ILLINOIS BUSINESS LAW JOURNAL

A Publication of the Students of the

University of Illinois College of Law

FALL 2010 ISSUE, VOLUME 11

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INDUCED INFRINGEMENT: WHAT STANDARD SHOULD THE SUPREME COURT ADOPT IN GLOBAL-TECH APPLIANCES V. SEB S.A.?

On October 12, the Supreme Court granted certiorari to Global-Tech Appliances, Inc. and Pentalpha Enterprises, Ltd. (Docket No. 10-6; July 29, 2010) to consider what state of mind must be shown by a patentee, under 35 U.S.C. §271(b), to establish that a defendant induced infringement of a patent. That section simply states: "Whoever actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. §271(b).

The Supreme Court's answer may have significant economic consequences, especially for foreign companies importing goods into the United States, because the statutory provision addresses indirect, rather than direct liability. Actions taken exclusively abroad could create liability for such companies, who must now contemplate the costs of complying with the to-be-announced Supreme Court standard. The standard will also affect whether officers and directors of a corporation would be held personally liable for indirect infringement. Such additional costs will undoubtedly be passed on to consumers and, given the scale of foreign trade in the U.S., these costs may have a large impact on the economy as a whole.

Although the statutory language itself does not require that an alleged infringer have actual intent to induce infringement, courts have widely required that specific intent to induce infringement be shown because of the statutory phrase "actively induces". Is the Doctrine of Inducement Dead? Vivian Lei, 50 IDEA 875 (2010). This judicial requirement implicates two questions: (1) what

"magnitude of intent"[1] must be established? Id. (2) to what must the intent be directed?[2]

The Federal Circuit finally resolved its previously-conflicting answers to the above questions in DSU Medical Corp. v. JMS, Co., 471 F.3d. 1293 (2006), or so we thought. In DSU Medical, the Federal Circuit announced the plaintiff's burden is to show that defendant's actions "induced infringing acts and that he knew or should have known his actions would induce actual infringements… [this] necessarily includes the requirement that he or she knew of the patent."Id at 1304 (internal quotations omitted). Furthermore, the Court not only required knowledge of the patent but also required the defendants to have specifically intended to aid and abet another's direct infringement.[3] Id at 1305. In summary, the Federal Circuit held that a §271(b) violation required (1) knowledge of the existence of a patent and (2) affirmative action inducing a third party to directly infringe.
All was well until the (relatively egregious) record of Pentalpha found its way to the Federal Circuit in SEB, S.A. v. Montgomery Ward & Co., Inc., Global-Tech Appliances, and Pentalpha Enterprises, Ltd., 594 F.3d 1360 (Fed. Cir. 2010). In that case, Pentalpha, a Taiwanese company, developed a deep-fryer with cheap, plastic outer shell by copying one of SEB's allegedly unmarked (i.e. not identified as patent-protected) deep-fryers that had been exported to Taiwan. Id. at 1365-66. Pentalpha planned to sell the deep-fryer to its wholesale customers, including Montgomery Ward, for importation and resale into the United States. Before doing so, Pentalpha sought an opinion letter from a New York patent attorney. An opinion letter states whether the attorney believes a particular product infringes any known patents. However, Pentalpha failed to disclose to its attorney that it had developed its deep-fryer by copying SEB's.

Though Pentalpha did not contest direct infringement, it argued that induced infringement could not be shown because it had no knowledge of the existence of SEB's patent before SEB brought suit against a Pentalpha customer. Apparently appalled by the facts, the Federal Circuit affirmed the jury's finding of induced infringement and in a fit of academicism held that "deliberate indifference of a known risk" that a patent may exist is a form of knowing that a patent exists. Id. at 1377. In doing so, the Federal Circuit both raised doubts about whether the "deliberate indifference" standard can be reconciled with its opinion under DSU Medical and with the Supreme Court's articulation of the standard: "affirmative intent that the product be used to infringe… active steps taken to encourage direct infringement…mere knowledge of infringing potential or of actual infringing uses would not be enough…The inducement rule, instead premises liability on purposeful, culpable expression and conduct." MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 916 (2005).

The "deliberate indifference" standard also raises questions as to (1) the requisite magnitude of risk that must be known and (2) what exactly constitutes deliberate indifference? Some risk that a patent covers the allegedly infringing product or activity always exists in a competitive market and opinion letters were traditionally relied on to mitigate this risk. With respect to what constitutes deliberate indifference, the Federal Circuit made clear that even in light of an opinion letter "deliberate indifference" may still be found. The Federal Circuit did not, however, state what it was, in addition to obtaining an opinion letter, that must be done to overcome a "deliberate indifference".

Without additional guidance, the deliberate indifference standard may vitiate the requirement of "intent to infringe" under DSU Medical: this would revert us back to the now-rejected standard of Hewlett-Packard Co. v. Bausch & Lomb,

the“intent to induce the infringing action” standard. 909 F.2d 1464 (Fed. Cir. 1990)). This is because intent to cause the infringing action will often be enough to establish “deliberate indifference” as to the existence of a patent if affirmative steps are not taken to ensure that the activity being induced is not protected by a patent.

I argue that the DSU Medical standard requiring knowledge of the existence of a patent and affirmative intent to infringe is the correct one. First, this standard has been implicitly approved by Congress in two ways: (1) in Congress’ enactment of §271(c) as a separate provision from §271(b) and (2) by Congress’ enactment of §287.

In their amici brief, twenty six law professors argue that the “deliberate indifference” standard would cause 271(b) to “swallow” 271(c). Global-Tech Appliances, Inc. v. SEB S.A.: Brief Amici Curiae of 26 Law, Economics, and Business Professors in Support of Petitioners, 2010 WL 3019717 (2010). In creating two different sections to address indirect infringement, Congress demonstrated its intent to treat these two types of indirect infringement differently. Section 271(b), as already discussed, addresses inducement to infringe, whereas section 271(c) addresses contributory infringement. Id. “[The Supreme Court has stated] that a contributory infringer under section 271(c) must know that the combination to which it is contributing ‘was both patented and infringing.’” Id (citing Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 488 (1964)). Thus, any activity that would infringe under 271(c)[4] would necessarily infringe under the “deliberate indifference” standard of 271(b). Id. This would cause 271(c) to be superfluous, collapsing it into 271(b) and ignoring Congress’ intent to treat the two indirect infringement sections separately.

Under §287, Congress requires that a patentee must provide notice to an alleged infringer in order to recover monetary damages. This provision illustrates Congress' understanding that it is more economically efficient to charge a patentee with the responsibility of notifying a potential infringer of the existence of a patent rather than requiring the infringer to perform an exhaustive patent search before investing in research and development (or even before simply using or selling a particular product). Section 287 also gives the alleged infringer a "free pass" up to the point of notice (that a patent exists). Allowing a "deliberate indifference" standard analysis under 271(b) would hold indirect infringers to a less culpable standard than direct infringers. The standard would also be inconsistent with Congress' recognition that, because of information asymmetry, it is more efficient to require a patentee to provide notice of the existence of a patent rather than allowing the patentee to rely on weak circumstantial evidence of the alleged infringers' knowledge of its existence.

Second, because a finding of indirect infringement necessarily entails a finding that another has directly infringed (and so 271(b) addresses behavior that could almost always be remedied by litigation against a direct infringer) 271(b) should be used sparingly and only to address truly deplorable behavior; a flexible standard is unnecessary to protect a patentee. Indeed, a flexible standard would create uncertainty and inhibit legitimate business activity.

Finally, a broad and flexible standard could have both unfavorable economic consequences (and anti-competitive effects) and could stifle innovation as a result of uncertainty.

In sum, the DSU Medical standard requiring knowledge of the existence of a patent and an affirmative intent to infringe is the correct standard under §271(b)

because: (1) Congress implied this to be the standard in enacting §271(c) and §287 (2) a patentee will have already proven, and can recover, as a result of direct infringement (3) a flexible standard's uncertainty may have economically unfavorable chilling effects.

1 The magnitude of intent could be one of the following: negligence, recklessness, or willfulness.
2 In other words, must the alleged infringer actually intend to cause infringement or must the alleged infringer only intend to encourage the actions that result in infringement regardless of his knowledge the existence of a patent? Id.

3 "[t]o establish liability under §271(b) a patent holder must prove that once the defendants knew of the patent, they actively and knowingly aided and abetted another's direct infringement…knowledge of the acts alleged to constitute infringement is not enough…specific intent and action to induce infringement must be proven" Id at 1305 (internal quotations omitted).

4 The language of 271(c) necessarily requires actual knowledge of the existence of a patent:
http://www.uspto.gov/web/offices/pac/mpep/documents/appxl_35_U_S_C_271.htm

TRANSFER FEE COVENANTS AND HOMEOWNER'S ASSOCIATIONS

In August 2010, the Federal Housing Finance Agency (FHFA) proposed "Guidance on Private Transfer Fee Covenants" (No. 2010-N-11) that would prohibit Fannie Mae, Freddie Mac, and the Federal Home Loan Banks from purchasing mortgages with private transfer fee covenants. A private transfer fee is charged each time a property subject to such a covenant is sold. The fee is typically calculated as a percentage of the property's sales price. These covenants are commonly used by homeowner associations.

FHFA's stated reason for this decision was that these covenants "appear adverse to liquidity, affordability and stability in the housing finance market and to financially safe and sound investments." FHFA was further concerned with the private income streams created by these covenants and whether all of the money collected was used for the stated purpose of the fees. Another concern was with disclosure of the fees since they can be hidden with other closing costs at the time of sale of a property. FHFA was also concerned with harm to the valuation of properties encumbered by these private transfer fee covenants.

Potential Advantages of the Guidance

The proposed guidance might provide benefits by reducing the prevalence of or entirely eliminating private transfer fee covenants.

The proposal would lead to more transparency for homeowner association fees. When paying homeowner association fees each year, most homeowners

probably fail to consider that part of the cost of running the association each year is paid by private transfer fees. Assuming that homeowner associations want mortgages on properties within their associations to be eligible for purchase by one of the FHFA-regulated entities, the associations would no longer be able to hide part of the cost of running the association in transaction fees paid by only a few homeowners each year.

The proposed guidance could also lead to increased liquidity in the market for homes currently covered by private transfer fee covenants. These transfer fees increase the transaction costs of each property sale. Reducing the transaction costs involved with property sales would increase the number and frequency of sales.

