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TWO SIDES OF THE SAME [BIT]COIN: WHY REGULATING BITCOIN WORKS IN ITS FAVOR

By: Amanda Maslar

The reality of the most notorious virtual currency is that it is only a matter of time before it comes under the purview of a regulatory body. Bitcoin is a cryptocurrency that exists entirely online; it is partially anonymous and affords its users rigorous privacy protections in their transactions.[i] Its online presence is shrouded in mystery, aided by the fact that no one knows exactly who introduced the world to the illustrious Bitcoin.[ii]

Bitcoin is not pegged to any currency, and its value is dictated entirely by demand.[iii] Central banks around the world have used monetary policy tools to manipulate the money supply and the value of currency throughout history; the Federal Reserve, however, has in recent years engaged in aggressive policies to stabilize the U.S. dollar, which has concerned some who fear inflation and a devaluation of the U.S. currency.[iv] Many people believe the Federal Reserve and other central banks around the world wield too much power, leading some to create alternative currencies like Bitcoin.[v] Anti-Federal Reserve activists and Internet-world enthusiasts alike admire Bitcoin for not being controlled by any nation's bank or centralized authority.[vi] This independence is an attraction for those who simply want more privacy in their transactions, but it has also led some to use it to facilitate illegal transactions, tax evasion, and money laundering, as the anonymity and digitals aspects of Bitcoin lend itself to these sorts of illicit activities.[vii]

The unique characteristics of Bitcoin have led to fierce debate over its legality and the need for potential regulation. It seems appropriate to call Bitcoin an alternative currency because it is so often referred to as a virtual currency. In the U.S., currency is defined as "an item (such as a coin, government note, or banknote) that circulates as a medium of exchange."[viii] In the context of the U.S. monetary system, however, the legality of Bitcoin is questionable. Article I of the U.S. Constitution grants to Congress the exclusive power to coin money and "regulate the value thereof."[ix] Many commentators have taken this to mean that the federal government has a monopoly over the right to issue currency.[x] Thus, the legality of currencies outside of the U.S. model is unclear, especially for private currencies that seem to be outside the scope of Congress' authority over the currency of the United States as a nation.[xi]

The legality of private currencies has centered on a largely obsolete and mostly forgotten statute called the Stamp Payments Act of 1862.[xii] The statute reads:

> Whoever makes, issues, circulates, or pays out any note, check, memorandum, token, or other obligation for a less sum than $1, intended to circulate as money or to be received or used in lieu of lawful money of the United States, shall be fined under this title or imprisoned not more than six months, or both.[xiii]

An excellent discussion of the legislative history and Congressional intent of this statute is discussed in United States v. Van Auken, an 1877 Supreme Court case involving the circulation of certificates granting the bearer fifty cents worth of goods in the Bangor Furnace Company.[xiv] After analyzing the phrasing of the Stamp Payments Act, the Court noted that the provision was drafted so as to

secure the national currency from competition with other currencies; notes for small items issued with "only a neighborhood circulation" were thus permitted, as they did not interfere with the national currency.[xv] This interpretation seems to imply that private currencies may be considered legal, depending on their geographic reach, what they can be exchanged for, and their ability to compete with the national currency.[xvi] Bitcoin's legality in the U.S. could hinge on it being deemed a local currency.

The establishment of local currencies used within communities has developed in a few regions in the U.S., mostly in the Northeastern corner of the country. Ithaca HOURS was a program created in 1991 to boost the local economy in Ithaca, NY and keep residents' money in the community.[xvii] Still operating today, the system is measured in hours, with one hour equaling $10.[xviii] Today, over 900 businesses in Ithaca, NY accept Ithaca HOURS as payment.[xix] BerkShares, a system set up in the Berkshire region of Massachusetts, is another example of a private currency based in a local community.[xx] BerkShares can be redeemed by exchanging federal currency at a number of local banks and can be used at local restaurants and shops.[xxi] Its website is clear in stating, "BerkShares will not, and are not intended to, replace federal currency."[xxii] These examples of regional currencies do not violate the Stamp Payments Act because they circulate only locally and typically rely on paper notes instead of coined money.[xxiii] This is also important because the Constitutional provision in Section 8 of Article I specifically discusses coining money instead of paper notes.[xxiv]

Bitcoin does not fit into the community currency category for exemption from the Stamp Payments Act. First of all, Bitcoin is a medium of exchange that is used globally and is in no way restricted by any kind of regional borders.[xxv] Theoretically, wherever one can access the Internet, bitcoins can be

exchanged for goods and services.[xxvi] There is also no limit to what bitcoins can be exchanged for, including narcotics, counterfeit money, fake identification documents, and other nefarious services.[xxvii] Finally, and perhaps most persuasively, bitcoins were created to compete with the U.S. currency and some users specifically use bitcoins just for that purpose only.[xxviii] These examples reveal that Bitcoin is inherently different from community currencies.

While this distinction may seem clear, application of the Stamp Payments Act is still uncertain because it might not be appropriate to classify Bitcoin as an alternative currency. Bitcoin is a virtual currency and lacks the physical aspects of currency, an important feature of the Act.[xxix] This means that Bitcoin is more of a competitor to online payment systems like Paypal or even transaction entities like Visa, MasterCard, or American Express than the currency of the U.S.[xxx] Additionally, Bitcoin is not pegged to the U.S. dollar; it can be exchanged for a multitude of national currencies and receives its value from supply and demand, not the value of any U.S. currency.[xxxi] So while the Stamp Payments Act could be amended to include virtual currencies like Bitcoin into its jurisdiction, as the Act stands it will likely not apply to regulate bitcoins.

It must be noted, however, that in August 2013, Germany declared Bitcoin a private currency and was careful in stating that Bitcoin would not be treated as a foreign currency but rather a financial instrument to be regulated by German banking rules.[xxxii] This classification is especially interesting given that it comes from Germany, arguably the most stable of the countries that utilize the ailing Euro.[xxxiii] An example of "classic German forward-thinking," this ruling would permit Germany to continue to collect tax on Bitcoin transactions if the Euro ever toppled and Germans turned to Bitcoin to fill that void.[xxxiv] While Germany's reasoning has little influence on U.S. regulatory decisions, it is important to

remember how Bitcoin has a global reach and U.S. policy will impact the world market.

Even discounting Bitcoin as a private currency does not bring it within the scope of the Stamp Payments Act because the arguments for pulling Bitcoin within the scope of the Act are increasingly outweighed by arguments against doing so.[xxxv] The price volatility of Bitcoin means it is not very useful as a medium of exchange, which is the role of currency.[xxxvi] This makes Bitcoin risky and unpredictable for both buyers and sellers.[xxxvii] Since Bitcoin does not fit into the existing laws governing alternative currencies, regulators should look to its other characteristics to better police bitcoins.[xxxviii]

Since Bitcoin has gained so much traction from people investing in bitcoins as capital assets, it seems fitting that the Securities and Exchange Commission ("SEC") regulate it, as the SEC's mission is to monitor the capital markets to ensure investors are operating in a fair and efficient marketplace.[xxxix] Additionally, in May 2013, Commissioner Bart Chilton of the U.S. Commodity Futures Trading Commission ("CFTC") announced he intended to introduce regulations to the Bitcoin marketplace.[xl] Commissioner Chilton implied Bitcoin had several commodity-like features that would pull it under the jurisdiction of the CFTC.[xli] While no action has yet to be taken by the CFTC, the Commodity Exchange Act (CEA) does give some insights into this potential for regulation.

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[i] Reuben Grinberg, *Bitcoin: An Innovative Alternative Digital Currency*, 4 HASTINGS SCI. & TECH. L.J. 159, 160 (2012).

[ii] The concept of Bitcoin comes from Satoshi Nakamoto's paper, *Bitcoin: A Peer-to-Peer Electronic Cash System*. Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN.ORG (2008),http://bitcoin.org/bitcoin.pdf. The race to unmask Satoshi Nakamoto has fueled several investigations. *See, e.g.*, Rebecca Greenfield, *The Race to Unmask Bitcoin's Inventors*, THE ATLANTIC WIRE (Oct. 11, 2011),http://www.theatlanticwire.com/technology/2011/10/race-unmask-bitcoins-inventors/43535/.

[III] NAKAMOTO, *SUPRA* NOTE 2, AT 1; *SEE* JOSHUA J. DOGUET, NOTE, *THE NATURE OF THE FORM: LEGAL AND REGULATORY ISSUES SURROUNDING THE BITCOIN DIGITAL CURRENCY*, 73 LA. L. REV. 1119 (2013).

[iv] DAVID WESSEL, IN FED WE TRUST 7 (2009).

[v] *See id.*; Nakamoto, *supra* note 2.

[vi] Grinberg, *supra* note 1, at 164 (discussing who Bitcoin's primary users are, which include "technology early adopters, privacy and cryptography enthusiasts, government-mistrusting 'gold bugs,' criminals, and speculators").

[vii] *Id.*

[viii] BLACK'S LAW DICTIONARY 440 (9th ed. 2009).

[ix] U.S. CONST. art I, § 8.

[x] Grinberg, *supra* note 1, at 182 (citingBrian W. Smith & Ramsey J. Wilson, *How Best to Guide the Evolution of Electronic Currency Law*, 46 AM. U. L. REV. 1105, 1111 (1997)); At the time of the writing of the Constitution, however, the framers were only familiar with coined money and so the document does not mention the issuance of paper money by the government.

Doguet, *supra* note 3, at 1132.

[xi] *Id.*

[xii] *Id.* at 1131–32.

[xiii] 18 U.S.C. § 336 (2012).

[xiv] United States v. Van Auken, 96 U.S. 366 (1877).

