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DIVERSIFICATION IN CORPORATE LAW

I. Introduction

In today's world where every law firm claims to value diversity throughout their ranks and prioritize it as a top concern in recruiting, it is easy to forget that even in the 1960s, Secretary of Labor Willard Wirtz called the American legal profession "the worst segregated group in the whole economy." [1] According to a 2003 American Bar Association study, slightly more than 89% of all lawyers in the nation are white. The overall numbers of women and minorities at the associate level are improving substantially, but the odds of making partner stay low. [2] Lawyers of color account for less than 5% of partners in all of the largest American law firms, according to the National Association for Law Placement. [3] White males have five times better odds than women of making partner, and seven times better than Asian-Americans or African-Americans. [4] Minority-owned firms provide a greater likelihood for advancement for many associates towards partnership, and the Clinton administration's programs worked to create a better environment for such firms. [5] However, in recent years a backslide has occurred; legal and political changes have made it more acceptable for corporations and the government to give short shrift to minority-owned firms. [6] Still, without pressure from the government, market forces are causing diversity in larger firms to become a business imperative. [7]

II. External

Pressure to Diversify

While large law firms have advised their own clients to diversify their employee population, they themselves have made virtually no progress in diversifying their own ranks. [8] In a legal profession "that prides itself on promoting equal opportunity under the law," firms are failing to adhere to their own standards. [9] Meanwhile, rapid globalization of international commerce is changing the face of the business world. [10] The Supreme Court has stated that "today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." [11] Companies and law firms of today have found that maintaining a strong posture on diversity promotes market share success. [12]

Some of the largest corporate clients to law firms are demanding that numbers of minority employment through the associate and partner ranks improve – and threatening to fire firms that do not comply or show adequate progress. [13] The business world today looks to become "the catalyst to change law firm culture."[14] Some clients even ask for not just diversity statistics overall for the firm, but also for the figures relating to the team of lawyers working on the specific relevant matter, and the hours billed by minority lawyers. [15] Clients are put off by a "beauty contest with a token lawyer in order to try and demonstrate diversity," says one chairwoman of a large firm's diversity committee. [16] The president of the American Bar Association stated that "Public confidence in our profession – and the justice system as a whole – requires that law firms and the judicial system reflect the full diversity of our society. Today they do not." [17]

The road ahead for law firm recruiters is a difficult one – though their corporate mottos and firm policies paint a picture of collegiality and a world where skin color is of no consequence, the reality is turning out to be the opposite. [18] Aggressive recruitment of minorities is being painted as a lose-lose situation for everyone when the program is not well run.

III. Internal Strife

White attorneys complain among themselves that minorities are being given special treatment and hired only to pay lip service to political correctness, and resent their minority colleagues for what they see as an unfair exemption to the meritocracy. [19] A former white partner at a San Francisco law firm stated that he was exasperated with "an excessive amount of whining" by minorities at the firm. [20] Meanwhile, a black lawyer at the same firm stated that he "was getting really frustrated" with the situation as well. "Success or failure depends on developing mentor relationships, and those are much more difficult for minorities to develop if there are no other minorities in positions of influence or power," he said. [21]

Indeed, attorneys of color are sometimes called "a token presence in the legal system." [22] Their numbers are high enough to undermine claims of racial exclusivity and elitism, but far too low to create a sense of belonging, community, or comfort in the legal community. [23] Their photos may be strategically present in firm brochures and websites to demonstrate firm diversity, but at the same time, many minority lawyers complain of sitting on the sidelines without meaningful work commensurate with their abilities. [24] Indeed, the stress of feeling culturally profiled "often creates an unproductive atmosphere of

heightened scrutiny and identity performance constraints that lead workers to behave in less authentic, less innovative ways." [25] Though many recruitment programs state that their goal is to achieve an authentic mix of perspectives from all backgrounds, minorities may end up feeling as though their success depends on behaving like the white majority around them.

IV. A Vicious Cycle

Minority lawyers at large law firms state that they receive fewer assignments that are generally lower in quality, and request better mentoring and a desire to stop feeling as though they fall short in socialization into the firm culture. [26] These associates feel as though they are receiving the "nuts-and-berries type work" while white associates more easily receive the "the filet mignon work." [27] The statistics reflect that their complaints have some basis.

[28] 59% of white associates at large firms reported working on more than 9 matters in the previous 6 month period, while only 33% of black attorneys and 38% of Hispanic attorneys said they had the same number of assignments. [29] Meanwhile, 71% of blacks and 58% of Hispanics at large law firms reported that they spent 100 or more hours on document review or similar low-level work, while half that number of white associates reported the same. [30] 52% of white male associates stated that they joined partners for lunch or breakfast, as compared to a 29% report of the same by black associates and 36% of Hispanic associates. [31] The reason for these statistics is, ironically, because of diversity initiatives of these firms. Such preferential hiring practices give the impression that black and other minority associates have lesser skills, and are therefore entrusted with less responsibility and given less opportunity to prove themselves. [32]

Sadly, the end result of this state of affairs is the high attrition rate of minority associates. After only two or three years, the proportion of both Hispanic and African-American associates falls very sharply at these top 100 American law firms – by around 40%. [33] The diversity programs in some firms are essentially self-defeating because of imperfect implementation. Though the initial hiring numbers are respectable, the treatment of minorities at these large law firms are so unpalatable that the end result is that leave the firm that they feel never truly invested in them.

V. Conclusion:

Diversity Initiatives Must Include Retention

In order to improve minority associate retention into the partner levels, there have been key factors identified as a step in the right direction. These include: mentoring relationships, adequate training for all employees regarding diversity initiatives, and exposure to valuable work and client relationships. [34] A partner at Seyfarth Shaw states, “It’s not just about ensuring affirmative-action compliance. It’s about treating people with respect and managing them so they will feel fully motivated.” [35] Another corporate executive warns against making too many promises too quickly; changes need to occur slowly and with the knowledge that sacrifices must be made on all fronts. [36] Besides job fairs and minority recruitment in hiring practices, retention must be a focus. Formal mentoring programs, emphasized lateral hires of experienced women and minorities, and the establishment of equal treatment programs ensuring equal access to work assignments, partner contact and client visibility are keys to this goal. [37] The bottom line, however, is that top-level management at the

firm must solidly support all the initiatives, lest they remain mere "window dressing." [38]

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FIRST YEAR, SECOND CHANCE

For eleven stellar seasons, the CBS hit "The Jeffersons" told the hilarious story of George and Weezie, who had moved on up the socio-economic ladder to "a deluxe apartment in the sky." [1] In contemporary legal education, a growing phenomenon parallels George and Weezie's desire to get a "piece of the pie." [2] This article will examine the trend of the transfer law student in addition to the successes, complications, and possible prejudices experienced by transfer students in securing employment.

For many prospective law students, the application process ends in heartbreak. One's entire life is broken down into discrete components by way of an LSAT score and GPA. Many cannot help but see their self-worth reflected, for better or worse, by such abstract enumerations. As these numbers are the primary considerations in law school admissions, poor scores can have the potential to bar applicants from admission to their ideal schools. Falling on the ugly side of the LSAT's bell curve may force an applicant to compromise his or her school selections. For instance, an applicant may well abandon significant criteria, such as location or reputation, in favor of the pragmatic "whoever will let me in." Inferior scores have forced many students to select less than ideal law schools in their quest to get their J.D.

That is, until recently. The *fait accompli* of enrolling into a law school is far less permanent than in previous years. Students who enrolled in their "second-choice" schools as 1Ls now transfer into the programs that initially rejected them. While this only applies to 1Ls with outstanding grades (the general consensus appears to be that a class rank from anywhere in the top 20% to the top 5% of a class is

required) trading up appears to be a growing trend.

II: That Lean and Hungry Look

The reasons for transferring tend to break down into two general categories: personal and professional. This article will focus on the latter. Those who transfer for personal reasons typically have spouses, families, or significant others in regions geographically distant from their 1L law school.

First year law students who are motivated by professional concerns, however, seem to represent the majority of a transfer class. With the exception of the truly elite law schools such as Harvard, Stanford, and Yale (the so-called "Trinity"), law students typically practice within some regional proximity to their law school. Transferring into a law school close to one's target city allows access to valuable alumni networks and placement in internships/externships.

"Upgrading" one's law school is also a motivation for those that transfer for professional reasons. [3] As flawed as the U.S. News World Report ranking of law schools [4] might be, law firm recruiters seem to draw more heavily at higher-ranked law schools. Highly selective law firms often will not consider law students outside of a given range of law schools. For example, the prestigious New York City firm of Wachtell, Lipton, Rosen & Katz is reported to rarely consider any law student not hailing from Yale (ranked #1 by US News), Harvard (#2), New York University (#4), or Columbia (#5). Thus, even if students find themselves happy with almost all other factors at a given law school, some will still ambitiously transfer "up" to a more nationally respected law school. For students hungry for positions at elite law firms or highly prestigious Federal clerkships, transferring opens significant professional doors.

III: But What Have You Done For Me Lately?

The reasons for a student seeking to transfer appear quite commonsensical. What are the motivations, however, for the law school administrators letting transfers into their programs? The answer appears deceptively simple, as noted by Nkonye Iwerebon, Dean of Admissions at the Columbia University School of Law: "They often turn out to be some of our very best students."[5] That, however, is only part of the story. Part of the difficulty in selecting a class of law students is the attempt to predict who will flourish in this highly competitive and Type-A driven environment. Undergrad GPA is not the best indicator of future success due to issues such as grade inflation and dissimilarity between majors. [6] The LSAT is arguably an even worse indicator. [7] Accepting transfer students allows admissions deans to expertly cut this Gordian knot. By requiring transfer candidates to be in the top 20% of their 1L class (if not better), admissions deans can admit students who clearly possess the ability to succeed in law school. There is little, if any, uncertainty; these students already have made the cut. This allows a law school to further "stack the deck" in having candidates that will likely pass the bar exam and flourish in law practice, all while holding a "___"School of Law J.D..