Potential Disadvantages of the Guidance

The guidance could lead to problems for the homeowner associations that rely on these fees to fund their operations. Homeowner associations are not operated to make a profit; over long periods of time, they should spend approximately the amount of fees that they collect. While private transfer fees may fund a small portion of homeowner associations' budgets, if these fees are prohibited, homeowner associations will have to adjust their operations. One possibility would be that homeowner associations would reduce their activities. However, assuming that homeowner associations were efficiently spending association fees and only engaging in necessary activities, reducing activities to compensate for lost revenue might not be possible. Instead, homeowner associations would likely replace lost revenue from private transfer fees by increasing homeowner association fees for every property owner in the association.

While increasing fees on every homeowner within the association would provide more transparency, homeowners are not likely to appreciate a sudden increase in their homeowner association dues. In a time when many homeowners are struggling to make mortgage payments, these increased dues could lead to an increase in foreclosures since many states allow foreclosures to collect homeowner association dues. Long term homeowners in associations might come to miss the subsidy provided by fellow association members who do not hold their properties for as long of a time.

Since many homeowner associations want mortgages within their communities to be eligible to be purchased by FHFA-regulated entities, the proposed guidance would greatly reduce the use of private transfer fee covenants nationwide. This area might be better regulated by states that can take into account factors specific to their states. Many states have already passed laws prohibiting private transfer fee covenants. For example, Illinois recently enacted Public Act 96-1345 which makes private transfer fee covenants recorded after January 1, 2011 void and unenforceable.

The public comment period for the proposed guidance ended last month. While the FHFA is yet to announce a decision, the proposed guidance will likely be adopted because the trend in some states and Congress is towards eliminating private transfer fee covenants.

ASX-SGX MERGER: WHAT SHOULD MATTER?

Currently, the Australian government is considering the merits of a proposed takeover by the Singapore Exchange Limited (SGX) of the Australian Stock Exchange (ASX). The over-$8 billion deal has the goal of creating a dominant force in the Asian-Pacific region and a globally-salient exchange. In fact, the merged exchange would "create the world's fifth-largest market operator by share value." The discussion should be focused on the viability of the merger, especially the potential impact on investors, the region, and the world. Debates about the pros and cons would seemingly be productive to decide whether or not the deal would be the right path to take in regards to the ASX, an exchange that some say would become "irrelevant" without merging with SGX. The talks since the merger was proposed have devolved however to the levels of political infighting. In the current scrum of the Australian Parliament, a few themes have emerged as the hot issues, specifically: Singapore's human rights record, the breakdowns of representation and ownership of ASX-SGX exchange, and Australian national interest. In deciding whether to combine exchanges should these concerns play a dominant role in evaluation and discussion over the raw data on the viability and projections for the combined exchanges?

Senator Brown from Australia's Green Party has said "[Singapore] is a state that tramples all over freedom of speech, democracy, the rights of oppositions, the ability for public discourse…It is a classic rule by the oligarchs of Singapore." As a result, Brown and his party plan to oppose the merging of ASX and SGX. According to freedomhouse.org, a watchdog organization focused on international civil and political rights, Singapore is a "partly free" state that still struggles to afford full political and civil liberties to its citizens living under the ruling

authoritarian People's Action Party. While full human rights are important for Singapore's citizens, "Singapore has traditionally been lauded for its relative lack of corruption", an issue that should be at the forefront of the Australian Parliament's mind when considering this merger. In fact, Singapore was ranked 3 out of 180 countries in Transparency International's 2009 Corruption Perceptions Index. While it is commendable that Australian politicians are willing to consider the human rights record of other countries before embarking on business ventures with them, it seems like concerns over Singapore's human rights record may be a façade. Arguably the most important civil and political liberties issue to consider before agreeing to a momentous business deal such as the ASX-SGX merger is corruption, but this seems to be left out of the discourse. It is admirable to care about Singapore's human rights record, but this issue should not be a controlling factor in deciding whether to merge the two exchanges. If human rights and civil and political liberties are going to be included in the discussion, maybe it is beneficial to focus on issues within this subtopic most relevant to business, including Singapore's excellent corruption record.

Another significant concern for many Australians is the level of control Singapore and the SGX would have over the merged exchanges. Not only has it been reported that SGX was willing to pay a premium price for ASX, but also that "the CEO would be SGX's current chief Magnus Bocker and the 15 member board would only feature four Australia-based directors." As a result much of the power for the merged exchanges would be consolidated in Singapore and this merger seems to look more and more like an acquisition. As Tracy Lee and Andrew Main explain in their article on the deal, it is especially worrisome that the Singaporean government currently owns a 23% stake in SGX through Temasek Holdings, a government investment company. While that percentage is expected to be reduced to 14.9% in the merged exchange, the percentage

ownership coupled with the control of the board and the inflated offering price seem to leave the ASX and Australians in the dust in terms of governance, regulation, and authority in the merged exchange. Before a decision on this potential deal is made, serious questions should be asked about Australian representation in terms of authority and ownership of the merged exchange. The ASX is considered a "national treasure" and before this merger moves forward, Australians should maintain some control over the exchange regardless of its purchase price.

Along the same vein, however, how big of a role should national interest play in determining whether to accept or reject the ASX-SGX merger deal? While national interest means that Australians should continue to have a decisive governing and regulatory role over any new iterations of the ASX, national pride has little place in determining the future of this exchange. Many politicians, including the Green Party's Senator Brown, have sworn to block the deal on the basis of national interest. They conflate national interest with national pride. According to Australian Treasurer Wayne Swan, the proposal will undergo a "national interest test." However, ASX chief executive, Robert Elstone, does not understand "how this [merger] is contrary to the national interest, [since] the combined exchange will be both more regionally relevant and globally relevant than the sum of its parts." It is debatable whether or not the merged exchange would be inherently good, as Mr. Elstone says it would be, not only for the ASX and Australia but also for the SGX. This should be the main question for the Australian Parliament, however, in deciding whether or not to approve the merger. National pride, while understandable for something such as a national stock exchange, should not necessarily be affected by (or conversely affect) the merger. The ASX will still exist when all is said and done regardless of whether the merger goes through or not and Australians will still have the same access to

the exchange they had in the past (possibly even better access to Asian investment products as a result of the merger). Any sort of discussion based on nostalgia or national pride is irrelevant and can only limit Australia from promising opportunities. For the Australian Parliament, the main question should be whether or not the ASX-SGX merger will actually be beneficial to the ASX and Australian investors, and other factors should be judged in light of this main issue.

IS THE SEC BLIND?

How does the SEC determine where to deploy its resources? What criteria does the SEC use to decide which companies to monitor and which to ignore? Answers to these questions and more were recently presented to the Illinois Corporate Colloquium by Cindy Alexander, an economist at the SEC. In her working paper, "Regulating Monitoring Under the Sarbanes-Oxley Act", Ms. Alexander and her coauthor Kathleen Hanley examine the usefulness of two factors used by the SEC in determining which companies to monitor: firm size and stock price volatility. Their findings suggest the answer to my title question is, decidedly, no.

Section 408 of the Sarbanes-Oxley Act of 2002 identifies company size and stock price volatility as two factors, among others, that the SEC should use as indicators of potential problems with a company's financial reporting. Section 404 of Sarbanes-Oxley requires companies to publicly disclose "material weaknesses" in their internal controls over financial reporting. Disclosures of "material weaknesses" are used as indicators of the (low) quality of financial reporting and the risk of non-compliance with Sarbanes-Oxley. Indeed, the market does respond negatively to the disclosure of "material weaknesses" in internal controls. (p. 9) The authors correlate the disclosure of "material weaknesses" with firm size and stock price volatility to "test the practical usefulness of the Section 408 factors as indicators of company-specific risk and potential harm to investors from false financial reporting." (p. 2) In doing so, Alexander and Hanley come up with some interesting results.

First, a company's size is not a good predictor that the company will disclose a "material weakness" in its internal controls over financial reporting. Large companies are actually half as likely to disclose a "material weakness" than small companies. (p. 14) But company size is a good indicator of the potential harm to investors from false financial reporting. The average market capitalization of large firms disclosing "material weaknesses" is 11 times greater than that of small firms disclosing "material weaknesses." (p. 3) Thus, large companies are less likely to make false financial reports than small companies, but hurt investors more when they do.

Second, the volatility of a company's stock price is a good predictor that the company will disclose "material weaknesses" in its internal controls. While smaller companies tend to have more volatile stock prices, the authors find that volatility is a good predictor of "material weaknesses" even when controlling for company size. (p. 17) Thus, large, low-volatility companies are least likely to disclose "material weaknesses" while small, high-volatility companies most often make such disclosures.

These results suggest that the SEC is looking in the right places for potential harms to investors, at companies representing the most likely risk of harm and those representing the biggest potential harm. However, "the failure of the SEC to catch some of the most egregious wrongdoing that surfaced after the financial crisis of 2007 and 2008", Edward Wyatt, "For Whistle-Blowers, Expanded Incentives" has served as the impetus for new approaches to protecting investors, including a proposed financial whistle-blower program. This program would reward whistle-blowers whose information leads the SEC to obtain a sanction of more than $1 million. Opponents of the program like former SEC chairman Harvey L. Pitt claim it "contains the seeds for undermining corporate governance

and internal compliance systems" implemented in response to Sarbanes-Oxley. So, the SEC can't uncover the most "egregious wrongdoing" and it undermines its own regulations with conflicting policies?

Section 408 of the Sarbanes-Oxley Act directs the SEC to monitor both the companies most likely to have problems with their financial reporting and companies representing the biggest potential risk to investors. The financial whistle-blower program does not undermine SEC monitoring or the corporate compliance programs initiated in response to monitoring because it offers potentially higher rewards to employees who "go first to their corporate compliance departments." Thus, the whistle-blower program simply recognizes that the SEC has limited resources and can't monitor every company. So, who should the SEC monitor?

If small companies' stock prices are volatile because they are innovative, then monitoring them may incentivize their managers to sacrifice innovation for stock price stability. But regulatory monitoring also improves investor confidence, thus potentially allowing small and innovative companies to raise more capital than they would without monitoring. Small companies also present a relatively small potential risk of harm to investors. Large companies represent a relatively large potential risk of harm to investors, but they are far less likely to cause harm through false financial reporting in the first place.

What all this suggests is that the SEC should focus its monitoring on large companies with volatile stock prices. In other words, the SEC should monitor the companies representing a combination of both 1) the greatest likelihood of non-compliance with Sarbanes-Oxley and 2) the greatest potential harm to investors. This approach would avoid hindering small companies that present little potential

risk to investors. It would also keep the SEC from attempting to monitor every large company and thus ballooning into a giant, unnecessary bureaucracy. The SEC's proposed financial whistle-blower program also serves this interest by incentivizing employees at all companies to report illegal activity. It appears the SEC is concerned about both its internal efficiency and its effectiveness. The SEC is clearly not blind.

