ILLINOIS BUSINESS LAW JOURNAL

A Publication of the Students of the
University of Illinois College of Law

FALL 2015 ISSUE, VOLUME 20

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DAILY FANTASY SPORTS & MODERN REGULATION

By: Alex Karl

American consumer markets are always seeking to develop new cutting edge ways to make money. One ever-present revenue goliath is the sports industry, which generates roughly $14.3 billion annually.[1] With every industry there are others who try to latch on and make a profit of their own, and this is no different with the sports industry and Daily Fantasy Sports (DFS) sites. DFS websites such as FanDuel and DraftKings hone into this market by allowing it's users to enter into contests where they create lineups from athletes in their respective sports in an attempt to win money.[2] The sites offer contests on a range of sports, including the NFL, NBA, MLB, PGA and more.[3] After choosing a contest you wish to join and paying a fee, users are allotted a set budget in which to create their lineup and each respective athlete is given a salary cost which when chosen detracts from your budget.[4] The athletes salaries are determined by their past performances, and a projection for how well they will do in this contest.[5] When the athletes are performing they are given points based on their statistics (I.E. touchdowns, baskets made, homeruns).[6] After the points are assigned, the owners whose lineups performed the best are the winners, and are given a cash payout.[7] Overall DFS is a spin-off of traditional fantasy sports which require year-long commitments to players by allowing owners to enter as many contests as they wish, and create new lineups each time. DFS websites make money from their users by taking a 10 percent cut of entry fees: fees which can range from $.25 to $10,600.[8] The DFS branch of the sports market is booming, and users will spend roughly $3billion in entry fees this year.[9] However while expansion has been rapid, some states such as New York are trying to shut down the websites.[10] In New York the attorney general has sent cease-and-desist letters

to both FanDuel and DraftKings by claiming they constitute illegal gambling, and is seeking a preliminary injunction during a lawsuit on the sites.[11] My goal in this piece is to outline the attorney general's argument against DFS websites, contrast DFS to other gambling allowed within the state, and suggest how states can handle DFS moving forward.

On November 17th, 2015 the New York attorney general wrote a memorandum of law which supports his argument for a preliminary injunction in the lawsuit against DFS. First, the attorney general highlights federal law that defines a bet or wager in terms of illegal gambling. A bet or wager can be defined as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance".[12] The key takeaway from this federal statue is that an outcome must be subject to chance, as this is the whole basis of the attorney generals argument. In his memorandum he argues the fees paid are bets, and the outcome of the contests depend on a "material degree" of chance.[13] He sites many factors that are out of the DFS player's control, such as athlete injury, which determine the outcome of the contests.[14] Next he moves on to discuss the wagers in relation to unlawful internet gambling, which means "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the internet where such bet or wager is unlawful under any applicable federal or state law".[15] The attorney general claims the sites constitute gambling by this definition and in violation of the Unlawful Internet Gambling Enforcement Act. However, FanDuel and DraftKings have countered by claiming they are exempt because of three provisions within the statute. The provisions state "(1) Payouts are made clear to users before the game takes place, and the number of users does not determine the payout. (2) Winning reflects "the relative knowledge and skill of the participants and are determined predominantly" by the accumulated statistics of individuals

across “multiple” sporting events. (3) Users can’t win prizes as a result of the performance of a team as a whole (say, the entire San Diego Chargers), the outcome of a game or the performance of a “single” individual athlete.”. [16] Despite the sites claiming they satisfy these conditions, the State is strongly holding that the contests are games of chance, and thus illegal. In order to give some backing to their argument, and identify harm aimed to be prevented, the State highlights the prevalence of gambling addiction. The attorney general claims there has been an increased amount of people claiming to be addicted to DFS at Gamblers Anonymous meetings, and meeting with counselors.[17] Also, the memo discusses how DraftKings has received numerous inquiries to their customer service representatives, citing gambling addictions in an effort to shut down their accounts.[18] While it is obvious gambling addiction is a significant harm to many people’s lives, and one which the State can cite public health and safety rational for an injunction, their argument seems somewhat week in my opinion because of the other available means in which one can legally gamble. Currently in New York the Gaming Commission recognizes the lottery, horse racing, video gaming terminals, electronic gaming terminals, and casinos as legal means of gambling.[19] These means are readily available statewide and depending on the service allow anyone over the age of either 18 or 21 to gamble legally. While the attorney general cites an increased gambling addiction concern from DFS websites, he fails to acknowledge the other means available for people to get their gambling fix. Being addicted to something is a disease, and true addicts will always find alternative means to satisfy their desire. While it cannot be overlooked that the availability of the internet and DFS websites create means of gambling which are now easily accessible, it still does not negate how many opportunities the State allows for its citizens to gamble on a daily basis. Currently, there are 8 horse racing tracks within New York.[20] In addition to this, there are 5 legal Off Track Betting facilities which allow for individuals to sit

and bet on horse races all across the nation.[21] Horse racing, by using the attorney generals definition from his memorandum, is a game of chance. After a bet is placed the outcome is directly subjected to a "material degree" of chance as a horse could get injured, or not perform up to par. Even if the attorney general were to claim these facilities are not as readily available as logging onto the internet, one can still play the most readily available game of chance; the lottery. Any individual who is 18 can walk to the nearest convenience store and buy a scratch off. This is no different than navigating the internet to set a lineup, and DFS takes more skill than using a lucky penny. While the argument I am presenting for DFS is somewhat of a fallacy because I am not claiming DFS does not include a "material degree" of chance, but rather painting the attorney generals claims as hypocritical, I still think it brings to light a potential resolution. The State is clearly not opposed to gambling, as it has promoted other legal forms. However, one thing that all the legal forms of gambling have in common is they are heavily regulated by the state.

New York State currently has the second highest debt in the nation with $141.4Billion.[22] The State should be looking for any opportunity to take a bite out of the debt. Allowing DFS to exist but taxing its revenue would be mutually beneficial. Last year after paying out prize money, New York made roughly $2.9billion from lottery regulation.[23] While the lottery may be a larger source of State revenue than DFS can be, taxing these sites would still bring in a large sum of money. New York makes up a large portion of DFS users, as it is roughly 7 percent of DraftKings user base and 5 percent of FanDuel's.[24] It would behoove the State to take advantage of this opportunity and implement a system similar to the one it uses to tax horse racing. Currently, depending on the bet type, the State takes a set percentage ranging from 15 to 25 percent of each wager placed on a horse race.[25] In handling DFS, the State should take a set

percentage from each fee paid by the users of the site, and use the revenue to either help pay off State debt, or give funding to other areas in need. The attorney general attempting to stop DFS by claiming they are gambling, and citing gambling addiction reasons is nonsensical. While I have not gotten into whether or not these sites constitute gambling by the legal definition laid out from the state, I will argue the State is promoting a false cause at the expense of an opportunity to increase State revenue. Ultimately, DFS and the State can coexist in the realm of legal gambling, and it would be extremely lucrative for both.

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[2] Louis Bien, Everything You Ever Wanted to Know About Daily Fantasy Sports and Why They're Getting Sued, (Nov. 24, 2015),http://www.sbnation.com/2015/11/24/9791608/draftkings-fanduel-daily-fantasy-sports-lawsuit-new-york-internet-gambling.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] Elaine S. Povich, States Consider Regulation of Daily Fantasy Sports Sites FanDuel and DraftKings, (Dec. 2, 2015),http://www.usatoday.com/story/sports/fantasy/2015/12/02/pew-stateline-state-regulation-daily-fantasy-sports-fanduel-draftkings/76660516/.
[10] Bien, *Supra*.
[11] *Id*.

[12] 31 U.S.C. § 5362

[13] Eric T. Schneiderman, Memorandum of Law In Support of Motion for a Preliminary Injunction, (Nov. 17, 2015),http://www.ag.ny.gov/pdfs/DK_MOL.pdf.

[14] *Id*.

[15] 31 U.S.C. § 5362

[16] Bien, *Supra*.

[17] Schneiderman, *Supra.*

[18] *Id*.

[19] https://www.gaming.ny.gov/gaming/.

[20] Horse Racing & Pari-Mutuel Wagering,https://www.gaming.ny.gov/horseracing/.

[21] *Id*.

[22] Christopher Chantrill, Comparison of State and Local Government Spending in the United States,http://www.usgovernmentspending.com/compare_state_spending_2016bH0d.

[23] Traditional Lottery Sales Allocation,http://nylottery.ny.gov/wps/wcm/connect/d3b44b48-2e98-4412-826c-617da6140b97/2014-15_traditionalLotterySalesV2.pdf?MOD=AJPERES.

[24] Bien, *Supra*.

[25] NEW YORK STATE RACETRACKS AND APPLICABLE TAKEOUT RATES, https://www.gaming.ny.gov/pdf/NYSTakeoutRates0615.pdf.

AUTOMATED VEHICLES: STRICT PRODUCTS LIABILITY, NEGLIGENCE LIABILITY AND PROLIFERATION

By: Steven Wittenberg

The proliferation of automated vehicles (sometimes called “self-driving cars”[1] or “autonomous cars”[2]) is poised to make American roads safer by reducing or even eliminating human error, which is the leading cause of collisions. In 2008, the National Highway Traffic Safety Administration (NHTSA) reported that 40 percent of crashes occur because of “recognition error,” which includes “inadequate surveillance” and “internal distraction,” while 35 percent of crashes arise from “decision error,” which includes speeding and misjudgments.[3] Automated vehicles can increase driver safety by removing driver error from the situation.[4]

California, Nevada, Michigan, Florida, and D.C. are the only states which have pioneered legislation regulating automated vehicles on public roads.[5] Virginia has dedicated 70 miles of a highway for public road testing.[6] To provide some background, the California statute requires drivers of automated vehicles to obtain a special license.[7] Additionally, the vehicles must have a way to “disengage the autonomous technology that is easily accessible to the operator.”[8] If the technology fails, the driver must take control or the car will initiate a complete stop.[9] Further, each vehicle is required to record “autonomous technology sensor data” thirty seconds before collisions that is retained for three years.[10] The statute also requires five million dollars of insurance for those conducting public road testing of automated vehicles.[11] Moreover, the statute bestows NHTSA regulations with superseding authority over California state provisions.[12]

Undeniably, defective autonomous technology will cause accidents for users of automated vehicles, which unfastens the question of who should be held liable. [13] The legal framework for accident liability is bifurcated into strict products liability and negligence theory.[14] Strict products liability may place fault solely on the manufacturer and will lead to increased consumer cost, but will produce higher demand. Strict products liability benefits plaintiffs because the burden of proof is relatively relaxed. Negligence liability, on the other hand, will create a more refined system of comparative fault and will present a cheaper price per unit for consumers, but it may unduly deter prospective buyers of the nascent technology. The proof required for negligence is much greater than strict products liability. Both theories of recovery will run into causation issues because other drivers will likely be the ones crashing into the automated vehicles due to their own fault; therefore, the automated technology will often not be the cause in fact of the accident. In the beginning, it may be necessary for manufacturers to promise they will assume liability for accidents that arise during autonomous mode, regardless of who caused the accident, to achieve strong initial product growth. Strict products liability's ability to assuage consumers' fear of liability outweighs the likely modest benefit of a reduced cost per unit gained in negligence theory. Therefore, the best legal theory for recovery is strict products liability because it assures risk averse consumers they will not be held liable when defective technology causes an accident, which will ultimately increase road safety as more automated vehicles hit the road.

