WISH Acquisition appealed the decision to the U.S. District Court for the Northern District of Illinois, without contesting the fact that its injury was the result of a breach of contract alone. In its opinion, the Court first noted that the Seventh Circuit had not addressed the issue directly since *Geiger*. The *Salvino* court then recognized the Circuit split between the Fifth Circuit (*In re Williams*) and the Ninth Circuit (*In re Jercich*) on the issue of whether tortious conduct is a requirement for § 523(a)(6). The district court concurred with the reasoning of the Bankruptcy Judge, holding that the better rule is the one requiring tortious conduct as an essential element of a *willful and malicious* injury. In so finding, the court adopted four basic reasons stated by the Bankruptcy Judge in his memorandum:

> (1) [T]he common application of "willful and malicious" strongly suggests its limitation to torts, making nondischargeable only debts arising from the same sort of conduct that the common law discourages by punitive damages; (2) the reenactment of the "willful and malicious injury" standard for nondischargeability

[130] *See id*.

> from the Bankruptcy Act of 1898 indicates Congress' presumptive intent to continue the established practice of limiting its application to tortious conduct; (3) the common law definition of "willful and malicious" applied by the Fifth Circuit, which encompasses not only actual intent to harm but also intentional acts that the debtor believes are substantially certain to cause harm, was not developed in connection with breach of contract, and when applied in the context of Section 523(a)(6) dramatically expands the number of nondischargeable debts and diminishes the scope of bankruptcy discharge; and (4) making intentional breaches of contract nondischargeable under § 523(a)(6) would create substantial tension with § 365(a) of the Bankruptcy Code, which authorizes a debtor to intentionally breach a contract if doing so will maximize the value of the debtor's property.[131]

For these reasons and to preserve the integrity of the bankruptcy discharge, the court held unequivocally that tortious conduct is an essential element of a willful and malicious injury under § 523(a)(6). It remains to be seen whether the Seventh Circuit, and others, follow *Salvino* in an effort to unify this rule.

VII. ANALYSIS – WHY THE CIRCUITS SHOULD REQUIRE TORTIOUS BEHAVIOR IN ADDITION TO A BREACH OF CONTRACT UNDER SECTION 523(A)(6)

Section 523(a)(6) and *Geiger* should be interpreted to require tortious behavior in addition to a breach of contract to be considered a *willful and malicious* injury. This reasoning (1) is more consistent with statutory construction, (2) promotes uniformity and efficiency, and (3) prevents an unwise merger between what constitutes a tort versus a breach of contract.

A. *Statutory Construction*

The most persuasive reason for adopting the tort requirement for § 523(a)(6) is that it is more consistent with traditional statutory interpretation methods. As the Supreme Court in *Geiger* pointed out, the phrase "willful and malicious injury…triggers in the lawyer's mind the category of intentional torts."[132] The use of the terms *willful* and *malicious* in the law generally connotes a level of reprehensibility of conduct that points to, at a

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[131] *Id*. at 10-11.
[132] Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998).

minimum, tortious behavior. In fact, the term malicious is often associated in the civil law with a high degree of reprehensibility and is used often in conjunction with the assessment of punitive damages. The Bankruptcy Judge in *Salvino* cited the venerable treatise Prosser on Torts to describe this recognized meaning:

> Something more than mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice', or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interest of others that his conduct may be called willful or wanton.[133]

Further, placing this in a historical context, the phrase *willful and malicious* indicates a desire to include not only intentional tortious conduct, but that which is so wrongful, it must be deterred.[134] The same motive is not applicable in the contract arena however. Generally, the motive behind a breach of contract is irrelevant, given that punitive damages are not generally

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[133] *In re* Salvino, 2007 WL 2028577 (Bankr. N.D. Ill. 2007) *citing* William Prosser, *The Law of Torts* Section 2 at 9-10 (4th ed. 1971).

[134] *See* Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd., 277 F.3d 936 (7th Cir. 2002) (Punitive damages…may be awarded where torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others); Nakajima v. General Motors Corp., 857 F.Supp. 100 (D.D.C. 1994) (Punitive damages are not favored under District of Columbia law; they may be awarded only if plaintiffs prove, by at least preponderance of evidence, that defendant's conduct is willful and outrageous, exhibits recklessness and willful disregard of the rights of others, or is aggravated by evil motive, actual malice, or deliberate violence or oppression); T & S Serv. Assocs., Inc. v. Crenson, 505 F.Supp. 938 (D.R.I., 1981) (A plaintiff seeking punitive damages under law of Rhode Island must demonstrate that defendant has acted with malice, wantonness or willfulness of such an extreme nature as to amount to criminality which, for good of society and warning to individual, ought to be punished); Northern v. McGraw-Edison Co., 542 F.2d 1336 (8th Cir. 1976) (In Missouri, punitive damages are awarded for the purpose of punishing the wrongdoer and to serve as an example and deterrent to others engaging in similar conduct in the future; punitive damages are allowed only when there is a finding of legal malice); Wegner v. Rodeo Cowboys Ass'n., 290 F.Supp. 369 (D.Colo., 1968) (Exemplary damages are awarded for purpose of punishing persons who have inflicted injuries with malice); Williams v. Jader Fuel Co., Inc., 944 F.2d 1388 (7th Cir. 1991) (Illinois courts take dim view of punitive damages, and insist that plaintiff seeking them demonstrate extraordinary or exceptional circumstances clearly showing malice or willfulness); Oros v. Hull & Assocs., Inc., 302 F.Supp.2d 839 (N.D. Ohio. 2004) (Party seeking punitive damages must establish that the offending party acted with actual malice); West Des Moines State Bank v. Hawkeye Bancorporation, 722 F.2d 411 (8th Cir. 1983) (Under Iowa law, award of punitive damages is designed to deter and punish, and should be made only upon finding of either actual or legal malice); Morse v. Duncan, 14 F. 396 (C.C.S.D.Miss., 1882) (In the absence of gross negligence, recklessness, willfulness, malice, insult, or inhumanity, actual damages can only be allowed).

available.[135] Thus, to interpret the *willful and malicious* language of § 523(a)(6) as including a breach of contract, even when committed to cause a specific injury to the non-breaching party, without an accompanying tort, would be inconsistent with its historical meaning.

Another reason mentioned in *Salvino* for adopting the tort requirement under Bankruptcy Code § 523(a)(6) is that the legislative history supports such an interpretation.[136] As discussed in Section II above, the sections of the Code relating to exceptions to discharge have been amended repeatedlysince their inclusion in the Bankruptcy Act of 1898. Prior to the *Geiger* case, and prior to the latest amendment to § 523(a)(6) of the Code, the *willful and malicious* exception has always been synonymous with tortious conduct.[137] Moreover, the legislative history of the 1978 amendment of the Bankruptcy Code suggests Congress intended to overrule an interpretation that a debt could be non-dischargeable even if the debtor did not specifically intend the injury.[138] Nothing in the legislative history, however, indicated a Congressional intent to change the application of the *willful and malicious* standard to suddenly include conduct that does not involve the commission of a tort. Neither the Fifth nor the Tenth Circuit indicated in their decisions, *Williams* and *Sanders* respectively any reason to alter the historical interpretation that a breach of contract must be accompanied by tortious behavior or intentional infliction of harm to be non-dischargeable.

B. *Uniformity And Efficiency*

Allowing a bare breach of contract to be included in the willful and malicious injury language of § 523(a)(6) could cause the bankruptcy courts to be flooded with claims and litigation. The term *willful and malicious* has been defined by the Supreme Court in *Geiger*, and restated in subsequent decisions. *Geiger* establishes that § 523(a)(6) applies to acts committed with the actual intent to cause injury, but excludes intentional acts that cause injury.[139] Broken down further, the term *willful* modifies the word *injury*,

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[135] In general, motive is irrelevant to a breach of contract claim. *See* Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903) (The motive for the breach commonly is immaterial in an action on the contract.); Koufakis v. Carvel, 425 F.2d 892, 906 (2d Cir.1970) (A breach is a breach; it is of marginal relevance what motivations led to it.); Weiskopf v. Am. Kennel Club, Inc., NO. 00-CV-471, 2002 WL 1303022, at *6 n. 1 (E.D. N.Y. 2002) (motive irrelevant to claim of breach of contract).

[136] *See In re Salvino*, 2007 WL 2028577 at *8.

[137] *See In re* Haynes, 19 B.R. 849 (Bankr. E.D. Mich. 1982) ("Moreover, any realistic reading of the discharge and dischargeability provisions of the Code clearly establishes that the Section 523(a)(6) exception, like section 17(a)(8) from which it is derived, was not intended to make non-dischargeable debts arising from mere breach of contract.").

[138] *See In re Salvino,* 2007 WL 2028577 at *8.

[139] *Geiger*, 523 U.S. at 59.

indicating that non-dischargeability requires a deliberate or intentional injury, not simply an intentional act that happens to cause an injury.[140] The term *malice* was not directly defined in *Geiger*, but subsequent courts have allowed an implied malice standard to suffice under § 523(a)(6).[141] The Restatement (Second) of Torts defines the willful and malicious standard as, "if the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."[142] Similarly, the Fifth Circuit held the intent to injure under § 523(a)(6) requires only, "a showing that the debtor intentionally took action that necessarily caused, or was substantially certain to cause, the injury."[143] This definition allows malice to be implied to circumstances where the debtor does not overtly exhibit an intent to cause injury, but that such intent may be implied from his/her actions.

If the courts allow a willful and malicious injury to be established by showing that a debtor was *substantially certain* that an injury would occur as a result of a breach of contract, the proverbial floodgates would be opened to litigation on the issue. Logically, it could be argued that nearly all breaches of contract could constitute *willful and malicious* injuries. Every breach of a contractual obligation to pay for goods or services (e.g., non-payment of rent, default on credit card debt, or mortgage debt, failure to pay medical bills), as long as non-payment is intentional, is substantially certain to cause an injury to the non-breaching party.[144] Almost every debt incurred is contractual (from credit cards to unsecured bank loans) and every debtor foresees that non-payment will financially harm the creditor. If this means every debt could conceivable be non-dischargeable, the exception swallows the rule. The Supreme Court recognized this hazard in *Geiger*, when it held, "A knowing breach of contract could also qualify. A construction so broad would be incompatible with the 'well known' guide that exceptions to discharge should be confined to those plainly expressed."[145] The result of allowing an intentional breach of contract, under the implied malice standard, to constitute a willful and malicious injury would be to increase the amount of litigation, decrease the efficiency of the Bankruptcy system and significantly dilute the effect of the bankruptcy discharge.

Additionally, allowing intentional breaches of contract without any accompanying tortious activity to constitute willful and malicious injuries under § 523(a)(6) would create inconsistencies within the Bankruptcy Code.

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[140] *See id*.
[141] *See In re Williams,* 337 F.3d at 509; *see also, Walker*, 142 F.3d at 823.
[142] RESTATEMENT (SECOND) OF TORTS, Sec. 8A, Comment b (1965).
[143] *See In re Williams*, 337 F.3d at 509.
[144] *See In re Salvino*, 2007 WL 2028577 at *8.
[145] *Geiger*, 523 U.S. at 62.

Section 365(a) of the Code allows a debtor to reject executory contracts that are not in the best interest of the bankruptcy estate.[146] *Salvino* recognized this inconsistency noting,

> [T]he rejection of an executory contract is a breach, always intentional, that will almost certainly harm the other party (since a contract burdensome to the estate is likely beneficial to that party). Thus, if Section 523(a)(6) applied to contract, the Code would punish under that provision the very conduct it encourages under Section 365(a).[147]

To maintain consistency, uniformity and certainty, any interpretation that puts two portions of the same law at odds should not be accepted.

C. *Unwise Merger of Contract And Tort*

The final reason the Fifth and Tenth Circuits' interpretation of § 523(a)(6) should be rejected is that it represents a step toward the elimination of the distinction between contracts and torts. Allowing a breach of contract to constitute a *willful and malicious* injury, a status previously reserved for torts only, represents a shift in the legal division of the two areas of law. Contract actions are created to enforce the intentions of the parties to an agreement, whereas tort law is primarily designed to enforce public policy.[148] When we begin to allow parties with a contract claim to access the remedies or utilize attributes exclusive to torts, then the distinctions between tort and contract become meaningless and the purposes behind the distinctions are thwarted. According to some, it is happening already, not just in the area of Bankruptcy, but in all areas of business litigation. More and more, when attorneys file a claim for a breach of contract, they will include a negligence and/or fraud claim arising out of the non-performance of the contract in order to attempt to access the additional tort remedies. Courts are faced with an intentional blurring of the two causes of action into one "contort" claim, described as the "nebulous and troublesome region where tort and contract law intersect and where finding the dividing line between the two fields is often difficult."[149]

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[146] 11 U.S.C. § 365(a) (1978).
[147] *In re Salvino*, 2007 WL 2028577 at *9.
[148] *See* Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454 (Cal. 1994); *See also* Foley v. Interactive Data Corp., 47 Cal.3d 654 (1988).
[149] Christopher W. Arledge, *When Does a Breach of Contract Also Give Rise To a Tort Claim? A Primer for Practitioners*, 48 ORANGE COUNTY LAWYER 42 (2006).

Some courts are willing to entertain a blurring of the distinction between contract and tort in order to access tort remedies (e.g., economic and punitive damages) to attempt to vindicate a sympathetic plaintiff. This is nothing new, as courts have always been sympathetic to victims of intentional breaches of contract, especially when the facts are egregious. Perhaps it was even this phenomenon that gave rise to the law school axiom, "bad facts make bad law."

It seems wise, however, for courts to resist the temptation to punish the breaching party in a contract dispute for his/her motives for the breach. The goal of contract remedies has always been to compensate the innocent party for the breach, rather than compel the promisor to perform.[150] A contract creates reciprocal, private duties for its parties. Freedom of contract allows the parties themselves to negotiate the rules and conditions that will give rise to and govern their legal obligations. The parties are able to negotiate their exposure to potential liability and take on only those risks they deem acceptable. It follows that contract actions enforce the parties' intentions and private, bargained-for obligations, whereas tort actions are designed to compensate the victim for all his/her injuries based on enforcement of a social duty. There is typically little ability to negotiate the terms and application of a social duty prior to acting.

Basic concepts of *fairness* would dictate that contract remedies should be confined to those damages within the contemplation of the parties. The California Supreme Court explained that limited contract damages, "serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of the enterprise."[151] Confusing the potential liability to contractual parties by combining tort and contract remedies works to undermine the basic and recognized common law goals of contract remedies.

The bottom line is that a breakdown in the distinction between contract and tort would serve to increase risk in contracts, creating higher transaction costs, less efficiency and could create a chilling effect on contract creation. Although allowing a breach of contract to join tortious conduct in creating a *willful and malicious* injury under Bankruptcy Code § 523(a)(6) will not, by itself, eliminate all distinctions between contracts and torts, it is a step down the slippery slope of that direction.

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[150] *See generally* William S. Dodge, *The Case for Punitive Damages in Contracts,* 48 DUKE L.J. 629, 630 (1999).

[151] Erlich v. Menezes, 981 P.2d 978, 982 (Cal. 1999).

VIII. CONCLUSION

While the U.S. Supreme Court's opinion in *Kawaauhau v. Geiger* may have cleared up some confusion as to the definition of the terms *willful and malicious* under Bankruptcy Code § 523(a)(6), its language may have actually created more uncertainty concerning the application of the same terms in matters of contract. As specifically noted above, two appellate courts (the Fifth and Tenth Circuits) have interpreted *Geiger* to mean that a breach of contract alone can be willful and malicious if the debtor intends to cause injury or is substantially certain that an injury will result to the nonbreaching party. Two other circuits—and nearly all other reported cases on this issue from lower courts in the remaining circuits—disagree, holding separate tortious conduct must accompany the breach to make it nondischargeable. The latter seems to be the more logical, practical, and theoretically consistent rule. Section 523(a)(6) and *Geiger* should be interpreted to require tortious behavior in addition to a breach of contract in order to be considered a *willful and malicious* injury.

I SEE WHAT YOU DID THERE: THE USE OF SOCIAL NETWORKS TO GATHER EVIDENCE

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I. INTRODUCTION

A prompt and thorough factual investigation is key to successfully prosecuting or defending a claim. Indeed, such an investigation can bring clarity to confounding events and contradictory testimony and thereby prevent claims from ripening into lawsuits at all. It is always important to frame the investigation broadly as a proper investigation examines more than the actions of the injured party (*i.e.,* the potential plaintiff). It is also important to consider others whose actions played a role in the events—that is to say, others who may be held in part responsible for the damages incurred.

In addition, while conducting the investigation, it is important to avoid becoming caught up in the issue of the admissibility of evidence. During a thorough investigation, exploring inadmissible evidence, such as hearsay, may lead to other relevant and admissible facts. Thus, it is important to be mindful of admissibility issues, but not feel constrained by them in the early stages of investigation. One should also be mindful of any documents created or statements taken during the investigation given their potential evidentiary implications. For instance, consider whether the documents and statements will ultimately have to be produced to the plaintiff, or whether the documents and statements can be protected as work product prepared in anticipation of litigation.

Social networking sites have created a treasure of opportunities when it comes to investigations. Individuals seem to take on a more carefree persona online, and this relaxed atmosphere can provide the details an investigator might need to prevail in any suit. Along with these fertile new hunting grounds comes some uncertainty as courts struggle to apply outdated rules of evidence to information obtained through social media.

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II. SOCIAL NETWORKING SITES

Social networking sites offer a wealth of readily available information—without the necessity of hiring a private investigator. A social network site is a web-based service that allows individuals to (1) construct public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others in the system.[1] Social networking sites may contain a plethora of information and, potentially, an abundance of incriminating, exculpating, impeaching, and mitigating evidence.

For instance, a MySpace page contains descriptions of the owner's recent activities, work history, education background, current and former relationships, and even thoughts on current events, including, perhaps, the accident in question or pending claims. MySpace pages may also include photographs, videos, and the names of potential witnesses. Likewise, an examination of an individual's Twitter account can tell you what the owner has recently said, who *follows* the owner, who the owner is following, and it may include comments from third parties.

Another good (or bad) thing about social networks is that friends or acquaintances of the page's owner may freely post information regarding others, including photos, videos, and comments. Thus, when a search of the intended user's posts and photos reveals little of interest, it is often fruitful to search the intended user's friends' posts and photos as well.

Social networking web sites have aptly been described as follows:

> In a bygone era, members of a community would gather at the local soda fountain to "chew the fat"—discuss matters of local politics, share the latest gossip, or complain about the weather. These days, millions of people are engaged in the same conversations not over root beer floats at soda fountains, but over keyboards in online communities known as social-networking web sites.[2]

At a fundamental level, social-networking sites are online networks of individuals linked through personalized Internet web pages. These web sites typically allow users to customize their own personal web pages (often known as *profiles*), post photographs or videos, add music, or write a journal or blog that is published to the online world. Social-networking sites also facilitate interpersonal communications through email systems that allow

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[1] Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 210 (2008).

[2] John S. Wilson, *Myspace, Your Space, Or Our Space? New Frontiers In Electronic Evidence*, 86 OR. L. REV. 1201, 1219 (2007).

users to exchange messages. These web sites allow users to compile lists of *friends* who are *ostensibly* part of one's social network. Users may also create and join groups based on common interests, such as Oregon Duck Fans or Alaskan Malamute Owners. The emergence of these popular services is the result of ingenuity, slick marketing, and tapping into our society's intense interest in customization.[3]

Consider the damage to a personal injury case if the defendant introduces into evidence at trial a video, procured from the plaintiff's Facebook profile, of the personal-injury plaintiff slam dunking a basketball. Consider if the video was filmed and posted days after the alleged incident. Similarly, consider the potential exposure of a professional who misrepresents his education and employment history on Twitter or a defendant's admission of guilt in a MySpace message.

Even if information on these sites is discoverable, lawyers may encounter evidentiary issues involving privacy concerns and authentication that could keep the information out of a courtroom. For example, it is possible that one could create a Facebook profile in another person's name and use that account to send incriminating messages. There also is the issue of whether content that has been modified or removed from a profile during the course of litigation constitutes spoliation of evidence.

Since these and other social networking sites are being developed faster than regulations on the discoverability of electronic information can be enacted, courts may need to broaden the scope of evidentiary principles applicable to this technology. Below are brief descriptions of some of the prominent social networking sites that are potentially most relevant to pre-suit claims investigation.

A. *Types of Social Networking Sites*

1. Facebook (www.facebook.com)

Facebook currently boasts over 845 million active monthly users worldwide, and is ranked as the most used social networking site worldwide.[4] On Facebook, users can add people as *friends*, send messages, and update personal profiles. Facebook users can create profiles containing photos, lists of personal interests, contact information, and other personal information.

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[3] *Id.* at 1221.

[4] *Fact Sheet*, FACEBOOK, http://newsroom.fb.com/content/default.aspx?NewsAreaId=22 (last visited March 4, 2012). For reference, the population of the United States is approximately three hundred and eight million as of April 2010 (U.S. CENSUS BUREAU, Population Estimates: National Totals: Vintage 2011 (April 1, 2011), http://www.census.gov/popest/data/national/totals/2011/index.html.

Communicating with friends and other users can be done through private or public messages as well as a chat feature.

Fifty percent of Facebook's active users log on to Facebook in any given day.[5] On average, each user has one hundred and thirty friends, is connected to eighty community pages, groups and events, and creates ninety pieces of content each month.[6] Facebook includes over nine-hundred million objects that people interact with (pages, groups, events and community pages), and, in total, more than thirty billion pieces of content (web links, news stories, blog posts, notes, photo albums, etc.) are shared on Facebook each month.[7]

One of the most popular applications on Facebook is the *photos* application, where users can post electronic photo albums. On October 14, 2008, Facebook announced that its users had posted a milestone 10 billion photos on the site, with two – three terabytes of photos uploaded to the site every day.[8] Currently, Facebook allows users to upload an unlimited number of photos. Privacy settings can be set for individual photo albums, potentially limiting the users that can see an album. For example, privacy settings on one photo album can be set so only the user's friends can view the album, while the privacy settings of another album can be set so that all Facebook users can view the photos. Another feature of the Facebook *photos* application is the ability to *tag*, or label users in a posted photo. For instance, if a photo contains a user's friend, the user can tag the friend in the photo. This tag sends a notification to the friend that they have been tagged, and can put a link to the photo on the friend's profile.

Access to Facebook has become easier with the advent of *smart phones* (mobile phones that offer computing ability and internet connectivity). There are more than two-hundred million active users currently accessing Facebook through their mobile devices, which provide instant connectivity and the ability to update a user's status in real time.[9] People that use Facebook on their mobile devices are twice as active on Facebook than non-mobile users.[10] As a result of this readily available access, Facebook has become an extension of many people's private lives, and stories that were once shared

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[5] http://www.facebook.com/press/info.php?statistics (last visited April 12, 2011)
[6] *Id.*
[7] *Id.*
[8] Doug Beaver, *10 Billion Photos*, FACEBOOK (Oct. 14, 2008, 8:03 PM), http://www.facebook.com/note.php?note_id=30695603919 (A terabyte is 1024 gigabytes). Additionally, Facebook announced on April 9, 2012 that it acquired Instagram, a photo-sharing application with an additional twenty seven million users. http://www.facebook.com/zuck/posts/10100318398827991.
[9] *Id.*
[10] *Id.*

confidentially through telephone calls and social gatherings are now memorialized publicly, with little regard for the potential consequences.[11]

2. MySpace (www.myspace.com)

MySpace works in much the same way as Facebook and is currently second in the number of subscribers. MySpace profiles contain a blog with standard fields for content, emotion, and media. MySpace also supports uploading images and includes an instant messenger application.

3. LinkedIn (www.linkedin.com)

LinkedIn has been touted as a social network for professionals. As such, it is arguably the most popular networking site for business professionals.[12] As with the aforementioned networks, LinkedIn is based on contacting others through searches.

4. Twitter (www.twitter.com)

As of February 2009, Twitter was the fastest growing social networking website.[13] Twitter users are recording an average of one hundred fifty-five million tweets a day.[14] Twitter offers a social networking and microblogging service that enables users to send and read other users' messages called *tweets*. Tweets are text-based posts of up to one hundred and forty characters displayed on the user's profile page that can posted through three methods: web form, text message, or instant message.

Twitter allows registered users to *tweet* or to *follow* other users by subscribing to a user's tweets, which does not require the followed users'

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[11] Albert L. Wysocki*, Think Before Posting*, FINDLAW KNOWLEDGEBASE (July 1, 2007), http://knowledgebase.findlaw.com/kb/2009/Jul/1255869_1.html.

[12] Over 150 million professionals are reported to use LinkedIn to exchange information, ideas and opportunities. http://www.linkedin.comlast visited April 30, 2012).

[13] "From February 2008 to February 2009, [Twitter] clocked in at a whopping 1,382 percent growth rate." Twitter, which counts the 35-to-49 age demographic as its largest, may be growing even faster. "'PC Web usage of Twitter.com doesn't tell the whole story,' the post by Nielsen Online's Michelle McGiboney read. 'The ability to (use) Twitter via a mobile phone--whether through the mobile Web or via text messages--is a driving factor in the social network's success. In January [2009], 735,000 unique visitors accessed the Twitter Web site through their mobile phones. The average unique visitor went to Twitter.com 14 times during the month and spent an average of seven minutes on the site.'" Caroline McCarthy, *Nielsen: Twitter's Growing Really, Really, Really, Really, Fast*, CNET (Mar. 19, 2009), http://news.cnet.com/8301-13577_3-10200161-36.html.

[14] MG Siegler, *Twitter Tweets Some Big Q1 Stats; 155 Million Tweets a Day Now*, TECH CRUNCH (Apr. 6, 2011), //techcrunch.com/2011/04/06/twitter-q1-stats/.

approval. A tweeter can subsequently *block* followers, which is actually of little practical value because most Twitter feeds are viewable to the public.

Tweets are publicly visible by default, and are visible on the user's profile page and delivered to other users who have signed up to receive them. Users can make tweets private, although Tweeters rarely use the *private account* option, which makes tweets viewable only to one's followers.[15]

5. YouTube (www.youtube.com)

YouTube was created in February 2005 as a video sharing website.[16] This site allows users to upload and share videos in a public forum. Visitors to the site can view, upload, download, and copy videos. Content on YouTube includes television shows, movie clips, music, and amateur videos.

More than sixty hours of video are uploaded every minute.[17] That means that more video is uploaded to YouTube each month than the three major US networks created in sixty years.[18] YouTube's demographic is broader than one might think, reportedly: eighteen to fifty-four years-old.[19]

6. Match (www.Match.com) and eHarmony (www.eharmony.com)

Match.com and eHarmony.com are online dating sites that maintain profiles for users and include chat rooms and other communication avenues. Match.com reportedly has more than twenty million members.[20] eHarmony claims a similar number of users.[21]

7. Flickr (www.flickr.com) [Photobucket.com and Picasa.google.com]

Flickr is an image and video hosting website and online community that is a popular website where users share and embed personal photographs. It adds a palette of features that make images easier to share, which makes the service widely used by bloggers to host images they embed in blogs and

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[15] Search Twitter at http://search.twitter.com/advanced.
[16] Jim Hopkins*, Surprise! There's a Third YouTube Co-founder,* USA TODAY (Oct. 11, 2006), http://www.usatoday.com/tech/news/2006-10-11-youtube-karim_x.htm.
[17] *Statistics*, YOUTUBE, http://www.youtube.com/t/press_statistics (last visited Mar. 4, 2012).
[18] *Id*
[19] http://www.youtube.com/advertise/demographics.html, citing Nielson NetView Audience Profile Report, May, 2011
[20] *Match.com*, FACEBOOK, http://www.facebook.com/pages/Matchcom/108141532541403 (last visited Apr. 12, 2011).
[21] Tomio Geron, *The $100M Revenue Club: EHarmony Captures Hearts Of VCs"*, WALL ST. J. (July 12, 2010), http://blogs.wsj.com/venturecapital/2010/07/12/the-100m-revenue-club-eharmony-captures-hearts-of-vcs/.

social media.[22] In September 2010, Flickr reported it was hosting more than five billion images, with three thousand new uploads occurring each minute.[23] PhotoBucket and Picasa are similar photo storage sites.[24]

8. Weblogs (or "Blogs")

Blogs are regular entries of commentary, descriptions of events, or other material such as graphics and videos, and have been aptly described as follows: "A blog is a personal diary. A daily pulpit. A collaborative space. A political soapbox. A breaking-news outlet. A collection of links. Your own private thoughts. Memos to the world."[25] Entries are commonly displayed in reverse-chronological order. A typical blog combines text, images, and links to other blogs, web pages, and media related to its topic.[26] The ability of readers to leave comments and message each other in an interactive format is an important part of many blogs.[27]

B. *Examples of the Real-Life Legal Consequences of Imprudent Social Networking Posts in Various Contexts*

1. Criminal Law

Law enforcement officials and prosecutors are increasingly paying attention to Facebook accounts and other social networking sites as part of their investigations.[28] Erika Scoliere was a twenty-year-old charged in a fatal DUI crash, and was out on bond awaiting trial after a July 2007 collision left a motorcyclist dead.[29] A condition of her release on bail was that she not

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[22] Daniel Terdiman, *Photo Site a Hit With Bloggers*, WIRED (Dec. 9, 2004), http://www.wired.com/culture/lifestyle/news/2004/12/65958.
[23] *5,000,000,000*, FLICKR (Sept. 19, 2010), http://blog.flickr.net/en/2010/09/19/5000000000/.
[24] Photobucket and Flickr are reported to have around 6.2 billion and 2 billion photos on them, respectively. Dave Parrack, *Facebook holds 10 billion photos – beating Photobucket and Flickr*, TECH.BLORGE (Oct. 16, 2008), http://tech.blorge.com/Structure:%20/2008/10/16/facebook-holds-10-billion-photos-beating-photobucket-and-flickr/.
[25] *What is a Blog?*, BLOGGER, http://www.blogger.com/tour_start.g (last visited April 2, 2011).
[26] *Blog*, WIKIPEDIA, http://en.wikipedia.org/wiki/Blog (last Visited April 12,2011).
[27] *Blogging and Microblogging*, SOCIAL BY SOCIAL, http://www.socialbysocial.com/book/blogging-and-microblogging (last visited April 12, 2011); To look for Blogs, general-purpose search engines may be of assistance. Check these sites: http://blogsearch.google.com, http://technorati.com, and www. blogpulse.com, which claim to track more than one hundred and fifty million blogs.
[28] Wysocki*, supra* note 11.
[29] *Id.*; *See also Update: Photos lead to monitoring,* CHI. TRIB. (June 05, 2009), http://articles.chicagotribune.com/2009-06-05/news/0906050189_1_alcohol-monitoring-drinking.

consume alcohol or be around people who were drinking, however prosecutors became aware of photos on Facebook showing Erika at a party drinking tequila.[30] During her bail violation hearing, Judge Thomas Mueller of Kane County, Illinois, leafed through Facebook printouts entered into evidence by the prosecutor. "It appears the defendant is having a grand old time drinking tequila," noted the Judge on the record.[31] "'Erika passed out in my bed. Ha Ha,'" the judge said, quoting one of the captions.[32] Erika was ordered to wear a Secure Continuous Remote Alcohol Monitor for the duration of her bail as a result of the hearing.[33] Similar scenarios play out everyday in the court system.