[xv] *Id.* at 367.

[xvi] Grinberg, *supra* note 1, at 183–85.

[xvii] Kaplanov, *supra* note 22, at 142.

[xviii] *What Are Ithaca Hours?*, ITHACA HOURS, http://www.ithacahours.com/ (last visited Nov. 12, 2014).

[xix] *Id.*

[xx] *What Are BerkShares?*, BERKSHARES, INC.,http://www.berkshares.org/whatareberkshares.htm (last visited Nov. 12, 2014).

[xxi] *Id.*

[xxii] *Id.*

[xxiii] Grinberg, *supra* note 1, at 186; Kaplanov, *supra* note 22, at 142–43.

[xxiv] *Id.*

[xxv] Grinberg, *supra* note 1, at 187.

[xxvi] *Id.*

[xxvii] Timothy B. Lee & Hayley Tsukayama, *Bitcoin Industry Reeling as Authorities Shut Down Silk Road Online Marketplace*, WASH. POST (Oct. 2, 2013),http://www.washingtonpost.com/business/economy/bitcoin-industry-reeling-as-authorities-shut-down-silk-road-online-marketplace/2013/10/02/961b105a-2ba1-11e3-97a3-ff2758228523_story.html.

[xxviii] Doguet, *supra* note 3, at 1134.

[xxix] *Id.* at 1134 –35; Grinberg, *supra* note 1, at 187. Bitcoin private keys can be printed out to prove possession of bitcoins, but this "physicality" is outside the Act's definition and intention. *See* 18 U.S.C. § 336 (2012); Quentin Fottrell, *To Secure Your Bitcoins Print Them Out: Why the Digital Currency Maybe be More Secure in Analog Form*, MARKETWATCH (Feb. 26, 2014, 11:10

AM),http://www.marketwatch.com/story/to-secure-your-bitcoins-print-them-out-2014-02-26.

[xxx] Doguet, *supra* note 3, at 1134 –35; Grinberg, *supra* note 1, at 187.

[xxxi] *Id.* at 1134 –35.

[xxxii] Matt Clinch, *Bitcoin Recognized by Germany as 'Private Currency',* CNBC(Aug. 19, 2013, 10:25 AM), http://www.cnbc.com/id/100971898.

[xxxiii] Strobe Tallbot, *Monnet's Brandy & Europe's Fate*, THE BROOKINGS ESSAY (Feb. 7, 2014), http://www.brookings.edu/series/the-brookings-essay.

[xxxiv] Matt Clinch, *supra* note 32.

[xxxv] Kaplanov, *supra* note 22, at 136.

[xxxvi] Greenfield, *supra* note 8.

[xxxvii] *Id.*

[xxxviii] Doguet, *supra* note 3, at 1136.

[xxxix] *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SECURITIES AND EXCHANGE COMMISSION, http://www.sec.gov/about/whatwedo.shtml (last visited Nov. 12, 2014).

[xl] Interview by CNBC Squawk Box with Bart Chilton, Commissioner, U.S. Commodity Futures Trading Commission, in Little Rock, AK (CNBC May 7, 2013),*available at* http://video.cnbc.com/gallery/?video=3000166533#eyJ2aWQiOiIzMDAwMTY2NTMzIiwiZW5jVmlkIjoiN3p5N3p4L0F0ZmNvaTh5M2Rha2lEUT09IiwidlRhYiI6ImluZm8iLCJ2UGFnZSI6MSwiZ05hdiI6WyLCoExhdGVzdCBWaWRlbyJdLCJnU2VjdCI6IkFMTCIsImdQYWdlIjoiMSIsInN5bSI6IiIsInNlYXJjaCI6IiJ9.

[xli] *Id.*

THE RIDE-SHARING ECONOMY: KEEPING LIABILITY IN THE REARVIEW

By: Keith St. Aubin

In large cities the world over, passengers have stopped reaching into the air to hail a cab and have begun reaching into their pockets for their smartphones. Companies such as Uber, Lyft and Sidecar represent a cross-section of the transportation sector of a rapidly growing marketplace: the so-called "sharing economy."[1] The sharing economy delivers products, places, rides and various other perks to consumers through the use of modern technology. Dog owners can turn to DogVacay rather than finding a kennel for Fido.[2] The elderly can now hire someone to clean their gutters using TaskRabbit instead of dealing with the snotty kid next-door.[3] Loan seekers can avoid the bank by booting up their PC and heading over to Lending Club.[4] The sharing economy exploded on the scene across various sectors seemingly overnight. Almost twenty years after Ebay began, the peer-to-peer model has expanded to the exchange of innumerable tangible assets. [5] However, not all people seem happy about the advent of the direct exchanges spurred on by innovative minds equipped with modern technology. Some heavy-hitters of the sharing economy, such as Airbnb, already face uphill battles in cities that seem less than eager to begin sharing the economy with everyday homeowners.[6]

Recently the transportation sector of the sharing economy has found itself under the proverbial microscope. Facing potential legal obstacles from several fronts, Uber and its fellow ride-sharing companies might have to pump the breaks before they lose millions. Robert Woods, a *Forbes*contributor, posits, "[T]he biggest legal exposure by a wide margin is accident liability."[7] The simple

response to such an argument would be that the companies could not be liable to victims because the drivers are not agents of the companies. The Restatement (Third) of Agency defines an agency relationship as when a principal "manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control" with the corresponding consent of the agent to the same terms.[8] For the moment, the insinuation that courts would find ride-sharing companies liable for tortious conduct of drivers seems unlikely for two reasons: 1) the drivers would likely be considered independent contractors, and 2) the Communications Decency Act may prevent liability.[9]

Turning first to the independent contractor theory, a clarification must be mentioned. Although "independent contractor" has entered colloquial speech, the Restatement (Third) of Agency has dispensed with its use because "some termed independent contractors are agents while others are nonagent service providers."[10] So, the question here boils down to whether drivers are agents or nonagent service providers.

Drivers act as nonagent services providers when they are operating "within an independent course of conduct not intended…to serve any purpose" of the companies facilitating the transactions.[11] Although the phrase "to serve *any* purpose" may give pause to some interpreters of the Restatement, the comment on § 7.07 indicates that the work completed by the drivers would not fall under the agent-employer relationship. If tortious conduct on the part of the drivers is not within " work assigned or…a course of conduct that is subject to…control," ride-sharing companies will not likely be held accountable.[12] Uber and its fellow service providers do not assign passengers to drivers nor control the conduct of the drivers. Rather, ride-sharing companies purport only to provide an "interactive computer service" through which a driver

and a passenger may engage in a direct deal.[13] If courts believe the ride-sharing companies fall outside the agency relationship, the companies will be in a favorable position because the Communications Decency Act could further insulate them from liability.

The Communications Decency Act provides for protection from civil liability for providers of an interactive computer service. The Act defines an interactive computer service as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet."[14] Given the definition of a service, some have argued that the Act only protects Internet Service Providers.[15] However, courts have disagreed with this argument.

Instead, courts have read the Act to "cover[] 'any' information services or other systems, as long as the service or system allows 'multiple users' to access 'a computer server.'"[16] Uber, Lyft and Sidecar operate in just such a manner. The GPS data of drivers and passengers are saved on the servers of the companies and accessed by users. In exchange for the service, the companies charge a percentage of the fare resulting from the agreement entered into between drivers and passengers. Judging by the lack of a clear agent-employer relationship and the apparent protection afforded by the Communications Decency Act, many people may assume that ride-sharing companies can rest easily. However, regulations based on decades of policy consideration ought to affect ride-sharing companies in the same manner as other transportation suppliers.

Regulations on taxicab drivers, livery services and other types of transportation providers exist to prevent harm to the population at large. "The bus company must expect that sooner or later its buses will cause harm, even if drivers are invariably careful. In this sense, bus companies impose risks that are materially greater than or different from the risks that we all impose upon one another by occasional use of motor vehicles."[17] Ride-sharing companies present the same types of risks to the public through the delivery of their service. Each of the three major players in the peer-to-peer ride-sharing economy, Uber, Lyft and Sidecar, offer $1,000,000 in liability coverage.[18] However, the coverage for each company is limited to the times between picking up and dropping off of a passenger.[19] Coverage does not extend to the period during which a driver logs into an application but has yet to procure a passenger. If not for the service provided by these companies, the drivers would have no purpose in driving around town.

The issue hit home on New Year's Eve of last year when a driver struck and killed a six-year-old girl in San Francisco.[20] The driver of the car had not picked up a passenger yet, but was actively awaiting one. The driver had logged into his application, but due to the policies of the company, will be fully liable for any damages resulting from the accident due to the lack of a passenger in the vehicle.[21] Seeing this as a major issue, California passed legislation in September 2014 that will require ride-sharing companies to carry liability insurance for drivers during any period they are logged into the ride-sharing application.[22] While the legislation may prove to be an important step in the regulation of this new sector of the economy, the current laws on the books do not go far enough. An earlier version of the bill passed in September called for drivers to carry $1,000,000 in liability coverage.[23] In a subsequent version, the

number was lowered to $750,000.[24] The law that finally passed required only $180,000 in total coverage.[25]

The sharing economy has evolved in a short period of time. Growth of a new industry inevitably requires that the law, from a legislative and judicial perspective, change with it. Legislators have the advantages of drafting new laws and repealing others. Judges, however, must wait for such changes in the statutes or apply old-world precedents to modern issues. Judges cannot control the effectiveness or timing of the former option, but through the latter option, they can extend vicarious liability to the sharing economy thereby forcing ride-sharing companies to take responsibility for the conditions they have created.