STRICT PRODUCTS LIABILITY RECOVERY

Strict products liability is the most efficient way to allocate liability for potential collisions caused by automated vehicles. Under this theory, there need not be any blameworthy state of mind or negligence on behalf of the manufacturer for

liability to attach.[15] Rather, strict products liability merely requires that (1) the product was defective when it left the automated vehicle manufacturer's control, (2) it was unreasonably dangerous, and (3) the defect was the actual and proximate cause of the injuries.[16] Potential cases of unreasonably dangerous defects by the manufacturer could include accidently shipping prototype software instead of "market-ready version[s]"[17]and failed manual override implements, which may result in preventing the driver from taking over the steering wheel or using the brakes. In addition, the technology may be too cautious and could lead to accidents by failing to take necessary risks to avert harmful contact with other vehicles or obstacles (i.e. evasive maneuvering).[18]

The policy implications of a strict products liability regime for accidents arising from automated vehicle defects are mixed. It would benefit consumers because it would pressure manufacturers of automated vehicles to sell fewer defective cars. Moreover, it would enable courts to resolve conflicts with relatively little administrative cost because there does not need to be any evidence of misconduct as "[t]he production and marketing of a defective product" is, itself, the evil act.[19] The legal cost for plaintiffs would also be relatively low because it would require less attorney time because the *prima facie*case is easier to fulfill. Additionally, the discovery process for evidence would be more straightforward and would involve fewer countermotions. Further, malfunction theory affords the inference that a defect exists, provided there are no other possible causes or evidence of abnormal use.[20] In terms of principle, *caveat emptor(*"let the buyer beware") is obsolete in an age of high technology and industry, especially for products claiming to be fully autonomous like the automated vehicle. It is argued the cost should be absorbed by the manufacturers because they are in the best position to avoid defective products.[21]

On the other hand, in instances of comparative fault of multiple actors, strict products liability is less flexible because there are only three affirmative defense for the manufacturer, which are the plaintiff's (1) misuse, (2) unreasonable assumption of risk, and (3) unreasonable failure to discover or foresee dangers.[22] Furthermore, the increased cost of ensuring vehicle safety might be passed on to consumers, which may bring about excessive deterrence, although there is little precedent for safety features increasing cost.[23]However, the safety features involved with autonomous technology are high tech software and digital hardware, not simple seatbelts and airbags, which are plausibly more costly to produce. Likely, however, any increased cost will not stifle the development of automated cars because there has already been significant investment in the product. Moreover, manufacturers are already offering to compensate for damages caused by defective technology.[24]

ABNORMALLY DANGEROUS ACTIVITY LIABILITY RECOVERY

An alternative to strict products liability recovery is to categorize driving an automated vehicle as an "abnormally dangerous activit[y]" (ADA).[25] This alternative would place liability with the driver of the automated vehicle for choosing to pursue the activity. ADA liability takes into consideration the following factors: (1) the risk of great harm; (2) the "inability to eliminate the risk by exercise of reasonable care;"[26] (3) the uncommonness of the activity; (4) the unsuitability for the locale; and (5) the social value of the activity.[27] The best potential cases of an ADA liability could involve driving an automated vehicle in a location where the manufacturer did not anticipate the driver to traverse or perhaps in a dangerous environment where the manufacturer instructed the driver not to travel (e.g. during severe weather). Both scenarios could subject the driver and others to high risks of great harm. However, both scenarios fail to the second

factor of the ADA test because the risks could be eliminated by exercising reasonable care by not driving in those dangerous settings.

The activity of driving an automated vehicle is not an ADA. First, although the activity of driving an automated vehicle may have a higher risk of harm than that of driving a normal vehicle, the probability of harm is likely not high enough to be sufficient for ADA liability. [28] Further, on public roads and places where autonomous vehicles are likely to be found, the harm risked is not of great magnitude. For example, automated vehicles have been shown to create less severe injuries compared to ordinary vehicles.[29]Second, the causes of these accidents will very likely be caused by other drivers through no fault of the automated technology.[30] Thus, drivers of automated vehicles will not be able to eliminate the risk through careful operation if other drivers are the cause of their accidents, therefore the second factor is fulfilled.[31] Third, as the product is new, the activity of driving an automated vehicle is uncommon. However the activity of driving a vehicle is not uncommon, and the risks associated with driving an automated vehicle will likely not differ greatly from driving a conventional vehicle, thus driving an automated vehicle is likely not uncommon. Fourth, driving automated vehicles on public roads suits the locale because "the *only* place where the activity can be carried on must necessarily be regarded as the appropriate one."[32] Fifth, the social value to the community is high because the states that have allowed automated vehicle benefit from jobs, tax revenue, and prestige as a leader in technology.[33] In sum, the activity of driving an automated vehicle is not an ADA because there is no high risk of great harm, it suits the locale, it is relatively common, and it conveys sufficient social value, although it satisfies the second factor that the risk cannot be eliminated by exercising reasonable care.

NEGLIGENCE RECOVERY

Negligence theory, albeit less efficient than strict products liability recovery due to heightened burden of proof requirements, benefits from a more fair distribution of liability between blameworthy parties. Negligence is established when there is (1) an act or failure to act that falls below the standard of due care (i.e. a breach), which (2) actually and proximately causes an injury to an individual to whom (3) a duty is owed.[34] In the context of automated vehicles, manufacturers owe a duty to use reasonable care in the design of their automated vehicles to avoid unreasonable risks of injury and to minimize injuries in the event of an accident.[35] Moreover, there is a duty to build cars without "latent or hidden defects,"[36] which would include defective automated technology. An example of a breach of that duty would be simply failing to warn of or make safe defects or hazards in the automated vehicle. Actual causation requires the defect to be the cause in fact of the accident, while proximate causation limits injuries to "those physical harms that result from the risks that made the actor's conduct tortious."[37] Negligence liability may be established as negligence *per se* or as evidence of negligence if a statute or regulation is violated.[38] For negligence *per se* to be used, the statute or regulation must be (1) intended to protect a specific class of plaintiffs of which the plaintiff is relevant member and (2) designed to prevent the type of injuries that the plaintiff sustained.[39] For example, software defects that prevent collecting sensor data thirty seconds before collisions violates the California statute.[40] However, this specific provision is not designed to prevent collisions, rather, it is designed to ensure data is recorded to determine how the accident unfolded and to prevent future accidents. Therefore, the sensory data collection provision cannot be used for negligence *per se* recovery for collisions.

The doctrine of comparative negligence allows a more fair distribution of fault between causal actors. Shares of responsibility are assigned in percentages to those with legal responsibility, including the negligence of the driver of the automated vehicle. [41] To illustrate, before an accident occurs, the driver of an automated vehicle might be negligent by failing to carefully watch the road, failing to take control of the steering wheel, or failing to apply the brakes. Alternatively, he or she might fail to perceive a warning that the automated technology is currently defective. The defendant manufacturer bears the burden to prove the plaintiff driver was also negligent.[42] If the factfinder finds the driver is a legal cause of the accident, then the responsibility must be apportioned between the driver and other negligent actors.[43] Fault is assigned based on the individual's "awareness or indifference with respect to the risks created . . . and any intent with respect to the harm caused . . . and the strength of the causal connection between the person's risk-creating conduct and the harm."[44] Therefore, the defendant, or other drivers, would need to show the driver of the automated vehicle had some awareness of the risks.

Negligence recovery allows apportionment of fault between parties, including those who could have avoided the accident in a cost-efficient manner. For instance, the manufacturer can economically include a warning system alerting the driver when the automated technology goes offline. Also, the driver can easily assume control when things go awry while the automated technology does the bulk of the navigating and driving. Historically, comparative fault was not available and plaintiffs were barred recovery if they were negligent in any amount through the doctrine of contributory negligence.[45]Today, however, comparative negligence is welcomed as a more efficient and evenhanded theory as it can "lead to an improvement in economic welfare" because it allows sharing or apportioning of damages.[46] Comparative negligence is more efficient because it effectuates the goal of deterrence and punishment with greater specificity, while

still compensating the plaintiff with what he or she is owed. Although it may create a fairer and more efficient system of compensation, the legal costs of a negligence regime are higher than strict products liability. Parties, notably optimistic defendants who hope to only be partially liable instead of liable for the whole of the damages, may be encouraged to take their chances in court instead of coming to a timely and efficient settlement, which raises attorney fees for all relevant parties. Further, more court cases increase administrative costs because they burden the court system with complex issues. In addition, a court outcome might produce an unfair apportionment between defendants because juries and jurists lack perfect knowledge. Although the legal costs are amplified in a negligence regime, the cost per automated vehicle will be lower than a strict products liability regime; manufacturers will enjoy a natural buffer against liability because of the more rigorous negligence test. Roads will become safer as a result of more consumers driving automated vehicles because of the reduced cost of negligence liability on manufacturers.

CAUSATION ISSUES

The plaintiff must display evidence that the defective automated technology was the actual and proximate cause of the accident to recover.[47] For strict products liability, the defect must have proximately caused the harm in a "reasonably foreseeable" way. Courts have determined that automobile accidents are a reasonably foreseeable consequence of defective automated technology.[48]Manufacturers must necessarily "contemplate [their products'] travel on crowded and high speed roads and highways that inevitably subject it to the foreseeable hazards of collisions and impacts."[49]Thus, establishing proximate causation will not be an issue where defective automated vehicles will foreseeably be involved in accidents (i.e. in their everyday use).

The chief issue of automated technology will be proving actual causation. For strict products liability, the evidence must show the defect was “more likely than not” the actual cause of the harm.[50]Other drivers will likely be the ones crashing into automated vehicles. For example, all of Google’s eleven accidents have not been caused by automated technology, but rather by human error.[51][52]Foreseeably, in most cases, the manufacturer will not be held liable because it likely would not have caused the accident, but instead would merely have created one of the instruments involved in the accident. In a rear end collision, for example, but-for the automated technology, the accident would still have resulted.