Photos aren't the only method by which unsuspecting posters get themselves into trouble on Facebook. Stories of arrests based upon threats made on Facebook are commonplace news stories. A Facebook event posting led to the arrest of half a dozen twelve and thirteen year-old girls in Carson City, Nevada.[34] "Attack a Teacher Day" was scheduled for January 7, 2011, according to an invite that went out to about 100 students.[35] In December, 2010, a twenty-five year-old Washington D.C. area man was arrested after threatening on his Facebook page that he could put pipe bombs on Metro cars or in Georgetown at rush hour.[36] A Baltimore construction worker was charged in December, 2010 with plotting to blow up a military recruiting station in Maryland after the FBI learned of his radical leanings on Facebook, joined his plot, and supplied him with a fake car bomb that he tried to detonate.[37] These types of scenarios have become all too common.

2. Family Law

A Wisconsin man also learned the hard way that it is unwise to post incriminating photos on Facebook. Dane County Sheriff's deputies arrested twenty year-old Cody J. Redenius after his ex-girlfriend reported that she had viewed a photo of Redenius on Facebook where he is seen holding a

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[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Maria Gold, *Va. man allegedly used Facebook to threaten D.C. area bombings,* WASH. POST (Dec. 14, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/14/AR2010121406829.html.
[37] Maria Gold, *Baltimore man accused of plotting to blow up military recruiting station in Md.,* WASH. POST (Dec. 9, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/08/AR2010120807514.html.

shotgun.[38] At the time, Redenius was under a Domestic Abuse Injunction that forbid him from being in possession of a firearm.[39]

A recent study by the American Academy of Matrimonial Lawyers revealed that eighty-one percent of the divorce attorneys noted an increase in the past five years of the number of cases where social networking sites were used as evidence.[40]

3. Employment Law

Massachusetts high school teacher June Talvitie-Siple paid the price for an unwise Facebook post about the students and parents in her community. Talvitie-Siple, a supervisor of the high school math and science program in Cohasset, Massachusetts, was forced to resign in August, 2010 after parents spotted Facebook comments she wrote describing students as "germ bags" and parents as "snobby" and "arrogant."[41] Similarly, the *Charlotte Observer* reported in May, 2010, that a local waitress lost her job after an unwise post about customers she had served earlier in the day. [42]

C. *Relevant Case Law*

1. New York

In *Romano v. Steelcase Inc.*, the plaintiff claimed she sustained permanent injuries as a result of an accident.[43] The plaintiff claimed she could no longer participate in certain activities due to her injuries and said that her injuries effected her enjoyment of life.[44] However, contrary to plaintiff's claims, the defendant discovered that public portions of the plaintiff's MySpace and Facebook pages revealed she had an active lifestyle after the accident, even traveling to Florida and Pennsylvania during the time

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[38] Wysocki, *supra* note 11; *see also Facebook Photo Leads to Arrest*, NBC15.COM (May 29, 2009), http://www.nbc15.com/home/headlines/46472692.html.
[39] *Id.*
[40] *Facebook Status Can Pose Problem in Divorce Court*, GASTON GAZETTE (July 25, 2010), http://www.gastongazette.com/articles/status-49303-facebook-social.html.
[41] Ki Mae Heussner & Dalia Fahmy, *Teacher Loses Job After Commenting About Students, Parents on Facebook*, ABC NEWS (Aug. 19,2010), http://abcnews.go.com/Technology/facebook-firing-teacher-loses-job-commenting-students-parents/story?id=11437248 (last visited April 12, 2011).
[42] Eric Frasier*, Facebook Post Costs Waitress Her Job,* CHARLOTTE OBSERVER (May 17, 2010), http://www.charlotteobserver.com/2010/05/17/1440447/facebook-post-costs-waitress-her.html.
[43] No. 3703242, slip op. 20388 (N.Y. Sup. Ct. Sept. 21, 2010).
[44] *Id.* at *2.

period she claimed her injuries prohibited any such activity.[45] In light of this information, the defendant sought to question the plaintiff at her deposition regarding her MySpace and Facebook accounts, to no avail.[46] Following the deposition, the defendant served plaintiff with a Notice for Discovery & Inspection requesting "full access to and copies of plaintiff's current and historical records/information on her Facebook and MySpace accounts."[47] However, the plaintiff refused to provide the requested information so the defendant sought the court's intervention. The court held that:

> The information sought by Defendant regarding Plaintiff's Facebook and MySpace accounts is both material and necessary to the defense of this action and/or could lead to admissible evidence. In this regard, it appears that Plaintiff's public profile page on Facebook shows her smiling happily in a photograph outside the confines of her home despite her claim that she has sustained permanent injuries and is largely confined to her house and bed. In light of the fact that the public portions of Plaintiff's social networking sites contain material that is contrary to her claims and deposition testimony, there is a reasonable likelihood that the private portions of her sites may contain further evidence such as information with regard to her activities and enjoyment of life, all of which are material and relevant to the defense of this action. Preventing Defendant from accessing Plaintiff's private postings on Facebook and MySpace would be in direct contravention to the liberal disclosure policy in New York State. … Thus, it is reasonable to infer from the limited postings on Plaintiff's public Facebook and MySpace profile pages that her private pages may contain materials and information that are relevant to her claims or that may lead to the disclosure of admissible evidence. To deny Defendant an opportunity access to these sites not only would go against the liberal discovery policies of New York favoring pre-trial disclosure, but would condone Plaintiff's attempt to hide relevant information behind self-regulated privacy settings. … The defense is entitled to obtain plaintiff's private information regardless of whether it is in a photo album at home or in cyberspace, which is where most people now store their photos.[48]

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[45] *Id.*
[46] *Id.*
[47] *Id.* at 3.
[48] *Id.* at 2.

In response to the plaintiff's argument that she had a Fourth Amendment right to privacy in her Facebook and MySpace entries, the court held that production of the plaintiff's entries on her Facebook and MySpace accounts would not violate her right to privacy, noting that one does not have a reasonable expectation of privacy in e-mails and other writings that have been shared with others, including entries on Facebook and MySpace.[49] In addition, the court noted that any privacy concerns were outweighed by the defendant's need for the information.[50]

Finally, the court agreed with Defendant that when plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings.[51] Quoting the Facebook website as it existed in November 26, 2008, the court found noteworthy the following notice:

> [w]hen you use Facebook, certain information you post or share with third parties (e.g., a friend or someone in your network), such as personal information, comments, messages, photos, videos . . . may be shared with others in accordance with the privacy settings you select. All such sharing of information is done at your own risk. Please keep in mind that if you disclose personal information in your profile or when posting comments, messages, photos, videos, Marketplace listing or other items, this information may become publicly available.[52]

The Second Circuit, in *United States v. Lifshitz*, has also considered whether one has a reasonable expectation of privacy in Internet postings or e-mails that have reached their recipients.[53] In *Lifshitz*, although noting that individuals generally possess a reasonable expectation of privacy in their home computers, the court held that individuals do not enjoy such an expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient:

> Users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting. They would lose a legitimate expectation of privacy in an e-mail that had already reached its recipient; at this moment, the e-mailer would be

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[49] *Id.* at 5-6.
[50] *Id.*
[51] *Id.* at 5.
[52] *Id.*
[53] 369 F.3d 173, 190 (2nd Cir. 2004).

> analogous to a letter-writer whose expectation of privacy ordinarily terminates upon delivery of the letter.[54]

2. New Jersey

Whether one has a reasonable expectation of privacy in e-mails and other writings shared with others, including entries on Facebook and MySpace, has been addressed by the United States District Court of New Jersey. In this instance the court ordered social networking entries to be produced.[55] In so holding, the court stated "[t]he privacy concerns are far less where the beneficiary herself chose to disclose the information."[56] As to the entries that had not been shared with others, the court held that they were to be preserved and did not need to be produced. At issue in *Beye* were on-line journals and diary entries of minor children who had been denied health care benefits for their eating disorders.

Judges themselves apparently utilize Facebook in legal proceedings. In *Purvis v. Commissioner of Social Seurity*., Ms. Purvis appealed the Commissioner's determination that she was not disabled as that term is used in the Social Security Act.[57] Ms. Purvis was a housekeeper, but alleged that she was unable to perform her duties due to her severe asthma.[58] Explaining that the Administrative Law Judge's denial lacked sufficient explanation for the basis of his denial, the court went on to note:

> Although the Court remands the ALJ's decision for a more detailed finding, it notes that in the course of its own research, it discovered one profile picture on what is believed to be Plaintiff's Facebook page where she appears to be smoking. Profile Pictures by Theresa Purvis, Facebook, http://www.facebook.com/home [url] (last visited Feb. 16, 2011). If accurately depicted, Plaintiff's credibility is justifiably suspect.[59]

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[54] *Id.* (citing Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001); *see also* Moreno v. Hanford Sentinel Inc., 91 Cal. Rptr. 3d 858 (Cal. Ct. App. 2009) (holding there is no reasonable expectation of privacy where person took affirmative act of posting own writing on MySpace, making it available to anyone with a computer and opening it up to public eye); Dexter II v. Dexter, 2007 WL 1532084 (Ohio Ct. App. May 25, 2007) (holding there is no reasonable expectation of privacy regarding MySpace writings available to the public).
[55] Beye v. Horizon Blue Cross Blue Shield of N.J., 2007 WL 7393489 (D. N.J. Dec. 14, 2007).
[56] *Id.* at *2.
[57] 2011 WL 741234 (D. N.J. Feb. 23, 2011).
[58] *Id.* at *1.
[59] *Id.* at *7.

3. Texas

Texas case law on the issue is scarce, and the majority of the published decisions on point are in the context of criminal law. There are, however, cases indicating that such evidence has been, and will be, admitted in Texas proceedings. However, reasoned analysis or review of the trial judge's decisions are few, if any. For instance, in *Munoz v. State*, the trial court admitted evidence that the appellant's MySpace page contained pictures of him displaying gang signs, wearing gang colors, and associating with known gang members.[60] On appeal, Munoz claimed the trial court erred in admitting the evidence, arguing that the state failed to lay the proper predicate.[61] The appellate court disagreed and affirmed the trial court's decision.[62]

In *Blue Bell Creameries, L.P. v. Denali Co., LLC*, the trial court refused to allow the admission of printouts of blog postings.[63] In this case, the defendant sought to enjoin the plaintiff from using the name *Mooo Tracks* as the name of an ice cream flavor.[64] The defendant alleged *Mooo Tracks* caused consumer confusion with its own ice cream product, *Moose Tracks*."[65] The defendant proffered blog printouts to prove that such confusion existed.[66] However, the court refused to consider the blog print outs, noting:

> The Court is concerned, on this record, that the blog entries lack sufficient indicia of reliability. Nothing is known about the persons who made the entries, about whether they are related in any way to either party or whether they are describing true events and impressions. Moreover, the authors' meaning and the import of the blog entries are far from clear.[67]

However, qualifying the holding, the court went on to state, "[t]his should not be construed as a ruling by the Court that entries on Internet blogs could not, on a different record, be reliable and admissible."[68]

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[60] No. 13-08-00239-CR, 2009 WL 695462(Tex. Ct. App. Apr. 8, 2009) (not designated for publication).
[61] *Id.* at *12.
[62] *Id.* at *14.
[63] No. H-08-0981, 2008 WL 2965655 (S.D. Tex. July 31, 2008) (not designated for publication).
[64] *Id,* at *1.
[65] *Id.* at *2.
[66] *Id.* at *5.
[67] *Id.*
[68] *Id.* at note 4.

In *Hernandez v. Texas*, Hernandez was accused of solicitation of a minor.[69] At trial, Hernandez attempted to introduce the minor's MySpace page, which showed a picture of the minor and her boyfriend taken sometime after the alleged solicitation with a caption that read, "omg how nasty i get it all the time jeje."[70] Hernandez argued the evidence was relevant because it tended to show the minor participated in certain sexual activities and did not first learn the words referring to the sexual activities from anything Hernandez said to her.[71] According to Hernandez, the MySpace page supported his theory that the minor fabricated the accusation against him.[72] With regard to the caption the court held it:

> [was] vague, offers no contextual support, and is potentially misleading. We are left to speculate as to what the caption refers, the nature of its intended meaning, and whether it was written in jest. Even if we take the caption to imply what appellant asserts it implies-that [the minor] was sexually active prior to the solicitation-we disagree that the implication makes it more likely that [the minor] fabricated the allegation of solicitation. Moreover, because the picture was taken after the solicitation, the caption also was posted after the solicitation. Therefore, the caption has no specific relevance to [the minor's] knowledge of sexual terms before her encounter with appellant. For these reasons, we conclude the evidence is irrelevant, the trial court did not abuse its discretion in refusing to admit it.[73]

County prosecutors in Cameron County, Texas have announced that county prosecutors plan to use prospective jurors' Facebook profiles and postings when considering whether an individual is qualified to sit on a jury.[74] Cameron County courtrooms recently were upgraded so that all courtrooms are Wi-Fi compatible, which will allow prosecutors to use iPads to check out Facebook profiles of potential jurors during *vior dire*.[75]

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[69] No. 04-09-00544-CR, 2010 WL 2099220 (Tex. Ct. App. May 26, 2010).
[70] *Id. at* *4.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] Laura B. Martinez, Cameron Co. *DA Will Check Facebook Profiles for Jury Picks*, HOUSTON CHRON. (Jan. 17, 2011), http://www.chron.com/disp/story.mpl/tech/news/7384860.html.
[75] *Id.*

4. Other Jurisdictions

Connecticut courts ordered the production of printouts of Plaintiff's Facebook page in *Bass v. Miss Porter's School*.[76] In that case, Defendants sought to compel production of documents that were "related to [Plaintiff's] alleged teasing and taunting through 'text messages' and 'on Facebook'," as well as, "all documents representing or relating to communications between [Plaintiff] and anyone else ... related to the allegations in [Plaintiff's] Amended Complaint."[77] Overruling Plaintiff's objection, the court noted: "Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting."[78]

In *Yath v. Fairview Clinics, N.*P., plaintiff sued for invasion of privacy after a health care professional posted information about her medical conditions on MySpace.[79] The court determined that posting private information on a publicly accessible internet website satisfied the "publicity" element of an invasion-of-privacy claim.[80] Other jurisdictions are grappling with these issues as well.[81]

D. *Ethical Considerations*

Unfortunately, discovery rules and ethical guidelines have been unable to keep pace with the digital sprawl of social networking sites.[82] Before considering the use of subterfuge—such as concealing one's true identity and purpose to contact a witness through a fictitious online profile—be mindful that legal and ethical precedents on this subject are slow in coming.[83]

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[76] 2009 WL 3724968 (D. Conn. Oct. 27, 2009).
[77] *Id.* at *1.
[78] *Id.*
[79] 767 N.W. 2d 34, 43-44 (Minn. Ct. App. 2009).
[80] *Id.* at 44.
[81] *Id.* at 43–44 (Minn. Ct. App. 2009); *see*, *e.g.,* A.B. v. State, 885 N.E.2d 1223, 1224 (Ind. 2008), (holding that a juvenile's profane messages criticizing disciplinary actions taken by her former school principal, which she posted on her MySpace profile and on a MySpace group page, were protected political speech); *In re* K. W., 666 S.E.2d 490, 494 (N.C. Ct. App. 2008) (concluding that victim's statements on her MySpace profile were admissible as prior inconsistent statements to impeach her testimony, but that exclusion was harmless error); In re T.T., 228 S.W.3d 312, 322-23 (Tex. Ct. App. 2007) (involving a termination of parental rights proceeding, in which the court considered a father's statement on his MySpace profile that he did not want children).
[82] Ken Strutin, *Evidence on Social Networking Sites*, L. TECH. NEWS (Nov. 11, 2009), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202435338350&slreturn=1&hbxlogin=1.
[83] *Id.*

Facebook, MySpace, LinkedIn, and Twitter make accessible to anyone at least some information about each user. This content, which ranges from as little as an account holder's username, to as much as the user's entire profile, is considered public. Some features, such as message boards, group pages, or the *wall* on a public profile, are overtly public. Access to other information is available only to the user's *friends*.

The Philadelphia Bar Association has determined that lawyers are prohibited from using deception when contacting a potential witness through online profiles.[84] The opinion was founded upon the following factual scenario: a witness in a civil case revealed during her deposition that she had Facebook and MySpace accounts.[85] The attorney seeking the ethics opinion believed these sites contained information relevant to the case, in particular, valuable impeachment evidence.[86] Access to the witness's pages was by permission only.[87] The attorney asked the committee whether it would be allowable to *friend* the witness without disclosing the affiliation or purpose.[88] All identifying and other information would be truthful.[89] The committee found that the proposed actions would constitute misconduct under the Pennsylvania Rules of Professional Conduct, including but not limited to Rule 8.4 prohibiting "dishonesty, fraud, deceit or misrepresentation."[90] As *friending* the witness without revealing the purpose of the contact was to gain access to private areas of her profile, it constituted an act of "deception."[91] The lawyer's concern over the witness's reluctance to otherwise permit access did not soften the nature of the concealment.[92] Whether the witness had a liberal practice of accepting friend requests, running the risk that someone might take advantage of the information, did not temper the result.[93]

Acknowledging conflicting views on covert investigation, the committee declined to recognize an exception along the lines of the one found in New York, as discussed *infra*.

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[84] *Opinion 2009-02*, THE PHILADELPHIA BAR ASS'N PROF. GUIDANCE COMMITTEE (Mar. 2009), http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.
[85] *Id.* at 1.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id* at 3.
[91] *Id.*
[92] *Id.*
[93] *Id.*

E. *The New York Exception*

On May 23, 2007, in Formal Opinion No. 737, the New York County Lawyers' Association's Committee on Professional Ethics considered whether a lawyer may hire an investigator who intends to employ subterfuge or dissemblance in order to gather certain evidence.[94] In short, the Committee held that the lawyer must consider whether the Code of Professional Responsibility permits the lawyer to proceed in such a way.[95]

The Committee considered first the definition of the word "dissemble," which is defined as follows: "To give a false impression about (something); to cover up (something) by deception (to dissemble the facts)."[96] Next, the Committee examined the *New York Lawyer's Code of Professional Responsibility* (the "Code").[97] DR 1-102(a)(3) of the Code provides: "A lawyer or law firm shall not . . . engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."[98] DR 1-102(a)(4) of the Code states: "A lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[99] In addition DR 7-102(a)(5) of the Code provides, "In the representation of a client, a lawyer shall not knowingly make a false statement of law or fact."[100] DR 1-104(d) of the Code provides, in relevant part, that a lawyer shall be responsible for a violation of the disciplinary rules by another lawyer or non-lawyer through involvement, knowledge or supervisory authority if the lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it.[101] Finally, DR 1-102(a)(2) of the Code stated, "A lawyer or law firm shall not . . . circumvent a Disciplinary Rule through actions of another."[102]

The Committee held that a plain reading of these rules leaves little doubt that "dissemblance" is ethically impermissible in New York if dissemblance is deemed equivalent to "dishonesty, fraud, deceit, or misrepresentation."[103] Moreover, the legality of the specific conduct has a bearing on whether the

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[94] *Opinion No. 737*, NEW YORK COUNTY LAWYERS' ASSOCIATION'S COMMITTEE ON PROFESSIONAL ETHICS (May 2007), http://www.ycla.org/siteFiles/Publications519_0.pdf; Non-Government Lawyer Use of Investigator Who Employs Dissemblance, NYCLA Eth. Op. 737, 2007 WL 7281470 (N.Y.Cty.Law.Assn.Comm.Prof.Eth. May 23, 2007).
[95] *Id.* at 2.
[96] *Id* at 2 (citing *BLACK'S* LAW DICTIONARY (8th ed. 2004)).
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*

conduct is covered within the meaning of DR 1-102(a)(3) of the Code.[104] However, it is important to note that dissemblance is distinguished from dishonesty, fraud, misrepresentation, and deceit by the degree and purpose of dissemblance. For purposes of the opinion rendered by the Committee, dissemblance was held to refer to misstatements as to identity and purpose made solely for gathering evidence.[105] This is commonly associated with discrimination and trademark/copyright testers as well as with undercover investigators.[106] It also includes, but is not limited to, posing as consumers, tenants, home buyers, or job seekers while negotiating or engaging in a transaction that is not by itself unlawful.[107] Dissemblance ends where misrepresentations or uncorrected false impressions rise to the level of fraud or perjury, communications with represented and unrepresented persons in violation of the Code, see DR 7-104 of the Code, or in evidence-gathering conduct that unlawfully violates the rights of third parties.[108] Thus, the Committee developed this approach:

> Non-government attorneys may ... ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances where: (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means; and (iii) the lawyer's conduct and the investigators' conduct that the lawyer is supervising do not otherwise violate the Code (including, but not limited to, DR 7-104, the 'no-contact' rule) or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties.[109]

However, the New York City bar says an attorney (or agent) can withhold strategic information when making a friend request. "An attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 2-3.
[109] *Id.* at 5-6.

without also disclosing the reasons for making the request."[110] A commentator has observed of this distinction:

> [S]tephen Gillers, who teaches legal ethics at New York University Law School and is a member of the ABA's Ethics 20/20 Commission [stated] "This is no different than if a lawyer or investigator learns that a witness typically hangs out at a bar on Saturday nights, and the investigator sidles up to the witness and starts a conversation. If the investigator doesn't misrepresent himself or his purpose, then it's OK," Gillers says.[111]

F. *Is a "Friend" Request a "Communication"?*

Courts have described friend requests as "communications among members."[112] To *friend* a user on Facebook, an attorney or investigator, user A, would initiate a standard, automated friend request to an opposing party, user B. Although user A cannot (1) change the request's default text, (2) control its routing, (3) view user B's e-mail address (even if the address is provided on user B's Facebook page), or (4) determine whether user B will open or accept the request (although user A can send a brief, personal message along with the friend request), courts consider friend requests impermissible contacts in some legal contexts.[113] This is because courts generally view the proprietary e-mail system within social networking sites as no different from the regular e-mail.[114] In investigatory contexts where

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[110] *Opinion No. 2010-2*, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS (September 2010), http://www2.nycbar.org/Ethics/eth2010.htm.

[111] Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous*, ABA L. J. (February 1, 2011), http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous/. As discussed above, the Philadelphia Bar Association disagrees, and requires an attorney (or agent) to make a full disclosure of the motive for making a friend request. Withholding this information is deceitful, the committee wrote, because it "omits a highly material fact—namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information ... to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access." *Opinion 2009-02*, THE PHILADELPHIA BAR ASS'N PROF. GUIDANCE COMMITTEE (Mar. 2009) at 3.

[112] United States v. Drew, 259 F.R.D. 449, 455 (C.D. Cal. 2009).

[113] Thomas V. Laprade and Jeffrey D. Russell, *Unfair-Weather Friends: Social Networking and Pretrial Discovery,* FOR THE DEFENSE 63 (May 2010). *See, e.g.,* People v. Fernino, 851 N.Y.S.2d 339 (N.Y. Crim. Ct. 2008) (friend requests violated a family court order of protection regardless of the fact the request could be turned down).

[114] *Id.*

one would not ordinarily send the subject of the investigation an e-mail via regular e-mail service, it is wise, based upon current law, to also avoid communicating via the social networking platform.

In addition, as discussed above, some courts consider befriending an opposing party or others, such as an opponent's witnesses, on Facebook a potentially unethical act. Inviting an opposing party to connect on LinkedIn is even more likely to be considered such an ethical violation.[115] The distinction seems to be that unlike Facebook, the default text of LinkedIn invitations can be changed, making them more similar to regular e-mail contacts.[116] Nonetheless, LinkedIn commonly offers good information, because some important information in a user's profile, including employment history, is often accessible to the public without the need to connect with the user. Even more useful is Twitter, which all but obviates the need to *communicate* with a user to gain information, because subscribing to a user's tweets does not require their knowledge or approval.[117]

As mentioned above, a surprising amount of information is often accessible without resorting to friending, inviting, or following.[118] Where access is unrestricted, there is nothing unethical about looking at it, as there is no communication with the party involved.[119]

G. *Issues of Authentication and Admissibility*

1. Authentication

If there is doubt about the authenticity of the records presented by the opposing party, the admission of the documents may be challenged on the ground of authenticity. Rule 901 of the Federal Rules of Evidence addresses the relevant guidelines for authentication. This is a very low standard for admission, as is the case with most states court rules.[120] Evidence is admissible when it is sufficiently supported to conclude that the evidence "is what its proponent claims."[121] Authentication may be accomplished in a myriad of ways, some of which are enumerated in Rule 901(b). For example, a document may be authenticated by direct proof, such as the testimony of a

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[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 67
[119] State Farm Fire & Cas. Co. v. Madden, 451 S.E.2d 721, 730 (W.Va. 1994) (holding lawfully observing a represented party's activities that occur in view of the general public is not a violation of any ethical rule).
[120] FED. R. EVID. 901.
[121] FED. R. EVID. 901(a).

witness with knowledge that the offered evidence is authentic.[122] In the alternative, as is often the case with electronic communications, the movant may provide circumstantial evidence of the authenticity under Rule 901(b)(4) by offering testimony about the distinctive characteristics of a message when considered in conjunction with surrounding circumstances.[123]

Although the standard is low, the evidence of authenticity must be enough to provide a rational basis for a jury to find that it is authentic.[124] The evidence, however, need not be conclusive and once the court has made a preliminary finding that the evidence is what the proponent claims, the evidence is introduced and is subject to cross examination.[125] The jury considers the evidence and makes the ultimate determination of authenticity, weighing the evidence accordingly.[126]

To comply with this admissibility standard, the testimony of a MySpace account holder or the introduction of business records from the social networking site or the Internet service provider is likely sufficient to overcome authenticity challenges.[127] The former should be used when attempting to admit content contained in the site, and the latter should be used when attempting to admit records to prove matters relevant to Internet service provider addresses, date stamped records, or other technical proofs. If these strategies are unsuccessful, presenting direct testimony of a records custodian can rebut further authenticity claims.

For instance, in *People v. Clevenstine*, the defendant objected to the admission of "electronic communications that occurred between him and [his] victims via [MySpace]."[128] The defendant claimed this evidence was inadmissible as it was not properly authenticated.[129] The court stated, "'[a]uthenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it,' and '[t]he foundation necessary to establish these elements may differ according to the nature of the evidence

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[122] Richard Raysman & Peter Brown, *Authentication of Social Media Evidence*, N.Y.Law Journal (2011); www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202531978733&slreturn=1; *see, e.g.,* United States v. Gagliardi, 506 F.3d 140, 151 (2d Cir. 2007) (holding chat room logs were properly authenticated as having been sent by the defendant through testimony from witnesses who participated in the online conversations).

[123] *Id.*

[124] Heather Griffen, Understanding and Authenticating Evidence from Social Networking Sites, 7 WASH. J.L. TECH. & ARTS 209, 215 (2012).

[125] *Id.*

[126] *Id.*

[127] Laurie L. Baughman, *Friend Request or Foe? Confirming the Misuse of Internet and Social Networking Sites By Domestic Violence Perpetrators*, 19 WIDENER L.J. 933 (2010).

[128] 891 N.Y.S.2d 511, 514 (N.Y. App. Div. 2009).

[129] *Id.* at 514.

sought to be admitted.'"[130] The court held "both victims testified that they had engaged in instant messaging about sexual activities with [the] defendant through the social networking site MySpace."[131] Additionally, a police officer testified "that he had retrieved [the] conversations from the hard drive of the computer used by the victims."[132] Further, a MySpace representative "explained that the messages ... had been exchanged by users of accounts created by [the] defendant and the victims, and [the] defendant's wife recalled the sexually explicit conversations she viewed in [the] defendant's MySpace account."[133] The court admitted the evidencing holding "[s]uch testimony provided ample authentication for admission of this evidence."[134]

One decision by the Court of Appeals of Tennessee held that testimony by a records custodian is not necessary in light of the witness's testimony authenticating the pages she printed from MySpace.[135] In this case the defendant appealed his conviction, which included seven counts of criminal contempt for violating an order of protection obtained by his ex-wife.[136] The defendant alleged several errors on appeal, including a challenge to the admissibility of printouts of conversations between himself and his ex-wife's friend, Ms. Lowe, conducted on MySpace.[137] Ms. Lowe testified that the defendant contacted her via MySpace on two occasions and asked her to contact his ex-wife and have his ex-wife call him.[138] Indirect contact of this nature was prohibited by the protective order previously obtained by the ex-wife.[139] Ms. Lowe testified that the copies of the MySpace communications accurately depicted the communications she had with the defendant and noted she printed the copies directly from her computer.[140] She further testified that the printouts showed the defendant's initial statements, showed her responses to those statements, and identified which party made each statement.[141] On appeal, the court upheld the admission of this evidence and found that a representative from MySpace was not a prerequisite to the admission of this type of electronic evidence.[142] In addition, the court determined the testimony of Ms. Lowe complied with Tennessee Rule of

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[130] *Id.* (quoting People v. McGee, 399 N.E.2d 1177 (N.Y. 1979).
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] People v. Dockery, No. 2009 WL 3486662 (Tenn. Ct. App. Oct. 29, 2009) (citing TENN. R. EVID 901(a)).
[136] *Id.* at *1.
[137] *Id.* at *6.
[138] *Id.*
[139] *Id.* at *1.
[140] *Id.* at *6.
[141] *Id.*
[142] *Id.*

Evidence 901(a), which read, "'The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the Court to support a finding by the trier of facts that the matter in question is what the proponent claims.'"[143]

In addition, in *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, the court refused to find that all information printed from web sites is *per se* inauthentic and inadmissible.[144] Instead, the court held that the printouts of web pages are properly authenticated and admissible where a witness's declaration establishes that the exhibits are "true and correct copies of pages printed from the Internet that were printed by [him] or under his direction."[145] In this respect, a witness may authenticate web pages she has seen, much in the same way as she might authenticate a photographs she has taken.[146]

In *Ohio v. Bell*, the trial court denied a defense motion to exclude printouts of MySpace instant messages alleged to have been sent to a victim by the defendant under his MySpace screen name.[147] The court pointed to the dearth of authority on the "important issue" of authenticating printouts of electronic communications. Moreover, it was not persuaded by the defense complaints "that MySpace chats can be readily edited after the fact from a user's homepage" and that, "while his name may appear on e-mails to T.W., the possibility that someone else used his account to send the messages cannot be foreclosed."[148] The trial court emphasized that the evidence required to meet the authentication threshold for admissibility "is quite low-even lower than the preponderance of the evidence," and observed that "[o]ther jurisdictions characterize documentary evidence as properly authenticated if 'a reasonable juror could find in favor of authenticity.'"[149]

In contrast, a case holding electronic media was not sufficiently authenticated is *Hood-O'Hara v. Wills*.[150] In this case, the Superior Court of Pennsylvania upheld the trial court's decision to exclude e-mail evidence proffered by the defendant.[151] The defendant offered the e-mails as proof the plaintiff had problems with alcohol.[152] The e-mails were purportedly sent from the plaintiff's mother to the plaintiff.[153] At trial, however, the plaintiff's

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[143] *Id.*
[144] 213 F. Supp. 2d 1146 (C.D. Cal. 2002).
[145] *Id.* at 1154.
[146] *Id.*
[147] 882 N.E.2d 502, 511 (Ohio Com. Pl. 2008), *aff'd*, 2009 WL 1395857 (Ohio Ct. App. May 18, 2009).
[148] *See id*. at 511-12.
[149] *Id.* at 512 (citing United States v. Tin Yat Chin, 371 F.3d 31, 38 (2d Cir. 2004)).
[150] 873 A.2d 757 (Pa. Super. Ct. 2005).
[151] *Id.* at 759.
[152] *Id.* at 760.
[153] *Id.*

mother denied sending the e-mails and indicated that she "had problems in the past with her e-mail account and had to, on at least one occasion, change her password."[154] As a result, the court agreed the trial judge properly excluded the e-mails as improperly authenticated hearsay.[155]

2. Hearsay

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[156] As an out-of-court *statement*, social networking evidence—by way of blogs, comments, or messages—is susceptible to the hearsay doctrine when being introduced in trial as proof the content is substantively true.[157] Admission of the records of Internet service providers and social networking sites will also be subject to the hearsay because the data is subject to human error—the driving purpose behind the hearsay doctrine.[158] Therefore, in order to introduce evidence from a social networking site or information from the businesses that run these sites, an exception to the hearsay rule must apply.