The road to legal legitimacy will be fraught with litigation. Los Angeles and San Francisco district attorneys have notified Uber, Lyft and Sidecar that they are operating outside the conventions of the legal system.[26] The ride-sharing companies may operate in this manner for a time, but dramatic changes in both the legislatures of the country and the courts must be implemented. Absent swift action from the government, the ride-sharing movement will undercut decades of regulation designed to benefit drivers, passengers and the public at large. Regulated taxicabs operate in a manner that requires accountability, oversight and a premium on public safety. Without similar restrictions and penalties imposed on the ride-sharing economy, Uber, Lyft and Sidecar will profit, while the drivers, the government and the public are left in the dust.

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[1] https://hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators/

[2] http://www.forbes.com/pictures/eeji45emgkh/neighborgoods/

[3] Id.

[4] Id.

[5] See http://www.businessinsider.com/the-success-of-the-sharing-economy-2014-2

[6] See http://www.law.illinois.edu/bljournal/post/2014/01/21/Hotel-Conglomerates-and-AirBnB-The-Tale-of-lobbyists-thwarting-a-cheap-stay-in-the-Big-Apple.aspx

[7] http://www.forbes.com/sites/robertwood/2014/01/08/big-liabilities-for-uber-sidecar-and-lyft/

[8]Restatement (Third) Of Agency § 1.01 (2006)

[9] See http://www.forbes.com/sites/robertwood/2014/01/08/big-liabilities-for-uber-sidecar-and-lyft/

[10]Restatement (Third) Of Agency § 1.01 (2006)

[11]Restatement (Third) Of Agency § 7.07 (2006)

[12] Id.

[13] See http://www.forbes.com/sites/robertwood/2014/01/08/big-liabilities-for-uber-sidecar-and-lyft/

[14] 47 U.S.C. § 230(f)(2)

[15]See Barrett v. Fonorow, 799 N.E.2d 916, 922 (2003)

[16]Batzel v. Smith, 333 F.3d 1018, 1030 (9th Cir. 2003)

[17]Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts § 426 (2d ed. 2014)

[18] https://www.lyft.com/safety; http://www.side.cr/policies/insurance/; https://support.uber.com/hc/en-us/articles/202347808-In-the-US-what-insurance-is-available-if-there-s-an-accident-;

[19] Id.

[20] http://www.newyorker.com/business/currency/uber-lyft-liability

[21] Id.

[22] http://www.reuters.com/article/2014/09/18/us-california-lawmaking-ridesharing-idUSKBN0HD01420140918

[23] Id.

[24] Id.

[25] Id.

[26] http://www.sfgate.com/bayarea/article/S-F-L-A-threaten-Uber-Lyft-Sidecar-with-5781328.php

PRACTICAL TIPS TO COMPLY WITH SEC BENEFICIAL OWNERSHIP REPORTING REQUIREMENTS

By: Clyde Tinnen, Partner, Kelley Drye & Warren LLP – *Clyde Tinnen is a partner in the Chicago office of Kelley Drye & Warren LLP. He focuses his practice on corporate law matters, including finance and securities law. Any questions relating to topics discussed in this article may be directed to the author at ctinnen@kelleydrye.com.*

On September 10, 2014, the Securities and Exchange Commission announced charges against 28 officers, directors, or major shareholders for failure to promptly file Form 4 and Schedule 13D and 13G reports, resulting in financial penalties totaling $2.6 million. Six publicly-traded companies were charged for contributing to filing failures by insiders or failing to report their insiders' filing delinquencies. SEC enforcement staff used quantitative data analytics to catch the violators. The news came as a shock to many practitioners given the Commission's historically passive stance on such violations.

Form 4s are required to be filed within 2 business days of the relevant transaction by certain officers[1], directors and parties that beneficially own more than 10% of a registered class of a company's stock. Schedule 13D and 13G are reports that beneficial owners of more than 5% of a registered class of a company's stock. Schedule 13D reports must be filed within 10 days after the trade date for the acquisition of 5%. Amendments of Schedule 13D reports are required to be filed "promptly" to disclose the acquisition or disposition of greater than 1% of the outstanding shares, in addition to other factual changes on the report, for example, the investor's intended actions with respect to the issuer. Schedule 13G reports must be filed within 10 days after the end of the first month in which the

person's beneficial ownership exceeds 10% of the class, computed as of the last day of the month, or if beneficial ownership is less than 10%, within 45 days after the end of the calendar year in which the person acquired 5%.
Given the SEC's willingness to pursue enforcement actions for these violations, officers, directors and large shareholders should consider the following suggestions:

Avoid being subject to the reporting requirements, if possible. Often investors become the beneficial owners of greater than 5% of a registered class of equity by virtue of the investor's ownership of other instruments, such as options, warrants, preferred stock and debt that can be converted into the registered class of equity within 60 days. If the terms of such instruments expressly provide that the investor may not convert the instrument if doing so would cause it to own more than 5% of the registered class of equity or do not permit such conversion to occur for 61 days or more, the investor may be relieved of its filing obligation. It is important in such instances that the terms be binding and valid (e.g., provisions that are non-waivable, enforceable, established in the issuer's governing instruments, applicable to affiliates and assigns, etc.) to effectively eliminate the right of the investor to acquire the securities.[2]

Grant power of attorney to reliable securities counsel to make filings on your behalf. Most officers, directors and large shareholders of publicly traded companies are extremely busy and depending upon their travel and work schedules may find it difficult to prepare SEC filings. Moreover, many of such persons do not have access to, or experience in, completing the filings electronically through one of the filing software programs. In addition, there are many interpretations and SEC "no-action" letters with respect to reporting requirements in particular circumstances that many reporting persons may not be

aware of. Rather than bear the administrative burden and expense of completing filings and learning curve associated with getting familiarized with all of the SEC's guidance on reporting, it is highly recommended to utilize the services of a reliable securities counsel and to grant such counsel power of attorney to make the appropriate filings as required. A firm with multiple persons available at short notice to make such filings is preferable, however, granting power of attorney to internal issuer counsel with securities law experience is also an excellent option, especially considering that other reporting obligations may be implicated by the transaction such as Form 8-K or Form 144 reports. Please note that the power of attorney must be filed with the SEC at the same time or prior to such person acting on behalf of the reporting person.

Hold all shares in one brokerage account with appropriate controls in place. Consolidating holdings of securities in one brokerage account greatly simplifies and enhances the likelihood of reporting compliance. Annual grants under compensation plans should be made directly to such account. The broker with custody of such account should be given very specific instructions that prohibit transfers absent clearance from the securities counsel that has been granted power of attorney and should also require that all confirmations of trades be delivered to such securities counsel. For officers or directors that enter into 10b5-1 trading plans (plans permitted under Rule 10b5-1 that allow shareholders to sell a predetermined number of shares at a predetermined time to avoid trading on inside information and the liability related thereto), the broker that administers such plan should receive similar instructions.

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law. Any questions relating to topics discussed in this article may be directed to the author at ctinnen@kelleydrye.com.

[1] Form 4 filings are required for an issuer's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Officers of the issuer's parent(s) or subsidiaries shall be deemed officers of the issuer if they perform such policy-making functions for the issuer. In addition, when the issuer is a limited partnership, officers or employees of the general partner(s) who perform policy-making functions for the limited partnership are deemed officers of the limited partnership. When the issuer is a trust, officers or employees of the trustee(s) who perform policy-making functions for the trust are deemed officers of the trust.
[2] For a further discussion of the factors that may indicate that a conversion cap is binding and valid, see Brief of the Securities and Exchange Commission, Amicus Curiae in Levy v. Southbrook International Investments, Ltd. (September 14, 2009)

A LOOK AT IRS'S TRANSFER PRICING AUDIT ROADMAP

By: Byung Kyu Cho

Background

There are still a number of corporations which have not fully recovered from the economic downturn, which consequently leads to less tax revenue for tax authorities. As such, some of the tax authorities around the globe have taken steps to counter the effects of the diminishing revenue by increasing a number of tax audits or performing audits in a more aggressive manner. However, based on the statistics provided by Internal Revenue Source ("IRS"), the IRS does not fall under this category. While the total number of business tax returns has slightly increased from 9.5 million in 2008 to 9.9 million in 2013, an examination coverage ratio, calculated by dividing the number of examined returns by the total number of returns, marginally reduced from 0.63% to 0.61%.[1] It is not surprising to see that enforcement revenue collected during this period decreased from $56.4 billion to $53.3 billion.[2] At a glance, it may seem that the IRS has remained friendly and not undergone dramatic changes as a whole.

However, when it comes to transfer pricing, it's a different story. Ever since the IRS settled a landmark case in 2006 in which GlaxoSmithKline Holdings Inc. agreed to pay $3.4 billion to resolve the largest tax dispute in the history of the IRS at that time[3], the IRS has continuously increased its enforcement efforts. In 2009, the IRS added 1,200 employees to deal with international issues[4] and the following year, it even reorganized the organization structure. More specifically, in October 2010, the IRS created the Large Business & International ("LB&I") division along with a number of

subdivisions including the Transfer Pricing Operations ("TPO") group to handle transfer pricing issues exclusively.[5]

2013 was an active year in terms of transfer pricing developments. While Congress did not pass any significant new legislations on transfer pricing and the Section 482 of the Internal Revenue Code remained essentially unchanged, Congress conducted hearings on the international tax practices of several prominent U.S. corporations, most notably Apple, Inc. In May 2013, senior executives including Timothy D. Cook from Apple testified before the Senate's Permanent Subcommittee about the company's profits that had avoided U.S. taxation with its complicated transfer pricing structure.[6] There is no doubt that the testimony significantly raised public and political awareness of transfer pricing practices in general.

