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TOO BIG TO FAIL V. TOO SMALL TO SURVIVE

By: Daniel Scheeringa

The Congressional Oversight Panel for the Troubled Asset Relief Program (TARP) has issued its final report, and the TARP program is projected to cost much less than forecast. Unfortunately, TARP didn't solve the original problem of "too big to fail". The problem is worse today, and the legislative solution may make things even worse.

Moral hazard is when rational actors take bigger risks than they otherwise would, in the knowledge that someone else will bear the risk. Although there were previous examples of the moral hazard of bailouts[1], the greatest illustration of this concept came in 2008. As the financial crisis broke, 18 large investment banks received $208 billion in TARP money to save them from insolvency after they made risky bets on CDO's. As the report states, in the case of AIG, the guarantee was extended not only to AIG itself but to its counterparties in its derivatives trades, leaving the government guaranteeing not only banks, but an entire market. (pg. 184) In one day, the risk was removed from the derivatives market, leaving only profits. In early 2009, once the immediate danger had passed, the US Treasury ordered stress tests of the 19 biggest banks, and announced it would provide more taxpayer funds to shore up any weakness. Since the crisis began, these banks have only become bigger and more interconnected. In 1995, six of the largest banks[2] controlled assets equivalent to 17% of GDP, in January 2011, their assets controlled over 45%.[3]

The Dodd-Frank Financial Reform Act sought to address the too big to fail problem. Title II empowers regulators to seize and dismantle large financial firms that are on the edge of insolvency. As Fitzpatrick and Thomson describe, orderly liquidation involves multiple steps. First, a firm must qualify as a covered financial firm, that is, a firm that derives more than 85% of revenue from finance, and any other firm designated as systematically important. Once a firm is deemed subject to Title II authority, the FDIC assumes receivership and oversees liquidation, preempting the bankruptcy court[4]. Under Title II, the FDIC would have the power to fire management, wipe out the shareholders' equity, seize assets, sell the assets and close the business. The FDIC is authorized to borrow unlimited amounts from the US Treasury to keep the firm solvent by extending credit, purchasing assets, or assuming or guaranteeing obligations.[5] These funds are supposed to be repaid within 60 days, funded by asset sales. What happens if asset sales don't raise enough is unknown.

But, as Gordon and Muller explain, the resolution authority may actually make another crisis more likely. The fact that the funding comes from the taxpayers may stoke public anger about bailouts, which would make regulators hesitant to step in until absolutely necessary. By the time sick firms go into receivership, they will be in a worse position, and the risk of systemic contagion will be increased. Intermediate means of intervention, such as lifelines from the Fed, or FDIC interventions short of receivership, are precluded by Dodd-Frank[6].

Too Small to Survive

While the last few years have been kind to big banks, they have been hard on their small competitors. Small banks were especially burdened by the moribund real estate market and later by small business defaults. 206 small banks, or 2.4% of all banks operating in the US, failed between January 2007 and

March 2010[7]. At a time when the biggest banks are only getting bigger, small banks, whose fortunes are tied to their communities' economies, are struggling.

Small bankers are concerned that the new regulatory scheme will only make things worse. Small bankers complain that the thousands of pages of proposed regulations will increase their compliance costs, forcing them to add to their compliance staff just to keep up with the paperwork. Historically, compliance costs as a share of operating expenses is two and a half times greater for small banks than large ones. Money banks spend on compliance is money that can't be loaned out to small businesses.

Another key concern is Dodd-Frank's lowering of "swipe fees" for debit card transactions. Although small banks have a carve-out in the law from the fee limits, they may have to lower their fees anyway, just to remain competitive. Banking analysts estimate banks will need an additional $1 to $2 billion in assets to sustain the additional costs, which may be difficult for small banks[8]. Bankers report that regulators are telling them that banks with less than $500 million in assets should consider merging.[9] At a time when Washington claims to be addressing the too big to fail problem, in reality, they seem to be making it worse.

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[1] Continental Illinois Bank in 1984, and the hedge fund Long-Term Capital Management in 1998. For a comprehensive account of the LTCM story, *see* Roger Lowenstein WHEN GENIUS FAILED (2000).
[2] JP Morgan Chase, Bank of America, Citigroup, Goldman Sachs, and Morgan Stanley

[3] Testimony of Josh Rosner to the House Oversight Committee, reprinted on roubini.com (Accessed April 16, 2011) (http://www.roubini.com/financemarkets-monitor/260754/dodd_frank_is_a_farce_on_too_big_to_fail)

[4] PL 111-203 § 202(c)(2)

[5] Id at § 204(d)

[6] Id at § 1101(a)(6)

[7] Craig P Aubuchon and David C. Wheelock THE GEOGRAPHIC DISTRIBUTION AND CHARACTERISTICS OF U.S. BANK FAILURES, 2007-2010: DO BANK FAILURES STILL REFLECT LOCAL ECONOMIC CONDITIONS? Federal Reserve Bank of St. Louis *Review* September/October 2010

[8] Testimony of Albert C Kelly Jr. to the Subcommittee on Financial Institutions and Consumer Credit of the House Committee on Financial Services March 2, 2011.

[9] Testimony of H. Charles Maddy III to the House Committee on Financial Services January 26, 2011.

SO SUE ME!

It is not every day someone says they want to be sued in federal court. But, in fact, Mr. Rajat Gupta, a former board member at Goldman Sachs and Procter & Gamble, is doing just that. Mr. Gupta sued the Securities and Exchange Commission claiming that the SEC cannot pursue their current administrative case against him because such a case would need to be brought in federal court. (It is alleged that Mr. Gupta fed Raj Rajaratnam inside information about both Goldman Sachs and Procter & Gamble which was used by the Galleon hedge fund investment advisors.) Recently, the SEC delayed Mr. Gupta's administrative case for at least 6 months. Not only is this bizarre case legally fascinating but it places the potency of a section of the monumental finance-reforming Dodd-Frank Act under siege.

Gupta seeks a federal injunction to prevent the SEC insider trading allegations from being heard before an administrative law judge. The SEC Division of Enforcement seeks administrative sanctions, civil monetary penalties, a cease-and-desist order, disgorgement of ill-gotten gains, and other civil remedies. In the past, such remedies for insider trading were "available only in federal court cases unless the defendant was a broker or investment adviser." Section 929P of the Dodd-Frank Act, however, allows for unregistered persons to be eligible for civil penalties in administrative cease and desist proceedings. Gupta's suit is based on the fact that the SEC is applying this provision retroactively. The Dodd-Frank Act went into effect on July 22, 2010 and "the only statement in the law on the timing of its effectiveness is that it shall take effect after the date of enactment of this act."

The legal community is left to try and understand the rationale behind this potential change in enforcement policy. Many speculate that administrative cases give the SEC a “home court advantage.” Administrative judges are generally viewed as more enforcement-friendly; and the use of these Article I judges gives the SEC greater freedom to pursue cases and impose the penalties they most wish to see handed down. There is also limited discovery in administrative cases and no possibility for a putatively more unpredictable jury trial. Finally, with administrative cases there exists “a procedure by which the full [SEC] commission itself reviews any decision in the case before an appeal ever goes before a federal judge.” It seems like the SEC easily stack the deck in its favor if such civil proceedings against any registered or *unregistered* individuals is allowed to stay within the purview of administrative judges under a new SEC policy.

