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CROWDFUNDING LIMITS – RAISING THE CAP

Almost everyone has heard of Kickstarter by now: it's the premier place for a team with an idea and a plan to raise capital to fund almost any sort of product. However, your return on your investment is the product itself if you pay enough money, or merely a thank you if the donation isn't large enough, and extra additional services or items if you pay more. You do not, however, receive an additional return on your investment – you either get the fair market value of your contribution or less. What if you could invest in a company personally, not just a product, without being a private accredited investor?

There exists a style of investing similar both to Kickstarter and traditional investment in business called equity crowdfunding. Enabled by the JOBS act of 2012, equity crowdfunding allows companies to raise money from the general public – not just private accredited investors. [1] Typically, companies raise capital from the public through an IPO – Initial Public Offering. This proces puts stocks of the company on the market and allows investor to become shareholders in the company. Equity crowdfunding, on the other hand, allows companies, usually small companies that don't have the strength for a successful IPO, to raise capital through public investors rather than private investors.

Companies using crowdfunding are capped at $1 million for the issuing company as well as additional caps on what each individual investor may contribute: 5% or $2,000, whichever is greater, if the individuals net income and net worth are both less than $100,000 and 10% of net income and net worth with a cap of $100,000 invested in crowdfunding per each 12 month period. [2]SEC's proposed rules set this cap[3] and they have already come under fire for restricting the growth of equity crowdfunding as a viable capital raising mechanism. SEC has also set various stringent rules relating to the companies

who raise the capital to begin with as well: most notably mandatory auditing by requiring corporations seeking to raise more than $500,000 to release audited financial information to investors in addition to other historical documents required under equity crowdfunding. Young companies could face high auditing costs, [4]as much as $29,000 for companies seeking to raise over $500,000. Companies would have to pay the auditing costs before the initial offering which, in a way, defeats the purpose of equity crowdfunding.

These auditing costs scale with the amount that the company seeks to raise as capital. In fact, the more a company seeks to raise, the less the auditing costs will be. For funding under $100,000, SEC estimates that auditing costs could eat between 12.9% to 39% of the capital raised. For funding near the cap at $1 million, the auditing costs could drop to around 7%.[5] Raising more capital allows companies to use crowdfunding successfully, as the payout is much higher than the pay in, which is the case for smaller contributions. While the auditing procedure is necessary for the investing public to be better safeguarded from scams and dishonest companies seeking to raise capital, the capital cap as it stands hurts companies more than it helps.

As it stands, crowdfunding is not working – there's no incentive for companies to use crowdfunding rather than raising capital privately. Releasing financial information that must be audited as well as the very stringent caps on individual investors prevent smaller businesses from using crowdfunding due to initial costs.[6]The larger companies, that have no problems with the costs, have no incentive to use crowdfunding because $1 million isn't much and with the hassle of obtaining the capital, they could easily go after private investors. The only optimal way to go for companies is to raise $499k and avoid the auditing mechanisms. Essentially, gaming the system is the only worthwhile way to use crowdfunding.

Crowdfunding is not useless but it's an interesting and valuable mechanism that doesn't quite work at this time. It has advantages over IPOs- there are many companies that do not have the strength for an IPO but would still like to have public investors.[7]However, the cap on the amount of capital to be raised, the cap on the amount of money investors can invest and the auditing threshold must be raised. As it stands, the process is too restrictive and unwieldy for companies to bother with it, no matter the benefits.

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[1] http://technical.ly/2013/11/18/equity-crowdfunding/

[2]https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540017677#.Uyifhtz3aAk

[3] https://www.sec.gov/rules/proposed/2013/33-9470.pdf

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[6] http://gigaom.com/2014/02/19/crowdfunding-comes-up-short-why-the-final-part-of-the-jobs-act-will-never-work/

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THE CONTRACEPTIVE MANDATE: BIRTH CONTROL OR BUSINESS CONTROL?

The Supreme Court heard oral arguments on March 25th, 2014, on the Tenth Circuit Case Hobby Lobby Stores, Inc. v. Sebelius and the Third Circuit Case Conestoga Wood Specialties v. Sebelius; a ruling is expected in late June.[i] Hobby Lobby and Conestogaare two prominent examples from over 71 cases involving for-profit businesses challenging the contraceptive mandate in the Patient Protection Affordable Care Act (ACA) on the grounds that this provision violates their religious beliefs under the First Amendment Free Exercise Clause, Establishment Clause, and the Religious Freedom Restoration Act (RFRA).[ii] Specifically, the contraceptive mandate requires that "all health insurers and non-grandfathered group health plans that offer group or individual coverage for certain preventative cost services for women without cost-sharing."[iii] A verdict for the government has large implications for for-profit businesses such as Hobby Lobby opposing the mandate. To explain, "The companies could face steep $100-a-day penalties for each employee if they violate the regulations. That works out to nearly $475 million a year for Hobby Lobby, which covers more than 13,000 workers."[iv] As Justice Kagan points out during oral arguments, a business could avoid such penalties by dropping health coverage altogether which would be *less expensive*, since the cost is only a $2,000 fine per employee.[v] However, for-profit employers dropping health insurance coverage to avoid penalty under the contraceptive mandate is not a solution to the problem because it undermines the goal of the ACA to increase access to health care. [vi]

Chief Justice Roberts' vote will likely be determinative in this case, as his vote was the swing vote in National Federation of Independent Business v.