Transfer Pricing Audit Roadmap

In another sign of this movement, the IRS released the Transfer Pricing Audit Roadmap ("Roadmap") on February 14, 2014.[7] The Roadmap provides "the transfer pricing practitioner with a comprehensive toolkit to address the key themes underlying a transfer pricing examination."[8] The document has 26 slides identifying steps that an examination team should take in a transfer pricing audit and provides clear direction on the roles of the team members.[9] Also, the Roadmap stipulates that an audit will consist of three phases: the planning phase of up to 6 months; execution phase of up to 14 months; and resolution phase of up to 6 months. The following is a brief summary of the information for each phase.[10]

*1) Planning phase**[11]***

The initial planning phase of the Roadmap can last up to six months, and starts before the 24-month audit cycle begins. In this phase, examiners are encouraged to familiarize themselves with taxpayer's business operations by reviewing relevant information, for example, 10-K or industry reports and to perform preliminary economic analyses. They are also expected to review tax returns, with particular emphasis on Forms 5471, 5472, 8833, 8858, 8865, and 926 as well as Section 6662(e) documentation. In addition, the examiners should prepare mandatory information request for targeted taxpayers and an initial examination contact letter.

In addition, the examiners need to prepare for an opening conference, which kicks off the 24-month audit cycle. Following the opening conference, financial statement/books and records orientation meeting is to be held within 30 days. Lastly, the examiners should prepare their risk analysis and audit plan, both of which are approved internally before being provided to the taxpayers.

*2) Execution phase**[12]***

In this phase, the examiners focus on fact finding by delivering necessary additional information request, if any, conducting interviews with relevant employees, and touring the taxpayer's plants or sites. After gathering necessary information, they prepare a written statement summarizing material facts found and share it with the taxpayer. Upon reviewing the statement, the taxpayer needs to provide a written confirmation or explanation of differences between its position and the IRS's.

Next, the examiners start performing economic analysis and later submit to the taxpayer for discussion of inaccuracies and points of disagreement.

*3) Resolution phase**[13]***

In this last phase, the audit team needs to meet with the taxpayer to discuss its findings on transactions at issue. The audit team and the taxpayer need to determine whether they could resolve disputed issues. If they cannot resolve, the audit team will prepare a revenue agent's report as well as 30-day letter for unresolved issues, hold the Appeals pre-conference meetings, and attend the post-Appeals meetings.

Recommendation

In the introduction of the Roadmap, the IRS explicitly states that the Roadmap "is not intended as a template – every transfer pricing case is unique, and the team will need to exercise its own judgment about how to best use these guidelines."[14] However, there is no doubt that taxpayers can take advantage of the Roadmap by going over every step to understand the IRS's approaches and prepare for potential transfer pricing examination. Based on the survey of 680 tax directors, vice presidents of tax, and chief tax officers in May 2014, 40 percent of the respondents believed that future transfer pricing audit process would be smoother due to the introduction of the Roadmap.[15] In addition, 20 percent of the respondents mentioned that the Roadmap would expand taxpayers' understanding of the IRS's transfer pricing concerns, and 15 percent anticipated it would provide them with enhanced certainty on tax audits.[16]

With up to six months of advance review and planning before the audit actually begins, it seems clear that most part of transfer pricing audits will be preliminarily determined in the planning phase. As such, taxpayers should prepare thoroughly for all meetings during this phase, since the audit team will be relatively receptive to the taxpayer's arguments. This idea is supported by the above survey; 53 percent of the respondents indicated that they would expand their preparation for transfer pricing audits by performing self-assessments, organizing relevant documentation and files in advance, and being more familiar with what is publicly available about their corporations' profile.[17]

Furthermore, as the Roadmap is still "work in process and [taxpayers] are strongly encouraged to contact the Income Shifting Issue Practice Networks (IPN) with any corrections, proposed additions or deletions, or other suggestions for improvement," taxpayers should stay focused on any further developments.[18]

Conclusion

By issuing the Roadmap, the IRS delivered a clear message; it wants the examiners to be more educated and able to conduct audits in consistent, reasonable and careful manner. At the same time, the Roadmap would allow the taxpayers to have appropriate expectations, better prepare for the audits in advance, and most importantly, avoid unnecessary arguments with the IRS and potential tax liabilities.

At the 2nd Annual International Tax Enforcement Conference on March 18, 2014, the Deputy Commissioner of LB&I Division cited examples of some countries that have moved toward a model of "cooperative compliance" in their interactions with taxpayers. The Deputy Commissioner added that "it is hard to

move aggressively in that direction, but conceptually it's where we'd like to go." Supported by the IRS's encouraging message, it seems possible that the model of "cooperative compliance" would be established in the U.S. someday. In the end, the IRS might not be an undefeatable enemy but a supportive friend.

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[1] Internal Revenue Service Fiscal Year 2013 Enforcement and Service Results

[2] *Id.*

[3] Compliance & Enforcement News (IR-2006-142), September 11, 2006 www.irs.gov/uac/IRS-Accepts-Settlement-Offer-in-Largest-Transfer-Pricing-Dispute

[4] 2010 Global Transfer Pricing Survey, Ernst & Young LLP

[5] www.irs.gov/Businesses/International-Businesses

[6] www.hsgac.senate.gov/subcommittees/investigations/hearings

[7] www.irs.gov/Businesses/Corporations

[8] Transfer Pricing Audit Roadmap www.irs.gov/pub/irs-utl/FinalTrfPrcRoadMap.pdf

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] www.kpmg.com/us/en/issuesandinsights/articlespublications/press-releases/pages/tax-practitioners-predict-streamlined-transfer-pricing-audits-with-new-irs-roadmap-tool-says-kpmg-survey.aspx

[16] *Id.*

[17] *Id.*

[18] Transfer Pricing Audit Roadmap www.irs.gov/pub/irs-utl/FinalTrfPrcRoadMap.pdf

GOVERNMENT GONE OVERBOARD WITH SARBANES-OXLEY

By: Austin Root

For most, it would be a stretch to compare the acts of a corporate executive who shredded company documents in order to cover up financial fraud with those of a fisherman who threw a few undersized red grouper fish back into the sea. For the Department of Justice, it is not stretch at all as both are guilty of the same crime. Should the Supreme Court agree with this comparison, there will surely be vast waves that disturb the business landscape.

Act One

In October of 2001, a scandal was revealed at the American energy company, Enron Corporation, which eventually led to the company's bankruptcy, dozens of charges against its executives, and the dissolution of Arthur Anderson, one of the largest audit and accountancy partnerships in the world.[i] Enron was able to hide billions of dollars in debt through misleading financial statements while portraying themselves to be a healthy, powerful business.[ii] To this day, the Enron Scandal is considered one of most notorious in history.[iii] Enron's collapse, and the financial ruin it left in its remains, prompted the enactment of new regulations and legislation to promote accurate and reliable financial reporting practices in publicly held companies.[iv] On July 30, 2002, President Bush signed into law a particular piece of legislation to "enhance corporate responsibility, enhance financial disclosures and combat corporate and accounting fraud," entitled the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act" or "Act").[v]

Act Two

On August 24, 2007, commercial fisherman Captain John Yates ("Yates") was fishing off the Florida coast when a suspicious officer, deputized by the National Marine Fisheries Service, boarded and inspected Yates' boat.[vi] The officer noticed three red grouper fish that did not appear to meet the minimum size limit of 20 inches in length.[vii] After further investigation, the officer had determined 72 red grouper measured less than 20 inches and instructed Yates to return to shore.[viii] Before returning to shore, Yates instructed his crew to throw the undersized fish overboard.[ix] When Yates' boat returned to shore for further inspection, 69 fish measured less than 20 inches in length; three less than the initial determination of 72 undersized grouper.[x] Yates was issued a typical citation for his actions.[xi] However, nearly three years later, Yates was charged with and ultimately convicted of violating 18 U.S.C. § 1519,[xii] the codification of Section 802 of the Sarbanes-Oxley Act.

Something's Fishy

On Wednesday, November 5, 2014, the Supreme Court heard oral arguments onYates v. United States, stemming from Yates' appeal of an Eleventh Circuit Case where the Court of Appeals held that a fish is a "tangible object" within the meaning of 18 U.S.C. § 1519. [xiii][xiv] Ultimately, the issue the Supreme Court will have to decide is whether the defendant, Yates, was deprived of fair notice that the destruction of fish would fall within the scope of 18 U.S.C. § 1519.[xv] The crux of the issue depends on how broadly, or narrowly, the court interprets the applicable statute.[xvi]

Could Section 802, better known as the "anti-shredding provision", of the Sarbanes-Oxley Act have possibly been intended to apply to fish? This provision punishes anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation[.]"[xvii] The federal government argued that the law was written and intended to be a broad anti-obstruction-of-justice law.[xviii] Based on this premise, the federal government contended that Yates had destroyed a "tangible object" when he tossed the red grouper fish overboard.[xix] Conversely, Yates argues the term "tangible object", as used in the Act passed after the Enron scandal, "only applies to records, documents, or tangible items that relate to record keeping" and not red grouper fish.[xx] Accordingly, Yates argues, he could not have received fair notice that a fish would be considered a "tangible object" for the purposes of the Act.[xxi]

The statutory interpretation issue is classic in the sense that it strains the tension between purpose-driven and text-driven interpretation. Accordingly, one could presume the Supreme Court's decision will split along the Justice's philosophies of interpretation. Some of the Justices scoffed at the Justice Department's application of the Act on commercial fishermen.[xxii] Justice Antonin Scalia exclaimed, "He could have gotten 20 years! What kind of sensible prosecution is that?"[xxiii] Other Supreme Court Justices were not so persuaded. For instance, Justice Elena Kagan said it was possible to read the law to include more than just corporate fraud.[xxiv] The Court must decide whether it will apply the law as written and leave Congress to fix it, or apply a principle to narrow the statute's reach despite the text, for example, the rule of lenity.[xxv]