In October of 2015, Volvo’s CEO announced his company would “accept full liability whenever one of its cars is in autonomous mode.”[53] This offer goes beyond traditional legal methods of recovery because it does not matter if the automated technology was the cause in fact. The covenant is likely designed to attract potential customers by conveying not only confidence about the vehicle’s safety, but also assurances there will be no future out-of-pocket legal or compensatory costs from accidents coming from the automated technology. A potential inefficient outcome is that a Volvo automated vehicle driver could be double-compensated by Volvo for an accident because of its covenant and also by the other driver(s) and defendant(s) (possibly including the manufacturer, again) who caused the accident through a judicial decision. Still, Volvo’s strict manufacturer liability pledge might be the jump start needed to properly incentivize buyers.

ASSUMPTION OF RISK

An affirmative defense to liability is provided if the plaintiff-driver assumed the risks associated with driving an automated vehicle. Under this theory, by proceeding with the activity of driving the vehicle in autonomous mode, the driver "manifests willingness to accept [the risk]," and is barred recovery.[54] However, the assumption of risk must not be contrary to public policy.[55] It is possible assumptions of risks arising from defective automated technology violate public policy because it puts other drivers on the road at risk. Also, it may be deemed unfair and harsh to preclude recovery to poorer classes of drivers who seek a cheaper bargain for automated cars by contracting away their rights. However, there is some precedent for manufacturers to create a valid release to limit their liability from collisions because car accidents are foreseeable.[56] Conversely, if accidents resulting from defective automated technology are considered *unforeseeable*, then it assumptions of risks and releases may be void.

PROLIFERATION

The main public policy goal of the proliferation of automated vehicles, notwithstanding the economic benefits to the municipality and state, is the improvement of vehicle and road safety. To that end, the more automated vehicles on roads, the better our collective safety. In addition to saving lives, increased automobile safety has a positive financial impact. It is predicted that a reduction in automobile-related deaths could save over $400 billion each year.[57] The primary question, then, is whether negligence or strict products liability will lure in more consumers to buy automated vehicles. Strict products liability will likely enhance proliferation more than negligence liability because it provides greater consumer security.

Consumers are risk averse and seek security when purchasing new technologies like the automated vehicle. Naturally, potential drivers will be more amenable to automated vehicles if they have assurances the manufacturer will be held strictly liable. The legal costs involved with strict products liability are significantly lower than with negligence because a breach of duty does not need to be established. Moreover, settlements will be achieved earlier because the burden of proof is met more easily than negligence. Although negligence provides a more equitable and fair regime of recovery, the positive social utility of enhanced road safety by the proliferation of automated vehicles through a strict products liability regime presents greater social value.

Volvo's promise to bear liability for accidents involving their automated technology indicates that strict products liability, at least initially, may be the preferred route to overcome consumer risk aversion. Toyota's national manager, John Hanson, suggested that consumer trust in automated vehicles is essential to their proliferation.[58] Trust can be developed by a broad assumption by the manufacturer to bear all costs caused by the automated technology. Negligence recovery may not provide the necessary legal safeguards to confer trust to new consumers of automated vehicles. Additionally, because some manufacturers are offering to assume liability for accidents caused by automated technology, manufacturers who do not make such an offer will likely sell fewer automated vehicles.

According to a 2014 online survey of 782 individuals, the top reasons for buying a new car are (1) reliability, (2) price, (3) running costs, (4) fuel efficiency, and (5) safety rating and features.[59] Although safety may be a strong public policy goal of cars, it is not the top goal for consumers. One solution is a marketing campaign designed to make driving an automated vehicle into a symbol of

enhanced safety. Consumers might brand themselves in their communities with identities subscribing to a lower automobile fatality rate through their automated vehicle. An analogy is driving a “green” environmentally-friendly vehicle (e.g. a Toyota Prius), which functions as a message to others that the driver is environmentally conscious. Additionally, if studies can depict automated vehicles as being extraordinarily safe, it may be a strong enough marketing tool to have a greater influence in consumers’ purchasing decision.[60] For example, even though other drivers might crash into an automated vehicle, automated technology can mitigate the severity of harm by making split-second decisions faster and smarter than human drivers. Highlighting such a safety feature may attract enough consumer attention to boost automated vehicle sales. The consulting firm Booz Allen suggests that “own[ing] the coming transformation,” is an important factor for a successful automaker, so perhaps good advertising may be enough. [61] A strong ad campaign can create the impression that the manufacturer is ahead of the curve. Further, automated vehicles may have a strong opportunity for robust initial growth because they are novel, and consumers likely believe novel cars as reliable and efficient (the first and fourth factors, respectively, in the aforementioned study).[62]Through competitive pricing and increased consumer acceptance, sales of automated vehicles should increase and costs should decrease.[63]

CONCLUSION

It is forecasted that by the year 2020, there will be ten million automated vehicles on the road.[64] Although more automated vehicles on the road will likely increase traffic safety, accidents involving such vehicles are guaranteed to occur. Regardless of whether strict products liability or negligence is used to determine how fault should attach after an accident, it may be necessary for manufacturers to

initially covenant that they will compensate for all damages caused by their technology to be competitive with companies like Volvo. Over time, the covenant to assume damages may no longer be required as consumer trust in the product grows. However, at some point a case will be brought against the manufacturer of the automated vehicle and the court will be forced to consider the strict products liability and negligence regimes. Both theories are workable for plaintiffs to recover for damages caused by automated technology defects.

Strict products liability removes the need for the driver to prove the manufacturer acted negligently in the production of the defective autonomous vehicle. It adheres to modern principles that highly technical products like autonomous vehicles should be free of defects. Although it may unfair to hold manufacturers liable, strict products liability encourages manufacturers to have superior quality assurance and control standards, which benefits the public. Moreover, it will be easier to administrate with fewer discovery problems and fewer countermotions, and will reduce legal fees for plaintiffs and defendants alike. Nevertheless, strict products liability could increase the cost of automated vehicles because manufacturers will need to absorb more liability, which they might pass on to consumers in the cost per unit.

Negligence theory delivers a fairer system of damages by attempting to provide for the most efficient outcome. The goal of negligence theory is to deter and punish the right actors with the right amount of damages, while fully compensating the plaintiff. It requires a higher showing of proof, which is harder to administrate, and increases legal fees. However, it will likely decrease the cost of each vehicle because manufacturers can budget for lower legal liability, which should increase sales of automated vehicles, which in turn will increase road safety as they proliferate.

A strict products liability regime for defective automated vehicles is ideal because it is more plaintiff-friendly than negligence as the burden of proof is easier to show and will more quickly resolve legal issues for plaintiff drivers. Strict products liability will encourage risk averse consumers to buy automated vehicles, therefore, roads will become safer.[65] Negligence, on the other hand, may unduly deter potential consumers of automated vehicles; despite the lower cost per unit on account of the manufacturer's lower legal burden, the risk of liability for drivers may appear excessive. Undeniably, automated vehicles do not have the benefit of decades of testing and defects are highly plausible. Strict products liability's capacity to assuage consumers' fear of liability outweighs the likely mild benefit of a reduced cost per unit granted in negligence theory.

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[4] *See* James M. Anderson et al., *Autonomous Vehicle Technology: A Guide for Policy Makers*, RAND Corporation (2014), http://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR443-1/RAND_RR443-1.pdf.
[5] Cal. Veh. Code § 38750 (West 2015); Mich. Comp. Laws Ann. § 257.665 (West 2014); Nev. Rev. Stat. Ann. § 482A.100 (West 2012); Fla. Stat. Ann. § 316.86 (West 2014); D.C. Code Ann. § 50-2352 (West 2013).

[6] Mariella Moon, *Virginia Opens Up 70 Miles of Highway for Driverless Car Testing*, Engadget (Jun. 3, 2015), http://www.engadget.com/2015/06/03/virginia-driverless-car-testing/.

[7] § 38750.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] The term "accident" is used loosely to mean "unintended collision" or any instance where an autonomous vehicle is damaged or causes damage without purpose to do so.

[14] *See also* John Villasenor, *Products Liability and Driverless Cars: Issues and Guiding Principles for Legislation*, Brookings Institution (April 2014), http://www.brookings.edu/~/media/research/files/papers/2014/04/products-liability-driverless-cars-villasenor/products_liability_and_driverless_cars.pdf (discussing also misrepresentation and breach of warranty as theories of recovery for automated vehicle accidents).

[15] 63 Am. Jur. 2D *Products Liability* § 519 (2015).

[16] 72A C.J.S. *Products Liability* § 35 (2015).

[17] *See* Brookings, *supra* note 6.

[18] *See, e.g.*, Mark Lelinwalla, *Google's Driverless Cars are Too Safe at this Point*, Tech Times (Sept. 1, 2015, 1:20 PM), http://www.techtimes.com/articles/81094/20150901/googles-driverless-cars-safe.htm (explaining Google's self-driving car decelerated to let a pedestrian pass a crosswalk and was hit by another car in the rear).

[19] Am. Jur., *supra* note 14.

[20] 72A C.J.S. *Products Liability* § 230 (2015).

[21] *See* Kimco Dev. Corp. v. Michael D's Carpet Outlets, 637 A.2d 603, 606 (Pa. 1993).

[22] Victor E. Schwartz, *Strict Liability and Comparative Negligence*, 42 Tenn. L. Rev. 171, 172 (1974-75).

[23] *Compare* Daniel Sperling et al., *The Price of Regulation*, Access (Fall 2014), http://www.its.ucdavis.edu/wp-content/themes/ucdavis/pubs/download_pdf.php?id=194 ("Regulatory actions have not distorted or perturbed automotive markets and industry structure much over the last few decades.") *with* Robert W. Crandall et al., *The Cost of Automobile Safety and Emissions Regulation to the Consumer: Some Preliminary Results*, Carnegie Mellon University Research Showcase (1982), http://repository.cmu.edu/cgi/viewcontent.cgi?article=2181&context=tepper ("Manufacturers have managed to incorporate safety improvements into cars relatively inexpensively (with exception to high-impact bumpers), whereas emissions constraints have required costly changes in auto manufacture.").

[24] Michael Ballaban, *Mercedes, Google, Volvo to Accept Liability when their Autonomous Cars Screw Up*, Jalopnik (Oct. 7, 2015, 11:47 AM), http://jalopnik.com/mercedes-google-volvo-to-accept-liability-when-their-1735170893 (introducing Volvo, Mercedes and Google as automakers who will accept liability for autonomous mode accidents).

[25] Restatement (Second) of Torts: Abnormally Dangerous Activities § 520 (1977).