Further, transfer admissions are a "backdoor" of sorts in regard to the information a law school is obligated to report to the American Bar Association ("A.B.A."). Law schools report the median LSAT and GPA of each year's entering class to the A.B.A., factors significantly utilized (25%) by U.S. News in their rankings. [8] Transfer students, however, do not come into play under this rule. [9] Therefore, law schools get the best of both worlds: already proven students that will not drag down LSAT or GPA medians. Consider further that 20% of a law school's ranking is based in employment rates and bar passage rates. [10] It is truly a positive sum game.

IV: The Devil is in the Details

As alluded to in the second section of this article, transferring into a top law school is only half of the battle. The basic question that served as the galvanizing spark for this article was "do transfer students have a harder time in securing the same employment as their peers?" The answer, as best as this author can surmise, is an exasperated "maybe."

The problem in asking the above question is that there is little empirical evidence to analyze. Certainly, no law firm would admit to having a policy of disregarding transfer interviewees. Transferring is also such a recent phenomenon that there appears to be no scholarly comprehensive study of the matter. Much of the information posited below (and above) has been assembled from non-traditional sources in the form of correspondence with transfer students, reading of blogs prepared by and for transfer students, and the databases found within the TransferApps Yahoo! group, in addition to this author's own experiences as a transfer student. The names of students interviewed and law firms mentioned will remain anonymous out of respect for the privacy of those involved.

In considering their On Campus Interview ("OCI") and Call Back Interview ("CBI") experiences, many transfer law students recalled a number of questions/matters of confusion arising from their transfer. One transfer student at the University of Illinois College of Law (#25) told of multiple interviews in which, despite his life-long residency in Illinois, including attendance at an Illinois college, his single year at an Arizona law school threw the interviewers for a loop. Lawyers conducting the interviews could not comprehend that he neither resided in Arizona nor intended to return to Arizona once Arizona was seen on his resume.

A disturbingly common issue experienced by transfer students during OCIs is confusion regarding the grading system at their 1L school. Law school grading systems can run from traditional (A+, A, A-, etc) to unique (numerical values from 1-99) to the outright bizarre practice of the University of Chicago Law School (numerical values from 155-186). [11] When an interviewer encounters a "rogue" grading system, the reactions appear to range from the flummoxed to the agitated. Other school-to-school variations, such as the name of the award given to the top student in each class (C.A.L.I. award, American Jurisprudence award, the Book award, etc), tend to make interviewing unnecessarily complicated. [12]

By far, the single most common question directed toward transfer interviewees appears to be "why did you transfer?" As a 2L transfer preparing for OCI this fall, this author was told by 3Ls to prepare a good answer for this almost certain question. In the law student blog "Droit Femme," a transfer student author expressly recommends other transfer students also prepare for this very question in her OCI oriented advice.[13] The "Sua Sponte" blog, written by a student who transferred from UC-Hastings (#36) to the University of Chicago (#6), makes the same suggestion. [14] The blog offers specific advice for the answer an interviewee might proffer: "'This is a much better school' does not count, regardless of how true a motivator it was for you." [15]

A far less innocuous problem with the 1L grades of a transfer student lies in the value, or lack thereof, prescribed to them by the interviewer. Several students indicated receiving either tacit or expressed indifference to 1L grades coming from an "inferior program." Law recruiters told a transfer student at Illinois Law that they would reconsider him for a position once he had Illinois grades, despite him being ranked in the top 10% at his 1L law school. Similarly, a transfer student at the University of Michigan Law School (# 8) recalled significant

prejudice during her interviews at elite Washington D.C. law firms. Several firms explicitly told this student to reapply as a 3L as the firms would not even consider her 1L grades. Such discrimination can represent a significant issue for transfer students in the fall OCI process. Many firms fill their Summer Associate class roster in the fall, leaving few, if any, positions open in the second semester.

V: Just the Facts Ma'am

Given the myriad first-hand accounts gathered, the interview prospects for transfer students at our nation's best law schools seemed precarious at best, if not outright bleak. Yet as this author ruminated, this pessimistic paradigm seemed to be contrary to what was known by fellow transfer students at not only at Illinois Law, but nationwide.

The Yahoo! Group, "TransferApps," represents a grass-roots collaborative effort by transfer law students and transfer hopefuls to demystify the application process. [16] On this site, transfer students from previous years ably answer the questions of nervous transfer candidates. More importantly, there exists the "2006 OCI Results for Transfers" database, in which many transfer law students reveal their successes and failures at their new law school. [17] Information such as 1L school, current law school, academic distinctions, number of firms interviewed with, number of firms giving offers, etc, is documented. [18] Review of the database reveals highly encouraging information to prospective and current transfer students. A student who left the University of Buffalo-SUNY (#77) to attend Columbia (#5) secured a highly prestigious summer associate position with the New York City powerhouse, Sullivan & Cromwell. [19] Similarly, a student from Brooklyn Law School (#60) transferring into N.Y.U. (#4) reports CBIs from not only Sullivan & Cromwell, but also Skadden, Arps, Meagher, & Flom, and

Debevoise & Plimpton. Transfer students at Harvard (#2) and Georgetown (#14) both report: “all the transfers here did very well.” 21

Obviously, this database is hardly comprehensive (only 30 students have posted their OCI information for the Fall of 2006) and can surely fall prey to exaggeration and/or self-selective reporting. However, the database clearly demonstrates that not only can transfer students be competitive in OCI process, but they are.

VI: Certain Uncertainty

In interviews and discussions about the unique status of transfer students in the OCI process, some students suggested that the A.B.A. or other agencies could issue a law that officially prohibits interviewing firms from discriminating against transfer students.

While this proposal sounds initially intriguing, this author doubts it could be of any practical significance.

The reason for such pessimism lies in the inherent plethora of variables that contribute to law firm hiring decisions. Not only will a firm consider grades, law review, and moot court, but also the personality and background of the applicant. If a socially inept or rude transfer student applied at a firm that traditionally refuses to hire transfer students, who is to say which contributed to the rejection? It presents a true “the chicken or the egg” scenario.

Given the myriad criterion a hiring partner might consider, it would be all but impossible to attribute a job rejection to an applicant’s transfer status in all but the most extreme and explicit circumstances.

Further, it may not be wrong to treat transfer students differently from their

traditional 2L peers in that transfers are in fact, different. Were a law firm were to require all transfer students be in the top 10% of their 1L class, an unofficial requirement relayed to an Illinois transfer student by several prestigious Chicago law firms, who is to say this is discriminatory/unreasonable? Would this be different from a Chicago law firm restricting hiring to the top 25% of the University of Chicago (#6), the top 20% of Northwestern (#12), and the top 10% from Illinois (#25), Washington University-St. Louis (#19), and Notre Dame (#27)?

The matter of the 1L school of a transfer candidate also complicates the transfer interview process. A random survey of the 2L transfer class of Illinois reveals law students from: Chicago-Kent (#60), John Marshall-Chicago (4th Tier, ranking #150-200), Wisconsin (#31), Michigan State (3rd Tier, ranking #100-150) and Northern Illinois (4th Tier). Such a wide variety of law schools, some more selective in their admissions than others, reflect differently on each respective candidate. Analogous to the question posited in the above paragraph, is it discriminatory or totally reasonable for a law firm to view a transfer student coming from a Top-50 law school differently than a law school with a lesser reputation?

VII: Ain't Nothing Going to Break My Stride

One cannot help but escape the answer suggested Section IV of this article. The answer to the transfer question can be nothing more than a "maybe." The OCI experience for transfer students is without a doubt different than for traditional 2Ls. This difference may be as minor as merely having to inform a curious interviewer why one decided to transfer or as significant as not being considered for a position due to the prejudices and policies of an elitist law firm. Practical

considerations appear to preclude any attempt to excise possible institutional biases against transfer applications.

The potential for such problems seems unlikely to stem the growing tide of future transfer students. By nature, transfer students are those used to adversity and overcoming past failures. Given the considerable sacrifice and additional work that burdens the law student who elects to transfer [22], it is unlikely that the smug bombast of a few hiring partners will be more than an annoyance. In light of how quickly the administrations of our nation's top law schools have warmed to the thought of transfer students amidst their ranks, it is not improbable that even the elite white-shoe law firms are not far behind.

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[2] *Id.*
[3] Karin Dybis, *Trading Places*, NAT'L JURIST, Mar., 2007, (Magazine), at 28, *available at*:http://www.nxtbook.com/nxtbooks/cypress/nationaljurist0307/index.php
[4] *America's Best Graduate Schools 2008,* U.S. NEWS & WORLD REP., (Magazine), *available at*:http://www.usnews.com/usnews/edu/grad/rankings/law/lawindex_brief.php
[5] Dybis, *supra* note 3.
[6] David A. Thomas, *Predicting Law School Academic Performance from LSAT Scores and Undergraduate Grade Point Averages: A Comprehensive Study*, 35 ARIZ. ST. L.J. 1007 (2003).
[7] *Id.*; Jeffery S. Kinsler, *The LSAT Myth*, 20 ST. LOUIS U. PUB. L. REV 393 (2001).