Sebelius, the decision upholding the individual mandate provision of the ACA.[vii] While the other Justices are projected to vote consistently with their views in National Federation, along liberal-conservative lines, Roberts may switch positions and reject the contraceptive mandate, thereby influencing Justice Kennedy who is projected to be the swing vote here.[viii] To explain, in National Federation, Roberts voted to uphold the "individual mandate," requiring all Americans to obtain insurance coverage or pay a penalty, because it could be characterized as a constitutional "tax."[ix] Accordingly, Roberts did not have to decide whether the individual mandate was constitutional under the Commerce Clause, even though he expressed in dicta that he believed it would be unconstitutional because Congress has the power to "regulate commerce not to compel it."[x] This reasoning is particularly applicable to the contraceptive mandate because the mandate not only requires employers to provide insurance coverage, but also stipulates what should be covered under the insurance policy.[xi] Therefore, the contraceptive mandate decision could provide Roberts with another opportunity to reject an ACA mandate provision on Commerce Clause grounds.

Recommendation for Revision to the Contraceptive Mandate

The contraceptive mandate includes exemptions for employers with fewer than 50 employees,

"Grandfathered Plans" or plans that were in place in their current form before March 23, 2010, and

Churches.[xii] Also, an amendment was subsequently passed providing a workaround for self-identified, non-profit "religious organizations," "which allows the required contraceptive services to be provided to employees without any financial or administrative involvement on the part of the employer."[xiii] Cases such as Hobby Lobby underscore the need for additional reform to the contraceptive mandate for for-profit businesses. To

explain, the impact of "a pro-Hobby Lobby verdict would most immediately affect the at least 22,000 people employed by the companies who brought these lawsuits."[xiv] However, a ruling in support of the mandate would discourage morally opposed businesses from providing health care coverage altogether, undermining the goal of the ACA to expand access to health care coverage and to reduce the cost of health insurance, a likely consequence of contraceptive coverage. [xv]

Regardless of how the Supreme Court ultimately rules in this case, a suggestion for a legislative solution that would appease both plaintiffs such as Hobby Lobby and the Government would be to provide for-profit employers with the option of having a third party pay for the birth control methods a business finds objectionable.[xvi] This is consistent with what was done by the amendment creating a workaround for non-profit religious organizations. The new amendment to the mandate for for-profit employers could include an option for employers to sponsor a plan that excludes the birth control methods they object to for a fee, less than the $2,000 fee for opting out of providing coverage. As an adjunct to this solution, the government would provide employees with the option to purchase supplemental plan coverage for all contraceptives not included in their employer's plan through the health insurance marketplace in the employer's state. Relying on the marketplace infrastructure already created by the ACA would help to reduce the cost of the supplemental insurance policy. This type of creative solution would be beneficial by bringing in more people to the state health insurance marketplaces already created as part of the ACA, while also providing for-profit businesses with the flexibility not to directly administer or sponsor the contraceptives they are morally opposed to supplying.

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[ii] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1125 (10th Cir. 2013) cert. granted, 134 S. Ct. 678, 187 L. Ed. 2d 544 (U.S. 2013).

[iii]Jaeah Lee, *Its not just about hobby lobby: These 71Companies Don't Want To Cover Your Birth Control Either*, Mother Jones, Apr. 2, 2014,http://www.motherjones.com/politics/2014/04/hobby-lobby-sebelius-contraceptive-for-profit-lawsuits

[iv]*Supra*, note i.

[v] *Supreme Court Seeks Compromise in Contraception Case*, USA Today, Mar. 25, 2014,http://www.usatoday.com/story/news/politics/2014/03/25/supreme-court-religion-contraception-hobby-lobby/6860479/

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[vii] Amy Davidson, *Roberts the Swing Vote: Court Upholds Most of Health Care*, The New Yorker, June 28, 2012, http://www.newyorker.com/online/blogs/closeread/2012/06/roberts-the-swing-vote-court-upholds-most-of-health-care.html

[viii]*Supreme Court Appears Ready to Reject Obamacare Birth Control Mandate*, Chicago Tribune, Mar. 25, 2014, http://articles.chicagotribune.com/2014-03-25/health/chi-supreme-court-obamacare-contraception-mandate-20140325_1_justices-corporate-rights-citizens-united

[ix] *Supra*, note vi.

[x]Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (2012).

[xi] *Supra*, note vi.

[xii] Id.

[xiii]http://www.capdale.com/ppaca-2014-the-implications-for-employers

[xiv] *Supra*, note ii.

[xv]http://www.guttmacher.org/pubs/tgr/06/1/gr060112.html

[xvi] Lauren Markoe, *Supreme Court Takes Up Hobby Lobby's Challenge to the Contraception Mandate*, Mar. 25, 2014, http://www.religionnews.com/2014/03/25/hobby-lobby-feds-face-supreme-court/

OWNING THE INTERNET: THE DEMISE OF NET NEUTRALITY

The Internet is the modern day printing press; a revolutionary game changer. The Internet owes much of its success to the theory of net neutrality. While net neutrality is not a new topic of discussion, it has been thrust in the limelight with the recent case of Verizon v. FCC, which many are proclaiming signifies a dangerous change in the policies of net neutrality. This article gives an overview of what net neutrality is, and what this means for people and businesses.

What is net neutrality?

A basic, not often thought about question is, how does the internet even work?

You connect to the Internet through pipes owned by telephone and cable companies such as Comcast, Verizon, AT&T, and Time Warner Cable; these are also known as Internet service providers (ISPs).[i]ISPs are controlled by the Federal Communications Commission (FCC) and by statutes such as the Telecommunications Act of 1996.[ii]The FCC "uses free, publicly available standards that anyone can access and build and it treats all traffic that flows across the network in roughly the same way."[iii]The FCC goes on to add that it in no way does it desire to "restrict the innovation on the Internet."[iv]

To accomplish these goals, the FCC has adopted three basic open Internet rules. The first is transparency, meaning that ISPs must disclose business practices. Second, ISPs cannot block lawful content, applications, services, or non-harmful devices. Finally, ISPs cannot unreasonably discriminate network traffic, such as providing particular services to certain websites, slowing down a website's speed, or degrading a certain website's quality.[v]These rules form the foundation of what net neutrality is and how it affects internet usage.