The Catch

The Supreme Court should take this opportunity to rein in the scope of the Sarbanes-Oxley Act by confining its application to those acts that it was intended. Yates' side has no shortage of supporters; the most notable being business groups given that the implications could cause turmoil in the business community.[xxvi] Should the Court uphold this verdict, companies would have to shoulder the overwhelming effects. One hypothetical that has been commonly used to exemplify the potential devastating implications is "the chemical spill":[xxvii] A chemical company has a spill and will likely be subject to some environmental fines if they do not make immediate cleanup efforts. However, the chemical company could face even larger penalties for cleaning up the spilled chemical for violating of the Sarbanes-Oxley Act, as it is destroying evidence. Following this reasoning, BP violated the Act during their oil spill when the company used chemicals to dissolve oil on the floor of the Gulf of Mexico.[xxviii]

A chemical spill is just one of many circumstances that would be adversely affected by anything but a Yates victory. Companies would face predicaments over the handling of inventory with a major, unanticipated spike in storage costs.[xxix] Corporations may stop throwing anything away and preserve inventory rather than face up to 20 years in prison for destroying evidence. Not even people outside of the business sector would be safe from the Act. Justice Stephen Breyer noted that applying this to undersized grouper fish would allow us to prosecute a hiker who picked a flower, knowing you're supposed to let wildflowers blossom.[xxx] It does not take a particularly vivid imagination to come with a myriad of undesirable scenarios that may occur, should the Court rule against Yates.

Understandably, a few of the Justices were puzzled by the prosecutorial discretion used to charge Yates with violating the Act.[xxxi] Logic and reason will simply tell us that throwing red grouper fish overboard could not possibly have been one of the acts intended to be covered by the Sarbanes-Oxley Act. However, navigating the sea of statutory interpretation will prove to be anything but simple for the Supreme Court, as they will have to grapple with the competing philosophies of text and purpose. Encouragingly, the Justices did express objection to the federal government's argument that the red grouper fish are "tangible object[s]", within the meaning of the Act. However, until the Court's decision is handed down, hit the deck, because the outcome of Yates v. United States may have a ripple effect whose bounds are unknown.

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[i] Market Failures: The Rise and Fall of Enron, University of Wisconsin Oshkosh (Sep. 18, 2010),http://www.uwosh.edu/llce/conted/lir/course-listings/Enron%20Scandal.pdf/vie-w.

[ii] Jean Folger, The Enron Collapse: A Look Back, Investopedia (Dec. 1, 2011),http://www.investopedia.com/financial-edge/1211/the-enron-collapse-a-look-back.aspx.

[iii] Easy Guide to Understanding ENRON Scandal Summary, Finance Laws, http://finance.laws.com/enron-scandal-summary.

[iv] Folger, *supra*.

[v] The Laws That Govern the Securities Industry, U.S. Securities and Exchange Commission,http://www.sec.gov/about/laws.shtml

[vi]United States v. Yates, 733 F.3d 1059, 1061 (11th Cir. 2013).

[vii] *Id*.

[viii] *Id.*

[ix] *Id.*

[x] *Id.* at 1062.

[xi] Dan Epstein, Fishy business at the Supreme Court: Florida Capt. John Yates' sad saga, Fox News (Nov. 5, 2014), http://www.foxnews.com/opinion/2014/11/05/fishy-business-at-supreme-court-florida-capt-john-yates-sad-saga/.

[xii]Yates, 733 F.3d at 1065.

[xiii] Yates v. United States, SCOTUS Blog (Nov. 14, 2014), http://www.scotusblog.com/case-files/cases/yates-v-united-states/.

[xiv]Yates, 733 F.3d at 1064.

[xv] SCOTUS Blog, *supra*.

[xvi] http://www.npr.org/2014/11/05/361655397/the-supreme-court-takes-up-the-case-of-the-missing-fish

[xvii]18 U.S.C. § 1519 (2012).

[xviii] Nina Totenberg, The Supreme Court Takes Up The Case Of The Missing Fish, NPR (Nov. 5, 2014),http://www.npr.org/2014/11/05/361655397/the-supreme-court-takes-up-the-case-of-the-missing-fish.

[xix]Yates, 733 F.3d at 1064.

[xx] *Id.*

[xxi] *Id.*

[xxii] Brent Kendall, Supreme Court Objects to Application of Sarbanes-Oxley on Commercial Fisherman, Wall St. J. L. Blog (Nov. 5, 2014), http://online.wsj.com/articles/supreme-court-objects-to-application-of-sarbanes-oxley-on-commercial-fisherman-1415218271.

[xxiii] *Id.*

[xxiv] *Id.*

[xxv] Jonathan Keim, Yates v. United States: Angling for A Narrower Statute (and Other Fish-Related Worldplay), National Review Online (Nov. 6, 2014), http://www.nationalreview.com/bench-memos/392193/yates-v-united-

states-angling-narrower-statute-and-other-fish-related-wordplay. [the Rule of Lenity is a doctrine requiring that ambiguities in a criminal statute relating to prohibition and penalties be resolved in favor of the defendant, and thus a more lenient punishment, if it is not contrary to legislative intent].

[xxvi] For Want of a Grouper, Wall St. J. (Nov. 6, 2014, 7:18 PM), http://online.wsj.com/articles/for-want-of-a-grouper-1415319486.

[xxvii] *Id.*

[xxviii]Jim McTague, The Supreme Court's Fish Tale, Barron's J. (July 4, 2014, 2:38 AM),http://online.barrons.com/articles/SB50001424053111904248904580003230993933438.

[xxix] *Id.*

[xxx] For Want of a Grouper, *Supra*.

[xxxi] Keim, *Supra*.

PREGNANCY DISCRIMINATION IN THE WORKPLACE: PROPOSED CHANGES IN THE LAW

By: Thomasin Sternberg

The impact women have on the workforce is not minute. In 2010, 46.8% of the labor force in the United States was comprised of women.[1] Yet many working women feel pressured to choose between having families and advancing their careers. The pressure to make this choice is detrimental to the advancement of women, leading to gender discrimination and inequality. According to a study published by UC Hastings College of Law, 43% of working women leave the work force to raise their children. [2]With women in such great numbers ultimately choosing family over work, many employers are mindful of how this choice will effect them when making hiring, firing, and promotion decisions. Oftentimes this leads to gender-based discrimination in the work place when employers give preferential treatment to male employees to avoid the costs associated with maternity leave.[3]

A number of federal and state laws have been enacted to address this inequity, however, as with most legislation, they tend to take a “one size fits all” approach that leaves many employees without a remedy. For example, the Family Medical Leave Act (FMLA) entitles covered employees, regardless of gender, to take up to 12 work weeks of unpaid, job-protected time off for specified family and medical reasons, including childbirth and caring for a child. [4] Covered employees are those who have worked at least 1,250 hours during the last 12 months for companies with 50 or more employees.[5] However, these limits on coverage leave many employees either outside of coverage and edged out of the work force at worst, or covered but without a paycheck at best. In fact, 40% of the

American work force is not eligible for FMLA, and many of those who are eligible cannot afford to take 12 weeks of unpaid leave.[6]

The Pregnancy Discrimination Act, which was passed in 1978 as an amendment to the Civil Rights Act of 1964, prohibits discrimination on the basis of pregnancy, childbirth, or other related medical conditions. [7] Under this act, women affected by pregnancy or other related conditions must be treated the same as any other employee who are similar in their ability or inability to work. [8] The Pregnancy Discrimination Act has given rise to litigation due to the fact that in many jobs, particularly those that require manual labor, pregnant women are often considered to be inherently dissimilar from other employers in their ability or inability to work.[9] The issue is exacerbated by the fact that manual labor jobs tend to be more hazardous to pregnancy, less flexible in scheduling, and pay lower wages than traditional office jobs.[10] It is for these reasons that women who are employed in low paying manual labor jobs are in the most need of the law's protection.[11]

The Supreme Court has granted a writ of certiorari to review Young v. United Parcel Service, in its October 2014 term, a case that hinges on this very paradox within the Pregnancy Discrimination Act. In Young, a delivery driver was required to lift 70lbs was given a 20lb lifting restriction by her doctor due to her pregnancy. [12] In accordance, the driver requested a light duty job that accommodated her restrictions. [13]Her employer denied her request, stating that she would be "too much of a liability" and that she "could not come back into the building until she was no longer pregnant," offering her unpaid leave.[14] The driver's claim for pregnancy-based discrimination arises out of the fact that the company offers light-duty work accommodations to some workers, such as those who have been injured on the job, or those who have lost their Department of

Transportation certification, but not to pregnant workers.[15] In holding for the employer, the United States Court of Appeals for the Fourth Circuit interpreted the Pregnancy Discrimination Act as providing no entitlement to pregnant workers to any accommodations whatsoever.[16] Rather, "employers can treat pregnant women just as badly as non-pregnant employees."[17] Pregnant workers who are denied light duty work, the court reasoned, have endured the same treatment as non-pregnant workers who are unable to perform their jobs.[18]

In its review of Young, the Supreme Court will determine in what circumstance an employer that provides work accommodations to non-pregnant employees must provide an accommodation to pregnant employees who are "similar in their ability in their ability or inability to work." The Court's four-justice conservative wing will likely find the reasoning of the Fourth Circuit to be sound, while the four-justice liberal wing will likely be looking to overturn the decision of the court below. The swing vote, Justice Kennedy, has been known to vote conservatively in cases involving gender equality for women, and will likely leave pregnant employees without a remedy beyond unpaid leave.