Information posted on a social networking may constitute an "admission," an exception to hearsay. Under the Federal Rules of Evidence, admissions by party opponents are admissible as substantive proof of the matter asserted.[159] As a result, when a party posts data to a social networking site and evidence of that post is introduced by the opponent at trial, provided the data is properly authenticated, the *admissions* exception should allow the information to come in over any hearsay objections. This is true "as an admission by the party's own statement."[160] Furthermore, information posted by others on a party opponent's site may come in under the admissions exception as a tacit admission by the party.[161] In other words, a statement posted on another's site, that the posting individual does not repudiate, may be considered an "adoptive admission."[162]

Additionally, hearsay exceptions can be useful in admitting these types of evidence.[163] Those are the exceptions for "present sense impression,"

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[154] *Id.*
[155] *Id.*
[156] FED. R. EVID. 801(c).
[157] *Id.*
[158] Laurie L. Baughman, *Friend Request or Foe? Confirming the Misuse of Internet and Social Networking Sites By Domestic Violence Perpetrators*, 19 WIDENER L.J. 933 (2010).
[159] FED. R. EVID. 801(d)(2).
[160] United States v. Siddiqui, 235 F.3d 1318, 1320-23 (11th Cir. 2000).
[161] Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1005 n.6 (3d Cir. 1994); Sea-Land Serv., Inc. v. Lozen Int'l, LLC, 285 F.3d 808, 821-22 (9th Cir. 2002).
[162] FED. R. EVID. 801(d)(2)(b).
[163] FED. R. EVID. 803(1)-(3).

"excited utterance," and "then-existing condition."[164] Because of the instantaneous nature of social networking, these hearsay exceptions will likely prove to be useful tools. The exceptions are applicable as electronic communications are particularly prone to candid statements of the declarant's state of mind, feelings, emotions, and motives. Further, communications are often sent or posted while events are unfolding. Thus, the rationale of the existing exceptions can be applied to admit even new forms of communication.

When attempting to admit Internet service provider or date-stamped records to prove things such as the frequency or location of an individual's access to the site, such records may be admissible under the "[r]ecords of regularly conducted activity" exception (otherwise known as the "business records exception").[165] To qualify for this exception, a record must be "made at or near the time" of the events by a person with knowledge, provided that the information is regularly kept.[166] Records from both Internet service providers and social networking sites will likely meet this exception because records from these entities are continually recorded and are up-to-date. However, this exception will only work to admit records of site usage, not the actual content on the site.

Perhaps the strongest basis for admission is found in Federal Rule of Evidence Rule 803(21), which allows for hearsay when it reflects on the "[r]eputation of a person's character among associates or in the community."[167] The last resort for admissions is Federal Rule of Evidence Rule 807, the residual or *catch-all* exception to the hearsay rule. However, this information may be barred by Rule 807's requirement that exhibits be characterized by "equivalent circumstantial guarantees of trustworthiness," a trait that may be lacking in evidence gathered on social networking sites.[168] Of note, courts seem to be more amenable to the application of the residual hearsay exception in recent times, so even without the "guarantees of trustworthiness," Rule 807 may provide basis for admission of this type of evidence.[169] In *Laster*, the Sixth Circuit affirmed the district court's decision to admit evidence under Rule 807 "if it is 'material,' 'more probative on the point for which it is offered than any other evidence which the proponent can

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[164] *Id.*
[165] FED. R. EVID. 803(6).
[166] *Id.*
[167] FED. R. EVID. 803(21).
[168] FED. R. EVID. 807.
[169] *See* United States v. Laster, 258 F.3d 525, 529-30 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1116 (2002).

procure through reasonable efforts,' and its admission best serves the interest of justice."[170]

H. *Other Considerations: The Stored Communications Act*

The Stored Communications Act (SCA) also comes into play with the use of social networking sites. The SCA is a federal statute prohibiting third parties from accessing electronically stored communications—for example, e-mail or Facebook entries—without proper authorization.[171] Under the SCA, an offense is committed by anyone who: "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided;" or "(2) intentionally exceeds an authorization to access that facility; and thereby obtains… [an] electronic communication while it is in electronic storage in such system."[172] The definitions in the Electronic Communications Protection Act (ECPA), known as the Wiretap Act, apply to the SCA, and *electronic storage* is defined as: "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication."[173] The SCA aims to prevent hackers from obtaining, altering, or destroying stored electronic communications.[174]

Furthermore, the *Konop* case provides an example of the applicability of this statute to issues of access to online information.[175] *Konop* concerned the denial of summary judgment to an employer on the employee's SCA claim.[176] In *Konop*, an airline pilot sued his employer, alleging that the airline viewed the pilot's secured website in violation of the SCA.[177] The pilot maintained a website in which he criticized the airline, the airline's officers, and the union. Certain eligible airline employees could access the site by logging in with a username and password created by the individual employees.[178] The employees were deemed eligible according to a list of names maintained by the pilot; however, the pilot expressly excluded management employees.[179] The vice president of the airline was concerned that the pilot was making untruthful allegations on the website, so he asked

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[170] *Id*. at 530 (quoting FED. R. EVID. 807).
[171] 18 U.S.C. § 2701 (2002).
[172] *Id*.
[173] 18 U.S.C. § 2510(17) (2001); 18 U.S.C §, 2711(1) (2009).
[174] *In re* DoubleClick Inc. Privacy Litigation, 154 F. Supp. 2d 497 (D. N.Y. 2001).
[175] Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 868 (9th Cir. 2002).
[176] *Id*.
[177] *Id.*
[178] *Id.* at 872.
[179] *Id.* at 872–73.

an eligible employee to assist him in accessing the website.[180] Upset by the pilot's accusations on the website, the vice president contacted the union about the website.[181]

The court first dismissed the pilot's claim under the Electronic Communications Privacy Act ("ECPA") because the vice president's act of logging into the site did not constitute an "interception" of an electronic communication and was, therefore, not prohibited by the ECPA.[182] Regarding the pilot's SCA claim, the court found that it raised questions about whether the eligible employee constituted a "user" of the website—in other words, whether the eligible employee had the power to "authorize" the vice president, a third party, to access the website.[183] However, the court noted that if that employee had such power, the vice president would have been authorized to access the website, and as such, would have been exempt from liability under the SCA.[184]

III. CONCLUSION

In sum, social networking sites like Facebook and MySpace encourage users to supply copious amounts of personal information, ranging from their likes and dislikes to regular updates on their daily affairs and activities. A surprising amount of this information is publicly accessible, without the need for friending, inviting, or following. As a result, these sites are tempting targets for attorneys and investigators seeking information about adverse parties or potential witnesses. Where access is unrestricted, there is nothing unethical in viewing the information. However, where access is restricted, the best practice is to avoid subterfuge to access the information.

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[180] *Id.* at 873.
[181] *Id.*
[182] *Id.* at 878–79.
[183] *Id.* at 879.
[184] *Id*. at 880; Pietrylo v. Hillstone Rest. Grp., No. 06-5754, 2008 WL 6085437 (D. N.J. July 25, 2008) (upholding jury verdict with punitive damages where company was held liable under the SCA for intentionally accessing a chat group on an employee's MySpace account without authorization from the employee to join the group).

CONFLICTED RESEARCH: MEDICAL SCIENTISTS ON THE PAYROLL

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I. INTRODUCTION

The purpose of this case is to explore the recent and eye-opening revelations of pervasive conflicts of interest throughout the United States medical industry, and to provide a framework within which the revelations can be examined and better understood. These revelations should provide rich, pedagogical fodder to professors of legal and ethical responsibilities of business executives, and enable those professors to demonstrate clearly the nature of conflicts of interest and the significant impact they play in the executives' ability to meet their obligations to stakeholders.

Conflicts of interest arise whenever executives have a private interest in the outcome of the task or responsibility they carry out on behalf of their employers. As a company employee, the executive owes his employer the duty to act solely for the benefit of his or her employer and not in the interest of the employee or third party; the employee's loyalty must be undivided.[1] As an officer of the company, the executive is an agent of the corporation, and owes the corporation the same fiduciary duties as those imposed on employees, including the duty to act solely for the benefit of the corporation.[2]

Whenever a conflict of interest exists, the executive cannot be said to act solely for the benefit of the employer. The conflict of interest may cause the executive to engage in a course of action that is not in the best interest of the company, or to fail to exercise independent judgment on behalf of the company, thereby breaching the duty of loyalty the executive owes to his

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[1] FRANK B. CROSS AND ROGER LEROY MILLER, THE LEGAL ENVIRONMENT OF BUSINESS: TEXT & CASES 486 (7th ed. 2009).
[2] *Id*. at 455.

employer. For example, a business executive has a conflict of interest if she owns stock in a company submitting a bid to the executive's employer: the executive may be tempted to enhance the value of stock she owns in the bidding company by approving its bid. Likewise, a business executive who enters into a contract on behalf of his employer to purchase consulting services from company owned by his daughter has conflicting interests: the executive may be more interested in benefiting his daughter than in obtaining the best terms for the employer. Similarly, a business executive who serves as a consultant to a third party and negotiates a lease or purchase agreement between the third party and his employer cannot be said to be acting solely in the interest of his employee.[3]

Unfortunately, the importance of conflicts of interest in examining the legal and ethical obligations of executives is frequently understated, because the explanation normally accorded them is couched in singular instances, such as the three examples cited above, all of which involve a single contract and none of which posed a significant impact beyond the immediate parties to the contracts in question. Such is not the case, however, in the conflicts of interest pervading the medical industry. Indeed, because these conflicts of interest threaten the public interest in safety and effectiveness of medical treatments and devices, they elevate the importance of addressing conflicts of interest in legal and ethical responsibility courses. Further, the professor teaching in these areas occupies the unique position of addressing ethical issues residing in her own or similar academic institutions, rather than critiquing ethical issues in outside business organizations. In effect, the professor is charged with putting his own house in order, rather than critiquing the activities of unrelated parties.

This case examines: (1) the extent and purpose of payments routinely made by the medical industry to physicians employed by academic organizations or engaged in private practice; (2) the failure of physicians to comply with regulations requiring them to disclose their conflicting financial interests; (3) the inability of the medical and research system to effect compliance with disclosure requirements; (4) forces inherent in the medical research system which have increased the incidence of conflict of interest, namely vertical integration of the pharmaceutical industry, the 1980 Bayh-Dole Act, and the accelerating need of the medical industry to conduct human experiments; (5) changes in medical research spawned by the increased dependence of drug and medical device companies on private industry medical research, namely industry contributions to physicians' nonprofit foundations, ghost written medical research, and the rise of the celebrity medical expert; (6) responses of medical institutions and academic organizations to the conflict of interest revelations; and (7) the three major

[3] MANUEL G. VELASQUEZ, BUSINESS ETHICS: CONCEPTS AND CASES 430-31 (4th ed. 1998).

solutions proposed to combat conflicts of interest in the medical research industry: mandatory disclosure of financial conflicts, instituting independent, federal testing of medical research results, and the AMA conflict of interest policy proposal.

II. MEDICAL INDUSTRY PAYMENTS TO PHYSICIANS

The relationships between physicians and medical related companies in the United States, generally acknowledged to be cozy given their mutual interest in patient care, also turn out to be quite pervasive and lucrative. A survey of U.S. doctors undertaken by Harvard University in 2003 and 2004, in which nearly half of the 3,167 practicing anesthesiologists, cardiologists, family practitioners, general surgeons, internists and pediatricians responded, demonstrates that one-quarter of the respondents acknowledge receiving payments from medical industry companies.[4] Similarly, a study published in the *New England Journal of Medicine* revealed that 80% of the responding doctors accepted free food or drug samples, one-third admitted being reimbursed for travel expenses to attend professional meetings or continuing medical education, and 28% reported they were paid for consulting, giving lectures, or signing up patients for clinical trials.[5]

Physicians serving as department heads in medical schools and teaching hospitals are also financially tied to the medical industry. In a survey published in the *Journal of the American Medical Association*, two-thirds of department heads acknowledge they have financial or other ties to the

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[4] *Survey finds doctor links with industry*, UPI (Apr. 26, 2007), http://it.moldova.org/news/survey-finds-doctor-links-with-industry-44482-eng.html.

[5] Christopher Lee, *Drugmakers, Doctors Get Cozier: Gifts Continue, Contacts Increase Despite Guidelines*, WASH. POST (Apr. 29, 2007), http://pqasb.pqarchiver.com/washingtonpost/access/1262426781.html?FMT=ABS&FMTS=ABS:FT&date=Apr+29%2C+2007&author=Christopher+Lee+-+Washington+Post+Staff+Writer&pub=The+Washington+Post&edition=&startpage=A.3&desc=Drugmakers%2C+Doctors+Get+Cozier%3B+Gifts+Continue%2C+Contacts+Increase+Despite+Guidelines; Robert Cohen, *Doctors routinely receive perks from pharmaceutical industry*, STAR-LEDGER, Apr. 26, 2007, at 79.
Family practitioners reported the highest number of meetings with drug company representatives (sixteen per month), followed by internists (nine per month), and cardiologists (ten per month). Doctors in group practices were three times as likely to receive gifts and nearly four times more likely to be paid for professional services than physicians practicing in hospitals. Eric G. Campbell et al., *A National Survey of Physicians – Industry Relationships*, NEW ENG. J. MED. (Apr. 26, 2007), http://content.nejm.org/cgi/content/full/356/17/1742. The drug industry has collectively decided to terminate the small gifts (*e.g.*, pens, notepads, staplers, clocks, calculators, stethoscope lights, and other trinkets and knickknacks) pharmaceutical companies give to doctors effective January 1, 2009. *See* Alan Bavley, *Drug industry, government, schools tackle conflicts*, CHATTANOOGA TIMES FREE PRESS, Oct. 12, 2008, at A8.

industry (*e.g.*, received research equipment or money to support residency and fellowship training, continuing medical education and research seminars from companies), 27% report that they worked as paid consultants, 27% report they served on companies' scientific advisory boards, 9% report they founded companies, and 7% report they served as company officers or executives.[6]

These types of financial relationships constitute conflicts of interest, which "occur when physicians have motives or are in situations for which reasonable observers could conclude that the moral requirements of the physician's roles are or will be compromised," and which pose a "serious threat . . . for professionalism and for the trust that patients have in physicians."[7]

III. FAILURE TO REPORT SIGNIFICANT CONSULTING COMPENSATION AND EQUITY HOLDINGS

While the above noted survey results standing alone do not indict the relationships between doctors and the medical industry, extensive information unearthed by Senator Charles E. Grassley (R. Iowa), ranking member of the United States Senate Committee on Finance, reveals multifaceted relationships between U.S. physicians and the medical industry, which have attracted significant attention and raise ethical concerns. Four recent revelations show that leading academic researchers at major universities have received, but failed to fully report, significant consulting fees from the medical industry.

First, the Senate Finance Committee reported that Psychiatry Professor Alan Schatzberg, a renowned and highly respected member of the Stanford University School of Medicine and President of the American Psychiatric Association, failed to report a $22,000 payment from Johnson & Johnson for consulting services, ownership of stock worth $6 million in Corcept

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[6] Katherine Mangan, *Medical Schools See Many Ties to Industry*, CHRON. HIGHER EDUC. (Oct. 26, 2007), at http://chronicle.com/weekly/v54/i09/09a03103.htm. *See* Charles Huckabee, *Another Academic Physician's Tied to Industry Come Under Senator's Scrutiny*, CHRON. HIGHER EDUC. (July 28, 2009), at http://chronicle.com/article/Another-Academic-Physicians/47484/?utm_source=at&utm_medium=en. (Medtronic, a medical device company, made $1.14 million in payments to a University of Minnesota medical professor who receive research funds from the Pentagon to undertake a study involving one of the company's products and failed to disclose his consulting relationship with the company when he appeared before a Senate panel to urge the Defense Department to support research into combat relate injuries.).

[7] Troyen A. Brennan, MD, MPH, et. al., *Health Industry Practices That Create Conflicts of Interest: A Policy Proposal for Academic Medical Centers,* J. AM. MED. ASS'N, Jan. 25, 2006, at 430.

Therapeutics which he cofounded in 1998 and which recently developed the drug Mifepristone (RU-486) for the treatment of depression, and $109,179 profits from sales of Corcept stock in 2005.[8] As a consequence of these disclosures, Professor Schatzberg was forced to resign as principal investigator on his grant from the National Institutes of Health (NIH) to investigate the biology of psychotic depression and to determine the effectiveness of Mifepristone as an antidepressant.[9] The results of that research are clearly capable of affecting the value of his Corcept stock.

Second, Senator Grassley accused Professor Jeffrey C. Wang, chief of UCLA's Orthopedic Spine Service, of violating university procedures by failing to inform UCLA that he received payments in the approximate amount of $459,000 during the period 2004 to 2007 from Medtronic, Johnson & Johnson, and FzioMed for royalties, consulting fees, and speaking fees.[10] In response to these accusations, UCLA removed Dr. Wang from his position as chief of the spine-surgery center.[11]

Third, Senator Grassley accused Harvard University Medical School Psychiatrist Joseph Biederman of failing to report consulting income received from drug companies in the amount of $1.6 million during the period 2000 to 2007.[12] Dr. Biedermann, a widely recognized expert on the use of antipsychotic drugs in children, whose studies are often financed by the drug makers and contributed to a 40-fold increase in the diagnosis of pediatric bipolar disorder,[13] persuaded Johnson & Johnson, the manufacturer

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[8] Ryan Mac, *Iowa senator targets Stanford Prof for conflict of interest*, STANFORD DAILY (July 10, 2008), http://www.cbsnews.com/stories/2008/07/10/politics/uwire/main4250153.shtml; Arlene Weintraub, *Drugmakers and College Labs: Too Cozy*, BUS. WEEK (June 26, 2008), http://www.businessweek.com/print/technology/content/jun2008/tc20080626_630542.htm; and Kent Garber, *Committee Questions a Top Psychiatrist*, U.S. NEWS & WORLD REPORT (June 26, 2008), http://politics.usnews.com/news/national/articles/2008/06/26/committee-questions-a-top-psychiatrist.html.

[9] Maria Jose Vinas, *Stanford Researcher, Accused of Conflicts, Steps Down as NIH Principal Investigator*, CHRON. OF HIGHER EDUC. (Aug. 1, 2008), http://chronicle.com/article/Stanford-Researcher-Accuse/41395/.

[10] Paul Basken, *UCLA Surgeon Accused of Hiding Medical Company's Payments*, CHRON. OF HIGHER EDUC. (May 28, 2009), http://chronicle.com/article/UCLA-Surgeon-Accused-of-Hid/47658/.

[11] Paul Basken, *UCLA Investigates Corporate Payments to a Surgeon at Its Medical School*," CHRON. OF HIGHER EDUC. (July 21, 2009), http://chronicle.com/article/UCLA-Investigates-Corporate/47423.

[12] *Harvard Psychiatrists Underreported Earnings from Drug Companies, Investigators Say*, CHRON. OF HIGHER EDUC. (June 8, 2008) http://chronicle.com/article/Harvard-Psychiatrists-Under/41117/; KAISER DAILY HEALTH POLICY REPORT, THE HENRY J. KAISER FAMILY FOUNDATION (June 9. 2008), http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=52614.

[13] Gardiner Harris and Benedict Carey, *Researchers Fail to Reveal Full Drug Pay*, N.Y. TIMES (June 8, 2008),

of Risperdal, to establish and fund the Johnson & Johnson Center for the Study of Pediatric Psychopathology at Boston's Massachusetts General Hospital to conduct clinical trials to determine appropriate use and dosing of Risperdal in children.[14] Dr. Biedermann and his colleagues published the results of that research in many articles favorable to the drug,[15] even though those clinical trials were apparently conducted contrary to restrictions imposed by Harvard University and Massachusetts General prohibiting researchers from conducting clinical trials if they receive payments of more than $20,000 from a drug maker.[16]

Finally, Senator Grassley accused Charles B. Nemeroff, a prominent Emory University psychiatrist, of failing to report at least one third of the $2.8 million in consulting fees he received from GlaxoSmithKline between 2000 and 2007, while he was the principal investigator on a $3.9 million grant from NIH to study five Glaxo drugs for treatment of depression.[17] While Emory University regulations prohibit the acceptance of more than $10,000 per year from any one company, Dr. Nemeroff exceeded that threshold each year between 2003 and 2006 but lied about it to Emory.[18] Dr. Nemeroff resigned as the principal researcher of the NIH grant on October 24, 2008, pending an investigation into his relationship with the drug company.[19] Upon completion of the investigation, Emory University

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http://www.nytimes.com/2008/06/08/us/08conflict.html?_r=1&scp=1&sq=Researchers%20Fail%20to%20Reveal%20Full%20Drug%20Pay&st=cse.

[14] David Armstrong and Alicia Mundy, *J&J Emails Raise Issues of Risperdal Promotion*, WALL ST. J. (Nov. 25, 2008), http://online.wsj.com/article/SB122755237429253763.html?KEYWORDS=JJ+Emails+Raise+Issues+of+Risperdal+Promotion; Gardiner Harris, *Research Center Tied to Drug Company*, N.Y. TIMES (Nov. 25, 2008), http://www.nytimes.com/2008/11/25/health/25psych.html?scp=1&sq=Research%20Center%20Tied%20to%20Drug%20Company&st=cse.

[15] Armstrong, *supra* note 14.

[16] *Id*. *See For Harvard Psychiatrist, Professorliness Is Next to Godliness*, CHRON. OF HIGHER EDUC. (Mar. 20, 2009), http://chronicle.com/article/For-Harvard-Psychiatrist-P/42600/ (In advance of his research, Dr. Biederman promised Johnson & Johnson that the proposed drug trial "will clarify the competitive advantages of risperidone vs. other neuroleptics.").

[17] Denise Gellene and Thomas H. Maugh II, *Doctor Accused in Congress' Probe*, LOS ANGELES TIMES (Oct. 4, 2008) http://pqasb.pqarchiver.com/latimes/access/1567238281.html?FMT=ABS&FMTS=ABS:FT&type=current&date=Oct+4%2C+2008&author=Denise+Gellene%3BThomas+H.+Maugh+II&pub=Los+Angeles+Times&edition=&startpage=A.19&desc=Science+File%3B+Doctor+accused+in+Congress%27+probe%3B+An+Emory+University+psychiatrist+allegedly+failed+to+report+much+of+the+income+he+got+from+firms+whose+drugs+he+was+evaluating.

[18] *Emory U. Psychiatrist Failed to Report Income from Drug Makers*, CHRON. OF HIGHER EDUC. (Oct. 4, 2008), http://chronicle.com/article/Emory-U-Psychiatrist-Faile/41743/.

[19] Chrissie Cole, *NIH Suspends Emory University Grant,* THE INJURY BOARD NATIONAL NEWS DESK (Oct. 14, 2008), http://news.injuryboard.com/nih-suspends-emory-university-grant-.aspx?googleid=249420.

announced that Dr. Nemeroff relinquished his post as Department Chair, a position he held for 17 years, that it would not submit a NIH or other sponsored grant or contract requests listing Dr. Nemeroff as an investigator or in any other role for a period of at least two years, and that Dr. Nemeroff must submit any compensation requests for speaking engagements to the dean's office for review.[20]

While those actions penalized Emory University, they did not deter Dr. Nemeroff. NIH continued his eligibility to serve on NIH advisory panels providing recommendations on who received grant funding.[21] One year later, Dr. Nemeroff accepted the position of professor and chairman of the department of psychiatry and behavioral sciences at the University of Miami.[22] Dr. Nemeroff landed the job shortly after Thomas R. Insel, Director of the National Institute of Mental Health, responding to the inquiry of the dean of the University of Miami's medical school, confirmed that Dr. Nemeroff was NIH grant eligible and could begin applying for NIH grants as soon as he arrived on campus.[23] Dr. Insel also gave the dean a positive recommendation of Dr. Nemeroff in an ensuing telephone conversation, NIH rules prohibiting a formal, written recommendation.[24] Dr. Insel's assistance reportedly was pay-back for earlier help given to him by Dr. Nemeroff. When Dr. Insel faced nonrenewal of his research position at NIH in 1994, Dr. Nemeroff hired him as professor of psychiatry and research director, and later lobbied in favor of Dr. Insel's appointment as Director of NIMH in 2002.[25]

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[20] *Emory U. Scientist Penalized for Hidden Payments From Drug Company*, CHRON. OF HIGHER EDUC. (Dec. 29, 2008), http://chronicle.com/article/Emory-U-Scientist-Penalize/42166/. Emory University publicly disclosed another psychiatrist's conflict of interest, when its medical school dean issued a letter of reprimand to Zachary N. Stowe, a professor of psychiatry, for failure to reveal he was paid by GlaxoSmithKline, a manufacturer of antidepressants, at the same time Dr. Stowe conducted a federally financed study of the use of the drugs in pregnant women. Paul Basken, *Emory U. Penalizes Another Psychiatrist With Hidden Financial Conflicts of Interest*, CHRON. OF HIGHER EDUC. (June 10, 2009), http://chronicle.com/article/Emory-U-Penalizes-Another-/47727/.

[21] Paul Basken, *NIH Director Says New Rules on Conflicts May Need to Be Toughened Further*, CHRON. OF HIGHER EDUC. (June 11, 2010), http://chronicle.com/article/NIH-Director-Says-New-Rules-on/65905/?sid=at&utm_source=at&utm_medium=en.

[22] Paul Baskin, *As He Worked to Strengthen Ethics Rules, MIMH Director Aided a Leading Transgressor*, CHRON. OF HIGHER EDUC. (June 6, 2010), http://chronicle.com/article/While-Revising-Ethics-Rules/65800/?sid=at&utm_source=at&utm_medium=en.

[23] *Id*.

[24] *Id.*

[25] *Id*.

IV. IMPOTENCE OF NIH, FDA, AND UNIVERSITIES TO UNCOVER CONFLICTS OF INTEREST

The four cases discussed above underscore the significance of the conflicts of interest uncovered by Senator Grassley and the impotence of NIH and the physicians' academic institutions to prevent them. While federal regulations require that researchers receiving NIH grants remain free of financial conflicts of interest (defined as receiving more than $10,000 per year or owning more than 5% of an entity that might bias their work), NIH relies on the academic institutions to gather financial information from grant investigators and to manage or eliminate conflicts of interest, but does not require universities to provide information about the conflicts or how they are resolved.[26] Indeed, a report of the inspector general of the Department of Health and Human Services concedes NIH does not know the number or nature of conflicts of interest and does not track how universities and other institutions resolved them.[27] Perhaps prompted by the steady stream of financial conflicts of interest in scientific research, NIH recently published a notice in the *Federal Register* announcing it would initiate formal rule making procedures to control how institutions better guarantee their research scientists are not biased by outside company payment.[28]

The FDA may be faring no better than NIH. The Office of Inspector General of the U.S. Department of Health and Human Services audited the financial disclosures made by researchers in "all 118 marketing applications approved by the FDA in the 2007 fiscal year," determined that "[o]nly 1

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[26] Jeffrey Brainard, *NIH Turns Blind Eye to Academics' Financial Conflicts, Audit Says*, CHRON. OF HIGHER EDUC. (Feb. 1, 2008), http://chronicle.com/weekly/v54/i21/21a00801.htm; Richard Monastersky, *Hidden Payments to University Researchers Draw New Fire*, CHRON. OF HIGHER EDUC. (Oct. 31, 2008), http://chronicle.com/weekly/v55/i10/10a01301.htm.; Jeffrey Brainard, *Senator Grassley Pressures Universities on Conflicts of Interest*, CHRON. OF HIGHER EDUC. (Aug. 8, 2008), http://chronicle.com/weekly/v54/i48/48a01201.htm.

[27] Gardiner Harris, *Researchers Go Unchecked, Report Says*, N.Y. TIMES (Jan. 19, 2008), http://www.nytimes.com/2008/01/19/us/19conflict.html?_r=1&scp=1&sq=Researchers%20Go%20Unchecked,%20Report%20Says&st=cse.

[28] Paul Basken, *NIH Plans New Rules to Police Researchers' Financial Conflicts of Interest*, CHRON. OF HIGHER EDUC. (May 11, 2009), http://chronicle.com/news/article/6456/nih-plans-new-rules-to-police-researchers-financial-conflicts-of-interest?utm_source=at&utm_medium=en. In response to NIH's request for public comment, two academic organizations, the Association of American Universities and the Association of American Medical Colleges, submitted a joint letter urging NIH to increase its oversight over research conflicts of interest and recommending that all research investigators report all financial conflicts of interest to their academic institutions related directly or indirectly to their research regardless of the amount of money involved. Katherine Mangan, *2 Academic Associations Urge the NIH to Increase Oversight of Research Conflicts*, CHRON. OF HIGHER EDUC. (June 11, 2009), http://chronicle.com/daily/2009/06/19810n.htm?utm_source=at&utm_medium=en.

percent of clinical investigators disclosed a financial interest in the products they studied," and concluded that "[c]linical investigators may not be disclosing all financial interests."[29] In contrast, and as noted above, the Harvard University survey of U.S. doctors determined that 28% of doctors were paid for consulting, giving lectures, or signing up patients for clinical trials, and the AMA survey determined that 27% of medical school department heads worked as paid consultants.

Further, most universities rely on their professors to report financial information, but lack the wherewithal to verify the information they submit.[30] Only a handful of states (Minnesota, Vermont, Maine, West Virginia, and California) and the District of Columbia require some level of disclosure of pharmaceutical company payments to physicians.[31] Hence, there is no database which universities can use to check the disclosures made by physicians to their academic institutions or which informs the public of the fees paid by drug companies to physicians for consulting, speeches, and clinical trials.[32] Moreover, the information submitted by universities to NIH about conflicts of information is not helpful: two-thirds of the reports failed to provide basic information describing the conflict and 90% failed to

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[29] Paul Basken, *FDA Is Not Doing Enough to Thwart Conflicts of Interest in Research, Audit Finds*, CHRON. OF HIGHER EDUC. (Jan. 12, 2009), http://chronicle.com/news/article/5782/the-fda-is-not-doing-enough-against-conflicts-of-interest-audit-finds?utm_source=at&utm_medium=en. The Inspector General's report caused Senator Grassley to remark: "It looks like the ability of the Food and Drug Administration to track financial ties is just as broken down as that of the National Institutes of Health." *See* Press Release, Grassley Comments on FDA Tracking of Clinical Investigators' Financial Ties (Jan. 12, 2009) (http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=18741).