[8] *America's Best Graduate Schools 2008: About the Rankings*, U.S. NEWS & WORLD REP., (Magazine), *available at*:http://www.usnews.com/usnews/edu/grad/rankings/about/08law_meth_brief.php

[9] *Id.*

[10] *Id.*

[11] THE 2007 BCG ATT'Y SEARCH GUIDE FOR AM.'S TOP 50 LAW SCHS. (BCG Att'y Search, Pasadena, CA), 2007, *available at*: http://www.bcgsearch.com/pdf/BCG_Law_Schoool_Guide_2007.pdf

[12] *Id.*

[13] *Transfer Law Students & Fall Recruitment*; DROIT FEMME,http://droitfemme.blogspot.com/2006/08/transfer-law-students-fall-recruitment.html (last visited Apr. 23, 2007).

[14] *Transferring F.A.Q. 1.*, SUA SPONTE, http://www.suasponte.org/archives/000798.php (last visited Apr. 23, 2007).

[15] *Id.*

[16] TransferApps: Law Students Attempting to Transfer,http://groups.yahoo.com/group/transferapps/ (last visited Apr. 23, 2007).

[17] 2006 OCI Results for Transfers Database,http://groups.yahoo.com/group/transferapps/database?method=reportRows&tbl=23 (last visited Apr. 24, 2007).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Dybis, *supra* note 3 at 28-29.

CUOMO'S CODE OF CONDUCT: TROUBLED TIMES FOR THE STUDENT LOAN INDUSTRY

In November of 2006, the office of the New York State Attorney General initiated an investigation into the financial agreements between New York universities and student loan providers as part of an effort to eliminate practices that created conflicts of interests in the lucrative $85 billion student loan industry. [1] However, this investigation did not receive a high degree of publicity or momentum until February of 2007 when the newly appointed New York Attorney General Andrew M. Cuomo expanded the investigation to include more than 60 universities nationwide and major student loan providers and banks. [2] Attorney General Cuomo's investigation revealed questionable practices within the student loan industry whereby universities were receiving illegal kickbacks for including certain lenders in their "preferred lender" list. [3] This discovery has led to a nationwide reaction and the student loan industry has been under significant probing from several lawmakers as well as the U.S. Education Department. [4]

Financial agreements between universities and student loan providers can create conflicts of interest that are potentially detrimental to more than 90 percent of U.S. university students who take out educational loans in reliance on the 'preferred lenders' list provided by their schools. [5] Student loan providers are able to secure a spot on a university's "preferred lender" list by providing payments (in form of revenue-sharing or kickbacks) and/or a variety of other benefits (e.g., paid trips) to the university officials. [6] Although most of university officials involved in such questionable practices are financial aid officials, a Chicago Tribune investigation revealed that Chicago State University

has been directing its students to obtain loans from a bank "in which the University President, Elnora Daniel, is a director and shareholder." [7] These conflicts of interests are not disclosed to the students and in some situations, the "preferred lender" list may not include providers of the best possible loans that the student could have otherwise obtained. [8] According to Attorney General Cuomo, these financial arrangements represent "an unholy alliance between banks and institutions of higher education that may often not be in the student's best interest." [9]

As part of Attorney General Cuomo's investigation, information requests and subpoenas were sent to 10 major banks including: Bank of America, Citizens Financial Group, JPMorgan Chase and Wells Fargo. [10] Student loan providers such as Access Group, College Loan Corporation, Education Financial Services and Sallie Mae were also investigated. [11] The investigation revealed several problematic practices in particular, including the creation of "preferred lender" lists without disclosing, to students, the criteria for such selection or the specific benefits associated with these preferred lenders, e.g., lenders providing fully funded trips for financial aid officers and their spouses to exotic locations and/or offering credit lines for schools in exchange for a spot on the school's preferred lender list. [12]

In addressing these problematic practices, Attorney General Cuomo's office drafted a Code of Conduct ("Cuomo's Code of Conduct") which is geared towards providing more transparency in student lending and conflict-of-interest-free financial aid services for all students. Cuomo's Code of Conduct prohibits student loan providers from engaging in revenue-sharing or making gifts to or funding trips for universities or university officials. [13] In addition to other restrictions, the Code also requires full disclosure on the criteria and process used to select

preferred lenders and prohibits any employee of a lender from staffing a college financial aid office. [14] Cuomo's Code of Conduct is included in the settlement agreements entered by several universities and major student loan providers as a result of Attorney General Cuomo's investigation.

The settlement agreement offered by Attorney General Cuomo allows universities and student loan providers who are engaging in such problematic practices to avoid legal actions without admitting guilt. These agreements primarily require the payment of a certain amount into a fund which will be used to educate students and parents about student loans, and the termination of any existing problematic or questionable financial arrangement. [15] Both Sallie Mae and CitiGroup have entered similar settlement agreements and will each pay $2 million into the settlement fund. [16] Education Finance Partners, another major student loan provider attributed with revenue-sharing deals with more than 60 universities, recently entered a settlement agreement with Attorney General Cuomo whereby the San Francisco-based lender will pay $2.5 million into the settlement fund. [17] In addition, several N.Y. universities such as Fordham University, St. John's University, and Long Island University have entered into similar settlement agreements involving the cessation of their respective revenue-sharing agreements with lenders and the "reimburse[ment of] students on a pro rata basis for the money received through those agreements." [18]

Although it is clear that the current financial arrangements between universities and student loan providers are problematic and may not be in the best interest of the students, the settlement agreements implemented by Attorney General Cuomo may not be an effective means of ensuring that such deceptive practices do not arise in the future. The so-called settlement fund causes one to be wary as it is unclear as to what sort of financial aid education would be provided to the

students or how such education would benefit the students. Based on the settlement agreements with Sallie Mae, Citigroup and Education Finance Partners, there is approximately $6.5 million in the settlement fund. When and in what manner will this fund be used to educate the students and parents? Moreover, requiring major lenders like Sallie Mae to pay merely $2 million as settlement agreement could be viewed more as a slap on the wrist than a deterrence.

All may not be lost as increased publicity concerning the Student loan industry has led to efforts by NY lawmakers to enact a bill that would make Cuomo's Code of Conduct the law in New York State. On April 16, 2007, N.Y.'s top legislators introduced the Student Lending, Accountability, Transparency and Enforcement Act ("SLATE") which would prohibit illegal kickbacks and would "require all New York colleges to adopt Cuomo's Code of Conduct for student loans or face fines." [19] Under this bill, "lenders and colleges could be fined up to $50,000 for a violation and individuals at colleges or lending institutions could face fines up to $7,500." [20] Joseph Bruno, the Republican leader of the state senate, noted that this SLATE bill will "protect parents and students from financial exploitation, provide more transparency and accountability in the student loan industry, and give our families piece of mind." [21] Furthermore, if the SLATE bill is passed into law, it would be a more effective deterrence to lenders and universities than Attorney General Cuomo's settlement agreements.

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ACCESSING UNCLAIMED TIF FUNDS

Developers looking for a new source of revenue during the housing slump should not overlook municipal redevelopment programs. Developing the right kind of project at the right location may qualify one for millions of dollars in government subsidies. Forty-nine states and the District of Columbia have some variation of Tax Increment Financing. [1] More commonly known as TIF, the program lets local municipalities subsidize projects in designated redevelopment areas.

Illinois was one of the first states to develop TIF. The state enacted the original version of its TIF statute in 1977 for the purpose of promoting development in areas which are “blighted or are in danger of becoming blighted." [1] The program works by using future property taxes to “provide incentives to develop areas which would remain undeveloped if not for governmental assistance.”[2] TIF districts do not create new taxes or automatically increase property taxes. Revenue comes from an increase in property taxes over time generated by an increase in land values after the improvements take place. [3]

While designating a certain part of a city as a qualifying TIF district is usually a political process, accessing TIF funds after a district has been created does not have to be. To encourage small businesses to use TIF funds, the city of Chicago created a “Streamlined Tax Increment Financing for Small and Mid Sized Building Projects” program. [4] The program gives developers streamlined access to millions of government dollars that often sit unclaimed for years after a TIF district has been created. [6] Developers in Chicago may use TIF funds to pay for a number of costly redevelopment expenses that often hold back construction. Some of these expenses include land acquisition and clearance, site preparation,

environmental remediation, building rehabilitation and repair, signs and awnings affixed to buildings, and professional fees related to redevelopment such as permit fees and legal fees. [7] Developers are also eligible for reimbursement of up to 30% of construction period interest costs. [8] Eligibility requirements vary by district and usually range from affordable housing requirements to a showing that the project is not financially and economically unfeasible without government funding. [9]

One example of an underutilized Chicago TIF with potential opportunity for developers is the Western Avenue North district in Chicago's Lincoln Square neighborhood. [10] In 2003, the City approved $61 million for the life of the district located along Western, Lawrence, and Lincoln avenues. [11] Since the district's creation, not one dollar has been appropriated. [12] By redeveloping areas such as the Western Avenue North district, developers can increase revenue by accesing government funds that often go unused for years after the creation of a TIF district.