[26] The "inability to eliminate the risk by exercise of reasonable care" is the most important factor in categorizing something as an abnormally dangerous activity, and if the risk could have been eliminated with due care, then negligence theory must be used as the theory for recovery.

[27] *Id.*

[28] *See* Brandon Schoettle & Michael Sivak, *A Preliminary Analysis of Real-World Crashes Involving Self-Driving Vehicles*, University of Michigan Transportation Research Institute (Oct. 2015), http://www.umich.edu/~umtriswt/PDF/UMTRI-2015-34_Abstract_English.pdf (revealing automated vehicles may not be safer currently).

[29] *Id.*

[30] *Id.* ("[S]elf-driving vehicles were not at fault in any crashes they were involved in.")

[31] *Id.*

[32] Restatement, *supra* note 26, (italics added).

[33] Thad Moore, *As Self-Driving Cars Come to More States, Regulators Take a Back Seat*, The Washington Post (Aug. 29, 2015), https://www.washingtonpost.com/business/economy/as-self-driving-cars-come-to-more-states-regulators-take-a-back-seat/2015/08/28/7a29413e-474f-11e5-8ab4-c73967a143d3_story.html ("Virginia is one of a handful of states seeking to attract the potentially lucrative business of developing self-driving cars. And along with a few other states, its lawmakers and regulators are inclined to welcome the industry — and get out of the way.").

[34] 65 C.J.S. *Elements of Actionable Negligence* § 20 (2015).

[35] Larsen v. Gen. Motors Corp., 391 F.2d 495, 504 (8th Cir. 1968).

[36] *Id.* at 503.

[37] Thompson v. Kaczinski, 774 N.W.2d 829, 838 (Iowa 2009).

[38] Restatement (Second) of Torts: Effect of Violation § 288B (1965).

[39] Craig v. Driscoll, 781 A.2d 440, 452 (Conn. 2001).

[40] § 38750.

[41] Restatement (Third) of Torts: Apportionment Liability § 8 (2000).

[42] *See id.* § 4.

[43] *Id.*

[44] *See id.* § 8.

[45] *See, e.g.*, Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809).

[46] Daniel L. Rubinfeld, *The Efficiency of Comparative Negligence*, 16 Journal of Legal Studies 375, 392 (Jun. 1987).

[47] 72A C.J.S. *Products Liability* § 35.

[48] Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1157 (Cal. 1972) ("Although a collision may not be the 'normal' or intended use of a motor vehicle, vehicle manufacturers must take accidents into consideration as reasonably foreseeable occurrences involving their products.").

[49] Larsen v. Gen. Motors Corp., 391 F.2d 495, 504 (8th Cir. 1968).

[50] 72A C.J.S. *Products Liability* § 230.

[51] Jerry Hirsch & Joseph Serna, *Humans at Fault in Self-Driving Car Crashes,* Los Angeles Times (May 12, 2015, 5:00 AM), http://www.latimes.com/business/la-fi-self-driving-accidents-20150512-story.html.

[52] *Cf.* Ballaban, *supra* note 24, ("[T]hat doesn't mean it's a physical impossibility that a self-driving car could *ever* be at fault, in a universe full of whimsical happenings.").

[53] Jim Gorzelany, *Volvo will Accept Liability for its Self-Driving Cars*, Forbes (Oct. 9, 2015, 11:38 AM), http://www.forbes.com/sites/jimgorzelany/2015/10/09/volvo-will-accept-liability-for-its-self-driving-cars/.

[54] Restatement (Second) of Torts § 496C (1965).

[55] *Id.* § 496B.

[56] *See* 61 Patricia C. Kussmann, Annotation, *Validity, Construction, and Effect of Agreement Exempting Operator of Fitness or Health Club or Gym from Liability for Personal Injury or Death of Patron*, 61 A.L.R. 6th 147 (2011) ("Because injuries associated with physical training and exercise are neither

unforeseeable nor unexpected, and because of the potentially large financial exposure associated with the inevitable injuries, gyms and health clubs generally require patrons to sign a release . . . . [T]he agreement was not void as a matter of public policy.").

[57] Lauren Keating, *The Driverless Car Debate: How Safe are Autonomous Vehicles?*, Tech Times (Jul. 28, 2015, 9:00 AM), http://www.techtimes.com/articles/67253/20150728/driverless-cars-safe.htm.

[58] *Avoiding Crashes with Self-Driving Cars*, Consumer Reports (Feb. 2014), http://www.consumerreports.org/cro/magazine/2014/04/the-road-to-self-driving-cars/index.htm.

[59] *Motorists Rank their Top Factors in Choosing a New Car*, The Telegraph (Oct. 1, 2014, 1:10 PM), http://www.telegraph.co.uk/sponsored/finance/hitachi/11130993/factors-new-car-choice.html.

[60] *See* Clifford Winston & Fred Mannering, *Consumer Demand for Automobile Safety*, 74 American Economic Review 316, 319 (May 1984) ("[I]f the benefits from safety devices are more firmly established and more widely known, then there will be a greater likelihood that they will be actually realized.").

[61] *The Connected Vehicle Movement*, Booz Allen Hamilton, http://www.boozallen.com/content/dam/boozallen/documents/2015/01/Auto_Market_Overview.pdf.

[62] Julia Pyper, *Self-Driving Cars could Cut Greenhouse Gas Pollution*, Scientific American (Sept. 15, 2014), http://www.scientificamerican.com/article/self-driving-cars-could-cut-greenhouse-gas-pollution/ ("[S]o-called intelligent transportation systems (ITS) could achieve a 2 to 4 percent reduction in oil consumption and related greenhouse gas emissions each year over the next 10 years as these technologies percolate into the market.").

[63] Consumer Reports, *supra* note 58.

[64] John Greenough, *10 Million Self-Driving Cars will be on the Road by 2020*, Business Insider (Jul. 29, 2015, 9:00 AM), http://www.businessinsider.com/report-10-million-self-driving-cars-will-be-on-the-road-by-2020-2015-5-6.

[65] Negligence *per se* may provide an equally plaintiff-friendly regime.

THE DANGER OF THE GAS TAX: TO PEOPLE, BUSINESSES, AND EVEN TO THE ENVIRONMENT

By: Joe Zender

Representative Earl Blumenauer of Oregon proposed an amendment earlier this year to raise the federal 'gas tax' from 18 cents per gallon to 33 cents.[1] While the proposal failed, this 82 percent increase is endemic of the exorbitant gas taxes and increases around the country, both at the federal and state levels. Even as gasoline consumption has leveled off in the U.S., national production of gasoline has increased drastically, leading to lower gas prices.[2][3]Even so, legislatures have moved to increase the burden on each gallon consumed by the taxpayers. The gas tax is now to a point where it unduly burdens businesses, citizens, and even potentially the environment. It should be eliminated and replaced with a more efficient and effective system for funding infrastructure.

The retail cost of a gallon of gasoline across the U.S. on October 1, 2015 was $2.42.[4] At the same time, the average state gasoline tax was 30.29 cents per gallon and the federal tax was 18.4 cents per gallon.[5] That means the total tax burden on a single gallon of gasoline was 48.69 cents. Without any tax, a gallon of gasoline on October 1st would have cost $1.93. This means that the current sales tax on a gallon of gasoline equates to roughly 25%. To put that into perspective, the highest state sales tax rate in the U.S. is a 9.45% tax in Tennessee.[6] There are even five states with no sales tax at all, including Oregon and Delaware.[7] As is fairly evident, the sales tax on gasoline is exorbitant and out of character with the rates other goods are taxed. Because of this wide disparity, revenues cannot be the only objective in mind, as they could be sought

in other areas with more regularity and conformity. Some believe that the true objective of gas tax stems from a motivation to protect the environment.[8]

There is no doubt that an increased cost, brought about by high gas taxes, decreases the amount of a product consumed.[9] Basic economics would say that no matter the size of the increased cost, it forces some purchasers out of the market.[10] However, even if the goal of decreasing gasoline consumption has been accomplished, it is likely causing adverse effects beyond merely costing fuel users more money. Akash Chougule, the Deputy Director of Policy for Americans for Prosperity, contends that an "important thing to remember about the gas tax is that increasing it would hit lower- and middle-income families hardest."[11] For families, their demand for gasoline is fairly inelastic, meaning that as price rises, their demand falls much more slowly. Families still need gasoline to power their vehicles, to get to work and to school, even if the cost increases. For those at lower income levels, the raised cost of gas due to a gas tax means that they spend more money on gasoline as a proportion of their income than do those of higher income. In other words, the gas tax imposes a heavier burden on lower income individuals. It saps up a larger proportion of income of those that least can afford it. Even if the gas tax was motivated by noble intentions such as environmental conservation, it imposes extra burdens on low income individuals and families. In addition to adversely effecting lower and middle income citizens, the objective of protecting and reducing harm to the environment might not actually be occurring. People and companies have to turn to other means for energy and power when they can no longer afford the typical fuels. For example, Greece recently increased their tax on heating oil and as a consequence its citizens could no longer heat their homes in that manner.[12] Instead of using heating oil, the people of Greece began burning wood and other substances in their homes.[13] Not only did this burning lead to greater air pollution across the entire country in

almost every major city, citizens started to illegally cut down trees for their fuel source.[14] So, not only was the air more polluted after the tax, which was meant to raise tax revenues and reduce consumption, major forests around cities like Athens were being cut down. While it isn't possible to cut down a tree to fuel a car, many companies have created more fuel efficient vehicles and begun to develop purely electric cars. But with the advent of these new vehicles comes new problems. In reality some studies have shown that electric cars are actually worse for the environment than traditional gas consuming vehicles.[15] This is not even considering the additional pollutants required to make the technologies, many of which come in the form of rare earth metals, mined by China in Inner Mongolia.[16] So while it may seem like sound policy to decrease gas consumption through the gas tax and thus prevent environmental degradation, it is very possible that the gas tax actually hurts the environment by promoting more environmentally dangerous behavior and consumption.