[30] Basken, *supra* note 29.

[31] Gardiner Harris and Janet Roberts, *A State's Files Put Doctors' Ties to Drug Makers on a Close View,* N.Y. TIMES (Mar. 21, 2007), http://www.nytimes.com/2007/03/21/us/21drug.html?scp=1&sq=A+State%92s+Files+Put+Doctors%92+Ties+to+Drug+Makers+on+a+Close+View&st=nyt. The Vermont legislature recently approved a law requiring the disclosure of financial conflicts of interest involving drug and medical device makers and physicians, nurses, pharmacists, and other health-care providers. The law also bans industry-sponsored meals and nearly all other gifts to health-care providers. Katherine Mangan, *Vermont Legislature Cracks Down on Drug Company Gifts*, CHRON. OF HIGHER EDUC. (May 19, 2009), http://chronicle.com/news/article/6504/vermont-legislature-cracks-down-on-drug-company-gifts?utm_source=at&utm_medium=en. A Massachusetts statute bans all gifts from pharmaceutical and medical device companies to physicians. David Armstrong, *Two States Restrict Firms' Gifts to Doctors*, WALL ST. J. (July 1, 2009), http://online.wsj.com/article/SB124640634767976599.html.

[32] *See*, *e.g.,* Maura Lerner et al., *Doctors' ties to drug firms raise concern*, STAR TRIBUNE (Mar. 23, 2007), http://www.prescriptionproject.org/assets/pdfs/StarTribune%20March%2023.pdf (detailing the income earned by Minnesota physicians and reported by medical companies to the Minnesota Pharmacy Board).

describe how the conflict was resolved.[33] Indeed, a recent survey led by the Association of American Medical Colleges found that fewer than 40% of medical schools have policies governing institutional conflicts of interest,[34] and the results of a recent survey of 211 chairmen of institutional review boards at research-intensive medical institutions in the United States demonstrate that one-third of the review boards did not require voting members to disclose any financial relationships with outside companies.[35] Further, a recent audit conducted by the inspector general of the Department of Health and Human Services demonstrated that "[u]niversities involved in federally sponsored medical research rarely take steps to investigate, reduce, or eliminate financial conflicts of interest among their scientists," that universities rarely direct the scientists to alter their financial relationships when conflicts are acknowledged, and that "the NIH does little, if anything, to police the matter."[36]

V. INHERENT FORCES FOMENTING CONFLICTS OF INTEREST

Several forces have coalesced to increase the incidence of conflicts of interest in the medical industry: the vertical integration of the pharmaceutical industry, the 1980 Bayh-Dole Act, and the rapidly accelerating need of the medical industry to conduct human experiments.

A. *Vertical Integration of Pharmaceutical Industry*

The pharmaceutical industry has become increasingly vertically integrated, giving drug companies control over the entire chain of production.[37] Drug companies develop new products, hire university and private-sector researchers to conduct drug trials, contribute to the design and pay for the study, and control which study results get published.[38] Drug

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[33] Brainard, *supra* note 26.

[34] Monastersky, *supra* note 26 ("A recent survey let by the Association of American Medical Colleges found that less than 40 percent of medical schools have policies governing institutional conflicts of interest, such as might arise when a company provides money directly to a university or to its senior officials. Over two-thirds of the medical colleges have more-limited policies governing payments to senior officials, but more than 20 percent of the institutions did not have even those narrow policies.").

[35] Paul Basken, *Campus Medical-Review Boards Often Fail to Police Themselves, Survey Finds*, CHRON. OF HIGHER EDUC. (Mar. 26, 2009), http://chronicle.com/daily/2009/03/14555n.htm?utm_source=at&utm_medium=en.

[36] Paul Basken, *Federal Audit Faults Universities Over Researchers' Financial Conflicts of Interest*, CHRON. OF HIGHER EDUC. (Nov. 19, 2009), http://chronicle.com/article/Federal-Audit-Faults/49220/?sid=pm&utm_source=pm&utm_medium=en.

[37] Sheldon Krimsky, *A Dose of Reform*, STAR LEDGER, Feb. 20, 2005, at 1.

[38] *Id*.

companies also market prescription drugs directly to consumers and physicians,[39] support medical journals and conferences through advertising and contributions, fund physician continuing education[40] and medical symposia, pay consulting fees to physicians for giving presentations and serving on committees and boards,[41] have financial relationships with the authors of guidelines establishing standards for prescribing medicines, [42] and provide financial incentives to physicians to promote off-label prescriptions of drugs to provide data justifying the alternative uses of pharmaceutical products.[43] Using their increased vertical control, as will be discussed more

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[39] Some legislators have responded to the direct marketing of drugs to consumers by introducing legislation to ban ads for prescriptions such as Viagra and Levitra in prime time television on decency grounds and to empower the FDA to prohibit tax deductions for drug advertisements directed to consumers. Natasha Singer, *Lawmakers Seek to Curb Drug Commercials*, N.Y. TIMES (July 27, 2009), http://www.nytimes.com/2009/07/27/business/media/27drugads.html?_r=1&scp=1&sq=Lawmakers%20Seek%20to%20Curb%20Drug%20Commercials&st=cse.

[40] A recent study of continuing-medical-education courses at the University of Wisconsin at Madison concluded that industry-sponsored continuing education courses offered without charge to physicians at Wisconsin "frequently advocate prescription medications over drug-free therapies and omit important information about potentially deadly side effects." Katherine Mangan, *U. of Wisconsin's Industry-Backed Courses Mislead Doctors and Could Hurt Patients*, CHRON. OF HIGHER EDUC. (Mar. 30, 2009), http://chronicle.com/article/U-of-Wisconsins-Industry-/42653/.

[41] *Id.*

[42] Nicholas Bakalar, *Potential Conflicts Cited in Process for New Drugs*, N.Y. TIMES (Oct. 25, 2005), http://www.nytimes.com/2005/10/25/health/policy/25drug.html?scp=1&sq=Potential+Conflicts+Cited+in+Process+for+New+Drugs&st=nyt ("more than one-third of the guideline authors acknowledged some financial interest in the drugs they recommended, including owning stock and being paid by the company to speak at seminars"; and "in half of the more than 200 guidelines examined, at least one author had received research financing from a relevant company, and 43 percent had at least one author who had been a paid speaker for the company.").

[43] Miriam Hill, *Casting a light on 'off-label' medical devices*, PHILADELPHIA INQUIRER, June 23, 2009, p. C1. Pfizer recently pleaded guilty to a felony violation for "misbranding Bextra with the intent to defraud or mislead," entered into a $2.3 billion settlement with the Justice Department for illegally marketing of the antibiotic Zyvox, the painkiller Bextra, epilepsy and nerve pain drug Lyrica, and the antipsychotic Geodon, and "agreed to an 'expansive corporate integrity agreement' with the Office of Inspector General of the Department of Health and Human Services" to avoid similar matters in the future. Shirley S. Wang, *It's Official: Pfizer Pleads Guilty to Illegal Marketing of Bextra*, WALL ST. J. (July 18, 2010), http://blogs.wsj.com/health/2009/09/02/its-official-pfizer-pleads-guilty-to-illegal-bextra-marketing/tab/print; Ashley Jones, *Pfizer Makes History With $2.3 B Fraud Settlement*, WALL ST. J. (Sept, 2, 2009), http://blogs.wsj.com/law/2009/09/02/pfizer-makes-history-with-23b-fraud-settlement/tab/print; and Miriam Hill, *FDA: Pfizer ignored warnings, gets record fine*, PHILADELPHIA INQUIRER, September 3, 2009, at C1. More recently, on January 15, 2010, Eli Lilly & Co. entered a guilty plea to charges it illegally marketed the anti-psychotic drug Zyprexa, and agreed to pay $1.42 billion to settle civil lawsuits and the criminal investigation.

fully below, drug companies seek to speed products to market as quickly as possible.[44]

The efforts of the pharmaceutical industry to promote drugs for the treatment of kidney disease typify the first cause. Pharmaceutical companies Gambro Healthcare and Amgen paid consulting fees to David Van Wyck, a University of Arizona College of Medicine professor, while he chaired a National Kidney Foundation panel charged with updating physician guidelines for treating anemia in kidney patients during 2004 and 2005.[45] Indeed, 12 of the 18 members of the panel chaired by Van Wyck disclosed financial ties to Amgen, Johnson & Johnson, or other manufacturers or marketers of antianemia drugs.[46] After the more liberal prescribing guidelines for the drug were finalized, Van Wick became a paid consultant to DaVita Inc., which acquired Gambro in 2005, is the nation's second-largest dialysis chain, and profits from the use of the drugs in more than 1,200 clinics.[47]

Likewise, in 2004, the pharmaceutical company Amgen underwrote more than $1.9 million worth of research and educational programs led by Dr. Allan Collins, the president-elect of the National Kidney Foundation. Amgen made the payments to the Minneapolis Medical Research Foundation (MMRF) pursuant to its research contract with MMRF, for which Dr. Collins served as senior researcher. The payments triggered concerns, because they represented a substantial financial connection to an individual closely associated with the National Kidney Foundation at a time the Foundation was considering revisions to its guidelines on treating anemia in kidney patients.[48]

Similarly, in 2006 the pharmaceutical industry accounted for about 30% of the annual $62.5 million budget of American Psychiatric Association, the

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Eli Lilly settles Zyprexa lawsuit for $1.42 billion, MSNBC (Jan. 15, 2009), http://www.msnbc.msn.com/id/28677805/.

[44] Alice Dembner, *Research Integrity Declines*, BOSTON GLOBE, Aug. 22, 2000, at E2.

[45] Christopher Rowland, *Researchers' advice stirs issue of conflict dispute over care of kidney patients*, BOSTON GLOBE (Dec. 8, 2006), http://www.boston.com/business/globe/articles/2006/12/08/researchers_advice_stirs_issue_of_conflict.

[46] *Id*.

[47] *Id*. Similar tactics were used by the five largest U.S. orthopedic firms who manufacture artificial knees and hips. In September 2007, four of those firms (Zimmer Inc., DuPuy Orthopaedics, Biomet Inc., and Smith & Nephew) reached a settlement with the Department of Justice and agreed to pay $311 million in fines and to release the list of their consultants and the payments they received. The fifth company, Stryker Orthopaedics, also released a list of its paid consultants, but was not named in the criminal complaint, because it cooperated with the federal investigators in the probe. According to the data they released, the five companies paid more than $200 million to doctors, clinics and university health systems across the country in 2007, for royalties, clinical trials, and consulting fees. Bill Toland, *Are Doctors Getting Fees or 'Bribes'?*, PITTSBURGH POST-GAZETTE (Nov. 7, 2007), http://www.post-gazette.com/pg/07311/831621-28.stm.

[48] Harris, *supra* note 31.

field's leading professional organization, which publishes the field's major journals and its standard diagnostic manual. One half of those contributions purchased drug advertisements in psychiatric journals and exhibits at the Association's annual meeting.[49] Many psychiatrists earn consulting fees from the pharmaceutical industry to give dinner talks about drugs to other physicians for fees ranging from $750 to $3,500 per event.[50] Minnesota and Vermont, which require pharmaceutical companies to disclose their payments to physicians in those states, report drug makers gave more money to psychiatrists than other specialties and that psychiatrists who received at least $5,000 from drug makers of newer-generation antipsychotic drugs wrote three times as many prescriptions to children for the drugs as psychiatrists who received less money.[51] Studies have also demonstrated that researchers who are paid by drug companies are more likely to report positive findings when evaluating that company's drug.[52] Further, 19 of the 27 members of the panel developing the Diagnostic and Statistical Manual of Mental Disorders ("DSM-V") prepared by the American Psychiatric Association and scheduled for publication in 2012, reported direct industries ties to the pharmaceutical companies, an increase of 14% over the percentage of DSM-IV task force members.[53] DSM-V is the APA's reference book, "the mental health bible," which recommends "treatment for known types of mental disorders, including what treatments are covered by health-care providers."[54] These financial conflicts are dangerous, because:

> [D]iagnosis informs treatment decisions. Hence, pharmaceutical companies have a vested interest in the structure and content of DSM and in how the symptomatology is revised. Even small changes in symptom criteria can have a significant impact on what new (or off-label) medications may be prescribed. Public trust in the independence of clinical psychiatry is undermined if former DSM panel members are using - or a perceived as using - their participation on DSM to leverage lucrative consulting arrangements with the Pharmaceutical industry or to funnel

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[49] Benedict Carey and Gardiner Harris, *Psychiatric Association Faces Senate Scrutiny Over Drug Industry Ties*, N.Y. TIMES (July 18, 2008), http://www.nytimes.com/2008/07/12/washington/12psych.html?scp=1&sq=Psychiatric%20Association%20Faces%20Senate%20Scrutiny%20Over%20Drug%20Industry%20Ties&st=cse .

[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] Lisa Cosgrove and Harold J. Bursztajn, *Toward Credible Conflict of Interest Policies in Clinical Psychiatry*, PSYCHIATRIC TIMES (Jan. 1, 2009), http://www.psychiatrictimes.com/display/article/10168/1364672.

[54] Paul Basken, *Do Drugs Help Psychiatrists Tune Out Patient Voices?*, CHRON. OF HIGHER EDUC. (Jan. 15, 2009), http://chronicle.com/article/Do-Drugs-Help-Psychiatrists/42250/.

> industry funding to their departments, associates, and programs (e.g, exerting their influence on prescription practices through public speaking arrangements, such as industry-sponsored CME symposia).[55]

Perhaps recognizing the dangers posed by medical industry sponsorship of conferences and association activities, past and current leaders of several professional medical associations recently advocated ending medical industry financial support for their conferences in a joint statement published in *The Journal of the American Medical Association*, because "such practices compromise health-care decisions and undermine public trust."[56] The leaders endorsing the statement were associated with the American Psychiatric Association, American College of Obstetricians and Gynecologists, American College of Physicians, American Academy of Pediatrics, American College of Cardiology, and Council of Medical Specialty Societies.[57]

B. *The 1980 Bayh-Dole Act*

The second force contributing to the increase of conflicts of interest in the medical industry is the 1980 Bayh-Dole Act. The Bayh-Dole Act foments the commercialization of new medical products by creating a uniform patent policy among the many federal agencies funding research, and gives academic researchers and their institutions the right to products developed with government money. This permits them to license the inventions to other parties, thereby encouraging them to develop financial ties to the biotechnology or pharmaceutical industries.[58] Doctors quickly learned that they could go into business while continuing to practice medicine.[59]

The second force is illustrated by Isador Lieberman, a leading Cleveland Clinic orthopedic surgeon, who pioneered and promoted a new treatment known as kyphoplasty for spinal fractures, and simultaneously enjoyed a

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[55] Cosgrove, *supra* note 53. In their "Counterpoint" to Dr. Cosgrove, Drs. David Kupfer and Darrel Begier eschew any such danger, because no wrongdoing has been proved, the relationships among academic institutions, the government, and the pharmaceutical industry are collaborative, and the drug industry is regulated by the government. *Id.*

[56] Paul Basken, *Medical-Group Leaders Call for End to Industry Role at Meetings*, CHRON. OF HIGHER EDUC. (Apr. 2, 2009), http://chronicle.com/daily/2009/04/14971n.htm?utm_source=at&utm_medium=en.

[57] *Id.*

[58] Dembner, *supra* note 44; Arlene Weintraub and Amy Barrett, *Medicine in Conflict*, BUS. WEEK (Oct. 23, 2006), http://www.businessweek.com/magazine/content/06_43/b4006081.htm.

[59] Weintraub, *supra* note 58.

decade-long professional association with Kyphon Inc., a Sunnyvale, California, kyphoplasty equipment manufacturer. Kyphoplasty competes with its predecessor treatment, vertegroplasty, in spine surgeries primarily on patients with osteoporosis-related spinal fractures. While both procedures inject cement into the broken spinal column, kyphoplasty inserts a balloon device into the compressed vertebra to try to restore its original height, and then inserts the cement into the cavity. Vertebroplasty is routinely performed on an outpatient basis with local anesthesia; kyphoplasty requires more expensive equipment, general anesthesia and overnight hospital stays, and hence is considerably more expensive that vertebroplasty. Dr. Lieberman began offering advice to Kyphon shortly after arriving at the Cleveland Clinic in 1997. He initiated the inaugural work on kyphoplasty in the Cleveland Clinic in 1999, using equipment provided by Kyphon, and reported the results of the first 30-patient trial of kyphoplasty in a medical journal.[60] Working with Dr. Mark Reiley, an orthopedic surgeon who developed the use of a balloon in spinal surgery and co-founded Kyphon Inc. to develop the instruments used in kyphoplasty, Dr. Lieberman praised the favorable results obtained in their initial use of kyphoplasty on 26 patients on the web and permitted data generated from his Clinic procedures to be used for commercial purposes before being published in medical journals. Dr. Lieberman accepted Kyphon's invitation to serve on its scientific and clinical advisory board, and, during his first kyphoplasty trial at the Cleveland Clinic, was offered stock options in the company, permitting him to purchase Kyphon stock for $1 per share before the company went public at $15 a share.[61] Lieberman exercised those options in June 2002, subsequently selling the stock at several intervals between then and January 2005.[62] In 2004, when questions about the safety of the kyphoplasty procedure arose, largely related to the danger of subjecting elderly patients to trauma and general anesthesia and the attempts to treat three or more vertebrae at once because of the higher cost of the procedure, Dr. Lieberman led the rebuttal for kyproplasty.[63] While promoting and defending kyphoplasty, Lieberman did not tell his patients about his financial interest in Kyphon unless asked, and did not reveal his Kyphon stock ownership in the numerous articles he wrote about kyphoplasty or in his Spring 2005 testimony touting the benefits of kyphoplasty at a Centers for Medicare and Medicaid Services committee hearing.[64]

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[60] Joel Rutchick, *Surgeon kept quiet about stake in company*, PLAIN DEALER, Dec. 10, 2006, p. A1.
[61] *Id*.
[62] *Id*.
[63] *Id*.
[64] *Id.*

C. *The Rapidly Accelerating Need of the Medical Industry to Conduct Human Experiments*

The third force contributing to an increase in conflicts of interest in the medical industry is the rapidly accelerating need of the medical industry to conduct human experiments as part of the drug and medical device approval process. In the early 1990s, managed care squeezed drug prices, leaving drug companies with one option: increasing the number of drugs they were selling. When the drug companies tried to hasten drug development, the academic world was unable to adapt rapidly, and drug companies began to recruit private practice doctors to mine their patient base for research subjects.[65] In short order, the medical industry changed providers of human subject experiments required as part of the approval process. In 1991, nearly 80% of human experiments were conducted by nonprofit academic medical centers; by 2000, 40% of the 60,000 human subject studies were conducted by nonprofit academic medical centers, and 60% were conducted by for-profit companies, moving more research to "private settings and even storefront clinics."[66] Likewise, there has been a significant increase in private industry funding of medical research that takes place in U.S. universities. According to a *New England Journal of Medicine* study, private industry funds more than two-thirds of medical research at U.S. universities; two decades ago, the main contributor to medical research was the federal government.[67]

The pressure to accelerate the pace of human experiments is seen most clearly in two ways: the pharmaceutical industry has increased the bounty it pays to physician to recruit volunteers for sponsored studies, and physicians themselves have increasingly engaged in the business of conducting human experiments. An investigation published by *The New York Times* reveals:

- Drug companies and their contractors offer large payments to doctors, nurses and medical staff to encourage the recruitment patients to enroll in the trials and offer finder fees to physicians who refer their patients to other doctors for research; fees paid to physicians for an enrolled patient ranged from $3,500 to

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[65] Kurt Eichenwald and Gina Kolata, *Drug Trials Hide Conflicts for Doctors*, N.Y. TIMES (May 16, 1999), http://www.nytimes.com/1999/05/16/business/drug-trials-hide-conflicts-for-doctors.html.

[66] Dembner, *supra* note 44.

[67] Alicia Chang, *Study identifies conflicts in med school research*, STAR LEDGER, May 26, 2005, at 63.

$5,000, enabling some physicians to net between $500,000 and $1 million per year doing clinical research.

- Physicians who successfully recruit the most patients are offered the opportunity to ghost write the papers published about the research.

- Testing companies frequently use physicians as clinical investigators regardless of their specialty, leaving the patient volunteers in the study to the care of a physician who is not knowledgeable about the patient's condition.

- Physicians conducting clinical investigations increasingly have little experience as clinical investigators.[68]

The shift to private industry providers of drug studies is demonstrated by the following *New York Times* data: in 1997, 11,662 private doctors conducted drug studies, a threefold increase since 1990, when 4,307 doctors conducted such studies.[69] Satisfied with the responsiveness and flexibility of private physicians who "sign contracts overnight, advertise widely, offer financial incentives for patients and open their offices at unusual times to accommodate patient schedules,"[70] the drug industry has begun to aggressively recruit doctors to "grab their piece of the research pie."[71] As the number of physicians conducting research has increased, the average number of studies conducted by physicians has decreased (*e.g.*, during the 1990s, 70% of the doctors conducting human experiments were involved in three or fewer drug studies; in 1997, one-quarter of the doctors conducted only one experiment).[72] This means that an increasing number of physicians conducting drug testing have little or no experience in doing so, and, with the increase in the number of generalist physicians engaged in research, doctors conducting clinical trials often have no expertise in the disease they are investigating.[73] Nonetheless, they receive several thousand dollars in compensation per patient for examining and monitoring as many as 24 trial participants over the course of several months.[74]

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[68] Eichenwald, *supra* note 65.
[69] *Id*.
[70] *Id*.
[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] Keith Darci, *Drug companies rely on volunteers to test their wares*, SAN DIEGO UNION-TRIBUNE, May 19, 2008, Today's Scene.

While the pressure to increase the pace of human experiments has increased, a study of the institutional review board policies at medical schools that receive funding from the National Institutes of Health demonstrates that fewer than half of those policies cover the topic of using finder fees or bonus payments to help recruit study participants.[75] In the absence of those policies, researchers "might otherwise be tempted to enroll ineligible study participants."[76]

VI. RELATED CHANGES IN MEDICAL RESEARCH

The significant increase in private industry drug studies has spawned three other changes in medical research: medical company contributions to nonprofit foundations associated with for-profit medical practices, ghost writing in medical research, and the celebrity medical expert.

A. *Contributions to Physicians' Nonprofit Foundations*

Physicians in private practice have begun to establish tax-exempt charities to engage in medical research or education, and drug and medical device companies are making significant contributions to these nonprofit organizations.[77] While the nonprofit organizations are separate entities, they are closely linked to physicians' medical practices. Typically, medical companies contribute funds to the nonprofit organizations to support medical research and educational programs. For example:

- CHF Solutions, a medical device company, contributed $180,000 to the Midwest Heart Foundation, a charitable organization associated with a thriving for-profit medical group outside of Chicago, which uses many of the products made by CHF Solutions. CHF Solutions' contribution represented about 10% of the contributions received by the Midwest Heart Foundation during 2004.

- Orthopedic device company Stryker contributed $200,000 to the Arizona Orthopedic Education Foundation. Its founder, Anthony K. Hedley, uses mainly Stryker devices with his own patients.

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[75] Paul Basken, *Universities Face Conflict-of-Interest Questions Over Finder Fees for Study Participants*, CHRON. OF HIGHER EDUC. (Mar. 19, 2009), http://chronicle.com/article/Universities-Face/42592/.

[76] *Id*.

[77] Reed Abelson, *Charities Tied to Doctors Get Drug Industry Gifts*, N.Y. TIMES (June 28, 2006), http://www.nytimes.com/2006/06/28/business/28foundation.html.

- DePuy Orthopaedics, a unit of Johnson & Johnson, contributed $75,000 to the Blue Ridge Bone and Joint Research Foundation, headed by Joseph T. Moskal, an orthopedic surgeon in Roanoke, Virginia. Those funds were used to offset the costs of a fellowship program permitting physicians to train in orthopaedic surgery performed in his medical practice.

- Medical device makers Guidant and Medtronic contributed funds to the Vascular Specialists Education Foundation headed by Marc H. Glickman, which uses those funds to support training of physicians and fellows on vascular disease procedures.[78]

To the extent these contributions are actually used for the foundation's charitable purpose (research and education), there would appear to be no problem. To the extent, however, these funds are used to subsidize or offset expenses of the medical practice (e.g., using fellowship funds to underwrite medical practice salary expenses), significant tax and conflict of interest issues and problems are created.

B. *Ghost Writing Scientific Research*

Senator Grassley described the practice of medical ghost writing in his inquiry to Wyeth Laboratories and press release dated December 12, 2008:

> Over the last year, the Committee has been examining a practice used by drug companies referred to as "medical ghostwriting." I have been informed that this practice involves marketing and/or medical education companies that draft outlines and/or manuscripts of review articles, editorials, and/or research papers. This information is then presented to prominent doctors and scientists, particularly those affiliated with academic institutions, to review, edit and sign on as authors, whether or not they are intimately familiar with the underlying data and relevant documentation. In addition, it is not always apparent in the publication that individuals and companies other than the listed authors were deeply involved in the study and/or drafting of the final manuscript. Articles published in medical journals are widely read by practitioners, and relied upon as being unbiased and scientific in

[78] *Id.*

> nature. Concerns have been raised, however, that some medical literature may be subtle advertisements rather than publications of independent research. The information in these articles can have a significant impact on doctors' prescribing behavior and, in turn, on the American taxpayer, because the Medicare and Medicaid programs pay billions of dollars for prescription drugs. Thus, any attempt to manipulate the scientific literature, that can in turn mislead doctors to prescribe drugs that may not work and/or cause harm to their patients, is very troubling.[79]

In his letter to Wyeth, Senator Grassley notes that documents uncovered in recent litigation involving Wyeth's hormone therapy products raise questions about the role of DesignWrite Inc. in devising, writing and obtaining academic investigators to sign on as the primary authors of articles appearing in *American Journal of Obstetrics and Gynecology*, *Obstetrics and Gynecology*, and *Primary Care Update for OB/GYNs*.[80]

This is not the first venture of Wyeth in medical ghost writing. Wyeth paid Excerpta Medica Inc. $40,000 to write ten articles supporting the use of the "fen" half of the "fen-phen" drug combination. Excerpta retained well-known university researchers to edit drafts and lend their name to the final work in exchange for $1,000 to $1,500 honoraria.[81] Two of the ten articles were published in the *American Journal of Medicine* and *Clinical*

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[79] Letter from U.S. Senator Charles Grassley, to Bernard J. Poussot, Chairman, President and Chief Exec. Officer, Wyeth from (Dec. 12, 2008) (http://finance.senate.gov/newsroom/ranking/download/?id=d80f46b5-d896-41b8-a7ae-136d7ec5a431); *See* Paul Basken, *Ghostwriters Haunt the Integrity of Medical Journals*, CHRON. OF HIGHER EDUC. (Sept. 14, 2009), http://chronicle.com/article/Ghosts-Haunt-the-Integrity-of/48365/?sid=at&utm_source=at&utm_medium=en ("The practice raises the specter of hidden bias in published papers that favor the effects of the company's drugs. Doctors rely on such papers when making life-or-death choices about treating their patients.")

[80] Grassley, *supra* note 79. Citing three Columbia University researchers who signed their names to articles financed by Wyeth, Senator Grasley subsequently recommended that NIH combat the practice of university researchers engaging in ghostwriting of drug company research articles. *Sen. Grassley Presses NIH Over Ghostwritten Research Reports*, CHRON. OF HIGHER EDUC. (Aug. 19, 2009), http://chronicle.com/blogPost/Sen-Grassley-Presses-NIH-Over/7741/?sid=pm&utm_source=pm&utm_medium=en. Wyeth also recruited a McGill University professor to contribute a ghostwritten article to the *Journal of the American Geriatrics Society*. In her article, Professor Barbara Sherwin "argued that estrogen could help treat memory loss in older patients." Lawyers representing clients suing Wyeth for harms caused by its hormone drugs have discovered 26 ghostwritten research papers in 18 medical journals. Paul Basken, *Professor at Canada's McGill U. Admits Signing Research Generated by Drug Maker*, CHRON. OF HIGHER EDUC. (Aug. 11, 2010), http://chronicle.com/article/McGill-U-Professor-Admits/48164/?sid=at&utm_source=at&utm_medium=en.

[81] *Research Ethics: Paying MDs to 'Write' Fen-Phen Articles*, AM. HEALTH LINE (May 24, 1999), http://www.americanhealthline.com/archives/1999/05/m990524.9.html.

Therapeutics. The remaining eight articles were never published, because the fen-phen drugs were pulled from the market after studies linked them to heart-valve damage and an often-fatal lung disease.[82]

Martin Keller, Professor of Psychiatry and Human Behavior and chairman of the psychiatry department at the Alpert Medical School of Brown University, and his coauthors were accused by doctors, lawyers, and journalists of permitting their names to be added as authors of the 2001 ghostwritten study of the antidepressant drug Paxil that concluded the drug was safe and effective in adolescents.[83] Their article became one of the most cited medical articles supporting the use of antidepressants in adolescents, and prompted Paxil manufacturer GlaxoSmithKline to promote the use of the product among children, an untapped market for antidepressants.[84] More recent studies, however, demonstrate Paxil can lead to increased suicidal tendencies in children, and Keller subsequently acknowledged receiving consulting fees in the tens of thousands of dollars from GlaxoSmithKline.[85]

Further, because of the increase in private industry funding of medical research at U.S. universities - private industry funds more than two-thirds of medical research at U.S. universities - concerns have also been raised about the control ceded by universities to private companies sponsoring the research over the results attained in the study. A recent survey shows many of the top medical school in the United States have no clear policies prohibiting medical ghostwriting; only thirteen of the top fifty medical schools have such policies.[86] A study conducted by the Harvard School of

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[82] Charles Ornstein, *Evidence in fen-phen suit claims drug maker had hand in journal articles*, THE DALLAS MORNING NEWS, May 22, 1999.

[83] Chaz Firestone and Chaz Kelsh, *Senator targets Brown U. professor's ties to big pharma*, CBS NEWS (Sept. 23, 2008), http://www.cbsnews.com/stories/2008/09/24/politics/uwire/main4473367.shtml. GlaxoSmithKline instructed its salespeople to offer assistance to physicians to write and publish articles about the helpfulness of Paxil. The offered assistance covered all facets from selecting a topic, writing the report, and submitting the article for publication. Matthew Perrone, *Glaxo used ghostwriting program to promote Paxil*, PHILADELPHIA INQUIRER, (Aug. 20, 2009), http://abcnews.go.com/Health/Business/wireStory?id=8366574.

[84] *Id*.