The full recommended citation to "Regulating Monitoring Under the Sarbanes-Oxley Act is: Alexander, Cindy R. and Hanley , Kathleen Weiss, Regulatory Monitoring Under the Sarbanes-Oxley Act (October 2, 2007). Available at SSRN: http://ssrn.com/abstract=1022161

UNDERVALUED RENMINBI: ILLEGAL OR INEFFICIENT?

The Chinese exchange rate has been the subject of recent complaints, but these are not new complaints. Early in 2000, Nicholas R. Lardy, the senior fellow of the Peterson Institute for International Economics, alleged that the Renminbi (Chinese currency) was undervalued by about 40% based on China's GDP. From 2005 to 2008, as China's GDP increased, the value of the Renminbi increased in relation to the dollar by about 20%, from about 8.27 Renminbi to the dollar to about 6.83 Renminbi to the dollar. However, the Chinese exchange rate has recently been a pretty hot issue again worldwide, and China is facing huge pressure, especially from the U.S to take action so that the Renminbi is properly valued. On September, 29 2010 President Barack Obama said that "China's currency is undervalued, resulting in a trade advantage for Chinese goods over American goods that contributes to the U.S. trade deficit." Chinasubsequently responded and claimed that "China will not bend to economic pressure from U.S. lawmakers, even as it further opens its markets to the world."

If the Renminbi is actually undervalued, international economic analysis suggests that this may contribute to China's current account surplus and the U.S. trade deficit. As the world's two largest economies, it is impossible to limit the imbalance between the two countries, and this problem has also lead to international imbalance as well. The U.S. has claimed that if Chinese authorities do not allow for its exchange rate to increase, it might delay the recovery from the Great Recession. If China increases the exchange rate by about 20% it may help to eliminate global imbalances, especially the U.S. trade deficit, and relieve the unemployment problem in the U.S. Therefore, there is a huge incentive for the U.S. to press China to increase exchange rate. The European Union ("E.U."), and

other emerging market economies have similar incentives as well. Therefore, the U.S. tried to pressure China not only through political influence, but also through legal reasoning. However, as one of the biggest export countries in the world, China tries to keep their export goods in a highly competitive position in the international trade market and can rely on the advantages of its currency to do so. Therefore, despite pressure from the U.S., China hopes to keep the Renminbi undervalued. Keeping exports competitive may be the main concern of Chinese authorities.

There is no doubt that there will be some other uncertain risks if China changes its currency exchange rate. For example, Japan did not expect the actions it took under the Plaza Accord in 1980s to lead to a Japanese economic recession. See 张舒英(ZHANG Shuying), "广场协议后日元升值及对日本经济的影响 (The effect of Plaza Accord to Japanese exchange rate and economy", April 2005.) However, if China insists that its "fixed" exchange rate be used regardless of the pressure from other countries, especially the U.S. and the E.U., the problem is that U.S. and E.U. may have no money to buy goods from China no matter how competitive or the cheap goods are. Since both the U.S. and the E.U. are struggling to recover from the Great Recession and their exports have difficulty competing with Chinese exports, they may not be able to find efficient measures to save their economies and to recover from the recession. However, China can "fix" its exchange rate, and eliminate the negative effect of the Great Recession to its domestic market. But, analyzing overall interests, the "undervalued" Renminbi makes China, the U.S., and the E.U. worse off, because it may restrict the U.S.'s, the E.U.'s, and even the whole world's, recovery from the Great Recession, and may also cause Chinese exports to lose their biggest consumer and market.

In the past, the U.S. tried to label China as a "currency manipulator" in order to bring action against China under World Trade Organization ("WTO") rule and the International Monetary Fund to push China to increase its exchange rate. However, there has not been sufficient evidence to prove China actually manipulated its currency until now. This "manipulation" makes it more likely that the currency measures China is taking are a substantive violation of relevant international norms. At the same time it should be noted that every country takes certain measures to control its own currency.

In addition, there are also several legal issues involved. Current WTO members should comply with the obligations imposed by agreements. Specifically, they should comply with the dispute of exchange arrangement among members found in Article XV of the General Agreement on Tariffs and Trade ("GATT"), which requires the contracting parties to seek cooperation with the IMF. The IMF may also pursue a coordinated policy with related jurisdiction. What's more is that Article XV (2) stipulates that in all cases concerning the foreign exchange arrangement, the WTO shall consult fully with the IMF. The WTO "shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange," and accept "the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the IMF, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES" as well. In practice, the IMF has not worked effectively in changing China's idea of its exchange rate or to settle the dispute. Although members have the duty to consult the opinion of the IMF if involved in exchange rate problems based on the Article

XV of the GATT, the IMF has no authority to enforce its policy or decision among members.

With regards to Article XV of the GATT, section 4 states that "ontracting parties shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund." Currently, there is no specific definition for the GATT's use of "intent." See Dukgeun Ahn, "Is the contemporary Chinese exchange-rate regime WTO-LEGAL?", April 2010. However, we might infer the meaning of intent from the way it is used in the IMF agreement. Article IV of the IMF agreement interprets "intent" to mean "to assure orderly exchange arrangements and to promote a stable system of exchange rates." The understanding of "intent" within the spirit of the GATT is difficult to determine, as is determining which kind of actions "frustrate" the "intent" of GATT. Some may argue that China fix its currency exchange rate regardless of its real value, and to adjust it so that it is increased in relation to the value of China's GDP, however, this may make the global economy worse. This is a typical action that frustrates the intent of GATT. On the other side, Chinese scholars may argue that the Real Effective Exchange Rate of the Renminbi has already increased about 21.37% in past years, and the major reason why China's current account surplus is increasing is the growth of China's GDP, and that there is no significant link between undervalued exchange rate and the economic crisis. Although the exchange rate of the Renminbi looks like it is "fixed", it does not frustrate the international trade market and violate GATT, since the "fixed" rate is decided by multiple factors, such as the demand of the market, the foreign exchange reserve, and domestic inflation, rather than taking economic advantages. Another important argument for China is that the IMF shall "respect the domestic social and political policies of members." In practice, the IMF takes a flexible attitude

for exchange rate problems, generally choosing to respect national opinions. See "从IMF和WTO规定看人民币汇率; (analysis of Chinese exchange rate from WTO and IMF rules), available at: http://www.21gwy.com/lunwen/jryj/a/5539/185539.html For example, with regards to the 1994 Mexico currency crisis, the 1997 Thailand currency crisis, and the 1998 Brazil financial crisis, the IMF left it to the market to adjust exchange rates to reasonable and effective rates rather than forcing nations to do so. While, Article XV of GATT and the IMF agreement may be possible methods to challenge China's exchange rate policy, it raise the problem of enforcement. The IMF has no enforcement tools of its own, and if "China does not comply with the recommendation by the WTO Dispute Settle Body," the recommendation is hard to enforce "due to the technical problems of injury calculation."

Another accusation is that the undervalued Renminbi may violate the WTO Agreement on Subsidies and Countervailing Duties ("SCM"), since it works as an import tax and an export subsidy. Under Article 1 of the SCM, there are three elements of a violation: (1) there must be financial contribution by a government; (2) a benefit must be conferred; and (3) the subsidy must be specific. In China's case, they may argue that it is not proper to find the undervalued Renminbi to be a direct financial contribution by a government, because generally speaking, changing exchange rate has never been looked at as a form of fiscal spending or revenue, although it may have similar function as subsidy, which can enhance the price of import goods in domestic and enhance the competitiveness of local goods. Moreover, the measures of fiscal subsidies under Article 1 of SCM do not include undervalued exchange rate. In addition, it is difficult to prove the "specific" element because even if the Renminbi is undervalued, China's exchange rate policies do not focus on specific enterprises or industries, as all exports may get benefits from it. Lastly, they may also argue that the government

does not provide a financial contribution, just governmental services, and it is normal for government to affect its exchange rate to a certain degree.

Other U.S scholars also raise several "non-violation complaints" against China's exchange-rate policy, however, they are also not tenable. These "non-violation complaints" include U.S. approaches outside of international laws, such as punishing China by increasing the U.S. import tax of its products and taking the directly monetary measure of making "direct purchases of Renminbi to counter China's direct purchases of dollars." >See C. Fred Bergsten, "Correcting the Chinese Exchange Rate", April, 2010. Nevertheless, they both have problems. First, by imposing additional tax on Chinese imports specifically and without the consent of WTO, this increases risk for the U.S because of the "non-discrimination principle". The second approach is also impractical because there is no well-functioning currency market in China, and there is a lack of full convertibility for it as well. Hence, it is difficult for U.S. purchases of the Renminbi to affect its exchange rate.

However, the most effective way to change the current policy of China is to make Chinese authorities realize the necessity of valuing the Renminbi correctly. In the international trade market, regardless of all of the complicated statistics and standards, the currency exchange rate depends on supply and demand of all resources and products. In China's case, with the development of its economy and advances in technology, China has much more competence in manufacturing. Therefore, the demand of buying products from abroad decreases, and supply of Chinese products increases. Under this circumstance, it is imperative to adjust the value of the Renminbi against the value of the dollar. Although Chinese export companies may face a big challenge if the exchange rate increases, it may make global economies, as well as China's overall wealth, better off. Because China has

already issued too much of the Renminbi to balance its foreign exchange reserve, China faces the risk of serious domestic inflation.

In conclusion, global economic recovery requires global cooperation. Merely increasing the exchange rate of the Renminbi may not save the world. However, China should realize that to save the world it is necessary to change its exchange rate policy in relation to the growth of its economy, because keeping a lower rate to maintain advantages of exports, but ignore other disadvantages, is not a wise choice, even if it is not illegal within the WTO/IMF regime.

THE SOCIAL NETWORK: DEFAMATION OR RIGHT TO PRIVACY

In 1952, James Hill, his wife and two children were held hostage by three escaped convicts in their Pennsylvania home. In an interview following the incident, Mr. Hill stressed that "the convicts had treated the family courteously, had not molested them, and had not been at all violent." *Time, Inc. v. Hill*, 385 US 374. The convicts were later apprehended and two convicts were killed. The Hill family kept away from the spotlight and sensationalism surrounding the story, moved to Connecticut and resumed a private life. In 1953, author Joseph Hayes published a novel, The Desperate Hours, which depicted a family of four held hostage by three escaped convicts in their home. Hayes's storyline differed from the actual events by incorporating violence including a beating and a verbal sexual assault to the family by the convicts. The book became a play, also titled The Desperate Hours, which eventually became the subject of a Time Life Magazine article. The Time's article mentioned the Hill family and gave the impression that "the play mirrored the Hill family's experience, which, to the knowledge of the defendant….was false and untrue." After filing suit against Time, Inc. the Supreme Court held in favor of Hill, that the Court cannot refuse the recovery of compensatory damages for "recklessly inflicted invasion of [Hill's] rights.