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UNDOCUMENTED TAXATION: MORE ILLEGAL IMMIGRANTS LIKELY TO FILE RETURNS

The historic case of James v. United States held that illegal gains constitute income that must be reported, despite any legal obligation which might arise to make restitution. [1] However, a whole different tax question arises for collecting legally earned income from residents illegally in the country. While the issue may not be clear to the millions of immigrants illegally residing in the country, the issue is clear to the Internal Revenue Service. “Everybody is a citizen for tax purposes,” remarks one Baltimore tax-preparer. [2]

This year, illegal immigrants have been sending in federal tax returns in what will likely be record numbers, despite concerns of immigration raids and the ability of the IRS to identify illegal immigrants through these returns. [2] While illegal immigrants are not issued Social Security numbers, they are allowed to file through individual taxpayer identification numbers issued by the Internal Revenue Service. [3] There have been 11 million of these numbers issued since the program began in 1996. [4] Returns through individual taxpayer identification numbers increased 30 percent in 2005, attributed to community outreach and potential amnesty programs using payment of taxes as a criteria to citizenship. [5]

While the Internal Revenue Service insists these individual taxpayer identification numbers have no significance on the illegal immigration debate, states and corporations have used the numbers to create other services. [6] For instance, Bank of America allows undocumented residents to obtain credit cards with these numbers while Citibank has allowed users of these numbers to access mortgage products. [7] States have been no stranger to individual taxpayer identification

numbers as well. Illegal immigrants in West Virginia, Kentucky, New Mexico, Utah and Illinois can now use their individual taxpayer identification numbers to obtain driver's licenses. [8]

Pro-illegal immigrant groups applaud individual taxpayer identification numbers as allowing undocumented residents to live normal lives. [9] Advocates continue to push for amnesty programs affording legal status to those with a documented record of tax filings. [10] They stress that "undocumenteds actually contribute more to public coffers in taxes than they cost in social services…[and] contribute to the U.S. economy by investing and consuming goods and services." [11] Crying foul at the requirement that illegal immigrants must pay taxes but are not entitled to certain government benefits, advocates propose allowing those who file to be granted eligibility to receive increased government benefits. [12]

The program is not without its critics.

At the American Immigration Law Foundation, director of the Immigration Policy center Ben Johnson says the issuance of individual taxpayer identification numbers is clear evidence that the United States immigration system is broken. [13] Citing reports that illegal immigrants cost the United States more than $10 billion per year, critics suggest that the taxes paid by the undocumented residents are heavily outweighed by the costs they create from consumption of public goods. [14] Some suggest through their issuance of individual taxpayer identification numbers, the Internal Revenue Service "places a higher value on collecting revenue than removing illegal immigrants." [15] Beyond individual taxpayer identification numbers, opponents also point to the use of fraudulent social security numbers and the perils of identity theft. [16]

Perhaps the sides can find a middle ground. The best middle ground would be to allow these individual taxpayer identification numbers, but to not allow these numbers to be used for anything except the payment and collection of taxes. Those who are Anti-Illegal Immigration, while perturbed at the thought of low border security and weak national defense, would agree that the issuance of some type of identification number only for purposes of collecting taxes would help increase government revenues. Pro-Illegal Immigration advocates, though unhappy that these oftentimes permanent residents are not afforded citizenship through these numbers, should find it reasonable that if a worker will avail himself to the benefits of working in the United States then that same worker should also pay dues to the economy that supports him or her despite not being able to recover full citizenship benefits.

Regardless of the immigration policy debate, this Tuesday on Tax Day, undocumented laborers will proudly be called citizens by one government agency – the Internal Revenue Service – but will probably not be afforded the same status by another, Immigrations and Customs. [17]

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EVOLUTION OF MATERNALISM IN CORPORATE LAW

I: Introduction

During the uncertain times of World War II,
Harvard University's president was interviewed concerning the condition of the law school. He stated that it wasn't bad as he had expected, given the war-time circumstances: "We have 75 students, and we haven't had to admit any women." [1]

One would think that the legal industry would have
made giant strides towards remedying such primitive opinions. On the contrary, a recent Harvard Law survey of large corporate firms found that some male lawyers still drop pencils under boardroom tables as an excuse to look at women's legs, and take clients to strip clubs where their female colleagues feel unwelcome. [2] Fortunately, not all firms tolerate such behavior. This article aims to examine the obstacles facing women and mothers in the field of corporate law, and what actions some firms are taking to alleviate their unique burdens.

II: Is the Glass Ceiling Shatterproof?

Historically
speaking, women have come a long way in the field of law. In 1975, large law firm populations were 85.6% male and graduating law school classes were 67% male. [4] In 2003, females made up 40% of the large law firm population, and women constituted 48.3% of graduating law school classes. [5] Women are more likely to work in the public sector

for the government and the judiciary than their male counterparts. [6] Even so, women that work in corporate law are more likely to leave private practice and less likely to become partners than men. [7] A 10-year study of first year associates from the classes of 1985 and 1986 revealed that 19% of the men made partner in 10 years, while only 8% of women made partner in the same period. [8] In 2004, women constituted one-third of 8th-year associates, but only one-fifth of that year's new partners. [9] Pay differences also reflect a gender disparity, as women are paid approximately 60% of men's earnings. [10]

As it stands today, women comprise 44% of associates, and only 17% of all partners are women. [11] In recent years, women have had higher law school grades than men, on average. [12] Studies have shown that discrimination towards women is no longer a significant factor in the hiring process; today, attrition is the real problem. [13] Women are often penalized for devoting too much time to family. Such penalties include through lower salaries, slower promotions, or removal from the partnership track altogether. [14] Compounding that problem is the reality that societal conditioning has taught women not to ask assertively for what they want in a working world that has a preexisting bias against females, which further worsens their situation. [15]

When women wrestle with becoming the impossible – a combination of Super Mom-power attorney – the unfairness of being simultaneously a mother and a working attorney becomes apparent. Women are more likely than men to interrupt their careers to care for elderly

parents, in-laws, and children. [16] Psychologically, women feel and tradition dictates that the burden of child rearing falls squarely on them. [17] Female attorneys must work harder to prove themselves than men to achieve an equivalent salary, and meeting the billable hour requirement is a daunting and sometimes insurmountable obstacle when raising a family. [18] The difference in societal attitudes towards women and men in the familial context becomes most apparent when children become a factor. A Women's Legal Defense Fund representative commented, "A woman who does less than everything for her child is seen as a terrible mother; a man who does more than nothing is praised as a wonderful father." [19] A prominent Washington, D.C., lawyer and 1960s graduate of Harvard Law describes the lives of her generation of women lawyers as: "We worked, we married, sometimes we divorced, we served our communities, had children, served their schools, tried to do it all, have it all, be it all; never forgetting, particularly, that we were supposed to be living greatly in the law, and that we were, in fact, just trying most of the time to stay alive." [20]

III: External Forces for Change

A. Legislation

Though women may walk a tougher road than their male counterparts, there are few law firms that dare to blatantly demonstrate their indifference to the plight of the female attorney. In today’s Title VII world, one will be hard pressed to find a law firm willing to test the litigious waters of obvious gender discrimination. For example, Dechert LLP was sued in 2000 for sex discrimination by one of their former partners after she returned from maternity leave. [21]

The Pregnancy Discrimination Act, Title VII, and the Family and Medical Leave Act are all powerful weapons that a working mother can use in her arsenal against a discriminatory employer. [22]

B. Market Forces

Not only is there governmental pressure for women to receive equal treatment regardless of decisions to have children, but large clients are increasingly putting the heat on firms to diversify their staff. [23] Wal-Mart, a company generating about $200 million of legal business annually, has stopped giving new business to some firms and withdrawn their business entirely from two others whose corporate teams did not meet their diversity standards. [24] Similarly, DuPont's senior counsel stated that it "parted ways" with a firm that did not adequately support their diversity efforts. [25] Over 100 companies, including household names such as American Airlines, Boeing and General Motors, have signed a pledge to track and benchmark the numbers of minority partners and associates rising through the ranks of the law firms they employ. [26] Some companies take it a step further, refusing to settle for a 'beauty contest' with 'token lawyers' on a working group, and insist on receiving billable hour reports for all lawyers, including minorities. [27]

C. Female Clients

Women are also becoming a force to reckon with in the business-to-business arena, their legal services purchasing power skyrocketing along with the rates of growth for women-owned businesses.

[28] More so than men, women business owners seek more long-term relationships with the law firms that they employ, and often demand that these firms employ women in high level positions. [29] The National Association of Minority and Women Owned Law Firms, which advocates for those groups working in corporate law, hosted an expo late last year in which in-house counsels could interview the top minority and women-owned law firms nationwide. [30] As women continue to climb the corporate ladder in the business world, attorneys may have to update their client-wooing locales from sporting events and strip clubs to include spas and wine tastings.