Despite the uncertainty that awaits the parties in Young, current proposed legislation also seeks to provide more protection to childbearing employees than the Pregnancy Discrimination Act is able to give.[19] The Pregnant Workers Fairness Act, introduced in May 2013 by Senator Robert Casey Jr., would make it unlawful for employers to fail to make reasonable accommodations for pregnant employees, and specifically makes it unlawful for employers to require pregnant employees to take a leave of absence if another reasonable accommodation can be provided. [20] This bill is modeled after the Americans with Disabilities Act, and has garnered the support of many women's advocacy and civil rights groups, 32 co-sponsors, and an endorsement from President Obama.[21] Regardless of the

pending result in Young, the Pregnant Workers Fairness Act seeks to ensure that pregnant women will be able to keep working and supporting their families.[22]

It is clear that the law has failed to address the strides women have made toward equality. Some employers already offer female employees flexibility in their work schedule and work duties because they want to attract the best talent, regardless of reproductive status. However, until every employer is required by law to make reasonable accommodations for pregnant workers, many women will continue to be faced with the difficult and unfair choice of work or family. In an economy where women make up half of the work force, the lack of accommodations for pregnant employees is, if nothing else, economically wasteful.

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[1] http://www.dol.gov/wb/factsheets/QS-womenwork2010.htm

[2] http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf

[3] http://www.theguardian.com/money/2014/aug/12/managers-avoid-hiring-younger-women-maternity-leave

[4] http://www.dol.gov/whd/fmla/

[5] Id.

[6] Joanna L. Grossman, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, Yale J.L. & Feminism, 15, 29(2009).

[7] http://www.eeoc.gov/laws/statutes/pregnancy.cfm

[8] http://www.eeoc.gov/eeoc/publications/fs-preg.cfm

[9] Joanna L. Grossman, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, Yale J.L. & Feminism, 15, 20 (2009).

[10] Id. at 22.

[11] Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, Duke J. Gender L. & Pol'y, 67, 123, (2013).

[12] Young v. UPS, 707 F.3d 437, 440 (4th Cir. 2013) cert. granted, 134 S. Ct. 2898 (2014).

[13] Id.

[14] Id. at 441.

[15] Id. at 445.

[16] Id. at 447-48.

[17] Id. at 447; Troupe v. May Dep't. Stores Co., 20 F.3d 734, 738 (7th Cir.1994).

[18] Young v. UPS, 707 F.3d 437, 450-51 (4th Cir. 2013) cert. granted, 134 S. Ct. 2898 (2014).

[19] ¶ 32,232 Dems Reintroduce Pregnant Workers Fairness Act- Proposed Legislation, Human Resources Management- Compensation Guide, May 16, 2013, at 1, *available at* 2013 WL 2075929.

[20] https://www.congress.gov/bill/113th-congress/senate-bill/942

[21] Id.; https://www.aclu.org/sites/default/files/assets/pwfa_-fact_sheet-final_7-16-14.pdf

[22] https://www.congress.gov/bill/113th-congress/senate-bill/942

ARE FISH TANGIBLE OBJECTS?

By: Louis Forristall

On November 5, 2014, the U.S. Supreme Court heard oral arguments for Yates v. United States that focused on this seemingly absurd question, and the outcome could impact much more than fish. The statute at issue was passed as part of the Sarbanes-Oxley Act. The Act provides a ban on paper shredding, and was passed in response to Enron executives' alleged destruction of documents to hide evidence. The Supreme Court's decision in Yates could impact the handling of records, documents and any other object that could be potentially relevant to a federal investigation. Despite concerns from Court, the statute's potentially broad applications are restrained by statutory and institutional limitations, and can also be significantly reduced with proactive steps from businesses.

The appellant, John L. Yates, was a captain of *Miss Katie*, a shipping vessel operating off the coast of Florida.[1] On August 23, 2007, the *Miss Katie* was boarded by a field officer of the Florida Fish and Wildlife Conservation Commission who was empowered to enforce federal laws.[2] While on board, the officer found three red grouper fish that measured under the 20 inch minimum size for taking that species.[3] Yates and his crew were instructed to return to port, and not to disturb the catch.[4] On the way, Yates instructed the crew to throw seventy-two undersized fish overboard, and replace them with red grouper of legal size.[5]

At trial, the Department of Justice charged Yates with violations of 18 U.S.C. §§ 2232(a) and 1519, the latter being the Sarbanes-Oxley Act's anti-shredding provision.[6] § 1519 provides a ban on destroying "any record,

document, or *tangible object*… with the intent to obstruct an investigation… within the jurisdiction of any department or agency of the United States."[7] Yates was convicted by a jury on both charges, and sentenced to thirty days imprisonment followed by 36 months' supervised release. [8]

Yates appealed the conviction on the grounds that the term "tangible object" as used in §1519 only applies to "records, documents, or tangible items that relate to recordkeeping," not fish.[9] The Eleventh Circuit disagreed, holding that "tangible object" should be given its "ordinary or natural meaning."[10] "Tangible object" can be plainly defined as an object "having or possessing physical form."[11] The court then held that plain meaning to apply to fish. At no point did the court's opinion mention that the law was passed as part of the Sarbanes-Oxley Act, or the history surrounding that act, because the presence of a plain definition rendered contextual analysis and legislative history irrelevant.

Before the Supreme Court, Yates argued that "the 'natural' and 'sensible' meaning of the phrase 'tangible object' includes only items used to preserve information."[12] Yates also focused on concerns that the Eleventh Circuit and the Government's interpretation of "tangible object" could result in broad applications of the law.[13] Led by Justice Scalia, the Court expressed concerns in their questioning of the government's representative that its interpretation could lead to lengthy prison sentences for very minor violations.[14] Justice Breyer went as far as to propose a hypothetical where someone is charged with a violation of the act for picking a wildflower.[15]

Regardless of the interpretation adopted by the Court, the case's outcome has major implications for recordkeeping in general. One concern expressed at

oral argument is that the government's proposed interpretation would create major uncertainties for businesses and individuals as to whether the government could bring charges whenever someone destroys a tangible object.[16] This concern is significantly limited requisite mental state of the statute. In order to violate the act, offender must have the "intent to impede, obstruct, or influence the investigation" of any agency of the United States. Questions of intent are determined "by the sufficiency of the evidence against" the defendant.[17] Therefore innocent or even negligent destruction of documents or tangible documents does not violate § 1519. [18]

Chief Justice Roberts also expressed concerns that the government's interpretation would provide them with "extraordinary leverage" when seeking guilty pleas. [19]Justice Breyer added that if the government "can't draw a line, there is a risk of arbitrary or discriminatory enforcement" of the statute.[20] Justice Breyer's comment was directed at the government's inability to point to a Department of Justice policy detailing how U.S. Attorneys should use § 1519. The Court's concerns that the law could be applied in arbitrary or discriminatory manners is mitigated by the reasonableness of factfinders at trial. Judges and juries are able to take these concerns into account, and will be unlikely to convict defendants charged with excessively minor offenses under the Act.Even if the narrow interpretation proposed by Yates is adopted, which would limit § 1519 to items used to preserve information, the danger of lengthy prison sentences for trivial acts would still exists. All Yates's interpretation would do is limit the type of acts the laws applies to.[21]

Ultimately the Court must decide between Yates's narrow interpretation that could lead to "odd" results, and the government's potentially over-broad interpretation that could lead to arbitrary enforcement of the law. The Court adopt

the government's interpretation because the plain language of the statute is clear.The drafting of the statute clearly shows that Congress meant for the Act to have a broad application. As the Eleventh Circuit held, based on the plain meaning of § 1519 "tangible object" "unambiguously applies to fish." [22] When the meaning of statutory language is clear, the court must "enforce plain and unambiguous statutory language according to its terms." [23] Most importantly, courts must adopt this interpretation of the statute when possible regardless of some policy of Congress, or considerations of injustice or inconvenience arising from the statute,[24] making most of Yates's and the Court's concerns expressed at oral argument irrelevant.

Although the Court's concerns should not influence their reading of the plain language of the statute, some of their concerns about the scope of their potential ruling are legitimate.Through their drafting of the Sarbanes-Oxley Act, Congress delegated broad powers to federal agencies in order to avoid interference with investigations, like the investigation at issue in Yates. Although the Court's concerns regarding an overbroad interpretation could eventually prove legitimate, that is an issue that should be addressed by Congress, not the Court. In the meantime, the potentially broad applications of the Sarbanes-Oxley Act feared by the Court can be easily reduced by businesses. Liability under the statute can be avoided if companies adopt document retention policies and standard policies for discarding tangible objects. Additionally, companies should implement policies to suspend deletion of documents when a possibility of investigation arises. The use of these standard policies would help to persuade judges that there was no intent to impede a federal investigation in the deletion of documents or objects.

[1]United States v. Yates, 733 F.3d 1059, 1061 (11th Cir. 2013) cert. granted in part, 134 S. Ct. 1935, 188 L. Ed. 2d 959 (2014).

[2] Id.

[3] Id.

[4] Id.

[5] Id. at 1062.

[6] Id.

[7] 18 U.S.C. § 1519.

[8] Yates, 733 F. 3d at 1063

[9]Id. at 1064.

[10] Id.

[11] *Black's Law Dictionary* 1592 (9th Ed. 2009).

[12] Amy Howe, *Justices Take the Measure of Fish Case: In Plain English*, SCOTUS Blog (November 5, 2014), http://www.scotusblog.com/2014/11/justices-take-the-measure-of-fish-case-in-plain-english/.