Time, Inc. v. Hill demonstrated an invasion of the right to privacy and how under certain circumstances, that right will supersede any First Amendment rights. With the advent of The Social Network in box offices, it is surprising the Facebook creator and Chief Executive Mark Zukerburg has not pursued similar legal action. Facebook has become a fixture in pop culture, with over 500 million users; even

the British Monarchy will soon have a Facebook page, according to CNN. Alternatively, Facebook has been pursuing legal action against sites that use "-book" in its title i.e. Teachbook, Lamebook, Placebook.

The networking site was launched in February of 2004 and has, as The Social Network depicts, been involved in legal controversies regarding it ownership and creation. Ben Mezrich , author of The Accidental Billionaires, collaborated with director David Fincher (Fight Club, Curious Case of Benjamin Button) and Aaron Sorkin, (The West Wing, A Few Good Men) to create the movie about Facebook's creation. Much of the focus is on the unflattering portrayal of Zukerburg as an arrogant, self-serving and angry Harvard programmer who would stop at nothing to achieve the success of Facebook. Mark Zukerburg chose not to participate in the movie's production and his opinion of the movie has usually been limited to one word, "fiction." A CBSnews report quotes Zukerburg saying the movie "got a lot of stuff wrong" and Facebook executives reportedly sought to discredit the film's unflattering portrayal of him .

The film's producers made The Social Network without receiving permission from Zukerberg or securing the right to Mark Zukerburg's life, a decision based on supposedly having enough research and background to back up the film with Zukerburg's cooperation.

In entertainment law, defamation is the unconsented and unprivileged communication to a third party of a false idea which tends to injure plaintiff's response by lowering the community's estimation of him, or by causing him to be shunned or avoided, or by exposing him to hatred, contempt or ridicule. Rubin, E. Leonard, Materials and Cases on Various Laws and Practices Pertaining to Entertainment and Communication Arts, p. 79. The requisite elements for a cause

of action to exist are 1) a communication 2) to a third party 3) of a false idea 4) injurious to plaintiff's reputation. Rubin, p. 80. Defamation occurs in one of two forms, libel (written) or slander (oral). Proof that the implications are in fact true defeats an action for defamation as truth is an absolute defense. A plaintiff does not need to demonstrate malice (intent to defame) and a defendant showing the absence of malice may only reduce damages. Statements can also be defamatory because of the activities of the plaintiff. This includes communicating ideas which "prejudice someone in [the plaintiff's] occupation, employment, profession or office." Rubin, p. 85.

Zukerberg could also potentially seek legal recourse regarding his right to privacy. Where defamation requires a communication to a third party, privacy can be violated despite no publication to third persons taking place. Rubin, p. 158. Privacy can also be violated even if the matters delved into are true or not particularly harmful to reputation. Privacy can also be invaded by "the unreasonable publication of aspects of [a person's] private life." Rubin, p. 163. The right to privacy "seems most analogous to that of trespass, by which one has the right to keep unwarranted intruders off his land not because of any resulting emotional distress or loss of rents, but merely to insure the solitude of land owners." Rubin, p. 158.

Zukerburg's analysis would begin with the question of is he a public figure? Public figures have a more restricted right to privacy, given the nature of their place in society. Zukerburg could easily argue that before The Social Network came out, his name was not so much in the spotlight as his product, Facebook; that few people knew him name compared to the million of people who recognized Facebook. If, however, Zukerburg fails to demonstrate he is a public figure, he must show malice on the part of the defendant; that the writers and

producers of The Social Network knew the information was false and recklessly disregarded the truth. Most importantly though, Zukerburg needs to show how he was damaged: did this movie production hurt him in any way? The common sense factor indicates that above all, Facebook received a level of advertising and public exposure greater than ever before which only benefitted the website. While The Social Network may have taken some creatively liberties in their portrayal of Zukerburg, without being able to show damages, Zukerburg's legal avenues are limited.

WHAT TO DO ABOUT THE BUSH TAX CUTS TO AVOID GOING TWO STEPS FORWARD AND ONE STEP BACK

I was six years old when my father first told me "there's no such thing as a free lunch." However, as a six year old, I had no concept of money, taxes or other individuals, so this declaration meant nothing to me. All I cared about was nap time, lunch and recess. My dad must have been crazy, because as far as I was concerned, some nice lady gave me my lunch every day and it certainly didn't cost me anything. However, now as a twenty something, in my seventeenth year of education, I realize that even if something seems free, someone somewhere is paying for it (likely through taxes). So, thanks dad, for paying for my lunches all those years ago (and my seventeen years of education).

As 2010 slowly – or quickly – draws to a close, one thought on everyone's mind is what is going to happen to the infamous Bush Tax Cuts. Almost everyone can agree that our economy is faulty at its best and utterly failing at its worst, but despite everyone recognizing a problem, no one can seem to come up with a solution.

One possibility, which President Obama advocates, is to abolish the tax cuts for the "wealthy," while keeping them in place for everyone else. William Gale, director of the Urban Brookings Tax Policy Center,argues that the rich will simply invest their money, which won't stimulate the economy, while the government can do a number of things with the taxes they would receive from raising their taxes, including extended unemployment benefits, infrastructure projects and other such aid to state and local governments. Once all the numbers are in, the Tax Policy Centersuggests that just 1.7% of households would pay higher taxes under the president's proposal than if Congress extended all the 2001

and 2003 tax cuts, which begs the question of whether Obama's new plan is really all that unfair.

As Roberton Williams, senior fellow at the Urban Institute, points out, Obama's proposal includes hiking the rates on capital gains (from 15% to 20%) and by taxing qualified dividends at 20%. Hiking rates on capital gains and dividends ultimately affects those who have large amounts of investment and Williams reminds us that if the Bush tax cuts simply expire, the top dividend rate would sky rocket to 39.6%. Again, this begs the question of whether Obama's new plan is really all that unfair.

Fairness aside, the big problem with Obama's plan is that it's not going to fix our economy. Quite frankly, our economy can't handle a permanent extension of the tax cuts for 98% of Americans. The treasury estimates that the costs of making the tax cuts permanent for everyone for the next decade would be roughly $3.7 trillion; $3 trillion of which would be from extending them for the vast majority of Americans, as the Obama plan would do. We can't afford to "lose" $3 trillion, solely because Obama made a promise to not increase taxes on those who make under $200,000. The happiness of 98% of Americans isn't more important than working towards ensuring that future generations have a solid economy.

While the debate over the Bush Tax Cuts rages on for another 59 days, there are a number of other viable options to keep in mind, some of which may take time, but ultimately could be better in the long run. Maya MacGuineas, director of the fiscal policy program at the New America Foundation, lists a couple viable options, which may take time to implement, but in the long run may make the world a happier place. After struggling to understand the Internal Revenue Code, the only thing that makes me feel better is that no one understands the

Code. While a complete overhaul of the Code would be ineffective and time-consuming, there are a couple key starting points. First, tax consumption, rather than taxing individual income. This will not only make everyone happy (especially those in a higher tax bracket), but may also cut down on frivolous spending and excessive waste. Second, take a hard look at all the loopholes in the Code that cuts down on the government's revenue by an estimated $1 trillion. Another viable option would be to take the money that the government now has from the cuts expiring and placing that money back in the hands of specified groups, acting as a stimulus. MacGuineas notes that a temporary stimulus put towards unemployment benefits, aid to states, a payroll tax cut, and business incentives for the weakest sectors (such as housing) would cost roughly $350 billion over the next two years, but save almost $3 trillion over the decade. Most importantly, however, is the immediate positive impact on the economy.

Americans, as a whole, have a tendency to live in the present. However, there have been generations before us and there will be generations that come after us. For the United States to even try to remain the great nation we once were, we need to learn from the past and apply it towards improving the future. Unfortunately, for our economy, there is likely no fix that will be both quick and permanent. We vote politicians into officeto "fix things"and when we don't see results, we vote them out of office the first chance we get. While politicians need to stop thinking about how best to get reelected and start thinking about working together to help improve the economy (and society's problems in general), we, as citizens, need to accept thatthey can't fix the economy by themselves.

Everyone likes to blame someone else for their problems. Growing up, I was incredibly gifted at blaming my parents for everything. Now, when just about

anything goes wrong, I (almost eagerly) blame Congress. However, the truth is that we are all to blame for the current state of our economy (though the degrees of culpability vary). Citizens and businesses, alike, seemingly enjoy taking out huge loans, not repaying them and then running to the government for help. Similarly, if you do receive government funds, please use it wisely and understand that the government is not just an endless money bank put in existence to help you. We need to start working with the government instead of constantly fighting it. Otherwise, it will wind up being a "two steps forward and one step back" outcome. Thinking about the present is great, but without worrying and thinking about stabilizing the future, current quick fixes may not go very far. While there are many possibilities about how bestto improve the economy (and the Bush Tax Cuts, in particular), one thing is certain: we won't get anywhere if we continue to fight each other every step of the way.

DATA, INFORMATION, AND THE PRACTICE OF LAW

The practice of law has changed substantially with the advent of computers, the Internet, and the "Information Age." In many ways, these changes in the legal landscape are not surprising, as they roughly parallel those in the personal and commercial worlds. Much of the technology that has made its way into widespread use has focused on improving and streamlining existing methods. Though we certainly interact now in ways that we could not have 30 years ago, this has largely been within a scheme of roughly incremental changes – the word processor can act as a much more efficient typewriter, and hard drives can act as a very large file cabinet (or library). Court filings, collaboration, and record keeping, among many other tasks, have been streamlined; previously inaccessible sources of information are available even to those with the smallest budget; young law students may seem "dependent" on online services for their research, but they, in turn, don't shudder instinctively at hearing the name "Shepard." However, there is a deeper level of change occurring in virtually every area of commercial and academic pursuit. Some of the literally unprecedented advancement in data gathering, storage, and analysis is moving from behind the scenes into the forefront, and the potential pitfalls faced by the legal system in accommodating this already pose a risk of becoming a significant problem.