The end is near? Verizon v. Federal Communications Commission

These rules have been in place since time immemorial, however, a recent court decision, Verizon v. Federal Communications Commission, 740 F.3d 623 (C.A.D.C. 2014), has made their fate uncertain.

On Jan. 14, the U.S. Court of Appeals for the District of Columbia ruled in favor of Verizon, stating that the government can't force ISPs to adhere to net neutrality.[vi] The issue was whether the FCC had the authority to issue its rules under the legal framework it had adopted, and whether it was subjected to the applicable administrative agency law.[vii]The court ultimately sided with Verizon. The court reasoned that,

> "*Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such. Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose per se common carrier obligations, we vacate those portions of the Open Internet Order."* ***[viii]***

In short, the court held that the FCC's rules improperly regarded ISPs as regulated utilities, like telephone companies.[ix]The court did state, however, that the FCC had the authority to act as overseer of Internet services, so long as it encouraged competition.[x]Ultimately, net neutrality has not yet been completely dismantled and the court hasleft it open for the FCC to restructure their rules consistent with the court's opinion.[xi]

Why this Matters

Some feel that the end of net neutrality is a good thing. Scott Cleland, an industry analyst and consultant for Fortune 500 companies, stated that the end of net neutrality, "respects the rule of law, Congress' Constitutional authority it to set interstate communications policy, the Constitution's protections, and court precedent."[xii]He adds that it "encourages private investment and innovation" and asserts that it helps keep the free market competitive.[xiii]

Many feel differently about the end of net neutrality. They suggest net neutrality's demise would be a double edged sword; businesses and consumers alike would suffer. Businesses could no longer use the Internet as freely as before and would be subjected to the rat race of whoever has the most money, gets the biggest piece of the pie. An example in recent headlines is theComcast and Netflix made with one another. The two media giants signed an agreement that has established a more direct connection between them, allowing Comcast users who access Netflix to have a better experience.[xiv]

Now, consider if these types of deals could be made across the board for all websites. While an established company like Netflix may be willing and able to pay, startups might not have those resources. If one of those new companies has a life-changing idea, it might not reach its audience efficiently.[xv] This decision could have serious implications for budding Internet start-ups who cannot pay the costs imposed by these bigger, overarching companies. Their websites would be slow and undesirable, costing them their businesses. Essentially, it would make the playing field so unleveled that there would be no competition or fair market interaction; basic tenants of what our society deems important for businesses to flourish.[xvi]

This could also be a blow to businesses because chances are that if control is given only to a select few, much stricter censorship will follow. These ISPs could decide where to funnel the money to; essentially deciding what will be

available, and what will not.[xvii]Additionally, without net neutrality, ISPs can more easily monitor Internet usage and gain information about the users.[xviii]This issue has been a serious one in the past year, heightening this fear would only exacerbate the issue. If the Internet becomes an undesirable place, businesses will lose out on its benefits.

Ultimately, the only true winners would be the ISPs.

The Future

Many Internet campaigns, such www.savetheInternet.com, are urging Internet users to take matters into their own hands and advocate for net neutrality. Garnering support for net neutrality is important; however, the real work needs to be by the FCC in changing their structure so that they can regulate the Internet within existing frameworks. As of mid-February, the FCC was taking steps toward creating an administrative body that could work according to their constitutional limits. The New York Times states that the FCC has created a plan "with rules that would prevent Internet service providers from blocking any legal sites or services from consumers and would aim to restrict, but not outlaw, discrimination." The new head of the FCC, Wheeler, has stated that he is aiming towards maintaining net neutrality, and will do so within the limits the court has set up.

If the FCC truly wishes to reinstate their Open Internet Rules, they will have to figure out a way they can rework their regulations in order for the court to rule that they are working in a way consistent with the Constitution.[xix] If not, the future is indeed uncertain for net neutrality and the rules of the Internet.

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[i] *Net Neutrality 101,* freepress,http://www.savetheInternet.com/net-neutrality-101 (2014).

[ii] Id.

[iii] *The Open Internet*, Federal Communications Commission,http://www.fcc.gov/guides/open-Internet (2014).

[iv] Id.

[v] Id.

[vi] Berkman, Fran. *What the FCC Net Neutrality Proposal Means for Your Internet*, Mashable, http://mashable.com/2014/02/20/fcc-net-neutrality-Internet/ (Feb. 2014).

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[xii] Crews, Clyde W. *Court rules against net neutrality in Verizon v. FCC*, Forbes,http://www.forbes.com/sites/waynecrews/2014/01/14/court-rules-against-net-neutrality-in-verizon-v-fcc/, (Jan, 2014).

[xiii] Id.

[xiv] Healey, Jon. *Netflix's deal with Comcast isn't a sign of the apocalypse*, Los Angeles Times,http://www.latimes.com/opinion/opinion-la/la-ol-netflix-comcast-net-neutrality-isp-consolidation-20140224,0,5246703.story#ixzz2uOtY2btd, (Feb. 2014).

[xv] *The pros and cons of net neutrality*, Phil for Humanity,http://www.philforhumanity.com/Pros_and_Cons_of_Net_Neutrality.html.

[xvi] Id.

[xvii] Id.

