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IMPOSING FIDUCIARY DUTIES ON POLITICAL PARTNERSHIPS

In a change from the ordinary politics of promoting the supremacy of one party platform over another, this past campaign season aspiring candidates promised bi-partisan cooperation on several key issues. It is interesting to think, though, of what these candidates meant by "cooperation." Analogizing the promised cooperation to a legal partnership framework, candidates could be interpreted to have campaigned to form bi-partisan political partnerships under which they would owe fiduciary duties of loyalty and care to their political foes. While cooperating under a duty of loyalty and care may sound appalling to the newly elected candidates, imposing legal-inspired fiduciary duties on political partnerships could benefit the American economic and political landscape.

As a brief review of fiduciary duties, the Revised Uniform Partnership Act (RUPA) requires that a partner owes to the partnership and the other partners the duty of loyalty and the duty of care.[1] The duty of care encompasses "refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law."[2] The duty of loyalty includes an anti-theft provision, a prohibition against self-dealing, and a prohibition against competing against the partnership.[3] In a revered opinion well-known to law students, Justice Cardozo described the standard of behavior for the duty of loyalty as "[n]ot honesty alone, but the punctilio of an honor the most sensitive."[4]

It is somewhat hard to believe that aspiring candidates envisioned serving the adverse party with the "punctilio of an honor the most sensitive." Additionally, in today's world, without pointing to specific examples, the media highlights all sorts of "grossly negligent or reckless" conduct of well-known political figures, some who resign or are removed from office, and some who remain in office, with or without the disdain of the American public. Alas, when we think of those bad apples who have gone astray in their political dealings, we doubt that political figures can cooperate with care and loyalty toward each other when they cannot refrain from their own acts of negligence or recklessness.

Yet, all is not lost. Shortly after the polls closed and the results were announced, prominent political leaders met and reaffirmed the spirit of bi-partisan cooperation echoed in campaigns throughout America.[5] One leader stated "[w]e won't agree on every issue . . . [but] we will do our very best to address big problems."[6] Another leader added that "we will work together – we being Republicans and Democrats, the president and the Congress – to solve the problems and make [Americans'] lives better, more secure and our country more safe."[7] Regardless of who these leaders are, or what parties they represent, the message is clear: political leaders want to work together to help America.

This inspiring message, if put to use, could greatly benefit the American economy in terms of cooperating on issues such as social security, minimum wage, immigration, health care, and the war in Iraq. What the message seems to lack at this point, however, are standards of conduct for this cooperation, which this article likens to the fiduciary duties imposed on legal partners.

The duty of care, as applied to political partners, begins with one's own actions and the reality of the political spotlight. This duty encompasses the responsibility to refrain from grossly negligent or reckless conduct, intentional misconduct, and knowing violations of law. Several political examples of breaches of this duty come to mind – lying under oath, breaking into an opposing party's national headquarters, and violating campaign finance laws, to name a few. Abidance by this duty, and the subsequent diminution of such breaches, would allow politicians, political parties, and cooperative alliances more time to focus on key issues and less time fighting corruption. Although the duty of care begins with individual political behavior, the duty would serve political partnerships as a whole as a mechanism to regulate political conduct.

The duty of loyalty would require politicians to put aside their differences when serving a political partnership to solve looming problems such as social security. Today's working generation works without definite security that there will be anything left in the social security system to supplement their retirement. With regards to issues like social security, there is no room for self-dealing or competing against the political partnership, because to do so would prolong the life of the issue until it is too late to make a positive difference. Furthermore, on issues like social security, political figures are not only partners, but also could be viewed as directors of an American corporation, with the duty to do what is best for the shareholders of American citizenship. Yet, as either partners or directors, the accompanying fiduciary duties constrain politicians' conduct to what is best for the country.

Predictably, if politicians agreed to the complete scope of legal fiduciary duties they would have to sacrifice some degree of loyalty to their own party and set aside personal viewpoints on certain issues. However, fiduciary duties in the political context are not expected to lead to complete agreement on all issues and are instead offered as a standard for political behavior in joint endeavors. Indeed, it is the spirit of democracy, free speech, and open dialog that characterizes American politics. Thus, as a last resort for particular issues, RUPA allows a partnership agreement to contractually restrict fiduciary duties provided that the agreement cannot eliminate the duty of loyalty or unreasonably reduce the duty of care.[8] This would allow political cooperation on certain key issues, while reserving those hotly contested issues as categories that may be disputed without violating the duty of loyalty to the other party.

As a final note, one might ask why imposing legal fiduciary duties would be more effective than other recourse, such as impeachment, media attention, and public condemnation. First, while impeachment is a potential remedy, it is rarely used. Second, political figures have suffered the effects of media attention and public condemnation for years, yet scandal persists. As an alternative, fiduciary duties would constrain the need for impeachment, negative media attention, and public condemnation by imposing a standard of behavior that would preempt these ineffective constraints. As a counterargument, fiduciary duties may lead to increased political litigation. Yet, even the threat of judicial recourse for breach of the duty of care or loyalty may adequately deter reckless conduct or self-dealing. At the very least, by recognizing the existence of the duties of care and loyalty, politicians know what is expected of them and consequently may not engage in behavior that would breach these duties.

In summary, hopeful candidates recited campaign promises for bi-partisan cooperation. After the election, American leaders then reaffirmed their intentions for such cooperation. Yet, what is missing from this proposed cooperative equation is a standard of conduct. To fill this void, bi-partisan political partnerships could model their behavior off the fiduciary duties of care and loyalty of legal partnerships to the benefit of the American society and economy.

[1] REV. UNIF. PARTNERSHIP ACT §404(a) (1997).

[2] *Id.* at §404(c).

[3] D. Gordon Smith & Cynthia A. Williams, BUSINESS ORGANIZATIONS: CASES, PROBLEMS AND CASE STUDIES 74 (Aspen Publishers 2004).

[4] Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928).

[5] *See* Dana Bash, Ed Henry & John King, *Bush, Dems Promise Cooperation as Senate Shifts*, CNN.COM, Nov. 9, 2006, *at* http://www.cnn.com/2006/POLITICS/11/09/election.main/index.html.

[6] *Id.*

[7] *Id.*

[8] REV. UNIF. PARTNERSHIP ACT, s*upra* note 1 at §103.

DOES MYSPACE CARE ABOUT COPYRIGHTS?

I. Introduction

They
probably should because Universal Music Group ("UMG") recently filed a copyright infringement lawsuit against the popular social-networking website. [1]. Myspace.com is alleged to allow its users to post and share UMG's videos and songs without permission. [2]. UMG wants an injunction against MySpace and a hefty damage award of $150,000 for each individual copyright infringement violation. [3].

II. Analysis

UMG
says that MySpace's content is "user stolen" intellectual property of others and that "MySpace is aiding copyright infringement by reformatting clips so users can transfer them to friends or post them to other sites." [4]. UMG attorney's stated in their complaint that "[d]efendants have made infringement free and easy. [They have] turned MySpace Videos into a vast virtual warehouse for pirated copies of music videos and songs." [5].

It is not like MySpace has been sitting around doing nothing to help detect the copyright violations. In October, they licensed "fingerprinting technology from Gracenote
to help prevent unauthorized music from landing on the site. The filtering system, which launched on Friday, is designed to automate the

removal of unauthorized works from the site once they have been flagged by copyright holders." [6]. This did not seem to be enough for UMG and they filed about two weeks ago.
UMG and MySpace have been negotiating. But talks ended about a week prior to UMG's filing. [7]. The last straw seemed to be when MySpace allowed an unreleased video from rapper Jay-Z. [8].

If UMG's suit is successful, there could be a big problem for all of the free services out there that allow users to post videos and music at will. The issue to be dealt with in this case, and could easily be applied to other companies that conduct similar business, is whether MySpace can be held liable for their users' copyright violations.

The answer to this depends on how the MGM v. Grokster case is interpreted. [9]. The court said that copyright violations turn on fine points like whether the service is capable of substantial non-infringing use, and whether the defendant can block infringements and failed to do so. [10].
The court said that Grokster and
StreamCast (both defendants in the case) could be held liable because there was evidence of "unequivocal indications of unlawful purpose" and because "neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software." [11]. The ultimate holding of this case was that "one who 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." [12].

III. Conclusion

So MySpace's best defenses are its implementation of the fingerprinting technology and the safe harbor provision under the Digital Millennium Copyright Act which was designed to protect sites that allow the public to communicate or conduct trade, videos and songs in this case, without accepting liability for user misconduct. [13].

[1] IP360.com, UMG Files Copyright Infringement Suit Against MySpace, http://ip.law360.com/Members/ViewArticlePortion.aspx?Id=138022& (November 20, 2006).

[2] *Id.*

[3] Don Jeffrey, *Universal Sues MySpace on Copyright Charge*, Bloomberg, Nov. 17, 2006, http://www.bloomberg.com/apps/news?pid=20601103&sid=aKkqRuMU_Bek&refer=us.

[4] Greg Sandoval, *Universal Sues MySpace for Copyright Violations*, CNET News, Nov. 17, 2006, http://news.com.com/Universal+sues+MySpace+for+copyright+violations/2100-1030_3-6136829.html.

[5] *Id.*; See also http://news.findlaw.com/hdocs/docs/ip/umgmyspace111706cmp.html(copy of UMG's complaint).

[6] Greg Sandoval, *Universal Sues MySpace for Copyright Violations*, CNET News, Nov. 17, 2006, http://news.com.com/Universal+sues+MySpace+for+copyright+violations/2100-1030_3-6136829.html.

[7] *Id.*

[8] *Id*.

[9] *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd*., 545 U.S. 913 (2005).

[10] *Id.*

[11] *Id.*

[12] *Id*. at 929.

[13] 17 U.S.C. §§ 1201-1202 (2000).

SUPER SIZE MY PREMIUMS PLEASE!

An analysis and proposed solution to the health care crisis brought on by the American obesity epidemic.

I: The United States' BIG Problem

As though a perverted manifestation of the maternal warning against making an "ugly face" ("or it will be stuck like that for the rest of your life") has actually rung true, the playground taunt of "fatty, fatty, two-by-four" is no longer a simple and vindictive pre-adolescent utterance but a fact. Much like a face stricken with a permanently contorted expression, our nation has been punished with a nationwide obesity epidemic. Throughout this article, the term epidemic is used to mean a rapid and extensive growth and not the outbreak of disease. Short of pathogen-laden Twinkies or Little Debbie being diagnosed with tuberculosis, obesity is not a disease. The United States has devoted greater attention to the obesity issue in the past year, but the country has yet to reach a solution to its pudgy predicament.

Classifying obesity's growth (pun intended) as "rapid and extensive" might qualify as an understatement. In 1960, the amount of obese Americans between the ages of 20 and 74 was 13.3%. [1]. This percentage jumped to 31.1% during 1999-2000. [2]. The percentage of children ages 6-11 classified as "overweight" in 1960 was 4%. [3]. In 1999-2000, the figure was 15.8%. [4].

Identifying the specific reasons for this increase falls far outside the scope of this article. [5]. The primary concern of this author is not one of causation, but one of consequence. The obesity epidemic triggered a significant increase in the cost of health-care in the United States. As obesity is largely a product of personal choice and is for the most part preventable, such a consequence is entirely unacceptable. This article proposes advancing an implicit “tax” in the form of increased insurance premiums on those who exceed acceptable levels of body fat percentage given their age and gender. As this article will note, individuals classified as obese have far greater risks for heart disease, diabetes, and other morbidities. Treating such high-risk individuals has adverse consequences for the health-conscious citizens resulting from increased insurance premiums or escalated taxes paid to Medicaid/Medicare. By redirecting the increased cost to those responsible, one arrives at a solution that provides incentives for leading a healthy lifestyle while not unfairly burdening the segments of the population that elect to make health-conscious choices.

This article also argues that taxing overweight individuals, as opposed to taxing unhealthy food, is the more effective fiscal incentive to combat obesity.

II: Super Size My Premiums Please!

The mere conceptualization of a fat-tax as a method to force people to lead healthier lifestyles may appear as yet another implicit surrender in the battle of common sense as an American virtue. Society has previously raised this white flag in the passing of legislation that increases taxes on cigarettes, bans smoking in public areas, and forces motorcycle riders to don a helmet. [6]. It seems for most of this country’s citizens, the fact that something may kill you is hardly an incentive to stop a given behavior. As a Social Darwinist, this author traditionally supports such bull-headed displays of freedom, as the gene-pool is likely better off without such people treading water.

The line is often drawn, however, when a person's freedom of choice results in consequences that are adverse not just to the person, but to third parties as well. It is in this harm to third parties that lies the rub in the obesity issue. Obesity is not simply a matter of personal choice, but a choice that carries significant fiscal consequences. "Treating obesity-related illnesses and complications adds billions of dollars to the nation's health care costs." [7]. The Surgeon General also notes that that obesity will soon rank on par with cigarette smoking in terms of the creation of preventable disease. [8]. The detriment obesity related issues pose to the average-sized American is most poignantly reflected in that 27% of the increase in health-care costs seen from 1985-2001 are directly attributable to treatment of the obese. [9]. It seems now that our nation of Burger Kings and Queens has led to the super-sizing of much more than value meals.

III: The Solution…short of just putting the Krispy Kreme down.

A solution to the obesity epidemic is not as simple as one might think. In defiance of Occam's Razor, the simplest solution of personal responsibility is clearly not the solution. While a rather conclusory statement, the mere fact that there IS an obesity epidemic reflects its validity. While smokers who claim they are unaware of the health risk of cigarettes cannot see the tumors growing in their lungs, the obese have no such argument. Irresponsible eating habits and a sedentary lifestyle have the very visible positive correlation with "symptoms" such as sweating while watching television and the inability to observe one's toes. Anyone willing to cautiously experiment with fruit and a treadmill would quickly appreciate that their "condition" is the direct result of specific lifestyle choices.

Thus, despite this author's strong libertarian leanings, some form of government-based action seems necessary.

Education holds great promise in the longer-term battle against obesity. The Department of Health and Human Services has launched the National Heart, Lung, and Blood Institute Obesity Education Initiative (O.E.I. hereinafter). [10]. The primary goal of the O.E.I. is "encourage the adoption of heart healthy eating patterns and physical activity habits that will not only help prevent or reduce the prevalence of overweight and obesity and their related coronary heart disease risk factors along with sleep apnea, but also help reduce morbidity and mortality from coronary heart disease." [11].

While education has been proven to be effective in deterring other self-destructive behaviors (e.g. smoking), the results of such efforts will not be felt for years. One is still forced to contend with the current generation of obese Americans who continue to drive up health-care costs.

It is this author's opinion that economic incentives are the most practical method of forcing a national slim-down. While avoiding a hilarious "carrot or the stick" pun, it seems that the surest way to get Americans to react to a problem is to force them to pay for it. From the Boston Tea Party to "Read my lips: No New Taxes," it seems no good citizen wants pay extra for something without a fight. Such an approach has gained significant attention and success in combating cigarette smoking. [12].

IV: The Shortcomings of the "Kaiser Soze" Tax

Several theories exist on how to exact a tax the obese as both an incentive for a healthier lifestyle and as a method to lower premiums on those with lower-risk lifestyles.

The most popular proposal is that of a fatty-food tax. This approach is a carbon copy of the theory behind curbing cigarette addictions by making the cigarettes themselves prohibitively expensive. At its most basic form, this form of tax would add cost on food defined as “unhealthy.” [13]. The usual culinary suspects would be rounded up and would cost the consumer more, thus providing a disincentive to purchase the item. [14].

Such an approach is likely the most popular as it is the least politically volatile, not because it is stands as the most effective. No politician worth his or her salt would risk alienating votes by calling attention on their more rotund constituents.

The fatty-food tax is inherently flawed because it is not the food itself that makes an individual fat, but the quantity consumed. While there is the natural association that some foods are more likely to contribute to weight gain, there is not causal relationship between the two. Weight gain and loss is governed by the end of result of the calories consumed minus calories expended equation. If one consumes more than one expends, the excess is converted into, among other things, stored body fat. If one expends more than is consumed, the body makes up for the caloric deficit by burning existing fat stores. One could subsist entirely on traditionally “fatty-foods” and still lose weight given a high enough daily caloric expenditure.

Further, this author finds the fatty-foods tax objectionable on political grounds. A staunch advocate of John Stuart Mill’s harm principle, [15],[16] there is no need to govern the specific food an individual consumes. Until that intake results in an infraction of one’s personal freedoms, namely, to pay a reasonable insurance premium, someone’s meals should remain their business.

A second approach is one of government mandated taxes based on one's body mass index (B.M.I) or body fat percentage. As noted by Dean Levmore of the University of Chicago Law School, enforcement of such a tax would be nothing short of a civil liberties and logistical nightmare. [17].

V: Some Food for Thought

The most effective method lies in using an economic incentive theory, like a tax, incorporated into an already existing infrastructure for enforcement. The solution? Standard incorporation of an implicit tax upon the obese through higher insurance premiums. Much like other risk-based behavior that has probability to result in greater harm to the person, obesity is clear in contributing to significant health risks. [18]. Insurance companies, by requiring the obese to pay significantly higher premiums, will merely level the playing field in terms rewarding those that abstain from high-risk behavior. Such a fiduciary incentive also serves to remove the moral hazard element of the obese. If an obese individual is fully covered under health insurance, there is no real consequence for the choice to engage in a high-risk behavior. [19]. As Stanford Law Professor Jeff Strnad notes: "Ex ante moral hazard would be reduced on individuals because individuals who chose unhealthful eating habits would have to cover the expected cost of such behavior in advance." [20].

The matter of enforcement is far less complicated under this system, as insurance companies regularly require physicals of policyholders. The enforcement scheme also raises an issue this author, proudly holding a minor in exercise science, feels has been grossly overlooked. Throughout the existing legal and lay person literature on a fat tax, the suggested method of determining whether an individual is obese is through the Body Mass Index (B.M.I.). An individual's B.M.I. is determined by dividing an individual's bodyweight by the square of their height. [21]. The B.M.I. has been the subject of much criticism from the sports science community but has somehow still prevailed. [22]. In this author's opinion, B.M.I.'s continued prevalence is based the fact its harder for patients to argue with a number than a physician informing them they are overweight ("You have a 30 B.M.I." "I'm just big boned.").

The inherent flaw of Body Mass Index measurements is that it fails to factor in the weight of muscle mass. Thus, one who is incredibly lean but highly muscular (any given fitness model or professional athlete), would likely be "overweight" per the B.M.I. in light of the height and weight calculation. [23]. The far more precise measure is one of body fat percentage, which measures the proportion of adipose tissue (body fat for the non pre-med majors) in regard to overall body mass. As the suggested approach would take such measurements during insurance physicals, the logistical drawbacks to using body fat percentage over B.M.I. (body fat determinations require a physical consultation, B.M.I. determinations do not) are rendered nearly moot.

Admittedly, the most glaring shortcoming of insurance-based incentives as a weapon to combat obesity is the startling amount of United States citizens who are not insured. As the uninsured cannot directly affect insurance premiums, one can argue that they are a non-factor in such analysis. Such an argument is shortsighted however, as the uninsured obese in this country will undoubtedly need medical attention and such costs are either passed on to the emergency rooms they enter (treating even the uninsured is a mandate passed on to all hospitals through the Emergency Treatment and Active Labor Act [24]) or the taxpayer through Medicare/Medicaid. To this conundrum, this article offers no solution. Implementing a reward/punishment mechanism on the poverty stricken is not only a public policy quagmire, but simply beyond the bounds of human decency, even for this author. This issue is particularly thorny in that it is the poor that are the least likely to be able to afford nutritional food or be able to choose time to exercise and therefore at higher risk for obesity.

VI: Death, Taxes, and Chicken Nuggets.

Ben Franklin noted that the only two certainties in life are death and taxes. Implementation of a fat tax appears an peculiar conflation of these two certainties; using the latter to prevent the former. The public health crisis of obesity in this nation is truly a matter that can no longer be ignored. Obesity has grown, much like stomach flab over a waistline, from being a health concern of the few to a fiscal concern of the many. Much like smoking-based ailments, obesity matters are particularly complicated as they appear highly preventable and the result of personal choice. If the main weapon to be used to combat this epidemic should be financial remuneration, public health initiatives, or something else entirely, remains patently unclear. Perhaps the American public should just be left to their own corpulent devices and be allowed to Rascal-Scooter themselves into an early, and quite large, grave.

[1] Jeff Strnad, *Conceptualizing the "Fat Tax": The Role of Food Taxes in Developed Economics*, 78 S. CAL. L. REV. 1221, 1222 (2005).

[2] *Id.*

[3] *Id*.

[4] *Id*.

[5] *See generally*, Richard Epstein, *Obesity Policy Choices: What (Not) To Do About Obesity*, 93 Geo. L.J. 1363.

[6] Saul Levmore, *Taxing Obesity – Or Perhaps the Opposite*, 53 Cle. St. L. Rev. 575, 576 (2005/2006).

[7] Department of Health and Human Services, *HHS Announces Revised Medicare Obesity Coverage Policy*, July 15, 2004, available at: http://www.hhs.gov/news/press/2004pres/20040715.html.

[8] OFFICE OF THE SURGEON GENERAL, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY, at XIII (2001).

[9] Ceci Connolly, *Obesity Gets Part of Blame for Care Costs*, WASHINGTON POST Oct 20, 2004, available at: http://www.washingtonpost.com/wp-dyn/articles/A46123-2004Oct19.html

[10] Department of Health and Human Services, *National Heart, Lung, and Blood Institute Obesity Education Initiative*, available at: http://www.nhlbi.nih.gov/about/oei/oei_pd.htm

[11] *Id.*

[12] *See* Levmore, *supra* note 6, at 577.

[13] *See* Strnad, *supra* note 1, at 1224-1227.

[14] *Id*.

[15] JOHN STUART MILL, ON LIBERTY (New Ed ed., Penguin Books 1982)(1859)

[16] *Id*.

[17] Levmore, *supra* note 6, at 580.

[18] Strnad, *supra* note 1, at 1222.

[19] *Id*., at 2005.

[20] *Id*.

[21] *See* ASKER JEUKENDRUP & MICHAEL GLEESON, SPORTS NUTRITION: AN INTRODUCTION TO ENERGY PRODUCTION AND PERFORMANCE (Human Kinetics 2004).

[22] *Id.*

[23] *Id*.

[24] 42 CFR 489.24 (as amended 2000, 2003).