Legislation and judicial interpretation, of course, continually develop to meet new challenges and to integrate new ideas, cultural norms, and situations. Lawmakers can intentionally be ambiguous in the terms of a statute, or they can reference tests such as "reasonable person" or "contemporary community standards" to avoid specifying a n exact rule. Further, courts can apply "reason and experience" in comparing a new situation to law and precedent. Through much of our legal

history, these concessions have enabled practitioners to operate with the knowledge that, should a trial be necessary, a reasonable fact finder could mirror the decision making process of the parties. However, many novel forms of analysis and inference are now being applied in the real world – processes which are neither amenable to interpretation based on a hypothetical person's view, nor subsumed clearly within the variations in meaning of a word that one could find in a dictionary or in legislative history.

As an example, consider the formulation of Federal Rule of Evidence 401. The basic rule is about as simple as it could be – evidence should be let in if it has "any tendency" to increase or decrease the likelihood of a material fact being true. Limitations are subject to outside considerations – potential for prejudice, the interests of time, and various exceptions and modifications throughout the Rules, for instance. In contrast, the gathering and use of information in business and academia has essentially undergone a paradigm shift. Entire fields – from quantitative finance, to enterprise resource planning, to behavioral marketing, to customer relations management – have turned to the collection and analysis of data over the wise decision of the experienced business person.

This ingenuity in collecting and using data has, in fact, become an essential element of many major businesses. Google, for instance, can offer many of its services for free use, due in large part to its scrupulous collection of every bit of data possible about its users. Such data collection allows for profitable advertising, which in turn allows for more data gathering, and so on. Pieces of information that once seemed useless because of their specificity can now be aggregated with many similar data points to provide accurate information about an individual. Similarly, pieces of information that were formerly innocuous – a person's first pet's name, for instance – can now be combined with other

seemingly benign, readily available information to provide the key to unlocking an entire identity.

The law currently affects the use of personal, private, creative, and other data in many ways. Ownership of data or compilations of data can be covered under copyright law, as well as by the social and business norms of a given community. Privacy concerns have received attention in the media as well, and provide a good example of the complexities involved. In a given instance of data collection, the same activities may expose a party to liability under a number of different legal theories. Data collection can constitute an invasion of privacy in civil tort, or it could run afoul of statutory proscriptions or constitutional limits. But data gathering or exchange on the internet is often governed by contractual terms as well. Traditional analysis, often based on a standard such as "reasonableness," can apply similarly to interpretation of various criminal, civil, or administrative issues. However, the relatively open and opportunistic developmental process available in the information age has allowed knowledge to be applied in ways that the current legal system may not be capable of modeling. In light of the ever-increasing availability of information, now may be our best opportunity to reevaluate how the law approaches reasoning, knowledge, and information.

In short, modern technology is allowing society to gather and use more data than ever before, and important decisions are now made based on information and inferences that no person could hope to comprehend. We are now living in a world where the smallest bits of information can transform existing anonymous or incomplete data into a legally recognized profile, record, or report. What used to be fully anonymous now lies somewhere between "anonymous for practical purposes" and "readily attributable." What does this mean for the legal system? Can we refine the definitions of terms like "personally identifiable," "reasonable,"

or even “information” itself, or should these terms be interpreted on an entirely new foundation?

At this point, it is not clear what form the answer will take. Statutes, rules, regulations, and judicial decisions could all contribute to a comprehensive solution. Depending on the issue and setting, each of these might have a distinct effect. Further, each might represent a different balance between privacy and efficiency, or a different attribution of duties to maintain privacy. On an individual level, as well, attorneys and business practitioners will need to look beyond traditional boundaries to integrate these new considerations into their work. In upcoming articles, I will discuss some examples to illustrate the significance of specific statutes, and how they may be particularly affected by the principles by which the system chooses to treat data, as well as some considerations specific to particular fields or roles in the legal community.

LUMBERMANS V. BROADSPIRE: WHY AN ARBITRATOR SHOULD DECIDE QUESTIONS OF PROCEDURAL ARBITRABILITY

On October 13, 2010, the Seventh Circuit handed down their ruling in Lumbermans Mutual Casualty Company v. Broadspire Management Service, Inc, LLC. In Lumbermans, the parties had a contract for Broadspire to purchase an Insurance Administration business from Lumbermans. The purchase agreement set out specific procedures for Lumbermans to submit a "disagreement notice" to the regularly submitted price reports created by Broadspire stemming from the transaction. The contract required that these disagreement notices have "reasonable detail" and an alternative determination of the payment required. Lumbermans submitted four disagreement notices. Broadspire refused to arbitrate the claim under the section of the contract which controlled the choice of dispute resolution for disputes arising from the disagreement notices. It was their contention that the disagreement notices did not comply with the contract and therefore should fall under the general arbitration clause which had different procedures. The court found that the dispute between the parties related to a question of procedural arbitrability. Therefore, the section of the contract which related to price report disputes governed whether or not the claim was arbitrable and that the arbitrator was only person competent to decide the question.

It is easy to criticize this decision at first glance because the court is essentially asking the arbitrator to decide whether or not a claim meets the requirements under the contract for arbitration. It is possible that an arbitrator may seek to maximize his relevance by interpreting the scope of the contract in a way which transforms non-arbitrable claims into arbitrable ones or impose a form of arbitration which is not appropriate to the dispute under the contract. However,

Lumbermans and its predecessors vests the power to decide those dangerous questions in the court. In Howsam v. Dean Witter Reynolds, Inc, 537 U.S. 79 (2002), the Supreme Court delineated procedural questions of arbitrability from substantive ones. Procedural questions are ones of gateway procedure disputes such as a statute of limitations. In contrast, substantive questions are ones which define the scope of the arbitrability clause.

In Lumbermans, the court determines that the dispute the plaintiff demanded arbitration for was a procedural question. In their decision, the court implicitly answers the substantive arbitrability question at issue when they determine which section of the contract the dispute falls under. What the court leaves for the arbitrator is whether or not the disagreement notices that Lumbermans submitted comply with the contract. This is a question which is substantially similar to timely filing and should be decided by the arbitrator.

It is important to note that in this case, whoever determines the arbitrability of the claim could be making determinations which are dispositive to the underlying claim. Broadspire contends that the reports are not sufficient because they do not have the required "reasonable detail" and do not provide an alternative payment. However, Lumbermans has stated that part of the deficiency in the price reports is a lack of sufficient information. Should the court state that this excuses Lumbermans deviation from the procedures, they have decided that Lumbermans' disagreement notices have merit. Under the contract this is a question solely for the arbitrator because the parties bargained for such a procedure. The court is barred by the contract from answering the question and the panel of arbitrators that Broadspire wishes to employ under the general arbitration clause should be barred as well.

The precedent which Lumbermans and its predecessors set is just part of a long line of Federal cases which favors arbitration of claims. By allowing the arbitrator to determine questions of procedural arbitrability, the court is furthering a policy which encourages parties to go to the arbitrator. If this was not the case, parties to a contract could essentially use alleged technical deficiencies to take the ultimate decision out of the hands of the arbitrator. Unlike the court, the arbitrator has more freedom when making decisions under the contract. Therefore a claim which the court may dismiss on procedural grounds, the arbitrator may allow to go forward for a decision on the merits because of other outside evidence that can be read into the contract. The parties bargained for this result when they bargained for arbitration as a method of dispute resolution. To allow a party to make an end run around the arbitrator would defeat the purpose of the agreement.

While arbitration does not afford the same degree of protection that a lawsuit in the District Court does, it serves an important purpose and should be encouraged. Arbitration is cheaper, less formal and much faster than filing suit. Further, it unclogs the increasingly busy courts and allows them to focus on complicated issues of law where their expertise is necessary or where having a jury has been deemed important. It also allows for adjudication by an expert in the field in the same way we allow the Executive Branch create administrative agencies which adjudicate their claims. In Lumbermans, the Court deferred, in part, to the arbitrator/audit firm because the arbitrator had knowledge that the court or a general dispute arbitration panel could not possibly have. For these reasons the Court made the correct decision in Lumbermans and kept arbitration jurisprudence on the correct path.

PROTECTING THE UNPROTECTED DOMESTIC WORKER

Domestic Workers are legally marginalized under current labor and employment law. They are currently unprotected under the National Labor Relations Act (NLRA), the Fair Labor Standards Act (FLSA), and the Occupational Safety and Health Act (OSHA). Further, they are de facto excluded from protection under a number of laws, like Title VII of the Civil Rights Act, which exempt employers who employ fewer than a specified number of employees. Section 2(3) of the NLRA explicitly excludes domestic workers from its protection because the term “employee” is defined to “not include any individual employed … in the domestic service of any family or person at his home” including nannies, housecleaners, caregivers, companions, etc.

Protection under the current NLRA is infeasible. Even if the definition of “employees” were expanded to include domestic workers the enterprises covered by the NLRA are limited to employers “affecting commerce.” This requirement is further limited, via self-restriction by the Board, to employers exceeding certain dollar minima. Also, the definition of protected activity requires “concerted activity.” The issue here is whether under the Act a domestic worker can engage in “protected activity” when concerted activity requires more than one worker and most employers hire one domestic worker per household. Thus, because of the concerns that may arise under the NLRA, it might seem more practical to leave it to the States. State governments may circumvent these concerns by enacting legislation to ensure basic labor rights for those who fall under the line of “domestic service.”

New York has spearheaded the effort to extend labor law protection to domestic workers by passing a Domestic Workers Bill of Rights (A1470B). Gov. David Paterson signed the Domestic Workers Bill of Rights on August 31, 2010 and it will go into effect November 29, 2010. The recently-enacted bill includes provisions entitling domestic workers to no less than the minimum wage, overtime pay, vacation, short-term disability benefits and protection against sexual harassment. It also authorizes the State Commissioner of Labor to report to the governor, speaker of the assembly and temporary president of the senate on the "feasibility and practicability" before November 1, 2010 of allowing domestic workers to organize for the purpose of collective bargaining in accordance with the State Labor Relations Act. The report is to address the potential for the formation of bargaining units comprised of domestic workers, whether there are any unique issues which arise in the formation of the bargaining unit and, if so, whether there are other possible frameworks for collective organization or for ensuring the benefits that accompany organization for domestic workers. This could be an insightful piece to consider should the possibility of amendment to the NLRA arise in the future. For now, it will be necessary for employers of domestic workers in New York to maintain clear payroll records of hours worked, including pay rate and overtime pay, develop an anti-discrimination/harassment policy and obtain insurance coverage for disability benefits of domestic workers (even if employed for less than 40 hours a week).