[xviii] Hudson, John. *Pros and cons of net neutrality in two lists,* The Wire, http://www.thewire.com/technology/2010/05/pros-and-cons-of-net-neutrality-in-two-lists/24598/, (May 2010).

[xix] *FCC seeks new path.*

NATIONAL SECURITY SPACE LAUNCH: NO CONTEST

Competition and innovation are key ideals in American society, and they were the main focus on March 5, 2014 when the CEOs of SpaceX and United Launch Alliance ("ULA") testified before the Senate Appropriations Subcommittee on Defense.[1] The ULA, a joint venture between aerospace giants Boeing and Lockheed Martin, currently provides launch services for the U.S. National Security Space Launch programs.[2] SpaceX, a relative newcomer to the space launch business,[3] is seeking to break ULA's current monopoly on national security launches and open the procurement process to other launch providers.[4]

The EELV Program

In 1994, the U.S. Air Force initiated the Evolved Expendable Launch Vehicle ("EELV") program to ensure that the U.S. military and civilian national security organizations would have reliable access to Earth's orbit for spy satellites, military communications, and other important payloads.[5] As originally conceived, the program would have selected a single launch provider from a competitive bidding process, replacing three aging systems with a new, improved launch vehicle.[6] Cost savings would be realized through the use of common components and launch infrastructure, and the elimination of costly maintenance on outdated technologies.[7] Based on projections of higher commercial launch activity, the Air Force revised its acquisition strategy in 1997 to select two launch providers, and it selected Boeing's Delta IV rocket and Lockheed Martin's Atlas V at the close of the selection process in 1998.[8] The selection of two contractors was intended to promote continued competition between them.[9]

In 2004, the Government Accountability Office ("GAO") found that the EELV program had achieved significant cost-savings over heritage systems, but that the cost of the program was increasing significantly each year.[10] On March

4, 2014, a GAO report found that costs had continued to increase since 2006, the year Boeing and Lockheed Martin joined their launch operations to form ULA.[11] Due to a lack of transparency in accounting for these costs, it has been difficult for the government to identify and negotiate for lower prices in its contracts with ULA.[12] Since they began launching in 2002, ULA's Delta IV and Atlas V rockets have had a nearly perfect record of launch success.[13]

The Hearing

The hearing on March 5 focused on several key issues related to the national security launch services procured by the Air Force. Reliability and affordability, the two original goals of the EELV program, were the main focus.[14] Michael Gass, CEO of ULA, touted the 100% success rate for Delta IV and Atlas V launches and acknowledged the high cost of ULA's launch services, but he insisted that ULA would work with the government to reduce costs.[15]SpaceX's CEO, Elon Musk, argued that SpaceX could provide launch services for much lower prices – about $90 million per launch compared to an estimated $380 million for each ULA launch, which would provide substantial savings to taxpayers.[16] SpaceX uses an innovative approach to manufacture its rockets, with a focus on cost-effectiveness.[17] Musk also highlighted the fact that Atlas V used Russian engines, which could lead to supply issues in the event of sanctions against Russia for its actions in Crimea or future conflicts, while SpaceX manufactures its parts exclusively in the United States.[18] At the time of the hearing, there were 36 possible launches to be sole-sourced from ULA and 14 future launches open for competition, which SpaceX is seeking to win with its Falcon 9 rocket.[19]

Policy Considerations

Competition and innovation are important drivers of industry, and they tend to lead to lower costs over time. Based on the current trend of rising costs for ULA's launch services over the past decade, it does not appear that there is any

significant pressure to decrease costs. The launches are a matter of national security and no other company currently has the ability to provide these services, for lack of certification.[20] SpaceX is currently seeking certification based on its previous successful Falcon 9 launches and other criteria, but there is no guarantee that it will receive certification, and Falcon 9 will still have to compete against the proven Delta IV and Atlas V rockets for the additional launches.[21] In addition, on March 7, 2014, the number of competitive launch slots was decreased from 14 to 7.[22]Under these circumstances, costs are likely to continue increasing unless some substantive changes are made.

The remedy to this situation is to increase competition for national security launches. If SpaceX can deliver launches at the cost estimated by Musk during the hearing, then it has the potential to save taxpayers billions of dollars while accomplishing the same important national security function. Open competition should also drive down the prices ULA currently charges for its services, so even if SpaceX is not selected, savings may still be realized. The current status quo does not provide any incentive for ULA to reduce costs and it is therefore unsustainable. Increased competition is the best way to significantly reduce these costs.

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[8] http://www.vandenberg.af.mil/library/factsheets/factsheet.asp?id=5207

[9] GAO-04-778R at 4.

[10] Id. at 7.

[11] US Gov't Accountability Office, GAO-14-377R, The Air Force's Evolved Expendable Launch Vehicle Competitive Procurement 2 (March 4, 2014),*available at*http://www.gao.gov/assets/670/661330.pdf

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[14] http://www.satellitetoday.com/launch/2014/03/05/spacex-ula-testify-before-congress-on-eelv-program/

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LESSONS FROM HARTNEY: HOW TO REDUCE TAX FORUM SHOPPING BY ILLINOIS RETAILERS

The Illinois' Local Retailers' Occupation Tax Acts (ROT Acts) allows "municipal governments and the Regional Transportation Authority (RTA) to impose a retail occupation tax 'upon all persons engaged in the *business of selling* tangible personal property at retail within the county, municipality, or metropolitan region."[i] Leading up to the recent Illinois Supreme Court decision in *Hartney Fuel Oil Co. v. Hamer*, a number of Illinois retailers with selling activities in multiple jurisdictions sought to pay Illinois Local Retailer Occupation Taxes only in the lowest tax rate jurisdictions where they accepted purchase orders, even when their predominant selling activities occurred in other places.[ii] This narrow interpretation of the "business of selling" in the ROT Acts complies with the Department of Revenue (DOR) regulations regarding the Acts, which establish a bright-line rule for purchase order acceptances.[iii]