What chance does Mr. Rajat K. Gupta have of winning his lawsuit against the SEC? According to Peter Henning of the New York Times, “The leading case in this area is *Landgraf v. USI Film Products*.” In *Landgraf v. USI Film Products*, the Supreme Court stated that “the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic…the ‘principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.’” They went on to state that there is the general presumption against “retroactive application of laws unless Congress clearly wants the new rule applied to earlier cases.” The Dodd-Frank Act has no affirmative language saying that this new rule should be applied retroactively which could favor Mr. Gupta. However, the Supreme Court went on to state that “the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.” If it does, then the Gupta suit could be dismissed. It is important to note however that many of the cases distinguished from the *Landgraf v. USI Film Products* decision hinge on the fact that the legislature was not clear about intending to apply the statute retroactively to past behavior and actions. Since Dodd-Frank does not explicate that the provision in 929 is retroactive, Mr. Gupta stands a decent chance of winning his suit. Additionally, the SEC already has the ability to file a lawsuit against unregistered persons in federal court. The differentiation between administrative court and federal court may not be sufficient to qualify 929 of the Dodd-Frank Act for retroactive application.

It will be interesting to see what the decision of the court will be but in the event that Mr. Gupta loses his federal suit, insider trading enforcement policies may permanently change. The use of administrative judges for insider trading civil cases may just be a strategic move for certain high-profile individuals.

UPDATE: Over the summer, Mr. Gupta and the SEC dropped their respective suits against each other. On October 26, 2011, Mr. Gupta was arrested and charged with securities fraud. The same day, Mr. Gupta finally got what he wanted; the SEC filed a civil suit against him in federal court.

THE END OF PEER-TO-PEER FILE SHARING?

Another major peer-to-peer file sharing platform will soon face obscurity as well as a potentially crippling damages payout. LimeWire was recently told by a U.S. District Court in New York to shut down its peer-to-peer file-sharing system, after being held liable for copyright infringement.[1] The RIAA, Recording Industry Association of America, filed suit about four years ago claiming that “as much as 93 percent of LimeWire’s file sharing traffic was unauthorized copyright material.”[2] This was the first time since the Supreme Court ruled in MGM Studios, Inc. v. Grokster, LTD that a file sharing software maker was targeted. The RIAA claims that LimeWire owes trillions of dollars in damages for enabling distribution of copyrighted songs, a claim the federal judge presiding has deemed to be “absurd” yet admits this is the first time “a court has been asked to consider the issue of whether a copyright holder can claim multiple awards for one copyrighted work.”[3] There is speculation that “the ruling could pave the way for a deal, similar to the way Napster was sued out of existence in 2000 but was reborn and now under the ownership of Best Buy, with licensing deals with all the major recording companies.”[4] Still, industry legal experts speculate statutory fines up to $150,000 per violation could leave LimeWire with a bill exceeding $1 billion, since the court will use the standard of one statutory damage award per each work regardless of the number of infringers (rather than each individual infringement of a copyrighted work)[5]. The RIAA, in preparation for the May 2nd court date, needs to determine how many direct infringements per copyrighted work occurred. This is not an easy task because LimeWire’s structure was as a “connect-style P2P platform” which makes determining the actual number of downloads difficult. [6]

A copyright infringement occurs when “copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner.”[7] LimeWire employed peer-to-peer networking, which allows computer to communicate with each one another, instead of utilizing a central server like Napster and other earlier file sharing sites.

Disputes regarding copyright infringement started back in 1984, most notably with the Sony Corp. of America v. Universal City Studios, Inc. The court protected VCR manufacturers from liability to contributory copyright infringement, determining that taping television was fair use, if done for the purpose of time shifting. If Sony and the movie industry been victorious, video-recording devices would have been eliminated from American homes. The Court held, that “because the device had legitimate uses, Sony wasn’t contributing to copyright infringement by selling it, even though the company knew that some users were using the product illegally.”[8]

Copyright infringement did not reach the mainstream level of Sony until A&M Records, Inc. v. Napster, Inc. in 2001. Napster permitted paid subscribers to search for a song, receive a list of other users who possessed a copy of the song and copy the song into their personal library. Napster routed these exchanges through internal servers, allowing “a modicum of control over how people used its network.”[9] This “modicum of control” ultimately prompted a rule that since Napster could prevent infringement, it had a responsibility to do so.

The generation of peer-to-peer sharing came about with the development of Morpheus and Kazaa. These services removed their centralized serves, thus allowing users to directly connect libraries and eliminated the possibility for someone to argue Kazaa had any control over what its users did. In 2005, MGM

v. Grokster made headlines as a landmark case that specifically addresses the legality of peer-to-peer Internet file-sharing services, but [had] broad implications for any technology that could potentially be used to infringe on copyrighted materials."[10] The Court decidedGrokster and other similar enterprises could be sued for the marketing of their file sharing software since the technology had both legal and illegal uses. The case also made headlines when Billionaire Mark Cuban helped finance most of Grokster's legal expenses, and Intel, Yahoo, Microsoft stepped into the court battle. On MGM's behalf, the RIAA and MPAA stepped in. In the end, the court did not care so much that the technology could be used for illegal purposes, but rather that Grokster encouraged infringement. Judge Souter wrote in the courts opinion concluding "whoever distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."[11] Grokster's decision "cleared the way for lawsuits targeting companies that induced or encouraged file sharing piracy." [12] Today, visitors to the Grokster website are warned their illegal activity will be caught and the following message:

> "The United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion picture and music files using unauthorized peer-to-peer services is illegal and is prosecuted by copyright owners. There are legal services for downloading music and movies. This service is not one of them. YOUR IP ADDRESS IS XX.XX.XXX.XX AND HAS BEEN LOGGED. Don't think you can't get caught. You are not anonymous."

On May 3, 2011 a jury began deciding what amount LimeWire will pay in damages, with individual baselines ranging from $750 to $150,000 for each worked that was infringed. At the time, total payout was expected to be between $7.2 million to $1.4 billion.[13] On May 18th, Limewire settled with the major labels for $105 million.[14]

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[1]http://www.abajournal.com/news/article/federal_judge_shuts_down_limewire_says_site_aided_massive_infringement/

[2] http://www.wired.com/threatlevel/2010/10/limewire-riaa-defeat/

[3]http://www.computerworld.com/s/article/9215074/RIAA_request_for_trillions_in_LimeWire_copyright_case_is_absurd_judge_says

[4] http://www.huffingtonpost.com/2010/05/12/limewire-loses-riaa-case-_n_574338.html

[5] http://www.zeropaid.com/news/92783/judge-to-riaa-limewire-liable-for-billions-not-trillions/

[6] ID

[7] http://www.copyright.gov/help/faq/faq-definitions.html

[8] Id 3

[9] http://www.washingtonpost.com/wp-srv/technology/articles/groksterprimer_033805.htm

[10] Id 9

[11] MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913

[12] http://www.wired.com/threatlevel/2010/10/limewire-riaa-defeat/

[13] http://news.cnet.com/8301-31001_3-20059366-261.html

[14] http://www.hiphopdx.com/index/news/id.15177/title.limewire-settles-out-of-court-with-four-major-labels-for-105-million/

THE OVERREACH OF THE E.P.A.: FACT OR FICTION?