[85] *Id*. GlaxoSmithKline also paid consulting fees to a reviewer of an article submitted to *New England Journal of Medicine* reporting a link between heart attacks and the drug Avandia manufactured by GlaxoSmithKline. The reviewer faxed an advance copy of the manuscript to GlaxoSmithKline, prompting Senator Charles Grassley to request information from GlaxoSmithKline describing what it did after receiving the advanced copy. Letter from Senator Charles Grassley, to GlaxoSmithKline (Jan. 30, 2008) (http://finance.senate.gov/newsroom/ranking/release/?id=33317a8c-ad81-43bb-8ed6-2acff4e45a46).

[86] *Few Top Medical Schools Ban Ghostwriting by Researchers, Survey Finds*, CHRON. OF HIGHER EDUC. (Feb. 1, 2010), http://chronicle.com/blogPost/Few-Top-Medical-Schools-Ban/20990/?sid=at&utm_source=at&utm_medium=en.

Public Health and appearing in the *New England Journal of Medicine*, demonstrates that, while medical schools overwhelmingly agreed they would not enter into contracts that would allow companies to edit research articles or suppress negative results, 50% would permit companies to draft research papers and 25% would permit them to provide the data.[87] Indeed, a recent study indicates that ghostwriting research articles "is distressingly common in top medical journals."[88] The study, presented at the Sixth Annual Conference on Peer Review and Biomedical Publication, "found the prevalence of 'ghost' authors at top-ranked medical journals ranged last year from 2 percent at *Nature Medicine* to 11 percent at *The New England Journal of Medicine,*" and that 7.8% of all articles from 2008 published in *Nature Medicine*, *The New England Journal of Medicine*, *Annals of Internal Medicine,* the *Journal of the American Medical Association, The Lancet,* and *PLoS Medicine* had at least one ghost author.[89] Perhaps stung by the negative publicity about ghostwritten articles, *The New England Journal of Medicine*, *The Lancet*, and the *Journal of the American Medical Association* have announced that they plan to require the disclosure by authors of possible conflicts of interest in their research by utilizing a uniform disclosure form of all actual and potential financial conflicts of interest.[90]

C. *The Rise of the Celebrity Medical Expert*

The rise of the celebrity medical expert is the third offshoot stemming from the increase in private industry drug studies. For example, Lisa Hark parlayed her work in the nutrition education program at the University of Pennsylvania medical school, her experience as host of television nutrition programs, and her authorship of a widely used and award winning nutrition textbook into a successful consulting practice in the field of nutrition. The Florida orange industry hired her to promote the health benefits of orange juice in a six-month, $24,800 contract that produced "more than 132 million media impressions," including a *Forbes* magazine quote in which Hark touts

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[87] Alicia Chang, *Drug Companies Influence Medical Research*, EXCITE NEWS (May 25, 2005), http://www.biopsychiatry.com/bigpharma/influence.html; *See* Michelle M. Mello et al., *Academic Medical Centers' Standards for Clinical-Trial Agreements with Industry*, NEW ENG. J. MED. (May 26, 2005), http://content.nejm.org/cgi/content/full/352/21/2202.

[88] Paul Basken, *Medical 'Ghostwriting' Is Still a Common Practice, Study Shows*, CHRON. OF HIGHER EDUC. (Sept. 10, 2009), http://chronicle.com/article/Medical-Ghostwriting-Is-a/48347/?sid=at&utm_source=at&utm_medium=en.

[89] *Id.*

[90] *Medical Journals Tighten Rules on Author Conflicts*, CHRON. OF HIGHER EDUC. (Oct. 14, 2009), http://chronicle.com/blogPost/Medical-Journals-Tighten-Rules/8448/?sid=pm&utm_source=pm&utm_medium=en; The uniform disclosure form was accessed on July 21, 2010, at http://www.icmje.org/coi_disclosure.pdf.

the benefits of orange juice for preventing colds and the flu.[91] Hark also provided a helpful comment to Tyson Foods campaign to promote its chickens as being "raised without antibiotics," saying "This is great news for American consumers who have made it clear they pay attention to the use and presence of all sorts of antibiotics in the environment."[92] The U.S. Department of Agriculture later ordered Tyson Foods to stop using the "raised without" label after Tyson Foods admitted it injected eggs with antibiotics. Working for the National Dairy Council, Hark advocated the benefits of consuming three servings of low-fat dairy a day.[93] Hark's website invites companies to engage her services as a nutritionist with the words:

> Are you looking for a media expert to help promote and market your company? Do you want to add credibility to your brand, consult with a nutrition expert, hire a spokesperson or develop an Advisory Board? Dr. Lisa Hark has the academic background and media experience to help your company successfully reach both consumers and health professionals.[94]

Similarly, psychiatrist Frederick K. Goodwin, the host of NPR's popular program "The Infinite Mind," admitted earning at least $1.3 million from 2000 to 2007 giving marketing lectures for drugmakers.[95] "The Infinite Mind" has won more than 60 journalism awards and generated over one million listeners in more than 300 radio markets.[96] Goodwin's weekly radio program frequently addressed topics important to the financial interests of companies for which he consulted.[97] For example, on September 20, 2005, Goodwin advised his audience that children with bipolar disorder who were not treated could suffer brain damage and that mood stabilizers have proven to be safe and effective in bipolar children. That same day, GlaxoSmithKline paid him $2,500 to give a promotional lecture for GlaxoSmithKline's mood stabilizer drug, Lamictal, at the Ritz Carlton Golf Resort in Naples, Florida, part of the $329,000 it paid him during 2005 to promote Lamictal.[98] In another segment of his show, Goodwin denied the existence of scientific evidence of a link between antidepressants and increased risk for suicidal

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[91] Tom Avril, *Corporate money, expert opinions*, PHILADELPHIA INQUIRER (Nov. 25, 2008), http://www.healthobservatory.org/headlines.cfm?refID=104580.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] Gardiner Harris, *Drug Makers Paid Radio Host $1.3 Million for Lectures*, N.Y. TIMES (Nov. 21, 2008), http://www.nytimes.com/2008/11/22/health/22radio.html.
[96] *Id*.
[97] *Id*.
[98] *Id*.

behavior, while receiving $20,000 from GlaxoSmithKline for a promotional lecture for Lamictal.[99] While Goodwin claimed he informed Bill Lichtenstein, the program producer, of his financial ties to drugmakers, Lichtenstein denies being aware of those ties.[100] When the drug industry consulting arrangements with Goodwin became public, Margaret Low Smith, vice president of NPR, announced that the show would be removed from its satellite radio service the following week, the earliest date possible, and NPR would never have broadcast the show it if had known of Goodwin's conflicting financial interests.[101]

VII. RESPONSE OF MEDICAL INSTITUTIONS AND ACADEMIC ORGANIZATIONS

The vast array of conflict of interest revelations uncovered by Senator Grassley produced swift responses from medical institutions and academic organizations. Harvard Medical School and Massachusetts General Hospital announced they would investigate doctors' disclosure and conflict of interest forms and re-examine their policies on the relationships between physicians and industry.[102] Harvard Medical School faculty and students subsequently formed a nineteen member committee to re-examine the school's conflict of interest policies, and engaged David Korn, the former dean of Stanford University, who assisted the American Medical Association in drafting a conflict-of-interest policy for medical schools, as a consultant to the committee.[103] The University of Minnesota approved a tougher financial conflicts of interest policy, which requires faculty and staff to disclose all financial interests, which "an independent observer might reasonably question whether the individual's objectivity in the performance of

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[99] *Id.*; *NPR Radio Host Failed to Disclose Payments*, AM. HEALTH LINE (Nov. 24, 2008), http://www.americanhealthline.com/search.aspx?query=NPR+Radio+Host+Failed+to+Disclose+Payments&topic=&.

[100] Harris, *supra* note 95; *Am Health Line*, *supra* note 99.

[101] Harris, *supra* note 95.

[102] *Harvard doctors' studies tainted*, PITTSBURGH TRIB. REV. (June 9, 2008), http://www.pittsburghlive.com/x/pittsburghtrib/news/breaking/s_571718.html; June Q. Wu, *Harvard medical school to reexamine conflicts of interest policy*, HARVARD CRIMSON (June 16, 2008), http://www.thecrimson.com/article/2008/6/16/harvard-medical-school-to-reexamine-conflicts/.

[103] Katherine Mangan, *Harvard Medical Students and Faculty Members Work to Expose Conflicts of Interest*, CHRON. OF HIGHER EDUC. (Mar. 3, 2009), http://chronicle.com/article/Harvard-Medical-Students-an/42501. *See* Charles Huckabee, *Sen. Grassley Asks Pfizer About Payments to Faculty Members at Harvard Medical School*, CHRON. OF HIGHER EDUC. (Mar. 3, 2009), http://chronicle.com/article/Sen-Grassley-Asks-Pfizer/42505 ("The Iowa senator is asking the drug maker Pfizer to provide details of its payments to at least 149 faculty members at Harvard Medical School").

University responsibilities could be compromised by considerations of personal gain," and prohibits those individuals from engaging in University-related activities in which a conflict of interest exists.[104] Michigan Medical School has announced that it will stop taking money from drug or medical-device manufacturers to pay for the refresher courses that doctors must take to renew their licenses.[105] *The Journal of the American Medical Association* published a correction listing sixty-four financial ties between the authors of published articles and manufacturers of antidepressant drugs, and revised its conflict of interest policy to require authors to divulge any financial ties they may have to the medical industry in an acknowledgement section.[106] The Federation of American Societies for Experimental Biology, which represents 84,000 research scientists, issued a report containing a suggested set of voluntary guidelines to assist scientists identify and manage conflicts of interest.[107] Two medical organizations, the Institute on Medicine as a Profession (IMAP) and the Association of American Medical Colleges, announced they would launch websites detailing conflict of interest policies instituted by academic medical centers.[108] IMAP's website is up and running, contains the conflict of interest policies of over 125 medical institutions, and can be accessed at http://www.imapny.org/policy/. The Cleveland Clinic announced that the financial links between its 1,800 physicians and researchers will be published on the clinic's website as part of its effort to minimize conflicts of interest.[109] The University of Pennsylvania School of

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[104] Paul Basken, *Minnesota Regents Outline Policy to Toughen Rules on Financial Conflicts of Interest*, CHRON. OF HIGHER EDUC. (Mar. 12, 2010), http://chronicle.com/article/Minnesota-Regents-Outline/64668/?sid=at&utm_source=at&utm_medium=en. The text of the policy approved by the Board of Trustees on March 12, 2010, appears in the minutes of their meeting accessed on July 20, 2010, at http://www1.umn.edu/regents/docket/2010/march/board.pdf.

[105] *Medical School Bans Industry Contributions for Continuing-Medical-Education Courses*, CHRON. OF HIGHER EDUC. (June 23, 2010), http://chronicle.com/blogPost/Medical-School-Bans-Industry/25050/?sid=at&utm_source=at&utm_medium=en.

[106] Katherine Mangan & Jeffrey R. Young, *Medical Journal Toughens Its Conflict-of-Interest Policy*, CHRON. OF HIGHER EDUC. (July 21, 2006), http://chronicle.com/article/Medical-Journal-Toughens-Its/19274.

[107] Jeffrey Brainard, *Biomedical Group Will Suggest Ways for Scientists to Handle Potential Conflicts of Interest*, CHRON. OF HIGHER EDUC. (July 28, 2006), http://chronicle.com/article/Biomedical-Group-Will-Suggest/7728.

[108] Shawn Rhea, *AAMC, institute ready online guides to centers' conflict-of-interest policies*, MODERN HEALTHCARE (Sept. 8, 2008), http://webcache.googleusercontent.com/search?q=cache:YxV_3dW1YuQJ:www.modernhealthcare.com/article/20080908/SUB/809059963%26Template%3Dprintpicart+Shawn+Rhea+AAMC,+institute+ready+online+guides+to+centers%E2%80%99+conflict-of-interest+policies&cd=1&hl=en&ct=clnk&gl=us.

[109] Katherine Mangan, *Cleveland Clinic to Divulge Scientists' Industry Ties*, CHRON. OF HIGHER EDUC. (Dec. 2, 2008), http://chronicle.com/news/article/5594/cleveland-clinic-to-divulge-scientists-industry-ties?utm_source=at&utm_medium=en; Reed Abelson, *Cleveland*

Medicine and health system announced it would launch a website disclosing searchable information on all outside activities of its doctors and scientists.[110] The American Psychiatric Association announced that it will no longer permit drug companies to provide education seminars and meals at its annual meeting.[111] The National Academies' Institute of Medicine issued a 353-page report calling on "medical schools, hospitals, and physicians' groups to publicly report money they receive from drug companies, to not accept free gifts or meals from the industry, and to ban physicians who have financial conflicts of interest from testing new therapies on people."[112] These responses, however, fall well short of the more comprehensive policy proposal developed by the American Medical Association, discussed below.

VIII. SOLUTIONS PROPOSED TO COMBAT MEDICAL INDUSTRY CONFLICTS OF INTEREST

Three major solutions have been proposed to combat the medical industry conflicts of interest detailed above in this case. The first solution is embodied in the Physician Payments Sunshine Act, which requires companies manufacturing drugs, medical devices or medical supplies to make quarterly reports to the Secretary of Health and Human Services detailing payments made to physicians or their employers, and prohibits tax deductions for advertising, promotion or marketing expenses for any payments not disclosed.[113] The reported information, in turn, will be published in the federal register permitting patients and consumers the

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Clinic Discloses Doctors' Industry Ties, N.Y. TIMES (Dec. 2, 2008), http://www.nytimes.com/2008/12/03/business/03clinic.html?fta=y.

[110] Josh Goldstein, *Penn Medicine to disclose doctors' drug ties*, PHILADELPHIA INQUIRER (Dec. 5, 2008), http://www.philly.com/philly/hp/news_update/20081205_Penn_Medicine_to_disclose_doctors__drug_ties.html.

[111] Josh Fischman, *Psychiatrists Say No to Drug Company Events at Their Annual Meeting*, CHRON. OF HIGHER EDUC. (Mar. 26, 2009), http://chronicle.com/article/Psychiatrists-Say-No-to-Dru/42636/ ("The American Psychiatric Association said yesterday that it would no longer allow education seminars and meals sponsored by pharmaceutical companies at its annual meeting").

[112] Katherine Mangan, *Institute of Medicine Calls for Ban on Drug-Company gifts to Professors and Others*, CHRON. OF HIGHER EDUC. (Apr. 28, 2009), http://chronicle.com/article/Institute-of-Medicine-Calls/42815/.

[113] The Physician Payments Sunshine Act of 2008, H.R. 5605, 110th Cong. (2008), http://www.govtrack.us/congress/bill.xpd?bill=h110-5605. A more comprehensive version of the Physician Payments Sunshine Act was introduced on January 20, 2009. *See* Press Release, Grassley Works to Disclose Financial Ties Between Drug Companies and Doctors (Jan. 22, 2009) (http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=18901#). The Physician Payments Sunshine Act of 2009, S. 301, 111th Cong. (2009), http://www.govtrack.us/congress/bill.xpd?bill=s111-301.

opportunity to learn about medical industry conflicts of interest, and thereby augmenting transparency and accountability for the various payments made to physicians.[114] Notably, a significant number of medical companies and organizations have endorsed the Physician Payments Sunshine Act.[115] Moreover, perhaps realizing the inevitability of public disclosure, Eli Lilly, GlaxoSmithKline, Merck, and Pfizer have agreed to publicly disclose payments they make to doctors.[116]

The public disclosure approach contained in the Physician Payments Sunshine Act and conceded by several major pharmaceutical firms, however, is only one-half of the normal legal resolution recommended for conflicts of interest within corporate governance. More particularly, when directors or officers find themselves in a conflict of interest, they must make full disclosure of the conflict and refrain from any participation in the transaction approval process. The latter requirement – not participating in the transaction

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[114] *See More disclosure needed on drug company payouts*, DENVER POST (Aug. 10, 2007), http://www.denverpost.com/search/ci_6586804.

[115] The following organizations have endorsed the Physician Payments Sunshine Act: American Medical Association, Association of American Medical Colleges, AdvaMed, Pharma, Abbott and Abbott Lab, Amgen, Astra Zeneca, Baxter, Boston Scientific, Bristol Myers Squibb, Eli Lilly, Johnson and Johnson, Medtronic, Inc., Merck, Pfizer, St. Jude Medical, Stryker, Wyeth, and Zimmer Holdings. Press Release, Support for S. 2029, the Grassley-Kohl Physicians Payments Sunshine Act (July 20, 2010) (http://finance.senate.gov/newsroom/ranking/release/?id=e869c734-de40-4b4f-9b7e-fd9d5d742c87). The following companies support the disclosure of financial contributions to continuing medical education: Baxter, Medtronic, Boston Scientific, Merck, Pfizer, St. Jude Medical, Abbott Lab, Amgen, AstraZeneca, Bristol Myers Squibb, Johnson & Johnson, Schering-Plough, Stryker, Wyeth, and Zimmer Holdings. Press Release, Responses From Pharmaceutical Drug and Device Makers to Grassley Request for Disclosure of Support for Continuing Medical Education (Apr. 11, 2008) (http://finance.senate.gov/newsroom/ranking/release/?id=637bd77c-508f-489d-84fd-133c94e6ea3b).

[116] In September 2008, Eli Lilly began disclosing on its website payments to doctors who serve as consultants. Shirley S. Wang, *Eli Lilly's Payments to Doctors Revealed*, WALL ST. J. (July 31, 2009), http://blogs.wsj.com/health/2009/07/31/eli-lillys-payments-to-doctors-revealed/tab/print/. Pfizer, GlaxoSmithKline, and Merck have also agreed to disclose payments made to doctors. *See* Linda A. Johnson, *Pfizer to disclose payments to doctors next year*, COURIER POST (Feb. 10, 2009), http://seattletimes.nwsource.com/html/health/2008726701_pfizer10.html ("Pfizer Inc., the world's biggest drugmaker, said Monday it will begin disclosing all sizable payments it makes to doctors, including those who test experimental drugs in people, a first for the industry. The disclosures would begin early next year and are planned to include all payments to medical personnel who prescribe drugs -- doctors, physician's assistants and nurse-practitioners -- exceeding $500 in a year, the New York-based company told The Associated Press."); Maria Panaritis, *Glaxo to change training-payment practices*, PHILADELPHIA INQUIRER (Sept. 22, 2009), http://www.allbusiness.com/education-training/curricula-medical-education/13010850-1.html l ("By year's end, Glaxo said, it also would begin publicly disclosing all payments it makes to doctors. . . . In September 2008, drugmakers Merck & Co., and Eli Lilly & Co., said they would begin publicly disclosing payments to physicians").

approval process – is not explicitly included in the Physician Payments Sunshine Act. Significantly, in at least one instance, public disclosure of conflicts of interest resulted in the removal of members of the FDA advisory committee charged with determining whether an extended-release version of pharmaceutical company AstraZeneca's Seroquel XR, a powerful antipsychotic used to treat depression and anxiety, should be approved. Jorge Armenteros, the chair and a voting member of the committee, who was paid by AstraZeneca to promote the drug in talks to other doctors, and four other committee members, were removed from the committee because of conflicts of interest made public by attorneys representing patients who are suing AstraZeneca and other makers of antipsychotics and claim the drugs triggered their diabetes.[117] The FDA panel, meeting without the five removed members, approved a limited use for Seroquel XR as an additional therapy for patients suffering from depression who do not respond to their current medications, and declined to approve the broader use requested by AstraZeneca to treat depression and anxiety as a single therapy. Approval of the broader use of Seroquel XR would have "dramatically expanded the market for Seroquel," which currently generates $4.7 billion in annual sales.[118]

The second proposed solution is the creation of a National Institute of Drug Testing (NIDT). The principal justifications advanced for this proposal are threefold: (1) "endemic" conflicts of interest in the system of drug evaluation have "been exacerbated by the rise in for-profit clinical trials, fast-tracking of drug approvals, government-industry partnerships, direct consumer advertising, and industry-funded salaries for FDA regulators;" (2) "those who manufacture and market products should not have undue influence and control over how the product is evaluated;" and (3) the concept of "independent science" should be reintroduced in drug testing to "prevent even the appearance of conflict of interest."[119] Under this proposal, the NIDT will be added to NIH and charged with the responsibility of independently testing the efficacy and safety of drugs and medical devices.[120] While medical companies can continue to pre-test drugs and medical devices using their own scientists or contracted researchers, the medical companies must submit the drug or device to NIDT for testing, thereby creating a "buffer" or "firewall" between drug companies and researchers who test drugs in animals or in human subjects.[121] NIDT will be financed by fees paid

[117] Miriam Hill, *Conflict for FDA panel on Seroquel*, PHILADELPHIA INQUIRER (Apr. 4. 2009), http://bipolarsoupkitchen-stephany.blogspot.com/2009/04/conflict-of-interest-fda.html.
[118] Miriam Hill, *A minor victory in Seroquel battle*, PHILADELPHIA INQUIRER (Apr. 8, 2009), http://www.philly.com/philly/business/42724807.html.
[119] Krimsky, *supra* note 37.
[120] *Id*.
[121] *Id*.

by the drug companies based on accepted research costs set by the institute; the NIDT will solicit qualified scientists to conduct the tests subject to protocols designed to protect the confidentiality of business information; and data from test results will be made fully accessible to the drug companies, health care providers and the general public.[122]

The third proposal is the far more comprehensive policy developed by the American Medical Association and aimed at academic medical centers. In issuing its proposed policy, the AMA noted that the "standing of the profession, as much as the integrity of the pharmaceutical and medical device industries, is jeopardized by allowing obvious conflicts to continue," and that academic medical centers "must more strongly regulate, and some cases prohibit, many common practices that constitute conflicts of interest with drug and medical device companies."[123] The AMA preliminarily emphasized that a wide range of psychological, sociological, and economic research demonstrates that even small gifts significantly influence physicians' behavior and that public disclosure of conflicts of interest alone is insufficient to satisfy the need to protect the interests of patients.[124] The AMA policy recommends:

- All gifts (zero dollar limit), free meals, payment for time for travel to or time at meetings, and payment for participating in online [continuing medical education] from drug and medical device companies to physicians should be prohibited.

- The direct provision of pharmaceutical samples to physicians should be prohibited and replaced by a system of vouchers for low income patients or other arrangements that distance the company and its products from the physician.

- Hospital and medical group formulary committees and committees overseeing purchases of medical devices should exclude physicians (and all health care professionals) with financial relationships with drug manufacturers, including those who receive any gift, inducement, grant or contract.

- [Drug manufacturers] should not be permitted to provide support directly or indirectly through a subsidiary agency to any [academic center continuing medical education]-accredited program. Manufacturers wishing to support education for

[122] *Id*.
[123] Brennan, *supra* note 7, at 429-33.
[124] *Id*. at 430.

> medical students, residents, and/or practicing physicians should contribute to a central repository . . . which, in turn, would disburse the funds to ACCME-approved programs.
>
> - Pharmaceutical and device manufacturers interested in having faculty or fellows attend meetings should provide grants to a central office at the AMC. That office could then disburse funds to faculty and training program directors.
>
> - Faculty at AMCs should not serve as members of speakers bureaus for pharmaceutical or device manufacturers. Speakers bureaus are an extension of manufacturers marketing apparatus. Because AMC faculty have a central role in training of new physicians and represent their own institution, they should not function as paid marketers or spokespersons for medicine-related industries.
>
> - [C]onsulting with or accepting research support from industry should not be prohibited. However, to ensure scientific integrity, far greater transparency and more open communication are necessary. Accordingly, consulting or honoraria for speaking should always take place with an explicit contract with specific deliverables, and the deliverables should be restricted to scientific issues, not marketing efforts. So-called 'no strings attached' grants or gifts to individual researchers should be prohibited.
>
> - AMCs should be able to accept grants for general support of research (no specific deliverable products) from pharmaceutical and device companies provided that the grants are not designated for use by specific individuals.
>
> - [C]onsulting agreements and unconditional grants should be posted on a publicly available internet site, ideally at the academic institution.[125]

[125] *Id*. at 431-32.

IX. POTENTIAL DISCUSSION QUESTIONS

A. *Do payments by medical industry companies to practicing physicians and medical school department heads create conflicts of interest?*

The payments by medical industry companies to practicing physicians and medical school department heads in the form of free meals and drug samples, travel expenses to attend professional meetings or continuing education programs, payments for consulting, lectures, and enrolling patients in clinical trials, donated research equipment, financial support for residency and fellowship training, and service on advisory boards, do create conflicts of interest. Having accepted those financial benefits, the practicing physicians and academic department heads cannot be said to be acting solely for the benefits of their patients or their academic employers. Whenever a reasonable observer cannot ascertain with certainty what motivated the physician to recommend a medical treatment (best interest of the patient or gratitude to a medical company) or the academic department head to undertake medical research (best scientific answer or best outcome for the medical company), a material conflict of interest exists, and the public interest in guaranteeing the safety and effectiveness of medical treatments and devices is threatened.

B. *Do the failures of Drs. Schatzberg, Wang, Biederman, and Nemeroff to disclose fully their financial interests and ties to medical industry companies violate their fiduciary obligations as employees respectively of Stanford, UCLA, Harvard and Emory Universities?*

As employees of Stanford, Harvard, Emory, and UCLA, Drs. Schatzberg, Biederman, Nemeroff and Wang owe multiple fiduciary duties to their employers: (a) to use reasonable diligence and skill in performing their duties, (b) to notify their employers of all information that comes to their attention and is relevant to the employment relationship, (c) to act solely for the benefit of their employers, (d) to follow all lawful and clearly stated instructions given to them by their employers, and (e) to account for all property and funds received and expended on behalf of the employer.[126] Their failure to disclose fully their financial ties to medical industry companies violates three of those duties. First, they failed to notify their employee of the true extent of their financial links to the medical industry companies, and that failure not only prevents the four physicians from fulfilling their employment obligations but also causes their employers to

[126] Cross, *supra* note 1, at 485-86; Restatement (Third) of Agency §§ 8.01, 8.02, 8.07, 8.08, 8.09(2), 8.10, and 8.11.

suffer significant damages in the form of lost external research funding and future research funding opportunities, doubts about the reliability of research undertaken by the University's medical scientists, and significant distractions as the universities respond to inquiries of the U.S. Senate Finance Committee and various news organizations. Second, Drs. Schatzberg, Wang, Biederman, and Nemeroff breached their fiduciary obligation to act solely for the benefit of their employer by accepting financial contributions and holding financial interests in medical industry companies and failing to disclose same. From that moment on, Drs. Schatzberg, Wang, Biederman, and Nemeroff placed their own financial interests and the interest of the medical industry companies above the interest of their employers. Third, Drs. Schatzberg, Biederman, Nemeroff and Wang failed to follow the clear instructions of their employers to disclose financial conflicts as part of their duties as principal investigators on externally funded research grants and thereby placed their Universities at risk of losing research funding in the future and thwarted the efforts of NIH and FDA to uncover pervasive conflicts of interest.

C. *Three inherent forces are identified in this case for fomenting conflicts of interest: the vertical integration of the pharmaceutical industry, the 1980 Bayh-Dole Act, and the accelerating need of the medical industry to conduct human experiments. Which of the three suggested solutions for eliminating conflicts of interest in the medical industry best addresses these inherent forces?*

The proposed Physicians Payments in Sunshine Act requires medical industry companies to file quarterly reports with the Secretary of Health and Human Services detailing payments made to physicians or their employers, denies tax deductions for advertising, promotion or marketing expenses for any payments not disclosed, and mandates publication of those quarterly reports in the Federal Register to notify the public of the existence and extent of financial interest conflicts. Hence, to the extent payments to physicians are brought to the attention of the public, that aspect of the vertical integration of the pharmaceutical industry is addressed. The proposed Physicians Payments in Sunshine Act, however, does not address the removal of physicians and medical scientists from participation in the transaction approval process, the financial incentives provided to physicians and medical scientists by the Bayh-Dole Act to commercialize medical drugs and devices, or the accelerating need of the medical industry to conduct human experiments.

Requiring independent testing of the efficacy and safety of drugs and medical devices by a newly created federal agency removes the physician and medical scientist with financial links to the medical industry from the

ultimate approval process for the drug or medical device, and thereby does address the impact of the financial contributions made by pharmaceutical industries on the approval process. Independent testing, however, does not mandate public disclosure of the financial conflicts of interest, does not address the financial incentives provided by the Bayh-Dole Act, and will likely exacerbate the need of the medical industry to conduct human experiments.

The American Medical Association proposal provides the most comprehensive means of disclosing financial conflicts of interest and eliminating the benefits flowing to medical industry companies from its direct financial support of medical conferences and continuing education programs. All gifts, meals, travel expense reimbursement, and payments for participating in medical company programs are prohibited. Free drug samples are replaced by vouchers for low income patients. Decisions on medical institution purchases of medical devices and equipment are made only by those without financial conflicts of interests. Financial support for continuing education programs and meetings are funneled through and disbursed by a central depository thereby eliminating the identification of the medical company with the financial support for those programs. Medical school faculty members are prohibited from participating in speaker bureaus and accepting fees for marketing and promoting medical products. And significant transparency is provided for accepting consulting fees and research support. While these proposals provide far greater disclosure of financial conflicts of interest and eliminate many practices creating such conflicts, they do not address the financial incentives provided to physicians and medical scientists by the Bayh-Dole Act to participate in the commercialization of medical products and the rapidly expanding need of the medical industry to conduct human experiments.

D. *Discuss whether the drug company practice of "medical ghostwriting," in which medical companies prepare drafts of articles, editorials and research papers, invite prominent doctors and scientists to add their names as coauthors, and publish the work in prominent medical journals read by practitioners who believe the publications contain independent research, is ethical.*

The drug industry practice of medical ghostwriting is likely unethical. To begin with, the practice of medical ghostwriting permits drug approval processes to proceed based on scientific evidence selected by the drug company to support the conclusion that the medical companies prefer, rather than the conclusion based on the best scientific evidence. This may lead to the approval of drugs in new markets that improve the profitability of the

drug companies, but may cause harm to patients in that market, as apparently happened in the case of the "fen-phen" drug combination and the prescribed use of antidepressants in adolescents. Likewise, practicing physicians who read and rely on these articles and papers may prescribe drugs that may harm their patients. From the utilitarian point of view, the practice of medical ghostwriting may cause more negative consequences than beneficial consequences, particularly if it triggers a loss of public confidence in the integrity of drug companies and the drug approval process and legislative action to reform the regulatory oversight over the drug industry.[127]

Likewise, the practice of medical ghostwriting likely misleads the readers of the journals in which the ghostwritten papers and studies appear about the extent to which the co-authors, generally perceived to be the leading doctors and scientists in their fields, actually conducted the research and formulated the scientific conclusions. From a Kantian point of view, such deception is unethical, because it uses the readers of the ghostwritten works as a means only to advance the interest of the pharmaceutical companies. Further, it is unlikely that medical ghostwriting is an acceptable universal practice that all participants in drug formulation, production, testing, approval, and consumption would be willing to accept.[128]

Finally, viewed from the perspective of the Rawls' Original Position/Veil of Ignorance Theory, it is unlikely that parties, who do not know what position they will occupy in society or what advantages or disadvantages they will possess, would be willing to permit society to employ rules or practices that permit drug companies to engage in medical ghostwriting. Likewise, employing Rawls' Principle of Equal Liberty, the deceptive nature of medical ghostwriting appears to deny equal and universal enjoyment of the most extensive basic liberties.[129]

E. *Discuss whether the employment of the "celebrity medical expert" to provide testimonials about the effectiveness of food products or medicines is ethical.*

The practice of food and drug manufacturers employing celebrity medical experts to tout the health benefits of their products is unethical in the absence of a disclosure that the celebrity medical expert has a conflict of interest in promoting the products. Lisa Hark's promotions of orange juice and Tyson Foods chicken products are misleading, if the target audience of her message is not told she was paid as a consultant to promote those products. Frederick Goodwin's recommendations that bipolar children could

[127] Velasquez, *supra* note 3, at 70-72.
[128] *Id*. at 94-97.
[129] *Id*. at 114-16.

be treated safely with mood stabilizers are misleading, if the significant consulting fees he earned to promote those drugs are not fully disclosed. As noted above, the use of deception does not normally produce the greatest net amount of good for those affected by the deception; deception uses the victim of the deception as a means only, and does not constitute an acceptable universal practice; and deception violates Rawls' theory of justice.