In addition to the foolhardiness of the decision to implement a gas tax, the way in which it is instituted is also significantly flawed. Given the competitive nature of the gasoline industry and its tax structure, the gas tax is inefficient in the short run and the entire tax is passed off to the consumers in the long run.[17] With gas stations placed in such close proximity to each other, their prices are in near perfect local competition.[18] At the same time, the gas tax is a per unit tax. In this situation, economic theory would say that in the short run the burden of the tax is shared between the seller and the consumer.[19]When the per unit tax is implemented, it pushes the market out of equilibrium. The amount buyers are willing to pay exceeds the amount sellers get to keep by the amount of the per unit tax.[20] This difference is also called the tax revenue. The reduction in buyer and seller surplus isn't totally encompassed by the tax revenue however, as there is a deadweight loss in the market.[21] A deadweight loss is an inefficiency in the

market that takes place when the market is out of equilibrium. Because both the seller and buyer see a reduction in surplus, which is the benefit parties get when they sell or buy a product for a more beneficial price than they would accept, they share the burden of the tax in the short run.[22]

However, in perfect competition, which is present in the retail gasoline industry, the long run consequences of a per unit tax are different than the short run ones. In the long run, firms in the industry will exit, as those that cannot make an economic profit under the tax regime leave the market.[23] As the marketplace becomes more concentrated and companies begin to produce less because of the increased marginal cost placed on them by the tax, the supply decreases.[24] As the supply available decreases, the retail price of the good increases. Eventually, the burden of the tax is placed entirely onto the consumer after firms that cannot make an economic profit exit the industry.[25] In foolishly implementing a per unit tax, such as the gas tax, the government creates inefficiencies in the market and deadweight loss in the short term and burdens the consumer with the entire tax in the long run.

As we have seen, the gas tax in the long run is entirely passed onto the consumers and currently the effective tax rate on a gallon of gas is around 25%. The question thus arises as to the legality of such an exorbitant tax. In Memphis Gaslight Co. v. Taxing Dist. of Shelby Cty., the U.S. Supreme Court stated that the U.S. Constitution does not protect property from unjust or oppressive taxation by states, as such matters are left to state laws and constitutions.[26] In Kirtland v. Hotchkiss, the Supreme Court stated that it could offer no relief to taxation if it "neither trench upon Federal authority nor violate any right recognized or secured by the Constitution of the United States."[27] This means that there is little basis to declare the gas tax illegal, at least state implemented gas taxes. M'Culloch v.

Statedescribes the only course of protection against oppressive taxation.[28]Judicial remedies are not protection from the abuse of taxation, the only protection is through the structure of the government itself.[29] As the legislature places taxes upon its constituents, they act upon the goodwill of the people and which, according to the court in M'Culloch, would serve as a sufficient security against erroneous and oppressive taxation.[30] However, the decision in M'Culloch was written in 1819, when the 15th Congress of 227 congressmen represented less than 10 million people.[31] The effectiveness of goodwill of the public to prevent excessive taxation is clearly weaker today as evidenced by a 25% effective tax rate on gasoline that is allowed to survive under this system.

If the gas tax were to be discontinued or placed on moratorium, one concern would be who would receive the benefits of this tax reduction. A study of gas tax moratoriums show that 70% of the gas tax reductions are passed on to the consumer at the retail level.[32] A moratorium on the gas tax would just be a short term elimination of the tax, so it could be expected that in the short run, after the gas tax was removed 70% of those savings would be passed onto the consumers. As the economics is the same as discussed above, in the long run, without the gas tax, more firms would enter the market, leading to less concentration and a greater supply. With a greater supply the price would fall at equilibrium to the level it would be without the tax in place. The surplus that was encompassed by the tax revenue and the deadweight loss when the tax was in place, would be shifted back to the consumers and the suppliers. Additionally, without the tax, the deadweight loss would be removed, eliminating inefficiencies in the market.
On October 1st the federal gasoline tax celebrated its 20thanniversary. Twenty years of an exorbitant tax that creates inefficiencies in the market, has little oversight by the both the judiciary and the public, and most effects those who can

least afford it. Twenty years of a tax that was foolishly implemented and often does not serve one of its stated means, which was to protect the environment. The government claims that this tax is needed and around the country legislatures continue to institute more gasoline taxes.[33] Some alternatives have been proposed, such as per mile taxes, but they have serious privacy and implementation concerns.[34]In practicality, much of the gas tax goes to repairing roads and bridges but it is a burden on people and the economy. It should be reduced or eliminated, in order to mitigate the damages it does and a better system should be put into place to maintain the infrastructure, such as privatization which is much more efficient and effective.[35]Regardless of the exact solution, the gas tax needs to go and the problems it causes with it.

[1] Matt Hurley, Congress Blocks Lawmaker's Gas Tax Hike Proposal, Heartland, (Dec. 11, 2015), http://news.heartland.org/newspaper-article/2015/12/11/congress-blocks-lawmakers-gas-tax-hike-proposal.
[2] U.S. Energy Information Administration, Product Supplied (Nov. 30, 2015),http://www.eia.gov/dnav/pet/pet_cons_psup_a_EPM0F_VPP_mbbl_a.htm.
[3] U.S. Energy Information Administration, Crude Oil Production (Nov. 30, 2015),https://www.eia.gov/dnav/pet/pet_crd_crpdn_adc_mbbl_a.htm.
[4] U.S. Energy Information Administration, Gasoline and Diesel Fuel Update (Dec. 21, 2015), http://www.eia.gov/petroleum/gasdiesel/.
[5] American Petroleum Institute, State Motor Fuel Tax (Oct. 31, 2015), http://www.api.org/~/media/Files/Statistics/State-Motor-Fuel-Excise-Tax-Update-October-2015.pdf.
[6] Tax Foundation, State and Local Sales Tax Rate in 2015 (April 8, 2015), http://taxfoundation.org/article/state-and-local-sales-tax-rates-2015.
[7] Id.

[8] Thomas Sterner, Fuel taxes: An important instrument for climate policy, Energy Policy, June 2007, at 3194-3202.
[9] Justin Marion and Erich Muehlegger, Fuel Tax Incidence and Supply Conditions, Journal of Public Economics, October 2011, at 1202-12.
[10] Id.
[11] Matt Hurley, Congress Blocks Lawmaker's Gas Tax Hike Proposal, Heartland, (Dec. 11, 2015),http://news.heartland.org/newspaper-article/2015/12/11/congress-blocks-lawmakers-gas-tax-hike-proposal.
[12] Constantinos A. Balaras, Tax Adds Fuel to Fire, ASHRAE, April 2013, at 70.
[13] Id.
[14] Id.
[15] Stephen P. Holland, Environmental Benefits from Driving Electric Vehicles?, The National Bureau of Economic Research, June 2015.
[16] U.S. Geological Survey, Rare Earth Elements – Critical Resources for High Technology (2012),http://pubs.usgs.gov/fs/2002/fs087-02/fs087-02.pdf.
[17] Stephen J. Entin, Tax Incidence, Tax Burden, and Tax Shifting: Who Really Pays the Tax?, Heritage Foundation, (Nov. 5, 2004),http://www.heritage.org/research/reports/2004/11/tax-incidence-tax-burden-and-tax-shifting-who-really-pays-the-tax/.
[18] Organisation for Economic Co-operation and Development,Competition in Road Fuel (2013),http://www.oecd.org/competition/CompetitionInRoadFuel.pdf.
[19] EconPort, Lecture on the Effects of a Per Unit Tax (2006),http://www.econport.org/econport/request?page=web_experiments_modules_taxes_lecture.
[20] Id.
[21] Id.
[22] Id.

[23] Stephen J. Entin, Tax Incidence, Tax Burden, and Tax Shifting: Who Really Pays the Tax?, Heritage Foundation, (Nov. 5, 2004),http://www.heritage.org/research/reports/2004/11/tax-incidence-tax-burden-and-tax-shifting-who-really-pays-the-tax/.

[24] Id.

[25] Id.

[26] Memphis Gaslight Co. v. Taxing Dist. of Shelby Cty., 109 U.S. 398, 400 (1883).

[27] Kirtland v. Hotchkiss, 100 U.S. 491, 495 (1879).

[28] M'Culloch v. State, 17 U.S. 316, 428 (1819).

[29] Id.

[30] Id.

[31] U.S. Census Bureau, Population: 1790 to 1990 (April 1, 1990),http://www.census.gov/population/www/censusdata/files/table-4.pdf.

[32] Joseph J. Doyle Jr. and Krislert Samphantharak, $2.00 gas! Studying the Effects of a Gas Tax Moratorium, Journal of Public Economics, August 2013, at 79-80.

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[34] Matt Hurley, Congress Blocks Lawmaker's Gas Tax Hike Proposal, Heartland, (Dec. 11, 2015),http://news.heartland.org/newspaper-article/2015/12/11/congress-blocks-lawmakers-gas-tax-hike-proposal.

[35] Laurent A. H. Carnis, Why Pr. Bullock Is Not Entirely Right and Pr. Tullock Is Completely Wrong: The Case for Road Privatization, Ludwig von Mises Institute, Libertarian Papers, June 2009, at 28.

THE STATUS OF ARBITRATION IN 2016: AN INSTITUTION IN REVIEW

By: Matthew Lowe

I. Introduction

The role that arbitration has played in corporate affairs has transformed over the years. As industries have expanded, so too has the function of arbitration. While some may argue that such expansion has had a positive and healthy affect on the adjudicative processes of private disputes, others disagree. Currently, arbitration clauses found in purchase agreements continue to be expansive, despite recent mainstream dissent. The labor and employment field, on the other hand, is undergoing changes in deferral standards following a recent decision by the National Labor Relations Board ("NLRB").

II. Background

Arbitration is a form of alternative dispute resolution that rests outside of the direct purview of the courts. Structurally, arbitration depends on the decision-making authority of an independent third-party (single or panel), which is chosen through the agreement of two contracting parties. As a practice, arbitration gained serious momentum in 1925, through the enactment of the Federal Arbitration Act ("FAA").[1] Prior to the FAA, arbitration was a tool used primarily by trade associations in order to enhance certainty and reduce disputes.[2] Courts have expanded the utility and accessibility of the institution to the extent that it governs many private agreements between parties today.[3]While agreements differ across industries in nature and content, the clauses that designate arbitration as the

adjudicative process to be utilized by the parties remain relatively similar.[4] Further, arbitration has become so legitimized by the courts that these types of clauses are generally found to require enforcement, even when they are obtained as a condition of employment, and would preclude employees or former employees from suing in court on their federal (or state) statutory discrimination claims.[5]

III. Concerns Raised Over Arbitration

With the features of present day arbitration functioning as they do, the question necessarily arises: is it fair? The short answer is yes, but groups exist that are highly critical of the role and pervasiveness of arbitration in its present form. As discussed, arbitration clauses are ubiquitous in modern contracts and they can present issues for consumers and employees alike. For one, ubiquity in itself can be problematic, as it forces parties to submit to arbitration as a prerequisite for purchase or employment.[6] Secondly, such submission has what some may consider severe and adverse consequences, including individuals' preclusion from judicial review by vesting exclusive control in arbitration and extinguishing avenues for appeals.[7] And thirdly, there have been concerns that arbitration clauses may reference governing procedural rules that change after the point of initial contract signing, subjecting a consumer or employee to terms that were not originally contemplated by an agreeing party.[8]