Earlier this month the House Energy and Commerce Committee passed a bill, the "Energy Tax Prevention Act of 2011," which, if it becomes law, would effectively halt the Environmental Protection Agency's proposed program to regulate greenhouse gas emissions. This is one of many attempts in an ongoing campaign by Republicans to limit the power of the EPA to make and enforce regulations related to greenhouse gas emissions. They are attempting this through **budgetary** control measures as well as by attempting to strip the EPA of its **regulatory authority** in this area through legislation. There appears to be an intentional effort to cast this as a battle between the legislative and executive branches. However, this is actually a battle royal including all three branches of the federal government, as well as many state, local, and private organizations. It is important to look at the recent history of this fight to truly understand the rhetorical attacks being waged at this point in the battle.

Our story begins with Congress's entry into the air control business in **1955**. This is the year that the "Air Pollution Control Act" was passed, a measure which funded federal research on air pollution. Later in 1963, the Clean Air Act was passed which formally introduced air pollution controls. The Air Quality Act of 1967, and the Clean Air Act of 1970, were further expansions of federal air pollution control. Shortly after the passage of the CAA of 1970, the National Environmental Policy Act of 1971, created the Environmental Protection Agency and the current make-up of air pollution control apparatus was born. Amendments to the CAA in 1977 and later in 1990 served the purpose of further clarifying the regulatory mandate of the EPA. These amendments gave substantially increased authority and responsibility to the federal government for the regulation of air quality and enforcement of compliance with federal standards. The definitions and standards given by the amendments were the result of the work of scientists, environmentalists, and international treaties like the Vienna Convention and the Montreal Protocol over nearly 40 years, to influence Congress that air pollution was a major problem that needed federal attention. [id.] They are also the last congressional action on the Clean Air Act since **1990**.

Fast-forward to November 29, 2006. The Environmental Protection Agency has denied a petition, offered by the state of Massachusetts, (along with a diverse group of 12 other states, 4 cities, and research and activist groups, including the Center for Food Safety, Greenpeace, the Sierra Club, Union of Concerned Scientists, and the U.S. Public Interest Research Group) requesting that the EPA regulate motor vehicle emissions in relation to their impact on climate change. *Mass., et al. v. EPA*, 549 U.S. 497 (2007). The EPA, backed by 10 states and 6 trade associations including the Alliance of Automobile Manufacturers and the Utility Air Regulatory Group, argues that the CAA, "did not authorize the EPA to address global climate change and that, in any event, executive policy specifically addressing global warming warranted the EPA's refusal to regulate such areas." The Supreme Court ultimately hears the case of Massachusetts, et al. v. Environmental Protection Agency. In this case Massachusetts argues that: 1. the EPA has the authority to regulate greenhouse gases, according to the CAA; and 2. if it has this authority its reasons for refusing to do so are inconsistent with statute. Id.

In April of 2007, in a 5-4 decision, the Court sided with the plaintiffs and ruled that the EPA could regulate greenhouse gases as "air pollutants." Id. It further ruled that based on its ability to regulate it can, under the mandate of the statute, “avoid taking further action only if it determines that greenhouse gases do not contribute to climate change, or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.” It finally held that the reasons the EPA had given for not conducting the study did not, “amount to a reasoned justification for declining to form a scientific judgment.” Basically, it sent the EPA back to find a justifiable reason for not making the determination, or in the absence of such a reason, to make the determination. The EPA dragged its feet in doing either, and as of **President Bush’s** departure from the White House, the EPA had not made a determination, nor had it offered other reasons for not doing so.

After President Obama came into office in 2009, the EPA moved forward with the task given it by the Supreme Court. In December of 2009, the EPA released its **finding** stating that greenhouse gases do cause or contribute to the endangerment of public health and welfare. Subsequently in April 2010, the EPA and the National Highway Traffic Safety Administration (NHTSA) **finalized** a joint national program to reduce greenhouse gases and improve fuel economy for cars and trucks.

As a result of these actions, Congressional Republicans have made the argument that the new EPA regulations **will** “drive up energy prices, depress the economy, and hamper job creation.” They have also argued that the EPA’s actions are an abuse of power and a usurpation of the legislative process. Senate minority leader**Mitch McConnell** has declared that the EPA’s recent actions are an, “attempt to do through regulation what they [Democrats, Environmentalists, the Obama White House?] couldn’t do through legislation.” The goal of the congressional Republicans seems to be cast the recent actions of the EPA as born of a desire of the Obama White House to circumvent the legislative process, but as we have seen the story is not that simple. The facts paint a picture of the legislative process at work. Unfortunately for Republicans, and many of their allies, the process is not working out in their favor.

Let's recap: Leading up to 2011, the U.S. Congress between 1955 and 1990 passed a series of legislation that: 1. Made air pollution a federal issue; 2. Created the EPA; 3. Defined the authority and scope of its regulations, and mandated its course of action in certain circumstances. The Supreme Court, having 7 of its nine justices appointed by Republican presidents, ruled in 2007 that the EPA, under the Bush administration, had given no justifiable reasons for refusing to conduct a study of the danger, or lack thereof, posed by greenhouse gases. Further, it ruled that absent this justification the EPA needed to conduct the study. The Bush Administration did not offer any further justification for refusing the study. The Obama Administration, absent that justification, conducted the study. According to the proper **process**, in 2009, they issued a finding of endangerment. Based on this finding, the EPA was mandated by Congress, to regulate greenhouse gases. In 2010, the EPA finalized a new program to regulate greenhouse gas emissions.

In 2011, the Republican led House and the Senate Republicans are seeking to remove the EPA's authority to regulate these gases. The President has promised to **veto** any measure to limit EPA authority. This means that in order to limit EPA's authority, thereby overruling the Supreme Court's interpretation of the current legislation, the Republicans would need to acquire a 2/3 majority of both houses to override a presidential veto. Given the highly divided state of the country on this issue this is a highly unlikely scenario. The other option is to get the court to reverse its decision interpreting EPA authority to extend to greenhouse gases. Considering that the two retiring justices who voted in with the majority have been replaced by Obama appointees, this too is a highly unlikely possibility.

Given these facts, it would seem that Senator McConnell's characterization would be more accurate if it went as follows:

> "They [the EPA] are doing through regulation what we [Congress] said they must do through legislation, and what the Supreme Court said they must do through adjudication. We don't like what they are doing and we don't have the votes to change the legislation, or the decision, so let's confuse the issue by accusing them of not following the rules."

Admittedly, there are plenty of reasonable and principled arguments on both sides of the issue as to whether the impact of the EPA's regulations will be helpful or harmful to the economy. It is extremely disingenuous however, to attempt to characterize the legitimate exercise of EPA authority to act as somehow extra-legal, or to accuse the EPA, and indirectly the Obama administration, of an attempt to cheat and circumvent the process.

WHAT GOES AROUND COMES AROUND: THE SUPER BOWL TICKET FIASCO

There was plenty of hype surrounding this year's Super Bowl. At the beginning of the season, Dallas insisted that they were going to play the first Super Bowl in their new stadium. Fairly quickly into the season, Dallas fans realized that the likelihood of that happening was slim. I held out hope for both the Chargers and the Bears, but it was yet another disappointing season for the Chargers and a disastrous end to the season for the Bears. However, as fans from across the country arrived at the brand new stadium to watch the Green Bay Packers ultimately beat the Pittsburg Steelers, many quickly realized it was not going to be a fairy tale ending and, for some, it was not simply because they were Steelers fans. After being forced to watch the game from different seats or from the lobby on television screens, some fans are taking matters into their own hands and are suing. Americans sure do love litigation.