IV: Changes From Within:

Many firms are mindful of the challenges faced by women in corporate law and have instituted programs to assist their progress and advancement within firms. [31] Additional initiatives designed specifically for working mothers in these forms take into account the countervailing pressures of motherhood and family life. [32] They recognize that to retain women's talent, they must change their business strategy. [33]

A. Programs and Initiatives:

Networking, mentoring, retreats, and seminars on navigating law firm life as a working mother all help to create a more comfortable environment for women balancing their work and home lives. [34] For example, Nixon Peabody has instituted a formal mentoring program that requires that all young lawyers, regardless of gender, have one senior colleague to turn to. [35] Epstein Becker& Green,

P.C. enjoys a 50% female attorney ratio, and 25% of its partners are women – one of the higher percentages in the industry. [36] A large percentage of their clients are high-level women general counsels, CFOs and CEOs. [37] The firm attributes part of their success to 'professional women' events such as wine, champagne and caviar tastings, self-defense and cooking classes, and golf clinics. [38] Chicago's Sonnenschein, Nath & Rosenthal organized a trip to the Lincoln Park Zoo to allow a partner and the deputy counsel of Conoco Phillips to talk business while both women's children played at the zoo. [39] Other Sonnenschein clients were also taken to such unorthodox locales as the Joffrey Ballet and a Madonna concert. [40]

Seminars held for women attorneys include tips and discussion groups on how to better manage their time, network, and develop business contacts. [41] Buchanan Ingersoll & Rooney's networking functions included an event which featured Republican Party's Mary Matalin as a speaker. [42] Others firms have professional development programs on speech and communication to help women level the male-oriented playing field of diction – to speak with more authority and confidence, without being overly aggressive. [43]

On-site daycare centers are also becoming popular within large law firms such as Arnold & Porter, whose Washington D.C. office's daycare center stays open late and on weekends for their attorneys' children. [44] Among unique initiatives for other large firms are breastfeeding lounges and summer child care that includes internships for support staff's teens. [45]

B. Work Time Flexibility

Telecommuting, flexible hours, and part time schedules are also helping women balance their equally demanding home and work lives. Large law firms such as Pillsbury Winthrop Shaw Pittman and Covington & Burling have created programs where part time workers can still reach partner level, and have increased paid and nonpaid maternity leave benefits. [46] Attorneys at Dickstein Shapiro can reduce their hours to 50% or 80% of a standard work week, based on a 1,950 billable hour year; pay is prorated to the amount of hours worked. [47] If these attorneys work longer hours during a trial or deal closing, they can work fewer hours after the hectic time has passed. [48] Skadden, Arps, Slate, Meagher & Flom's new maternity leave policy, FRM (Flexible Return from Maternity), allows attorneys to return to the firm in a reduced schedule. [49] New mothers and fathers can work shorter days for up to a year, coordinating with the firm to work out a flexible schedule – or they can switch to an indefinite part time schedule if they wish. [50] To ease separation anxiety, infants can be left with the child care center on the premises. [51] Weil, Gotshal & Manges' press release in November of last year announced an unusual state of affairs – the majority of its partnership class for 2006 was female.[52] Two of those partners fall into the new category of "Flex-Time Partner," which allows partners to work on a flexible schedule. [53] Allen & Overy provides maternity coaching support to help a new mother hand over her existing work to colleagues and to manage her return to the workplace at the end of her leave. [54] Another option that Allen & Overy provides is that of a 3-year

career break, which pledges a best effort to rehire an employee at the same level at which they left.

V: Conclusion:

There is still much progress to be made on behalf of women in corporate law, but external forces and internal initiatives are combining to make the industry increasingly friendly and accommodating to women and mothers. Corporate law firms must assiduously monitor their newly implemented initiatives' effectiveness, lest these programs become a short lived fad. [55]

Discouraging statistics on female promotion, salaries, and attrition may abound; however, one University of Michigan survey reveals an uplifting result: out of all the lawyers that graduated from that institution, it is women with children that rank highest in contentment. [56] The survey notes that these women are under constant pressure, but they are satisfied with how their lives have turned out. [57] The survey notes, "They enjoy their family lives. They enjoy their jobs. And to the extent each causes stress, each also provides respite from the other." [58]

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ANCHORS AWEIGH! THE U.S. NAVY, THE U.S. COAST GUARD, AND REGULATING INTERNATIONAL SHIPPING ON THE HIGH SEAS

Law students enrolled in a "substantive" criminal procedure course frequently sweat over the intricacies of search and seizure law within contexts familiar to the average land-lubber attorney – the home, the automobile, and the person strolling down the street. Perhaps some die-hard students will take the time to learn more obscure aspects of the Fourth Amendment such as administrative searches and the law of satellite reconnaissance. But who really bothers to learn anything about maritime search and seizure law? The idea of pirates, smugglers, and privateers in the twenty-first century is absurd to most people, including many attorneys. But, be forewarned! In the post 9/11 world the men and women in the United States Navy and United States Coast Guard are on call twenty-four hours a day monitoring commercial and private vessels on the high seas. [1] They are enforcing regulatory legislation developed by Congress and applicable to all tankers, container ships, and other vessels that are vital links between the United States and other markets around the world. [2]

Although many people are unaware of the functions of America's sea forces outside of the war-making context, the Navy and Coast Guard are active 365 days a year protecting the borders of the United States. [3] This is done through active monitoring and boarding of international shipping that falls within lawful jurisdiction of the country. [4] The Navy and Coast Guard are distinct branches of the military with independent chains of command. [5] They frequently cooperate in joint operations within the maritime regulatory and law enforcement

contexts. This happens often in waters surrounding the United States and its territories, where the country's jurisdiction is the strongest. [6] Also, operations are ongoing throughout Latin America and South America, where the Navy and Coast Guard frequently work with local governments to interdict smugglers, drug runners, and assist in regulating vessels operating in the area. [7]

The two key questions of law applicable to American naval operations are (1) jurisdiction to conduct the regulatory activities performed and (2) what substantive powers Congress and international law grants to our forces to do their job. [8] Jurisdiction is somewhat more complex and is a close cousin of the constitutional principles surrounding searches and seizures. The substantive law exists generally within international treaties, maritime custom, and congressional enactments. [9] Congress's legislation in this area and the military's activities are analogous to the relationship between Congress and the federal administrative agencies. Congress develops policy and sets clear limits, and the military's chain of command uses their expertise and skills to figure out where the rubber meets the road. [10]

Whether military forces have the authority to assert jurisdiction over a particular vessel depends on a number of factors including the presence of Admiralty jurisdiction generally, proximity of the suspect vessel in relation to American coastal waters, and the specific interest in the suspect vessel (i.e., whether the military has "probable cause" that the vessel is engaged in unlawful activity, whether they have "reasonable suspicion" of the same, and the like). [11] The Constitution bestows general admiralty jurisdiction on the federal courts, [12] and gives Congress the exclusive authority to defining the substantive requirements of regulatory shipping laws. [13] Congress has exercised its authority broadly by assigning crimes and offenses against the laws of the United States that occur

outside the jurisdiction of the landmass of United States' territory (such as a domestic flagged vessel, and island outcropping, an aircraft, and even in space) to fall within admiralty for purposes of regulation. [14] Supreme Court interpretation has further clarified this grant of jurisdiction to all areas outside of the United States on the high seas, as well as the Great Lakes. [15]

There are a variety of criminal and non-criminal statutes that grant substantive authority to the Coast Guard to board, search, and seize vessels and crewmembers that are not in compliance with the dictates of Congress. [16] Generally speaking, the closer a vessel is to the coasts of the United States, the greater the power to search without probable cause. [17] Further, if the vessel is registered and flying the flag of the United States, Coast Guard personnel may board ships and conduct inspections including more invasive searches if probable cause of a crime is suspected, [18] even if there is no substantial relationship between the criminal activity and the United States. [19]

The types of regulatory stops military vessels engage in are varied, from run of the mill Coast Guard safety inspections and document checks, [20] to large scale drug interdiction exercises. [21]. The U.S.S. Crommelin, an Oliver Hazard Perry-class guided missile frigate of the United States Navy, [22] has seen its share of these regulatory stops in South America and elsewhere. During the summer of 2004 the ship participated in one of the largest drug busts to that point, seizing more than 36000 pounds of cocaine worth over $ 36 million. [23] I recently interviewed the navigator on board, LTJG Jeff MacDougall of the United States Navy, and asked him some questions about the ship's role in those activities. The interview appears in full below. [24]

Q: Who are you and what do you do for the Navy?

A: LTJG Jeff MacDougall, USN. I am Navigator on USS CROMMELIN (FFG 37).

Q: How did you decide on the Navy instead of another service?

A: Family tradition, both my father and grandfather were in the Navy.

Q: Are you planning on making a career out of it?

A: No, I plan to get out after about 5 to 6 years (three tours).

Q: So, what does the Navy do in regards to regulating shipping on the high seas?

A: The Navy will only "regulate" shipping if it is known that a particular vessel is carrying an illegal cargo. For example, narcotics, illegal weapons, etc. In this case, we may be tasked to stop and board the vessel, then conduct a search to account for all crew and attempt to locate any contraband.

Author's Note: Navy and Coast Guard ships require probable cause to board non-U.S. flagged vessels, and probable cause to search non-public areas of U.S.-flagged vessels. As a general rule, once probable cause is establish the Coast Guard has the authority by act of Congress to board any vessel and seize any object or person on board. [25] Note however that the Supreme Court has long held it prudent for the vessel's country of registry to be notified and the matter turned over to them if the crime does not "affect the peace and dignity of the (United States)." [26]

Q: How does this compared with the mission of the Coast Guard?

A: The Coast Guard is capable of performing the same mission.

Q: Does the Navy work with the Coast Guard? How to they interact?

A: The Navy and Coast Guard operate jointly in many of these operations, both with vessels from each service coordinating to intercept the suspect vessels.

Q: What type of vessels do you look for? What kinds of traits seem suspicious?

A: We use land-based intelligence to develop search areas, and ID vessels suspected of carrying contraband. We then use this information to search for the

particular suspect vessel. Aside from our intel, other traits we could look for include high-powered radios, satellite phones or other overly expensive equipment on small fishing vessels, excess quantities of fuel (used for the long voyages), vessels operating outside of established shipping lanes or fishing zones.

Q: What is the typical way a naval vessel would hail another? Is this similar to the way civilian vessels hail each other?

A: We call one another up by hull number or position if hull is unknown (eg, "Warship five-nine this is Warship three-seven, over" vs "Warship in position two-one degrees two minutes north, one-five-seven degrees five-six minutes west, this is Warship three-seven four nautical miles off your port bow, over.") Civilians call one another by vessel name if it is known, or by position if it is unknown.

Q: In what instances would the Navy or coast Guard board a civilian vessel? Are drugs always involved, or are commercial carriers also subject to boarding?