Some of those concerns regarding arbitration have seeped through the gates of the otherwise exclusive legal community and into the mainstream. In October and November of 2015, *The New York Times*published a multitude of seemingly anti-arbitration articles. On October 31, 2015, the news outlet unleashed the first part of a three-part series entitled: "Arbitration Everywhere, Stacking the Deck of

Justice," in which journalists Jessica Silver-Greenberg and Robert Gebeloff touched on not only the aforementioned ubiquity of arbitration clauses (highlighting their presence in various major companies' terms and conditions policies, including: Netflix, AT&T, TimeWarner, T-Mobile, eBay, Expedia, Discover, EA (Electronic Arts), Starbucks, and many more), but also the effect of these clauses on access to the courts.[9]

Arbitration clauses in purchase and employment agreements not only foreclose judicial review for single grievants, but, as an additional procedural feature, they also tend to foreclose attempts to bring class actions by multiple grievants.[10] The enforceability of these features is illustrated in recent case law. In 2014, judges upheld arbitration clauses banning class actions in 134 out of 162 cases.[11] In 2010, one of the most impactful Supreme Court decisions affecting the practice of arbitration in the United States occurred in *AT&T v. Concepcion*. In *Concepcion*, AT&T charged customers for products it had promised not to charge them for.[12] Upon customers' attempts to form a class and sue the company, the Court held that they could not do so after they signed a contract with AT&T that included an arbitration clause forbidding class action.[13]

IV. The Vitality of Arbitration in Consumer Contracts

Criticisms of arbitration may have value for future reform efforts, but for now, those criticisms do nothing more than undermine the current need, purpose, functionality, and efficacy of the practice. The decision in *Concepcion*, for example, was reached due to the Court's valid acknowledgments of a variety of considerations including, *inter alia*, matters of federal preemption and broader policy relating to the preservation of freedom of contract principles.[14] The central argument against the mandatory arbitration clauses at issue in

the*Concepcion* case relied on the rights of the states. The attorney arguing against AT&T focused on the jurisdiction of the California courts — which had rejected the class action ban as "unconscionable" — and sought to have the Supreme Court hold in favor of the ability of state courts to enforce their own laws.[15]However, the Court found that "when state law prohibits outright the arbitration of a particular type of claim, the conflicting state rule is displaced by the FAA."[16] They further stated that "the point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."[17] Ultimately, in such circumstances as those presented in*Concepcion*, the Court concluded that "requiring the availability of [class-wide] arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[18]

The decision in *Concepcion* is illustrative of more than just an adherence to federal preemption rules. The decision also signals a broader policy in which there is a presumption in the courts favoring arbitrability and awards handed down by arbitrators.[19] This deference is due to a push towards enforcing and advancing the rights of private parties in the realm of contracts. The courts should play a very limited role in interfering with the terms agreed upon between such parties. Even where there is alleged unconscionability, such as in *Concepcion*, they should only intervene in very rare circumstances. To do otherwise would eviscerate not only arbitration agreements but also the principles upon which they are founded. Many times, unconscionability is an easy answer for litigants arguing against arbitration because it provides a legal method of alleging "unfairness". Currently, the survival of a claim of unconscionability requires plaintiffs to use the terms in their arbitration clause to explain how it is sufficiently unconscionable and how it is inconsistent with the purpose of the FAA — if successful, the arbitration clause will be invalid and plaintiffs can

pursue their class action lawsuit.[20] Thus, defenses to allegedly unfair arbitration clauses do still exist and*Concepcion* does not completely foreclose the possibility of filing a class action suit; the requirements are just reasonably and necessarily stringent so as to preserve the rights of contracting parties.

V. Changes to Arbitration Specific to Labor and Employment

In the realm of labor and employment, arbitration continues to be built into collective bargaining contracts and non-union employment contracts to the benefit of all contracting parties. Perhaps one of the most notable works regarding the importance of arbitration in labor and employment is Samuel Estreicher's *Saturns for Rickshaws: The Stakes In the Debate Over Predispute Employment Arbitration Agreements,* in which Estreicher states:

The unspoken (yet undeniable) truth is that most claims filed by employees do not attract the attention of private lawyers because the stakes are too small and outcomes too uncertain to warrant the investment of lawyer time and resources. These claims have only one place to go: filings with administrative agencies where they essentially languish, for the agencies themselves lack the staffing (and often even the inclination) to serve as lawyers for average claimants. The people who benefit under a litigation-based system are those whose salaries are high enough to warrant the costs and risks of a law suit undertaken by competent counsel; these are the folks who are likely to derive benefit from the considerable upside potential of unpredictable jury awards. Very few claimants, however, are able to obtain a position in this "litigation lottery."[21]

Estreicher's rationale continues to permeate policy considerations within the scope of the NLRB. Still, while arbitration is normative within the labor and employment industry and NLRB review of arbitral decisions is relatively rare,

aspects of this are set to change in the near future. In 2014, the NLRB, comprised of a more liberal board under President Obama, changed arbitration deferral standards, overturning its previous standard, which had been law for over three decades.[22] Under the new standard, the burden of proof is now on the party seeking deferral. Further, deferral is now appropriate only when: (1) the arbitrator has been explicitly authorized to decide the statutory issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) NLRB law reasonably permits the award.[23]

Fortunately for employers, application of the new standard is prospective, as the NLRB has announced that it will not apply the new standards until those contracts have expired or the parties have agreed to present particular statutory issues to the arbitrator.[24]Employers can therefore amend provisions to account for these changes following expiration. The effects of the new standard are numerous, including employer likely having to face duplicative litigation in the form of grievance-arbitration proceedings and factually related unfair labor practice charges.[25] In terms of overall impact to the arbitration landscape in labor and employment, perhaps NLRB member Philip A. Miscimarra summarized the effects best when he stated in his dissent that the new deferral standards "effectively guarantee that … arbitration will *not* be final and binding. The outcome will be more work for the [NLRB], at the expense of speed, predictability, and certainty for the long litigation treadmill that is associated with [NLRB] and court litigation of unfair labor practice claims."[26]

VI. Conclusion

Arbitration, in many ways, serves to advance the principles of freedom of contract between private parties. As such, it is reasonable and expected that the courts have and continue to uphold arbitration clauses, especially in consumer contracts. Thus, despite recent mainstream attacks on the practice of executing compulsory arbitration agreements, the core principles underlying the practice create protection and maintain valid enforceability. Generally, these principles have extended to the labor and employment industry and, while they still do in most aspects, a recent NLRB decision has departed from its previous arbitral deferral standards, which may threaten the protections and validity of arbitration.

[1] 9 U.S.C. § 1

[2] Katherine Van Wezel Stone, *Rustic Justice*, 77 N.C.L. REV. 931, 936 (1998).

[3] 5 N.Y. Jur. 2d Arbitration and Award § 69

[4] JAMS Clause Workbook: A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts (Apr. 1, 2015), available at http://www.jamsadr.com/clauses/

[5] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (U.S. 1991)

[6] Michael A. Geibelson, Bernice Conn, *Clause and Effect Parties Agreeing to Standard Arbitration Clauses May Unwittingly Alter Their Rights*, L.A. Law., October 2006, at 35, 36

[7] Id. at 41.

[8] Id. at 40.

[9] Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stack the Deck of Justice*, NY Times (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0

[10] Id.

[11] Id.

[12] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)

[13] Id. at 351.

[14] Id.

[15] Id.

[16] Id. at 341.

[17] Id. at 344.

[18] Id. at 344.

[19] 6 C.J.S. Arbitration § 238

[20] Megan Barnett, *There Is Still Hope for the Little Guy: Unconscionability Is Still A Defense Against Arbitration Clauses Despite AT&T Mobility v. Concepcion*, 33 Whittier L. Rev. 651, 670 (2012)

[21] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predisputes Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 563 (2001)

[22] *Olin Corp.*, 268 NLRB 573 (1984)

[23] Babcock & Wilcox Construction Co., 361 NLRB No. 132 (2014)

[24] Id.

[25] McGuire Woods, *NLRB Reverses Board Precedent on Arbitration Deferral Standards* (Dec. 17, 2014), available at https://www.mcguirewoods.com/Client-Resources/Alerts/2014/12/NLRB-Reverses-Precedent-Arbitration-Deferral-Standards.aspx.

[26] *Babock & Wilcox*, supra note 22.

WHY EVERYONE SHOULD CONDEMN THE BDS MOVEMENT

By: Jacob Mezei

The Boycott, Divestment and Sanctions (BDS) movement is a global movement started by 171 Palestinian organizations in 2005 with the goal of harming the Israeli economy by urging people, private corporations, and governments to boycott Israeli goods and services, divest funds, and establish economic sanctions on Israel. [1] Simply put, the BDS movement is bad. It is bad for the Palestinians. It is bad for the Israelis. It is bad for the world. The BDS movement harms third world countries in dire need of economic stimulus and hampers the growth of business and the development of technology. In addition, it incites hatred and discrimination, is harmful to future peace negotiations, and, as the *Cour De Cassation* (the highest court in France) recently ruled, it is illegal.[2]

The point of a peaceful boycott movement is to harm the entity being boycotted more than harming the ones doing the boycotting. However, the BDS movement achieves the opposite outcome.[3] BDS severely weakens the Palestinian economy and barely puts a dent in the Israeli economy.[4] Israel, which has a population of 8 million people, has a current GDP of about $307 billion, whereas Palestine (West Bank and Gaza), which has a total population of 4.2 million, has a current GDP of about $12 billion.[5] “In 2012, Israeli sales to the Palestinian Authority were $4.3 billion, about 5% of Israeli exports (excluding diamonds) less than 2% of Israeli GDP, according to the Bank of Israel.”[6] The same year, “Palestinian sales to Israel accounted for about 81% of Palestinian exports and less than a percentage point of Israeli GDP. Palestinian purchases from Israel were two-thirds of total Palestinian imports (or 27% of Palestinian GDP).”[7]

In a recent article, Bassam Eid, a human rights activist and commentator on Palestinian domestic affairs, explained that there is little correlation between the objectives of the activists abroad and the realities of the Palestinians in the West Bank and Gaza.[8] "Whereas the movement's spokespeople live in comfortable circumstances abroad, boycotts will result in increased economic hardships for actual Palestinians."[9] The BDS movement leaders and activists do not care about the hardships the movement will impose on Palestinian people and attempt to "justify calling for boycotts that will result in increased economic hardships for the Palestinians by asserting that Palestinians are willing to suffer such deprivations in order to achieve their freedom."[10] However, these words are spoken by western academics, most of whom have never stepped foot in Gaza or the West Bank and have no idea what the Palestinian people really want and need. The harsh reality is that the BDS movement is a foolish and flimsy endeavor that does nothing to the Israeli economy but substantially hurts the Palestinian economy. Eid ends his article by stating "As a Palestinian who actually lives in east Jerusalem and hopes to build a better life for his family and his community, this is the kind of 'pro-Palestinian activism' we could well do without. For our own sake, we need to reconcile with our Israeli neighbors, not reject and revile them."[11] The Palestinian people need activists abroad to help their economy so that they can build a better country for themselves and their children.