[13] Id.

[14] Id.

[15] Id.

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PIRATING AN INDUSTRY: RIDESHARING AS A SUBVERSION OF LIVERY REGULATION

By: Matthew Holm

"A ride whenever you need one," boasts the corporate tagline of San Francisco-based company Lyft.[1] Founded in 2012, Lyft is a relatively recent addition to the growing "ridesharing" industry.[2] Its competitors such as UberX, Sidecar, Summon, and Wingz have altered the urban transportation market by allowing smartphone users to summon a car, track the driver's arrival, and pay for a ride, all at the touch of a virtual button.[3] The concept is genius and has gained widespread popularity in major cities in the United States and around the globe since Uber's launch in 2009.[4]

But these fledgling ride-for-hire companies continue to straddle regulatory fences and have required both controversial legislation and a stream of litigation to define the restrictions and mandates that will apply to the drivers and vehicles they employ. Uber has been under attack for its circumvention of ride-for-hire regulation since October of 2010 when the State of California Public Utilities Commission and the San Francisco Municipal Transportation Agency issued letters of notice to cease and desist operating without proper permits and licenses.[5]

These companies are essentially a subset of the livery industry, and their emergence signals a shift in consumer demand. Fairness would suggest that these new companies should play by the same rules that apply to all other ride-for-hire operations, but many state and municipal lawmakers have responded to a modern world of tech-worshiping constituents by legally acknowledging these companies

as a new "category of for-hire transportation service" and regulating them separately.[6]

So-called "ridesharing" companies have taken hold of the market by their groundbreaking use of smartphone GPS tracking and payment technology. But technology does not differentiate the companies' business from other operations in the livery industry. In fact, taxi companies are beginning to incorporate the same technology to keep their services relevant and their businesses competitive.[7] Curb, an app released earlier this year, allows smartphone users to request, track, and pay for rides with professional cab drivers from third party companies.[8] So while Uber's CEO Travis Kalanick will continue to assert that the rapidly growing company is simply a "technology platform,"[9] the distinction between his company's services and those provided by traditional cab companies cannot exclusively lie in the use of smartphone technology.

Is there really a legally significant distinction between the "ridesharing" companies and traditional taxi companies? The service provided is facially indistinguishable; passengers summon a ride and are transported to their destination by a hired vehicle and driver for a fee.

The distinction lies in the employment conditions of the companies' drivers and the ownership of vehicles used. Unlike taxi companies, Uber and Lyft carefully contract with but do not extend full employment to their drivers, who use their own privately owned vehicles.[10] "It's easy to become a driver," promises Uber's website, which outlines three necessary steps: "Get started, Get the App, Start Driving."[11]

The companies have artfully circumvented regulation as a traditional taxi company by calling themselves "ridesharing." That label is not well suited, however. Under Illinois's Ridesharing Arrangements Act, the term implies carpooling:

> "(a) Ridesharing arrangement" means the transportation by motor vehicle of not more than 16 persons (including the driver):
> (1) for purposes incidental to another purpose of the driver, for which no fee is charged or paid except to reimburse the driver or owner of the vehicle for his operating expenses on a nonprofit basis; or
> (2) when such persons are traveling between their homes and their places of employment, or places reasonably convenient thereto, for which
> (i) no fee is charged or paid except to reimburse the driver or owner of the vehicle for his operating expenses on a nonprofit basis, or
> (ii) [a fee may be charged in excess of reimbursement in certain very limited circumstances compliant with other sections of the Illinois Vehicle Code.]"[12]

Even though Lyft markets themselves as "your friend with a car,"[13] the definition provided in the Illinois Compiled Statutes hardly applies to the commercial nature of the company's business. The "blurry" use of the term "ridesharing" has led to the coinage of another questionable label that is gaining widespread use: "Transportation Network Companies," or TNCs.[14] This new label is just the most recent attempt to artificially characterize the service as something other than a traditional taxi service.

Despite the attempt to define their taxi business as a carpooling enterprise, the companies still face public safety concerns. Legislation has been passed in

many jurisdictions, including an ordinance in the City of Chicago.[15] While these pieces of legislation validate the artificial ridesharing distinction, they also place important safety and licensing restrictions on drivers and vehicles in ridesharing operations.

In Springfield, the last General Assembly gained heavy media attention for its passage of HB 4075, which would have amended the Illinois Vehicle Code and the Ridesharing Arrangements Act to enact regulations targeted at consumer protection and public safety. The bill would have created a legal distinction between private ridesharing arrangements already allowable under the statute and a newly defined category of "commercial ridesharing arrangements." The bill would have regulated the commercial arrangements with vehicle marking and licensing requirements, vehicle safety inspections, restrictions on pickup and drop-off locations, and provisions ensuring accessibility for disabled persons. The bill also contained provisions that would have saddled the dispatching companies with liability for incidents arising during ridesharing use of private vehicles, and would have allowed the drivers' insurance companies to deny coverage during dispatches. In many ways, the bill would have subjected ridesharing drivers to some of the same regulations and expectations the state already imposes upon professional taxi services.[16]

When all of these provisions presumably would have been in the interest of the safety of the people of the state, and professional taxi companies are subject to even stricter state regulation, why did Democratic Governor Pat Quinn veto the bill when it was sent to his desk?[17] In his veto statement, he claimed the action was motivated by thoughtful deference to the Illinois constitutional principle of home-rule and argued that local governments were better equipped to regulate the matter.[18] More plausibly, the legal jargon was cover for a politician

imminently seeking reelection who was fearful of the public's reaction to hampering a company that has garnered overwhelming popularity.[19] Still, even after Quinn's failure to be reelected, the bill still might have enough supporters in the House and Senate to make a veto override possible.[20]

Passing legislation on the subject has proved divisive and challenging, and litigation has bloomed all over the country. While the primary complainants are members of the competing taxi industry who claim tortious interference with their business,[21] they are not the only ones who claim harm from ridesharing's business model. Uber's own drivers have brought a class action in a case called Yucesoy v. Uber Technologies, currently pending in a Massachusetts Superior Court in Boston.[22] The suit challenges Uber's classification of its drivers' as independent contractors to avoid providing them with employee benefits.[23] The suit also claims that Uber's tipping policy violates gratuity laws and is misleading to riders,[24] and that Uber "retains a portion of the gratuity for itself."[25] A similar class action was recently dismissed from a San Francisco federal court in a case called O'Connor v. Uber Technologies; the plaintiffs in that case challenged only Uber's misleading representations to the public suggesting that price of rides include gratuity.[26] In a complex decision, the Northern District of California dismissed for failure to show necessary elements of a contract law claim and failure to show fraudulent conduct under California's Unfair Competition Law, among other things.[27]

These companies have misled the public in a variety of ways to circumvent fair business practices. They have succeeded in creating an arbitrary distinction between themselves and regular taxi companies that has exempted them from standard safety and licensing regulation. This "new" industry of metropolitan transportation, while it incorporates technology in admirable ways,

should not be immune to the same safety, licensing, insurance, and employment mandates that apply to other ride-for-hire companies. As long as this loophole continues to exist, why would any new company in the livery business classify themselves as a taxi company when they can cut costs and corners by structuring themselves as a TNC?

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DATA BREACHES: IS ANYONE RESPONSIBLE?

By: Robert Vickers

With seemingly increasing frequency, news reports reveal data breaches involving personal data stored on commercial data servers. In some cases, the victims intentionally stored the data on the servers, while in others it was not the victims who stored the data, but a commercial entity, storing information about their customers. Whether or not users or the company uploaded the data kept on company servers, who holds the responsibility for keeping the data safe?

One of the more recent newsworthy breaches involved cloud storage: the recent celebrity nude photo hack against Apple's iCloud service[1] that has generated intense publicity[2]. Despite some early news reports alluding to yet another flaw in an online service, Apple claims that the blame for the inadvertent exposure of celebrity data does not lie on Apple[3]. Instead, hackers attacked individual accounts from which they could deduce user names, passwords, or security questions[4].

In this case, it appears the breach involved data users themselves uploaded to the servers for storage. Access to such data by the hosting company depends in part on whether or not the company managing the servers defines the service as an Electronic Communication Service (ECS), or as a Remote Communication Service (RCS) as defined by the Stored Communications Act, 18 U.S.C. §§ 2701–2712.

Essentially, an ECS would be a service like webmail[5], and an RCS would be a cloud storage service[6], well at least they way most people may think

about them. The statutes specify the differences between the different types of services, one of which being that an RCS hosting company cannot access any data stored within it for any purposes other than user storage and processing[7]. Likewise, different rules applied depending on the type of service, dictate when the government can access data stored on the service, and whether or not a search warrant is needed[8]. Furthermore, the category (ECS or RCS) a particular service falls under, despite its popular and advertised name or usage, depends entirely on the Terms of Service (ToS) as defined by the service provider.

Google, for example, has a generic ToS which applies for all of the services they provide[9]. At one time, "Google reserve[d] the right … to pre-screen, review, flag, filter, modify, refuse or remove any or all Content from any [Google] Service[10]. Today, Google just says that they will sift through your data in order to provide you with advertisements you may be interested in[11].

Two court cases, Flagg v. City of Detroit[12] and Viacom Int'l Inc. v. Youtube Inc.[13] refused to allow screening for unlawful content when information was stored on a RCS[14]. This decision also likely means the content cannot be accessed for advertising or other purposes[15]. As a result, many services can write their ToS so as to not define the service as a RCS[16]. In such a manner, although the service may not provide stored data willingly to a third party, the service can view the data itself, ostensibly to provide target advertisements to pay for the "free" service[17].