AMERICA'S PASTIME OF A TIME PAST: BASEBALL HAS LOST ITS SPECIAL PLACE IN THE AMERICAN COURTS, BUT WHY? (PART 2 OF 2)

I. Introduction

The introductory section of *Flood v. Kuhn* entitled "The Game" earned Justice Blackmun a smirk retort from Justice Douglas in a dissenting opinion.[1] Even Justice White who joined in the judgment of the Court noted his disapproval of the rant.[2] Even still, based on the legal doctrine of stare decisis (let the decision stand) the Court allowed a poorly-reasoned precedent stand to protect the once-beloved baseball from antitrust regulation.[3] But the courts have now redacted the special treatment previously given to baseball partially because its profit-oriented nature has become apparent.

II. Analysis

Sports journalists and commentators point to the Adonis-like attitudes of athletes, inflated salaries and endorsements, and general misconduct as reasons for decreased fan interest. Some sight that the games have lost their purity in this age of free agency, where players bounce around, mercenaries for hire to whichever team pays the most. These are all examples of the larger public relations problem that baseball faces, the overdue realization that baseball is a business. The players understand that owners are out to make money, and so many players have opted for free agency, leaving behind a team that drafted them and a fan base, instead to pursue financial gain.

The public has finally realized that it is a business as well. That baseball was not big business (and in part *stare decisis*) is what saved it from antitrust regulation in the trilogy of *Federal Baseball, Toolson*, and *Flood*.[4]
Antitrust regulation, in those cases the Sherman act, was only applicable to businesses participating in interstate commerce. Initially, baseball was seen as a national sport yet related to business local to each state and city with which the team was associated.[5] Relying on the principle of *stare decisis* and exphasising the special treatment baseball had been granted, Justice Blackmun was able to justify the favorable ruling for his beloved baseball in *Flood*.[6] But Justice Douglas noted in his dissent, "baseball today is big business that is packaged with beer, with broadcasting, and with other industries."[7] Further, Justice Douglas was helpful in pointing out that baseball team owners have "records many say reveal a proclivity for predatory practices."[8] This realization, that owners have a tendency to do whatever it takes to increase profit also helped the American sports fan understand the nature of organized professional sports. The courts, being composed of Americans, have reflected this realization.
Furthermore, it is counterproductive for baseball to restrict the use of player names and statistics in fantasy leagues. The court in *Gionfriddo v. MLB* found that the use of player names with statistics would likely enhance baseball players' marketability; [9] an increase in baseball's popularity would follow. Similarly, restricting fantasy league participation would hurt baseball's popularity and thus, the bottom line: profits. MLB may believe that the revenues from licensing to fantasy leagues will outweigh any potential positive effect on revenues generally from the increased fan involvement that

fantasy sports play engenders. Such a belief is risky, and unsound. However, MLB intends to appeal the CBC decision. With the way copyright law sits today, it is unlikely that MLB's appeal will succeed.

[1] *Flood v. Kuhn*, 407 U.S. 258, 287 (1972).

[2] *Id.* at 285.

[3] *Id.*

[4] *Id.* at 282-85.

[5] *Id.* at 269.

[6] *Id*. at 285.

[7] *Id.* at 287.

[8] *Id*.

[9] *Gionfriddo v. MLB*, 94 Cal.App. 4th 400, 415 (2001).

LEASING TO MORE THAN JUST HUMANS? WHO'S LIABLE WHEN BONGO BITES?

It has often been said that a dog is a man's best friend. Dogs are an ever-popular pet, but people can choose from a wide variety of pets today including exotic birds, large snakes, and even scary spiders. Unfortunately, pet lovers looking to lease a home or apartment need to choose a location carefully because not all landlords allow pets. Some landlords may ban pets because the pets may make noise that disturbs other tenants and other landlords fear that the pets may damage the leased premises. For those landlords that brave the threats of property damage and noise complaints and allow pets, can such landlords be held liable when a tenant's pet attacks someone? This article will address a landlord's potential liability for an attack caused by a tenant's pet in Illinois.

A landlord has a duty to maintain portions of the premises that the landlord controls in a reasonably safe condition, but "a landlord is not liable for injuries caused by a defective condition on the premises leased to a tenant and under the tenant's control." [1] Yet, a landlord may still be liable to a third party for an injury that occurs on a portion of the premises the landlord does not control if one of the following exceptions applies:

(1) a latent defect exists at the time of the leasing that the landlord should know about; (2) the landlord fraudulently conceals a dangerous condition; (3) the defect causing the harm amounts to a nuisance; (4) the landlord makes a promise at the time of the leasing to repair a condition; (5) the landlord violates a statutory

requirement of which a tenant is in the class designated to be protected by such requirement; and (6) the landlord voluntarily undertakes to render a service. [2]

The Restatement (Second) of Torts also sheds light on a landlord's liability. "A lessor of land is not subject to liability to his lessee or others upon the land with the consent of the lessee or sublessee for physical harm caused by any dangerous condition which comes into existence after the lessee has taken possession." [3] The phrase "lessor of land" means "one who has leased land for a definite or indefinite period, no matter how great or small, by a written or parol lease, irrespective of whether a statute of fraud requires the lease to be in writing." [4]

In *Klitzka v. Hellios*, the mother of a two and one half year old child brought suit against a landlord for injuries sustained when a tenant's dog attacked the child. [5] The tenant did not have insurance to cover injuries to the child. [6] At trial, the defendants argued "that they were landlords who had no control over the premises and therefore owed [the child] no duty," and the trial court granted summary judgment for the defendant. [7] On appeal, the appellate court considered the following issue of first impression in Illinois: "under what circumstances does a landlord owe a duty of care to his tenant's invitees [8] to prevent injury from an attack by an animal kept by the tenant on the leased premises?" [9] The appellate court affirmed the judgment of the trial court and held that "a landlord owes no duty to a tenant's invitee to prevent injuries proximately caused by an animal kept by the tenant on the leased premises if the landlord does not retain control over the area where the injury occurred." [10]
It should also be noted that the court in *Klitzka* disagreed with the rule articulated in the California case of *Uccello v. Laudenslayer*, which held that a landlord was vicariously liable when the landlord knew of the dangerous propensity of a tenant's animal. [11] The *Klitzka* court stated that it disagreed with the rule

because it would force landlords to terminate tenancies, and the tenants would simply move to a new location with their still dangerous pets. [12] Ultimately, the *Klitzka* court explained that it would still have found that the defendant landlord owed the victim no duty of care even if it accepted the rule articulated in *Uccello* because the pet involved in *Klitzka* was not known to be dangerous. [13]

The holding in *Klitzka* favors the landlord and is consistent with the notion that a landlord is not liable for injury caused by a defective condition on the premises leased to the tenant and under the tenant's control. The *Klitzka* court's reasoning for not following *Uccello* also suggests that landlords might receive favorable treatment from Illinois courts in vicarious liability cases involving pet attacks.

Sources

[1] *Rowe v. State Bank of Lombard*, 531 N.E.2d 1358, 1366 (1988); *Vesey v. Chi. Housing Authority*, 583 N.E.2d 538, 542 (1991).

[2] *Klitzka v. Hellios*, 810 N.E.2d 252, 256 (2d Dist. 2004) (citations omitted).

[3] Restatement (Second) of Torts § 355 (1965).

[4] Restatement (Second) of Torts § 355 cmt. a (1965).

[5] *Klitzka*, 810 N.E.2d at 254.

[6] *Id.*

[7] *Id.*

[8] "The duty owed to a licensee differed from that owed to an invitee under common law; however, since the enactment of the Premises Liability Act, 740 Ill.

Comp. Stat. 130/1 *et seq.* (West 1994), that distinction has been eliminated." *Rhodes v. Ill. Cent. Gulf R.R.*, 665 N.E.2d 1260, 1267 (1996).

[9] *Klitzka*, 810 N.E.2d at 254.

[10] *Id.* at 259.

[11] *Id.* at 258; *see also Uccello v. Laudenslayer*, 118 Cal. Rptr. 741, 743 (Cal. Ct. App. 1975) (holding that "a duty of care arises when the landlord has actual knowledge of the presence of the dangerous animal and when he has the right to remove the animal by retaking possession of the premises").

[12] *Klitzka*, 810 N.E.2d at 258.

[13] *Id.*

THE IRS PRIVATE DEBT COLLECTION PROGRAM'S EARLY TRIALS AND TRIBULATIONS

I. Introduction

Empowered by the American Jobs Act of 2004,
the IRS recently implemented a private debt collection program designed to "reduce the growing number of uncollected tax liabilities while allowing the Service to better focus on more complex tax cases and issues."[1] The plan was criticized early on for paying the private collectors as much as 24% of the recovered liabilities in return for their collection efforts, which amount was thought could result in improper collection practices on the part of the private collectors.[2] While the plan hasn't been in action long enough to render judgment on whether these concerns are warranted, another problem has reared its head: the program isn't making money. It may not so much as break even.[3] This article addresses concerns of abuse and well as profitability in the short and long term.

II. Analysis

The
legislation under which the collection program was implemented specifies that private collectors are to behave no differently than the IRS, and that taxpayers are to be afforded the same access to the Taxpayer Advocate Service as they would were they being pursued by the

IRS itself.[4] In order to ensure that private collection tactics remain above board, the IRS has said that the private collectors shall be prohibited from taking enforcement actions (liens, foreclosures, etc.) and also from threatening or intimidaing tax debtors.[5] The private collectors are also prohibited from engaging in debt settlement negotiations with the debtors – – such activity is considered "inherently governmental."[6] In addition to these prohibitions, the IRS will monitor live collection phone calls, perform extensive background checks on collection contractors, as well as require contractors to subject their employees to similar background checks.[7]

Critics of the program do not suggest that the IRS hasn't created safeguards against cutthroat collection practices, rather they question whether the safeguards in place are enough to overcome the collector's incentive to maximize her own profits through coercive or fraudulent means given the significant rewards of successful collection.[8] In particular, some critics point to the fact that Congress legislated against incentive-based pay for IRS employees in 1998, underscoring its fear that such incentives would result in overly aggressive collection practices.[9]

III. Scandal & Debate

There has already been one scandal concerning abuse of private collection – – a bribery in Texas connected with the obtention of a private collection contract.[10] Prosecutors ultimately dropped the charges after the accused contractor made a substantial charitable donation to a University of Texas program dealing with money and politics.[11] The IRS maintains that the collection companies/goals of profit maximization do not create a substantial and ongoing conflict with proper collection practices.

In addition to fear of abuse, early critics expressed concern that the cost of implementing this program (hiring contractors, performing all the necessary training and background checks and instating a constant review process, the 24% contract fee) would be too high to justify outsourcing of the debt collection.[12] The concern has proven not unwarranted, as the initial costs of the program (around $60 million) could prove to be greater than the initial collection efforts (potentially as little as around $58 million) by this December.[13] Still, the government maintains that over time potential collections could amount to as much as $1.4 billion, far in excess of the projected 10-year cost of around $77 million.[14]

IV. Conclusion

From this author's perspective, there is little fear that the private debt collection program will more than pay for itself as it goes forward. Undoubtedly there were relatively high fixed costs in getting this program off the ground that will be paid off in spades over time. However, this author is highly suspect of the ability of the private collection institution to stay its bloodlust sufficiently to comply with fairly high levels of governmental ethics being imposed upon them. If the IRS fails to collect on its debts, the government doesn't go into bankruptcy – – the people of the country don't sue them for failing to maximize their revenues – – the Service employees don't suffer paycuts and layoffs. There is a lot of money out there in the form of uncollected back taxes to be had, and it would surprise this author a great deal if the early scandal in Texas wasn't indicative of the future for this program, one replete with much backscratching and corruption.

[1] *Private Debt Collection Program*, *at*www.irs.gov/businesses/small/article/0,,id=155136,00.html.
[2] Jim Kouri, *IRS to Use Private "Bounty Hunters" to Collect Taxes*, **THE CONSERVATIVE VOICE**, October 31, 2006, *at* www.theconservativevoice.com/article/19813.html.
[3] Kevin McCoy, *Initial Costs Hit IRS Plan to Recover Delinquent Taxes*, **USA TODAY**, November 1, 2006, *available at*www.usatoday.com/money/perfi/taxes/2006-10-31-irs-usat_x.htm.
[4] *Supra* note 1.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] David Cay Johnston, *IRS Enlists Help in Collecting Delinquent Taxes*, **NEW YORK TIMES**, August 20, 2006, *available at*www.nytimes.com/2006/08/20/business/20tax.html?ex=1313726400&en=b7fe1a06a605c749&ei=5088&partner=rssnyt&emc=rss.
[9] *Supra* note 2.
[10] Kevin McCoy, *IRS Plan to use Private Debt Collection Runs into Snags*, **USA TODAY**, May 4, 2006, *available at*www.usatoday.com/money/perfi/taxes/2006-05-04-irs-usat_x.htm.
[11] *Id.*
[12] *Supra* note 8.

[13] *Supra* note 3.

[14] *Id.*

THE FUTURE OF U.S.-CUBAN TRANSPORTATION LAW

The story has been told in many different ways, but for the most part it goes something like this: during the height of the Cold War, a newspaper reporter is flying on an Air Force jet interviewing a major general about a new missile designed to keep the Soviets on their side of the Iron Curtain. During the conversation, the general opens a cigar box full of Cubans, takes one out, and lights it up. "General," the newspaper reporter asks, taken aback, "what are you doing? Isn't that behavior supporting the illegitimate regime of Cuba?" The general taps his cigar, gives the newspaper man a wink, and replies, "No son, I consider it to be burning the communist's crops." [1]

For half of the twentieth century and the entirety of the twenty-first, Cuba has been ruled by a communist government under the direction of Fidel Castro. Castro took power during a communist revolution in 1959 and has led the country under tight communist control. [2] United States foreign policy since the end of World War II has been tailored to deny benefit to the nation's direct enemies and enemies of her allies. One of these policy decisions has been a complete embargo on trade with Cuba since January of 1959, designed to starve the Cuban economy of American currency. [3] The big questions are whether or not the embargo is still warranted in the post-Cold War world where there are no ties between Cuba and terrorism and what will happen in U.S.-Cuban relations once Castro is no longer in power due to incapacity or death.

I. The Current Status of the Cuban Trade Restrictions

Prior to Castro's ascension to the head of the Cuban communist party, Cuba was a tropical resort vacationers from the United States. [4] The country was liberated from Spanish colonial rule by U.S. forces at the conclusion of the Spanish-American War in the 1890s, although the independence came with strong American influence. [5] The embargo was a direct result of the seizure and nationalization of American industries in Cuba following Castro's revolution. [6] After Castro's rise to power, nearly all ties were cut by President John F. Kennedy. In a presidential proclamation issued on February 3, 1962, Kennedy set the tone for American policy towards Cuba for the rest of the century. [7] He noted aggression and the need for an embargo to protect American security in the region. [8]

Soon after Congress passed laws creating and enforcing the embargo, some of which still exist today. They can be found in 22 U.S.C.A. § 2370(a) along with other restrictions on foreign trade. [9] Specifically, the limitations on trade, and other financial transactions from the United States to Cuba are discussed in § 2370(a), and almost total prohibitions on travel to Cuba by U.S. citizens. [10] Violations of the embargo statute are serious and enforced with stiff fines and other penalties in the Code of Federal Regulations. [11]

These violations are rare (although possible – one source indicates that as many as 15,000 U.S. citizens traveled to Cuba illegally in 1996) and reported cases interpreting and applying the embargo statute are even rarer. The one famous U.S. Supreme Court exception is *Zemel v. Rusk*, which held that the constitutional guarantee of a freedom of travel was not violated by the government invalidating U.S. passports for travel to Cuba. [12]
In recent years, Castro has had a number of health problems. This year was the first since 1959 that Castro had not been direct control of the country, as he stepped down to recover from surgery. [13] He placed control of the country in the hands of his brother, Raul Castro. [14] The question on everyone's mind was

in the event of Castro's death, would U.S.-Cuban policy remain static or would it be open to change? Relations with other communist countries have become more open since the demise of the Soviet Union, like those of Vietnam, China, and the eastern bloc. Will this change also come to Cuba?

II. Recent Cuban-U.S. Relations and Possibility of Trade with Cuba in a Post-Castro World

The Bush administration has continued with the status quo regarding Cuba throughout his presidency. Although little appears to be done towards Cuba in regards to the war on terrorism, the country remains on illegal immigration's radar screen. [15] Immigration to the United States has always been a desire of Cubans following the 1959 revolution [16], but the Bush administration has reacted by increasing the number of Coast Guard interceptors in the seas between Cuba and the United States in a plan called "Operation Distant Shores." [17] With a *de facto* wall constructed between this country and Cuba, it is clear that the status quo will not allow for much to change in embargo law in the near future without significant reforms in this country or in Cuba.

Cuba has much to offer the United States, and at least one legal commentator has hypothesized that opening up unrestricted trade with Cuba would benefit the U.S.'s economy. [18] Besides the large amount of classic 1940s and 1950s American automobiles that Cuba is famous for still having [19] – evidence of the effects of the embargo on Cuba since the revolution – Cuba also has a lot of agricultural potential and would be a fantastic trading partner in the western hemisphere. [20] Two possible scenarios exist in which the United States might be willing to end the embargo and open up trade with Cuba: (1) the Cuban government changes and becomes something not communist, (2) the Cuban economy collapses forcing the Cubans to change their economic system.

If Castro becomes incapacitated, it is possible that the new government will be more open to reaching agreements with the United States. The United States has territory on Cuban soil at the Guantanamo Bay naval station, and Havana is a major port in its own right. [21] Shipping between Havana and Miami could probably start almost overnight, and the relative proximity of Cuba and the United States (90 miles at the closest point) [22] makes the legs of the journey quick. The Cuban economy is in serious amounts of debt (it owes approximately $20 billion to Russia alone) [23] and trade with the United States would be a real possibility of recovery. Positive cash flow into the country (and perhaps even the re-opening of the country to American tourism) would benefit the Cuban people in a post-Castro world.

Thus, it is likely that in the future we will again be able to legally visit Cuba and American corporations will have another market to buy raw goods from and sell products. It is probable that the embargo will end once Castro (and his immediate old guard) are no longer in power. There are many budding entrepreneurs in both this country and Cuba that are waiting to capitalize on the benefits trade between our countries would produce. Even if Cuba keeps its major industries nationalized, there is no reason the country couldn’t adopt a model of communism similar to China’s that embraces certain elements of private ownership and free enterprise while embracing core principles of communist belief. Cuba’s economy is ailing from the lack of U.S. dollars flowing into the country, and remedying the problem would be simple.

Someday the general in the airplane will not have anything to worry about except anti-smoking laws.

Footnotes:

[1] For an example of one version of the story, consult Peter Kaminsky, *Smoker's Delight*, 7 FAST COMPANY153, ¶ 21 (1997), http://www.fastcompany.com/magazine/07/153smoke.html

[2] Mary Beth Norton, et. al., A PEOPLE AND A NATION 866 (5th ed. 1998).

[3] *See* 22 U.S.C. § 2370(a) (2006). *See also* Charlotte Mulhern, *So Close… Cuba's Potential Lures Investors* (1997), http://findarticles.com/p/articles/mi_m0DTI/is_n12_v25/ai_20226328 ("The basic goal of the sanctions is to isolate Cuba economically and deprive it of U.S. dollars.")

[4] Mulhern, *id*.

[5] Norton, *supra* note 2, at 646, 651-52.

[6] *Id*. at 866. *See also* 22 U.S.C. § 2370(a) (2006).

[7] John F. Kennedy's proclamation was #3447. *See* 27 F.R. 1085 (1962) *as quoted in* 22 U.S.C.A. § 2370(a) (West 2006).

[8] *Id*.

[9] *See* 22 U.S.C. § 2370(a) (2006), et al.

[10] The Supreme Court had upheld these travel restrictions based on 22 U.S.C. § 211(a) (2006). Zemel v. Rusk, 381 U.S. 1 (1965).

[11] *See generally* 31 C.F.R. 501, et. al., *cited in* 22 U.S.C.S. § 2370 (Lexis 2006).

[12] Charlotte Mulhern, *So Close… Cuba's Potential Lures Investors* (1997),http://findarticles.com/p/articles/mi_m0DTI/is_n12_v25/ai_20226328 (on the illegal travelers to Cuba). Zemel v. Rusk, supra note 10.

[13] *Brother: Castro 'Getting Better,' not Dying* (2006),http://www.cnn.com/2006/WORLD/americas/10/08/castro.sick.ap/index.html

[14] *Id*.

[15] See American Immigration Law Foundation, *Cuban Migration: Averting a Crisis* (2003),http://www.ailf.org/ipc/policy_reports_2003_CubanMigration.asp

[16] *See id*.

[17] *See id*.

[18] *See generally* Christi M. DeMelfi, *Nothing But the Facts: An In-Depth Analysis of the Effects of Economic Sanctions Against Cuba*, 5 J. Int'l Bus. & L. 137 (1992).

[19] *See* Chris Baker Compositions, LLC, *Cuba's Classic American Automobiles* (2006),http://www.danheller.com/cuba-cars.html. *See also* Dan Heller, *Dan Heller Photography: Cuba Automobiles* (2006), http://www.danheller.com/cuba-cars.html (photos of Cuban automobiles).

[20] *See generally* Charlotte Mulhern, *So Close… Cuba's Potential Lures Investors* (1997),http://findarticles.com/p/articles/mi_m0DTI/is_n12_v25/ai_20226328

[21] United States Navy, *Guantanamo Bay Naval Station* (2006), http://www.nsgtmo.navy.mil/(official site from the U.S. Department of Defense).

[22] *See* New York Times Editorial, *90 Miles and Light-Years Away* (2006),http://travel2.nytimes.com/2006/08/10/opinion/10thu2.html?n=Top%2FReference%2FTimes%20Topics%2FPeople%2FC%2FCastro%2C%20Fidel&adxnnl=1&adxnnlx=1162865688-9tTEsPxl+PyNIFD9vBESGQ

[23] Carmen G. Gonzalez, *Trade Liberalization, Food Security, and the Environment: The Neoliberal Threat to Sustainable Rural Development*, 14 Transnat'l L. & Contemp. Pros. 419, 483 (2004).