A real-life effect that has recently made headlines in the news is when SodaStream, an Israeli company that operated in the West Bank and employed many Palestinians, had to relocate to Southern Israel as a direct result of the BDS movement.[12] The factory, located in Mishor Adumim, employed about 500 Palestinian workers.[13] When it officially closed in September 2015, all of these Palestinians lost their jobs.[14] One of these workers, Taqsim Mohsin, told Al Jazeera that "BDS is hurting us; many of us can't get work in the West Bank and wages are so low. We need this work."[15]

Even the Palestinian National Authority lauded Israel's treatment of Palestinian workers. In a recent article in *Al-Hayat Al-Jadida*, the official newspaper of the Palestinian Authority, the Palestinian Authority explained that "[w]henever Palestinian workers have the opportunity to work for Israeli employers, they are quick to quit their jobs with their Palestinian employers – for reasons having to do with salaries and other rights."[16] The BDS movement is a movement comprised of western ideologues that tout support for human rights to mask their own personal agendas, and meanwhile the only people who suffer for it are the very people the movement is advertised to benefit. "Surveys and interviews conducted by Al-Hayat Al-Jadida clarify that the salaries of workers employed by Palestinians amount to less than half the salaries of those who work for Israeli employers in the areas of the Israel-occupied West Bank, which house factories, tourist facilities and agricultural lands."[17]

BDS not only hurts Palestinians, but it hurts the rest of the world because it convinces educated people to abandon technology and innovation that, in some instances, is life saving, and, in other instances, is extremely important for the technological and scientific progress of mankind. Israel is perhaps the most technologically advanced country in the Middle East and brings a lot to the world in terms of innovation in science and technology.[18] The list of Israeli contributions in technology and science over the past 65 years is astounding. The list includes cancer screening technologies, drip irrigation, desalinization, drone aircraft, computer processors, Leukemia treatment, the only non-interferon Multiple Sclerosis treatment, nanowire technology, flash drives, micro-computer technology, the Centrino computer chip, tumor imaging, Parkinson's treatment, bionic exoskeletons to help paraplegics walk, breast tumor treatment, missile defense system (or Iron Dome), type 1 diabetes treatment, the collider that detected the "God Particle," and much more.[19] So when the supporters of the

BDS movement argue for a boycott of Israeli goods and services, as well as academic and cultural boycotts, they argue to boycott the technology and science that was engineered, invented, and discovered by Israelis in Israel, including everything mentioned above and a lot more. This is a dangerous movement that benefits no one. If you truly believe in the BDS movement you should throw away your cell phone and discard your MacBook, as some of the technology in both was either invented or engineered in Israel. However, that is not what BDSers do. Instead, they choose to boycott certain things that they do not need/use on a daily basis and choose to purchase, use, sell, and enjoy Israeli products when it is convenient and necessary (which is most of the time).[20] More than anything, the BDS movement is a vehicle for one to unleash his anti-Semitic viewpoints and hatred toward Israel, and that is why legal action is being taken in western countries to minimize the effects and strength of the movement. On October 20, 2015 France's highest appellate court ruled that the BDS movement is illegal and stated it "'provokes discrimination, hatred, or violence' on the basis of ethnicity, nationality, or religion."[21] Part of the reasoning behind banning the movement is because French BDS activists were notorious for "intimidating a number of supermarkets to remove Israeli products from their shelves, movie theaters to stop programming Israeli movies, and universities to cancel lectures by Israeli citizens."[22] Much of these boycotts occurred "simply because of their nationality and their Jewish religion; not for the opinions they personally might have held about Israeli politics."[23] This goes against the French Republic's law on freedom of the press, which prohibits discrimination, hatred, or violence against "a person or group of people on grounds of their origin, their belonging or their not belonging to an ethnic group, a nation, a race or a certain religion."[24] The BDS movement only targeted Jewish businesses, products, and people, and therefore the French Cour De Cassation believed it necessary to criminalize promoting BDS propaganda.

France is not the only western country to outlaw anti-Israel boycott movements. The United States has taken various measures to resist the movement. Since the 1970s Congress has passed legislation, "originally designed to counteract the Arab League Boycott of Israel," which is now applied generally to all illegal boycotts against any country including Israeli companies and Israeli goods.[25] The Export Administration Act of 1979 (EEA) "prescribes penalties that may be imposed for a violation of antiboycott regulations."[26] The penalties include fines of at least $50,000 and imprisonment of up to 5 years.[27] The Act defines participating in the boycott as "agreeing to refuse or actually refusing to do business in Israel or with a blacklisted company; agreeing to discriminate or actually discriminating against other persons based on race, religion, sex, national origin, or nationality."[28] The Ribicoff Amendment to the Tax Reform Act (TRA) also "denies various tax benefits normally available to exporters if they participate in the boycott."[29] In addition, some states have specifically condemned the BDS movement. For instance, in Tennessee, the "Tennessee House of Representatives in an overwhelming 93-1 vote" passed Senate Joint Resolution 170 in April 2015 which condemns the BDS movement as "one of the main vehicles for spreading anti-Semitism and advocating the elimination of the Jewish state."[30] Even in our very own state, "[t]he Illinois House just joined the state's senate in unanimously passing a bill that would prevent the state's pension fund from investing in companies that boycott Israel."[31]

A boycott for a good cause that achieves a good result is something worth supporting. The BDS movement is not a good cause and does not achieve a good result. The BDS movement is anti-business, anti-innovation, anti-science, anti-human rights, anti-Semitic, and, quite frankly, it is a movement that the Palestinians and the rest of the world could do without. Western intellectuals and academics should move on to something worthwhile.

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NO LONGER A LONG SHOT: WHY THE ODDS FAVOR THE EVENTUAL LEGALIZATION OF SPORTS GAMBLING

By: Jack Meyer

New NBA commissioner Adam Silver made headlines recently when he wrote in a *New York Times* op-ed piece that he was in favor of the legalization of sports gambling.[1]This came as a surprise to some NBA fans, as this is the same sport that was previously rocked by a points shaving scandal involving former referee Tim Donaghey. Silver's essential thesis was that since sports gambling is already widespread despite its illegality, a push toward legalization is long overdue. Though little hard data exists, some estimates suggest that nearly $400 billion is illegally wagered on sports each year,[2] including $9 billion wagered on the NCAA Men's Basketball Tournament alone.[3] With the emergence of the internet and fantasy sports, sports betting has perhaps never been more widespread and Silver's call for legalization certainly does not fall on deaf ears. Proponents of sports gambling have called for legalization so that the industry can be regulated and corruption eliminated. According to Commissioner Silver, "I believe that sports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated."[4] While sports gambling is currently illegal under Federal law, its eventual legality appears likely in the near future.

Sports gambling was made illegal under Federal law with the passage of the Professional and Amateur Sports Protection Act of 1992.[5] This legislation made sports gambling illegal in all but four states- Nevada, Oregon, Montana, and Delaware. With the advent of the internet however, gamblers no longer have to travel to one of the few states which allow gambling and sports betting. The result

is that sports gambling has become as commonplace as it has ever been. The proliferation of the internet on mobile phones, coupled with the increasing popularity of fantasy sports has led to an age where "all it takes is a credit card, internet connection, and a cell phone to place a bet."[6] Sports betting is so widespread and seemingly acceptable to the American public that sports television outlets such as ESPN frequently mention point spreads on the air and offer advice to bettors under a sarcastic "for entertainment purposes only" disclaimer.[7]

Fantasy sports betting services such as DraftKings and FanDuel have dramatically increased the opportunities for sports gamblers by provding a wide variety of sports related gambling options. In seasons past, fantasy football was played primarily between friends and co-workers for relatively nominal amounts of money. Today web-based companies such as DraftKings and FanDuel have transformed fantasy sports by offering new options such as one day fantasy leagues, some of which have turned sports gamblers into millionaires overnight. Fantasy sports has expanded from solely the NFL several years ago to now including the NBA, Major League Baseball, the NHL and the PGA Tour. Thus more opportunities exist for the sports gambler than ever before and the notion that the practice is illegal is largely ignored by the American public.

The primary battle cry for those in favor of the legalization of sports gambling is twofold. First is the argument that gambling will exist regardless of whether the government chooses to legalize it, and as it exists right now, states are losing out on millions of dollars of potential tax revenue that either leaves the state or goes to criminal enterprises. Second, the legalization of sports gambling could help eliminate corruption and provide consumer protection by giving bettors the outlet of legal recourse. California State Senator Roderick D. Wright proposed

legislature in his state where a gambling enterprise could operate under the supervision of the Department of Justice and the Gaming Control Board. According to Mr. Wright "This process gives bettors assurances that they are on a fair playing field with proper legal recourse. It also allows the state to bring in millions–in the long run, billions–that would have otherwise gone to those engaged in criminal enterprise."[8]

A principal concern with the legalization of sports betting is that it will lead to the risk of point shaving and a loss of the integrity of the game. Points shaving certainly has occurred in the past, with notable examples being the 1919 Chicago White Sox who were accused of intentionally losing the World Series in exchange for money paid to them by organized crime bosses. A more recent example is the Boston College basketball scandal of the 1980s where players were accused of fixing games under the pressure of the mafia. It is crucial to keep in mind however that the risk of game fixing is far greater when the athletes themselves are financially vulnerable. In other words, the 1919 White Sox were not compensated in salary anywhere near to the level of today's Major League players. Thus, a contemporary baseball player is highly unlikely to be influenced by money from gamblers because he is already highly compensated in salary by his team.

Gambling in collegiate athletics is arguably more susceptible to points shaving due to the fact that college athletes are not compensated beyond their free tuition. Despite this, the legalization of sports gambling will likely bring an increased attention on point spreads meaning that it is highly likely that an attempt at points shaving would be noticed immediately, where in the past it may have flew under the radar. Adam Silver echoed this theory when he referred to the Tim Donaghy points shaving scandal, "The Donaghy controversy also made me aware how

important it is that we have a way of monitoring irregular activity on our games," Silver said. "But for the FBI knocking on our door and notifying us about Donaghy's betting, none of the systems that we then had in place had captured any betting by Tim Donaghy."[9] Additionally, the legalization of sports gambling would place the gambling industry in the hands of legitimate businesses and would eliminate the potential influence of organized crime.