Other recent newsworthy data breaches include the Home Depot data breach earlier this year[18], and the Target data breach last year[19]. In the case

of the Home Depot breach, in addition to credit card account numbers, email addresses were also stolen[20].

In cases such as these, typically hackers from overseas, through malware, trojans, hacking, or other means, gain access to a company's database containing customer information and sell such information to others who use the data to assume a customer victim's identity and purchase goods and services for themselves[21].

As provided by law, for a customer who quickly notices and reports a breach of their credit card number, personal liability is limited to $50[22]. The remainder of liability usually falls upon the credit card issuer[23].

As far as liability for allowing the breach in the first place, in many cases similar to these, it seems that liability has yet to be placed. Whether in the cases against Hannaford Bros.[24], Michaels Stores[25], or Express Scripts[26], when customer data is stolen, be it simply electronic payment (credit card) information or more substantial personally identifiable information such as dates of birth and Social Security Account Numbers, the entity whose database has been broken into has yet to be found liable for the breach. Oftentimes, as in the cases above, because the victim did not contract with the entity who stored their information to store that information, courts have often found the victim lacks standing to sue.

In an attempt to eliminate the utility of stolen credit card numbers, credit cards containing electronic chips, as currently used overseas, are being introduced into the United States[27]. These, however, are not a panacea: apparently the system, developed by Visa for use in the United Kingdom, has a problem with recognizing any currency other than the Great Britain Pound[28]. Nor has the

new card chip system completely eliminated the ability of thieves to steal money from a credit card[29]. Furthermore, the change to a new system will be very expensive, with costs projected to be as much as $11 billion[30].

With expenses like that looming in the near future and the limited liability companies have faced when databases are broken into and customer data is stolen, it is not surprising that companies are not acting faster to rollout new technology to protect their customers. Although it would be nice, and companies should look after their customers better in order to build a relationship and instill loyalty, based on current trends, it probably won't happen anytime soon.

As always, it is up to consumers to protect themselves. While the possibilities and utility for cloud computing are great, customers need to be aware that information they place on a server owned by another party may not be secure. Likewise, information collected by companies about their customers has and will continue to be targeted by hackers. A recent survey revealed that 91% of Americans believe they do not control their personal information that companies possess[31]. The only choice is for consumers to take action to protect themselves: be aware where their data goes and limit what they release. Don't worry though; we are committed to your privacy and are not collecting any personally identifiable information which may or many not be used to personally identify you, or are we?[32]

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PLAYING HARDBALL WITH THE ROOFTOP OWNERS: THE CUBS' CASE FOR WRIGLEY FIELD EXPANSION

By: Jack Meyer

Wrigley Field has been the home of the Chicago Cubs since 1914 and is the second oldest ballpark in Major League Baseball. The iconic venue has remained largely unchanged throughout the past century, and only recently has Cubs ownership declared a substantial renovation a necessity. The Cubs have not won a World Series since 1908 and the Ricketts family, who took over ownership of the team in 2009, view an out of date ballpark as a serious impediment to fielding a winning team. The Rickettes have proposed a privately funded $575 million renovation to Wrigley Field. The renovation is expected to be completed in four phases beginning in 2014 and lasting until 2018 which will upgrade the stadium in a variety of ways such as providing additional seating capacity with outfield bleacher expansion, revenue generating advertising signs in the outfield, and a new clubhouse designed to attract free agents to the team. The biggest roadblock is a complicated contractual situation with the rooftop owners who signed a contract with the Cubs in 2004, whereby the owners pay a percentage of their profits to the Cubs for the right to sell admission to their rooftop views of Cubs games. The Wrigley Field renovation plan would obstruct the views of the rooftop owners who have erected bleachers on top of buildings outside of the stadium. In short, "Ricketts says the signs will generate the advertising dollars he needs to build a winning team. (The Cubs began this season with a payroll ranked 23rd in the league.) The rooftop owners say the signs will put them out of business." After an inquiry into the contractual language as well as an investigation into the business ramifications, it becomes readily apparent that the Cubs should continue with the Wrigley Field renovation despite the rooftop contract.

In order to properly understand the conflict between the Cubs and the rooftop owners, one must first possess a basic knowledge of the history of Wrigley Field. Unlike most modern stadiums which are constructed in large open spaces adjacent to massive parking lots, Wrigley Field sits in the middle of a residential neighborhood on Chicago's North Side. Because of this, a few fans in the 1970's and 1980's who happened to live in the apartment buildings across the street from Wrigley Field began to watch Cubs games while sitting in lawn chairs on top of their roofs. This was a charming and unique feature of the ballpark and television cameras would often capture small groups of people grilling and drinking beer on their rooftops on sun drenched summer afternoons. Those quaint and charming images are now distant remnants of a bygone era and the rooftops of today have evolved into sophisticated commercial enterprises generating $20 million annually with massive bleachers constructed on top of the same roofs once inhabited by a handful of primitive lawn chairs.

The transformation of the rooftops into big business prompted a lawsuit by the Cubs in 2002, claiming that the rooftops unfairly profited off the team by competing with the Cubs for ticket sales. The lawsuit was settled in 2004 with a contract which has formed the basis of the current controversy. Under the terms of the contract, the rooftop owners were to pay the Cubs 17% of their annual profits in exchange for the right to sell tickets to Cubs games. The contract also provided provisions in the event that renovations to Wrigley Field would obstruct the view from the rooftops. These provisions are crucial to the Cubs' case because in every contract dispute it is imperative to look at the intent of the parties at the time the contract was made. The specific language of the contract states:

"The Cubs shall not erect windscreens or other barriers to obstruct the views of the Rooftops, provided however that temporary items such as banners, flags and

decorations for special occasions, shall not be considered as having been erected to obstruct views of the Rooftops. Any expansion of Wrigley Field approved by governmental authorities shall not be a violation of this Agreement, including this section."

The clause regarding "windscreens and other barriers" could potentially be seen as ambiguous and the rooftop owners would likely attempt to make the case that the outfield signage and videoboards proposed by the renovation would violate the contract by falling under the umbrella of "other barriers." At the time the contract was signed in January 2004, the Cubs had used windscreens to block the rooftops' view of the ballpark during the 2003 season while their lawsuit against the rooftops was pending. In the event that the rooftop owners would challenge this provision, a judge would likely interpret the contractual language narrowly, as referring specifically to windscreens or other similar barriers, and not large videoboards or outfield signs.

Wrigley Field expansion was certainly foreseeable to the parties at the time of the contract and there are other provisions which deal more directly with this possibility. For example the Cubs agreed to reimburse the rooftop owners for construction costs if higher rooftop bleachers needed to be constructed due to Wrigley Field expansion. The contract also contained a provision regarding the Cubs' obligation if Wrigley Field expansion made the rooftop businesses no longer viable, but it is noteworthy that this provision expired in 2012. Thus, both parties were aware of the potential for Wrigley Field expansion, and the rooftop owners cannot argue that the expansion was something that which figuratively (and now literally) came out of "left field."

Of immense importance is the clause referring to Wrigley Field expansion being

approved by a government entity. This, more than any other clause, can be seen as a death blow to the rooftop owners. Wrigley Field has been designated as a landmark by the Chicago City Council, meaning that the Cubs needed approval from the city to expand Wrigley Field. The City of Chicago approved the renovation plan in July 2014 ; thus the expansion of Wrigley Field is not a violation of the rooftop contract because it was approved by "governmental authorities."

The Cubs have recently began construction on the four year renovation of Wrigley Field and Cubs Chairman Tom Ricketts has stated publically that he intends to continue with the plan of erecting outfield signs and videoboards despite the rooftop contract. Ricketts is right to continue with the renovation plan for several reasons. First, the express and implied language in the contract favors the Cubs. Second, the Cubs have far greater financial resources than the rooftop owners and are likely to win a drawn out legal battle. Third, even if in the rare event that the Cubs would lose in court, the projected revenues of a renovated Wrigley Field make a breach of the rooftop contract an immensely better business decision than adhering to the current contractual constraints.

The business model behind the Wrigley Field renovation is relatively simple. The new outfield signs and videoboards will generate advertising revenue that can be used to pay higher player salaries and in turn make the team more competitive. A more competitive team, coupled with the Cubs' already strong national fan base, will likely lead to a highly lucrative television contract when the Cubs' current television deal expires in 2019 . (Ideal timing with the renovation scheduled to be completed in 2018). For a point of reference, the Los Angeles Dodgers recently signed a television contract with Time Warner worth $7 billion and it is a widely held belief that the Cubs potential contract will far exceed that of the Dodgers.

Fueled by the revenues of this contract, which are unmatched by any other team in a sport with no salary cap, the Dodgers have fielded one of the most talented rosters in the Major Leagues.

The Cubs have fielded an intentionally mediocre roster in recent years in order to amass high draft picks and to save money to spend on potential free agents in the near future. This mediocrity is a part of a larger plan which centers around a renovated Wrigley Field and the Cubs would not be able to complete this plan if they were to adhere to the current rooftop contract. Thus, public support would likely be on the Cubs' side if they decided to breach.

Ultimately the only statistic that truly matters to a sports franchise owner is that of wins and losses. Therefore, it is not simply the renovation to Wrigley Field itself that matters, but rather, it is the after effects that are projected to come with the renovation that will add immense value to the team. The Cubs and the rooftop owners could still reach a settlement agreement at any time in the near future, but as it stands right now, the Cubs should continue the Wrigley Field renovation and force the rooftop owners to sue. Could the rooftop owners be the final impediment standing in the way of a legendarily elusive World Series title for the Cubs? Only time will tell, but Cubs fans have waited long enough.

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