A: To the best of my knowledge, any vessel can be boarded if there is a reasonable belief that it is carrying contraband, but this requires authority from the local Coast Guard district who receives their direction from above them and goes through necessary diplomatic channels depending on the vessel's flag (what country they are registered in).

Q: What is the scope of the boarding's search when conducted?

A: Everything is searched. Every possible storage space, fuel tanks are drained and searched, and false bulkheads (fake walls) are located and taken down if they exist.

Q: Do you think that the Navy and Coast Guard's role in this regulatory function is the best way to go about doing things?

A: They do a good job of completing the mission while still respecting individual rights. For instance, if contraband is found, the detainees are treated humanely,

washed, given clean clothes and food and water. Throughout the process, they are treated as suspects just as any American would be.

Q: Do you every work with the militaries or law enforcement agencies of foreign countries in working in this role?

A: Yes, we help train many countries Navies and Coast Guards to perform this mission. We also conduct exercises to promote joint operability (our ability to work together despite language barriers and differences in operating procedures).

Q: Do you think civilian shipping lines are doing enough to defend against terrorism?

A: They are very limited in what they can do. They rely on the Navies and Coast Guards of the areas they are sailing through for defense. I a terrorist were to attack a freighter, it would be difficult to stop it unless we had prior warning of it and could deter the attack with the presence of warships. We do conduct exercises to test our ability (and that of local militaries) to defend against specific threats to shipping (eg, an attack on the Panama Canal).

Q: What about domestic port authorities? How does the security here in America (according to your own observations) compare with port security in foreign countries?

A: Security is entirely dependent on the port you are in. When a Navy warship goes to a foreign port, security is high, because we pay for it.

Q: One last thing: are there any modern-day pirates left? Does the Navy and Coast Guard every come across them?

A: Yes. Piracy still exists in many areas of the world, and they prey on everything from small pleasure craft to cruise liners to container vessels.

Author's Note: Modern day pirates are very active in the southeast Asia region where commercial shipping lines bring a large volume of traffic to the area. [27] This is also a problem around the horn of Africa, where a recent United Nations relief ship was boarded by force. [28] The Canadian

Broadcasting Company has noted that "Somali pirates are trained fighters, often dressed in military fatigues, using speedboats equipped with satellite phones and Global Positioning System equipment. They are typically armed with automatic weapons, anti-tank rocket launchers and various types of grenades, according to the UN Monitoring Group on Somalia." [29]

The author would like to extend a special thanks to Lt. MacDougall, whom without his help this article would not have been possible. More thanks goes out to all active, reserve, and retired American military personnel who have contributed to the continued security and vitality of the United States of America.

Endnotes:

[1] *See* United States Navy, *The U.S. Navy* (2007), http://www.navy.mil; United States Coast Guard,*USCG Home Page* (2007), http://www.uscg.mil.

[2] *See generally* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 1.12 (Hornbook ed., 2004).

[3] *See* text accompanying note 1, *supra*.

[4] 19 U.S.C. § 1581(a) (2007).

[5] 14 U.S.C. § 3 (2007) (stating that the Coast Guard is organized under the Department of Homeland Security in peacetime).

[6] *See* United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983) (noting that inspections of vessels in United States waters has traditionally been permissible without probable cause or even reasonable suspicion, but probable cause is required to search the "private areas" of the vessel); *cited in* SCHOEMBAUM, *supra* note 2, at § 1.12; *see also* L. Stephen Cox, *Sources of American Maritime Criminal Law*, 26 TUL. MAR. L.J. 145 (2001).

[7] *See* Global Security, *U.S. Military Operations: Counterdrug Operations* (2007),http://www.globalsecurity.org/military/ops/drug-ops.htm.

[8] *See* SCHOENBAUM, *supra* note 2, at § 1.12.

[9] *See id.*

[10] *See generally* RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE, § 2.4 (2002).

[11] *See* text accompanying note 6, *supra*.

[12] U.S. CONST. art. III, § 2.

[13] U.S. CONST. art. I, § 8 (providing Congress authority to fight piracy and other crimes on the high seas with appropriate laws, and to regulate commerce among the several states).

[14] 18 U.S.C. § 7 (2007).

[15] United States v. Rogers, 150 U.S. 249, 261 (1893); United States v. Grush, 26 F. Cas. 48, 51 (D. Mass. 1829); *but cf.* In re Air Crash Off of Long Island, 209 F.3d 200, 207 (2d Cir. 2000) (criticizing previous cases for not holding to the common law's accepted definition of jurisdiction in the high seas).

[16] *See* 19 U.S.C. § 1581 (2007) (specific enforcement provisions for the Coast Guard relating to boarding of vessels); 14 U.S.C. § 89(a) (2007) ("Coast Guard Enforcement Statute," relating to the powers of the Coast Guard during peace time law enforcement activities); 21 U.S.C. § 955, et. seq. (2007) ("Marijuana on the High Seas" Act); 46 U.S.C. § 1901, *et. seq.* ("Maritime Drug Law Enforcement Act"); *see also* SCHOENBAUM, *supra* note 2, at § 1.12.

[17] United States v. Rogers, *supra* note 15, at 261.

[18] *See* United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983).

[19] United States v. Julio-Diaz, 678 F.2d 1031 (11th Cir. 1982); *cited in* SCHOENBAUM, *supra* note 2, at § 1.12.

[20] *See* SCHOENBAUM, *supra* note 2, at § 4.2 n. 15.

[21] *See* text accompanying note 7, *supra*.

[22] United States Navy, *Welcome to the Official Website of the U.S.S. Crommelin*, (2007),http://www.crommelin.navy.mil/.

[23] Cmdr. Daniel W. Roberts, *USS Crommelin Scores First Narcotics Seizure*, NAVY NEWSTAND, (July 6, 2004), *available at* http://www.news.navy.mil/search/display.asp?story_id=14107.

[24] Via email to author, April 2007.

[25] *See* 19 U.S.C. § 1581(a) (2007).

[26] *See* Mali v. Keeper of the Common Jail, 120 U.S. 1 (1887), *cited in* SCHOENBAUM, *supra* note 2, at § 1.12 n. 9.

[27] *See Piracy*, WIKIPEDIA, (April 18, 2007), http://en.wikipedia.org/wiki/Piracy.

[28] *Pirates Hijack Food Aid Ship Off Somali Coast*, CBC NEWS, (February 25, 2007),http://www.cbc.ca/world/story/2007/02/25/somalia.html.

[29] *Id.*

NOT SO FUNNY FUNNY BUSINESS

Open your local paper and you will see advertisements, turn on your car radio and you will hear advertisements. Small business owners typically use newspapers and radio ads to sell their products and services, but the process of selecting the proper advertisement is often difficult. [1] Selection of the proper media is not the only decision the business owner faces. The advertisement's content is also important. Off the wall advertisements can be beneficial to a business because they can make a business stand out. [2] Recently a local Champaign-Urbana radio station has spread two wacky ads through the airwaves. Both radio advertisements imitate famous movie characters in an attempt to entice listeners to go tanning. What characters you ask, why "Bormat" and "Neapolitan" of course. Surely, these simple name changes will shield the business that ran the ads from legal liability, right? This article will briefly analyze these radio ads under the privacy law tort of misappropriation.

Misappropriation is one of the four ways that a defendant can invade a plaintiff's privacy. [3] "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." [4] A defendant commonly commits the tort of misappropriation through the "appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose." [5] Courts have dealt with the appropriation of the likeness of celebrities in commercials.

In *Middler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), Ford Motor Company used a sound alike to sing a Bette Middler song for a

commercial. [6] Middler then brought an action against Ford Motor Company. [7] The court held that Ford Motor Company appropriated Middler's identity and that her claim was sufficient to defeat summary judgment. [8] Yet, the court limited its holding by stating that it only "hold[s] that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California." [9]

In *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), singer Tom Waits brought a voice misappropriation action against Frito-Lay, Inc. for using a singer to imitate his voce in a radio commercial. [10] At the trial level, the jury found in favor of Waits. [11] On appeal, the court held that the voice misappropriation claim was "legally sufficient." [12]

Exposing a business to liability for misappropriation can be dangerous. The court in *Waits* affirmed a $500,000 punitive damage award of against Frito-Lay, Inc. because a "[a] rational jury . . . could have found that the defendants, in spite of their awareness of Waits' legal right to control the commercial use of his voice, acted in conscious disregard of that right by broadcasting the commercial." [13]

Whether the advertisements mentioned at the start of this article amount to misappropriation is a decision for the court, but it seems likely that a successful argument could be made. In accordance with the Restatement definition for misappropriation, both ads imitate the voices of famous movie characters to advertise a business's product. Not only do sound alikes imitate the characters' voices, but they also include specific references and quotes from the movies that the characters appear in.

Advertising is an important part of running a business, and it should be treated as such. This article is not meant to serve as legal advice, but rather as a warning

to small business owners to advertise carefully. [14] When in doubt ask someone that is qualified to give an informed answer.