Nevertheless, although New York has acted and California is being petitioned to follow its steps, millions of Domestic workers within the remaining states, who are usually women or immigrants, still find themselves vulnerable to violations of basic labor and employment laws.For as A1470B states in its section on legislative findings and intent, "Domestic workers often labor under harsh conditions, work long hours for low wages with out benefits or job security, are

isolated in their workplaces, and are endangered by sexual harassment and assault, as well as verbal, emotional and psychological abuse." There are over 200,000 women who work as nannies, housecleaners, caregivers and companions in New York State. But there are millions within the remaining United States who remain unprotected. The call for legislative action beyond the state of New York remains.

SHIPPING JOBS TO INDIA: DEMOCRATIC FOE AND REPUBLICAN ALLY?

Democrats are notorious for criticizing Republicans' support of worldwide American companies who "outsource" (i.e., move operations and workers) to nations like India. While Democrats' opposition to outsourcing was initially meant to incite sympathy and support from voters on "Main Street", it has begun to alienate wealthy and influential Indian-American voters, most of whom were previously supporters of Democratic candidates.

Shipping jobs to India has long been a rival issue between Democrats and Republicans. However, Elizabeth Williamson's Wall Street Journal article entitled "Outsource Attack Ads Alienate Voters Tied to India" provides a new spin to the decade old party battle. According to the article, USINPAC, the chief Indian-American lobbying group who have long funded the Democratic Party, is now contributing money to Republicans to defeat Democratic candidates who criticize so-called outsourcing.

One example of Indian-Americans' new push for the Republican Party is John Kasich, the GOP challenger to Ohio Democratic Governor Ted Strickland. After Strickland banned outsourcing of Ohio state business last month, the USINPAC emptied their pockets to Kasich. Additionally, in Illinois, 200 immigrant Indian business owners have raised over $100,000 for Republican candidates.

Why are Indian-Americans so ideologically supportive of outsourcing? For the same reasons Republicans support American companies that sometimes bring

baseline jobs to India: it allows those U.S. companies to be more competitive by increasing their local country employment. While this concept has fathomed Democrats for decades, here is a simple explanation. According to a World Bank survey provided by HSBC Business, it would cost $19,000 to employ an American as a call agent, and $7,500 to employ an Indian. By allowing unskilled, baseline jobs to be served in India for less than half of the amount it would cost to employ an American worker, it allows technology-based companies like Dell to spend those saved funds on growth and expansion. And, finally, economic growth of American companies in those foreign locales often results in the creation of more skilled jobs for U.S. workers who service or oversee those foreign operations. While this may be an oversimplified explanation, it is still a logical conclusion of why Indian-Americans support outsourcing. It also suggests that Democrats should quit their witch hunt for corporations who endeavor to expand their operations and employment overseas, even though they are engaging in what the Democrats otherwise perceive as negative outsourcing.

In this regard, Democratic House Representative Jerry McNerney introduced legislation entitled: "Stop Outsourcing and Create American Jobs Act of 2010" (H.R. 5622) earlier this year. Under Section 4(a) of that Bill, a "Federal department or agency may give a preference in the award of a contract for the procurement of goods or services in a fiscal year to any potential contractor that has not engaged in outsourcing during the fiscal year . . ." How would Democrats expect this proposed legislation not to alienate prominent Indian-Americans? This bill broadly, and suspiciously, procures funds to any contractor, regardless of merit, who does not outsource. According to an interview in McKinsey Quarterly with Romi Malhotra, who runs Dell's India operations, Dell engages in so-called "outsourcing" because it enables them to limit their labor costs while, at the same time, benefit from the knowledge and experience that local workers acquire while

working with other companies, both local and foreign. Thus, Dell outsources not just for lower labor costs but also to learn from Indian-based companies. If this Act were implemented, American companies (and therefore the U.S. global economy) would be deprived of knowledge from competitors around the world. As a result, the “Stop Outsourcing and Create American Jobs Act of 2010” legislation would not only alienate Indian-Americans who want the Indian economy to thrive, but will also stunt U.S. corporations’ ability to grow, learn, and progress from outsourcing to countries around the world, such as India. This should be an awakening for Democratic politicians who feel required to demagogue companies who outsource. Not only are they weakening the U.S. economy that they are fighting so ardently to lead, they are, ironically, funneling reelection funds into the coffers of their competitors.

WHAT HATH MADOFF WROUGHT? PRIVATE ACTIONS UNDER THE MARTIN ACT

By: Daniel Scheeringa

The New York statute that has given Attorneys General the power to take on Wall Street, and catapulted many of them into the governor's mansion, is about to undergo a radical change if a Southern District judge's ruling is upheld. In a guest editorial in Westlaw Business Currents, Hall and Johnston of DLA Piper explain the law and recent developments.
Sections 352 and 353 of Article 23-A of New York's General Business Law (collectively known as the Martin Act) give the Attorney General the power to investigate, regulate, and take action against securities fraud. Since 1987, the courts have held that the Martin Act is the sole province of the Attorney General, and preempts private tort action for securities fraud. The Martin Act differs from most other state securities statues by having a much lower evidentiary requirement. The Martin Act requires only proof of misrepresentation (including omissions) and materiality. It differs from common law fraud and federal securities law by not requiring proof of scienter, reliance, or damages.

This makes the bar for relief much lower than a classic case of fraud, or of securities fraud under SEC Rule 10b-5.

A successful 10b-5 suit requires proof of both transaction causation, that the plaintiff would not have made the investment but for the alleged fraud, and loss causation, that the alleged act or omission caused the loss for which the plaintiff seeks to recover damages. The scienter provision requires that plaintiffs establish

either a strong inference of motive and opportunity to commit fraud, or strong circumstantial evidence of misbehavior or recklessness.

Enter Bernie Madoff. Fairfield Greenwich was a Madoff feeder fund which lost $7 billion of its investors' money, and collected $400 million in fees between 2005 and 2008. After Madoff's fraud came to light, Fairfield Greenwich was hit with multiple lawsuits alleging gross negligence, breach of fiduciary duty, third-party beneficiary breach of contract and unjust enrichment, among others. Judge Marrero consolidated these lawsuits into a class action suit that came to be known as Anwar v. Fairfield Greenwich.

The filing of the suit was inevitably followed by the motion to dismiss. The defense motion made multiple arguments, foremost among them that the Martin Act preempted private claims. Judge Marrero thought the preemption argument significant enough to merit its own separate opinion.

The judge based his opinion on two main arguments. The first, that rules of statutory construction foreclose preemption, rests on the rule that clear legislative intent is required for a statute to override the common law. He applies this by holding that nothing in the clear language of the Martin Act preempts private action. Marrero's second argument was that the history of the Martin Act does not support preemption.

Without presuming to question Judge Marrero's legal reasoning, there is a great deal of precedent to support the opposite view, that the Martin Act does preempt private action. The New York Appellate Division ruled this in CPC Intern v. McKesson Corp. in 1987, holding that the purpose of the statute was to create a statutory mechanism for the New York Attorney General to prevent securities

fraud through investigation and intervention. At the federal level, this question was most recently addressed by the 2nd Circuit Court of Appeals in 2001 in Castellano v.Young & Rubicam. In that case, the court devoted only two paragraphs of the opinion to holding that the Martin Act preempted private claims, in deference to the New York Appellate Division.

Leaving aside arguments about legislative intent and federalism, this case has significant public policy implications. Judge Marrero's ruling, if it stands, opens the door to a huge number of new lawsuits. Plaintiffs would only have to prove that there was a material misstatement somewhere in an offering prospectus, not that they relied on it at all, believed it, or that it caused them any damage. The Martin Act prohibits, among other things, "any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances" or any false statement where the person knew the truth, could have found out the truth, didn't try to learn the truth, or didn't know. Imagine what the plaintiffs' bar can do with that.

Given the fact that many prospectuses are often based on unproven assumptions, and unprovable projections, startup companies may meet their investors in court more often than in the boardroom. Companies will have to balance their need for capital against the costs of almost inevitable litigation. Every market crash brings waves of litigation, where courts are called upon to distinguish securities fraud from bad investment decisions. A private right of action, under the Martin Act's low evidentiary hurdle, will encourage many more lawsuits.

The case is currently pending in front of the U.S. 2nd Circuit. However, if the Appeals Court does uphold this ruling, the judges there should be prepared to hear a lot more securities fraud cases.

TEMPORAL FOLLY IN THE CREATING SMALL BUSINESS JOBS ACT OF 2010

The Creating Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504 (Title II, H.R. 5297) became law on September 27, 2010. The Joint Committee on Taxation (Committee) estimates that the tax provisions will provide $56 billion in relief to small businesses in 2011. Congress had taken a revenue-neutral approach to the relief, much of it in the form of accelerating depreciation on recent investments in capital assets. The Committee gives an in-depth technical explanation of the new provisions, some of which include:

One-year extension of bonus depreciation

Prior to the new law, the fifty percent bonus depreciation deduction on the cost of qualified property investments had expired. Congress has extended the allowance to qualified property acquired and put into service in 2010. This deduction is allowed in conjunction with the otherwise applicable depreciation deduction. The Committee projects that the extension will provide $40 billion in tax relief during 2011, making this single provision more than two-thirds of the stimulus.

Increase and expand expensing of certain depreciable business assets

For tax years beginning in 2010 and 2011, a taxpayer may claim a deduction for the full cost of capital investments up to an aggregate amount of $500,000 with a phase-out threshold of $2 million. For example, if a taxpayer's aggregate cost of qualifying property placed in service during the applicable tax year equals $2,200,000, the taxpayer will be able to "expense" $300,000 for that tax year;

while a taxpayer placing property in service with an aggregate amount of $2,400,000 will qualify for a $100,000 deduction. The previous limitation was $250,000 with an $800,000 phase-out. For tax years beginning in 2012, the limitation will revert to the pre-2007 level of $25,000 with a phase-out threshold of $200,000. Additionally, Congress has temporarily expanded the property qualifying as a capital investment to include certain real property, such as qualified leasehold improvement property, qualified restaurant property, and qualified retail improvement property. A taxpayer may deduct up to $250,000 with respect to qualified real property. The Committee estimates this provision will provide a $9.7 billion stimulus in 2011.