CHINA MAKES PLANS TO DIVERSIFY ITS CURRENCY RESERVES

People's Bank of China Governor Zhou Xiaochuan announced at a meeting of central bankers in Frankfurt this past Friday that his nation plans to diversify its $1 trillion currency reserves. [1] Zhou stated that China has a clear diversification plan that includes "currencies, investment instruments, [and] emerging markets," but does not include the sale of any of its dollar denominated assets, which make up approximately 70% of China's total reserves. [2] Despite Zhou's assurances that China would not be selling off its dollar denominated assets, the dollar fell to a two and a half month low against the Euro and gold prices rose to a two month high. [3]

Many
analysts believe that China is unlikely to sell off a large amount of its dollar denominated assets; as to do so would be against China's interests. [4] If China were to make such a sale, the sudden influx of U.S. debt on the world market would cause the dollar to plummet, devaluing the rest of China's dollar denominated reserves. [5] Because it is unrealistic for China to sell off a large amount of its dollar denominated assets, many in the banking industry believe that the dollar will not continue to fall. [6]

In fact, rather than dumping their dollar denominated reserves, most central banks are switching from traditional treasury bills to higher yield agency-debt, and securities issued by Freddie Mac and Fannie Mae, the sale of which recently hit an all time high. [7] The Bank for International Settlements reports that dollars accounted for 66% of world-wide central bank reserves at the end of March, a small change from 2001 when dollars accounted for 70% of reserves. [8]

The Chinese want to diversify their reserves in order to have greater flexibility in their monetary policy. [9] Many analysts believe that given China's trade surplus the Yuan is undervalued. [10] The Chinese want to adjust the Yuan's exchange rate gradually because they fear a rapid re-evaluation of the Yuan could lead to a serious disruption of China's internal economy that would result in bankruptcies and unemployment. [11] China's concern about destabilizing its internal economy is good news for the U.S. as it means that China is unlikely to make any dramatic changes in its reserve policy. While a change in policy is bound to happen at some point, it will most likely happen gradually over a long period ensuring that both the U.S. and Chinese economies are not seriously disrupted.

[1] CNNMoney.com, *Dollar Falls on China Diversification Talk*, Nov. 10, 2006, http://money.cnn.com/2006/11/10/markets/dollar_china.reut/index.htm [hereinafter *Dollar Falls*].
[2] Simon Rabinovitch, *Reserve Shift Taps Forex, emerging Markets: China*, Yahoo.com, Nov. 10, 2006, http://news.yahoo.com/s/nm/20061110/bs_nm/economy_china_zhou_dc.
[3] *Id.*
[4] Matthew Benjamin & Christopher Anstey, *Zhou Says China Will Diversify Reserves Without Dumping Dollars*, Bloomberg.com, Nov. 10, 2006,

http://www.bloomberg.com/apps/news?pid=20601068&sid=ad6Wgf9XLHiE&refer=economy.

[5] Rabinovitch, *supra* note 2; *Id.*

[6] *Dollar Falls*, *supra* note 1.

[7] Benjamin & Anstey, *supra* note 4.

[8] *Id.*

[9] Rabinovitch, *supra* note 2.

[10] *Id.*

[11] *Id.*

THINKING ABOUT REFINANCING YOUR MORTGAGE? THINK AGAIN

Recently, more and more homeowners have begun taking advantage of the various mortgage refinancing options available to consumers. The third quarter of 2006 saw the highest number of "cash-out" mortgage refinances of any quarter since 1990. [1] While cash-out refinancing can put money in the homeowner's pocket for things such as home repairs or remodeling, or simply free up money to consolidate and pay off other debts, higher interest rates on a higher amount of money financed as a mortgage may not make good financial sense. Homeowners should also be wary of the recently highly publicized "interest-only" refinancing option which lowers payments in the short-term but increases them dramatically after only a short period of time. [2]

Cash-out refinancing is a mortgage refinancing option that allows a homeowner to collect a check at the closing for the amount of cash taken out of the equity built in the home,with the mortgage then refinanced at the higher amount under the new terms of the mortgage. [3] For example, if a person's home is worth $200,000 and he has paid back $100,000 of his first mortgage, he has gained $100,000 in equity. If that person then chooses to do a cash-out refinance, he can take out as much of that $100,000 of equity he wants to receive in cash (and that the lender will approve) and add it on to the mortgage. So, if the person cashes out $50,000, he will receive a check for $50,000 at the closing and his new mortgage will be for $150,000 financed under the terms of the new mortgage. This differs from a home equity loan in that under a home equity loan, a person keeps his original mortgage and takes out a second mortgage under new terms for the amount of money he takes out of the home. [4]

In recent months, cash-out refinancings have resulted in refinanced mortgages that were an average of 5 percent higher than the first mortgages on those homes. [5] While having cash on hand may sound like a good deal, cash-out refinancing can be a bad deal for the unwary refinancer, especially with recent rises in interest rates. Homeowners should shop around for cash-out options in order to ensure they are getting the best possible interest rate on the new mortgage, and to ensure that the new rate is a lower one than the first mortgage. In addition, homeowners who are already locked into good mortgage terms at a low interest rate should consider taking out a home equity loan so they are only taking out small amount of money at the new presumably higher interest rate, rather than refinancing their entire home mortgage at a higher rate.

Another refinancing option presents more potential problems for the unsavvy refinancer, wooed by commercial on television encouraging people to take advantage of lowering their monthly mortgage payment. This is the "interest-only" option. Interest-only refinancing takes a homeowner's mortgage and refinances it into a new mortgage that is structured in tiers so that the homeowner only initially pays the interest for a period of time, then begins to pay off some of the principle with interest, and then (in some types of interest-only loans) later pays off more of the principle with interest each month. [6] While this may sound appealing, the terms of these loans may come as a surprise to people who have been faithfully paying their mortgage for a few years, then suddenly they realize that their monthly payment has doubled or even tripled. These loans can be deceptive since they often guarantee that "your principle balance will NEVER increase." [7] While this may be the case, this does not meant that one's payment will never increase, only that the principle amount, i.e. the amount financed, will not increase due to the way the interest and principle payments are structured.

An example of this type of mortgage that is commonly offered on television commercials works like this: A person buys a home for $150,000. For the first 10 years, the interest only payment is $953. [8] After 10 years, the principle and interest payment becomes $1219. [9] In addition, the rates on these mortgages are not fixed and could fluctuate to make payments even higher. [10] What people fail to realize in this instance is that they are only paying interest on the loan for the first 10 years and are building no equity in their home! This might be a good deal if you are 75 years old with no family, but for most homebuyers, this is not a good option. Other examples offered in the fine print of commercials advertising these mortgages are even more drastic with mortgage payments increasing from $700 to $1200 to $1500 over a period of years. Overall, interest-only mortgages do not make good financial sense, as one is better off spending that money on rent and not tying up all of one's credit.

People considering refinancing their mortgages should be careful to investigate all available options and only agree to new terms after carefully examining the fine print. Otherwise, the unwary refinancer is only likely to quicken their debt.

Sources

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[3] *See* Rockfinancial.com, *Cash-out Refinance vs. Home Equiy Loan*,http://www.rockfinancial.com/refinance/refinancing/cash-out-refinance.html?lid=1334.

[4] *Id.*

[5] *Cash-out Refinancing Hits Peak*, CNN MONEY,http://money.cnn.com/2006/11/01/real_estate/cash_out_refis_peak/index.htm?postversion=2006110111.

[6] *See Interest Only is All About Choices*, *supra* note 2.

[7] *Id.*

[8] Rockfinancial.com, *Smart Choice*, https://www.rockfinancial.com/refinance/refinance-loans/smartchoice.html?lid=1298&rbsol=449.

[9] *Id.*

[10] *Id.*

Could the Rule Against Pro Se Representation be a Problem for Single-Member LLCs?

Limited liability companies (LLCs) enjoy unique hybrid status as a "relatively new form of doing business that is created and defined by state law."[1] Though the LLC is "not formally characterized"[2] as either a partnership or a corporation, but as a hybrid entity, problems occur when precedent addresses partnerships or corporations, but not LLCs directly. When the law fails to address LLCs specifically, judges and commentators analyze the law and determine whether an LLC should be grouped as a corporation or a partnership for a specific purpose. For example, bankruptcy laws do not refer specifically to LLCs, yet LLCs can still be debtors or creditors.[3] Generally speaking, "LLCs have been treated as corporations almost by default for bankruptcy purposes."[4] However, placing LLCs into default corporate categories may not always effectively serve the goals of an LLC. In particular, this article addresses a current interpretive problem existing in the characterization of single-member LLCs for the purpose of determining whether the LLC may appear before a court without counsel.

While default corporate categorizations may work for LLCs in bankruptcy proceedings, the imposition of corporate treatment on LLCs for other purposes may not adequately serve the goals of certain types of LLCs. For one, it may not be practicable to require all LLCs to be treated as corporate-like entities for the purpose of court representation. The general rule for corporate representation is that corporations, as "artificial entities, may only appear in court through an attorney."[5] Thus, any non-lawyer representing the corporation engages in "the unauthorized practice of law."[6] Courts have included LLCs within the group of artificial entities who may not be represented by a non-lawyer.[7] The policy behind this requirement is that:

[T]he conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents but as well for his adversaries and the court. The lay litigant frequently brings pleadings that are awkwardly drafted . . . In addition to lacking the professional skills of a lawyer, the lay litigant lacks many of the attorney's ethical responsibilities, e.g., to avoid litigating unfounded or vexatious claims.[8]

From the court's perspective, the nonlawyer lacks the skills, knowledge, and style needed to aptly appear before the court. This seems to be sending a message to businesses that if they want to organize as a limited liability company, they will be held to some of the same rules of business as corporations, including the requirement of appearing in court through professional counsel.

However, is this really positive precedent for LLCs? Larger hybrid entities, such as those organized as an LLC subsidiary under a parent corporation may not be affected by *pro se* rules, as any legal matters could be handled by the parents' counsel. Yet consider smaller, single-member LLCs that are not part of a larger corporate family. In *Collier v. Cobalt, LLC*, a defendant lay person presented the court with a motion to appear on behalf of the co-defendant LLC, partly because the LLC could not afford an attorney.[9] The defendant was the sole "employee, owner, and shareholder" of the LLC [10], and so presumably his self-representation would not adversely affect anyone's interest but his own. Nonetheless, the court denied the defendant LLC's motion for *pro se* representation.[11] Following the reasoning laid out by a bankruptcy court in *In re ICLNDS Notes Acquisition, LLC*, the *Cobalt, LLC*court did not seem to care whether the LLC was characterized as a partnership, corporation, or hybrid entity and held firm to the premise that "it may only appear in court through counsel."[12] The irony in the ruling, however, is that the court recognized "the apparent harshness of this rule in a situation such as that alleged here, i.e., where a legal entity consisting of a sole employee and shareholder is unable to afford counsel" but did nothing to shape its holding as to fit the realities of the case.[13] From one perspective, the court seems to be punishing the single-member, closely-held LLC for establishing itself as a legal entity. Cobalt, LLC likely established itself under LLC form to enjoy limited liability and protect its sole owner from personal liability. Yet due to lack of funds, the LLC was unable to defend itself in court, putting its sole owner in a likewise uncomfortable position. Though the sole owner could be protected by limited liability, he could not protect the business itself if he could not afford the cost of legal counsel. In this case, the sole owner did not have sufficient funds for his own representation either, yet he was allowed to remain in court *pro se* on his own behalf.[14] From this point of view the sole owner may have been better off not establishing the LLC form, because at least then he would be able to represent his business in a court of law. Yet, without the organizational establishment, the sole owner would be exposed to the personal liability that he sought to protect against in the first place.

As the current message stands, courts are sending a clear message to LLCs that if they want to enjoy the benefits of the organizational form, they need to have sufficient funds on hand in case of legal controversies. Another way to deal with this issue may be to carve out an exception for closely-held single-member LLCs to allow for *pro se* representation. This would not be incongruent with current precedent; rather, it would remove from the category of corporations and other "artificial entities" single-member LLCs, which could be considered "individuals" who would be allowed self-representation. Although it still would be in the best of the interest of the single-member LLC to seek more experienced, legal counsel in the event of a dispute, a carve out would enable closely-held businesses to retain both limited liability and the ability to appear in court if they could not afford legal counsel. In any event, the impracticable result suggested by *Cobalt, LLC* demonstrates why grouping LLCs with corporations or partnerships for specific legal purposes may not always result in sensible outcomes.

[1] *In re* ICLNDS Notes Acquisition, LLC, 259 B.R. 289, 292 (Bankr. N.D. Ohio 2001).

[2] *Id.*

[4] Nicholas Karambelas, LIMITED LIABILITY COMPANIES: LAW, PRACTICE AND FORMS § 17:3 (2006).

[5] *In re* ICLNDS Notes Acquisition, LLC at 293.

[6] *Id.*

[7] *In re* Interiors of Yesterday, LLC, 284 B.R. 19, 23 (Bankr. D. Conn. 2002).

[8] *Id.* at 24.

[9] Collier v. Cobalt LLC, 2002 WL 726640 at *1 (E.D. La. 2002).

[10] *Id.*

[11] *Id.* at *2.

[12] *Id.* at *1.

[13] *Id.* at *2.

[14] *Id.*

DON'T MESS WITH STAR WARS

I. Introduction

Lucasfilm, Ltd. was recently awarded $20 million in damages from the British company Shepperton Design Studios for trademark infringement, copyright infringement, and unfair competition. [1]. Shepperton was using Lucasfilm's TIE fighter pilot helmets and Stormtrooper helmets and costumes from the Star Wars movies. [2],[3]. The strength of the Star Wars mark and all of the characters in each movie is very strong, as evidenced by a judgment like this.

II. Analysis

The U.S. District Court for the Central District of California awarded Lucasfilm the $20 million in damages. [4] Shepperton was found to have made and sold unlicensed copies of Stormtrooper and TIE fighter costumes and fraudulently said they were authentic items. [5]. On top of the damages, a permanent injunction was granted against Shepperton permanently barring them from "copying, reproducing, importing, licensing, marketing or displaying any of its unauthorized Star Wars products in the United States." [6].

As far as the trademark and unfair competition part of this case the Lanham Act presumably played a big part. The Lanham Act's purpose is to "secur[e] to a mark's owner the goodwill of his business and protect[] consumers' ability to distinguish among competing producers." [7]. Section 43 of the Lanham Act states:

"Any person who, on or in connection with any goods or services . . ., uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which (a) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." [8].

It is clear here that Shepperton violated this provision of the Lanham Act almost completely. They used Lucasfilm's trademarks of the Stormtrooper and TIE fighter when they replicated the helmets and costumes of the respective Star Wars characters. By claiming that the items were authentic, Shepperton falsely represented an association with Lucasfilm. By these facts, it is easy to see that a consumer looking to buy these items would be confused and deceived into believing there was an association between Shepperton and Lucasfilm. Under these facts, it would be very difficult to show that Shepperton was acting properly under the law.

III. Next Step

Lucasfilm's next move it so go after Shepperton to enjoin them from making and selling their Star Wars items in the U.K. [9]. Howard Roffman, the president of Lucas Licensing, said "Infringers like Shepperton need to understand that we will pursue them anywhere in the world to shut them down and seek restitution."

[10]. This is not the first time Lucasfilm has gone after infringers.

[11].

[1] IPLaw360.com, $20M Award Reveals "Dark Side" of Costume Making, http://ip.law360.com/Members/ViewArticlePortion.aspx?Id=11594 (October 11, 2006).

[2] *Id*.

[3] TIE fighter pilots wear a flight helmet reminiscent of the stormtrooper design, with breather tubes affixed to provide necessary life support in the cramped quarters of their starfighters. StarWars.com, TIE Figher Pilots, http://www.starwars.com/databank/organization/tiefighterpilots (last visited Oct. 26, 2006).

[4] StarWars.com, Lucasfilm Wins Lawsuit Against Stormtrooper Pirate, http://www.starwars.com/collecting/news/misc/news20061011.html (last visted Oct. 26, 2006).

[5] *Id*.

[6] ipnewsblog.com, Another Battle Over Star Wars, http://ipnewsblog.com/index.php/2006/10/11/another-battle-over-star-wars (Oct. 11, 2006).

[7] *Two Pesos v. Taco Cabana, Inc*., 505 U.S. 763, 774 (1992).

[8] 15 U.S.C. § 1125(a)(1)(A) (2000).

[9] StarWars.com, Lucasfilm Wins Lawsuit Against Stormtrooper Pirate, http://www.starwars.com/collecting/news/misc/news20061011.html (last visted Oct. 26, 2006).

[10] *Id*.

[11] *See e.g. Lucasfilm, Ltd. v. Media Market Group, Ltd.*, 182 F. Supp. 2d 897 (N.D. Cal. 2002); *and Lucasfilm, Ltd. v. High Frontier*, 622 F. Supp. 931 (D.D.C. 1985).

AMERICA'S PASTIME OF A TIME PAST: BASEBALL HAS LOST ITS SPECIAL PLACE IN THE AMERICAN COURTS, BUT WHY? (PART 1 OF 2)

I. Introduction

Baseball has enjoyed a special place in the hearts of American sports fans. It is touted as America's pastime. As Americans, judges are not immune to either the love of the game or the special status it holds in American culture. While other sports faced antitrust regulation with respect to the reserve clause, baseball was exempted by the courts. **[1]** The reserve clause restricts the right of the player to contract with a team other than the one he is currently signed with.**[2]** Justice Blackmun, in his famous opinion in *Flood v. Kuhn*, pays homage to the baseball gods with a nearly seven-page-long introductory section entitled "The Game."**[3]** This storied past of baseball (MLB) no longer holds sway as recent rulings evidence. Specifically, in the *CBC v. MLB Advanced Media,* a federal district court recently held that MLB did not have rights over player names and statistics so as to require fantasy baseball leagues to purchase such rights from MLB**.[4]**

II. Analysis

The first part of this article addresses the treatment courts have given to baseball in the past and present. A thorough analysis of baseball case law is beyond the scope of this article; as such, a brief history of seminal cases is presented. The second part, to be published on November 27, 2006, will hypothesize why MLB has lost the preferential treatment it once received.

Baseball received special treatment in the past but does not so currently. In the past, as evidenced by a set of three cases culminating in Justice Blackmun's ode to baseball in *Flood v. Kuhn,* baseball was exempted from antitrust regulation as to the reserve clause while other sports were not **[5]** because baseball was held not to be interstate commerce in the pivotal case *Federal Baseball*.**[6]** More recently, as demonstrated by *CBC v. MLB Advanced Media*,**[7]** baseball has found itself on the short-end of potentially pivotal legal holdings.**[8]**

A. The legal precedent set by the trilogy of *Federal Baseball, Toolson,* and *Flood* demonstrates baseball's once special place in the law.

F*ederal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*

is the seminal case in which the Supreme Court created MLB's exemption from the Sherman Antitrust Act (the Act). The Act, which prohibits the restraint of trade, applies only to interstate commerce.**[9]** The court held that baseball was not interstate commerce; as such, the Act did not apply.**[10]**

In 1922 when Federal Baseball was decided, interstate commerce had a narrower definition which would later be expanded.**[11]** Even under this expanded definition, in 1953 the Supreme Court upheld the exemption.**[12]** The Court held favorably for baseball based on respect for the prior decision in *Federal Baseball*, the 30-year gap during which baseball expanded and thrived on the exception, and Congress' failure to change the law.**[13]** The Court made this decision without addressing the key issue in Federal Baseball: whether baseball is interstate commerce.**[14]**

Flood at 275. The Court also pointed to expert opinion that stated baseball would fail in the chaos that would follow if antitrust regulation was applied to it.**[15]** Thus, the Court chose to protect baseball. Other sports, although arguing that they too should be exempted because they were not interstate commerce, were held to be subject to the Antitrust Act.**[16]** The Supreme Court limited the exemption only to baseball.

In *Flood* in 1972, the Supreme Court finally held that baseball was clearly within the definition of interstate commerce, but for the same reasons as in *Toolson*, the Court continued to exempt baseball from federal antitrust law.**[17]**

An uncited reason may be that American judges once again protected America's pastime. The Court did consider expert opinion stating that baseball would be ruined if the reserve clause was prohibited.**[18]**

In the time after *Flood*, the players' association, the baseball players union, finally escaped the oppressive trappings of the reserve clause through contractual negotiations.**[19]** Struggles in the negotiations over the reserve clause were in fact a substantial cause of the player's strike in 1994.**[20]**

As a result of the eventual success of these negotiations, Congress drafted legislation that curtailed the special treatment baseball received by finally passing the Curt Flood Act, named in honor of the lead plaintiff in *Flood v. Kuhn*.**[21]**

B. The legal battle that is *CBC v. MLB Advanced Media* is an indication of the long forgotten traditional place of baseball in American culture.

In the recent case of *CBC Distribution and Marketing v. MLB Advanced Media*, CBC, a company operating an internet fantasy baseball league for profit, asked for a declaration from the courts that player names and

statistics were not excludible.**[22]** CBC had been paying for licensing rights to the player information, but MLB Advanced Media, the internet marketing arm of MLB, did not extend the offer when the license ran its course in 2005.**[23]** Player statistics are the fundamental basis of the fantasy league competition; without statistics, there is no competition. As such, prohibition of the use of the player names and statistics would prevent CBC from conducting its fantasy baseball league business. The court held, based on both the state right of publicity laws and federal copyright laws, that the information could not be excluded from use publicly.**[24]**
First, under state law, the court held that player names and statistics do not cause confusion so as to mislead customers that the players themselves are in fact approving and endorsing CBC's activities.**[25]**
Second, under copyright law, the court held that player names and statistics are a non-unique compilation of fact and are news of the day in the public domain that cannot be copyrighted.**[26]**
This ruling does not only hurt MLB's bottom line, it sets a precedent that may affect all other professional sporting leagues, which are watching this case closely.**[27]** MLB may appeal this decision, but it is unlikely that MLB would succeed.**[28]**

III. Moving Forward

This ruling is merely one sign of the love lost between baseball and the public. The public may have lost its love because of the sky rocketing player salaries; the reports of unsportsman-like conduct such as poor attitude, steroid use, or other off-the-field conduct; or union hold-outs. It is not one of these factors alone, but all combined that have made it apparent to the public that baseball is not just a sport, a pastime as it were, but instead big business out for profit. The courts have reflected this change in public opinion.

[1] *See Flood v. Kuhn*, 407 U.S. 258 (1972)(discussing the history of case law that created baseball's exemption from federal antritrust law).
[2] Peter M. Macaluso, Note, *Bang the Gavel Slowly: A Call for Judicial Activism following the Curt Flood Act*, 9 B.U. Pub. Int. L.J. 463, 467 (2000).
[3] *Flood*, *supra* note 1 at 260-67.
[4] *CBC Dist. & Marketing, Inc. v. MLB Advanded Media*, 443 F.Supp.2d 1077, 1107 (E.D. Mo. 2006).
[5] *Flood*, *supra* note 1 at 276-277 (comparing the treatment of boxing, which was subject to federal antitrust regulation, to the treatment of baseball).
[6] *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 201-06 (1922).
[7] *Flood*, *supra* note 1.
[8] Michael McCarthy, USA Today, *Fantasy Leagues can use baseball stats* (August 9, 2006) http://www.usatoday.com/sports/baseball/2006-08-08-fantasy-statistics_x.htm?POE=SPOISVA&POE=click-refer.
[9] Macaluso, *supra* note 2 at 464-65.
[10] *Id.* at 466.
[11] *Id*. at 467.
[12] *Toolson v. NY Yankees, Inc.*, 346 U.S. 356, 357 (1972).
[13] *Flood*, *supra* note 1 at 273-74.
[14] *Id*. at 275.
[15] *Id*. at 274.