F. *Should the policy of the Bayh-Dole Act to fund academic research, give academic researchers and their institutions the right to products developed with government money, and to permit physicians and medical scientists to commercialize drugs and medical devices be modified or abandoned?*

The Bayh-Dole Act encourages scientific research and the commercialization of drugs and medical devises by permitting academic researchers to license their intellectual property and develop financial ties with the biotechnology or pharmaceutical industries. The Bayh-Dole Act has significantly increased the participation of academic institutions in technology transfer, enhanced their income streams, spawned new businesses, and facilitated the movement of discoveries from the university laboratory to the marketplace quickly and efficiently. It also enhances employment opportunities and federal and state tax revenues, thereby returning the benefits of scientific research full circle. Recent results of a survey conducted by the Association of University Technology Managers, for example, reported significant economic development was spurred in 2008 by University research and inventions: 543 new university spinoff companies; $2.3 billion in licensing revenue for 154 institutions and their inventors; and 4,350 licenses of inventions for new products.[130] Hence, given the benefits generated by the Bayh-Dole act, it is doubtful whether the incentives it provides should be modified or abandoned.

One recent example of the impact of Bayh-Dole is the disclosure by the University of Wisconsin that Thomas A. Zdeblick, a renowned surgeon and chairman of the department of orthopedics, earned royalty income in the amount $19.4 million between 2003 and 2007 from Medtronic, which sells spinal implants developed by Dr. Zdeblick. Dr. Zdeblick was the inventor of 25 U.S. patents, 7 pending U.S. patent applications, 41 foreign patents, and 20 pending foreign patent applications developed with Medtronic. In accordance with University of Wisconsin policy, Dr. Zdeblick fully disclosed

[130] Goldie Blumenstyk, *University Inventions Sparked Record Number of Companies in 2008*, CHRON. OF HIGHER EDUC. (Feb. 15, 2010), http://chronicle.com/article/University-Inventions-Sparked/64204/?sid=pm&utm_source=pm&utm_medium=en.

his income from outside sources. Dr. Zdeblick also insists that he does not receive any royalties on devices implanted into his patients.[131]

As Dr. Zdeblick's experience demonstrates, it is possible to neutralize the potential impact of conflicts of interest resulting from outside income from medical companies by fully complying with disclosure requirements, declining royalties on products selected for the physician's patients, and refraining from any decision making process in which the outside income creates a conflict of interest. In short, the significant benefits of the Bayh-Dole Act in encouraging the development and commercialization of drugs and medical devices by supporting scientific research and ceding ownership of the intellectual property to the academic researchers and institutions can be maintained without triggering injurious conflicts of interest.

[131] *See* Paul Basken, *Surgeon's Royalties Bring Heat to a Medical School with Strict Ethics Policy*, CHRON. OF HIGHER EDUC. (Feb. 27, 2009), http://chronicle.com/daily/2009/02/12570n.htm?utm_source=at&utm_medium=en. Dr. Zdeblick was not the only physician receiving payments from drug and medical devices companies. "Paul A. Anderson, a professor of orthopedic surgery . . . was paid $150,000 by Medtronic for eight days of work as a consultant; Ben K. Graf, an associate professor of orthopedic surgery . . . collected $770,000 in royalties from the medical-device manufacturer Smith & Nephew; and Clifford B. Tribus, an associate professor of orthopedic surgery . . . was paid $310,000 for royalties and 15 days of work as a speaker and consultant for Stryker Spine, another device company." Paul Basken, *Several U. of Wisconsin Medical-School Professors Accepted Large Corporate Payments*, CHRON. OF HIGHER EDUC. (June 22, 2009), http://chronicle.com/article/Several-U-of-Wisconsin-Med/47784/.

A HOUSE DIVIDED: THE INCOMPATIBLE POSITIONS OF THE CENTERS FOR DISEASE CONTROL AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ON OBESITY AS A DISABILITY

KENT D. KAUFFMAN*

I. INTRODUCTION

The Centers for Disease Control and Prevention (CDC) is an arm of the Department of Health and Human Services,[1] with a $10.8 billion budget for 2011[2] and approximately 10,400 employees. According to its website, the mission of the CDC is: "Collaborating to create the expertise, information, and tools that people and communities need to protect their health – through health promotion, prevention of disease, injury and disability, and preparedness for new health threats."[3] One of the CDC's highest priorities is combating the nation's obesity problem, something the CDC refers to as an epidemic.[4] Approximately one-third of Americans are obese,[5] and even though the obesity rates for all age-ranges in America have risen unabated for many decades, the CDC still believes that the battle against obesity can be won.[6] The centerpieces of the CDC's arsenal against obesity are the

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[1] *CDC Organization*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/about/organization/cio.htm (last updated Feb. 17, 2012).

[2] *Budget Overview, FY 2011 CDC Budget Summary*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/fmo/topic/Budget%20Information/appropriations_budget_form_pdf/CDC_FY_2011_Operating_Plan_Summary.pdf (last visited Feb. 28, 2012).

[3] *CDC Mission*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/about/organization/mission.htm (last updated Jan. 11, 2010).

[4] *CDC TV: The Obesity Epidemic*, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 22, 2011), http://www.cdc.gov/cdctv/ObesityEpidemic.

[5] *Nutrition, Physical Activity, and Obesity,* CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/winnablebattles/Obesity/index.html (last updated Dec. 21, 2011).

[6] Letter from Thomas R. Frieden, Director, Centers for Disease Control and Prevention, to the Colleagues, the U.S. Dep't of Health and Human Servs. (Jan. 14, 2011) (http://www.cdc.gov/WinnableBattles/Obesity/pdf/Obesity_WB_Letter.pdf).

promotions of increased physical activity and increased consumption of fruits, vegetables and other foods that are low in fats and sugars.[7]

The Equal Employment Opportunity Commission (EEOC) was created by Title VII of the 1964 Civil Rights Act and its mission is to eliminate unlawful employment discrimination.[8] One of the anti-discrimination laws the EEOC is empowered to administer is the Americans with Disabilities Act of 1990 (ADA),[9] which was significantly amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA).[10]

While the question whether obesity is covered by the ADA has not been consistently answered by the federal courts, after the passage of the ADAAA the EEOC has taken an active role in asserting that obesity is a covered disability (including filing two noteworthy lawsuits against employers, alleging obesity discrimination). The difficulty with the EEOC's stance is that it disregards the reality that obesity presents in the workplace, one of ever-burgeoning healthcare and other employment costs that are unsustainable. It is also a stance that is antipathetic to the CDC's evermore urgent attempts to alter the direction of the obesity trend line.

This article will examine the obesity epidemic, including its causes and costs in the workplace, and explore the dichotomy between the CDC and the EEOC, as it relates to obesity in America. Furthermore, the article will recommend that despite the enlarged scope of disability coverage intended by the ADAAA, if the CDC has any chance to win the obesity battle, the EEOC needs to be a noninterventionist, unless an employee's obesity is the direct result of a naturally occurring medical condition. The courts and the EEOC took that approach with respect to smoking as a disability, and the disinclination had positive effects toward reducing smoking.

II. *EEOC V. RESOURCES FOR HUMAN DEVELOPMENT*: A TEST CASE IN DISABILITY DISCRIMINATION BASED ON OBESITY

At the time of her death in 2009 at the age of 48, Lisa Harrison likely had a Body Mass Index (BMI) of ninety-six, which is over three times higher than would qualify as obese. At five feet two inches tall, Ms. Harrison's

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[7] *What Can Be Done? Adult Obesity*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Aug. 3, 2010), http://www.cdc.gov/vitalsigns/AdultObesity/WhatCanBeDone.html.

[8] *See* 42 U.S.C. § 2000e-4 (2009). The EEOC consists of a five-member bipartisan commission, appointed by the President of the United States, which administrates a budget of over $367 million and 2,470 employees. *EEOC Budget and Staffing History 1980-Present*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm (last visited Feb. 28, 2012).

[9] Americans with Disabilities Act of 1990, Pub. L. No. 101-336 (S 993), 104 Stat. 327 (1990).

[10] Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325 (S 3406), 122 Stat. 3554 (2008).

weight through adulthood ranged from 400-527 pounds,[11] something her sister attributed to using food as a source of comfort.[12] Two years before her death, [13] Ms. Harrison was fired from her job at Family House Louisiana, a long-term residential facility for drug addicted women and their children.[14] According Ms. Harrison's sister, Family House Louisiana fired Harrison—who had been employed at Family House for nine years and who worked with the children residing at Family House—because it was concerned that in her condition she would be unable to perform cardio pulmonary resuscitation in the event of an emergency.[15] Believing she was unlawfully discriminated against because of her weight, Ms. Harrison filed a complaint with the Equal Employment Opportunity Commission (hereafter EEOC). A series of negotiations between her and Family House's parent organization in Philadelphia, PA, Resources for Human Development, Inc., ended after her death.

But in 2010, the Equal Employment Opportunity Commission (EEOC) filed a federal suit in the Eastern District of Louisiana on behalf of the estate of Ms. Harrison.[16] The lawsuit is one of only a few cases the EEOC has filed

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[11] *See* EEOC v. Res. for Human Dev., Inc., No. 10-3322 (E.D. La. Dec. 6, 2011).

[12] Mark Waller, *Gretna Woman Says She Was Fired for Being Obese*, Nola.com (Jan. 16, 2011), http://www.nola.com/crime/index.ssf/2011/01/woman_says_she_was_fired_for_b.html.

[13] *Id.* She died in a hospital after having admitted herself for what her family thought at the time may have been due to gall stones or a blood clot.

[14] *Family House Louisiana, Description*, RESOURCES FOR HUMAN DEVELOPMENT, http://www.rhd.org/Program.aspx?pid=48 (last visited Feb. 28, 2012).

[15] *CDC Organization*, *supra* note 1.

[16] *See Res. for Human Dev., Inc.,* No. 10-3322. In its press release announcing the lawsuit, the director of the New Orleans EEOC office announced, "This is a classic case of disability bias, based on myths and stereotypes. The evidence shows that Ms. Harrison was a good and dedicated employee who did not deserve to be fired. All covered employers, whether for-profit or non-profit, must abide by the ADA's provisions." The EEOC attorney in charge of litigation in Louisiana provided the following for the press release: "The filing of this suit sends a strong message to employers that they cannot fire disabled employees based on perceptions and prejudice. Ms. Harrison's obesity did not interfere with the care she provided to young children. Those children deserved better from her employer just as she did. The EEOC will continue to scrutinize situations like this very closely, and to file suit where necessary to enforce the ADA. That extends to unfortunate circumstances, like those here, where the fired employee has subsequently died." *EEOC Sues Resources for Human Development, Inc., for Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Sept. 30, 2010), http://www.eeoc.gov/eeoc/newsroom/release/9-30-10u.cfm. The EEOC brought another publicized suit against an employer, alleging disability discrimination based on obesity, when it filed an ADA claim against military vehicle manufacturer BEA Systems in September 2011, on behalf of Ronald Kraz II. Kraz had worked for BEA Systems in Houston, Texas, for 16 years, and weighed between 450 and 680 pounds during that time, but was fired in 2009. L.M. Sixel, *Man Fired at 680 Pounds Says Weight Didn't Hurt His Work*, HOUS. CHRONICLE (Sept. 29, 2011), http://www.chron.com/default/article/Man-fired-at-680-pounds-says-weight-didn-t-hurt-2193407.php.

in which it alleged that obesity, itself, (rather than an impairment associated with obesity) is a disability under the ADA.[17] Although the alleged wrongful conduct occurred before enactment of the ADAAA[18] and is, therefore, a case not brought under the ADAAA's provisions, the suit seems to be a response to the ADAAA's stated desire that the broad scope of protection intended by the ADA be "reinstated."[19]

In its answer, Resources for Human Development responded by claiming that the EEOC missed the statute of limitations, as well as failed to state a claim upon which relief may be granted.[20] Concerning the accusation in the EEOC's complaint, the answer claims that Resources for Human Development had a "legitimate, non-discriminatory reason" for releasing Ms. Harrison. In regard to the former employee, the answer states she was neither a qualified individual with a disability under the ADA, nor that it regarded her as such.[21]

On December 6, 2011, the U.S. District Court denied two motions for summary judgment filed by Resources for Human Development.[22] In its Order, the Court disagreed with the defendant's argument that the EEOC's own regulations exclude obesity as a disability and instead concluded that severe obesity qualified as a disability under the ADA.[23] Furthermore, the Court concluded that there was no requirement that an obese person establish an underlying physiological basis for such a condition.[24]

III. THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008: A LESSON IN CHECKS AND BALANCES

Passed in 2008,[25] the Americans with Disabilities Act Amendments Act[26] was an explicit knuckle-rap on the United States Supreme Court.

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[17] *See* EEOC v. Texas Bus Lines, 923 F. Supp. 965 (S.D. Tex. 1996); EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436 (6th Cir. 2006).
[18] Jan. 1, 2009.
[19] Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325 (S 3406), 122 Stat. 3554 (2008), § 2(b)(1).
[20] Answer, EEOC v. Res. for Human Dev., Inc., No. 10-3322 (E.D. La. Nov. 30, 2010).
[21] *Id.* Resources for Human Development also asked for attorney's fees, on the basis that the lawsuit was filed without merit and with the sole intent of harassment.
[22] EEOC v. Res. for Human Dev., Inc., No. 10-3322 (E.D. La. Dec. 6, 2011).
[23] *Id.*
[24] *Id.* Summarily, the Court believed that there was a genuine issue of material fact to be litigated, namely why Ms. Harrison was fired: either she was fired because Resources for Human Development regarded her as being disabled due to her obesity, or because her obesity limited her job performance.
[25] President George W. Bush signed the unanimously-passed ADAAA into law on September 25, 2008, and it went into effect January 1, 2009.
[26] Later codified at 42 U.S.C.A. §§ 12101-12213.

Having observed from the sidelines while the Court's interpretation of the original Americans with Disabilities Act of 1990 narrowed the scope of the law's coverage and application, Congress made its displeasure known in the ADAAA's opening sentence: "An Act to restore the intent and protections of the Americans with Disabilities Act of 1990."[27] But the reproach did not end there. Section 2(b) of the ADAAA lists two Supreme Court ADA cases that Congress expressly rejected in the revised statute: *Sutton v. United Air Lines, Inc.*, and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[28] In Section 2(b)(3) of the ADAAA, Congress expressed its desire that the ADAAA "reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*,[29] which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973."[30]

The original Americans with Disabilities Act began with a prologue that "some 43,000,000 million Americans have one or more physical or mental disabilities and this number is increasing as the population as a whole is growing older."[31] That language was removed in the Americans with Disabilities Act Amendments Act, along with other precatory language from the ADA, including that:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[32]

The definition of a disability in the ADAAA still retains its prior version's three-pronged approach: "A) a physical or mental impairment that substantially limits one or more major life activities of such individual; B) a record of such impairment; or C) being regarded as having such

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[27] Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325 (S 3406), 122 Stat. 3554 (2008).
[28] *Id. See* 527 U.S. 471 (1999); 534 U.S. 184 (2002).
[29] 480 U.S. 273 (1987).
[30] The Rehabilitation Act of 1973 was the forerunner to the ADA of 1990, in that it prohibited disability-discrimination by federal agencies, and in federally-funded projects and employment. 29 U.S.C. §§ 701-718 (DATE?). For the purposes of determining employment discrimination under the Rehabilitation Act, the U.S. Justice Department applies the standards of the Americans with Disabilities Act. *A Guide to Disability Rights Laws*, U.S. DEP'T OF JUST. (Sept. 2005), http://www.ada.gov/cguide.htm#anchor65610 (last updated Feb. 16, 2006).
[31] Pub. L. No. 101-336 (S 993), 104 Stat. 327 (1990).
[32] *Id.*

impairment."[33] But the third part of that prong now references a new portion of the statute that establishes what it means to be regarded as having such impairment. It states:

> An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.[34]

The ADAAA addresses what would substantially limit a disabled person's major life activities in another new section,[35] which states, "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." As it concerns the role that bodily functions play in one's major life activities, the ADAAA provides that, "a major life activity also includes the operation of major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[36]

In furtherance of its stated desire that the ADAAA be liberally construed, Congress provided rules of construction on the definition of "disability" in a later section:

> The definition of "disability" in paragraph (1) shall be construed in accordance with the following:
>
> (A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.
>
> (B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

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[33] 42 U.S.C.A. § 12102(1) (West 2009). In the ADA of 1990, this was paragraph 2.
[34] *Id.* at § 12102(3)(A).
[35] *Id.* at § 12102(2)(A).
[36] *Id.* at § 12102(2)(B).

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

(I) Medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
(II) Use of assistive technology;
(III) Reasonable accommodations or auxiliary aids or services; or
(IV) Learned behavioral or adaptive neurological modifications.[37]

IV. THE BACK STORY TO THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008; WHAT HAPPENED IN THE INTERVENING EIGHTEEN YEARS

Congress expressed its displeasure not only with the U.S. Supreme Court in the ADAAA, but also the EEOC. In addition to rejecting the Supreme Court's decisions in *Sutton v. United Air Lines, Inc.* and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[38] Congress twice chided the EEOC. First, in its Public Law Findings section, it spoke to the EEOC's definition of "substantially limits," stating that the Commission's "ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, by expressing too high a standard."[39] Yet, the EEOC's then-current regulations were a response to

[37] *Id.* at § 12102(4).
[38] Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325 (S 3406), 122 Stat. 3554 (2008).
[39] Americans with Disabilities Act Amendments Act of 2008 § 2(a)(8). Later in its Purposes portion of the Public Law version, Congress signified its "expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that

Supreme Court precedent that criticized the EEOC's earlier interpretation of the ADA, particularly *Sutton v. United Airlines, Inc.*, and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams.*

A. *Sutton v. United Airlines, Inc*.

In *Sutton v United Airlines, Inc.*,[40] twin sisters with severe myopia who were commercial pilots with a regional airline applied to be commercial pilots for United Airlines. At their interviews, they were both told that despite meeting all other application requirements, a mistake had been made in inviting them because their uncorrected vision was worse than the 20/100 allowed for United Airline pilots.[41] With corrective lenses, however, each woman had a vision of 20/20. The sisters sued United Airlines for wrongful employment discrimination under the Americans with Disabilities Act, but their complaint was dismissed for failure to state a claim upon which relief can be granted,[42] and this decision was upheld by the Tenth Circuit Court of Appeals.[43] In so doing, the Tenth Circuit concluded that the sisters could not be "substantially limited" in a major life activity, when taking their corrective lenses into account, nor could they show (for defeating a motion to dismiss) that United Airlines "regarded" them as substantially limited.[44]

Acknowledging the split among the federal circuits on the relationship between corrective measures and the substantially limited language of the ADA,[45] the Supreme Court followed the Tenth Circuit's line of reasoning. A critical part in *Sutton* was the Court's rejection of the EEOC interpretive guidelines[46] for its regulations that implement the ADA,[47] specifying that mitigating measures should not be considered in determining if one has an impairment or if such an impairment substantially limits a major life

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defines the term 'substantially limits' as 'significantly restricted' to be consistent with this Act, including the amendments made by this Act." *See* Americans with Disabilities Act Amendments Act of 2008 § 2(b)(6).

[40] 527 U.S. 471 (1999).

[41] Both sisters had uncorrected left-eye vision of 20/200 or worse, and uncorrected right-eye vision of 20/400 or worse.

[42] Sutton v. United Airlines, Inc., No. 96-S-121, *1996 WL 588917* (D. Colo. 1996).

[43] Sutton v. United Airlines, Inc., 130 F.3 893 (10th Cir. 1997).

[44] *Id.* at 906.

[45] *See* Bartlett v. N. Y. State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998); Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir., 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997); Arnold v. United Parcel Serv., Inc., 136 F.3d 854 (1st Cir. 1998); Washington v. HCA Health Servs. of Texas, Inc., 152 F.3d 464 (5th Cir. 1998).

[46] 29 C.F.R. 1630, App. § 1630.2(h),(j) (1998).

[47] 29 C.F.R. §§ 1630.1-1630.16 (1998).

activity.[48] Finding that the plain meaning of the term "substantially limits," is a present-tense notion, the majority—in an opinion written by Justice O'Connor—thought the EEOC's view that mitigating measures may not be considered in the disability-determination was unreasonable and counter to the ADA's text.[49]

Justice Stevens dissented, citing the Senate's and the House of Representative's Reports, in finding that the legislative history of the ADA showed that Congress intended its disability anti-discrimination coverage to apply to those with impairments, regardless if they are in an corrected or mitigated state.[50] But to the majority, the language of the statute was clear and not in need of the influence of legislative history.[51] Furthermore, to the majority, the congressional findings at the beginning of the ADA that "some 43,000,000 Americans have one or more physical or mental disabilities…" was essential to its stance that Congress expressed its intent clearly enough in the ADA.[52] Following *Sutton v. United Airlines, Inc.*, the EEOC removed the mitigating measures language concerning impairments and substantial limitations from its Appendix accompanying its ADA regulations.[53] In 2011, the EEOC revised its ADA-Appendix again, this time to acknowledge the changes made by the ADAAA and the congressional dissatisfaction of cases like *Sutton* and *Toyota Motor Manufacturing*.[54] A new regulation was issued that, "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures."[55] Nine years after *Sutton,* Congress redacted the "43,000,000 Americans" sentence from its findings in the ADAAA.

B. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*

Unlike the plaintiffs in *Sutton* who sued a prospective employer for wrongful employment discrimination, the plaintiff in *Toyota Motor*

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[48] *Sutton v United Airlines, Inc* , 527 U.S. 471, 482 (1999).
[49] *Id*.
[50] *Id.* at 500-01.
[51] *Id.* at 482.
[52] *Id.* at 484. According to Justice O'Connor, that amount was drawn from a report prepared by the National Council on Disabilities, which also listed in the same report a disability population as high as 160 million based on an approach referred to as "nonfunctional" (*See id.* at 486-487). Such a measure of disability was also referred to in *Sutton* as the health conditions approach. Therefore, the usage of such a number when there were larger disability numbers available showed Congress's intent that the ADA was limited to disabled Americans without mitigated or corrective measures.
[53] 29 C.F.R. § 1630, App. 1630.2(h),(j) (2000).
[54] 29 C.F.R. § 1630, App. 1630 (2011).
[55] 29 C.F.R. § 1630(j)(1)(vi) (2011).

Manufacturing, Kentucky, Inc. v. Williams[56] sued her former employer for violating the ADA. Ella Williams began working in 1990 at a Toyota assembly plant in Kentucky and developed carpal tunnel syndrome. She was then assigned to modified duties, although she later filed a workers compensation claim, which was settled in 1992. Unsatisfied with Toyota's response to her condition, she filed an ADA claim that was settled in 1993, whereupon she returned to work.[57] In 1996, Ms. Williams' duties at Toyota were changed and her new job required her to hold her arms above her shoulders for hours at a time. Although she and Toyota disagreed over what caused her to miss work after this change in her duties, Toyota fired her in 1997 for excessive absenteeism. She then sued, alleging Toyota violated the ADA by failing to reasonably accommodate her.[58] Her disability suit was based on her claimed inability to perform certain manual tasks, which she said substantially limited a major life activity.

The District Court granted summary judgment to Toyota, but the Sixth Circuit Court of Appeals reversed.[59] Using what it believed to be the reasoning in *Sutton*, the Sixth Circuit held that in order to prove a substantial limitation in the major life activity of performing manual tasks, a "plaintiff must show that her manual disability involves a 'class' of manual activities," and also that such activities affect the ability to perform tasks at work.[60] It did, however, agree with the District Court that Ms. Williams had no wrongful termination claim because since she was completely restricted from working, she could not be a "qualified individual with a disability" within the meaning of the ADA.[61]

A unanimous Supreme Court reversed the Sixth Circuit Court of Appeals.[62] In an opinion also written by Justice O'Connor, the Court concluded the Sixth Circuit did not apply the proper standard in determining that respondent was disabled under the ADA, because it analyzed only a limited class of manual tasks and failed to analyze whether Ms. Williams' impairments prevented or restricted her from performing tasks that are of central importance to most people's daily lives.[63] As the depositions showed, at the time Ms. Williams was claiming to be disabled for the purposes of the manual job-tasks at issue, she was able to perform many tasks associated

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[56] 534 U.S. 184 (2002).
[57] *Id.* at 188.
[58] *Id.*, at 190.
[59] Williams v. Toyota Motor Mfg., Kentucky, Inc., 224 F.3d 840 (6th Cir. 2000).
[60] *Id*. at 843.
[61] *Id.* at 844.
[62] *See* Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002). Future Chief Justice John Roberts represented Toyota before the Court.
[63] *Id.* at 198.

with daily life.[64] And in a sentence that would catch the ire of a later congressional bill,[65] the Court wrote that terms like "major" in major life activities, and "substantial" in substantially limits, "need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act."[66]

The Court also ruled that for an impairment to substantially limit a person's ability to perform manual tasks, the impairment must be permanent or long-term.[67] In so stating, the Court cited the EEOC's regulation that—at the time—defined what "substantially limits" means.[68] That regulation stated, "The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

> (i) The nature and severity of the impairment;
> (ii) The duration or expected duration of the impairment; and
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.[69]

In response to the congressional directive of the ADAAA, the EEOC revised its ADA regulations in 2011, removing the above language.[70] In its place are regulations stating that "[t]he term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard."[71] The new regulations also provide that episodic impairments are covered by the ADA if considered substantially limiting when active,[72] and that, "[a]n impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment."[73]

C. *The Americans with Disabilities Act Restoration Act of 2007*

On July 26, 2007, House Resolution 3195 was introduced and, as it stated forthrightly, was a "Bill to restore the intent and protections of the

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[64] *Id.* at 201-02.
[65] ADA Restoration Act of 2007, H.R. 3195, 110th Cong. (2007).
[66] *See Toyota Motor Mfg.,* 534 U.S. at 197.
[67] *Id.*
[68] 29 C.F.R. § 1630.2(j)(2), (2000).
[69] *Id.*
[70] 29 C.F.R. § 1630.2(j) (2011).
[71] 29 C.F.R. § 1630.2(j)(1)(i) (2011).
[72] 29 C.F.R. § 1630.2(j)(1)(vii) (2011).
[73] 29 C.F.R. § 1630.2(j)(1)(viii) (2011).

Americans with Disabilities Act of 1990."[74] Like the opening of the ADAAA of 2008, H.R. 3195 contained the similar invective against post-ADA Supreme Court decisions. Beyond *Sutton* and *Toyota*, H.R. 3195 cited other Supreme Court cases that "have narrowed the class of people who can invoke the protection from discrimination the ADA provides,"[75] including *Murphy v. United Parcel Service, Inc.*,[76] and *Albertson's, Inc. v. Kirkingburg*.[77]

In *Murphy*, a UPS mechanic, whose job required that he drive commercial vehicles, had blood pressure that exceeded the Department of Transportation's (DOT) allowance for commercial drivers, but was erroneously certified by UPS when he was hired. When UPS discovered the error, it fired the mechanic, who then brought an ADA claim. In upholding the lower courts' dismissal, the Supreme Court held that the mechanic was not regarded as disabled, but was unqualified to drive because of valid DOT safety regulations.[78] The Court also reiterated its rationale from *Sutton* that the determination whether one is disabled must be considered in light of available mitigating circumstances,[79] which in this case was high-blood pressure medication that, when taken, still did not bring down the plaintiff's high-blood pressure sufficiently to allow him to drive a commercial vehicle.

Albertson's, Inc., was decided the same day as *Murphy* and also involved a commercial driver erroneously certified to drive a commercial vehicle, in this instance due to vision impairment. As in *Murphy*, the plaintiff was erroneously certified to drive and then fired after the error was discovered two years later. Albertson's also refused the driver after he obtained a DOT waiver. In its unanimous decision, the Court reversed the Ninth Circuit Court of Appeals, reminding the Ninth Circuit that that mitigating measures need to be considered when analyzing if an impairment

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[74] ADA Restoration Act of 2007, H.R. 3195, 110th Cong. (2007). It originally had 130 co-sponsors. Almost one year earlier, H.R. 6258 was introduced as the ADA Restoration Act of 2006. *See* ADA Restoration Act of 2006, H.R. 6258, 109th Cong. (2006). Both bills were introduced by Representatives Steny Hoyer (a Democrat from Maryland, he was then the House Majority leader) and James Sensenbrenner (a Republican from Wisconsin), with the 2007 bill being introduced because H.R. 6258 came at the end of the 2006 legislative session. *See* Joint Statement of Representatives Hoyer and Sensenbrenner on the Origins of the ADA Restoration Act of 2008, H.R. 3195, 110th Cong., http://www.law.georgetown.edu/archiveada/documents/Hoyer-SensenbrennerJointStatementonADAoriginsHR3195.pdf (last visited Feb. 29, 2012).

[75] ADA Restoration Act of 2007, H.R. 3195, 110th Cong. (2007).

[76] 527 U.S. 516 (1999). This decision was written by Justice O'Connor.

[77] 527 U.S. 555 (1999).

[78] 527 U.S. at 522.

[79] *Id.* at 521.

rises to the level of being substantially limiting,[80] and that an ADA-qualified disability must be determined on a case-by-case basis, not reflexively.[81]

The substance of the ADA Restoration Act of 2007 was similar to that in the ADAAA of 2008. It had a rule of construction declaring that a physical or mental impairment should be determined, "without considering the impact of any mitigating measures the individual may or may not be using or whether or not any manifestations of an impairment are episodic, in remission, or latent."[82] It also required that the provisions of the ADA Restoration Act be "broadly construed to advance their remedial purpose."[83]

V. OBESITY: THE SLOWEST-MOVING EPIDEMIC

Unlike the rapidity with which traditional epidemics (such as the bubonic plague of the 14th century or the Spanish Influenza of the early 20th century) traverse a country rendering it impossible to prevent or avoid, the obesity plague has had a slow-moving and still inexorable result. Those who are obese, and particularly those who are morbidly obese, face an all too familiar fate: loss of quality of life on the way to a high rate of premature mortality.