Deduction for health insurance costs in computing self-employment taxes

The new law permits self-employed taxpayers to deduct the cost of health insurance when calculating net income for the purpose of determining tax liability under the Self-Employment Contributions Act (SECA), often referred to as the self-employment tax. Generally, self-employed taxpayers may deduct the cost of health insurance when determining adjusted gross income with respect to income tax liability, but are barred from using the deduction to calculate net income with respect to SECA. This provision is welcome relief to small business owners. However, it only applies for the tax year beginning 2010.

Five-year carryback of general business credit

For the tax year beginning in 2010, an eligible small business may carryback the excess general business credit unused due to statutory limitation up to five years. Additionally, the general business credit limitation will not be subject to the alternative minimum tax. Previously, the excess unused credit could be carried

back only one year (or carried forward up to twenty years). Thus, the provision will accelerate the use of the excess credit by providing additional prior years against which an eligible business may immediately offset the credit.

Increase of amount allowed as deduction for start-up expenditures

Congress has increased the allowable deduction for start-up expenses to $10,000 with a phase-out threshold of $60,000 for such expenditures. This provision only applies to the tax year beginning in 2010. Previously, entrepreneurs could deduct start-up expenses up to $5,000 with a phase-out threshold of $50,000.

Temporary exclusion of 100 percent of gain on certain small business stock

The new law temporarily permits exclusion of 100 percent of gain on stock acquired between September 27, 2010 and January 1, 2011, provided that the stock is initial issue and held for five years. To take advantage of the exclusion, the taxpayer must purchase stock from a domestic C corporation with aggregate assets totaling under $50 million both before and immediately after issuance. Additionally, the corporation must meet certain active trade and business requirements. The previous exclusion of the gain of qualified stock was seventy-five percent.

Of course, the unifying theme of these provisions is their temporary nature. Indeed, by not allowing small businesses adequate time to plan their investments to take advantage of the potential tax benefits, many of the provisions seem less for the purpose of encouraging economic growth than for providing campaign-trail talking points as mid-term elections approach.

Particularly striking is the fifty-percent bonus depreciation extension (upon which the majority of the putative stimulus relies), which will only apply to capital expenditures made in 2010. True, the retroactive provision will still reward small businesses who made capital investments in the first three quarters of 2010. However, Congress' evident reluctance to extend bonus depreciation through 2011, despite the bill's passage so late in the year, provides taxpayers with a terribly small window for action. Further, the failure to extend bonus depreciation for the following year could have the unintended effect of decreasing capital expenditures in 2011, thereby slowing down what has already been a sluggish recovery. Taxpayers wanting to take advantage of the fifty-percent bonus deduction are forced to act immediately, thereby accelerating capital investments which may have occurred in 2011 to this year. Consequently, while bonus depreciation will likely spur short term investment, the provision's near sunset could potentially lead to a corresponding decrease in capital expenditure which was destined for 2011.

If Congress were serious about stimulating the capital expenditures of small businesses, it would have provided that the bonus depreciation extension mirror that of the "expense" provision, allowing bonus depreciation for the 2011 tax year. Such an approach would have both comported with the congressional goal of a revenue-neutral stimulus as well as encouraged sustained investment in 2011. Further, such an extension would have substantially increased the stimulus. As noted above, the Committee estimates that the bonus depreciation extension will provide $40 billion in stimulus. Even assuming a fifty percent decrease in the bonus extension's effectiveness if it were extended through 2011, that would still provide an additional $20 million in revenue-neutral stimulus.

In sum, while these tax breaks will likely help spur capital investment and provide some additional capital to small business, the overall effectiveness of the legislation as a stimulus is, at best, likely mitigated by its passage so late in the year. At worst, Congress' failure to extend bonus depreciation through 2011 could further stall a lagging recovery. In any event, the tax provisions, though limited in duration, do offer small businesses some attractive tax breaks, so long as they act before the year is out.

A SOLUTION TO EXECUTIVE OVER-COMPENSATION?

Many television commentators and academics claim that executive compensation is skyrocketing out of control. While the commentary on television is most likely rooted in populism, academics explain this contention by resorting to board capture theory. According to board capture theory, corporate boards of directors are dominated by their firm's top executives. Thus, when an executive negotiates his compensation, he is effectively negotiating with himself and people who want to keep him happy. Therefore, executives get substantially more favorable compensation packages than they would if their contracts were negotiated in an arms-length and adversarial manner.

A solution to this problem was recently presented to the Illinois Corporate Colloquium by Harwell Wells. In their working paper available on SSRN, "Executive Compensation in the Courts: Board Capture, Optimal Contracting and Officer Fiduciary Duties,"[1] Professor Wells and Professor Randall Thomas argue that the courts can step in to solve the problem of executive over-compensation based on board capture.

Noting that "most courts have…claimed that they are reluctant to closely examine executive pay levels and practices," (P. 6) Wells and Thomas propose that Delaware courts do what they are comfortable with and competent to do: "evaluate the negotiation process used in reaching a compensation agreement." (P. 46)

Wells and Thomas argue that the Delaware decision in Gantler v. Stephens recognizing fiduciary duties for corporate executives allows judges to "ask

whether officers upheld their fiduciary duties when negotiating their compensation agreements." (P. 37) Later Delaware decisions make clear that officers' fiduciary duties require them to negotiate subsequent compensation agreements "in a manner that is fair to the company from a procedural perspective," that is, in an adversarial and arms-length manner. (P. 39)
There are two distinct problems with this proposal. The first is that only subsequent compensation agreements made with current executives are susceptible to examination based on executive fiduciary duties. Thus, a new executive's initial compensation agreement would be insulated from judicial scrutiny based on executive fiduciary duties. Yet a paradigm case of alleged executive over-compensation, and one relied upon by Wells and Thomas to formulate their argument, involved a shareholder challenge to a CEO's initial compensation agreement. That case concerned the compensation agreement made between Disney and its short-term CEO Michael Ovitz. Because Ovitz was not an executive when he negotiated his contract, he had no fiduciary duty to Disney shareholders and his contract could not be challenged using the approach advocated by Wells and Thomas. Thus, their solution does not address some of the most egregious cases of alleged executive over-compensation. So a question is left to be answered: how can compensation agreements made between firms and new executives be scrutinized (and by whom?) when shareholders feel the board of directors negotiated ineffectively?

The second problem is that the authors do not propose a workable remedy that is likely to be applied. Let us consider the potential remedies for this sort of breach of executive fiduciary duties. The authors proffer two possibilities: restitution or rescission of the agreement. Rescission seems like a remedy judges will be unlikely to apply. To require disgorgement of all compensation derived from the corrupted agreement is a very harsh punishment, especially considering that the

board of directors will likely have breached their fiduciary duties to shareholders during the negotiation process as well. Basically, judges will not want to impose such a harsh penalty on one executive when the executive is not solely responsible for the agreement.

If a court chooses a restitution remedy, it would require the executive to return to the corporation any sum above what she would have received in a fair (adversarial and arm's-length) negotiation. But this method of determining damages requires the court to do what the authors say courts are not good at and don't like doing: deciding what constitutes a "fair" executive compensation package. This suggests judges will be unwilling to order restitution in cases where a compensation agreement seems to have been corrupted. The low probability that courts will impose restitution or rescission in cases like this raises a problematic question: how can courts determine what damages an executive owes his or her firm in a way that does not require their reaching conclusions on the substance of executive compensation?

Professor Larry Ribstein has already questioned whether courts are actually well-equipped to determine the process by which executive pay should be negotiated. Prof. Ribstein points to the Delaware Supreme Court's decision in Smith v. Van Gorkom, which nullified a seemingly fair agreement on procedural grounds. Considering courts' frustration at their inability to determine what constitutes appropriate or fair compensation, giving them a tool to evaluate the process of negotiation may be the only way to get courts to address board capture problems. Overall, the paper is encouraging because it presents a new approach by which judges can scrutinize alleged executive over-compensation. The paper also includes an historical section pointing to instances in the past when judges have shown a willingness to examine executive compensation practices. Focusing on

the process of negotiations rather than the substance of agreements does directly address the problem articulated by board capture theorists. However, Wells and Thomas' approach does not address compensation packages given to new executives. It also does not yet offer an effective remedy that judges will be likely to apply. Thus, future research may have to directly address a question judges and academics remain unable to answer: by what method can a judge effectively and fairly determine what constitutes appropriate pay for an executive officer of a particular company?

1. The full and recommended citation to this article is as follows: Thomas, Randall S. and Wells, Harwell , Executive Compensation in the Courts: Board Capture, Optimal Contracting and Officer Fiduciary Duties (March 15, 2010). Vanderbilt Law and Economics Research Paper No. 10-10; Temple University Legal Studies Research Paper No. 2010-5. Available at SSRN: http://ssrn.com/abstract=1571368

POSSIBLE CHANGE ON THE HORIZON FOR FORECLOSURE LAW

The current financial crisis ushered in by the collapse of the sub-prime mortgage market has shaken the foundations of our financial markets, exposed numerous Ponzi schemes, most infamously that of Bernard Madoff, and resulted in a tremendous increase in home foreclosures and bankruptcies. In many of the current bankruptcy cases the line between a fraudulent conveyance and a legitimate transfer can make a difference of millions of dollars for the legitimate creditors. In the realm of real estate, this situation has placed on the courts the burden of deciding which is more important: fair and equitable distribution of assets among creditors, or the historical distinctions between fraudulent conveyance law and foreclosure law.

In the late 1980's and early 1990's a trend emerged whereby Bankruptcy courts began to allow homeowners who had become insolvent to avoid sales of foreclosed properties that occurred as early as 1 year before the debtor declared bankruptcy. See Glaves, The Controversy Over Section 548 of the Bankruptcy Code in the Mortgage Arena: Making the Case for a Federal Statute Reforming the Foreclosure Process, 23 J. Marshall L. Rev. 683 (1990); Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives, 71 Va.L.Rev. 933 (1985). The courts declared these transfers as fraudulent transfers under the meaning of 11 U.S.C. § 548(a)(2), which states that voluntary or involuntary transfers by insolvent debtors for 'less than reasonably equivalent value,' made within one year prior to bankruptcy, are presumptively fraudulent and avoidable by the trustee. Ehrlich at 934. Considering the emphasis Federal bankruptcy policy places on, "attaining a maximum

…distribution [of debtors assets] to the general creditors of the debtor," the argument for this application of the law followed that, "due to the fact that the typical foreclosure sale yielded far less than the fair market value of the property being sold," the purchaser at the sale subsequently received a, "windfall at the expense of the mortgagor's unsecured or under-secured creditors." Id. at 933-34. Therefore, "[a]pplying section 548 to foreclosure sales can provide relief for the mortgagor and his creditors …by giving the bankruptcy trustee the opportunity to resell the property at a price which presumably will more closely reflect the property's true market value." Graves at 686.