[16] *Id*. at 276-77.

[17] *Id.* at 282-87.

[18] *Id*. at 274.

[19] Macaluso, *supra* note 2 at 476-77.

[20] *Id*.

[21] *Id*.

[22] *CBC*, *supra* note 4 at 1081-82.

[23] *Id*. at 1081.

[24] *Id*. at 1107.

[25] *Id*.

[26] *Id*.

[27] McCarthy, USA Today, *supra* note 8.

[28] Jeff Douglas, AP, *Fantasy Leagues allowed to use MLB stats* (August 8, 2006) http://abcnews.go.com/Sports/wireStory?id=2289040.

THE UNLAWFUL INTERNET GAMBLING ACT AND THE TAX REVENUE THE UNITED STATES GOVERNMENT COULD HAVE HAD

I. Introduction

Many
people who gamble on-line will tell you that October 13, 2006 truly was an unlucky day. On that Friday, President Bush signed into law the Unlawful Internet Gambling act.[1]. The bill makes it illegal for banks and credit card companies to transact with online gambling companies.[2] By preventing banks from allowing deposits into gambling sites, the bill hopes to prevent people from partaking in on-line gambling. The question many people have is why the United States would outlaw internet gambling when it could have regulated the industry and benefited from the tax revenue it would have received?

II. Analysis

The
first thing taught on the first day of an Income Tax class is that tax base times rate equals revenue (tax base x rate = revenue). Congress can increase tax revenue in one of two ways; increase the tax rate or increase the tax base. Increasing the tax rate will get everyone's attention, and since no one likes taxes, Congress should be in no hurry to raise the tax rate. However, by increasing the tax base Congress can still raise tax revenue without drawing so much negative attention.

Regulating internet gambling could be a great opportunity for Congress to increase the tax base and garner more revenue.

Many European nations, including the United Kingdom, have for some time been regulating internet gambling.[3]. The regulation of gambling in the United Kingdom has meant that the government has benefited from increased tax revenue, because the gambling companies are treated just like ordinary business and must pay taxes.[4]. In addition, once the United Kingdom began regulating online gambling, several companies that had previously been overseas brought their operations to the United Kingdom, further increasing the tax revenue to the British government.[5].

Online gambling was a $12 billion industry in 2005, and is expected to have revenue around $15 billion in 2006.[6]. The companies that make up this industry are generally located in gambling friendly countries such as Costa Rica and England.[7]. Companies such as Sportingbet PLC are publicly traded on the London Stock Exchange.[8]. By not accepting online gambling, the United States has closed its doors to businesses that operate gambling websites, even though US gamblers account for about 50% of the internet gambling market.[9].

By regulating internet gambling, instead of attempting to outlaw it, the United States could stop itself from foreclosing a highly taxable industry. Countries that have chosen to regulate internet gambling are receiving billions a year in tax revenue.[10]. By regulating internet gambling, the United States would attract gambling companies onto their shores where they could legally operate just like any other business.

Such regulation would also work to quell the fears of those who feel that online gambling is dishonest or unfair.[11]. Regulation could work to provide a safe means for people to gamble on-line, while at the same time allowing Congress to tax a highly profitable and popular industry.

Unfortunately, Congress has failed to take steps to regulate internet gambling, choosing instead to try and outlaw it. However, the current legislation will fail to accomplish congress's intended goal preventing people from partaking in online gambling. The current legislation will prevent banks and credit cards from sending money to online gambling companies.[12]. The bill does not explicitly prevent a person from participating in online gambling.[13]. Rather, it just makes it more difficult for a person to make deposits into an online gambling account.[14]. Moreover, the Act does not prevent the use of third party intermediaries in the process of funding online gambling accounts.[15]. One such intermediary is NETteller.[16]. NETteller is a financial institution that allows people to deposit money that the can use online to buy merchandise, goods, or even fund their online gaming account.[17]. NETteller has come out and said that they will continue to do business with US customers.[18]. What this means is that customers can deposit money into their NETteller accounts, and then fund their online gaming accounts, thus never having to use their bank accounts directly. Furthermore, many online gambling sites have said that they will not leave the US market and will continue to accept deposits from US customers.[19].

III. Conclusion

It appears that US gamblers will be able to continue using online companies for their gambling activities, because they have ways to get around the limits placed on banks and credit cards from funding online gambling accounts. This means that gambling companies will continue to operate in overseas markets just like any other business and will pay taxes to the host country. If the United States took the steps to regulate the thriving online gambling industry, it would attract numerous gambling companies that would want to establish operations in the lucrative US market. Attracting these businesses will allow the United States to garner billions of dollars in tax revenue. All the current legislation does is take money away from the United States and allow those countries that have chosen to regulate to benefit.

[1] Bob Pajich, *President Signs Unlawful Internet Gambling Act*, Cardplayer.com, October 13, 2006 *at*http://www.cardplayer.com/poker_law/article/1491

[2] H.R. Conf. Rep. No. 109-__, *available at* http://media.cardplayer.com/pdf/h/hr49543_portscr.pdf (report number pending).

[3] Walter Jefferson, *Online Gambling Legislation in the United Kingdom*, *at*http://www.betfactor.com/articles/uk_gambling.shtml

[4] *Id.*

[5] *Id*.

[6] Jeremy Herron, *Internet Gambling Still Expected to Grow*, Associated Press, October 16, 2006, *at*http://biz.yahoo.com/ap/061016/market_spotlight_internet_gambling.html?.v=1

[7] Wikipedia, Online Gambling, *at*http://en.wikipedia.org/wiki/Online_gambling. (last visited October 25, 2006)

[8] *Gambling Shares Tumble on U.S. Move*, Reuters, October 2, 2006, *at*http://www.cnn.com/2006/BUSINESS/10/02/gaming.stox.reut/index.html

[9] *Supra* note 6

[10] *Id.*

[11] Allyn Jaffrey Shulman, *A Comprehensive Analysis of the Internet Gambling Prohibition Act*, Cardplayer.com *at*http://www.cardplayer.com/magazine/article/15416

[12] Allyn Jaffrey Shulman, *What's NOT Included in Anti-Gambling Legislation*, Cardplayer.com, *at*http://www.cardplayer.com/poker_law/article/1428

[13] *Supra* note 2

[14] *Supra* note 11.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Lisa Wheeler, *NETteller Will Continue to Do Business with America*, Cardplayer.com, *at*http://www.cardplayer.com/poker_law/article/1483

[19] Allyn Jaffrey Shulman, *Online Poker Sites*: *Who's In and Who's Out?*, Cardplayer.com, *at*http://www.cardplayer.com/poker_law/article/1499

From M-16s to the F.R.C.P. : The 11th Circuit's USERRA Blunder

I: Introduction

On June 19, 1879, General William Sherman famously declared that war is hell. [1]. It is undeniable that war demands great sacrifices from those who serve. In 1994, Congress sought to mitigate the depth of such sacrifices through the enactment of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). The USERRA's purpose is two fold: prevent employment discrimination against those who have served in the military and secure the reemployment of military servicepersons. [2]

The 11th Circuit erred in its interpretation of the USERRA in deciding the matter of *Coffman v. Chugach*. [3]. The ultimate holding was correct in light of the recognition of the plaintiff's failure to establish a prima facie case. Despite this, the court's method of arriving at its conclusion failed to establish an acceptable standard for future courts to follow.

II: The USERRA

The USERRA was born out of the ashes of World War I. As American soldiers returned from the Western Front, many found that the jobs they had left were not waiting for them when they returned. [4]. "Over 200,000 World War I veterans ended up jobless upon their return from service to their country." [5]. In reaction to this plight, on the eve of America's entry into World War II, Congress passed the Selective Training and Service Act of 1940 to statutorily assure the job security of those serving their country. [6].

The Selective Training and Service Act evolved through the next half-century. In 1994, Congress enacted the USERRA, which, despite modification from the original 1940 act, sought to enforce the same goals. [7]. The USERRA prohibits employment discrimination based on an applicant’s military status, [8] establishes that those returning from military services are entitled to reemployment conditional on several requirements, [9] and addresses various details pertaining to issues of seniority, promotion, etc. [10].

***III: Coffman v. Chugach Support Sys. Inc* [11]**

Charles Coffman served as a civilian contractor at Tyndall Air Force Base in Panama City, Florida. [12]. An Air Force reservist, he was called into active duty. [13].While serving overseas, Coffman’s employer was replaced as the primary contractor at Tyndall. [14]. Coffman returned to Tyndall to find the new contractor unable/unwilling to reinstate him in his pre-deployment position. [15]. Coffman then filed suit under the USERRA, suing for reinstatement to his pre-activation position. [16].

IV: The Misinterpretation of *Kicinksi*

When Charles Coffman left for his Air Force service, his employer, Del-Jen, was the primary contractor for base support at Tyndall. [17]. When Coffman returned, however, Del-Jen had been replaced by Chugach. [18]. It is this replacement that complicates the application of the USERRA.

The USERRA anticipated such acquisitions/takeovers and specifically included the term “successor in interest” within the definitions of “employer” regarding who may be implicated by the USERRA. [19]. What Congress failed to do however, as *Coffman* succinctly notes, is define what “successor in interest” actually means. [20].

The judiciary, in navigating around this omission, crafted in *Leib* a seven-prong test to determine if a successor-employer falls within governance of the USERRA. [21]. Despite acknowledging *Leib* as the standard test for these matters, the Coffman Court refused its implementation. [22]. Rather, the court cited *Kicinski* in holding that “such analysis is unnecessary and improper” without a merger/transfer of assets. [23], [24]. Coffman continues by citing several cases in which the merger/transfer of assets preceded a finding of successor-liability thus fallaciously concluding that the issue of asset transfer is a necessary element to the successor-liability equation. [25].

The scope of this article precludes a full analysis of the clear factual distinctions between *Coffman*and *Kicinski.* However, even a cursory juxtaposition of the two matters shows that any analogy between the two cases is improper for purposes of USERRA implementation. The conclusion the Coffman court arrived upon, that is, to not even bother applying the *Leib* test, is inherently flawed due to the faulty premise upon which it was based. The proper course would have been to give the Leib test its due merit and actually analyze the facts, not baldly assert conclusions.

V: The Dropped Ball

The *Coffman* court stressed the transfer/merger of assets as a dispositive issue in their determination of successor liability. [26]. This conclusion is based upon the observation of other relevant cases also involving the transfer/merger of assets in their respective findings of successor liability. [27].

Such fallacious reasoning is often classified under the Latin moniker of *post hoc ergo propter hoc*. [28]. This fallacy is found in arguments that allege that because X occurred before Y, X is the cause of Y. Consider an individual who picks a stray tennis ball off the ground and then notes that there are no polar bears openly prowling the area. If he were to conclude that the lack of polar bears was the result of his newly acquired tennis ball, he would be a victim of the “post hoc” fallacy. Unfortunately, the*Coffman* court is exactly this victim in arriving at their conclusion. Simply noting that previous cases that have found successor liability have also found the transfer/merger of assets is entirely inadequate as a line of reasoning. There appears to be no express indication outside of *Coffman* alleging the necessity of the asset issue.

VI: The Once and Future Test

This author suggests that the proper course of action would be implication of the *Leib* test in all successor-privity matters. The test offers protection to successor businesses by placing the burden of proof on the plaintiff and only finding successor liability in situations, which conform to the scrutiny of the seven factors of *Leib.* The plaintiff's interests are protected by not couching successor-liability issues in esoteric business concepts or denying justice because of the hollow transfer of paperwork.

While war may be hell for our nation's fighting men and women, their transition back into civilian life should not be as equally arduous. It runs contrary to notions of justice and common decency to have veterans, upon laying down their rifles, be forced to pick up the Federal Rules of Civil Procedure. The USERRA is a worthy attempt to improve the lives of our returning veterans; the enforcement of that law should be equally noble.

[1] Lloyd Lewis, *Sherman: Fighting Prophet* 637 (reprint ed., U. Neb. Press 1993) ("There is many a boy here today who looks on war as all glory, but, boys, it is all hell.").

[2] 38 U.S.C. §§ 4311-4313 (1994).

[3] *Coffman v. Chugach Support Sys. Inc.*, 411 F.3d 1231, 1232 (11th Cir. 2005).

[4] *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240, 242 (8th Cir. 1991).

[5] *Id*. at n.3.

[6] *Wrigglesworth v. Brumbaugh*, 121 F. Supp. 2d 1126, 1130 (W.D. Mich. 2000)

[7] *Id*.

[8] 38 U.S.C. § 4311 (1994).

[9] 38 U.S.C. § 4312 (1994).

[10] 38 U.S.C. § 4313 (1994).

[11] *Coffman*, 411 F.3d 1231.

[11] *Id*.

[13] *Id*.

[14] *Id*.

[15] *Id*., at 1233.

[16] *Id*.

[17] *Coffman*, 411 F.3d at 1232.

[18] *Id*.

[19] 38 U.S.C. § 4303(4)(A)(iv) (1994).

[20] *Coffman*, 411 F.3d at 1237.

[21] *Leib*, 925 F.2d at 248 (1. Substantial continuity of same business operations, 2. Use of the same plant, 3. Continuity of work force, 4. Similarity of jobs and working conditions, 5. Similarity of supervisory personnel, 6. Similarity in machinery, equipment, and production methods, 7. Similarity of products or services).

[22] *Coffman*, 411 F.3d at 1238.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] *Id*. at 1238.

[27] *Id.*

[28] *Black's Law Dictionary* 1205 (Bryan A. Garner ed., 8th ed., West 2004)("After this, therefore because of this.")

BANKS CHEATING WORKERS OUT OF OVERTIME PAY ARE IN TROUBLE

Introduction:

There is
a common practice among banks to classify their brokers in such a way that makes them ineligible to receive overtime pay, and now their brokers are fighting back to receive the pay that they feel is rightfully theirs. Morgan Stanley, Citibank, Wachovia, and Bear Steams have all been sued for failing to pay overtime to eligible employees. The U.S. Department of Labor is now chiming in to say which employees must be paid overtime, and it is not looking good for the banks.

Morgan
Stanley has agreed to pay up to $42.5 million to settle a class action suit against 4,000 of their employees and former employees for failing to pay overtime to them even though they were eligible for overtime pay under the law. [1] Similar cases have been filed against Citibank, Wachovia, and Bear Steams Cos. [2]

The plaintiffs alleged that improper deductions were taken for their wages and that they were not compensated for overtime performed at Morgan Stanley. [3] Morgan Stanley defends itself by alleging that the company should not have to pay overtime to financial advisors because financial advisors are exempt professionals under the law. [4] The attorney for Morgan Stanley says that if their classification of brokers is wrong now, "this means the industry has to start treating brokers more as advisors whose primary duty must be advising clients and not as sales people if they want to avoid paying overtime." [5]

Wachovia has also had to pay back wages to its brokers for the same issue when an audit showed that they had not paid overtime to qualified workers. [6] They performed the audit themselves in cooperation with the U.S. Department of Labor. [7] Some of their employees in operations, technology, and other divisions had jobs that were improperly categorized as being salaried when they were actually not. Those people received a lump sum from the company in back wages. [8] A Wachovia spokes woman, Christy Phillips, said that Wachovia would be taking a proactive stance about classifying jobs in the future. [9]

According to the U.S. Department of Labor, employees that are permitted or required to work more than forty hours per week are generally owed premium premium pay for such overtime work. [10] Their website says that, "employees covered by the Fair Labor Standards Act (FLSA) must receive overtime pay for hours worked in excess of 40 in a workweek of at least one and one-half times their regular rate of pay." [11] Banks have tried to get around this by classifying jobs so that employees don't qualify under the FLSA, but unfortunately for those companies, the Department of Labor looks at the work actuality performed and not how the bank classifies the position when determining who should earn overtime. [12]

Firms that purposely try to get around employment laws by misrepresentation should not only have to pay back wages, but should also pay punitive damages to the government. When an employer knows that if sued, it only has to pay the money that it owed the employee in the first place, the employer is less likely to pay initially and instead waits to see if anyone challenges them. In that situation, if the bank is eventually made to pay, it has not lost anything. The law would be more effective if employers knew that they could be punished for misrepresentations they make in order to get around paying their employees in accordance with FLSA laws.

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[6] Charlotte Business Journal, *Wachovia Pays Back Wages* (BizJournals.com), *available at*http://www.bizjournals.com/charlotte/stories/2003/02/24/dailey19.html.
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[11] *Id.*
[12] *Id*.

POWER AUCTION: RATES IN ILLINOIS TO RISE

The cost of "running" your business, not to mention heating your home, in Illinois may change after the Illinois Commerce Department's recent power auction. [1] Currently, power rates have been frozen since 1997, but the freeze will expire in 2007. [2] It is then that some people, including state legislators, feel power rates will increase and the results of the power auction will be felt. [3] The current statute governing power rates in Illinois is known as the Electric Service Customer Choice and Rate Relief Law of 1997. [4] In the next paragraphs this article will attempt to synthesize some of the information surrounding this topic by explaining the power auction, the extent of potential rate increases, and the potential for a continuation of the Rate Relief Act of 1997.

The power auction took place from September 5 to September 8. [5] During the power auction state suppliers placed bids for the right to supply electricity to ComEd and Ameren. [6] The power auction also set fixed power rates for homes, small businesses, and large businesses. [7] Winning bidders in the auction included: "Ameren Energy Marketing, American Electric Power Service, Conectiv Energy Supply, Constellation Energy Commodities Group, DTE Energy Trading, Dynegy Power Marketing, Edison Mission Marketing & Trading, Energy America, Exelon Generation, FPL Energy Power Marketing, J. Aron, J.P. Morgan Ventures Energy, Morgan Stanley Capital Group, PPL EnergyPlus, Sempra Energy Trading and WPS Energy Services." [8] The Illinois Commerce Department will release more details surrounding the auction on December 1. [9]

Views on the power auction depend on who you ask. Patricia Clark, spokeswoman for the Citizens Utility Board, a consumer advocacy group, feels that the Illinois legislature should delay the current freeze on rates until more competition enters the electricity market. [10] On the other hand, Mort Kamien, Northwestern University economist, blames the lack of competition on the rate freeze because rates are currently far below market value. [11]

A major concern among businesses and consumer advocacy groups is that the power auction approach will lead to increased rates for customers. [12] Excelon’s customers, based on the auction results, would see their rates rise by approximately 22 percent. [13] Customers of Ameren’s electric utilities would see their rates rise anywhere from 40 to 55 percent. [14] The Building Owners and Managers Association of Chicago estimates that office buildings in Chicago, on average, could experience a 72 percent increase in their ComEd electricity rates. [15] This figure rate increase was 90 percent for Chicago area office buildings that used electricity for heat, and 54 percent for those that did not. [16] Despite the potential increases, John Rowe of Excelon emphasized that "‘even with the 22 percent increase on ComEd’s base, prices will have risen less than inflation since the rate cut’ a decade ago." [17] On the flip side, consumer advocate Patricia Clark, emphasizes that the rate increases come at a time when companies like Excelon are making large profits. [18]

The power auction is under attack in court and in the legislature. On August 23 the Appellate Court for the Second District of Illinois denied Illinois Attorney General Lisa Madigan’s request to halt the Illinois Commerce Department approved September power auction. [19] Madigan’s appeal of the order allowing the auction is currently pending in the Second District Appellate Court. [20] If Madigan blocks the rate increase, ComEd may need to purchase power on the spot market. [21] Purchases made on the spot market are more volatile than long term contracts, and thus, rates may increase despite a block by Madigan. [22] In fact, John Rowe of Excelon, suggested that legal action by Madigan caused uncertainty and may have been a factor in higher auction prices. [23]

In the Illinois Legislature, House Bill 5766, whose prime sponsor is Lisa Dugan, proposes a continued rate freeze for three more years. [24] "David Vite, president of the Illinois Retail Merchants Association, said the legislation would hurt business" because "businesses would have to continue paying transition charges for switching to other providers." [25] ComEd also disapproves of the legislation, and has stated that a longer rate freeze would put the company at risk of bankruptcy. [26]

Although power rate increases in Illinois seem likely, they will depend on the outcome of Attorney General Lisa Madigan's pending appeal and on House Bill 5766.

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[6] Wisniewski, *supra* note 1, at 58.

[7] *Id.*

[8] *See 16 Suppliers*, *supra* note 1, at 1.

[9] *Id.*

[10] Comerford, *supra* note 2, at 1.

[11] *Id.*

[12] Wisniewski, *supra* note 1, at 58; Comerford, *supra* note 2, at 1.

[13] *CEOs Doubt Lawmakers*, *supra* note 3, at 9.

[14] *Id.*

[15] Wisniewski, *supra* note 1, at 58.

[16] *Id.*

[17] *CEOs Doubt Lawmakers*, *supra* note 3, at 9.

[18] Comerford, *supra* note 2, at 1.

[19] *Illinois Appellate Court Refuses to Halt Com Edison/Ameren Power Auction*, ELECTRIC UTILITY WEEK, Aug. 28, 2006, at 17.

[20] *16 Suppliers*, *supra* note 1.

[21] Comerford, *supra* note 2, at 1.

[22] *Id.*

[23] *CEOs Doubt Lawmakers*, *supra* note 3, at 9.

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[25] Mary Wisniewski and David McKinney, *Madigan Calls For Special Session to Freeze Electric Rates*, CHICAGO SUN TIMES, Oct. 3, 2006, at 51.

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CHINA'S NEW M&A REGULATIONS

I. Introduction

The first piece
in this series (A Warning to Foreign Companies Entering "Sensitive" U.S. Markets, in the September 6th, 2006 edition of this publication) discussed the attempts of foreign companies to enter "sensitive" areas of the US economy, focusing on how the US government derailed the purchase of US companies by foreign entities. [1] This
piece will discuss the Chinese government's new regulations covering M&A transactions involving foreign investors purchases of Chinese companies will affect the M&A market and possible motivations behind the new legislation.