A. *What it Means to be Obese*

Obesity is nothing more than a large imbalance of the intake of calories versus calories burnt, resulting in excess body fat.[84] Although once thought of as a cosmetic issue, obesity was classified as a chronic disease in 1985.[85] As far back as the 17th and 18th centuries, some doctors considered

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[80] *Id.* at 565.
[81] 527 U.S. at 566.
[82] ADA Restoration Act of 2007, *supra* note 75, at § 4.
[83] ADA Restoration Act of 2007, *supra* note 75, at § 7. According to Representatives Hoyer and Sensenbrenner, as a result of negotiations between various representatives of the business and disability communities on a compromise to H.R. 3195, it was reintroduced in a substituted form in 2008 (*See* Joint Statement of Representatives Hoyer and Sensenbrenner, *supra* note 82). On the same day, a similar piece of legislation, S 3406, was jointly introduced in the Senate by Senators Tom Harkin and Arlen Specter (*See Sensenbrenner Introduces Legislation to Restore Americans with Disabilities Act Protections*, CONGRESSMAN JIM SENSENBRENNER (July 26, 2007), http://sensenbrenner.house.gov/News/DocumentSingle.aspx?DocumentID=70108. It was that legislation that was eventually passed unanimously as the Americans with Disabilities Act Amendments Act of 2008.
[84] *See Childhood Obesity Facts*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/healthyyouth/obesity/facts.htm (last updated Sept. 15, 2011); David B. Allison et al., *Obesity as a Disease: A White Paper on Evidence and Arguments Commissioned by the Council of the Obesity Society*, 16 Obesity 1161 (2008).
[85] Frank Greenway, *The Future of Obesity Research*, 16 Nutrition 976 (2000).

"corpulency" a disease.[86] Body Mass Index (BMI) determines whether one has a healthy weight or is overweight. That number is the result of a calculation of one's weight in kilograms divided by the square of one's height in meters.[87] In 1998 the National Institutes of Health revised its BMI standards, resulting in a stricter determination when one qualifies as overweight.[88] As a result of that controversial reclassification, twenty-five million more Americans qualified as overweight.[89]

Being overweight is thought of as having a Body Mass Index (BMI) of at least twenty-five.[90] Obesity is generally defined by having a BMI of between 30-34.99, while severe obesity—sometimes referred to as Class II obesity—is having a BMI between 35-39.99.[91] Class III obesity is generally thought to be a BMI of at least forty, and is also known as morbid obesity, a term alternately used when one weighs at least 100lbs above their ideal body weight.[92] Class IV obesity is called super obesity, and applies when one's BMI is at least fifty.[93]

Not all health experts agree with labeling obesity as a disease,[94] while some in the self-proclaimed "acceptance" groups argue that obesity is not necessarily unhealthy, in and of itself, but is pushed as a disease by anti-fat

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[86] Five centuries ago, English physician Thomas Sydenham said, "corpulency may be ranked amongst the diseases arising from original imperfections in the functions of some of the organs, yet it must be admitted also, to be most intimately connected with our habits of life." WILLIAM WADD, CURSORY REMARKS ON CORPULENCE: OR OBESITY AS CONSIDERED A DISEASE 75 (London, Smith & Davy, 3d ed. 1816). *See* David Haslam, *Obesity: A Medical History*, 8 Obes. Rev. (Supp. 1) 31, 33 (2007).

[87] Amy Berrington *de Gonzalez, Body-Mass Index and Mortality Among 1.46 Million White Adults,* 363 NEW ENGL. J. MED., 2211, 2212 (2010).

[88] *Who's Fat? New Definition Adopted*, CNN.COM (June 17, 1998), http://www.cnn.com/HEALTH/9806/17/weight.guidelines.

[89] *Id.*

[90] *Assessing Your Weight and Health Risk*, NATIONAL HEART LUNG AND BLOOD INSTITUTE, http://www.nhlbi.nih.gov/health/public/heart/obesity/lose_wt/risk.htm (last visited Feb. 29, 2012).

[91] Christopher J. Ruhm, *Current and Future Prevalence of Obesity and Severe Obesity in the United States*, 10 Forum for Health Econ. & Pol'y. (Forums) Article 6 (2007).

[92] *See Classification of Overweight and Obesity by BMI, Waist Circumference, and Associated Disease Risks*, NATIONAL HEART LUNG AND BLOOD INSTITUTE, http://www.nhlbi.nih.gov/health/public/heart/obesity/lose_wt/bmi_dis.htm (last visited Feb. 29, 2012); *Morbid Obesity*, N.Y. TIMES, http://health.nytimes.com/health/guides/symptoms/morbid-obesity/overview.html (last updated June 3, 2005).

[93] *How to Calculate BMI (Body Mass Index) & What It Means to You*, BARIATRIC SURGERY SOURCE, http://www.bariatric-surgery-source.com/how-to-calculate-bmi.html (last updated Oct. 20, 2011).

[94] Allison, *supra* note 84.

biased physicians.[95] In 2008, a panel commissioned by The Obesity Society wrestled with the question of whether obesity is a disease and concluded that the question was so ill-founded (due to a lack of widely accepted clarity on what a disease actually is) as to not beget an answer.[96] The panel did reach consensus that obesity should be considered as a disease, in order to reap positive gains in dealing with the obesity epidemic.[97]

The Centers for Disease Control and Prevention (CDC) would like to see all states have an obesity rate of 15%,[98] a percentage that none have achieved since 1980 when all the states had obesity rates below 15%.[99] According to the CDC, as of 2009 Colorado had the lowest adult obesity rate (18.6%), and Mississippi the highest (34.4%).[100] At that time, thirty-three states had at least 25% of their populace who were obese.[101] By 2010, Colorado still was the only state with an adult obesity rate under 20%, but it had increased to 19.8%, while forty-one states had at least 25% of their populace who were obese.[102] But in July 2011, the CDC released its latest obesity-data, drawn from a survey of over 400,000 adults, and it showed that Colorado's obesity rate was no longer under 20%, but was 21%.[103] The 2011 information also showed that thirty-six states experienced a 25% increase in their obesity rates over the prior year.[104] Some clinicians believe BMI is too loose a definer of obesity, in that it aggregates two data pieces without taking

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[95] Allen Steadham, *Obesity Is Not a Disease*, 1 DOC News, no. 2, Oct. 2004, at 10.
[96] Allison, *supra* note 84.
[97] *Id.*
[98] *Vital Signs Adult Obesity*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Aug. 2010), http://www.cdc.gov/VitalSigns/pdf/2010-08-vitalsigns.pdf.
[99] Steven Reinberg, *U.S. Obesity Epidemic Continues to Spread*, YAHOO! NEWS (July 11, 2011), http://news.yahoo.com/u-obesity-epidemic-continues-spread-160604351.html.
[100] *U.S. Obesity Trends by State 1985-2009*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/obesity/data/trends.html#State (last updated Feb. 27, 2012).
[101] *Id.*
[102] *Report, F as in Fat: How Obesity Threatens America's Future 2011*, TRUST FOR AMERICA'S HEALTH (July 2011), http://healthyamericans.org/report/88.
[103] *U.S. Obesity Trends: Trends by State 1985-2010*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/obesity/data/trends.html (last updated Feb. 27, 2012).
[104] *U.S. Obesity Rates Rise as 36 States See 25% Climb in the Last Year*, MAIL ONLINE (July 21, 2011), http://www.dailymail.co.uk/news/article-2017115/U-S-obesity-rates-rise-36-states-25-cent-climb-year.html. Such was the failure of the U.S. Department's Health and Human Services decade-long "Healthy People 2010" goal of having the national obesity rate at 15% (*See Objective 19-2, Reduce the Proportion of Adults Who Are Obese*, HEALTHY PEOPLE, http://www.healthypeople.gov/2010/document/html/objectives/19-02.htm (last visited Feb 29, 2012)), that the Healthy People 2020 national target for obesity is 30% (*See Nutrition and Weight Status-Objective 9: Reduce the Proportion of Adults Who Are Obese*, HEALTHYPEOPLE.GOV, http://www.healthypeople.gov/2020/topicsobjectives2020/objectiveslist.aspx?topicId=29 (last updated Jan. 4, 2012)).

into consideration other factors, such as percentage of body fat.[105] For example, one might have a BMI that is over twenty-five (or even thirty, qualifying as obese) and yet be healthy with a very low body fat percentage.[106]

B. *The Life Cycle and Trend of Obesity*

Obesity has at least one characteristic that qualifies it for the epidemic label: it is no respecter of age groups. According to a 2011 report issued by the Institute of Medicine, almost one in ten American babies is overweight,[107] and a little over 20% of them are either overweight or obese.[108] An alarming percentage of American school-aged children are overweight or obese, a trend that has ominously increased. In 1980, the prevalence of childhood obesity was 6.8%; but by 2008, it was 19.6%.[109] During that same time period, adolescent obesity went from 5.0% to 18.1%.[110] Whether or not

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105 Jane E. Brody, *Weight Index Doesn't Tell the Whole Truth*, N.Y. TIMES (Aug. 30, 2010), http://www.nytimes.com/2010/08/31/health/31brod.html.

106 *Id.* That is the case for those athletes who have considerable muscle tissue, which is denser than fatty tissue. BMI may be less effective in assessing a person's healthy weight, in light of its inability—as a basic calculation—to measure lifestyle factors that might contradict the conclusion that one is overweight or obese. But as a macro-measure of unhealthy weight, it has proven to be effective.

107 *Early Childhood Obesity Prevention and Policies* (Leann L. Birch et al. eds., National Academy Press, Washington, D.C., 2011).

108 For those aged 2-19, the CDC defines overweigh as a BMI at or above the 85th percentile and lower than the 95th percentile for children of the same age and sex, and it defines obesity as a BMI at or above the 95th percentile for those of the same age and sex. *Basics About Childhood Obesity*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/obesity/childhood/basics.html (last updated Apr. 26, 2011).

109 *Childhood Obesity Facts*, *supra* note 84.

110 Cynthia L. Ogden et al. *Prevalence of High Body Mass Index in US Children and Adolescents, 2007-2008*. 303 JAMA 242, 245-246 (2010). (Adolescents are those from 12-19 years old.) A 2001 cross-sectional, self-reported survey of 137,593 children from the ages of 10-16, across 34 primarily European countries, showed the prevalence of obesity among American children to be second at 6.8%, with only Malta having a higher obesity rate. *See* Ian Jansen, *Comparison of Overweight and Obesity Prevalence in School-Aged Youth in 34 Countries and Their Relationships with Physical Activity and Dietary Patterns,* 6 Obes. Rev. 123 (2005). According to the work of Dr. David Freedman from the Centers for Disease Control and Prevention (who examined data from the largest study of heart disease factors in the United States), 2 out of 3 obese children will grow up to be obese (*See* Laura Blue, *Do Obese Kids Become Obese Adults?,* TIME MAGAZINE (Apr. 28, 2008), http://www.time.com/time/health/article/0,8599,1735638,00.html), and if they become parents, they are more likely to have obese children (*See* Robert Whitaker, *Predicting Obesity in Young Adulthood from Childhood and Parental Obesity,* 337 NEW ENGL. J. MED. 869 (1997)).

obesity is predetermined,[111] either way, overweight parents pass on obesity to their children – as a learned habit or as a biological bequest.[112]

The percentage of American college students who are overweight or obese has also increased noticeably. According to one study[113] that collected data in 1993 and 1999, the rate of overweight college students increased from 21.7% to 26.8%, while the rate of obesity rose from 4.1% to 6.5%. Class II Obesity (defined as those with a BMI of 35-39.99) increased from 0.9% to 1.9%.[114] As the study showed, every class—from freshman to fifth-year seniors—had markedly increased in weight over the seven-year time-span.[115]

Adult overweight and obesity rates have also dramatically increased in recent decades. Between 2007 and 2009, the number of obese adult Americans increased by 2.74 million people.[116] According to the CDC, between 1960-1962, 44.8% of American adults (age 20-74) were overweight (having a BMI of at least twenty-five), while in 1999-2002, the percentage had increased to 65.2%.[117] Obesity rates have increased more noticeably over that time period. Obesity (a BMI of at least thrity) in American adults was 13.3% during 1960-1962, but by 1999-2002, obesity had almost tripled to 31.1%.[118] The upward trend of obesity is so linear that a group of

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[111] Alexandra Blakemore, and Phillipe Froguel, *Is Obesity our Genetic Legacy?,* J. OF CLINICAL ENDOCRINOLOGY & METABOLISM, Vol. 93, No. 11 (supp. 1), s51-s56 (2008).

[112] The rate of obesity among American teenagers has risen dramatically, so much so that the U.S. Army has been recruiting from an ever-heavier pool of prospective soldiers from 1993-2006, the prevalence of overweight 18-year-old civilian applicants to the Army increased from 22.8% to 27.1%. For this study, the researchers looked at the data of 759,269 subjects, collected at the Military Entrance Processing Stations (MEPS), as part of the administrative intake for applicants to the Army. More alarming is that obesity among those Army applicants increased from 2.8% to 6.8% during that period, a 240% increase. (See Lucy L. Hsu, *Trends in Overweight and Obesity Among 18-year-old Applicants to the United States Military, 1993-2006*, 41 J. ADOLESCENT HEALTH 610 (2007)).

[113] Toben F. Nelson, *Disparities in Overweight and Obesity Among US College Students*, 31 AM. J. HEALTH BEHAV. 363, 366 (2007).

[114] *See id.* The data for this survey were collected from 119 four-year colleges or universities with data in both the 1993 and 1999 Harvard School of Public Health College Alcohol Study. Male students were more likely than female students to be overweight and obese, with African-American and Hispanic males having the highest rates.

[115] *See id.* The freshmen obesity rate went from 3.1 to 5.2, while their morbid obesity (Class II) rate went from 0.7 to 1.7. Obesity rates continued to worsen as students matriculated and by the time the last class of fifth-year seniors was heading to the working world, their obesity rate was 5.7 in 1993, but nearly doubled to 10.9 in 1999. For those same college seniors, their Class II obesity rate moved from 1.2 to 3.7, the second-highest rate increase. According to the study, sophomores had the highest rate increase for Class II obesity: 0.8 to 2.5.

[116] *Vital Signs Adult Obesity*, *supra* note 98.

[117] *Health United States, 2004, With Chartbook on Trends in the Health of Americans* (National Center for Health Statistics, Hyattsville, MD, 2004).

[118] *See id*. A study that investigated obesity prevalence during 2007-2008 concluded that the age-adjusted prevalence of adult obesity in America was 33.8%, with men having a prevalence of 32.2% and women a prevalence of 35.5%. *See* Katherine M. Flegal et al., *Prevalence and*

researchers who looked at obesity data from 1970-2004 estimated that by 2030, 86.3% of American adults will be overweight or obese.[119] Without a change of direction, by 2048 all of America will be overweight or obese,[120] a situation that will provide the English language the conundrum of having a term of imbalance—overweight—without a frame of reference.

Obesity's effects reach into every aspect of society, even the U.S. automobile industry. A 2011 consulting report suggested that Americans are becoming so obese that they are becoming too large to fit comfortably into

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Trends in Obesity Among US Adults, 1999-2008, 303 JAMA 235, 238 (2010). One researcher examined past and current rates of obesity and severe obesity in predicting that, by 2020, 77.6% of U.S. men and 71.1% of U.S. women will be overweight, while 40.2% of men and 43.3% of women will be obese (*See* Ruhm, *supra* note 91). Continuing the trend that more women than men will be obese by 2020, the research predicts Class II, III, and IV obesity percentages for women to be 25.3%, 12.8%, 5.6%, in contrast to the same obesity class-predictions of 16.4%, 6.3%, and 3.1% for men.

[119] Youfa Wang et al., *Will All Americans Become Overweight or Obese? Estimating the Progression and Cost of the US Obesity Epidemic,* 16 OBESITY 2323 (2008).

[120] *See id.* According to The Centers for Disease Control and Prevention, obesity currently is highest among black women (41.9%) and Hispanics (30.7%). *See Vital Sings Adult Obesity, Latest Findings,* CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/vitalsigns/AdultObesity/LatestFindings.html (last updated Aug. 3, 2010). A research study presented at the Endocrine Society's annual meeting in 2009 suggested that BMI and body fat measurements overestimate fatness among blacks, and may require race-specific obesity standards. *See Widely Used Body Fat Measurements Overestimate Obesity in African-Americans, Study Finds*, Science Daily (June 11, 2009), http://www.sciencedaily.com/releases/2009/06/090611142407.htm. The lower educated and the poor have the highest obesity rates: more than 33% of those who earn less than $15,000 per year are obese, compared to 24.6% of those who earn more than $50,000 per year (*see Report, F as in Fat, supra* note 102). Research shows that Class II and higher obesity rates among adults are increasing more rapidly than their overweight and Class I obesity counterparts. One study showed that, between 1986-2000, those reporting a BMI of 40 (Class III obesity) quadrupled, while those whose BMI was 50 (Class IV obesity) increased by a factor of 5. *See* Roland Sturm, *Increases in Clinically Severe Obesity in the US, 1986-2000*, 163 Arch. Intern. Med. 2146, 2147 (2003). During the same period, Class I obesity increased, but it only doubled (from 1 in 10 to 1 in 5). Other data show that between 1960-2004, obesity nearly tripled, from a prevalence rate of 13.4% to 31.5%, while Class II obesity nearly quadrupled, from a prevalence rate of 3.3% to 12.9% (*See* Ruhm, *supra* note 91). During that time frame, Class III obesity increased by nearly a factor of 5, from a prevalence rate of 0.88% to 5.17%, and Class IV obesity increased by over a factor of 6, from a prevalence rate of 0.28 to 2.07%. Another researcher investigated the rate increase in obesity between 2000-2005, which showed that while the rate of increase in Class I obesity was 24%, the prevalence of Class III (morbid) obesity increased 50%, and the prevalence of Class IV (super) obesity increased 75%. In fact, using 1986 as a baseline, the rates of increase for all classes of obesity have increased in an inversely proportionate way: the more severe the obesity, the greater its prevalence increase. *See* Roland Sturm, *Increases in Morbid Obesity in the USA: 2000-2005*, 121 PUB. HEALTH 492 (2007).

gasoline-saving, subcompact cars.[121] In order to reduce foreign-oil dependence, more fuel-efficient cars need to be driven. Yet in 2011, small cars constituted a smaller part of the U.S. automotive market than in 2008.[122] Hippocrates realized the deleterious connection between obesity and mortality, writing over 2,400 years ago that "persons who are naturally very fat are apt to die earlier than those who are slender."[123] A mortality study using data from 527,265 U.S. men and women, between age 51-70, in 1995-1996 (of which 61,317 died during the ten-year follow-up) showed that the risk of death for those who were overweight increased by 20-40%, but for those who were obese the risk increased by 200-300%.[124] This increased risk was for otherwise healthy, non-smokers.[125] A 2010 study on the mortality of 1.46 million white adults concluded that the estimated hazard ratio for death increased as the subjects' BMI entered the overweight range.[126]

In 1980, the Journal of the American Medical Association published the research of a medical doctor who studied 200 morbidly obese men who were admitted to a weight control program from 1960-1977, fifty of whom died during that time or the follow-up time.[127] As compared to the general population, the rate of mortality was twelve times greater for the morbidly obese men aged 25-34, and was 6 times greater for the morbidly obese men aged 35-44.[128] A study on the causes of death in the United States in 2000 showed that being overweight was the second leading cause (400,000 deaths)

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[121] Sharon Silke Carty, *Are Americans Too Big to Drive Small?,* SACRATOMATOVILLE POST (July 19, 2011), http://sacratomatovillepost.com/2011/07/19/are-americans-too-big-to-drive-small.

[122] *Id.* However, car manufacturers have responded to the expanding consumer. Toyota, for instance, has redesigned the Prius V with concave door panels, thus allowing those with much wider hips to fit in the front and back. James Tate, *U.S. Obesity Rates Contribute to Poor Sales of Small Cars*, MSN (June 16, 2011), http://editorial.autos.msn.com/blogs/autosblogpost.aspx?post=90f4da4c-a334-4288-86f9-2da339269426.

[123] Hippocrates, *Aphorisms*, II.44.

[124] Kenneth F. Adams et al., *Overweight, Obesity, and Mortality in a Large Prospective Cohort of Persons 50 to 71 Years Old*, 355 NEW ENGL. J. MED. 763 (2006).

[125] *Id.*

[126] Berrington *de Gonzalez, supra note 87. (*A hazard ratio is the effect a given variable (in this instance, BMI) has on the risk or hazard of an event). The subjects had a median age of 58 with a median BMI of 26.2, and 47% reported they were never smokers. The estimated hazard ratio for those who had never smoked, but had a BMI of 25-27.5 was 1.12; for those with a BMI of 30-34.9 the hazard ratio was 1.41; for those with a BMI of 35-39.9 was 2.04; and for those with a BMI of 40-49.9 was 3.11. These hazard ratios reflect a follow-up time period of 15 years.

[127] Ernst J. Drenick et al., *Excessive Mortality and Causes of Death in Morbidly Obese Men*, 243 JAMA 443 (1980).

[128] *Id.*

behind smoking (435,000 deaths).[129] The results of that survey caused Dr. Julie Gerberding, the director of the CDC (and a co-author of the study) to say, "This is tragic. Our worst fears were confirmed."[130]

Not only is obesity a leading cause of death, but it is also the second leading cause of preventable death.[131] There is strong evidence that obesity is on pace to overtake smoking as the leading cause of preventable death, particularly since the proportion of smokers in America decreased by 18.3%, between 1993-2008, while the proportion of those who are obese has increased during the same time by 85%.[132]

C. *The Causes of Obesity*

While the rates of obesity and its associated costs can be quantified and generally agreed to, the same cannot be said about the causes of obesity as a cultural phenomenon. Some see obesity as the primary result of genetics, while others see it as consequence of the sedentary, calorie-crazed, super-size-me culture.

A study begun by researchers at Boston University School of Medicine resulted in the discovery in 2006 of what had been for over a decade mischaracterized in other studies as the fat gene.[133] Using DNA samples from the Framingham Heart Study,[134] the researchers identified a common, obesity-gene among 10% of individuals, and replicated their findings with four other population samples.[135] In 2007, researchers funded by the

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[129] Ali H. Mokdad et al., *Actual Causes of Death in the United States, 2000*, 291 JAMA 1238 (2004). Originally, the authors miscalculated the number of deaths due to overweight and obesity and then corrected that figure. Ali H. Mokdad et al., *Correction: Actual Causes of Death in the United States, 2000*, 293 JAMA 293 (2005).

[130] Lindsey Tanner, *Americans Eat Themselves to Death*, CBS NEWS (Dec. 5, 2007), http://www.cbsnews.com/stories/2004/03/09/health/main604956.shtml.

[131] Haomiao Jia & Erica I. Lubetkin, *Trends in Quality-Adjusted Life Years Lost Contributed by Smoking and Obesity*, 38 AM. J. PREV. MED. 138 (2010).

[132] *Id.* Officially, heart disease is the leading catalyst of death in America, causing 26% of the deaths in 2006. *See Heart Disease Facts*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/heartdisease/facts.htm (last updated Jan. 27, 2012); Mokdad, *Actual Causes of Death*, *supra* note 129. Of the leading risk factors for heart disease, obesity is second, while physical inactivity is first, high blood pressure is third, high cholesterol is fifth, and diabetes is sixth-- all of which are consequences of obesity.

[133] Alan Herbert et al., *A Common Genetic Variant Is Associated with Adult and Childhood Obesity*, 312 SCI. 279 (2006).

[134] The Framingham Heart Study began in 1948 as a search for the causes of cardiovascular disease, and had a sample of 5.209 residents of Framingham, Massachusetts. The Framingham study also examined the health of over 5,000 of the offspring of the 1948 participants. FRAMINGHAM HEART STUDY, http://www.framinghamheartstudy.org/index.html (last updated Feb. 28, 2012).

[135] *Herbert, supra* note *133*.

Wellcome Trust,[136] identified a gene in one out of six people that was correlated with a 70% higher chance of obesity for those study participants who possessed two copies of the gene, compared to those who had no copy of the gene.[137]

While acknowledging the role that genetics play in obesity, the CDC emphasizes behavior as obesity's primary cause.[138] The CDC's obesity web page focuses on "Calories In" and "Calories Out," and stresses physical activity, reduction in television time, and healthier food choices as ways to prevent obesity.[139] A 2009 study published in the American Journal of Clinical Nutrition, showed that the risk of obesity for those who inherited the fat gene from both biological parents was 2.5 times higher than for those who did not have that gene – but only if they consumed a high-fat diet and exercised little.[140] For those with the FTO gene variant[141] who got less than 41% of their calorie-intake from fat, obesity was not more prevalent.[142]

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[136] The Wellcome Trust is the United Kingdom's larges medical charity, which funds research in biomedical research and the medical humanities. WELLCOME TRUST, http://www.wellcome.ac.uk/index.htm (last visited Feb. 29, 2012).

[137] Timothy M. Fraylinget et al., *A Common Variant in the FTO Gene Is Associated with Body Mass Index and Predisposes to Childhood and Adult Obesity*, 316 SCI. 889 (2007). Researchers in the United Kingdom released a study in 2011, concluding that there is a master switch gene that controls other genes found in one's fat cells. Named KLF14, this gene is thought powerful enough to regulate genes that affect insulin, cholesterol, and BMI, which may make it a target in the biological fight against obesity. *See* Kerrin S. Small et al., *Identification of an Imprinted Master* Trans *Regulator at the* KLF14 *Locus Related to Multiple Metabolic Phenotypes*, 43 *NATURE GENETICS* 561 (2011). There is a corollary to the fat gene: the skinny gene which was first discovered in fruit flies in 1960. Winifred W. Doane, *Developmental Physiology of the Mutant* Female Sterile(2)Adipose *of* Drosophila Melanogaster. *II. Effects of Altered Environment and Residual Genome on Its Expression*, **145** J. EXP. ZOOL. 23 (1960). This gene—named the Adipose gene—is thought to be responsible for keeping those who are inordinately thin in that state, regardless what they eat. Jae Myoung Suh et al., *Adipose Is a Conserved Dosage-Sensitive Antiobesity Gene,* 6 CELL METABOLISM 195 (2007). Recent data suggests that 13% of the population possess this "lucky" gene. Dolores Corella et al., *APOA5 Gene Variation Modulates the Effects of Dietary Fat Intake on Body Mass Index and Obesity Risk in the Framingham Heart Study,* 85 J. MOL. MED. 119 (2007).

[138] *Causes and Consequences: Is There a Quick Answer to the Question, "What Contributes to overweight and obesity?",* CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/obesity/causes/index.html (last updated May 16, 2011); *Obesity and Genomics*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/genomics/resources/diseases/obesity/obesedit.htm (last updated Apr. 20, 2010).

[139] *Causes and Consequences, supra,* note 138.

[140] Emily Sonestedt et al., *Fat and Carbohydrate Intake Modify the Association Between Genetic Variation in the* FTO *Genotype and Obesity*, 90 AM. J. CLINICAL NUTRITION 1418 (2009).

[141] Fat mass and obesity-associated proteins are known as FTO genes, and are located on chromosome 16. *MeSH Supplementary Concept Data*, NAT'L LIBR. OF MED. (2011),

Some think the fat gene—as it is known—can be kept at bay, if not conquered, by the old-fashioned lifestyle that includes lots of physical activity. After observing 711 members of the Amish community in Lancaster County, Pennsylvania, including those with the FTO gene variant, researchers from the University of Maryland noticed that despite all the high-caloric foods the Amish eat daily, those with the fat gene who did the most exercise weighed on average fifteen pounds less than their neighbors or family members who did not have the fat gene but did the least exercise.[143]

D. *The Costs of Obesity*

Obesity's costs are intertwined with obesity's consequences: a litany of illnesses and health complications, and a troubling array of direct and indirect costs. For example, according to the Office of the United States Surgeon General: over 80% of those with diabetes are overweight or obese; high-blood pressure is twice as common for those who are obese (compared to those with a healthy weight); and, the risk of developing arthritis increases between 9-13% for every two pound increase in weight.[144]

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http://www.nlm.nih.gov/cgi/mesh/2011/MB_cgi?mode=&term=FTO+protein,+human (last visited Feb. 29, 2012).

[142] *Id.*

[143] Evadnie Rampersoud et al., *Physical Activity and the Association of Common* FTO *Gene Variants with Body Mass Index and Obesity*, 168 ARCIVES INTERNAL MED. 1791 (2008). The Amish would not use the word "exercise" because for them physical activity begins at daybreak and ends at nightfall. Having spurned for religious reasons the combustion engine and electricity, the Amish lifestyle is equivalent to a daily "exercise" regimen of three to four hours, a fact the researchers observed through the use of battery-operated, activity monitors worn by the study participants.

[144] *Overweight and Obesity: Health Consequences*, OFF. OF THE SERGEANT GENERAL, http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_consequences.html (last visited Feb. 29, 2012). As dramatic an increase in the obesity rate has been over the past decades, it is actually outdistanced by the increase in the rate of diabetes over the same time. In 1960, 0.91% of Americans had diabetes; in 2000, the percentage was 4.4% (an increase of 383.5% over 40 years); by 2009, 6.86% of America had diabetes (an increase of 56% in nine years). There are the following types of diabetes: Type 1 diabetes is commonly known as childhood diabetes, and Type 2 diabetes is referred to as adult-onset diabetes. Type 2 diabetes has become so prevalent that data on the increases in "diabetes" refer to increases in Type 2 diabetes. *Long-term Trends in Diabetes October 2010*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 2011), http://www.cdc.gov/diabetes/statistics/slides/long_term_trends.pdf. The Centers for Disease Control estimated that diabetes costs in 2007 were $174 billion. Of that figure, the CDC allocated $116 billion to direct costs—which on an individual basis calculated to be 2.3 times higher for those persons with diabetes compared to those without it—and $58 billion to indirect costs, such as disability, loss of work and premature death. *2011 National Diabetes Fact Sheet*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/diabetes/pubs/pdf/ndfs_2011.pdf (last visited Feb. 29, 2012). And according to the Mayo Clinic, Type 2 diabetes is preventable through proper diet and

The medical costs of obesity are calculated by considering direct costs (preventative, diagnostic, and treatment) and indirect costs (morbidity and mortality). According to the CDC, these costs are "staggering."[145] A study on the associated costs of obesity estimated that the total for 2008 could have been as high as $148 billion, while ten years earlier the costs were $78.5 billion.[146] A 2010 study asserted that the per capita costs for full-time male employees with Class III obesity were $6,087, and for women with Class III obesity the costs were $6,694.[147]

In the workplace, the costs of obesity are attributed to absenteeism and presenteeism,[148] in addition to its direct medical costs. While obese employees make up 37% of the American workforce, they account for 61%

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sufficient exercise. *Type 2 Diabetes: Definition*, MAYO CLINIC, http://www.mayoclinic.com/health/type-2-diabetes/DS00585 (last updated Jan. 25, 2012).

[145] *Overweight and Obesity: Economic Consequences*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/obesity/causes/economics.html (last updated March 28, 2011).

[146] Eric A. Finkelstein et al., *Annual Medical Spending Attributed to Obesity: Payer- and Service-Specific Estimates*, 28 HEALTH AFFAIRS w822 (2009). According to the authors, about half of the estimated costs for obesity are borne by Medicare and Medicaid. That study also used data from 2000-2001 to conclude that overweight- and obesity-attributed medical costs varied from $170 per year for overweight male employees to at least $1,500 per year for female employees with Class II obesity.