End Notes:

[1] Howard E. Van Auken, B. Michael Doran, & Terri L. Rittenburg, *An Empirical Analysis of Small Business Advertising*, J. OF SMALL BUS. MGMT., Apr. 1992, at 87, 87.
[2] Elizabeth J. Goodgoold, *Getting Persona*, ENTREPRENEUR, Mar. 2003, at 65, 65.
[3] RESTATEMENT (SECOND) OF TORTS § 652A (1977). A person can also invade another's privacy by "(a) unreasonable intrusion upon the seclusion of another, . . . (c) unreasonable publicity given to the other's private life, . . . or (d) publicity that unreasonably places the other in a false light before the public . . . ." *Id.* at (a), (c), (d).
[4] *Id.* at § 652C.
[5] *Id.* at cmt. b.
[6] *Middler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988)
[7] *Id.*
[8] *Id.* at 463-64.
[9] *Id.* at 463.
[10] *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1096 (9th Cir. 1992).
[11] *Id.*
[12] *Id.* at 1112.
[13] *Id.* at 1105-06.
[14] *See also* Christopher C. Larkin, *Traps for the Unwary: Avoiding Some Common Mistakes in Intellectual Property Law*, 27 BEVERLY HILLS B.

ASSN'N J. 89 (1993) (warning that "virtually anything that is associated with a celebrity may expose your client to liability").

THE DARK SIDE OF LAND USE RESTRICTIONS

Residential land use restrictions are part of life in most areas in the United States. There may be land-use restrictions regarding "building height, architectural styles, materials, orientation, view preservation" [1] and even the color of your home. [2] These restrictions may have benefits, to essentially assure quality homes are being built as well as maintain property values by preventing doublewides from being built next to mansions. However, what happens when these restrictions go too far? For example, the government may reject a landowner's building plan not because it fails to meet the technical requirements of local building and zoning codes, but because the board simply does not like what the structure will look like. [3] Along more disturbing lines, land use restrictions can (and have) made it difficult for hundreds of natural disaster victims to construct decent temporary housing. [4] Welcome to this, the dark side of land-use restrictions.

While one could discuss a variety of potential problems regarding land use restrictions, the issue of aesthetic restrictions will be the focus here. David and Diane Williams decided to build a duplex in a residential area of California. [5] While they were very careful to plan their facility just right, so as to make it past the local review board, the proposal was denied due to how the facility was proposed to look. [6] The guidelines stated that the structure must not be "monotonous" but must also be "harmonious" with the rest of the neighborhood. [7] This guideline is vague and subjective, especially considering that the Williams' architect wrote these guidelines himself when he was the chairman of the local review board, and yet was not able to meet his own restrictions. [8] Such a result indicates a real flaw in the system: it is inefficient

for landowners to spend their resources and time on a plan that may or may not get past the review board. Predictability is key, and this feature is obviously lacking in some local review boards.

Beyond this issue of inefficiency, there are possible first amendment rights at stake. The Williams' lawyer suggests that "purely aesthetic guidelines may not jibe with constitutional guarantees of due process and free expression." [9] Courts have long recognized a special interest in the home as opposed to other properties, which may afford them more freedom of expression. A judge in Williams' case noted that there is "no reason why a uniquely architectural design, expressing [the homeowner's] personal views and attitudes, is not as worthy of First Amendment protection as 'live nude dancing.'" [10] Since architecture is a distinct and recognized form of art, and art is among those areas protected by the first amendment, perhaps aesthetic guidelines which are certainly vague and subjective should be eliminated. The individual landowner's preferences, as well as the private covenants in place, should take priority.

More broadly, property rights are infringed upon when these kinds of land use restrictions go into effect. When a landowner is told that they can't create a structure on their land that looks a certain way, a small part of their bundle of rights has been taken away. However, property rights are not absolute. [11] As long as the government leaves you with some economically viable use of your land and does not reduce it's value to virtually zero, the land use restrictions are generally valid and legal. [12] While takings will not be discussed in depth here, it should be noted that these restrictions are in some cases extremely limiting, and may be worthy of just compensation though in all likelihood, courts would favor the government's right to enforce such restrictions.

Land use restrictions are perhaps an important societal and governmental tool which can help to maintain or dramatically increase the value of land. [13] However, flexibility must be built into that system to assure that exceptions

can be made when the situation calls for it. Perhaps local governments should forgo involvement and leave these kinds of restrictions and limitations up to private covenants which would then be enforced by private neighborhoods and the courts if need be. At the very least, local review boards should be required to maintain a set of easy to read and, most importantly, easy to follow guidelines. Architects and landowners should not be made to guess whether the architectural plan they put time and money into will or will not pass muster with local review boards.

[1] Steven B. McBride, Site Planning and Design, The Web Book of Regional Science, West Virginia
University, http://www.rri.wvu.edu/WebBook/McBride/main.html.
[2] Robert Pollock, *Architectural Correctness? – Restrictions on Architectural Design*, REASON, Oct. 1994, *available at* http://www.findarticles.com/p/articles/mi_m1568/is_n5_v26/ai_16101031.
[3] *Id.*
[4] *FEMA: Land Use Restrictions Delay Placement of Temporary Homes for [Katrina Victims]*, THE DAILY RECORD (Baltimore), Dec. 22, 2005, *available at*http://www.findarticles.com/p/articles/mi_qn4183/is_20051222/ai_n15964264.
[5] *See* Pollock, *supra* note 2.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] National Trust's State and Local Policy Program for the National Trust for Historic Preservation,*Understanding Property Rights*, Cardi

Toolboxhttp://www.cdtoolbox.net/government_policies/000208.html (last visited Apr. 8, 2007).

[12] *Id.*

[13] *Id.*

A PENNY FOR YOUR POUNDS: U.S. COMPANIES ARE PAYING OVERWEIGHT EMPLOYEES TO GET INTO SHAPE

I. Introduction

The Zone, Atkins, liposuction, colonics, the liquid diet… Many people have tried and failed at losing those last five pounds. However, would the effort be less frustrating if someone offered you money to lose weight? Employers across the U.S. have noticed problems associated with overweight employees, and they are hoping that monetary incentives will solve the problems. This article will first examine the rising healthcare costs in the workplace. It will then focus on employer efforts to combat these costs. Finally, the article will explain some cautionary steps that employers should take when implementing weight loss efforts.

II. America's Rising Healthcare Costs

Obesity is a serious problem plaguing Americans. About every ninety seconds, obesity claims a life. [1] Not only does obesity affect one's quality of life, it also has serious implications in the workplace. Employers incur huge costs related to their overweight employees. "On average, at least twenty-two percent of employees at any given workplace are overweight or obese." [2] Additionally, obese employees incur thirty-six percent more in healthcare costs than do employees who are considered normal weight. [3]

In 1994, employers spent $13 billion for the following costs associated with obesity-related health problems: "(1) higher use of health care services; (2) lowered productivity; (3) increased absenteeism; (4) higher health and disability insurance premiums; and (5) other weight-related conditions." [4] This amount was broken up as follows: "$8 billion was paid by health insurance, $2.4 billion for sick leave, $1.8 billion for life insurance, and $1 billion for disability insurance." [5] One can only surmise how much these numbers have grown in the past thirteen years.

III. Creative Measures to Remedy the Problem

These significant figures spurred employers to take action, and many of them have turned to perhaps the greatest motivator possible: money. For example, IBM has paid out more than $130 million to the 65,000 employees (about half of IBM's US workforce) who are enrolled in its fitness programs. [6] Bonuses up to $300 a year are paid to employees who exercise at least three times a week. [7] Considering that the U.S. industry loses thirty-nine million work days through obesity-related lost productivity, absenteeism, and medical expenses, [8] this investment is well worth it. The National Business Group on Health Care estimates that by reducing healthcare costs and increasing employee productivity, businesses such as IBM will recoup a $3 return on every dollar spent on preventive measures. [9]

Other companies have adopted similarly creative solutions. The Container Store in Texas allows its employees to earn points for completing a required unit of activity (employees can also earn a point

for drinking eight ounces of water); the employees can then exchange points for gifts cards or money. [10] Some employers are handing out T-shirts and duffel bags to encourage healthful living by employees. [11] Texas Instruments offers its employees a $10 discount per month off their health insurance premiums provided that they participate in the company's wellness program. [12] Motorola, Pfizer, Union Pacific, and General Motors offer rewards ranging from iPods to cash to encourage workers to lose weight. [13] Freedom One Financial Group, a Michigan provider of 401(k) plans, "jump-started its fitness program in 2005 by offering a free four-day cruise to Jamaica for employees who met certain weight loss or body fat reduction goals." [14] The possibilities are almost endless. The moral of the story is that if an employer is willing to dangle the carrot, the employee will likely follow.

IV. Applicablity Beyond Obesity

Offering employees monetary or material incentives is not limited only to weight problems. The Federal Reserve Bank of Dallas provides a program monitoring the prevalence of muscular skeletal disorders which have increased its healthcare costs. [15] By bringing in arthritis specialists to improve how employees function at their workstations, the Bank has seen increased employee attendance, leading to a gain of about $250,000 per year. [16] Other companies have launched health monitoring programs in areas such as diabetes and metabolic syndrome. [17] Finally, there are also companies who implement preventive measures by trying to get their employees to visit their doctors more often. [18]

V. Legal Implications

Employers have to be careful when implementing these programs to make sure that obese employees do not feel like they are singled out. Most importantly, employers cannot try to avoid these healthcare costs simply by refusing to hire obese individuals. Although there is no federal law prohibiting discrimination on the basis of one's weight, this does not mean discriminatory action should be condoned. [19] It is morally questionable to refuse employment based on one's appearance. If companies can discriminate based on one's weight, it follows that they can also discriminate based on one's height or hair length. These standards are arbitary and they should not enter into the hiring process. Furthermore, companies should be aware of the goodwill they could lose and the harm to their reputation should they decide to discriminate against obese individuals.