II. Analysis

On Aug. 8, 2006, the People's Republic of China ("PRC")'s Ministry of
Foreign Commerce ("MOC") issued new regulations ("Revised Provisions") on M&A transactions in China. [2] These new regulations would simultaneously ease and impede foreign acquisitions by allowing all stock purchases, but also requiring government approval of most M&A transactions involving offshore entities. [3] The Revised Provisions went into effect on Sept. 8, 2006, replacing the interim provisions issued in 2003. [4]

This piece will first focus on two main areas of rule-making: share exchanges involving off-shore entities (whether foreign or domestically controlled) and domestic Chinese companies, and the additional regulatory approval requirements for foreign purchases of Chinese companies. The piece will then discuss the possible effects on foreign purchases of Chinese entities and possible motivations behind the law.

III. Share Exchanges

For the first time, foreign buyers will have authorization to "pay for stakes in Chinese companies in shares instead of in cash." [5] This new option will give foreign buyers increased flexibility and will bring China in line with international practice. [6]

However, in order to take advantage of these rules, the parties must satisfy a number of conditions including:

- the acquirer's shares must be tradable on an overseas stock exchange;
- the offshore company's trading price must be "stable" for one year preceding the transaction;
- the shareholders of the target company must be the legal owner of the shares, which must also be legally transferable;
- the shares of both the acquirer and target must be unencumbered. [7]

IV. Increased Regulatory Scrutiny

While the new regulations increase business' flexibility in how they pay for their purchases, they also raise new regulatory hurdles to approval. For most transactions involving offshore restructurings, firms must obtain prior approval from the MOC. [8] The regulations "confer broad new powers to block investments in key industries if they are deemed to be a danger to China's economic security," "alter control of a key Chinese brand," or involve a firm with more than 2,000 employees. [9]

As always, "the devil [will] be in the detail[s] and the implementation of the regulations." [10] Some investors are concerned that the rules "put the onus on the buyer and seller to declare if the deal might affect . . . economic security." [11] Moreover, the rules "are pretty vague about what you've got to report, what's influencing economic security," says John Grobowski, co-managing partner of Baker & McKenzie's Shanghai office. [12] He continued, "[t]his puts a pretty heavy burden on the parties involved in the transaction to make those kind of determinations." [13]

"Furthermore, if an M&A transaction is completed without the required MOFCOM review and approval, the Revised M&A Provisions authorize MOFCOM to either rescind the M&A transaction or retroactively amend the agreed contractual terms and conditions of the M&A transaction." [14] Thus, if the companies miscalculate, and determine, inaccurately, that the deal does not require review by the Chinese government, it can have very serious consequences. Therefore, companies will likely be very cautious in determining whether to request government review. While the review process is not especially time consuming, requiring a decision within thirty days, the government has not yet indicated the level of scrutiny that will be applied. [15]

Thus, firms should be very careful when considering purchases of companies that might trigger this review process.

V. Effects on the Foreign M&A Markets

According to The Financial Times, "It is tempting to conclude that one of the world's toughest markets for mergers and acquisitions is getting tougher." [16] While, as noted above, the regulations strengthen the regulatory scrutiny, they simultaneously ease some parts of the process. "The approval process will be more streamlined", and all relevant ministries are on board. [17] The old regulations, on the other hand, gave power to a ministry which seemed "unaware of its new responsibilities." [18]

However, experts doubt the new rules will "have a big impact on M&A because big takeovers are already subject to strict vetting." [19] The most important factor will be how the regulations are applied as the blocking provisions are subject to wide interpretation. [20]

VI. Motives Behind New Regulations

Leaders claim that China, the developing world's biggest recipient of foreign investment, isn't closing off its economy. [21] Rather, their motivation stems from the "government's growing preoccupation with helping the expanding universe
of Chinese companies and pressing domestic issues such as poverty and wealth disparities." [22] However, "because the new restrictions are part of a broader policy shift —

rather than some temporary interest in penalizing foreign businesses — it's a potentially scarier development for foreign companies." [23]

There also seems to be an element of domestic politics in play. "Increasingly savvy domestic companies — some of whom have been stymied
in their efforts to expand overseas — are seizing the moment to push for moves they hope will strengthen them against outside competitors." [24] "'As local Chinese companies become more competitive, they are becoming
more sophisticated in using whatever means are available to them to maintain their position,' says Henry Wang, a lawyer with DLA Piper Rudnick Gray Cary in Shanghai. 'They are using a combination of the media and government help.'" As Chinese companies become more sophisticated, they appear to be emulating their American counterparts, taking advantage of the ability to lobby the government to produce positive results.

VII. Conclusion

While the new regulations simplify some areas of the M&A market, by allowing all stock mergers, they also create new barriers to entry into the Chinese market. However, once companies adopt to, and understand how the new rules will affect business, the rush into China will probably resume at an even greater pace.

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Regulations, (Aug. 9, 2006) (Unpublished report on file with author)
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[9] *Supra* note 5, *New Rules*.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id*.

[14] *Supra* note 2, Revisions.

[15] *Id*.

[16] *Chinese Deals*, The Financial Times, Aug. 10, 2006, *available at*http://www.ft.com/cms/s/cfa81d08-285d-11db-a2c1-0000779e2340.html.

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[21] Andrew Batson and Mei Fong, *In Strategic Shift, China Hits Foreign Investors With New Hurdles*, Wall St. J., Aug. 30, 2006, at A1.

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[25] *Id*.

BANK OF AMERICA SETTLES MONEY LAUNDERING SUIT FOR $7.5 MILLION

The Bank of America recently settled a money laundering suit brought by Manhattan District Attorney, Robert M. Morgenthau for $7.5 million, $6 million in penalties and $1.5 million in costs, ending an almost three year investigation conducted in coordination with foreign authorities. [1]

District
Attorney Morgenthau said that a series of transfers, totaling more than $3 billion, prompted the investigation because they possessed some of the ear-marks of terrorist financing, much of which comes from South America. [2] The transfers originated in offshore shell companies owned by illegal Brazilian money services and were routed through the Bank of America account of a Uruguayan money remitter. [3] Although officials do not know the identity of many of the recipients, District Attorney Morgenthau believes that some of the transferred funds went to Mideast terrorist organizations. [4]

Under the terms of the settlement, Bank of America admitted that it failed to adequately asses the risk of some of its customers, agreed to cooperate with ongoing investigations, and to improve its anti-money laundering program. [5] Even so, Bank of America admitted no wrong, stating that it takes money-laundering seriously and that it never has knowingly done business with parties engaged in illegal activities. [6]

The Bank of America investigation was part of an on-going anti-money laundering program that has traced almost $19 billion in illegally transferred funds, and recovered $19.5 million for the city and state. [7] District Attorney Morgenthau also announced that thirty four individuals and sixteen British Virgin Island companies, all of whom were involved with illegal transmissions of money from Brazil, had been indicted for violation of New York's banking laws. [8] As Brazilian authorities are criminally prosecuting the defendants, in it is unlikely that District Attorney Morgenthau will prosecute them in the United States. [9] However, the indictments were necessary to freeze their illegally transmitted assets, which total $17.4 million. [10]

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[10] Enrich & Bray, *supra* note 1.

MERCK OWES THE IRS BIG BUCKS – FOR TAKING ADVANTAGE OF THE INTERNATIONAL TAX MARKET?

I. Introduction

There are two things in life that are certain: death and taxes. Corporations have successfully cheated the former by achieving perpetual life. And, from their births, it seems like corporations have also been doing their darndest to avoid the latter. Offshore affiliates have become a popular corporate technique for avoiding income tax.[1] Recently, Merck has been investigated for putting its own unique spin on the traditional offshore affiliate.

II. Analysis

In 1993, Merck in conjunction with a British bank entered into a Bermuda partnership whose assets were substantially comprised of the soon-to-be-valuable patents behind cholesterol-lowering medications Zocor and Mevacor.[2] In creatinig this partnership, Merck engaged in a practice called "inversion:" a method of reorganization wherein a domestic corporation reorganizes itself to become a subsidiary of a foreign parent entity, thereby rendering any profits generated by the foreign business operations outside of the reach of the federal income tax.[3] In other words, "the arrangement . . . allowed some of the profits to disappear into a kind of Bermuda triangle between different tax jurisdictions."[4]

In order for such a reorganization to pass IRS muster, it must have independent "economic substance," meaning that there must be some economically colorable justification for the reorg other than tax avoidance.[5] Merck offers that the partnership, whose existence was never previously publicly disclosed, was simply a way of raising financing for its 1993 acquisition of a pharmacy benefits firm: Medco.[6] Presumably, Merck's argument would go as follows:in order to incentivize investment by the British bank (the other partner), they had to secure the investment with a sure thing, like their Zocor patents. Similar facts were seen in a recent Second Circuit case where the court held that the foreign banks in a GE deal were not "bonafide equity partners" and on this basis found no economic substance in the transaction.[7] While the IRS has not disclosed the basis upon which it will pursue Merck for back taxes, a similar fate may await the drug company.

III. Conclusion

In light of the constant struggle that exists between corporate efficiency and preservation of the tax base, consider for a moment tax arbitrage as a matter of theory. Does tax avoidance differ substantially from other things that corporations do on regular basis? In what way is shopping around for favorable tax treatment in different jurisdictions different from, say, shopping around for favorable labor laws for the purpose of minimizing a manufacturer's overhead? Or from shopping around for favorable management laws upon incorporation? Doesn't tax avoidance, on a very rudimentary logic level, have very valuable economic substance all its very own? This is not to say that there aren't valid policy reasons for obligating corporations to behave in this counter-capitalist manner. It is all but undeniable that the corporate tax base has the *potential* to be a if not the most valuable source of tax revenue for the federal government. However, it is at very least debatable as to whether the corporate tax comes even near to that potential in practice given the many creative tax arrangements engineered for corporations.[8] Given that the value pouring out of the corporate tax base is most likely far less than it could be, is it possible that the funds recouped through investigation and prosecution are not worth the dollars that the government spends in the process? This author does not know the answer to that question. However, it seems possible that trying to reach funds that have been merely shopped around on the international tax market costs more than it is worth to this government, and that aiming to keep corporations from taking advantage of lower tax rates elsewhere is a losing battle not worth fighting.

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REAL ESTATE AUCTIONS: IS A BIDDER LEGALLY BOUND?

Real estate auctions exist in many forms and are becoming increasing popular over the internet. Ebay alone boasts that 55,000 property have already been sold through eBay Real Estate. [1] There are significant benefits to using the internet to purchase property, since one can shop for real estate around the globe, pick a suitable property, and bid online from the comfort of one's home. [2] Traditional real estate auctions still exist, most commonly as government auction of seized property [3] or as bank auctions of foreclosed property. With the current estimate that one in three properties will be sold by auction by the year 2010, [4] one might wonder which, if any, of these auctions legally bind the bidder to purchase the property.

Traditional real estate auctions for government property or bank foreclosures occur on the steps of the home at a specified time with the potential buyers present at the property to bid. [5] Potential buyers usually have the opportunity to inspect the property before bidding and are present at the property during auction so no unforeseen glitches in the process can occur. These auctions are thought of as legally binding because purchasing property through an auction which one has had the opportunity to inspect is not significantly different than shopping around with a real estate agent and deciding which home to purchase. In addition to being legally binding, most auction companies have a process for pre-screening all potential bidders to make sure they are creditworthy and financially pre-qualified, including access to cash in an amount at least ten percent of the expect sales price which can be paid at the close of the auction or soon thereafter as a downpayment. [6] Traditional auctions are somewhat of a gamble since the buyer never knows how high the price might climb in the midst of competitive bidding, but a buyer might also incur substantial savings on the purchase of property. Auctions have the benefit of not having commissions attached to them, [7] as do normal sales of property through real estate agents, so the savings from that alone can be significant, especially when combined with the auctioneer's desire to sell the property quickly.

Internet auctions, however, pose significant risks since people generally are not physically visiting the property before bidding. There can be various legal issues as well such as title or deed problems, any structures on the property could be in massive disrepair, or the property might be inaccessible altogether. [8] Because of the risks inherent in internet auctions that are not associated with traditional auctions, internet auctions are not legally binding. [9] Internet auctions can more appropriately be thought of as "an interactive advertising tool" in which a seller can identify a serious potential buyer and the two can later sit down and negotiate a contract for the purchase of the property. [10] In addition, eBay Real Estate allows sellers to decide whether they want to make bids binding or not binding. However, this does not mean that sellers on eBay have the ability to decide whether or not they want to legally bind bidders. Instead, making an auction binding simply creates an incentive for only serious buyers to bid because if an auction is deemed binding by the seller and a bidder does not follow through with the purchase, they can be penalized by . . . negative feedback! [11] Thus, in the internet auction world, nothing can be legally binding until the buyer and seller sign a contract for the purchase of the property.

With the many conveniences of shopping online and the fact that bidding online does not legally bind the bidder, the internet is a great place to explore potential property investments, as opposed to the gambling and out-bidding atmosphere of the traditional, legally binding real estate auctions.

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[10] *Id.*

[11] *Id.*

A SALTY FLAVOR TO YOUR (FORMERLY) LAND-BASED CONTRACTS: NORFOLK SOUTHERN V. KIRBY TWO YEARS LATER

In 2004 the Supreme Court of the United States handed down a decision that changed the jurisdictional requirements of adjudicating a contract in admiralty. [1] This was a major development in an area of the law that is remarkably resistant to change because of the nature of shipping evolves little compared to other technology. These changes should have had a larger effect in legal circles, because now certain “mixed contracts” that fell in the grey area between admiralty and non-admiralty law were considered to be within admiralty jurisdiction entirely. [2] Now certain contracts for the carriage of goods that arrange for transportation over both land and water in a single contract can be adjudicated in certain instances that were impossible before. [3] Currently, a shipping container undergoing some catastrophic event in Nevada could be litigated in admiralty as long as the majority of its journey was made on navigable waterways or the high seas. This counter-intuitive principle deserves a closer look by business attorneys working in the transportation field because now more than ever it is possible that they will brush up against an ancient (and somewhat mystifying) area of law that most lawyers working away from the coastline would never before had encountered. It is a useful exercise for any lawyer in the field to examine exactly how the jurisdictional requirements for maritime contracts changed, what decisions have been made since, and exactly what it means to their legal practice.

Of the entirety of American jurisprudence, few areas are as separated from other subjects as admiralty law. [4] Most specializations are related to the basic subjects of contracts, torts, property, and the criminal law by advancing their concepts a step further or by focusing in on a tiny area in far greater detail. Admiralty law is wholly separate, and although its precedent speaks to all of the common law in one way or another, the processes or even the underlying principles are different and maritime in flavor. [5] This is because admiralty developed along separate lines in common law England than did its land-based cousins. [6] A consequence of the separation is that admiralty lawyers frequently only specialize in admiralty claims (or in some cases, transportation claims), and attorneys in conventional fields are somewhat unaware and mystified by the separateness of maritime law.

I. Traditional Admiralty Jurisdiction

For any claim to be litigated under the unique rules of admiralty law, the jurisdictional threshold requirement must be met. [7] Furthermore, the policies of admiralty law should be examined to understand why admiralty is necessary in the modern United States. At English common law, admiralty fell between the cracks of the competing law and equity courts. Jurisdiction was determined geographically. If the contract was made at sea, it was a maritime contract and was appropriate for admiralty jurisdiction. [8] If the tort occurred at sea, then the resulting claim was also appropriate for admiralty. [9] Rules developed to determine how to determine geographical locations. The most important was that "sea" meant any water affected by the tides. If you were subject to a contractual breach or a tort on a body of water affected in this manner, then you were eligible for the admiralty courts. [10]

These concepts were transferred to the United States during the colonial period and shortly thereafter, but it soon became apparent to federal courts [11] that the English rules were not well-suited for American marine activities. [12] Many American waterways were fully navigable by ships that were not affected by the tides, such as rivers and large lakes. The amount of river traffic increased in the United States as the population started moving west in the early nineteenth century, and the Courts were hard pressed to find a reasonable solution of updating the elements of admiralty jurisdiction. [13] Specifically it was apparent that admiralty law should be in the province of the federal government only; not only because of express constitutional authority, but because the interstate nature of shipping meant a uniform law was preferable to a smattering of irreconcilable state decisions. [14]

The federal courts soon developed an American test for admiralty jurisdiction bringing all such claims into federal court. [15] Justice Joseph Story was at the forefront of these decisions and is known for his lengthy, scholarly decisions that slowly extended jurisdiction to what it is today. [16] American admiralty tort jurisdiction required that the cause of action occur (1) on navigable waters (2) during traditional maritime activity (3) in a manner that could potentially disrupt maritime commerce. [17] Each element over time evolved their own specific nuances, but Story's contribution to admiralty contract jurisdiction has remained static until only recently. [18] A contract is maritime if its nature is substantially related to maritime matters. [19] This differs from the English law because American judges look for a contract's subject matter, not where it was made geographically. [20]

Because admiralty law is exclusively litigated in front of a single judge or a panel of judges (where does one find jurors on the high seas?) the law changed slowly. Maritime contract law didn't fundamentally change. The case law from the nineteenth century to modern times only added examples to what is and what is not maritime subject matter.

II. *Norfolk Southern v. Kirby*

As is the case with many landmark cases, *Norfolk Southern Ry. Co. v. Kirby* [21] involved a very interest fact pattern. "This," wrote Justice O'Connor, "is a maritime case about a train wreck." [22] The General Motors Company ordered $1.5 million worth of machinery from the James N. Kirby Company of Australia to be sent to an automotive plant in Huntsville, Alabama. [23] The machines were loaded into ten shipping containers. [24] Kirby hired a freight forwarding company, which arranges for overseas transport but doesn't ship items themselves, which gave Kirby a bill of lading. [25] The bill of lading is a contract that also serves as proof that the forwarding company received the items. [26] Under federal law, the forwarding company and the actual carrier were limited to only $500 of liability per container. [27] Furthermore, the bill of lading contained a standard "Himalaya Clause," which extended the limited liability to "servants, agents, or other independent contractors" working under or for the two organizations. [28]

Because the shipping containers were capable of being easily loaded on board the ship and subsequently offloaded to a waiting Norfolk Southern freight train at its debarking port in Savannah, Georgia, the contract was a "through bill of lading" providing for carriage from factory to factory as opposed to breaking the trip into sea- and land-borne legs as was common in the era before containerization. [29] The sea voyage from Australia to Georgia was without incident, but the Norfolk Southern train derailed on its way inland to Huntsville rendering most of the equipment damaged or destroyed. [30]

The theory forwarded by Norfolk Southern was that it was an "agent" of the forwarding company, thus the through bill of lading's Himalaya Clause extended the $500 limitation on liability to them. [31] The District Court agreed [32], but the decision was reversed by the Eleventh Circuit. [33] Through the appeals process, the parties relied in state law contract principles in their arguments. [34] Once the case reached the Supreme Court, Kirby raised the issue of federal admiralty principles being the controlling law instead of the common law contracts principles of Alabama. [35] The Court used this minor threshold issue as an opportunity to expand admiralty jurisdiction within the contract realm. [36]

Federal admiralty law controls the interpretation of maritime contracts where there is no overriding local interest that would require application of local laws. [37] This is so that the law remains uniform throughout the United States. [38] First, the Court determined that there was no material interest in applying local law in the case, and then they raised more than a few eyebrows by holding the bill of lading as a maritime contract even though the cargo was lost on a land leg of the journey. [39] This expansion was focused on the bill of lading being *primarily* maritime, as the majority of the trip was on water. The Court noted that the purpose of applying admiralty principles to maritime contracts is to protect those contracts, and in the modern era "the shore is now an artificial place to draw the line." [40] They pointed to containerization methods and modern machinery in ports to quickly offload such containers for the expansive understanding of maritime contracting. [41]

The Court was also careful to state a limitation on itself – a maritime contract necessarily involves the majority of the trip to be over water: "(it) is useful in a conceptual inquiry only in a limited sense: if a bill's *sea* components are insubstantial, then the bill is not a maritime contract (emphasis retained)." [42] By meeting the threshold jurisdictional question, the Court was able to go on to reverse the Eleventh Circuit, holding that Norfolk Southern was in fact covered by the limitation in the bill of lading's Himalaya Clause and remanding the case. [43]

III. Case Law Applying the New Rule

In theory, *Kirby* should have sent shockwaves throughout American jurisprudence resulting in a flood of cases on the dockets of admiralty courts around the country. Two years later, this effect has yet to be seen. There are a few possibilities for why this is so: admiralty might not be particularly appealing to attorneys litigating cases best heard in front of a jury, the dispute settles quickly because the depth of admiralty case law clears any grey area in the facts that litigants could use to their advantage in civil court, or (and most probably) the majority of attorneys are afraid of the mysteries of admiralty due to inexperience in the field.

Some courts have heard maritime contract cases in the post-*Kirby* world. The majority of them follow*Kirby*, but some have distinguished its facts and held contrary. The Supreme Court has yet to speak on any of these opposing decisions.

As recently as last month in *Atkins Machinery, Inc. v. Powell Company, Inc.* [44], the U.S. District Court for the District of South Carolina applied a similar Himalaya clause to the one found in *Kirby* to a freight carrier who negligently damaged a textile machine on its way to Thailand. [45] It is fairly clear that without the expand rule established in *Kirby*, the defendant's motion to dismiss would not have been granted. Both parties acknowledged that the damaged occurred at a port within the United States as the freight carrier was loading the machine's shipping containers on the company's vessel. [46] The voyage had not even seen navigable waters at that stage, and without *Kirby*'s rule the bill of lading would not have been considered a maritime contract for purposes of the

Himalaya Clause. [47] Similar results from similar fact patterns were found in *Polimeros Technolgia, S.A. v. Maersk Sealand*[48] (a shipper's motion for summary judgment was granted upholding a Himalaya Clause after several thousand dollars' worth of equipment was stolen from a Guatemalan port) and *Monarch Gems v. Malca-Amit, USA, LLP* [49] (Himalaya Clause extended to carrier when a shipment of diamonds disappeared in route).