People seem to be split as to who should win the current law suits filtering through the system. One writer, Gregg Doyel, hopes that the plaintiffs that are suing lose and are forced to pay attorney's fees to the other side. Sure, the four hundred people whose seats were not ready for the game received tickets to next year's Super Bowl and received triple the face value of their ticket. With all due respect to Mr. Doyel, I am at a complete loss as to how this gentleman became a sports writer. As a Bears fan and a Chargers fan, the Packers and the Steelers are at the top of my list for teams I hate the most. However, for fans traveling across the country to watch their team play in the biggest football game of the year, it is kind of imperative that they actually get to watch the game. Who cares if they get tickets to next year's game; if it is not a repeat of Packers and Steelers, chances are many of the fans will not want to go to the game (at least not with the same amount of excitement that they presumably had going into this year's game). From my point of view, you simply cannot put a price on missing out on the biggest game of the year, especially when your team is playing. Maybe it is different for me, because my heart continually gets ripped out of my heart with each of my teams (Chargers always manage to blow it, the Bears are master choke artists, the Cubs are, well, the Cubs and USC is currently in their own legal battle for reducing the bowl ban), but if one of my teams did make it to the big game and I got tickets and was subsequently told I would not actually be able to see my team play, I would cry. I would cry a lot. I would be pissed. Really pissed.

So the NFL decided to "sweeten the deal," by allowing the 400 displaced fans to opt to have a ticket to *any* Super Bowl in the future. Well, great! Except…if you opt for this ticket (essentially meaning, if you do not think your team will make it to the Super Bowl next year), you forfeit the monetary compensation of approximately $2,400. So, now the fans get to make this horrible decision – do you hope your team makes it to the big game next year and take a ticket to that as well as taking the money or do you, like many die-hard fans, want to go to a game where can watch your own team for the championship? However, what happens if something extraordinarily unexpected happens before your team makes it to the championship title game (like your team continues to slide into the abyss, like the Chargers or heavens forbid, you die). The NFL is trying to find a nice cozy way to get out of the ditch they have dug for themselves, but their options are not fixing anything. The bare bones truth is that Dallas built a brand new stadium and there is absolutely no excuse to inform fans, mere hours before the game, that their tickets are essentially no good. As Peter King points out, Dallas didn't even apply for permits for the seats until a month before the game. [3]

As a law student, I can appreciate that most litigation is frivolous and, if I were not such a fanatic about sports, I would probably agree with Mr. Doyell that this is just excessive and pointless. However, the NFL is not just in place built for the pleasure of the fans. It is a business; a very lucrative business. The better the team, the more money the team makes. However, something needs to be done about the way Jerry Jones conducts his business. Some of the individuals that encountered problems at the Super Bowl were the so called "founders" of the stadium. Individuals that paid $100,000 a pop to help build the stadium and, in return, have the best seats in the house for all of Dallas' home games.

Three individuals who encountered problems with their tickets were quick to act and filed a federal class action law suit. Steve Simms, Mike Dolabi and Wes Lewi, filed a class action suit against numerous defendants, including the NFL, the Dallas Cowboys and Jerry Jones, himself. Simms represents those displaced at the Super Bowl, while Dolabi represents the "Founders" and Lewis represents the relocated group. Each plaintiff, representing their class of ticket holders, seek to enforce the same rights and remedies, including breach of contract, breach of the covenant of good faith and fair dealing, fraud, deceit and concealment, negligent misrepresentation; and Texas Deceptive Practices Act. The complaint goes into more detail about what plaintiffs claim under each claim of action.

I'm not sure about the strength of the class action's individual claims, but hey, I'm not a lawyer…yet. However, it does not seem that the NFL can afford to get into a battle with the fans. Jerry Jones apparently "wants fans to know" that he accepts responsibility for the seat fiasco at the Super Bowl. Personally, I would love nothing more than to see Jerry Jones go down for the five million that the federal class action is seeking. Yes, I hate the Packers and the Steelers. Passionately. However, I'm standing by my fellow fans and sure hope that Jerry Jones gets what is coming to him and certainly what he deserves. If anything like this happens again, as I am sure it will, I would love to be the attorney to take on the case.

DIMINISHING PRIVACY TO INFORMATION RECEIVING GROWING PUBLIC ATTENTION

It's been several months now since my first article on the general subject of data and information in the law. Normally, I could attribute the delay to typical publishing delays, an overbooked 2L year, and an overly inquisitive (read: easily distractible) mind. But, in this case, I am writing about perhaps the most visible aspect of the topic: the privacy of personal information in an increasingly connected society. Given the increasing focus on the topic in academia, government, and media, it has been difficult to keep up with all of the recent developments. Even the turn of the New Year – often a good time for a retrospective look – hasn't slowed the pace. There have been some significant developments in the legal and regulatory world. A small selection of some of the most significant news includes:

- At the start of December, the Federal Trade Commission released a proposed framework of "Fair Information Practice Principles" for commercial entities that focuses on integrating privacy into every stage of design, simplifying consumer choice, and increasing the transparency of data practices. The FTC also announced the conclusion of an enforcement action against the advertiser EchoMetrix for failing to be clear to parents about the data it gathered about their children.
- The Commerce Department has released a green paper describing a need for a "Dynamic Privacy Framework," including a Privacy Policy Office, emphasis on transparency and simplicity of privacy notices, global cooperation and parity in information laws, and a federal security breach notification law, possibly similar to California's SB 1386

- United States v. Warshak, et al., — F.3d —-, 2010 WL 5071766 (6th Cir. Dec. 14, 2010) found a reasonable expectation of privacy in email records, requiring a warrant under the Fourth Amendment to compel disclosure of communication stored at or transmitted through an ISP, regardless of how long it had been stored. The case directly addressed a user's communications, but the expectation of privacy, as a principle, may extend to other types of identifying information.
- President Obama signed the Restore Online Shoppers' Confidence Act into law December 29th. The bill aims to reduce potentially abusive unilateral aspects of online transactions. Specifically, it prohibits a vendor silently passing the customer's transaction and personal information to a third party for fulfillment, and restricting negative-option marketing.
- The Equal Employment Opportunity Commission's final rule implementing Title II of the Genetic Information Nondiscrimination Act went into effect January 10. The rule broadens and clarifies what types of information an employer must avoid seeking or storing about its employees.

These actions and programs generally represent fairly long research and discussion programs, which include a variety of stakeholders and address a variety of aspects of the online information ecosystem. For instance, the FTC focuses more on enforcement than does the Commerce Department, and so seeks to provide businesses with a framework – notably a proposed "Do Not Track" checkbox for users to opt-out of behavioral tracking.