Although the ability to tax forum shop by setting up "skeletal" sales locations is economically favorable to retailers, it has resulted in grave consequences for Illinois counties with comparatively high tax rates. For instance, Cook County has a 9.5% tax rate, significantly higher than other jurisdictions such as Dekalb County with a tax rate of 8%.[iv] In one example, "the RTA claimed that United and American Airlines, which set up offices in DeKalb County to buy jet fuel, deprived public transit agencies of nearly $300 million during the past seven years."[v] This is fundamentally unfair to the collection of tax revenues by the RTA and Cook County because American and United Airlines primarily operate in Cook County. Furthermore, these airline examples are inconsistent with the legislature's goal in passing the ROT Acts which was to "collect taxes in relation to services enjoyed by the retailer."[vi]Therefore, the

question before the Illinois Supreme Court in*Hartney* was what is the proper definition of "the business of selling," as intended by the legislature in the ROT Acts?[vii]

Application: The *Hartney* Decision

Hartney Fuel Oil Company is an Illinois retailer of fuel oil. In addition to its [main] Forest View office in Cook County, Hartney has a 'sales' office in Mark in Putnam County.[viii] Hartney's interpretation of the ROT Acts was that the "relevant regulations set a bright-line test: where the purchase order is accepted for a sale at retail in Illinois, and the purchaser takes delivery in Illinois, the sale has its situs where the seller accepts the purchase order."[ix] Accordingly, Hartney was paying the retail occupation tax based on the location of its sales office in Putnam County, where the sales tax rate is 2.5 percentage points lower than in Cook County.[x] The Illinois Department of Revenue and Local Governments brought a lawsuit against Hartney, arguing that the regulations instead present a fact-intensive inquiry, which would require Hartney to pay the retail occupation tax in Forest View where it predominately operates.[xi]

The court ultimately concludes that only a totality-of-the-circumstances view for determining "the business of selling" accords with the legislative intent of the local ROT Acts.[xii] In so holding, the court finds that the DOR regulations establishing a bright-line rule for purchase order acceptances are inconsistent with the statute. As stated by the court, "We are persuaded that this regulation impermissibly narrows the local ROT Acts, contrary to the legislature's intention to allow local governments to collect taxes from retailers in their jurisdictions."[xiii] To comply with the court's opinion, the DOR filed emergency regulations in January 2014, and will write new regulations including three additional business activities: "where the offer is made, the location of inventory and the location of sales personnel authorized to negotiate and finalize transactions."[xiv] The court ultimately abated Hartney's assessment for the taxes

owed to Forest View, Cook County, and the RTA because "the court found there was nothing illegal about Hartney Fuel Oil relying on now-invalid regulations."[xv]

RECOMMENDATION

The court in deciding to permit Hartney to avoid liability for its back tax liability makes clear, "We can't blame businesses for spotting and exploiting this loophole."[xvi] Accordingly, the key challenge facing Illinois lawmakers post-*Hartney* is how to prevent these types of tax loopholes from forming. The answer, at least in the *Hartney* case, is the need for more legislative clarity. To explain, since the legislature did not clearly define what it meant by "the business of selling" in the ROT Acts, the DOR had to step in to provide regulatory guidance. However, the DOR in providing a "bright-line" rule for taxation to occur in the jurisdiction where the purchase order is accepted created too narrow of a test, undermining the legislature's goal.

The DOR's initiative to rewrite the ROT Acts' regulations to include three additional business activities is a good short-term solution to remedy the tax loophole by conforming to the legislator's intent of taxing retailers in the location where they perform the majority of their business.[xvii] However, a better long-term solution would be for the Illinois Legislature to rewrite the ROT Acts to incorporate a more streamlined taxation structure because under the current set of standards a business could potentially be taxed in four different jurisdictions. To simplify the current four-part balancing standard while making it broad enough so businesses cannot go "tax forum-shopping," Illinois legislatures should consider adopting a tax structure modeled after the West Virginia Business and Occupation Tax (B & O tax).[xviii] Under this structure, a particular city divides its businesses into industry classifications, and the classifications requiring greater resource use are taxed at higher rates.[xix] A business is subject to the B & O tax in a particular city if the business collects the majority of its gross receipts in that

city and its services are directed from that city, or if its principal office is located in that city and it has not been taxed by another municipality.[xx]Washington and Ohio also collect a B & O tax but on a state-wide basis.[xxi] Implementing this tax structure in Illinois would make it easier for business owners to determine where they will be taxed, while simultaneously holding businesses financially accountable to the RTA and the local government for their resource use.

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[i] *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, 998 N.E.2d 1227, 1234 (my emphasis).

[ii] http://tax.illinois.gov/News/HartneyDecision.htm

[iii] *Court Shuts Down Sales Tax Havens*, The Chicago Tribune, Nov. 28, 2013, http://articles.chicagotribune.com/2013-11-28/opinion/ct-sales-tax-haven-edit-1128-20131128_1_hartney-fuel-oil-co-illinois-supreme-court-sales-taxes

[iv] *Id.*

[v] Ameet Sachdev, *Illinois Supreme Court Tosses Department of Revenue's Tax-Collection Rules*, The Chicago Tribune, Nov. 22, 2013, http://articles.chicagotribune.com/2013-11-22/business/ct-biz-1122-sales-tax-ruling-20131122_1_illinois-supreme-court-hartney-fuel-oil-co-suburban-taxing-districts

[vi] Hartney, 998 N.E.2d at 1237,1238.