A noteworthy concern with sports gambling legalization is that it will lead to more gambling addicts. The argument is based on the premise that sports gambling is viewed as a "gateway drug" to other types of gambling. According to a *60 Minutes* investigation, the number of younger gambling addicts is nearly double that of the older generation.[10] This could perhaps be due to the fact that younger people tend to be more technologically astute and therefore are more likely to engage in gambling on their mobile devices instead of gambling at formal casinos. While the risk that gambling poses for addiction cannot be ignored, the argument can be made that legalizing sports gambling removes the stigma from the activity and therefore makes it more likely that problem gamblers will seek professional help before it is too late.[11]

Though there are arguments both for and against the legalization of sports gambling, it appears inevitable that the practice will be legalized in the coming years. Legalization would provide both states and consumers with tangible benefits, and since sports betting seems highly likely to continue regardless of government intervention, regulation through legalization appears to be in the best interest of all parties. Thus, the inevitable legalization of sports betting is far from a long shot; it is a close to a sure thing as one can get.

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UNNECESSARY TOUGHNESS: THROWING THE FLAG ON THE NFL'S NEW PERSONAL CONDUCT POLICY

By: Jack Meyer

In the wake of the Ray Rice incident and subsequent domestic violence arrests involving several other NFL players during the 2014 season, the NFL encountered a public relations firestorm. The NFL faced widespread public criticism that domestic violence among NFL players had become an "epidemic" and that the male dominated league was indifferent to the issue.[1] Commissioner Roger Goodell nearly lost his job after his perceived mishandling of the Rice incident, and public pressure forced the NFL take significant action to address domestic violence offenses among its players.[2]

This pressure led the NFL to hastily implement a player conduct policy specifically aimed at addressing crimes against women, such as domestic violence and sexual assault. The NFL admittedly used this new policy as a public relations maneuver, knowing full well that the policy did little to actually prevent domestic violence and was only aimed at publicly punishing players for domestic violence. [3]

The current NFL Collective Bargaining Agreement (CBA) does not specify any exact punishments for off-field incidents. On-field player conduct violations and corresponding suspension and fine amounts were collectively bargained and are outlined in painstaking detail in the NFL's CBA. For example, exact dollar figures are outlined for highly technical on-field offenses such as a player wearing the wrong color cleats or showing up to training camp one pound overweight, yet no penalties are expressly specified for off-field player conduct.[4]While the

NFL's new Personal Conduct Policy finally gives NFL employees notice of potential punishments for off-field behavior, the policy possesses a number of significant flaws.

1. Collective Bargaining Issue

Perhaps the most obvious flaw is that the new Personal Conduct Policy was issued by the NFL, approved by the league's franchise owners, but then implemented without the consent of the NFL Players Association (NFLPA).[5] The NFLPA is a party to the league's Collective Bargaining Agreement (CBA), meaning that the new policy is a blatant labor law violation.[6] The NFL cannot materially alter the terms of an ongoing collective bargaining agreement without the consent of the opposing side.[7]
The NFL claimed that the policy was issued under the commissioner's authority to issue discipline for conduct detrimental to the league and that therefore the policy need not be collectively bargained. The NFL stated: "The Personal Conduct Policy is issued pursuant to the commissioner's authority under the NFL Constitution and Bylaws to define and sanction conduct detrimental to the NFL."[8]While the commissioner does possess broad authority to punish players for conduct detrimental to the league, the new policy likely violates the CBA because it imposes a new form of discipline that was not collectively bargained. The introduction of the "Commissioner's Exempt List" which authorizes employees to be suspended with pay while the NFL conducts an investigation into alleged personal conduct violations is not included in the league's CBA. Although the CBA affords Goodell the power to "define and sanction conduct detrimental," the commissioner cannot alter the forms of discipline from those previously outlined in the CBA. Thus, the new Personal Conduct Policy is likely illegal

because the NFL materially altered the terms of an ongoing collective bargaining agreement without the consent of the NFLPA.

2. Details of the NFL's New Personal Conduct Policy

In addition to being a labor law violation, the NFL's new policy overwhelming favors the league and is unfairly detrimental to those who are accused of violating the policy. A six game suspension (37.5% of the NFL season) is authorized for first time "violations involving assault, battery, domestic violence or sexual assault."[9]These suspensions can be increased (amount not specified) if "aggravating factors" are present such the use of a weapon or a crime against a child.[10] If an individual is found to have violated the policy a second time, he is banished from the NFL for life. [11]

A suspension is authorized regardless of whether an NFL employee is ever formally charged or convicted of a crime if an NFL investigation finds that an employee has engaged in prohibited conduct.[12] The policy states "In cases where you are not charged with a crime, or are charged but not convicted, you may still be found to have violated the Policy if the credible evidence establishes that you engaged in conduct prohibited by this Personal Conduct Policy."[13] "Credible evidence establishes" is not a legal standard and is not defined anywhere in the Policy. NFL employees thus possess a lack of knowledge of what facts and circumstances will give rise to whether a violation of the Policy has occurred.

The language of the Policy also expressly states that NFL employees are required to cooperate with NFL investigations even if such cooperation results in self-incrimination. The policy states:

"League and team employees are required to cooperate in any such investigation and are obligated to be fully responsive and truthful in responding to requests from investigators for information (testimony, documents, physical evidence, or other information) that may bear on whether the Policy has been violated. A failure to cooperate with an investigation or to be truthful in responding to inquiries will be separate grounds for disciplinary action."[14]

While the Fifth Amendment does not apply to private entities such as the NFL[15], a policy which forces an NFL employee to testify against himself in a league investigation could have an adverse effect on the accused's criminal case due to the public nature of NFL suspensions. If the testimony provided by the accused were to be leaked to the public, it could very well be used against him at trial. In sum, NFL employees appear to have little chance of avoiding a conviction if a personal conduct violation is alleged. The Policy forces individuals to incriminate themselves and then an ambiguous standard of proof is applied to determine whether a violation has occurred.

3. Appeals Process

The NFL's appeals process is virtually non-existent. If an NFL employee is found to have violated the policy, he would be suspended by a "disciplinary officer" appointed by Commissioner Goodell.[16] Should the individual decide to appeal the suspension, Goodell would have the right to hear the appeal.[17] The unfairness of the policy is especially worrisome due to the severity of potential punishments. (an individual can be banished for life if found to have violated the policy a second time.) It should be noted however that Goodell's power to hear player appeals was agreed to by the NFLPA in the most recent CBA.[18] This power is not a new component of the personal conduct policy.

4. Application of the New Personal Conduct Policy

Employers can rightfully hold their employees to standards higher than that of the general public because employees consent to a particular code of conduct when they agree to work for an employer. The primary issue with the NFL's new Personal Conduct Policy is that NFL employees never consented to the Policy. Additionally, the manner in which the Policy has been applied has led to several NFL imposed suspensions of players being overturned by Federal Courts.
Ray Rice's indefinite suspension was overturned by a Federal judge in November 2014 who determined that Goodell's actions were "arbitrary and capricious" when he suspended Rice two separate times for the same incident.[19] This was a relatively simple suspension to overturn because the NFL's CBA expressly states that players cannot be suspended more than once for the same offense.[20]
Another high profile domestic violence case involved Vikings running back Adrian Peterson. He pled guilty to a reduced charge of misdemeanor child abuse after graphic photographs surfaced which depicted Peterson's son with severe bruising resulting from a beating inflicted by Peterson.[21] He was suspended indefinitely by the NFL who applied the stricter domestic violence policy to justify his punishment.[22] The suspension was eventually reversed by a Federal court who determined that Peterson's due process rights were violated because he was suspended under the stricter personal conduct policy for offenses that took place before the new policy went into effect.[23]

That both Rice and Peterson had their suspensions reversed by the courts should come as no surprise; they are clear abuses of arbitrator discretion. A more interesting case would be if a player challenged his suspension based on lack of consent to the Policy or lack of proper notice of potential punishments.

5. NFL Player Reaction to New Personal Conduct Policy

Current NFL players have questioned whether the new personal conduct policy is effective in preventing domestic violence.[24] Under the policy, players are now required to attend a domestic violence training seminar prior to each season.[25] These seminars have been widely criticized by players for both treating them as perpetrators and for doing little to actually prevent domestic violence. According to Cincinnati Bengals offensive tackle and NFLPA President Eric Winston,

"I don't think the league has done the players a service. They haven't approached them in an educational way that, if there is some symptoms or there is some precursors, perhaps, like, 'Hey, if you're experiencing these things or thinking these things, why don't we talk about it.' Instead of taking a tone that's 'We can educate you, we can help you,' it's, 'You're a bad person.'"[26]
Winston continued, "until we get to a point where we're really educating guys and helping guys and preventing things, these issues are going to continue."[27]

Conclusion

As a whole the NFL's new Personal Conduct Policy was a public relations maneuver designed to compensate for Goodell's mishandling of the Ray Rice case. In an attempt to garner public support that the league was taking domestic violence seriously, the NFL created a Personal Conduct Policy that: 1) violates the league's CBA, 2) violates Federal Labor Law, 3) is egregiously unfair to its employees, and 4) raises legitimate questions as to whether it is even effective in preventing domestic violence. The fact that this policy still exists is nothing short of remarkable.

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[6] Marc Edelman, Why The New NFL Personal Conduct Policy Violates Federal Labor Law, Forbes (Dec. 11, 2014).http://www.forbes.com/sites/marcedelman/2014/12/11/why-the-new-nfl-conduct-policy-violates-federal-labor-law/

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[10] Id.

[11] Id.

[12] NFL Personal Conduct Policy. Accessed athttp://workplacebullying.org/multi/pdf/NFL-Conduct.pdf

[13] Id.

[14] Id.

[15], Frequently Asked Questions, Garrity Rights (Nov. 29, 2015)http://www.garrityrights.org/faq.html

[16] Id.

[17] Id.

[18] Id.

[19] Marc Edelman, Ray Rice's NFL Reinstatement Should Surprise Nobpdy, Forbes, (Nov. 28, 2014),http://www.forbes.com/sites/marcedelman/2014/11/28/ray-rices-nfl-reinstatement-should-surprise-nobody/

[20] *See* NFL CBA Art. 46 sec. 4

[21] ESPN News Services, Judge Rules in Peterson's Favor, ESPN, (Mar. 1, 2015) http://espn.go.com/nfl/story/_/id/12387081/judge-david-doty-rules-favor-adrian-peterson-minnesota-vikings

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[23] Id.

[24] Sarah Kogod, Players don't think the NFL's Domestic Violence Training is Working, SB Nation, (May 6, 2015).http://www.sbnation.com/nfl/2015/5/6/8209087/nfl-domestic-violence-training-presentation-nflpa

[25] Id.

[26] Id.

[27] Id.