[147] Eric A. Finkelstein et al., *The Costs of Obesity in the Workplace*, 52 J. OCCUPATIONAL ENVTL. MED. 971 (2010). This study also estimated that those with a BMI above 35 represent 37% of the population, but are responsible for 61% of obesity's excess medical costs. According to a national weight-loss organization that runs obesity camps for children and adolescents, the costs of being and staying obese over one's life total $549,907. *See Cost of Obesity*, WELLSPRING CAMPS, http://www.wellspringcamps.com/childhood_obesity_cost (last visited Feb. 29, 2012). While this organization has a self-interest in viewing the costs of obesity as inordinately high, its figure is derived from examining the treatment costs of the illnesses most directly associated with obesity, as well as diminished or lost wages associated with obesity, and the costs of diet programs. The sources upon which that number is drawn are varied, including the Centers for Disease Control and Prevention, the American Heart Association, and the American Diabetes Association, as well as peer-reviewed journal article. An economic study concluded, after examining the literature on marginal costs of obesity (reduced earnings due to premature death, increased healthcare costs), that for a 50-year-old male the marginal costs of obesity were slightly under $400,000. *See* Jay Bhattacharya & Neeraj Sood, *Who Pays for Obesity?,* 25 J. ECON. PERSP. 139, 146 (2011). The authors estimated that, of that amount, $15,000 was attributed to increased medical-care costs (without taking into account health care insurance costs).

[148] Finkelstein, *supra* note 147. Presenteeism was coined by Manchester University (UK) psychology professor Cary Cooper, and refers to being at work but being less than fully functioning or productive, due to a medical condition, which includes depression; *Definition of Presenteeism*, MEDICINENET.COM, http://www.medterms.com/script/main/art.asp?articlekey=40516 (last editorial review Nov. 12 2004); *Professor Cary Cooper Explains Presenteeism*, YOUTUBE, http://www.youtube.com/watch?v=firSwj_3jBM (uploaded Dec. 3, 2010).

of the excess costs in the workplace attributed to obesity.[149] Absenteeism has been shown to be highest among obese women, who miss one week of work more per year than non-obese women.[150] A study on absenteeism, using data collected by the Agency for Healthcare Research and Quality, found that across all occupations, the overweight are 32% more likely, the obese are 61% more likely, and the morbidly obese are 118% more likely to miss work than employees with a healthy weight.[151] This study estimates the that absenteeism costs related to morbid obesity were $238 per morbidly-obese employee, and that the aggregate costs of obesity were $4.3 billion, in 2004 dollars, of which $3.2 billion was attributed to female employees.[152]

The loss of productivity at work due to medical factors, known as presenteeism, has been studied for its connection to obesity. A 2005 study on presenteeism asserted that obesity was a significant factor in presenteeism and that the obese were more likely to have lost-productive time than overweight or non-overweight workers.[153] This study asserted that lost-productivity due to obesity cost $42.29 billion ($1,627 per obese employee), of which two-thirds was attributed to presenteeism.[154]

VI. OBESITY AS A DISABILITY: THE DISTINCTION BETWEEN PHYSIOLOGICAL AND NON- PHYSIOLOGICAL ROOTS

The U.S. Supreme Court has never taken a disability case involving obesity, but, after the passage of the ADA in 1990, several federal courts have.[155] In 1993, the First Circuit Court of Appeals concluded in *Cook v.*

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[149] Finkelstein, *supra* note 147.

[150] Finkelstein, *supra* note 146.

[151] John Cawley et al., *Occupation-Specific Absenteeism Costs Associated with Obesity and Morbid Obesity*, 49 J. OCCUPATIONAL ENVTL. MED. 1317 (2007). While absenteeism costs for obese women are more than those for obese men, across occupations, both male and female managers (as opposed to salespersons or professionals, for instance) have the highest per-employee costs related to morbid obesity.

[152] *Id.*

[153] Judith A. Ricci & Elsbeth Chee, *Lost Productive Time Associated with Excess Weight in the U.S. Workforce,* 47 J. OCCUPATIONAL ENVTL. MED. 1227 (2005).

[154] *See id.* While that study attributed the costs of obesity-caused presenteeism to be greater than $11 billion annually, a later study asserted that presenteeism cost $30 billion annually, part of a total annual cost of obesity among full-time employees attributed to be $73.1 billion. *See* Finkelstein, *supra* note 147. This and the earlier study on presenteeism were based on data gathered from questions the researchers asked employees about their workplace habits, with respect to productivity.

[155] *See* Cook v. R.I. Dep't. of Mental Health, Retardation, and Hosps, 10 F.3d 17 (1st Cir. 1993); Francis v. City of Meriden, 129 F.3d 281 (2d Cir. 1997); Walton v. Mental Health Ass'n of Se. Pa., 168 F.3d 661 (3d Cir. 1999); Coleman v. Ga. Power Co., 81 F.Supp. 2d 1365 (N.D. Ga. 2000); EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436 (6th Cir. 2006).

Rhode Island Department of Mental Health, Retardation, and Hospitals,[156] that the plaintiff's obesity[157] was a disability covered by federal antidiscrimination law.[158] Although this suit was brought under section 504 of the Rehabilitation Act of 1973, the analysis on which it was based is identical to the Americans with Disabilities Act and its decision was cited by later courts interpreting morbid obesity cases under the ADA.[159] The plaintiff in *Cook* claimed that her denial of a medical attendant job in a facility for the developmentally disabled was based on her morbid obesity. In upholding the plaintiff's award of $100,000 at trial, the First Circuit found disability coverage for the plaintiff under the "regarded as having a disability" prong of the statute.[160] Despite the defendant-employer's claim that obesity is a mutable condition that negates its coverage as protected impairment, the court found just the opposite.[161] And speaking to the argument that obesity is a voluntarily-induced condition that hinders it as the predicate for a disability-discrimination claim, the court stated, "Given the plethoric evidence introduced concerning the physiological roots of morbid obesity, the jury certainly could have concluded that the metabolic dysfunction and failed appetite-suppressing neural signals were beyond plaintiff's control and rendered her effectively powerless to manage her weight."[162] *Cook* is a rare case, in that a federal court upheld the finding of obesity-based discrimination.

In 1997 in *Francis v. City of Meridian*, the Second Circuit Court of Appeals ruled on a discrimination claim where a firefighter claimed he had been discriminated against because he was disciplined for exceeding his department's weight limit.[163] The firefighter's discrimination claim was tied

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[156] 10 F.3d 17 (1st Cir. 1993).

[157] According to the case, the plaintiff was a 5'2" woman who weighed over 320 pounds. Her BMI would have been 59, which is Class IV, Super Obesity, not "morbid" obesity, the term the Court used. *See* text accompanying footnote 94.

[158] Although the case was brought under the Rehabilitation Act, the Court stated in its footnote 10 that it relied upon the regulations implementing the ADA in determining if an impairment "substantially limits" a major life activity.

[159] *See* Joyce v. Suffolk Cnty., 911 F.Supp. 92 (E.D.NY 1996); Morrow v. City of Jacksonville, 941 F. Supp. 816 (E.D. Ark. 1996); Clouse v. Boise Cascade Corp., 955 F.Supp. 670 (W.D. La. 1997); Fredregill v. Nationwide Agribusiness Ins. Co., 992 F.Supp. 1082 (S.D. Iowa 1997).

[160] That part of the Rehabilitation Act is the language of the ADA, 42 U.S.C. A. § 12102(1).

[161] Cook v. Rhode Island Dep't. of Mental Health, Retardation, and Hospitals, 10 F.3d 17, 24 (1st Cir. 1993).

[162] *Id*. Inserting itself into the cultural morass over obesity, the court stated at the end of its opinion, "In a society that all too often confuses "slim" with "beautiful" or "good," morbid obesity can present formidable barriers to employment."

[163] 129 F.3d 281 (2d Cir. 1997). Based on the firefighter's weight, his maximum allowable weight was 188 pounds, but his weight fluctuated between 217 and 243 pounds, which would have been up to 29% over his allowable weight.

to the "regarded as" prong of ADA, but the court found the claim defective in that it didn't allege that the fire department "regarded him as suffering from a physiological weight-related disorder."[164] In so doing, it cited a similar Sixth Circuit obesity-discrimination case brought by state police officers who lost a discrimination claim after being disciplined for failing to meet departmental weight standards.[165] As to whether obesity was a disability covered by the ADA, the court stated that "obesity, except in special cases where the obesity relates to a physiological disorder, is not a 'physical impairment' within the meaning of the statutes."[166]

The Sixth Circuit Court of Appeals reiterated its view on obesity as a perceived disability in 2006, when it held that non-physiological morbid obesity was not an impairment under the Americans with Disabilities Act.[167] In *E.E.O.C. v. Watkins Motor Lines, Inc.*, the employee worked as a driver/dock worker and had a weight ranging from 340-450 pounds.[168] After a ladder accident injured his knee, the employee was placed on a leave of absence that resulted in his termination after 180 days, following the employer's doctor's conclusion that the employee could not safely perform his job. Believing the employee was discriminated against, and regarded as disabled by his employer, because of his obesity, the EEOC sued on the employee's behalf. However, the District Court granted a summary judgment, ruling that non-physiologically caused obesity was not an ADA-covered impairment. On appeal, the Sixth Circuit affirmed.[169] In its decision, the court cited the *Cook* decision,[170] even though the court in *Cook* discussed that employee's inability to control her eating, while the court in *Watkins* did not consider what caused the employee's obesity, other than to say that it was not established to be physiologically-caused. A concurrence in *Watkins* acknowledged that the EEOC did nothing to establish the physiological cause of the employee's obesity (unlike what the *Cook* plaintiff did), but thought (in a footnote) that morbid obesity might be a disorder that by its very nature has a physiological cause.[171]

In *Walton v. Mental Health Association of Southeastern Pennsylvania*, a 1999 case from the Third Circuit Court of Appeals, the court stated that it had not recognized a cause of action against an employer who discriminates against an employee based on a perception that the employee is disabled due

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[164] *Id*. at 285.
[165] Andrews v. Ohio, 104 F.3d 803 (6th Cir. 1997).
[166] *See Francis*, 129 F.3d. at 286.
[167] EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436 (6th Cir. 2006).
[168] *Id*. at 438.
[169] *Id*. at 443.
[170] *Id*. at 442.
[171] *Id.* at 445 (Smithgibbons, J., concurring, footnote 1).

to obesity.[172] In the case, a mental health agency terminated an employee in charge of advocacy consumer training, due to excessive absences that were the result of the employee's depression.[173] Having been denied the chance to amend her complaint to allege discrimination based on the perceived disability of obesity, the employee appealed to the Third Circuit, which upheld the lower court. In so doing, the Court of Appeals noted that being perceived as being disabled because of obesity was not tantamount to being perceived "as disabled by some impairment that substantially limits one of her major life activities."[174]

VII. CONTRASTING SMOKERS WITH THE OBESE: WHY ARE THE FORMER NOT CONSIDERED DISABLED?

There is another activity that, like overeating, shortens one's life and burdens it with a host of degenerative conditions, as well as subjects society to ever-escalating costs: smoking. And the effects smokers have had on society—in addition to their own health—is evident in the way smokers are treated. Smokers are subject to an increase in heath care premiums,[175] cigarettes are hit with a heavy "sin tax,"[176] and smoking has become anathema in almost every public place, including parks. For example, New York City passed in 2002 its Smoke Free Air Act (SFAA), which prohibits smoking in public buildings, in all bars and restaurants, and on public transportation.[177] Such was the outrage of Academy-Award winning actor

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[172] Walton v. Mental Health Ass'n of Se. Pa., 168 F.3d 661 (3d Cir. 1999).

[173] *Id.* at 665. Before taking a leave of absence that was longer than she stated it would be, the employee missed 125 days of work in the three-year period leading up to her termination.

[174] *Id.*

[175] Jilian Mincer, *Insight: Firms to Charge Smokers, Obese More for Healthcare*, REUTERS (Oct. 30, 2011), http://www.reuters.com/article/2011/10/30/us-penalties-idUSTRE79T2S220111030. As indicated in the Reuters article, Wal-Mart is one employer who will be increasing the employee-portion of health care premiums in 2012 for those who are smokers. Greg Rossiter, a Wal-Mart spokesman, was quoted in the article as explaining the increase in the premiums on smokers thusly: Tobacco users consume 25 percent more health-care services than non-smokers. This trend of increasing premiums on tobacco users has been part of what is called a shift from "smoke-free workplaces to smoker-free workplaces. According to the *New York Times*, a smoking employee costs, on average, $3,391 more per year for health care lost productivity. A. G. Sulzberger, *Hospitals Shift Smoking Bans to Smoker Bans*, N.Y. TIMES (Feb. 10, 2011), http://www.nytimes.com/2011/02/11/us/11smoking.html?pagewanted=all.

[176] Derek Thompson, *In Praise of Sin Taxes for Cigarettes, Soda, Marijuana . . .*, THE ATLANTIC (May 21, 2009, 9:24 AM), http://www.theatlantic.com/business/archive/2009/05/in-praise-of-sin-taxes-for-cigarettes-soda-marijuana/17963.

[177] Smoke Free Air Act of 2002, N.Y. ADC. LAW § 17-501- 1514. The SFAA has since been amended to extend the smoking ban to hospital entrances, public parks and beaches (*See id.* at

and inveterate smoker Jeremy Irons towards New York City's smoking bans and fines, that in a 2011 interview he advocated that smokers be treated like the disabled.[178]

The similarity between the way public health experts view the obese and smokers extends into the home. In 2011, a lighting-rod commentary published in the *American Journal of the American Medical Association* suggested removing severely obese children from their homes and parents.[179] While acknowledging the constitutional rights of parents to raise their own children as they deem necessary, the authors' concern for the associated health repercussions of childhood obesity—and in particular type 2 diabetes—led them to conclude that states could rely upon federal child abuse and neglect law[180] to "intervene to protect the child's interest."[181] The authors' position was prescient and came to fruition in September 2011, when an eight-year-old boy in Cleveland, Ohio, was removed from his home

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§ 17-503). New York City is not alone in banning smoking. According to the Centers for Disease Control, as of the end of 2010, 26 states had enacted comprehensive smoke-free laws, where a decade earlier there were none. *State Smoke-Free Laws for Worksites, Restaurants, and Bars -United States, 2000-2010*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 22, 2011), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6015a2.htm?s_cid=mm6015a2_w.

[178] Jada Yuan, *Just Like You Imagined*, N.Y. MAGAZINE (March 27, 2011), http://nymag.com/arts/tv/features/jeremy-irons-2011-4. In the article, Irons spoke of New York City's anti-smoking laws as "terrible bullying of a minority that cannot speak back," stating that smokers should be treated like "the handicapped people and children." The response by the National Organization on Disability to Mr. Iron's view on smokers as handicapped was that it was a "very inappropriate comparison." Furthermore, the National Organization on Disability stated, "We all know smoking imposes huge costs on society, not only on the smoker but also on those around them. How can one say that people who choose to smoke deserve protection as those born with disabilities through no fault of their own is beyond me." Jon Swaine, *Jeremy Irons Says Smokers Deserve Special Protections, Like Disable People*, THE TELEGRAPH (Apr. 4, 2011), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8427200/Jeremy-Irons-says-smokers-deserve-special-protections-like-disabled-people.html.

[179] Lindsey Murtagh & David S. Ludwig, *State-Intervention in Life Threatening Childhood Obesity*, 306 JAMA 206 (2011). Ms. Murtagh is a professor in the Department of Health Policy and Management at the Harvard School of Public Health, and Dr. Ludwig is a doctor at Children's Hospital, in Boston, Massachusetts.

[180] CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, Title I, Subtitle B, §142(a), 124 Stat. 3482 (2010). *Specifically, CAPTA defines child abuse or neglect as* "any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm . . . or an act or failure to act which presents an imminent risk of serious harm."

[181] Murtagh, *supra* note 179. The recommendation for putting children in foster care was only for those who were severely obese, but the authors also envisioned lesser interventions ranging from in-home social supports to financial assistance.

and placed in foster care because he weighed over 200 pounds.[182] Although the child's removal from his mother was not predicated on a specific policy, the Cuyahoga County Department of Children and Family Services—which took custody of the boy—claimed that the child's severe obesity was the result of medical neglect.[183]

And with respect to smoking, as early as 1997 James Garbarino, the director of the Cornell University Family Life Center, averred that parents who smoke were committing child abuse.[184] Part of the reasoning behind Dr. Garbarino's argument that parental smoking constituted abuse that required government intervention was not only the health risks associated with second-hand smoke, but also the opinion that children of smokers are more likely to become smokers.[185] Though removal of obese children from their parents and charging smoking parents with child abuse may seem overreaching and invasive to the family unit, such responses may be on the increase as society seeks evermore urgent efforts to stem the associated costs (financial and otherwise) of dangerous lifestyles.

VIII. THE ADA HAS NOT BEEN FOUND TO APPLY TO SMOKERS

In the employment setting, smoking has in the past few decades gone from being the unsavory act one does outside in a designated space to being no longer allowable during working hours.[186] While second hand smoke concerns may have been the impetus behind ever-increasing restrictions on smoking at work, increased healthcare costs and an opposition to the smoking lifestyle are taking smoking bans to the next progression: refusing to employ smokers. Beginning in 2012, the Baylor Healthcare System will

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[182] Rachel Dissell, *County Places Obese Cleveland Heights Child in Foster Care*, CLEVELAND.COM BLOG (Nov. 26, 2011, 9:00 PM), http://blog.cleveland.com/metro/2011/11/obese_cleveland_heights_child.html. One question raised by the action taken by the Cuyahoga County Department of Children and Family Services is that, according to state estimates on childhood severe obesity, 1,380 children in Cuyahoga County are severely obese, as is the boy put into foster care.

[183] *See id.* In fact, according to Mary Louise Madigan, a spokesperson for the Department, the county had been working with the child's mother for over a year, without success, before asking the Juvenile Court for custody.

[184] *Cornell Child Abuse Expert Says It's Time to Recognize Smoking as Child Abuse*, CORNELL UNIV. SCI. NEWS (Sept. 26, 1997), http://www.news.cornell.edu/releases/Sept97/smoking.abuse.ssl.html.

[185] *Id.*

[186] *See generally Leslie* Zellers et al., *Legal Risks to Employers Who Allow Smoking in the Workplace*, 97 AM. J. PUB. HEALTH 1376 (2007). This article discusses the liability employers face due to second hand smoke dangers when they allow smoking at their places of employment. Its authors state that over 2000 municipalities and 11 states have passed laws either restricting the right to smoke at work or mandating smoke-free work places.

no longer hire smokers, including doctors and hospital volunteers.[187] This employer of almost 20,000[188] will not consider the applications of those who profess to be smokers and will rescind the employment offers of those who test positive for nicotine after being hired.[189] Concerning the reason for such a strict policy, Baylor Healthcare Systems CEO Joel Allison stated, "It's about how we deal with rising healthcare costs."[190] And Baylor is not alone. The Cleveland Clinic stopped hiring smokers in 2007,[191] and health insurance giant Humana announced in 2011 that it would no longer hire smokers who work at its facilities in Arizona.[192]

Perhaps not unsurprisingly, smokers have not been treated as if they were disabled under federal law.[193] The EEOC has never filed a suit against an employer, alleging that its treatment of a smoking employee was in violation of the ADA. Rare is the case where one has alleged that smoking is a disability. In one such case, *Brashear v. Simms*,[194] a Maryland prison inmate who was left smokeless after a state regulation barred the use of tobacco in Maryland prisons, sought an injunction to prevent him from being discriminated against in violation of the Americans with Disabilities Act. The District Court declared his suit frivolous as a matter of law, but it addressed his claim that he was protected under the ADA. Without deciding if the ADA applies in penal institutions but assuming for the sake of the point that it did, the court rejected the notion that smoking is a disability. In fact, it did so without the need for reliance on legal precedent:

> [C]ommon sense compels the conclusion that smoking, whether denominated as 'nicotine addiction' or not, is not a 'disability' within the meaning of the ADA. Congress could not possibly have intended the absurd result of including smoking within the

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[187] Gary Jacobson, *Dallas-based Baylor Health Care System to Stop Hiring Smokers*, DALLASNEWS.COM (Sept. 21, 2011), http://www.dallasnews.com/business/health-care/20110921-dallas-based-baylor-health-care-system-to-stop-hiring-smokers.ece.

[188] As of 2010. *Facts and Stats*, BAYLOR HEALTH CARE SYS., http://media.baylorhealth.com/pages/baylorfacts (last visited Dec. 30, 2011).

[189] *Id.*

[190] *Only Nonsmokers Need Apply at Baylor*, CBS DFW (Sept. 22, 2011), http://dfw.cbslocal.com/2011/09/22/only-non-smokers-need-apply-at-baylor.

[191] *Cleveland Clinic Won't Hire Smokers*, FOXNEWS.COM (June 28, 2007), http://www.foxnews.com/story/0,2933,287137,00.html. As of 2007, the Cleveland Clinic was the second largest employer in Ohio, with 36,000 employees.

[192] Ken Alltucker, *Humana Won't Hire Smokers in Arizona*, ARIZ. REPUBLIC (June 30, 2011), http://www.azcentral.com/arizonarepublic/news/articles/2011/06/30/20110630arizona-smokers-not-hired-by-humana.html. Before instituting this ban on smokers, Humana applied it to its Ohio employees.

[193] The rules interpreting the ADAAA allow employers to restrict or prohibit its employees from smoking at work. 29 C.F.R. § 1630.16(d) (2011).

[194] 138 F.Supp.2d 693 (D.Md. 2001).

> definition of 'disability,' which would render somewhere between 25% and 30% of the American public disabled under federal law because they smoke.[195]

And yet, the very next sentence in *Brashear v. Simms* portends a possibility that smokers might be covered under the ADAAA, in that it cites the yet-to-be legislatively-overruled *Sutton v. United Airlines* as conclusive that smokers—whether nicotine-addicted or not—are ineligible for ADA protection because they have a remediable condition.[196] As a result of the passage of the ADAAA and its rejection of the precedent that ameliorative effects or mitigating measures limit a substantial impairment, a few employment law practitioners wondered aloud if smoking would now be a condition requiring reasonable accommodations.[197]

IX. RECOMMENDATIONS

Congress's desire in expanding disability-coverage is laudable. Likewise, the EEOC's championing of obesity-based discrimination in employment is also commendable, particularly in light of Congress's directive to the EEOC that its actions are to be more reflective of legislative will.[198] In accord with the congressional edict that the ADAAA provide expanded coverage, the EEOC revised its Interpretive Guidance on Title I of the Americans with Disabilities Act in 2011.[199] Part of those revisions included the deletion of the EEOC's guidance on obesity, which stated: "[E]xcept in rare circumstances, obesity is not considered a disabling impairment."[200] But the ramifications of the ADAAA's removal of the

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[195] *Id.* at 696.
[196] *Id.*
[197] *See* Michael Moore, *ADA Amendments May Open the Door for Nicotine Addiction Claims*, PA. LAB. AND EMP. BLOG (Oct. 29, 2008), http://www.palaborandemploymentblog.com/2008/10/articles/discrimination-harassment/ada-amendments-may-open-the-door-for-nicotine-addiction-claims; Jon Hyman, *More on Smoking as a Disability*, OHIO EMPLOYER'S L. BLOG (Oct. 30, 2008), http://www.ohioemployerlawblog.com/2008/10/more-on-smoking-as-disability.html. The conclusion reached by the Pennsylvania practitioner was that because of the high percentage of smokers who are nicotine dependent and in light of the expansive coverage of the ADAAA, nicotine addicted smokers could well find coverage in a similar fashion to those who are covered because of drug or alcohol addictions. The Ohio practitioner thought just the opposite, that smokers, whether nicotine addicted or not, would still find no coverage under the ADAAA.
[198] 42 U.S.C.A. §§ 12101-12213; Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325 (S 3406), 122 Stat. 3554 (2008).
[199] App. to Pt. 1630, 29 C.F.R. § 1630.1-1630.16 (2011).
[200] *Id.*

"mitigating measures" language in the ADA, as well as its rejection of *Sutton v. United Air Lines, Inc.* and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, are problematic when applied to obesity. Furthermore, the EEOC's corresponding shift creates an untenable dilemma in which a national health crisis that is absolutely reversible is given the kind of legal imprimatur that will unintentionally contribute to its growth.

Too mixed a message is being sent when the CDC makes fighting obesity a paramount priority, while the EEOC considers obesity a protected status and seeks to affect public policy by making test cases of employment discrimination claims based on non-medically caused obesity. The federal government needs a more unified approach. In light of the ominous consequences of obesity on the U.S. healthcare system, and in light of the similar tactic the CDC takes to both obesity and smoking—which is to stop now—obesity should be treated like smoking for disability law purposes, unless one seeking federal disability protection because of obesity can establish that the obesity is due to naturally occurring or genetic medical reasons.[201]

As the District Court in *EEOC v. Resources for Human Development* noted in its Order denying the summary judgment motions,[202] the EEOC Compliance Manual section 902 on the definition of "Disability," states "Voluntariness is irrelevant when determining whether a condition constitutes an impairment."[203] Furthermore, the Manual cites from a House Judiciary Report on the original ADA, which stated "[t]he cause of a disability is always irrelevant to the determination of disability."[204] Yet when one federal appellate court cited that phrase, it failed to provide behavioral causes as supportive of that statement, but rather surmised whether a disability was caused by "birth defect, injury, defect, or disease."[205]

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[201] According to WebMd.com, about 1% of obesity is due to medical causes, such as thyroid problems or Cushing's syndrome. *Medical Causes of Obesity*, WEBMD.COM, http://www.webmd.com/diet/medical-reasons-obesity (last reviewed Sept. 19, 2009). According to a British healthcare website, less than 1 in 100 adult obese people have a medical cause for obesity. *Obesity and Overweight in Adults*, PATIENT.CO.UK, http://www.patient.co.uk/health/Obesity-and-Overweight.htm (last visited Feb. 29, 2012). And according to a 2009 article on the rise of obesity in developed countries, medical causes are insignificant as a reason for the alarming increase. Instead, an increase in caloric intake and a decrease in physical activity due to technological innovations are the causes. Sara Bleich et al., *Why Is the Developed World Obese?,* 29 ANN. REV. PUB. HEALTH 273 (2008).

[202] *See* Section II, *supra*.

[203] *Section 902 Definition of the Term Disability, Notice Concerning the Americans with Disabilities Act Amendments Act Of 2008, U.S. EQUAL EMP. OPPORTUNITY COMMISSION,* http://www.eeoc.gov/policy/docs/902cm.html#902.2e (last visited Feb. 29, 2012).

[204] H.R. Rep. No. 101-485(III), at 29 (1990), *reprinted* in 1990 U.S.C.C.A.N. 451, 452.

[205] *McKay v. Toyota* Motor *Mfg., U.S.A., Inc., 110 F.3d 369, 382* (*6th Cir. 1997*).

If the CDC's attempt to stem the tide of the obesity epidemic has any hope of success, it needs the law and the EEOC to be noninterventionists, as it has been with smoking as a disability. The rate of smoking in America has decreased,[206] and it is fair to attribute the non-accommodation stance as a contributing factor. New York City, which at the direction of Mayor Bloomberg has made smokers persona non grata, experienced such a smoking reduction that the number of adult smokers in New York is at an all-time low since 2002.[207] Whereas smoking is recognized as an addiction,[208] obesity—or that which leads to the state of being obese—is not considered the result of an addiction.

One wonders if Congress's desire in the ADAAA that the determination that an impairment substantially limits a major life activity be made "without regard to the ameliorative effects of mitigating measures,"[209] included taking America's number one public health problem and requiring that it be accommodated in the workplace. Furthermore, where obesity is not medically caused, such as because of hyperthyroidism, it is not so much a

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[206] According to *Cigarette Smoking Among Adults - United States, 2007*, CENTERS FOR DISEASE CONTROL AND PREVENTION, 57 Morbidity and Mortality Weekly Report 1221 (2008), smoking prevalence fell to 19.8% in 2007. Reacting to the report, Tom Glynn, director of International Cancer Control of the American Cancer Society, said this was the lowest smoking rate since the 1920s. When the CDC began keeping smoking prevalence records, the rate of smoking was over 40%. The credit to that reduction went to non-accommodation tactics, including increased cigarette taxes and no-smoking laws. Bill Hendrick, *Smoking Rate is Declining in the U.S.,* WEBMD (Nov. 13, 2008), http://www.webmd.com/smoking-cessation/news/20081113/smoking-rate-is-declining-in-us.

[207] *Mayor Bloomberg, Speaker Quinn, Deputy Mayor Gibbs, and Health Commissioner Farley Announce Number of City Smokers has Hit an All-time Low at 14 Percent,* NYC.GOV (Sept. 15, 2011), http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2011b%2Fpr327-11.html&cc=unused1978&rc=1194&ndi=1. According to the press release, the number of New York City smokers who have stopped smoking is 450,000. Part of the credit to the decrease in smoking was given to the city's Smoke Free Air Act.

[208] While addictions are thought to be covered under the ADA, the only addictions that have been denominated by the EEOC are drug addiction and alcoholism. II-2.2000 Physical or Mental Impairments, *Title II Technical Assistance Manual*, THE AMERICANS WITH DISABILITIES ACT, http://www.ada.gov/taman2.html (last visited Feb. 29, 2011). In contrast, a gambling addiction is not covered, according to the EEOC's rules. 29 C.F.R. § 1630.3(d)(2) (2011). According to the CDC, most smokers are addicted to nicotine, which is the most common form of chemical dependence in the United States. *Nicotine Addiction*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/tobacco/quit_smoking/how_to_quit/you_can_quit/nicotine (last updated Jan. 24, 2011).

[209] 42 U.S.C.A. § 12102(4)(E)(i) (West Supp. 2009).

condition that is ameliorative as it is curable, and self-curable at that.[210] Assuming the CDC achieves its Healthy People 2020 target of a 30% obesity rate in America[211] (an obesity rate that is double what the CDC sought to achieve for its Healthy People 2010 campaign), that would still mean that much more than 120 million Americans would be obese. As was said in *Brashear v. Simms* about whether smoking was as a disability under the ADA, could Congress have wanted that many Americans to be considered disabled?[212] The numbers are daunting and the implications, both in and out of the workplace, are breathtaking.

[210] The CDC's obesity web site has a web page listing "What Can Be Done" and categorizes actions for federal and state governments, communities, and individuals to reduce obesity. All recommendations concern eating healthier foods or increasing physical activities. *See Vital Signs Adult Obesity, supra* note 98. Centuries earlier, the Greek physician Galen recounted his response to an obese patient: "I reduced a huge fat fellow to a moderate size in a short time, by making him run every morning until he fell into a profuse sweat; I then had him rubbed hard, and put into a warm bath; after which I ordered him a small breakfast, and sent him to the warm bath a second time. Some hours after, I permitted him to eat freely of food, which afforded but little nourishment; and lastly, set him to some work which he was accustomed to for the remaining part of the day." Haslam, *supra* note 86.

[211] Allison, *supra* note 84.

[212] Murtagh, *supra* note 179.