There is a lot to highlight about these developments. First and foremost, a number of groups are at least attempting to focus on some of the central issues that we face going forward. For instance, it is easy to point out that user agreements and privacy policies tend to be overwhelmingly long and dense. But our ability to remedy this will be substantially strengthened by having now acknowledged that these statements are not only obscure legalese, but tend also to serve primarily to protect service providers from liability, not to protect or even notify users. Along with statutory safe harbors to remove some of the technicalities, a national or international standard requiring notification of security breaches can spur proper precaution through market forces and solid business practice. Further, "Privacy by design" encourages agencies and companies alike to consider processes from the ground up, and signifies some recognition that we may need to start over in some places, rather than working incrementally in addressing the problems we face.

Perhaps most significantly, the FTC and the Commerce Department both specifically acknowledge the rapid development in information technology and its use. In perhaps the best statement of deference to the unknown future is the FTC's inclusion of "Decreasing Relevance of Distinction Between PII [Personally Identifiable Information] and Non-PII" as a theme in its roundtables leading up to December release. More directly, the Commerce Department's Privacy Policy Office would provide oversight, not only to assure enforcement, but also specifically to track where existing regulations are becoming out-dated. It is largely this situation, where technology and creativity have already lead to alarming increases in monitoring and tracking, that has received substantial coverage in the media.

The Wall Street Journal, for instance, has added to its "What They Know," series of articles since I wrote last. The series as a whole is a relatively thorough, if somewhat alarmist (and ironic considering the number of trackers on the WSJ site), attempt to document and explain the amount and types of information that advertisers, websites, mobile phone companies, and service providers have about the average web user. In addition to technology, the narrative includes the motivation and reasoning behind such extensive data collection – including business plans and profiles of some major and minor players in the industry. In its Decemberinstallment the series turned its focus to some of the more complex "device fingerprinting" techniques, which do not require storing anything on the user's device. A related blog post elaborates on how these technologies are beginning to be used outside the fraud investigation context in which they originated.

This illustrates two major public policy difficulties that we face in any attempt to regulate the collection of information. First, the fact that several of the leading companies in the field have spun off from anti-fraud and anti-piracy firms highlights the difficulties in distinguishing between desired and unwanted tracking. To the extent that privacy is held absolutely protected, companies may be unable to trace, or even discover, criminal and fraudulent activity. In fact, many will be unable to sustain their business models, either due to this liability or simply due to potential decreases in advertising revenue. Second, device fingerprinting is a prime example of technology developing much more quickly than regulatory schemes. For tracking "cookies," specifically, technology that has not been directly related to marketing or privacy has been applied such that the entire "cookies" debate may be moot by the time the system even begins to successfully address it.

Distinguishing desired from unwanted information gathering causes problems for all parties, not just regulators and lawmakers. Users, even those who understand how to implement a given preference, face difficult decisions regarding how to use the internet, their phones, and even their regular appliances. While most people likely prefer to be tracked as little as possible, significant cost to use currently free services is a fairly significant weight to bear, and having personalized, relevant ads and content provided with no conscious effort really is a benefit. Younger generations, which are typically considered especially vulnerable, appear to be increasingly willing to share personal details with their most distant acquaintances as well as advertisers. People often have little concept on exactly what trade-offs they may be making, and the new government proposals largely address this by demanding clear and transparent notice of privacy practices. However, treating these proposals as major progress side-steps the major issue – I would argue that perhaps the most substantial policy problem lies in finding a way to partially convey the possible benefits and risks a consumer faces. It may be best summarized in an email Call for Papers I recently received for a special "Pervasive Intelligibility" workshop at the upcoming Ninth International Conference on Pervasive Computing, which will focus entirely on the need for technological systems to be "scrutable" to users – "to improve the usability of these novel, and possibly unintuitive, systems and to help users understand, appreciate, trust, and ultimately adopt them." While there is still such difficulty in making counter-intuitive technology itself both secure and intelligible, "clear" legal judgment in its use will not be practical.

The service provider, too, faces a wide range of choices and uncertainties. Corporate directors may face a complicated due diligence burden when performing otherwise routine business activities, to assure that private data is not only kept secure, but is limited to precisely specified purposes. On the other hand, major regulations such as the Gramm-Leach-Bliley Act currently contain exceptions (at 15 U.S.C. 6821(d) or (e), for example) for financial or insurance institutions to bend some privacy rules in order to root out fraud and other crimes. How do such exceptions apply in cases like those discussed in the WSJ series, where the same party investigating fraud is also collecting or providing marketing information? Furthermore, many of the proposed frameworks include an exception for information collected for "legitimate business reasons." One of the characteristics that distinguish the Information Age from earlier times is the ability to "mine" data that is already collected for unrelated purposes. At any time, though, political bodies might decide that a particular use of data is abusive, rather than astute business practice, thus destroying a potentially significant investment.

A regulatory system could easily err in either direction on several different levels. By being too rigid, regulations might fail to proscribe unwanted, but sufficiently creative, conduct. Or it might punish innocent, harmless business practices, which run afoul of a technicality – even one that didn't exist when the data was first collected. On the other hand, basing liability too much on intent leads to problems in situations of rapid growth. Given the exponential growth of technological progress, few major innovations are perfectly foreseeable, and thus are not likely intentional in a legal sense. With the amount of information already collected in so many different forms, regulations cannot be restricted to data collection, which was originally intended to create a profile.

Overall, we face a difficult task in an unknown environment. We must simplify choices for users, but we must also be more detailed and transparent regarding business practices; we must take privacy into account throughout the innovation life cycle, but we must allow for ever-changing definitions of privacy as a result of that innovation. And we must continue to balance, as a society, our need for crime prevention with concerns for freedom and privacy in a faster, more connected, global society. Comments on the FTC and Commerce

Department papers are now available, but the true complexity of the regulation of personal information remains to be seen.

ORAL COMPLAINTS AND THEIR EFFECT ON SUMMARY JUDGMENT FOR FLSA RETALIATION LAW SUITS: KASTEN V. SAINT GOBAIN

On March 22, 2011, the Supreme Court came to a decision in *Kasten v. Saint Gobain*. The Seventh Circuit had ruled that an oral complaint made to an employer who the employee believed was violating the Fair Labor Standards Act ("FLSA") did not fall under the anti-retaliation provision of the act. The Court reversed the Seventh Circuit and found that an oral complaint was sufficient. This decision raises questions about the standards under which summary judgment could be granted in an FLSA retaliation case.

Prior to this decision, it was easy to determine whether or a filed complaint complied with the standards of the retaliation provision. The Court in *Kasten* spells out exactly what a complaint which complies with the statute would look like. Essentially the complaint would have to be "sufficiently clear and detailed for a reasonable employer to understand it." The employee would have to ensure that the employer knew that the employee was asserting "rights protected by the statute and a call for their protection." The Court states that an oral complaint can achieve this purpose as well as a written complaint. This is probably true. However, allowing oral complaints to the employer as the basis for a retaliation suit can complicate the granting of summary judgment in favor of the defendant.