Other courts have distinguished the case, choosing not to hold certain bills of lading as maritime and denying litigants the benefit of admiralty jurisdiction. In *Folksamerica Reinsurance Company v. Clean Water of New York* [50], the Second Circuit criticized the lack of detail in *Kirby*'s test. The case involved an injured harbor worker that sued Folksamerica for insurance coverage. [51] Folksamerica claimed his policy did not cover the worker because the worker's employer was a mere subcontractor to the policyholder. [52] The Court went to great length describing their own jurisdictional test, stated flatly that the *Kirby* Court did not apply a threshold test appropriate to the type of insurance (even though marine insurance) contract in the case, and refused to apply it. [53] Marine insurance is a grey area within the *Kirby* framework, but a plethora of other cases have held that contracts for marine insurance are in fact maritime contracts. [54] A liability extension clause in these logically ought to work in the same manner as a Himalaya Clause, thus allowing for limited liability *a la Kirby*. Other cases distinguished the Carriage of Goods by Sea Act applications from the Hamburg Rules applications [55], contracts that did not expressly state liability was extended "beyond the (port of debarkation) [56]," and where there is clear evidence that the parties to the bill of lading never intended for the Himalaya Clause to extend to the specific agent that caused the damage. [57]

IV. Application to Land Based Practice

Any motorist driving down an interstate highway sees the modern result of shipping every time they spot a flatbed trailer hauling one or more shipping containers. These shipping containers revolutionized the business of shipping and allowed cargo to be loaded at a factory, taken by rail to a port, loaded onto a ship, offloaded at the debarkation port, loaded onto a truck, and then delivered to the buyer without requiring any machine or dock worker to touch the actual goods themselves. [58] The efficiency in this system is immense (in terms of both time and money) from the "break bulk" shipping methods of yesteryear that required hundreds of hired hands to offload cargo at a port one crate at a time. [59] The difference in data is staggering: in the modern world it takes a container-ready port crane to offload a ship in several hours versus offloading a break bulk ship in the 1950s, which could take weeks. [60]

The decision in *Kirby* is a fresh breath of air into a (sometimes) musty area of the law. Many of the principles still litigated in admiralty courts across the country were developed in pre-Revolutionary times, and a select few can trace their roots back as far as ancient Mesopotamia. [61]. Applying these can be difficult at best to an attorney litigating a uniquely twenty-first century problem like that of damaged shipment hundreds of miles inland. Problems such as those were non-issues as little as fifty years ago, when the process of unloading a ship took weeks and it logically followed that two separate bills of lading would be necessary to (1) get the shipment to the debarkation port and (2) get the shipment from the port to wherever it was going via road or rail. Nowadays, goods do not move from their containers from the factory to the buyer. Efficiency has been applied to the business of shipping, and the Supreme Court has rightly applied it to the law of shipping as well.

Because of this, the possibility of admiralty causes of actions in any jurisdiction in the United States is a reality. Assuming the container's bill of lading involved a "substantial" sea leg of its overall journey, any Himalaya Clause could be raised as a pre-trial defense to negligence, theft, and logically business and economic torts. It is not a stretch to believe most attorneys engaged in the practice of business or transportation law would come across a possible admiralty claim sometime during their practice – and in the post-*Kirby* world, those instances will be far more common.

Footnotes:

[1] *See* Norfolk Southern Ry. Co. v. Kirby, 543 U.S. 16 (2004).

[2] *Id*. at 29.

[3] *See* Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 1-10 (Hornbook ed., Thomson-West 2004).

[4] *Id*. at § 3-1.

[5] *Id*.

[6] *See* 1 BENEDICT ON ADMIRALTY §§ 41, 42 (Matthew Bender, 2006).

[7] *See* Schoenbaum, supra note 2, § 1-2.

[8] *See* DeLovio v. Boit, 7 Fed.Cas. 418, 444 (C.C.D. Mass. 1815).

[9] *See* In Re The Plymouth, 70 U.S. 20 (1825)

[10] *See* The Propeller Genesee Chief v. Fitzhugh, 53 U.S. 443 (1851) (English rule discussed throughout).

[11] Since the founding of the country, federal courts have been charged with litigating admiralty suits, with the stated policy of insuring admiralty law is uniform throughout the country. *See* Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73. *See also* THE FEDERALIST Nos. 7 and 11 (Hamilton).

[12] *See* DeLovio, 7 Fed.Cas. 418.

[13] *See id*.

[14] *See id*. *See also* U.S. Const. art. I sec. 7. Joseph Story is known for his scholarship promoting a uniform commercial law (including admiralty) across the

country. Ironically, his goal did not come to pass (although Congress's authority to do so is without question) but the American Law Institute used many of his theories when drafting the Uniform Commercial Code, which was eventually adopted in various forms all over the United States.

[15] *See* Schoenbaum, *supra* note 2, § 1-2.

[16] *See* DeLovio, 7 Fed.Cas. 418.

[17] *See* Schoenbaum, *supra* note 2, § 1-5. *See also* Omaha Indemnity Co. v. Whaleneck Harbor Marina, Inc., 610 F.Supp. 154 (E.D.N.Y. 1985).

[18] Norfolk Southern Ry. Co., 543 U.S. 16.

[19] *Id*. at 23-24. *See also* North Pacific Steamship Co. v. Hall Bros., 249 U.S. 119, 125 (1919).

[20] *See* Schoenbaum, *supra* note 2, § 1-10.

[21] 543 U.S. 16 (2004).

[22] *Id*. at 18.

[23] *Id*. at 21.

[24] *Id*.

[25] *Id*. at 20.

[26] *See* Schoenbaum, *supra* note 2, § 8-11.

[27] *See* 46 U.S.C. § 1292(b) (Carriage of Goods by Sea Act).

[28] *See* Schoenbaum, *supra* note 2, § 8-8. The Himalaya Clause was named after the good ship Himalaya, from a British case: Adler v. Dickson (The Himalaya) [1955] 1 Q.B. 158.

[29] Norfolk Southern Ry. Co., at 24.

[30] *Id*. at 18.

[31] *Id*. at 21.

[32] *Id*. at 22.

[33] *See* Norfolk Southern Ry. Co. v. Kirby, 300 F.3d 1300, 1308-1309 (11th Cir. 2002).

[34] Norfolk Southern Ry. Co., at 25.

[35] *Id*. at 22.

[36] *Id*.

[37] *Id*. at 27-28.

[38] *Supra*, note 11.

[39] Norfolk Southern Ry. Co., at 28-30.

[40] *Id*.

[41] *Id*.

[42] *Id*. at 27.

[43] *Id*. at 35.

[44] 2006 U.S. Dist. LEXIS 63624 (D.S.C. Sept. 5, 2006).

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] 2006 A.M.C. 356 (S.D. Tex. 2005).

[49] 2005 U.S. Dist. LEXIS 9971 (N.D. Ill. May 4, 2005).

[50] 413 F.3d 307 (2d Cir. N.Y. 2005).

[51] *See id*. at 309.

[52] *See id*. at 310.

[53] *See id*. at 320-322.

[54] Subject to a few narrow exceptions including "preliminary contracts" to procure marine insurance in the future. *See* Schoembaum, *supra* note 2, at § 17-2.

[55] Ferrostaal, Inc. v. M/V Sea Phoenix, 447 F.3d 212 (3rd Cir. 2006).

[56] Oparaji v. N.E. Automarine Terminal, USA, Inc., 2006 U.S. Dist. LEXIS 45508 (D.N.J. June 19, 2006).

[57] Atkins Machine Co. v. C.H. Powell, Co., 2006 U.S. Dist. LEXIS 63624 (D.S.C. Sept. 5, 2006)

[58] *See generally* Marc Levinson, THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER(Princeton University Press, 2004).

[59] *Id*.

[60] *Id*. at 3.

[61] *See* 1 BENEDICT ON ADMIRALTY § 2 (Matthew Bender, 2006).

SPORTS STADIUMS: DO FRANCHISES REALLY NEED PUBLIC FINANCING TO BUILD THEIR NEW STADIUMS

I. Introduction

Many people have spent a summer night or a Sunday afternoon at the ballpark or stadium watching their favorite teams. These stadiums are an integral part of a professional sports franchises operations. In recent years there has been a surge in new stadiums being built by teams as they take advantage of the willingness of cities to provide public financing. Since 2000 there have been 17 new stadiums built for National Football League and Major League Baseball teams. [1]. In addition, several teams are in discussions for the building of new stadiums in the next few years. [2].

II. Analysis

Of those 17 new stadiums only one, SBC Park in San Francisco, was built entirely with private funding. [3]. Sports teams have on average have been able to get 70% of the costs of building a new stadium financed through public funding. [4]. This generally allows sports franchises to cut their costs and increase their profits, while taxpayers pick up the tab. [5].

There are several methods by which teams are able to attain public financing for their stadiums. One of the more common ways is the issuance of tax-exempt bonds. [6]. This exemption works to lower the interest on debt and thus helps to reduce the cost to the team of paying for a stadium. [7]. This can mean that a team can save over $2 million a year in tax payments. [8]. Another way that teams can get public financing is through local tax exemptions and increases in taxes to the citizenry. [9].

It is puzzling as to why cities and taxpayers have been so willing to publicly finance these high priced stadiums. Especially when one considers the following; a recent study by Forbes revealed that the average worth of the 32 teams in the National Football League is $898 million. [10]. In fact, there are five teams that have eclipsed the one billion mark. [11] A look at the television contracts that have been signed by the NFL and Major League Baseball further help to illustrate the influx of money that professional franchises have access to. The NFL recently signed television contracts that will provide the league with $3.1 billion annually for the next five years. [12]. MLB, although not at the level of the NFL, will receive around $300 million annually for the next five years. [13].

The above numbers help to show the wealth and prosperity of professional sports teams. However, in spite of this data, most sports franchises are able to attain the financing necessary to build a new stadium. For example, both the Mets and Yankees have had stadium financing proposals approved and are hoping to open new stadiums in the next few years. [14]. The Yankees new stadium is expected to cost $930 million, and they will receive $866 million from tax-exempt bonds issued by New York City. [15]. The Mets plan to spend $800 million on their new stadium, and will receive $632 million from public funds.

The principle justification for why sports franchises should receive public financing to support the building of stadiums is that it provides a boost to the local economy. [16]. However, these justifications may be overstated in relation to the costs that are imposed via taxes necessary to finance the price of the stadium. Simply put, if a franchise can build a stadium without any cost to the public, then any benefit to the community will come without the community first having to undertake the cost of providing financing for the stadium. In other words, when the franchise receives public financing they are imposing a cost on the community, and the community cannot truly benefit economically until it has repaid those costs.

A study done just two years ago contends that sports franchises can build their own stadiums without public subsidizes. [17]. The study reported that teams could recover half the construction costs within five years, and the entire cost within twelve years. [18]. Furthermore, within twenty years, a franchise's revenues from the stadium could exceed construction costs by $100 million and $200 million in thirty years. [19]. Under this scenario, not only does the team get its new stadium, but the team has a continuous revenue stream that does not subject taxpayers to the burden of covering the stadium's costs. Thus, if sports stadiums are really supposed to provide a boost to the economy, then they should do it without first imposing costs upon the community.

One team that has failed to get full public support for the building of a new stadium has been the Florida Marlins. [20]. The Marlins are attempting to get approval for a $360 to $390 million stadium, but have been unable to get the additional public funding they deem necessary to finalize the plans. [21]. The county of Miami-Dade and the city of Miami offered $166 million in tourist taxes to the building of the stadium. [22]. Another option that has been considered for raising more money has been to raise the sales tax. [23]. However, officials feel that the Marlins are over-estimating the costs of the stadium and they don't want to commit or increase any more taxes in order to fund the stadium. [24]. It may be time for more communities to take the South Florida example and stand firm in their commitment to not provide excess public funding for new sports stadiums.

III. Conclusion

It seems that with the abundance of revenue that sports franchises have they should make a greater effort to finance the building of their stadiums without the assistance of public funding. Sports franchises are generating tremendous amounts of revenue and requiring them to finance their own stadiums will remove the burden from the taxpayer. Taxpayers should be willing to treat sports franchises like the private business that they are. A taxpayer would not subsidize a new building for Fortune 500 Company or any other corporation, and they should not be willing to do it for professional sports franchises either.

[1] *See* World Stadiums, http://www.worldstadiums.com/north_america/countries/united_states.shtml. (last visited Sep. 23, 2006).
[2] Bryan Virasami, *Mets Detail Stadium Financing*, NEWSDAY, April 11, 2006, *available at*http://www.newsday.com/sports/baseball/mets/am-mets0411,0,7473458.story.
[3] James Hannah, *Clubs Could Bear the Cost of Ballparks*, USA TODAY, March 25, 2004, *available at*http://www.usatoday.com/sports/baseball/2004-03-25-ballpark-construction-costs_x.htm.
[4] *Id.*
[5] *Id.*
[6] Roger G. Noll & Andrew Zimbalist, *Are Publicly Subsidized Sports Stadiums Worth the Cost*, BROOKINGS REVIEW, *available at*http://www.oldcity.org/stadium1.htm.
[7] *Id.*
[8] *Id.*
[9] *Id*.

[10] Kury Bandenhausen, *The Business of Football*, FORBES, *available at*http://sports.espn.go.com/nfl/news/story?id=2572739.

[11] *Id.*

[12] *Id.*; Wikipedia, NFL on Television, *at* http://en.wikipedia.org/wiki/NFL_on_television#List_of_NFL_television_contracts. (last visited Sep. 23, 2006)

[13] Wikipedia, Major League Baseball on Television, *at* http://en.wikipedia.org/wiki/MLB_on_Cable_Television. (last visited Sep. 23, 2006)

[14] Virasami, s*upra* note 2

[15] *Id.*

[16] *Id*.

[17] Hannah, s*upra* note 3

[18] *Id.*

[19] *Id*.

[20] Sarah Talalay, *Miami-Dade predicts $100 million shortfall in funding for Marlins stadium*, SUN SENTINEL, Sept. 15, 2005, *available at* http://www.sun-sentinel.com/sports/baseball/marlins/sfl-marlstad15sep15,0,7194397.story?coll=sfla-sports-marlins.

[21] *Id.*

[22] *Id*.

[23] *Id*.

[24] *Id*.

WHERE TO OPEN A BUSINESS: CONSIDERATION OF LIVING WAGE ORDINANCES

A company must keep three factors in mind when trying to decide where to open its doors, "location, location, [and] location." [1]. Closely related to location, a company might consider traffic flow, highway access, and the presence of other businesses in the area. [2]. The applicable minimum wage is an unlikely consideration for a company that is in the process of selecting a location, but that may soon change. Federal law sets a minimum wage floor, but States can pass their own statutes raising the federal minimum wage. [3]. On the rise, however, is the presence of local ordinances that index minimum wage levels to cost of living increases or that target specific companies. [4]. This article will first briefly examine two such ordinances, one from Santa Fe and one from Chicago, and it will then set out options for companies wishing to do business in cities that have some form of a living wage ordinance.

Santa Fe passed a living wage ordinance on February 27, 2003. [5]. The ordinance requires businesses that contract with the city and that have 25 workers or more to pay a minimum wage as set forth by the ordinance. [6]. The ordinance also targets businesses that register with the city and that have 25 workers or more. [7]. The ordinance required targeted contractors and businesses to pay a minimum wage of $8.50 from January 1, 2004 to January 1, 2006. [8]. This amount increased to $9.50 on January 1, 2006. [9]. The ordinance requires a further minimum wage increase on January 1, 2008 to $10.50. [10]. On January 1, 2009, "and each year thereafter, the minimum wage shall be adjusted upward by an amount corresponding to the previous year's increase, if any, in the consumer price index for the western region for urban wage earners and clerical workers." [11].

The ordinance did not receive a warm welcome by all and the New Mexicans for Free Enterprise challenged the ordinance in court. [12]. At the trial level, the trial court upheld the ordinance. [13]. On appeal, the New Mexicans for Free Enterprise challenged the creation of ordinance as a violation of municipal powers. [14]. They also challenged the ordinance as a violation of equal protection, a violation of eminent domain principles, and as illegal ratemaking. [15]. Lastly, the New Mexicans for Free Enterprise alleged that the city of Santa Fe and the district court made procedural errors at the trial level. [16]. Ultimately, the Court of Appeals for New Mexico affirmed the judgment of the district court and upheld the Santa Fe ordinance. [17].

The court held, inter alia, held that the Santa Fe ordinance did not violate equal protection guaranteed by the New Mexico constitution. [18]. The court reasoned that although the ordinance created a class, employers of 25 workers or more, there existed uniformity within the class. [19]. Not only did uniformity exist within the class, but the court also explained that the size-based classification was rationally related to a legitimate government purpose in that "'[s]maller businesses simply have a limited capacity to leverage large expense increases.'" [20]. Furthermore, the court stated that the New Mexicans for Free Enterprise failed to demonstrate how the ordinance "[was] invidious, arbitrary, or irrational." [21].

Recently, the Chicago city council proposed an ordinance that would make it mandatory for certain employers to pay a minimum wage higher than that required by federal statute. [22]. The ordinance "would have required a higher minimum wage for employees of stores with 90,000 square feet or more operated by companies with at least $1 billion a year in sales." [23]. The ordinance also would have required that affected businesses pay employees "$13 an hour in wages and benefits by [the year] 2010." [24]. Businesses that the ordinance would affect held off on plans to acquire real estate and open new businesses in Chicago. [25]. According to Alderman Danny Solis, "Wal-Mart officials assured him they would build at least five new Chicago stores if the ordnance were repealed." [26]. Ultimately, Mayor Daley vetoed the ordinance and the Chicago city counsel did not have the requsite number of votes to override the veto. [27].

Businesses in search of the perfect real estate for their operations must now consider the applicable state and local minimum wage laws, but such businesses are not without options to help stomach higher wages. One option is to pursue legal action on the grounds that an ordinance violates the equal protection guarantees of the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." [28]. The protections of the Fourteenth Amendment also extend to corporations. [29]. Yet, such an approach may not be successful as proved to be true with respect to the Santa Fe ordinance. [30].

In terms of a more narrow reaching statute, views on the constitutionality of such ordinances are mixed. One commentator has suggested that an ordinance that would only require grocery workers to receive a higher wage would not violate equal protection. [31]. The commentator explained that if a "classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" [32]. With respect to the Chicago ordinance, one

large Chicago law firm contends that the ordinance likely violates the equal protection guarantees of the United States and Illinois constitutions.
[33]. Ultimately, there are no clear-cut answers and courts will have to analyze the individual ordinances, but with local ordinances starting with a presumption of constitutionality, businesses that chose to take legal action will have an uphill battle.

Businesses might also try to avoid paying higher wages through circumvention of the factors that make the ordinance effective. For example, in Santa Fe, many small businesses maintain a staff of 24 in order to avoid paying the higher wages that the Santa Fe ordinance mandates for businesses of 25 employees or more.
[34]. With respect to the proposed and now vetoed Chicago ordinance, businesses might have been inclined to reduce the square footage of their businesses to avoid paying the higher minimum wage. As for the asset requirements of the proposed Chicago ordinance, perhaps the creation of subsidiaries would have allowed businesses to avoid the higher wages. Businesses could also chose a location near but outside the boundaries and reach of the city with the living wage ordinance.

Businesses also have the option to simply pay the higher wages. A community might scorn a business that attacks local ordinances aimed at making the lives of local citizens better and sales and profits might suffer. [35]. It is possible that a business's decision to accept a living wage ordinance might lead to higher sales in the community, but such empirical results are yet to be determined.

Location has always been an important factor for companies wishing to do business, and now location has become even more important, especially since it may dictate higher employee wages *by law*.

[1] Stewart L. Cohen, *Location, Location, Location*, 21-6 Am. Bankr. Inst. J. 30, 31 (2002).

[2] Brook Stockberger, *Where should you put your store?*, Las Cruces Sun-News, Mar. 12, 2006.

[3] *See* Michael Higgins and Gary Washburn, *'Big-box' law faces test; City layers advised before vote that measure legally suspect*, Chi. Trib., July 28, 2006, at 1.

[4] *See id.* (noting that the following cities have living wage ordinances: Santa Fe, Madison, San Francisco, Albuquerque, and Washington, D.C).

[5] *See* http://www.santafelivingwage.org/finalordinance.htmlaccessed 9/25/06 at 11:43am.

[6] *See* http://santafenm.gov/cityclerks/livingwageeng-span.pdfaccessed 9/25/06 at 11:45am.

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149 (N.M. Ct. App. 2005).

[13] *New Mexicans for Free Enter.*, 126 P.3d at 1156-57.

[14] *Id.* at 1157.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 1173.

[18] *Id.* at 1168.

[19] *Id.* at 1168.

[20] *Id.* (alteration in original).

[21] *Id.*

[22] Gary Washburn & Dan Mihalopoulos, *Daley vetoes 'big box' law*, Chi. Trib., Sept. 12, 2006, zone C, at 1.

[23] Gary Washburn & Mickey Ciokajlo, *'Big-box' veto sticks; Defiant backers vow to offer even tougher wage measure,* Chi. Trib., Sept. 14, 2006, news zone C, at 1.

[24] *Id.*

[25] Washburn, *supra* note 22.

[26] *Id.*

[27] Washburn, *supra* note 23.

[28] U.S. Const. amend. XIV, § 1.

[29] *Bell v. Maryland*, 378 U.S. 226, 262 (1964).

[30] *See New Mexicans for Free Enter.*, 126 P.3d at 1168.

[31] George Lefcoe, *The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the skirmishes Between Wal-Mart and the United Food and Commercial Workers Union*, 58 Ark. L. Rev. 833, 850 (2006).

[32] *Id.* at 851.

[33] *Chicago Becomes First U.S. City to Establish Minimum Wage Rules For "Big Box" Retailers,* Aug. 3, 2006 available at http://www.ufcw.org/issues/minimum_wage/minimum_wage_big_box.cfm.

[34] Daniel Duggan, *Empty Threats or Empty Store Fronts?*, Illinois Real Estate J., Sept. 6, 2006.

[35] *See* Stephen Franklin, *Big-box battle not over yet; Union leaders say they will bring wage proposal back in February,* Chi. Trib., Sept. 14, 2006, business zone C, at 1 ("Wal-Mart has chosen to fight these living wage ordinances, so they have chosen to make themselves a target."); Washburn, *supra* note 22 ("Wal-Mart, Lowe's and Target Corp. said they were putting plans for future stores on

hold pending the fate of the big-box ordinance, news that drew scorn from ordinance supporters who contended the Chicago market is too attractive for big retailers to bypass.”).

FUN WITH THE TAX CODE: CHANGES ABOUND IN 2006 TAX YEAR

I. Introduction

They
say that death and taxes are the two sure things in life. That may very well be the case, but taxes and tax law are ever changing. Rates are regularly moved up or down new taxes are added and certain taxes are eliminated. For the 2006 tax year, Congress made several changes that will have an impact on people as they get their financial records together and start preparing their taxes for the April deadline. Some of the changes that Congress made include; The Pension Protection Act, The Energy Tax Incentives Act and The Tax Increase Prevention and Reconciliation Act.[1]. The article focuses on whether changes to tax law will actually be beneficial to individual taxpayers.