[vii] *Id.* at 1240.

[viii] *Id*. at 1232.

[ix] *Id.*

[x] Ameet Sachdev, *supra* note v.

[xi] Hartney, 998 N.E.2d at 1234.

[xii] *Id.*at 1238.

[xiii] *Id.*at 1245.

[xiv] Ameet Sachdev, *Illinois Creates New Local Sales Tax Rules*, The Chicago Tribune, Jan. 22, 2014, http://articles.chicagotribune.com/2014-01-22/business/chi-illinois-local-sales-tax-rules-20140122_1_sales-taxes-illinois-supreme-court-sycamore

[xv] Ameet Sachdev, *supra* note v.

[xvi] *Supra*, note iii.

[xvii] Hartney, 998 N.E.2d at 1237,1238.

[xviii]http://www.cityofcharleston.org/sites/default/files/documents/B%26O%20TAX%20FREQUENTLY%20ASKED%20QUESTIONS.pdf

[xix] *Id.*

[xx] *Id.*

[xxi]http://dor.wa.gov/docs/reports/2010/Tax_Reference_2010/28bando.pdf

IN-APP PURCHASES: THE CLASSIC GAME OF BAIT-AND-SWITCH, NOW AVAILABLE ON GOOGLE PLAY

In February, a New York mother of a five-year-old boy did what many busy parents do to keep their kids occupied: she gave him a game.[1]

This particular game, Marvel's "Run Jump Smash", was on her tablet.[2] She purchased the game for 99 cents at the Google Play Store, but in the 30 minutes following that purchase, her son accrued $65.95 in charges to her debit card for "game currency."[3] The game did not ask for the mother's password in order to make the charges; Google required a password in order to make the initial purchase of the game, but for 30 minutes after that, a user can make as many subsequent purchases as he or she likes, unfettered by a password or other controls.[4]

The mother has now filed a class action suit against Google on behalf of other parents unknowingly charged by in this "in-app purchase" scheme.[5]Many are justifiably calling these gaming apps – which are free or very cheap to download, but then lures the user into make purchases while using them – "bait apps," after the classic "bait-and-switch" sales tactic.[6] The $65 charge representing the Google class action is small change compared to some cases. One parent reported $2,600 in charges after her daughter played "Tap Pet Hotel".[7] Unfortunately, Google is not the only tech company that has allowed this ploy to impact consumers.

Apple is Google's top competitor in the app world, and faced a practically identical class-action lawsuit and FTC investigation for the exact same issue.[8] The FTC said they had received tens of thousands of complaints about unauthorized charges by Apple as the result of in-app purchases.[9]Apple eventually settled for

$5 million and issued $32.5 million in refunds.[10]Facebook faced a similar class-action lawsuit for unauthorized Facebook Credit purchases made by children.[11] Until the February lawsuit was filed, Google had avoided scrutiny in the United States. The European Commission invited Apple, Google and European consumer protection agencies to a meeting last month to discuss concerns about in-app purchases and ask the companies for solutions.[12] The European Union Justice Commissioner stated that she believes these apps mislead consumers and encroach upon their consumer protection rules.[13]

Parents in these cases have an obvious legal defense when minor children make unauthorized, in-app purchases. Generally, individuals under 18 years old can only incur voidable contractual duties.[14] But aren't bait apps questionable on other grounds, as applied to infants and adults alike?

Misrepresentation may provide an enlightening legal framework for the bait app issue. A misrepresentation is defined as an assertion that is not in accord with the facts.[15] Surely, labeling these apps as free or low-cost is not completely honest. It is, at the very least, misleading. The fact is that those attractive costs advertised to consumers only apply to the download – bait app games are, undeniably, not free or low-cost if one actually wants to play them.

While bait apps eventually tell the consumer about the hidden costs, it is likely that an app's initially advertised price (free or a few cents) induced the consumer to download it. If parents had known that the app contained opportunities for their children to rack up credit card debt, they likely would not have downloaded it to begin with, in order to avoid that risk.

Further, failing to tell consumers about the costs of using the apps is equivalent to a non-disclosure on Google's part. For the purposes of misrepresentation, a person's non-disclosure of facts known to him is equal to an assertion when the other person is entitled to know the fact because of a relation of trust and confidence between them.[16] Giving a company your debit or credit card number,

and the ability to withdraw funds, requires a certain amount of trust and confidence in the business. Google demands testing and compliance of all apps sold on Google Play.[17] As well-known as the company is, consumers should be able to trust it with their financial information.

While most adults will likely notice and avoid bate-app charges before they are incurred, the fact remains that the tactics app developers use walk an ethical line. Using games to target children for in-app purchases is taking unfair advantage of parents who turn their backs, even if only for a few moments. Developers knew that small children would play games such as “Run Jump Smash” and “Tap Pet Hotel”, and that this young audience does not yet possess the mental capacity to make responsible spending decisions, or even realize they are spending real money.

When it comes to Google’s bottom line, ridding itself of this unethical practice would make good business sense as well. Dealing with consumer complaints and refunding money to outraged parents must cause more headaches than a 99-cent app is worth. As with any business, protecting your customers and establishing trust ensures they will buy from you again and again. If retailers can require that customers enter a PIN number every time they make a debit card purchase, tech businesses can easily require similar security measures during their transactions. Overall, the misleading qualities of in-app purchases make them both legally and commercially unsound. Google should have learned from its already-burned competitors and fixed the problem before more unhappy parents decided to take the issue to court. Moving forward, tech companies like Google must remember that gaining consumer trust is just as important in their industry as in any other. This notion must guide every business decision they make, even if it is only worth 99 cents.