Summary judgment is an important tool courts use to expeditiously dispose of merit-less cases. It is important to the efficient administration of justice that those cases do not reach trial. The cost of litigation is high and it is an injustice to force a defendant to go to trial against every plaintiff, no matter how unworthy. When a court is determining summary judgment, they look at all of the uncontested facts. If the uncontested facts, along with the allegations by the non-moving party taken as true, show that the moving party is entitled to a judgment as a matter of law, the court should enter summary judgment. This decision could make it near impossible for a defendant to win summary judgment as long as the plaintiff knows how to frame their statement to the court. Of course, when a plaintiff does not allege a statement which complies with the statute, the defendant will win summary judgment. However, when the plaintiff knows what they are doing, the case will likely get past summary judgment and on to settlement or even trial. What really illuminates this problem however is the fact that the Court implicitly decided to extend the right to complain from just complaints to the government, but also complaints directed towards the employer. While the benefits and drawbacks of this portion of the decision are relevant and raise interesting questions, for the purposes of this discussion I will assume that it is a good policy in general. We, as a society, should desire self regulation. When a company is engaged in wrong doing, we should want the company to correct its behavior without government intervention. Therefore, it makes sense that we would not want a company to retaliate against its employee's for pointing out that the company is violating federal law. In addition, this policy helps avoid an adversarial relationship between employees and management, which in turn leads to fewer lawsuits.

However, once an employment relationship has been terminated, the former employee and employer are at odds. Unlike a situation where the employee has complained orally to a third party, the contents statement will be contested by the employer and there will be no neutral witnesses. The employer is going to downplay the clarity of the statement and the employee is going to explain how clear the statement actually was. The only real solution in the current system would be to send the issue to a trier of fact to determine exactly what happened. However, other solutions are possible. For example, one solution would be for Congress to clarify and differentiate between complaints to a neutral third party and complaints to the employer. Oral complaints to a third party could be the basis of a retaliation suit whereas complaints to the employer would have to be in writing. However, this might defeat the purpose of the policy behind allowing complaints to an employer by making it easier to be covered by the anti-retaliation provision when an employee reports violations to the government. This would not apply to all situations of course. For example, in an office setting an employee is probably more likely to send an email to HR to complain about violations of the statute rather than complaining to the boss. However, a large number of the employees covered by the FLSA do not use computers in their job which would preclude them from sending an email to HR. Rather, they would be more likely to complain, orally, to their direct supervisor.

The decision in *Kastens* may create a situation where employers and employees are caught in a he-said, she-said struggle and as a result are unable to dispose of the case through summary judgment. This raises the cost of litigation and could result in a company settling lawsuits which do not have merit to avoid going through an expensive trial. However, any inefficiency in the litigation phase seems to be outweighed by the gains in efficiency in the grievance stage. Essentially, the danger of going to trial will deter employers from firing employees because they are complaining to supervisors about violations of federal law. This encourages employees to bring complaints to the attention to the company and allows the company to self regulate.

DODD-FRANK CREDIT RATING AGENCY REFORM IN THE CROSSHAIRS

By: Daniel Scheeringa

In the aftermath of the financial crisis, Congress passed the Dodd-Frank Financial Reform Act, which sought to prevent its repeat. Yet the new House Republican majority is taking aim at a key provision of the law, which sought to give investors more accurate information by holding credit rating agencies legally liable for giving high ratings to low quality mortgage-backed bonds. While there are other ways to ensure accurate credit ratings than enhanced liability, congressional Republicans are removing an imperfect protection without replacing it with anything better.

The financial crisis of 2008 provided enough blame to go around for almost everyone involved; big banks, mortgage lenders, government, and even homeowners. But a great deal of responsibility for the crisis is allotted to the credit rating agencies ("CRA's"), most famously Moody's, S&P, and Fitch. The CRA's gave mostly favorable credit ratings to mortgage backed Collateralized Debt Obligations (CDO's) which turned out to be much more risky than the CRA's led people to believe, reaching a 36% default rate by July 2008. These CDO's were complex and illiquid investments, which many of their buyers did not completely understand, making reliable ratings even more important Commentators have cited several reasons for the failure of the CRA's: their oligopoly, the conflict of interest stemming from the "issuer pays" model, and their immunity from legal liability.

Congress attempted to deal with this problem even before the crisis, passing the Credit Rating Agency Reform Act of 2006, which abolished the SEC's authority to recognize "nationally recognized ratings agencies," and allowed smaller credit ratings companies with three years of experience to register as "statistical ratings organizations." Congress' intention was to open the market to a greater number of ratings agencies, increasing customer choice and incentivize accurate and reliable ratings. However, under the "issuer pays" model, the CRA's customers weren't looking for accurate ratings of their securities, but for the most favorable ratings. Increased competition among the CRA's gave CDO issuers more opportunities to get the rating they wanted, a practice known as "ratings arbitrage."

The failure of increased competition is proof of the second major problem with the CRA's, the inherent conflict of interest in the "issuer pays" model. Even if Moody's and S&P begin to lose their market dominance, new entrants to the market will feel the same pressure to adjust their ratings to please the client. John Coffee, of Columbia Law School theorizes that the eventual solutions to this problem lie in: 1) Creating an independent panel that would assign ratings agencies to issuers, as called for in the Franken Amendment to Dodd-Frank, 2) Moving from an "issuer pays" model to a "subscriber pays" model, where investors commission their own rating, and 3) A government rating agency.
In addition to the lack of competition and conflicts of interest, accurate credit ratings are also discouraged by the protection from legal liability that CRA's have traditionally faced. CRA's are sometimes sued, either by issuers for giving bad ratings (*Jefferson Cty. School Dist. v Moody's*, 175 F3d 848.), or by investors who suffered losses after their highly rated securities failed (*Abu Dhabi Commercial Bank v Morgan Stanley & Co., Inc.* 651 F. Supp. 2d 155.) The courts held that credit ratings are expressions of opinion rather than assertions of fact, and

therefore are protected by the First Amendment, subject to a demonstration of actual malice.

The Dodd-Frank Financial Reform Act stripped away those protections, so that CRA's were now subject to the same expert liability as an auditor or securities analyst, and required only a "knowing" or "reckless" state of mind for liability, rather than proof of scienter. It also repealed Section 436 of the Securities Act of 1933, which granted "safe harbor" for ratings, which were part of a prospectus. As a result, CRA's were now required to give their consent for their ratings report to be included in the prospectus for a new issue security.

President Obama signed Dodd-Frank into law in July of 2010. It took less than a week for problems to arise. With their new legal exposure, the CRA's refused to give that consent. Since asset-backed bond issuers were required by law to disclose their rating, this deadlock threatened to drive new debt issuance into the unregulated private market, or shut down new issuance altogether. The SEC temporarily solved this problem by issuing a six-month exemption that allowed asset-backed issuers to sell in the public market without a rating. That temporary solution became permanent in November 2010, when the SEC extended it indefinitely.

Although research suggests that exposing CRA's to legal liability fails to solve the fundamental conflict of interest resulting from "issuer pays", a sub-optimal solution is still better than nothing. Unless Congress takes some other action to reform the credit rating process, it will have done nothing more than help set the clock back to 2006.

NCAA EXPANSION OF DIVISIONS

I love sports and follow professional and collegiate football pretty religiously. I went to the University of Southern California (USC) for undergrad, where I got to enjoy our football team before everything turned dark for the Trojans. I now attend the University of Illinois for law school and, let's face it; the football team leaves something to be desired. I'm a Chicago Bears fan and a San Diego Chargers fan and November 28, 2010 was basically my favorite day of football ever; the Bears beat the "unstoppable" Eagles 31 – 26 and the Chargers manhandled the Colts 36 – 14. Even though USC is now on a two year bowl ban and I'm not living in Los Angeles, I still have a special place in my heart for USC and the Pac-10, as I'm sure most people do about their alma mater. Therefore, I've been keeping an eye on the future expansion of the Pac-10 and the other conferences.