Opponents argued that this application undermines the state-mandated foreclosure sale system. Id. From a state policy perspective, mortagees must, "have an expeditious and final forum to realize the value of mortgaged collateral, and potential bidders at the sale must be assured that their newly acquired title is irrevocable." Ehrlich at 933. For this reason, many states operate under the "near-universal principle that a non-judicial foreclosure sale will not be overturned, nor will confirmation of a judicial foreclosure be denied, because of 'mere inadequacy in the price received." Id. Further, "applying § 548 in this context destabilizes the certainty of titles transferred at foreclosure sales, and thus is likely to exacerbate the underlying problem of inadequate foreclosure sale prices." Graves at 686. As one commentator has acknowledged, this creates an "inevitable tension between state and federal policies," which govern the finality of such transfers. Ehrlich at 933.

In, BFP v. Resolution Trust Corp, the Supreme Court attempted to relieve this tension when it ruled that the phrase "reasonably equivalent value" would not be read to mean that inadequacy of the sales price is a basis for setting aside a sale absent some deviation from proper procedure. BFP v. Resolution Trust Corp.,

511 U.S. 531 (1994). This ruling however did not deal with the claim that the procedures by which many states conduct these sales create a distinction between foreclosed properties and regular real estate. See Graves. Dissenters claim that because of the different markets created by this system there will consistently be a problem with windfall profits gained at the expense of the legitimate creditors who have an interest in the bankrupt debtor's assets. Id.

Recent events, such as the court trending toward an "objective" good-faith standard when deciding whether a transferee can be exempted from a § 548 avoidance, may represent a broadening of the courts understanding of the principles guiding fraudulent conveyance law. Cases like Tacoma, In re M & L Business Machine Co., and Bayou, show a propensity to view the line between the principles guiding fraudulent conveyance law and those guiding preference law as non-existent. (Tacoma Assoc. of Credit Men v. Lester 433 P.2d 901 (Wash. 1967); Jobin v. McKay (In re M & L Bus. Mach. Co.) 84 F.3d 1330, 1335 (10th Cir. 1996); In re Bayou Group, LLC, 396 B.R. 810, 843-49 (Bankr. S.D.N.Y. 2008)). Traditionally, the guiding principle of fraudulent conveyance law had been to ensure that a debtor's assets were not squandered or transferred to non-creditors without allowing that "some creditor" get paid. Lutterbein, "Fraud and Deceit Abound" but do the Bankruptcy Courts Really Believe Everyone is Crooked: The Bayou Decision and the Narrowing of "Good Faith," 18 Am. Bankr. Inst. L. Rev. 405 (2010). "The basic object of fraudulent conveyance laws is to see that the debtor uses his limited assets to satisfy some of his creditors…"it does not seek to ensure that all creditors are guaranteed payments or paid equally." Boston Trading Group Inc. v. Burnazos, 835 F.2d 1504, 1509, 1512 (1st Cir. 1988); Lutterbein at 422. Preference law on the other hand had as its guiding light the equity of creditors. Lutterbein at 422. There is an argument to be made that more and more the courts are trending to treat conveyances that

place creditors in an unequal position, due simply to bankruptcy filing dates, as fraudulent. This is an interesting development and I am excited to watch which way the courts will lean in deciding the future of fraudulent conveyance law.

3G'S WHOPPER OF A PROBLEM: THE LOSS OF THE SUPER FAN

On September 2, 2010, 3G Capital announced that it planned to acquire Burger King Holdings. The deal itself is valued between $3 billion and $4 billion with 3G currently working on the tender offer of $24 per share for the company's outstanding shares. With Burger King being the world's second largest hamburger fast-food chain, it was not difficult for 3G to find financing for this highly-leveraged buyout. However, is 3G truly ready to tackle Burger King's problems? 3G Capital is a private-investment firm based in New York with ties to Brazil. Even though Burger King is its first acquisition, 3G Capital brings prior consumer products and retail experience to the table through its previous investments in companies like Anheuser-Busch InBev. Additionally, through "investments in the Wendy's and Carl's Jr. restaurant chains," 3G was able to learn about the fast-food industry. According to Diane Brady in her article, "The Challenges Facing Burger King Buyer 3G Capital," 3G seems to be ready for the challenge and is planning to grow Burger King long term (at least a decade) instead of espousing the more short-term goals typical of many private-investment acquisitions. Brady's sources explain that 3G plans to fix Burger King's problems through cost-cutting measures and international expansion.

While cost-cutting and international expansion can be potential fixes, the underlying issue at the heart of Burger King's current woes may not be adequately addressed by 3G's current restoration plans. Six years ago, Burger King re-envisioned itself and its target market. According to Julie Jargon's article, "As Sales Drop, Burger King Draws Critics for Courting 'Super Fans'," since this strategy shift Burger King's target market has been 18-34 year-old people (mostly

males) who visit the chain "on average almost 10 times a month." Aiming mainly for these so-called "super fans," the company geared its promotions, advertising, pricing and even menu towards this demographic. This resulted in food options that were perceived to be less healthy and ad campaigns that seemed to alienate women and children. Jargon notes that as a result of this strategy "Burger King posted 20 consecutive quarters of same-store sales growth in the U.S. and Canada through its fiscal 2009 third quarter. But as the economy weakened, Burger King started to suffer." Not only did the economic situation make Burger King's super fans less inclined to eat out, but health concerns also seemed to creep into their minds making Burger King's "super-fan-geared" food choices less enticing. Additionally, since its period of financial growth ended, Burger King has been scrambling to maintain the super fan market by trying to woo them back with pricing deals that have angered franchisees and resulted in lawsuits.

Clinging to this outdated strategy has led to slumping sales and fighting franchisees and is the true underlying problem 3G inherits in its acquisition of Burger King. Before 3G can even begin to think about reworking Burger King through cost-cutting and (more importantly) international expansion, the issues of domestic strategy needs to be rectified since, as of now, 69% of Burger King's revenue comes from US and Canadian sales. With so much of their revenue coming from domestic sales, the specter of the super fan needs to be addressed. Despite past success, these super fans, either because of health awareness or economic issues, have not flocked back to Burger King in the numbers they used to. The current running promotions including the $1 double cheeseburger that has led to the debacle with franchisees (wsj) are aimed at recapturing the heyday of the super fan instead of looking forward towards a new strategy. The days of the dominance of the super fan are seemingly over and instead of looking towards cost-cutting measures and international expansion as the most important orders of

business, 3G Capital first need to figure out how to replace a target audience that has all but disappeared

NEW PROCESS STEEL, L.P. V. NATIONAL LABOR RELATIONS BOARD: THREE MONTHS LATER

On June 17, 2010, the Supreme Court held in New Process Steel, L.P. v. NLRB that over 600 decisions made by two-member panels of the National Labor Relations Board (NLRB) must be vacated and reheard because the procedure of having two-member panels hear a dispute did not comply with the National Labor Relations Act (NLRA). The majority and the dissent both based their decisions on their interpretation of the statute. However, in his dissent, Justice Kennedy also highlights the fact that when Congress passed the NLRA, they surely did not intend to allow the Labor Board be left defunct for a long period of time.

While labor unions in the United States have been in a serious decline for many years, the Bureau of Labor Statistics reports that in 2009 there were still 7.9 million workers in the private sector that belonged to a union. These 7.9 million people do not have the option of going to District Court in order to enforce the rights contained in the NLRA. The worker's right to have full process and the costs and benefits which go along with it, for violations of their statutory rights, has been traded for the ability to have their disputes adjudicated quickly and cheaply. Allowing the President or a member of Congress to block their right of adjudication for a period of time by either refusing to appoint or confirm new members would contravene the purpose of the statute. These workers would have no other remedy because their access to courts is blocked until they exhaust all administrative remedies through the NLRB(?).

So now that the labor board has begun reviewing the cases which were decided by the two member panel, almost all of the decisions have either been an affirmation

without amendment of the two member panel's decision or an order to show cause in the case of a refusal to bargain complaint. Almost of all these decisions included almost identical language except for the two decisions which amended the original decision. The amended decisions did not alter the original holding, but rather they added to the original decision. There was only one decision where one of the two board members who made the original decision dissented and the dissent was based on the amendment to the decision.

The outcome of these decisions can be explained two ways. The first explanation could be that since the two original board members were on the three member panel, they agreed, explicitly or implicitly, to just uphold all of their decisions and overrule the third member, if the third member disagreed. This is probably not accurate since there was a decision which was amended and one of two members who originally made the decision dissented.

Another explanation is that the third member of the delegation really had no effect on the outcome. The third member of the panel would not actually add to the range of outcomes but rather simply serves as a tie breaking vote, should there be a tie. Since all of the decisions were unanimous, there was no need for a tie breaking vote and no need for a third member.

Still, it is important to note that there is a strong argument for reversal of two member Labor Board's decisions other than the strictly textual one espoused by the majority. While the Labor Board technically has the power to delegate their decision making ability to two members under certain circumstances, it is not ideal and it is not intended for a long period of time. Since the typical decision making body of the board is three members, a two member board reduces the range of possible outcomes and as a result, the best outcome may not be the one

which is decided upon. While the actual outcomes have increased from two (side 1/side 2) to three (side 1/side 2/tie), the range of outcomes in terms of the basis of the decision decreases. Imagine a delegation of three members where one is pro-management and two are pro-labor. While the pro-management member of the board might agree with the outcome, he or she may not agree with the majority's reasoning. If it is a two member panel, with one member being pro-management and one pro-labor, the outcome may be the same but the reasoning behind the decision would be more conservative. While there may be an even better outcome with more members than three, the number three was decided upon for a reason. Due to the limited number of outcomes, it would probably be inefficient to raise the number of board members on any given decision.

However, the situation in this case was the best scenario for this delegation to occur. Both of the board members who remained were on opposing sides of the labor-management continuum. The decision to delegate was made by four members of the board. The decisions which resulted from this delegation were decisions where both a person who was labor oriented and a person who was management oriented agreed. While the optimal situation would have included another management or labor oriented member, it can not be said that either side was rubber stamping decisions because of their bias.

A driving principle behind the NLRA is that justice delayed is justice denied. By overturning the Labor Board's decisions, they delayed and as a result denied justice for many workers. Since the Labor Board did not change their mind on any of the decisions, justice was sacrificed for no real purpose. It will be interesting to see in the future whether or not the President or members of Congress decide to use their newly acquired power to destroy the Labor Board without formally repealing it.