1. http://gigaom.com/2014/03/10/mother-sues-google-over-kids-apps-after-5-year-old-son-buys-65-worth-of-virtual-currency/
2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. http://www.theregister.co.uk/2014/03/17/google_in_app_purchases_play_store_update/
8. In re Apple In-App Purchase Litig., 5:11-CV-01758 EJD, 2013 WL 1856713 (N.D. Cal. May 2, 2013)
9. "Letter to FTC", 2014 WL 587860 (F.T.C.), 1
10. http://www.theregister.co.uk/2014/03/17/google_in_app_purchases_play_store_update/
11. http://www.huffingtonpost.com/2012/04/24/facebook-suit-mother-class-action-credits_n_1449648.html
12. http://www.reuters.com/article/2014/02/27/eu-consumers-apps-idUSL6N0LW2QF20140227
13. Id.
14. Restatement (Second) of Contracts §14 (1981)
15. Restatement (Second) of Contracts §159 (1981)
16. Restatement (Second) of Contracts §161 (1981)
17. http://gigaom.com/2014/03/10/mother-sues-google-over-kids-apps-after-5-year-old-son-buys-65-worth-of-virtual-currency/

LIKELY EFFECTS OF US IMMIGRATION REFORM ON THE NATIONAL DEFICIT AND SOCIAL SECURITY SYSTEM

There has been growing bipartisan efforts in Congress to reform the laws that govern U.S. immigration policy.[i] On June 27, 2013, the U.S. Senate passed "The Border Security, Economic Opportunity, and Immigration Modernization Act" (S. 744).[ii] If this proposed reform becomes law, it will likely help reduce the growing budget deficit and add to economic growth. It is important to not mistake immigration reform with pure amnesty, because a comprehensive or piecemeal reform will address the problem of millions of "illegal" and undocumented immigrants as well as: "specialized programs for agriculture and hi-tech industries, border security and visa-tracking capabilities, temporary work programs, the future of undocumented adults and children already present in the U.S., systems for employer verification of work eligibility, and other dimensions."[iii]

The U.S. Congressional Budget Office ("CBO") found that immigration reform will help reduce the federal budget deficit by over two trillion dollars over the next decade.[iv] Furthermore, according to the Pew Research Center, birth rates in the U.S. have been at their lowest levels since the 1920s.[v] Because "new immigrants and their descendants are still projected to account for most of the nation's population increase by mid-century,"[vi] in the absence of population growth, the U.S. economy is likely to contract in the future. The foundation of economic growth is represented by the total Gross Domestic Product ("GDP") (i.e. the total output of a nation's economy), which is calculated from the total number of workers and the average output per worker. It is predicted that immigration reform will have a positive impact on U.S. economic growth, which will increase to 5.4% in 2033.[vii]Because "growth in the labor force participation rate can, in turn, raise

the rate of GDP above the rate of population growth,"[viii] "providing legal status to our nation's 11 million undocumented immigrants would grow U.S. GDP by a cumulative $832 billion and raise the wages of all Americans by $470 billion over a decade, all while creating on average 121,000 jobs each year."[ix]These are, of course, only estimates. Nevertheless, this implies that any debate about immigration reform that omits discussion about its accompanying economic effects is partial at best.

Opponents of immigration reform may argue, among other things, that expansive immigration reform will drive down wages for the lower and middle class. However, "economists have repeatedly found that immigrants do not bring down the wages of lesser-skilled Americans and instead find that immigrants actually have small but positive effects on native workers' wages and job prospects."[x]This is mainly because immigrants tend to complement, rather than compete with, indigenous workers.[xi]What's more, immigration reform can also become one of the ways to save the Social Security program.[xii] According to official Social Security Administration data, "[o]ver the next 50 years, new legal immigrants entering the United States will provide a net benefit of $407 billion in present value to America's Social Security system."[xiii]Because Social Security benefits to existing retirees are funded primarily out of the taxes paid by today's workers, an additional influx of workers into the taxpayer pool is extremely beneficial to America's Social Security fund. What's more, according to the Pew Hispanic Center, the median age of illegal immigrant adults is 36.2 years of age; in contrast, the median age of legal immigrants and U.S.-born adults stands at 46.1 and 46.5, respectively.[xiv] So, because "immigrants typically arrive near the start of their working years . . . legalization would expand [the] tax base in a significant and meaningful way."[xv]

Nevertheless, immigration reform should not be a hand-out for law breakers. Current illegal immigrants seeking legalization will have to demonstrate their tax history and pay backdated taxes (plus a fine for illegal stay in the country). Unfortunately, with respect to this issue and many others, there were numerous serious flaws in S.744. For example, the bill does not require payment of all back taxes and "[does] not specify how tax authorities are to collect back taxes from illegal immigrants."[xvi] What's more, S.744 (pg. 620) explicitly preempts states from enforcing immigration laws. Without a similar provision such as the 287(g) program (which is amended throughout S.744) under which the "state or local entity receives delegated authority for immigration enforcement within their jurisdictions,"[xvii] explicit ban of sanctuary cities, and E-verify (S.744 replaces this proven program with unspecified verification system,), S.744 is questionably unsound.Furthermore, most importantly, illegal immigrants who have committed serious crimes should not qualify for legalization in any way.[xviii]While S.744 disqualifies an alien for registered provisional immigrant status for aggravated felony, three or more misdemeanor offenses, unlawful voting, and other violations, it is flawed in other respects. First, it is imperative that classification of what constitutes a serious crime should be decided at the onset at the Federal level and not left to local jurisdictions, since some jurisdictions categorize certain serious crimes as misdemeanors while others classify these same crimes as felonies. This can create confusion and make the system not uniform with respect to crime categorization. Disturbingly though, Section 245B(3)(B) ("Waiver") allows for serious criminals to get legal status. Those who would otherwise be excluded may be granted legal status by the Secretary for "humanitarian purposes, to ensure family unity, or if such a waiver is otherwise in the public interest."[xix] Such loopholes should be corrected and dealt with at the underpinning levels of the reform.