It is most likely no surprise that the big reason behind division expansions is money, money, money. As Scott Groves points out, the Pac-10 is economically behind other divisions (namely the SEC and the Big-12), because they don't have a television contract and they don't have a conference title game. Conference championship games bring in millions of dollars each year and if the Pac-10 can get to the point where they too have one, it will (most likely) bring in lots of extra revenue that can then be shared across the athletic departments of the schools. At the beginning of the year, there was a lot of hoopla about whether the Pac-10 was going to become the Pac-12, Pac-14 or the Pac-16. Currently, the University of Utah and the University of Colorado have become parts of the Pac-10. Groves notes that Denver, Colorado is the 12th largest television audience in the nation (although, with the rate things are going for the Broncos, as late, I assume this is shrinking). [1]

So now my beloved USC is part of the Pac-12 and its commissioner, Larry Scott, has announced that they will use a North/South alignment, which means the "North" schools will only travel down to Los Angeles once every two years and vice versa. For a USC fan, I'm pretty excited about this, as Oregon seems to be our kryptonite. One of the more intriguing factors is the implementation of a conference championship game. The details are currently still being worked out, but there's a lot of "what ifs" that go into the equation. Directors urge for a "neutral site," but with the conference now including Utah and Colorado, the Pac-12 has a huge geographic base to cover (Washington, Oregon, Utah, Colorado, California and Arizona). Further, it is college football and in order to make the most money, the fans have to be happy. If Colorado is in the championship game, their fans aren't going to be happy if the game winds up in New Mexico, due to "neutrality". If less fans travel to the game, it means less money for the business and less money getting returned back to the schools. If modeled after the NFL, the number 1 seed could receive home field advantage, which seems to be fair (though not neutral) and will still maintain the collegiate atmosphere of being played in a college stadium. [2]

In addition to the money advantage of realignment, there is also an added bonus of prestige and the assumption that if you are part of the BCS affiliated divisions, you're simply better than other teams in non-affiliated divisions. The champions of these divisions get automatic bowl bids (the BCS has the national championship game and four bowl games). Teams from the other non-affiliated divisions can only get into a bowl game under very narrow circumstances, because usually the BCS would rather invite a second ranked team from an affiliated division than the champion of one of the “lesser” divisions. It’s this sort of thought process that has motivated teams like Boise State into proving that they deserve to be in bowl games. All Boise State (part of the non-BCS affiliate Western Athletic Conference) had to do to make the national championship game was beat Nevada; however, with that one loss to Nevada, they were dropped in the polls to such a degree that not only did they lose their chance at playing for the national championship, but they also missed their chance to play in any of the other bowl games. More importantly, they lost a lot of money. Last year, the WAC brought in $7.5 million at the end of the season, with about $3 million going to Boise State and the rest being distributed among the rest of the schools. This year, had Boise State been undefeated, the WAC would have likely brought in $10 million (due to more lucrative television deals), with close to $3.5 million going to Boise State. Ironically, since Nevada is in the same conference, when they beat Boise State, they also lost money for their school (about $1 million), since the payout depended on Boise State going undefeated. [3] As Cork Gaines humorously puts it, “[n]ext time, Nevada should just bet $1 million on themselves to win the game. That way if they win they win. And if they lose, they still win.”

The Pac-10 used to be dubbed (at least around Southern Cal) “USC and the nine little dwarfs.” Now the Pac-10 is a lot more evenly matched and, even though I miss the days of USC dominance, the Pac-10 is becoming a stronger conference, with teams like Oregon and Stanford really stepping up to the plate. I’m excited to see what Utah and Colorado have to bring to the table. For Utah and Colorado, it’s a chance to play in a conference that will bring them recognition (either positive or negative), but more importantly, it will give them the chance to play among the so-called elite teams. Had Boise State been in a different conference, their one loss likely wouldn’t have hurt them so much in the polls and perhaps they still would have had a chance to go on to a bowl game. So whether the reasons for expansion are prestige, money or some other reason, everyone should be excited at seeing how the expansion of divisions affects the individual schools as well as the NCAA as a whole.

QUANTITATIVE EASING MAY CREATE FOREIGN UNEASE

While I cringe to find myself on the same side of the fence as Sarah Palin, she and Republican politicians in Washington D.C. may be right to fear Ben Bernanke and the Federal Reserve’s new effort of quantitative easing. The Federal Reserve’s proposed plan is to buy $600 billion in Treasury bonds by June 2011. Their aim is to lower long-term interest rates and to keep the dollar cheap, thereby stimulating the U.S. economy by encouraging the sale of goods overseas. While Palin may not understand why she objects the plan, I do: it has the potential to antagonize U.S. trade partners and stiffen foreign trade.

Dissenting Conservatives are concerned with the long-term effects of the move, which could cause a domino effect of runaway inflation and frustrate U.S. trade partners. Bill Gross, the manager of the largest mutual fund in the world, Pacific Investment Management Company, LLC (PIMCO), questioned the move last month. He believes the Federal Reserve’s effort of pumping 900 billion dollars into the system could result in a decline in the U.S. dollar of up to 20 percent. The Fed argues that a decline in the value of the dollar is exactly what the U.S. economy needs to stimulate the sale of goods overseas. However, will nations around the globe want to continue interacting with the U.S. if we threaten the price of their goods?

This move will frustrate U.S. trade partners, like China. At the beginning of November, the official Xinhua news agency cast doubt on the bond-buying enterprise, calling it a “self-centered” move that will have “considerable spill-over effects in the other parts of the world.” Additionally, according to Barry Eichengreen, a professor of economics at University of California, Berkeley, and Douglas Irwin, a professor economics at Dartmouth College, quantitative easing will reflate the Chinese economy. This could frustrate China because inflation there is already alarmingly high.

There are already signs that China’s frustration with quantitative easing has caused them to move away from the U.S. dollar. According to The Market Oracle, in September China supported a Russian proposal to begin trading using the yan and the ruble rather than the U.S. dollar. Additionally, it sought to make an agreement with Turkish Prime Minister Erdogan to exclude the U.S. dollar and instead use their own currency in their planned trade of $50 billion over the next five years. According to Gross, investors are withdrawing from the U.S. dollar because quantitative easing lowers the yield investors earn on the dollar. Therefore, the already fragile dollar could suffer a blow in the foreign market if quantitative easing is enforced.

The easiest way to frustrate a financial giant is to enforce hypocritical financial reform. For the last several years, the U.S. has fronted an attack on China for devaluing its currency, insisting that U.S. businesses cannot compete with China’s low prices. The U.S. House of Representatives recently passed a bill attacking China’s management of its currency and in late October, U.S. Treasury Secretary Timothy Geithner fostered an international agreement that would discourage currency devaluation among the G-20 nations. If the U.S. violates this agreement by devaluing its currency, it may anger China and the G-20 nations and jeopardize foreign trade relations.

The most daunting aspect of the plan is that it has already failed before. In November 2008, the Federal Reserve implemented a $600 billion quantitative easing program. Four months later, the plan was not performing, so the Fed upped the total to $1.8 trillion. It will be difficult for the Fed to argue the plan worked, since the unemployment level is shockingly high, 9.3 percent, businesses are in the red, and the housing market is floundering. When the plan was implemented in November, 2008, unemployment was at 6.5 percent, and a year later it rose to 9.4 percent. While there are surely other factors that contributed to the rise, it is evident that quantitative easing did not resolve unemployment. Why is the Fed reinstating a formerly botched plan and estimating a different result?