II. Analysis

The
Pension Protection Act was signed into law for the purpose of revising tax rules related to pension plans and individual retirement accounts (IRAs).[2]. ne provision of the act allows for charitable contributions from a taxpayers IRA account to be tax free.[3]. This is a new provision in the tax laws, and allows for a maximum, tax free, contribution up to $100,000.[4]. One of the big benefits of this Act is

for older generations. Starting on December 31, 2006 taxpayers who are 62 or older are allowed to withdraw money from their pension plans without having to retire.[5] These provisions make-up only two aspects of the Act. However they are two provisions that should benefit taxpayers. Allowing for tax-free contributions to charity will promote charitable contributions and the provision for pension plan withdrawal will allow older workers to use their pension distributions to reduce their workload. For a more detailed analysis of the Pension Protection Act, see Ericka Roberson, Get Receipts for Every Donation: New Tax Laws Require Them, The Journal of the Business Law Society, at http://iblsjournal.typepad.com/illinois_business_law_soc/tax/index.html.

The Energy Tax Incentives Act will also have an impact on taxpayers as they prepare their returns. This particular provision provides incentives through various tax deductions and credits for the efficient use of energy.[6]. Tax credits can be received for residential as well as vehicle credits.[7]. Individuals qualify for small credits for home improvements that make their homes more energy efficient.[8]. For example the use of electric and geothermal heat pumps qualifies a taxpayer for $300 of credits.[9]. For those homeowners who make use of solar panels for some or all of their energy qualify for a 30% of the qualified investment in the panels up to a maximum of $2,000.[10]. Taxpayers can receive additional for credits for driving certain energy efficient vehicles.[11]. For example, a 2005 or 2006 Toyota Prius provides a taxpayer with a $3,150 tax credit.[12]. A Chevy Silverado Hybrid pick-up provides a $650 tax credit.[13]. Providing for tax credits in this area will provide for a better and more efficient use of energy sources.

In addition to the above changes, The Tax Increase Prevention and Reconciliation Act has important implications for taxpayers.[14]. One of the provisions included in this Act is the raising of the kiddie tax age limit from; under 14 to under 18.[15]. The purpose of the kiddie tax is to prevent parents from reducing their tax liability via transfers to their children.[16]. Under the new law, a child under 18 (as opposed to under 14, in the previous tax law) pays taxes at his or her parents highest marginal tax rate for all investment income over $1,700.[17]. This provision of the act will likely lead to higher tax burdens for families whose teenage children have investment income. Previously, the kiddie tax ignored children above 14, children between 15-17 can now be subject to the kiddie tax. Another provision of this Act is to extend investor tax breaks to at least 2010.[18]. This provision works to reduce the tax rate on long-term capital gain.[19]. In addition, it applies the same favorable tax rate to dividends from domestic corporations as it does to long-term capital gain.[20].

III. Conclusion

The tax changes discussed above are merely the tip of iceberg. Congress, as in most years, has enacted numerous changes to tax policy that will effect many individual taxpayers. Some individuals will find that they are paying more in taxes than last year, and others will find that they are able to tax advantage of various deductions and credits to reduce their tax burden. However, in the end, most everyone ends up paying something.

[1] *See* Jackson Hewitt Tax Resource Center *at* http://www.jacksonhewitt.com/resources_changes_federal4.asp?urlSection=resource

[2] *Id* at http://www.jacksonhewitt.com/resources_changes_federal4.asp?urlSection=resource#pension_protection

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* at http://www.jacksonhewitt.com/resources_changes_federal4.asp?urlSection=resource#reconciliation_act

[7] *Id*.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *See* Bassman, Laserow, & Company, PC *at* http://www.bassman.com/5-06-newtaxact.html

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

WHERE HAVE YOU GONE DOOGIE HOWSER M.D.? A NATION TURNS ITS LONELY EYES TO YOU. [1].

By: Collin Delaney

A brief examination of the fiduciary, ethical, and professional paradigm shifts experienced by the health-care provider following the September 11th terrorist attacks.

As our nation recently observed the fifth anniversary of the September 11th attacks, one cannot help but reflect on the fundamental changes that have occurred since. Foreign and domestic policies have undergone watershed transitions, the effects of which are still being understood. Health-care in the United States, specifically the role of the health-care provider, is no exception. Significant shifts have occurred and continue to occur in regard to how the government interacts, influences, and regulates health-care. New issues in medical ethics are now being vociferously debated. Even the day-to-day expectations of physicians and hospitals have seen marked change.

While certainly no one with any experience in health-care will classify the pre-September 11th period as simple, the inordinate complexity of health-care administration seems to be metastasizing at ever growing rates. Long gone are the Doogie days of introspectively typing one's thoughts on the practice of medicine while basked in the green glow of a word processor.

I: Legislation

Considerable legislation has passed following September 11th which may mean significant changes for the health-care provider. The most visible piece of

legislation with implications for health-care providers is the Uniting and Strengthening America by
Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, better known as the USA PATRIOT Act. [2],[3]. A provision within the PATRIOT ACT, known as the First Responders Assistance Act, allows for significant portions of revenue to be directed, in the event of a terrorist attack, toward “first responders” namely, ambulance companies and hospitals containing emergency rooms. [4],[5].

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, more succinctly known as the Bioterrorism Act, has far deeper implications for health-care providers. [6],[7]. The Bioterrorism Act was a mammoth $4.6 billion dollar appropriation seeking to increase preparedness in the government and hospitals in the event of a bioterrorist event/public health emergency. [8]. With nearly $520 million specifically earmarked for hospitals, the act can be a vital increase in funding for hospitals struggling to meet government preparedness standards. However, such funding is not without caveat. The Bioterrorism Act brings significant increases in government intervention and oversight in regard to physicians and researchers who work with biological agents and toxins. [9]. It is far too early to tell if such measures are merely precautionary or have the potential to result in significant curtailment in free research and testing.

As anyone who has ever haggled over an insurance premium can testify, fiscal matters are paramount in the world of health-care. The impact of such monetary appropriations seen in the PATRIOT Act and the Bioterrorism Act cannot yet be fully appreciated. However, it is hardly conjecture to state that hospital administrators and physicians will feel the effects considerably.

II: Ethical Concerns

The issue of increased intervention and monitoring of research involving potentially deadly pathogens is not exclusive to governmental entities. The post-September 11th fear of bioterrorism has been an issue that the medical community has been struggling with internally as well.

Increases in technology have allowed advances in the field of virology to grow at unprecedented rates. [10]. There exists significant debate among physicians, researchers, and scientists regarding whether if the results and information of virology based research should be kept restricted and thus out of the hands of bioterrorists. [11]. The stakes on both sides are incredibly high. Those arguing against any limitation point to stunting the development of anti-viral vaccines for diseases such as HIV, SARS, and Ebola. [12]. Would it be worth delaying or compromising research with considerable life saving potential?
Conversely, the cost of human life could be staggering if a bioterrorist were able to convert sensitive viral research into a weapon.

One can certainly appreciate the considerable impasse the respective groups have reached. A sudden, and perhaps entirely unanticipated, ethical and real world quagmire now besets modern physicians and researchers. What might have been the noble pursuit to cure AIDS on September 10th has now been transformed into an increasingly perilous activity with Jack Bauer-esque implications.

III: Practical and Professional Changes

The post-September 11th world also means significant practical changes for the health-care provider. Of the many consequences of the terrorist attacks were the deep emotional and mental traumas experienced by the survivors and those who lost loved ones. [13].

Disproportionately high figures of Post Traumatic Stress Disorder (PTSD) and depression were recorded among residents of New York City following the September 11th attacks. [14]. It has been estimated that nearly 525,000 residents of New York City suffered from PTSD or depression following the attacks. [15]. Despite this, only 129,000 sought treatment. [16]. While there are myriad reasons as to why only a relatively small percentage sought out treatment, there are clear lessons that can be learned from such statistics. [17].

It has been strongly suggested that it is the primary-care physicians, the "go-to" doctors for families and individuals, need greater instruction in being able to identify and screen their patients for stress disorders and depression following terrorist events. [18]. As PTSD is a highly individualized affliction with systems that are not always easily identifiable, often those with the condition do not realize it. [19]. If primary-care physicians have the ability to identify these physiological ailments in their role as administrators of standard heath care, greater numbers of afflicted patients will be able to receive needed care. The potential need for increased training and education for current and future providers will play a role in redefining what day-to-day practice of medicine entails.

IV: What These Changes May Mean for the Post-September 11th Physician

The answer to the terrorist threat under our current administration seems to be one of increased governmental control at the cost of personal liberties. It is this author's opinion that in the coming years, the health-care providers will experience significant reductions in professional freedom as the need to be able to respond to a terrorist-initiated public health crisis inversely increases.

As evidenced by the Bioterrorism Act, the government is assuming greater influence over the research and laboratory work involving pathogens.

Additionally, through conditional money appropriations, the government's public health subdivisions will be able to exercise increasing amounts of control over the administration of hospitals, both in and outside times of crisis.

Further support for this theory is found in the Center for Disease Control's Model State Emergency Health Powers Act (Health Powers Act). [20],[21]. The Health Powers Act, enacted in whole or in part in thirty-eight states, reflects a significant curbing of civil and professional liberties in times of public health emergency. [22]. Elements of the act, relevant to physicians and hospitals, allow the government to revoke licensure for non-compliance in "assisting" with operations. [23]. The original wording of the bill, now amended, allowed for the criminal prosecution of health-care providers. [24].

Truly, the world of Joltin' Doogie has left and gone away. [25]. The role of the hospital administrator and physician is substantially different than it was five years ago. The proposed need for stricter regulations governing the study of pathogens may have immediate consequences regarding how physicians are able to treat their patients. An increased appreciation for the mental health damage caused by terrorist acts may require that hospitals and physicians obtain a deeper understanding of traumatic stress disorders. Increased governmental pressures, both in funding and regulation, may serve to significantly limit professional freedoms previously enjoyed. Increases in governmental power can only come with the reciprocal abdication of power by physicians and hospitals. It is impossible to tell what exactly these changes will mean for the health-care provider in the coming years. What appears certain however, is that fundamental changes in how the administration of health-care is perceived will continue to occur as the United States attempts to grapple with the new world order ushered in by September 11th.

[1] Simon and Garfunkel, MRS. ROBINSON (Columbia Records 1968).

[2] Edward McArdle, *2001-2002 Survey of New York Law*, 53 SYRACUSE L. REV. 629, 633 (2003),

[3] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (codified in sections of 18 U.S.C., 28 U.S.C., 50 U.S.C., 47 U.S.C., 22 U.S.C., and 31 U.S.C. (2001)) [hereinafter Patriot Act].

[4] McArdle, *supra* note 2, at 633.

[5] Patriot Act (codified at 28 U.S.C. 509 § 1005 (2001)).

[6] McArdle, *supra* note 2, at 633-634;

[7] Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-88, 116 Stat. 594 (codified in sections in 42 U.S.C., 21 U.S.C., 29 U.S.C., 38 U.S.C. (2002)) [hereinafter BPRA].

[8] McArdle, *supra* note 2, 633-634.

[9] *Id.*

[10] *See* Robert A. Bohrer, *Ethical Perspectives on New Ethical Dilemmas for Biotechnology*, 760 PRAC. L. INST. 908-909 (2003).

[11] *Id*., at 912-913.

[12] *Id.*, at 912.

[13] Gerry Fairbrother and Sandro Galea, THE CENTURY FOUNDATION, TERRORISM, MENTAL HEALTH, AND SEPTEMBER 11TH: LESSONS LEARNED ABOUT PROVIDING MENTAL HEALTH SERVICES TO A TRAUMATIZED POPULATION (2005),http://www.tcf.org/Publications/HomelandSecurity/911mentalhealth.pdf

[14] *Id.*, at 15-16 (14% of respondents were found to have PTSD, depression, or both following the attacks. When respondents were limited to those in the vicinity of the attacks, the figure exceeds 20%).

[15] *Id.* at 28.

[16] *Id.*

[17] *Id.* at 35.

[18] *Id.* at 36.

[19] Fairbrother and Galea, *supra* note 13, at 36.

[20] *Id.*

[21] The Model State Emergency Health Powers Act: as of October 23, 2001. Atlanta: Centers for Disease Control and Prevention, 2001, http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf. (last visited Sept. 13, 2006).

[22] PublicHealthLaw.Net, Model State Public Health Laws,http://www.publichealthlaw.net/Resources/Modellaws.htm#MSPHPA (last visited Sept. 13, 2006) ("Thirty-eight (38) states [AL, AK, AZ, CA, CT, DE, FL, GA, HI, ID, IL, IN, IA, LA, ME, MD, MN, MO, MT, NV, NH, NJ, NM, NC, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WI, and WY] and DC have passed a total of 66 bills or resolutions that include provisions from or closely related to the Act."

[23] *See* George Annas, *Bioterrorism, Public Health, and Civil Liberties*, 346 NEW ENG. J. MED. 1337 (2002).

[24] *Id.* at 1337-40.

[25] Simon and Garfunkel, MRS. ROBINSON.

CHINA APPROVES CITIBANK-LED CONSORTIUM'S BUY-INTO GUANGDONG DEVELOPMENT BANK

China's approval of the Citibank consortium's buy-into Guangdong Development Bank ends a year-and-a-half battle for control of the bank. [1]

The Citigroup consortium, which includes China's largest insurance company and one of China's largest electricity distributors, offered approximately three billion dollars for an eighty five percent stake in Guangdong Bank. [2]

The

Citibank consortium beat out its closest rival a consortium led by France's Societe Generale. [3] U.S. based, private investment firm, The Carlyle Group, pulled out of the bidding. [4] Despite a last minute attempt to get back into the race, Ping An Insurance's bid was hobbled when they tried to make large donations to the Guangdong provincial government a portion of their bid. [5]

Despite their leadership position in the consortium, Citibank will only take a 19.9 percent stake in Guangdong Development Bank, as Chinese law currently forbid a single foreign bank from owning more than 20 percent of a Chinese bank. [6] Both Citibank and Societe Generale lobbied the Chinese government to make an exception to the limitations on foreign ownership of Chinese bank to no avail. [7]

China’s entry into the World Trade Organization was conditioned in part on it opening its banking sector to foreign competition. [8] Nevertheless, China has been putting up obstacles to foreign banks that want to set up shop in China. [9] By allowing the Citibank led buy-in to go forward, China seems to be taking a somewhat less protectionist approach. While Chinese companies will still be for the most part own Guangdong Development Bank, Citibank’s 19.9 percent share allows the bank to receive the benefits of being part of a large, well-financed, and experienced banking organization.

[1] *Citibank beats out Scoiete Genrale for China's Guangdong Development Bank*, Todayonline.com, Sept. 13, 2006, http://www.todayonline.com/articles/14210.asp.
[2] *Id.*
[3] *Id.*
[4] *China cabinet backs Citibank-led plan to take over Guangdong Devt Bank – UPDATE*, Forbes.com, Sept. 12, 2006, http://www.forbes.com/markets/feeds/afx/2006/09/12/afx3009761.html.
[5] *China’s Ping re-enters bidding for Guangdong Development Bank- source*, Forbes.com, Sept. 5, 2006, http://www.forbes.com/business/feeds/afx/2006/09/05/afx2992079.html.
[6] *Citibank beats out Societe Generale for China’s Guangdong Development Bank*, *supra*, note 1.
[7] *Id.*
[8] David Lague, *China tries to limit access for foreign banks*, iht.com, Sept. 5, 2006, http://www.iht.com/articles/2006/09/05/business/chibank.php.
[9] *Id.*

TAX MOGUL H&R BLOCK TEMPTS FATE BY BRANCHING INTO THE WORLD OF EVERYDAY BANKING

I. Introduction

Tax preparation giant H&R Block announced at the beginning of this month that in response to lawsuits brought by angered taxpayers about the company's Refund Anticipation Loan (RAL) program, it will be revamping the program in an effort to reduce consumer cost as well as, presumably, it's own litigation costs.[1] But will the plan work?

II. Operation

The H&R Block RAL program operates as follows. First, the taxpayer turns over his tax return information to H&R Block, who in turn computes the anticipated refund. Then, H&R Block presents the taxpayer with a paperwork from one lending institution with whom it contracts which offers to pay out the amount of the anticipated refund (less fees that amount to annualized interest rates from 40% to more than 500%) the same or next day as a loan. In return for providing the lending institution with the consumer, the lending institution and H&R Block share the loan fee. When the refund arrives about one to two weeks later, it is automatically used to pay off the loan.[2] If the taxpayer is denied his refund in whole or in part, suddenly the same taxpayer that was willing to pay exorbitant fees to get $200 today instead of $300 a week later is faced with a seemingly insurmountable loan and interest rate.

RALs are regularly criticized as predatory for appealing primarily to working class individuals and taking advantage of paycheck-to-paycheck lifestyles.[3] Indeed, according to 2004 IRS data, 78% of all individuals that used RAL programs had adjusted gross incomes of $35,000 or less.[4] The running themes in class actions attacking these loans are that the loan fees qualify as usurious and that H&R Block, as an agent of the taxpayer, had a fiduciary duty to the taxpayer to disclose, in short, what a bad deal these loans truly are.[5] Such lawsuits have only in rare cases resulted in a finding of a fiduciary relationship.[6]

III. Aims

So what does H&R Block's new plan do to try and fix this? Two things. The first is to reduce prices on its fee schedule so that now a typical $2,800 loan carries with it a fee of "only" $60 which the company says equates to an annualized 36% interest rate.[7] The second is a little more creative. H&R Block has obtained a bank charter.[8] On some level, this two-part plan of action makes sense. H&R Block in 2004 was found to serve 27% of households not possessing a bank account.[9] Instead of obtaining a RAL, customers could instead open up an H&R Block bank account with their refund. Result? H&R Block obtains revenues from a new, lower-income banking industry, and taxpayers obtain the benefit of being able to access their money via ATMs as well as have a bank account open in the event that the customer wants to take advantage of the IRS Free File [10] program in the future. H&R Block would essentially be hedging its losses caused by lowering the fees associated with RALs, boosting its image, and potentially reducing its litigation costs. Sounds pretty good, right?

It does sound good, until one starts to consider what might happen once these two programs start to exist side by side. For example, what if the taxpayer decides in the first year to go the way of opening a bank account — only to decide the following year to "take advantage" of the RAL program. While banks generally don't have a fiduciary duty to their depositors, fiduciary duties have been found where a customer "reposes trust in the bank and relies on it for financial advice" or where the bank "knows that the customer is relying on its professional judgment."[11] H&R Block has relied in the past on the fact that it is ultimately the consumer's decision alone to enter into a RAL to disprove the existence of a fiduciary relationship. However, once the company name becomes generalizable to everyday financial services and taxpayers begin relying on its services year-round for one-stop-financial-shopping, it is possible and likely given the negative press RALs continue to receive that courts will react differently and be more likely to find a fiduciary relationhip. The fact of consumer autonomy becomes infinitely more difficult to swallow the more H&R Block becomes entrenched in their lives.

IV. Conclusion

There is something positive to be said for H&R Block's creativity in approaching what is its increasingly less profitable RAL market. However, I question whether at the end of the day the decision will be a positive one for the company. It is very possible that instead of having the positive effects of lowering the cost of RALs to consumers and creating a new source of revenue for H&R Block, it will instead result in a lashback by the courts and the beginning of a slow death for the H&R Block RAL. It will be interesting to see how the company's foray into everyday financial services will play out.

[1] Jonathan Stempel, *H&R Block Cuts Rates on Tax Refund Loans*, REUTERS, Sept. 7, 2006, *available at* http://news.yahoo.com/s/nm/20060907/bs_nm/financial_hrblock_dc.
[2] *See generally* Jean Ann Fox, Patrick Woodall & Chi Chi Wu, *Another Year of Losses: High-Priced Refund Anticipation Loans Continue to Take a Chunk Out of Americans' Tax Refunds*, THE NCLC/CFA 2006 REFUND ANTICIPATION LOAN REPORT, *available at* www.consumerlaw.org/news/content/2006RALReport.pdf.
[3] *See* Bernice Young, *Tax Refund Scheme Targets the Working Poor*, THE NATION, April 17, 2006, *available at* www.thenation.com/doc/20060501/yeung.
[4] *Supra* note 2.
[5] *See, e.g.*, Basile v. H&R Block, 897 F. Supp. 194 (E. D. Pa. 1995) (plaintiffs alleged violation of Delaware usury laws as well as breach of fiduciary duty, among other claims).
[6] Green v. H&R Block, Inc., 735 A.2d 1039, 1049 (Ct. of App. Md. 1999) (holding that plaintiffs had presented sufficient evidence of an agency/fiduciary relationship to defeat summary judgment); *but see, e.g.*, Basile

v. H&R Block, 761 A.2d 1115, 1121-22 (Pa. 2000) (holding that no agency relationship exists that gives rise to fiduciary duties).

[7] Eileen Alt Powell, *Top News – H&R Block to Develop Banking Service*, ASSOCIATED PRESS, Sept. 7, 2006, *available at* http://news.aol.com/topnews/articles/a_handr-block-to-develop-banking-service/n20060907004609990001?cid=403.

It should also be noted that while a "typical" loan might be for $2,800 and carry with it a 36% rate of interest, other loans could be for as little as $200 and carry with them rates as equally unconscionable as those under the old fee schedule.

[8] *Supra* note 7.

[9] *Supra* note 2.

[10] 'Free File' is a web-based electronic filing program made available by the IRS through an agreement with the Free File Alliance to taxpayers who make less than $50,000 annually. This agreement does not ban Free File commerial preparers from marketing RALs to taxpayers. *Supra* note 2.

[11] 9 C.J.S. *Banks and Banking* § 248 (2006).

HAS THE BUBBLE BURST? ECONOMIC IMPLICATIONS OF A BUYER'S MARKET

For the past several years, residential real estate has been a seller's market. With low interest rates and not enough houses to go around, sellers could expect to receive top dollar for their homes and could turn their homes around fairly quickly once they put their homes on the market. In early January, the National Association of Realtors projected that existing home sales would fall this year by 4.4%, but as of early September, that forecast has dramatically decreased, with existing home sales for 2006 projected to fall 7.6% below sales in 2005. [1] The market looks even worse for new home sales, with a 16% fall expected this year. [2] Indeed, it is a buyer's market, and if the bubble really has burst, the economic implications could be far-reaching.