On a positive note, opponents of immigration reform need to recognize what legalization of status will truly entail in the short term. The current version of the Senate bill provides a 13-year path to citizenship.[xx]Because only citizens have the right to vote and receive government benefits, such as unemployment insurance and Social Security, and have immunity from deportation for committing a crime, such privileges of citizenship would not apply to legalized non-citizens.[xxi]

The key to a good reform is to synchronize the various proposals so that the overall effect is "an improved legal immigration system that is generous enough to discourage unauthorized immigration and provide a solution for the 11 million unauthorized immigrants[.]"[xxii]These aspects of immigration reform may alleviate the antagonists who argue that it is unfair to legalize those who broke the law to begin with. Overall, immigration reform is as much about the human dimension as the economic one. It is a way for the U.S. to address its growth and fiscal challenges for the years to come, maintain its human-capital competitiveness on the world stage, and avoid stagnant or declining economic growth.

In sum, immigration reform is expected to have a positive effect of population growth; increased labor force participation rates,[xxiii]and an increase in the pace of entrepreneurship among immigrants, which is documented to be greater than among the native born population, may in turn raise the likelihood of greater innovation and productivity.[xxiv]Finally, principally in light of the so-called aging "Baby Boom" generation, immigrants and their offspring will make a crucial contribution to America's dwindling Social Security system which is arguably in dire need of more funds and reform.

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EXTORTION AND PROFESSIONAL IRRESPONSIBILITY

Most people often have the misconception that being a member of the legal profession automatically affords one a "get-out-of-jail-free" card. Needless to say, such a privilege has not and will not, ever be available to any member of society, including those who make, shape and enforce the law. A lesson which two Tennessee lawyers chose to learn the hard way, instead of in a Professional Responsibility course. "Two Tennessee lawyers have been indicted by a grand jury [on March 12, 2014] in an extortion case . . . They are accused of pressuring a client [Michelle Langolis] several years ago to pay $50,000 in probate case legal fees she had not agreed to pay by threatening her with arrest."[1] Additionally, attorneys Carrie Gasaway, and Fletcher Long, who once worked together as law partners, did go on to have Langolis arrested on a theft-of-services charge, alleging that she had issued them a bad $50,000 check, eventually these charges were dropped. [2]However, after being arrested Langolis retained the services of another attorney who had her bond reduced to a reasonable amount, and on February 28, 2012 "at the request of District Attorney General John Carney, the Tennessee Bureau of Investigation (TBI) began looking into the allegation.[3] In October 2010, Langlois sought the legal services the accused, in the reading of her father's will. [4] "An initial fee for the services was agreed upon by both parties….after the will reading, Gasaway asked Langlois to sign a contract for an additional $50,000…when Langlois refused, Gasaway and Long made continued demands for the additional payment and then obtained an arrest warrant for the victim with a $75,000 bond."[5]

On March 5, 2014, after a two year investigation the case was finally filed with Montgomery County Grand Jury.[6] The grand jury returned indictments on

one count of Extortion against Gasaway and one against Long. It is only right that both attorneys be treated as having the same mental state and criminal intent within this particular circumstance. Both individuals "unlawfully and intentionally, knowingly or recklessly" used coercion upon a former client.[7] Their actions are not only morally and ethically wrong, but they should be punished in both the professional and criminal capacity. Gasaway and Long's unethical legal practices hurt the profession as whole because it enhances the long standing negative perceptions some members of society harbor towards lawyers. Their actions were also detrimental to past clients, which is a clear violation of Model Rule 8.4 (b), which prohibits a lawyer from committing criminal acts of any kinds.

Outside of possibly being sanctioned professionally by the ABA for professional misconduct, Gasaway and Long face far more serious charges in state court. Most states define extortion as "the gaining of property or money by almost any kind of force, or threat of 1) violence, 2) property damage, 3) harm to reputation, or 4) unfavorable government actions." [8] Individuals who are extorted can be thought of as victims of bullying because they are forced to do things outside of their will, out of fear instilled in them by someone who seems more powerful and/or threatening. Gasaway and Long threatened their former client with jail time and then made good on their promise when she refused to pay such an outrageous amount of money for a probate case. It is important for the court to send the message that there is no room for such professional misconduct within this particular career field. Lawyers are advocates, counselors and trusted confidants, who owe a duty of loyalty and care to all of their current, past and perspective clients. Failing to properly punish and/or fine Gasaway and Long would have negative professional and ethical implications for practicing lawyers

in the future, it could send a message that over charging clients and black mailing them is acceptable when in fact it is not and has never been.

Gasaway and Long surrendered at the Montgomery County Jail on March 12, 2014 and both were released on their own recognizance.[9] The arraignment hearing was held that same day.[10] Nonetheless, this investigation is still active and ongoing, with District Attorney General Tommy Thompson prosecuting the case.[11] It is highly probable that with the insurmountable time spent investigating this incident and with the support of the evidence collected both Gasaway and Long will likely face harsh professional and criminal disciplinary sanctions, which are justly deserved for their great displays of professional irresponsibility.

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[10] Id.

[11] Id.