MICROSOFT'S MESSAGE TO ITS PARTNERS

From September 2009 to September 2010, Google's share of the U.S. mobile phone OS market has risen a staggering 18.9 percent, going from 2.5 percent to 21.4 percent, while Microsoft has seen its share of the mobile OS market decline from 19 to 10 percent. Notably, the other major players in the U.S. mobile OS market either held their share, in the case of Apple and Palm, or saw a modest decline, in the case of Research in Motion. Clearly, the rise of Google's open source Android OS represents a greater threat to Microsoft's future in the mobile OS market than it does to other companies.

Given Microsoft's dramatic loss of market share, several industry analysts have speculated that Microsoft'slawsuit against Motorola, alleging that several of Motorola's Android based phones violate Microsoft patents, is in direct response to the pummeling Microsoft has taken at the hands of Google. This speculation was heightened when open-source analyst Carlo Daffara commented via Twitter that two of the nine allegedly violated patents, specifically 5579517 and 5758352, were covered by the Open Invention Network (OIN).

OIN acquires patents and licenses them royalty free to entities that agree not to assert their own patent violation claims against Linux-based systems, such as Android. OIN members include Sony, Red Hat, IBM, TomTom, and—yes—Google. Consequently, an infringement claim with respect to patents 5579517 and 5758352 against Google would not likely result in just litigation with Google, but with the entire OIN community. Despite Microsoft's vast resources, it has previously demonstrated a reluctance to embrace such a strategy. For example, in 2009 Microsoft alleged infringement of these same two patents when it brought action against TomTom, which was not an OIN member at the time. Subsequent to TomTom joining OIN shortly after Microsoft filed its claim, Microsoft and TomTom agreed to a settlement. Thus, it appears that Microsoft is waging a proxy suit against Motorola to avoid engaging OIN.

However, as Seth Weintraub noted, Microsoft's current action against Motorola is more likely to illustrate for Samsung, HTC, and LG the consequences of abandoning Microsoft's Windows Mobile platform. Since Motorola's introduction of the Razr in 2004, which helped increase its share of the handheld market from 15 percent to 23 percent at the end of 2006, Motorola has struggled to remain profitable. While it has consistently performed well in the handheld market, Motorola has lacked competitiveness in the quickly expanding smartphone market. Consequently, Motorola response was to concentrate its efforts on making Android phones, to the exclusion of other platforms.
This view is furthered by Microsoft's contradictory position regarding Apple's recent lawsuit against HTC. Last spring Apple alleged that the user interface on HTC's Android phones was in violation of twenty Apple patents. Shortly thereafter, Microsoft came to HTC's defense by executing a licensing agreement, which, as explained by Microsoft's press release, "provides broad coverage under Microsoft's patent portfolio for HTC's mobile phones running the Android mobile platform." True, Microsoft may have simply seen the Apple-HTC lawsuit as an opportunity to exact royalties from HTC no matter which mobile platform HTC was using. However, in the context of Microsoft's treatment of Motorola, Microsoft appears to be sending a clear signal to its partners: We'll license you under our patent portfolio even if you use the Android platform; but if you leave Windows Phone 7 from your lineup, then litigation is forthcoming. Consequently, the current action against Motorola is more likely directed at maintaining its current partners than about attacking Google.

REGULATORY TAKINGS IN REAL PROPERTY: FACT OR FICTION?

We are constantly changing the fundamental character of property ownership in this country. Nowhere is this more evident than in the real property arena. As the past few years have shown us, real estate has morphed from a long-term, stable investment to become a hugely derivative enterprise, which has diversified and become interconnected with other sectors of the economy as never before. The argument has been made that real estate has lost its original character and that it has become commoditized. Regardless of one's position on this question it is clear that because of this continual transformation, takings law is constantly pressured to look at situations where the new concept of economic devaluation of property must be reconciled with the traditional notion of the bundle of sticks, and the state's inability to render that bundle obsolete by legislative action, without compensation. Herein lies the basic regulatory takings conundrum that perplexes not only first year property students, but students, professors and practitioners in the fields of land use, urban planning, real estate development, and constitutional law.

Justice Scalia in his opinion in the groundbreaking case, Lucas v. South Carolina Coastal Council, spoke of the inherent difference in reasonable expectations from real property vs. personal property, specifically to owners of investment property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). He explained that, "by reason of the State's traditionally high degree of control over commercial dealings, [the property owner] ought to be aware of the possibility that new regulation might even render [] his property economically worthless." *Id*. He refused, however, to place this standard on real property, explaining that for real property the State can only regulate and forbid uses when, "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id*. This line of reasoning is consistent with the jurisprudence of the Supreme Court up to this point. As we look at cases like *Pennsylvania Coal v. Mahon* and *Penn Central* we see that the Court has continually approached this problem by affording to the real estate investor the same regard and same standing as the homesteader who is purchasing property with a conventional understanding of his rights in that parcel. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922);*Penn Central Transportation Co, et al. v. New York City et al.*, 438 U.S. 104 (1978)

However, as the market continues to incentivize real estate investors to use real property as more and more of a short term investment rather than a long term store of wealth, and as advocates of this process continue to press Congress and State legislatures to promote this use in the tax codes and other regulation, does the argument weaken for a distinction between real property and commodities in the regulatory takings analysis involving a developer or commercial owner of real estate? Put another way, does the principle that similarly situated properties be treated similarly apply here as well?

As we continue down this path, the goals and purposes of real estate developers' property ownership are rapidly diverging from those of the homeowner. Developers are in the business of developing land to manage or sell and make a profit with an increasingly shorter time horizon for recouping investment and recognizing thisprofit. The tax code treats their activities differently from those of principle residence real property owners and affords different advantages to each according to their situation, so should the courts. *See*, IRC §§ 121 and 1231 (detailing how to treat the gains on property held as a principal residence versus those on property used in one's trade, business, or as investment.)

This is not a completely new idea. In *Penn Central*, the Court did develop a balancing test, however, the question focused on economic value and its relationship to the taking question. Economic value should be analyzed when determining fair compensation but should only be used once the Court has found a taking. The base line for those who are engaged in the real estate business should be different than those who own land in a traditional sense, just as it is in the tax code. This would allow judges to look at the purpose of ownership and possibly the use of the property to determine whether a regulation has affected in a way that is inconsistent with the way government regulates the market. This treatment would place speculators and developers in a position to take the same risk with real estate that they would take with other commodities, a market where the government is constantly regulating and influencing value, yet where the proposition of a regulatory taking is laughable.

Perhaps this would also protect the residential home buyer and the residential market as a whole from the ups and downs of the financial and commercial markets which are much more speculative. It would make the takings analysis easier because it would create a clearer federal standard. The states would still have the ability to decide property law as far as what sticks are in the bundle. The federal standard would simply establish which types of clients are similarly situated. This could also alleviate the overburdened docket of the Supreme Court. No longer would they be dealing with cases where business speculators are presenting arguments and asking to be treated as if they were homesteaders losing their property. They would have to argue from their true position, that of the commodity owner whose cash cow got slimmer because of a new law.