The market surge, which was initially brought on in the late 1990s by low interest rates and easily obtainable mortgages with favorable terms, has been replaced in the tighter economy of 2006 by higher interest rates which makes mortgages unaffordable for many potential buyers. [3] In the past three years, the interest rates on some long-term adjustable mortgages have tripled, causing many owners to attempt to sell their homes or be foreclosed upon. [4] The current number of homes for sale on the market is the highest it has been since the early 1990s [5], with 3.86 million homes currently for sale, the equivalent of a 7.3 month housing supply. [6]

Because of the current decline in home sales, the U.S. Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on Housing and

Transportation and the Subcommittee on Economic Policy held a hearing on September 13, 2006, in which testimony was heard and members discussed "The Housing Bubble and Its Implications for the Economy." [7] Reports indicate that in some markets there will be a negative impact on the economy due to "market psychology" and the fact that in recently hot markets such as Arizona, Nevada, and California where residential sales and sale prices are declining, investors are no longer sinking their money into the real estate market. [8] This is causing an economic downturn in these once hot locations. Investors previously bought residential property within minutes of it being put on the market, but are now either investing their capital elsewhere or not investing their excess capital at all. An economic impact is also being felt by investors who purchased large amounts of residential real estate in these hot locations and are now forced to place it on the market at prices below what they initially paid for the property. [9] Thus, these investors will lose money on their transactions and as a result will have less capital to invest in other areas of the economy.

Another significant economic impact can be seen in the fact that existing homes are not appreciating as much as they have been in the past. [10] This means that in the near future, the downturn in housing sales will have a general economic impact on consumer spending ability both for people who are able to sell their homes at a lower price than they expected to receive, and for people who are locked in to an adjustable mortgage who are paying an increased amount to the mortgage company. [11] Both sellers and owners paying a higher rate will be left with less disposable income which would normally be invested in various areas of the economy.

Thus, although it is a buyer's market due to the surplus of housing and decline in home price, high interest rates dictate that fewer people will actually be able to purchase homes. Other downturns in the economy due to lack of investment and lack of disposable income will only worsen as interest rates rise and the housing market swells in number of homes available.

Sources:

[1] Noelle Knox, *Realtors Forecast What Home Builders Know: Home Sales This Year Will Tumble*, USA Today, Sept. 7, 2006, http://www.usatoday.com/money/economy/housing/2006-09-07-homes-forecast_x.htm

[2] *Id.*

[3] Robert Z. Aliber, *Real Estate Recession Coming*, N.Y. Sun, Sept. 12, 2006,http://www.nysun.com/article/39480?page_no=2&access=320298

[4] *Id.*

[5] *Id.*

[6] Knox, *supra* note 1.

[7] *The Housing Bubble and Its Implications for the Economy: Hearing before the S. Comm. on Banking, Housing, and Urban Affairs Subcomm. on Housing and Transportation and the Subcomm. on Economic Policy,* 109th Cong. (2006) (panel statements), http://banking.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=236

[8] *See generally Id.* (statement of Patrick Lawler, Chief Economist, Office of Fed. Housing Expertise Oversight).

[9] Aliber, *supra* note 3.

[10] *See supra* note 7 (statement of David F. Seiders, Chief Economist, National Association of Homebuilders).

[11] *Id.*

NEW LIFE IN AN OLD METHOD: A CONCISE RAILROAD LAW PRIMER

The reality of the modern world is that fuel prices are enormous compared with averages from as little as ten years ago, and it is improbable that they will decline anytime in the near future. [1] One consequence of current fuel prices is the higher cost of freight and passenger transportation around the country. Carriers must adjust their rates according to a confusing maelstrom of fluctuating fuel costs, federal security requirements pertaining to the war on terrorism, and the instability of steady customers in the lukewarm economy. [2] A solution may be as simple as looking to a transportation method that is over a century old and is conveniently located in nearly all major American markets – the railroad system. Railroad freight and passenger services, and the laws that accompany them, are probably unfamiliar to many practicing attorneys because of the multitude of other transportation options that sellers have preferred over the last half century.

The railroad's decline from the late 1950s to just recently has highlighted the benefits of other methods of transportation when fuel costs are relatively inexpensive. To the producer of the 1960s interstate trucking was cheap, reasonably reliable, and was not dependant on railroad time tables. [3] Also, an increase in the volume of air transportation at the same time provided sellers with a means of delivering goods to buyers in only a fraction of the time that was once required by rail. In addition, passenger rail service suffered as the interstate highway system made personal travel from the comfort of one's own automobile more attractive than trains constrained by set routes. [4]

The rising price of fuel and the accompanying increase in freight rates by trucking companies and fares by the airlines have put the spotlight back on railroads as a possible solution to the current shipping dilemma. [5] Rail transportation is more fuel efficient than interstate trucking, and is capable of carrying a wider variety of materials than aircraft. Although the rail system has declined in recent decades, there are thousands of miles of track still in use and many thousands more that have been abandoned by regular revenue service. [6] In short, it is probable that rails will play a far more important role in national transportation than they have in the recent past. In fact, high technology giants have chosen rail service over interstate trucking to move their merchandise from major ports on the west coast across the country because of its cost-effectiveness. [7] Because coal and timber shipments are now taking a backseat to DVD players and stereo equipment in railroad freight cars, a short practice primer on contracts for the carriage of goods ("COG") via railroads is pertinent.

COGs are essentially service contracts and thus are not covered by the Uniform Commercial Code. [8] They are rooted deep within the common law of contracts, and their law does not materially differ from state to state. The most striking difference between railroad COGs and their road, air, and maritime counterparts lie in the way that courts have analyzed their terms in light of public policy. [9] Railroads have been determined to be vital to the public interest by both Congress and the courts, and as such are under heavy federal regulation based on theories of public policy [10] and Congress's express power to regulate interstate commerce. [11] Courts, although cognizant of the time-honored freedom of contract, are aware of the public interest within the railroads and will construe COGs narrowly in a manner that will not injure that public interest. [12] However, if the construction of a given COG will not materially injure public interest, then the express terms of the contract will be upheld. [13]

The leading case in this area is *Taylor v. Florida East Coast Ry. Co.* [14] A landowner in Florida contracted with a local railroad to build a spur line off their main track, complete with depot for passenger and freight access, to serve a hotel that the landowner was constructing. The contract was honored; the line and depot were built and trains served the area for thirteen years. The original landowner died and passed a fee simple in the property to his heirs. The railroad immediately ceased operations and tore up the track. [15] The heirs sued for specific performance, and although the court found that the contract had been substantially performed and there was no remedy available to the heirs at law, equity could enforce the contract and require the railroad to again take up operations. [16] The court's reasoning for this was that, due to the public nature of railroad service, the railroad's freedom of contract could be curtailed in the public interest. [17] Note that the construction of railroad COGs in one manner or another essentially strikes to the remedy offered by the court. Thus, when drafting railroad COGs an important theme to consider from rough outline to completed document is what detriment (if any) the contract may inflict on railroad operations and how to minimize those detriments through preliminary negotiations and minimizing express terms.

COGs rarely stand by themselves in business transactions between corporate buyers and sellers. Instead, they are only a small cog in the wheels of the overall purchase agreement between a buyer and seller or a series of buyers, sellers, and intermediaries. [18] The typical sales transaction will include an independent agreement for shipping the purchased items. These can be one of two varieties: a "shipment contract" in which the seller's liability for the goods terminates after the sales transaction is completed (essentially at the front doors of the factory or warehouse), and a "destination contract" in which the seller has a duty to deliver the goods to the seller as a part of the overall purchase agreement. [19]

Railroad COGs can be drafted easily from standard forms, keeping in mind a few specifics to the rail industry that may want to be considered more closely:

1. Fuel Price Cap

It defeats the purpose of using railroads to transport freight if the price of fuel is the same if not more expensive than in alternate methods of transportation. The party carrying the burden of delivery would be better served with a quicker method of transportation if there was not a substantial discount on fuel prices offered by the railroad in proportion to the efficiency of the method. At any rate, it pays to make sure that the COG specifies an exact, express fuel price within its material terms.

2. Independent Contracts of Inspection and Associated Clauses

It has been customary in admiralty practice for years to provide for an independent third party to inspect cargo right before it is shipped to the buyer (in some cases immediately before the doors to the cargo container are sealed) to objectively document that condition of the cargo. This is vital to insurance and negligence litigation to prove when (and where) damage occurred if the cargo does not arrive to the buyer in the condition she was expecting it to be in. Thus, it is well worth the added cost to have documentation of the condition of the goods prior to departure.

3. Express Duty of Care Terms for Railroad Operation

The duty of care a seller (or in the case of a shipment contract, the third party railroad) owes the freight and buyer can of course be expressly modified by the terms of the contract. However, the common law default rule courts will imply into a COG depends largely on whether or not the railroad was operating in the capacity of a common carrier or a private carrier. Common carriers are those railroads that operate in an "open to the public" fashion – accepting freight from anyone for a fee, and as such have a higher duty of care towards the freight they are carrying.

The drafter of a railroad COG should keep in mind the interests of the party she is representing, and negotiate the duty of care owed the cargo accordingly. History tends to repeat itself, and transportation law is no exception. If fuel prices stay steady or increase even further, it is likely that the railroads will provide new wine in old bottles for the transportation industry. Thus, it is pertinent to any attorney that represents buyers, sellers, shippers, or even remotely affected third parties to find a basic understanding of how railroad contracting operates. It might not be the too distant future when a business person in Chicago, needing to send goods to a buyer across the country, ignores the telephone number to FedEx and instead calls the Central Pacific Railroad Office.

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[2] *The Economic Impact of Higher Oil Prices*, CBC NEWS ONLINE, Mar. 17, 2005, *available at* http://www.cbc.ca/news/background/oil/economicimpact.html.
[3] *See generally Transportation*, 28 ENCYCLOPEDIA BRITANNICA 788-792 (15th ed. 1989).
[4] *See generally Transportation in the U.S.*, ENCYCLOPEDIABRITANNICA (2006),*available at* http://www.history.com/encyclopedia.do?articleId=224413.
[5] *Id*.
[6] *See generally Transportation*, supra note 3.
[7] John Schmeltzer, *Fuel Price Hikes Bear Down on Railroads, but Profits Up*, CHICAGO TRIBUNE, Mar. 26, 2005, at C1.
[8] U.C.C. § 2-102 (2001)

[9] *See* Taylor v. Florida East Coast Ry. Co., 45 So. 574 (Fla. 1907).

[10] *See* Interstate Commerce Commission v. Oregon-Washington R. & Nav. Co., 288 U.S. 14 (1933).

[11] U.S. CONST., art. I, § 8.

[12] On the philosophy of freedom of contract, *see* JEFFREY FERRIELL & MICHAEL NAVIN,UNDERSTANDING CONTRACTS 7-8 (2004).

[13] *See* Taylor, 45 So. 574.

[14] *See id*.

[15] *See id*. at 648-51.

[16] *See id*. at 647.

[17] *Id.*

[18] THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 489 (West 2004).

[19] *Id*. at 490.

NO ONE AT THE HELM: TRUSTEE APPOINTED TO MANAGE DEATH ROW RECORDS

Suge Knight's hopes of maintaining control of Death Row Records during its Chapter 11 reorganization were dashed on July 7, 2006, when United States Bankruptcy Judge Ellen Carroll placed the company under the management of a case trustee. Judge Carroll cited gross mismanagement of the record company's finances, stating, "it seems apparent that there is no one at the helm." [1]

The Death Row case illustrates a pervasive tension in corporate reorganizations: at what point does the interest of the creditors trump the vested control of management, which may have driven the company insolvent in the first place? Under certain conditions, the bankruptcy court has the power to transfer control of the estate from the debtor-in-possession to a trustee under section 1104(a) of the Bankruptcy Code. [2]

The Death Row Records Bankruptcy

Rap mogul Marion "Suge" Knight epitomizes the life of ruthlessness and violence glorified in the gangsta rap genre he worked so hard to promote. Knight formed Death Row Records in 1991 and became one of the most successful producers of all time, garnering multi-platinum hits from his stable of rap and hip-hop artists, especially its early stars Dr. Dre, Snoop Dogg, and Tupac Shakur. [3]

Knight and his label quickly lost both market share and credibility following the departure of Dr. Dre and Snoop Dogg, the East Coast / West Coast war, and the still-unsolved murder of Tupac (in 1996). [4] Knight's series of incarcerations resulted in his prolonged absence from operating Death Row: he served five and a half years of a nine year sentence for assault and weapons violations from 1996-2001, several months for associating with known gang members from 2001-2002, and another sentence for assaulting a parking attendant, from 2003 to April 2004. [5]

More recently, Knight and Death Row suffered a $107 million default judgment arising from a 2002 civil lawsuit brought by former associate Lydia Harris, who claimed that she was instrumental in the founding of Death Row Records and was entitled to a share of the company. [6] The judgment's high punitive damages component of $60 million reflected Knight's consistent failure to appear at court-ordered hearings and failure to provide required financial statements during discovery. [7] Knight and Death Row are contesting the judgment, based on an alleged settlement of the claim. [8]

On March 21, 2006, with the judgment amount still outstanding, the company was ordered into receivership. [9] It was anticipated that the receiver would sell off the master tape libraries of Dr. Dre, Snoop Dogg, and Tupac, Death Row's most valuable assets. [10] In a last minute bid to save his label from receivership, Suge Knight declared bankruptcy for himself and Death Row under chapter 11 on April 4, 2006. [11]

Appointment of a Trustee for a Chapter 11 Case

The Bankruptcy Code reflects a strong presumption in favor of allowing the debtor-in-possession to continue to run the business during its reorganization. Therefore, the appointment of a case trustee under section 1104(a) is considered an "extraordinary remedy." [12] Ultimately, the debtor-in-possession is a fiduciary of the estate, with a duty to "protect and conserve property in his possession for the benefit of creditors", and to "refrain[] from acting in a manner which could damage the estate, or hinder a successful reorganization of the business." [13] By law, the Bankruptcy Court exercises exclusive jurisdiction over the property of the estate, with the inherent authority to enforce the duties of its representative. [14]

A party in interest or the U.S. Trustee can request the appointment of a case trustee at any time prior to the confirmation of a plan of reorganization in a chapter 11 case. Under section 1104(a)(1), the court, after notice and hearing, shall order the appointment of a trustee for cause, including fraud, dishonesty, incompetence, or gross mismanagement. [15]

It is often mismanagement that leads a company into insolvency in the first place, but this alone is not usually sufficient for removing the debtor-in-possession. "The philosophy of chapter 11 is to give the debtor a 'second chance' and, consistent with such philosophy, current management should be permitted to identify and correct its past mistakes." [16] However, should the court find evidence of postpetition conduct that rises to gross mismanagement, the appointment of a trustee may be appropriate. [17]

Bankruptcy courts have broad discretionary powers to determine whether the conduct complained-of warrants the appointment of a trustee. Courts have found cause in a variety of circumstances, including continued losses, [18] failure to follow Code and Rule provisions, [19] failure to keep the affairs of the debtor separate from individuals, [20] and failure to keep adequate books and records. [21]

In its June 2006 Motion to Appoint a Chapter 11 Trustee, the United States Trustee cited compelling evidence why Suge Knight should be removed from management control over Death Row. [22] Recall that Knight was jailed several times between 1996 and 2004 and could not have effectively managed Death Row in his absence. While this occurred prepetition, Knight acknowledged during the initial Debtor's 341(a) hearing in May that he had not reviewed financial statements for Death Row in over a decade. Further, a significant number of Death Row's creditors are judgment creditors, including Ms. Harris and the I.R.S. [23] The U.S. Trustee also alleged undisclosed insider payments by Death Row to Knight and omissions and false statements in the bankruptcy petition schedules. [24]

Given that Suge Knight is the sole owner, officer, and director with any authority at Death Row, and in light of the evidence pointing to his financial mismanagement, dishonesty, and past failure to comply with court orders, Judge Carroll signed the order to appoint a trustee on July 7, 2006. [25] Trustee Todd Neilson, appointed on July 19, is now de-facto CEO of Death Row, responsible for the management of its property for the benefit of its creditors, operation of the business, and, if appropriate, filing a plan of reorganization.

The value of Death Row's assets have not been adequately determined, but are shadowed by its $100 million plus debts. Should Mr. Neilson determine that rehabilitation is simply not feasible, Suge Knight's efforts to save his company from receivership by entering bankruptcy may be worthless. Hard to imagine 15 years ago that Death Row, the center of the gangsta rap revolution, would one day be run by an accountant.

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[2] *See* 11 U.S.C. § 1104(a) (West 2006).

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[10] *Id. See also Suge Knight Squanders Last Chance to Save Death Row Records*, CBC.CA, Apr. 2, 2006,http://www.cbc.ca/story/arts/national/2006/04/02/knight-deathrow.html.

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[15] 11 U.S.C. § 1104(a)(1) (West 2006).

[16] *In re* Ionosphere Clubs, 113 B.R. at 168, citing H.R. Rep. 95-595, at 220 (1977).

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[21] *See*, *e.g*., *In re* Hotel Assoc., Inc., 3 B.R. 343 (Bankr. E.D. Pa. 1980).

[22] *See* Motion of U.S. Trustee for Appointment of Chapter 11 Trustee, *In re* Death Row Records, Inc., No. 06-11205 (Bankr. C.D. Cal. filed Apr. 4, 2006) *available at*http://knight.pszyjw.com/folder.asp?main=Death%20Row%20Records,%20Inc (Under "Chapter 11 Trustee Documents" select the link "USTs Motion to Appoint Chp 11 Trustee – DDR #027 (1 of 8)").

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A WARNING TO FOREIGN COMPANIES ENTERING "SENSITIVE" U.S. MARKETS

I. Introduction

While the United States generally pushes for more open access for its investors to foreign markets, the sight of foreign companies trying to invest in "sensitive" areas of the U.S. economy has drawn a very different reaction. Two recent acquisition attempts illustrate this point: CNOOC's, a Chinese oil and gas company, attempted acqusition of Unocal and Dubai Ports World's attempted takeover of security for a number of eastern and southern ports.

II. Analysis

On June 23, 2005, CNOOC announced its attempted acquisition of Unocal, an California-based independent oil and gas company. [1] The Chinese company's offer was $18.5 billion, which was roughly $2 billion more than Chevron,the next highest bidder, offered, reflecting a premium of about $1.5 billion over the value of Chevron's offer. [2] CNOOC made an all-cash offer of $67 per share compared to Chevron's lower combined cash and stock offer of $61.26. [3]

Even before the offer was announced, lawmakers in Washington announced that the deal deserved additional scrutiny: "As the world energy landscape shifts, we believe that it is critical to understand the implications for American interests and most especially, the threat posed by China's governmental pursuit of world energy resources. The United States increasingly needs to view meeting its energy requirements within the context of our foreign policy, national security and economic security agenda." [4] Even the Secretary of Energy hinted that the deal would receive heightened scrutiny. [5]

Even though the CNOOC offer was much better for Unocal shareholders, the increased scrutiny of the deal served as a major roadblock to shareholder approval. The bid forced Unocal's shareholders to weigh the higher offer "against the risks the deal face[d] in Washington." [6] In addition to the standard process, the proposed deal would be subject to approval by the Committee on Foreign Investments in the United States ("CFIUS"), a Federal multiagency group that can "prevent any foreign investment on the grounds of national security." [7] This standard procedure, for which CNOOC started the paperwork in early July 2005 was put into jeopardy by House legislation that would disallow funding for any government review of the deal. [8] CNOOC eventually abandoned its takeover bid on Aug. 3, 2005 after the Senate included a provision that would have delayed any government consideration of its bid for several months. [9] While the company blamed the abandonment on political pressures, part of the blame should be placed on the company's own missteps, including missing a crucial deadline for an initial offer before Chevron's had been accepted. [10]

In 2006, Dubai Ports World (DPW) faced similar problems in its bid to takeover Peninsular and Oriental Steam Navigation Co., a U.K. company that handled port security at a number of U.S. ports. [11] Not long after the announcement, U.S. lawmakers requested that the White House review the national security implications of having an Arab company running U.S. ports. [12] Soon after, it came out that the CFIUC had already approved the deal. [13] This disclosure outraged U.S. lawmakers who threatened to block the deal because of security concerns. [14] Moreover, neither an additional, more stringent review of security concerns [15] nor an unprecedented package of port security measures was enough to mollify the objectors. [16] In the wake of legislation that would have blocked the deal, DPW agreed to divest itself of any U.S. holdings acquired in the deal. [17]

U.S. lawmakers are not alone in objecting to foreign ownership; they are in the company of the new populist government of Bolivia which is seeking to renationalize major areas of its economy. [18] While the Republican party has been anxious to avoid anything that even smacks of the word "French", it is imitating France's economic protectionism. [19] Experts are worried about "an undercurrent of anxiety about the global economy that has become a general political phenomenon." [20] This concern has spread to other European countries including Spain and England. [21] This spread engenders worries that "protectionism remains the greatest threat to global growth." [22]

These two failed takeovers serve to warn foreign companies looking to invest in "sensitive" areas of the U.S. economy that they must consider more than the economics of the transaction. Even though

CNOOC's offer was worth significantly more than the eventual sale price, the delay and the chance that the merger would be rejected were enough to sway institutional shareholders against approval. [23] Asked what lessons he had learned from the failed attempt, CNOOC Chairman Fu Chengyu responded, "We learned we need to be more prudent in terms of public relations and political lobbying when dealing with such a big deal … the first things you need to go for are public relations and political lobbying. And then if those work out, you turn to talk about the deal." [24] While some have raised concerns that the trouble was stirred up by Chevron in an attempt to scotch the deal [25], the numbers don't seem to bear that out. Only slightly over half had received campaign funds from Chevron in the past two years. [26] Even the letter writer, Rep. Pombo, had only received $13,500 from Chevron, barely a drip in the bucket.

Even given the concerns raised by these failed acquisitions, be ready for many more takeover attempts by Chinese and other third world firms. This piece is less worried by the idea that the uproar was related to political donations than to the fears of the unknown. While the idea of working at a Chinese or Indian firm may cause alarm, economists warn that in the long run we should be ready for an increasing number of these takeover bids. [27] Given the level of China's dollar holdings, we should not be surprised that it is seeking to diversify its portfolio. That has shown itself in CNOOC's attempted purchase of Unocal and another Chinese firm's attempted purchase of Maytag. [28] In fact, in economic terms, the U.S. may be better off because direct investment is less likely than treasury investments to be pulled out quickly leaving a mess behind. [29]

The biggest losers in these two cases were not the buyers. In the CNOOC-Unocal deal, the shareholders received approximately $1 billion less under Chevron's offer. [30] The biggest losers in the DPW deal might be American citizens: DPW was the first internaitonal maritime shipping company to have its security management systems ISO certified. [31]

III. Conclusion

While it is important to have transparent, public reviews of these deals, as opposed to a review by an "obscure committee of second level officials." [32] However, review before Congress, as some have proposed, is also inappropriate. [33] A more appropriate approach would require a stringent approach to security done in a public, transparent manner, but prevent politicians from using the deals to score cheap political points.

"While the Unocal and Maytag contests may prove to be setbacks for two of China's star companies that are seeking to become global corporations, they and others are expected to return to the fray."
[34]

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