Additionally, paying obese employees to lose weight seems like a sound business decision, but what about employees who are not overweight? Employers should encourage all employees to participate in wellness programs because prevention is easier than rehabilitation. Given that seventy percent of chronic conditions are preventable, companies want to keep low-risk employees at low risk. [20] A normal weight employee could very well have health problems such as high blood pressure, high cholesterol, or diabetes. Although these problems may not manifest themselves in the form of obesity, they can still contribute to decreased work productivity. Thus, it is a smart business move to include healthy weight employees in company wellness programs.

Finally, there are privacy concerns. Employers have to be careful with the employees' personal information gathered from health screenings. Some employers have decided to avoid potential problems by hiring third-party vendors to conduct the health screening process. [21] Third-party vendors only turn over the health information of the employees as a group and not of the individual employees. [22] This way, employees do not have to worry about the possibility of the information being used to deny them health coverage. [23]

VI. Conclusion

Although employers adopted these measures with cost saving in mind, it is the employees who end up as big winners. The workers are happier, healthier, and live longer. One employee participating in his company's wellness program discovered he had prostate cancer during a routine health screening, and he was able to receive prompt treatment. [24] For such employees, these programs are priceless.

[1] Kelley M. Blassingame, *Employers, Government Fight to Curb Obesity Epidemic*, EMP. BENEFIT NEWS, Aug. 2003, at 37.
[2] Peter Neurath, *Insurers Tackle Weight Issue with Obesity Programs*, PUGET SOUND BUS. J. July 30, 2004, *available at* http://seattle.bizjournals.com/seattle/stories/2004/08/02focus8.html.
[3] *Workforce Health Improvement Act: Healthy Employees; Healthy Bottom Line: Subcomm. On Tax, Fin. and Exports of the H. Small Bus. Comm.*, 108th Cong. 35 (2004).

[4] Kathryn Hinton, Note and Commentary, *Employer by Name, Insurer by Trade: Society's Obesity Epidemic and its Effects on Employers' Healthcare Costs*, 12 CONN. INS. L.J. 137, 143 (2005/2006).

[5] *Id.*

[6] Richard Luscombe, *To State Workers: Get Fit or Lose Your Job?*, CHRISTIAN SCIENCE MONITOR, Jan. 30, 2007, at p.3.

[7] *Id.*

[8] Hinton, *supra* note 4.

[9] Luscombe, *supra* note 6.

[10] Roger Yu, *Wellness Benefit: Fitter Workers May Help Trim Costs for Firms*, DALLAS MORNING NEWS, July 7, 2004, at 1D.

[11] *Id.*

[12] Brendan M. Case, *Providing Extra Incentive for Some Local Workers*, DALLAS MORNING NEWS, April 5, 2006, at 3d.

[13] Luscombe, *supra* note 6.

[14] Melinda Fulmer, *Get Paid to Lose Weight*, MSN MONEY, Mar. 16, 2007, http://articles.moneycentral.msn.com/Insurance/InsureYourHealth/GetPaidToLoseWeight.aspx.

[15] Yu, *supra* note 10.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Jennifer Shoup, Comment, *Protecting the Obese Worker*, 29 IND. L. REV. 206 (1995).

[20] Fulmer, *supra* note 14.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Yu, *supra* note 10.

THE APPLICATION OF EU COMPETITION LAW TO PROFESSIONAL SOCCER: SHOULD THE EU REGULATE PROFESSIONAL SOCCER? (PART II)

As one of the primary aims of the EU has been to establish a common market and foster competition, and as soccer has increasingly become a large economic enterprise, the EU's regulation of soccer is simply not surprising. Legal scrutiny of sports rules and regulations has grown as the EU has expanded its involvement in the regulation of Member States. The realm of professional soccer has perhaps been the most publicized and hotly debated area of sports in the EU. What was once thought to be immune from the scrutiny and regulation of EU institutions such as the European Council, the Commission, and the ECJ, is no longer afforded such protection. That is, the governing bodies of professional soccer can no longer rely on the past deference afforded to them. A brief discussion of the inherent purposes of the EU helps explain why this is so.

II. Should the EU Regulate Professional Soccer?

a. The Purpose of the EU

The EU's structure and its very purpose has been to regulate the affairs of Europe; to establish a consistent set of rules and regulations which will help unify Europe into a single cohesive entity. [1] But sports organizations have been hesitant to let the EU govern the realm of sports. [2] Initially, even the EU appeared to have decided to refrain, as the 1957 Treaty of Rome did not specifically mention the regulation of sports. [3] But the landscape of profesional sports has drastically changed since then, and although the governing bodies of professional soccer would like nothing more than the EU to refrain from meddling in their affairs, the

EU's involvement did not merely stem from its own interest in regulating professional soccer. That is, the European Commission, by the end of 1998, had been presented with a large number of complaints related to sports. [4]

Thus, the EU should be involved in the regulation of sports, especially professional soccer, due to the growing legal uncertainties in the business of sports. Most importantly, these legal uncertainties have to do mainly with the economic aspects of professional soccer. Given this fact, and given the EU's commitment to establishing free markets and fair competition among businesses, it appears that not only does the EU have sufficient legal footing to be involved in professional soccer, but also an obligation, if professional soccer threatens the economic objectives of the EU.

The economic objectives of the EU can be traced back to the founding treaty of the EU, the Treaty of Rome. The purpose of the Treaty of Rome was to remove trade barriers between the members through the creation of a common market. [5] This purpose is also evident in the EC Treaty. [6]

But the desire to get involved stems not only from a desire to integrate economies and remove obstacles to trade, but also due to the EU's commitment to socio-cultural integration. [7] If soccer is such a cultural glue, and if its popularity is shared by a large number of Europeans, then it would naturally make sense for the EU to express interest. The EU is in the business of creating a unified Europe, and in the process is interested in fostering a European identity. Thus, the EU's involvement in soccer would appear to be appropriate. [8]

However, there has always been strong resistance towards the EU's involvement in the regulation of professional soccer, as governing bodies of the sport have

always felt that the special nature of their sport will be severely misunderstood. [9] Although professional soccer may possess characteristics which render it unlike ordinary businesses, the fact of the matter is that its tremendous commercialization in the recent past makes it susceptible to legal second-guessing and intervention. [10]

Aside from the question of whether the EU *should* regulate professional soccer, it is quite evident that it *will* regulate it. The governing bodies of soccer have recognized this truth for quite a while now, and have been quite active in maintaining their own involvement in the decision-making process, by attempting to form a working dialogue with the EU, however grudgingly they may be doing so. [11]

Sources:

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2. Richard Parrish, *Reconciling Conflicting Approaches to Sport in the European Union*, in PROFESSIONAL SPORT IN THE EU: REGULATION AND RE-REGULATION 21 (Andrew Caiger and Simon Gardiner, eds., T.M.C. Asser Press 2000).
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5. Europa- The EU at a Glance-The History of the European Union,http://europa.eu/abc/hostory/indexen.htm.
6. *See* European Community Treaty, art. 2.
7. Parrish, *supra* note 2, at 21.
8. *See id.* (discussing the use of sports to promote European solidarity and identity, and noting that soccer is a tool of urban and regional regeneration and a tool to combat social exclusion).

9. *See* Stephen Weatherill, *Resisting the Pressures of "Americanization": The Influence of European Community Law on the "European Sport Model"*, 8 WILLIAMETTE J. INT'L L. & DISPUTE RES. 37, 40 (2000) (discussing the arguments for why professional soccer should be self-regulated, and rejecting them as generally lacking intellectal persuasion).

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11. UEFA-UEFA Organization-Introduction: EU Matters, athttp://www.uefa.com/uefa/keytopics/kind=2048/index.html.

PESTILENCE, WAR, FAMINE, DEATH…AND UNEMPLOYMENT?: AN ANALYSIS OF THE INTERNET MESSAGE BOARDS' IMPACT ON LAW FIRM RECRUITMENT

I: Common Sense is Not So Common

Polished black shoes. Dry-cleaned charcoal gray suit. Freshly pressed royal blue dress shirt. Red power tie. I ran through this checklist for every on-campus interview and call back interview this fall. Emails from my Career Services Office reinforced this sartorial splendor constantly. Eventually I began to notice that the CSO included several new items. "Make sure your Facebook and MySpace profiles do not have/reveal anything incriminating about you. Employers will check before an interview." Come again? The hiring partner of a Vault 100 firm is going to "friend" me?

As incredulous as I was, I began to see this advice echoed throughout a variety of mediums. As *TheNew York Times* reported: "…recruiters are looking up applicants on social networking sites like Facebook, MySpace, Xanga and Friendster, where college students often post risqué or teasing photographs and provocative comments about drinking, recreational drug use and sexual exploits in what some mistakenly believe is relative privacy." [1]. More than one recruiter admitted to denying a candidate based on what the candidate's online profile had revealed. [2].

Needless to say, eager law students, myself included, cleaned up the posts on their "wall" *tout de suite*. Unfortunately, a new malevolent (albeit similar) force looms on the horizon, poised to ride in like a horseman of the Apocalypse, bearing perpetual unemployment alongside pestilence, war, famine, and death. [3]. Sadly, unlike the MySpace quandary, this new evil is not based on a specific person's

lack of common sense ("the candidate's Web page had this description of his interests: 'smokin' blunts', shooting people and obsessive sex, all described in vivid slang." [4]). Further, it is a far more difficult problem to remedy than the mere editing of an online profile.

II: Reputation Pwn3d

Fellow law student procrastinators are likely familiar with the now infamous law student online message-board, AutoAdmit/XOXOHTH ("AutoAdmit" hereinafter). *The Washington Post* captures the essence of the board in noting: "It contains many useful insights on schools and firms. But there are also hundreds of chats posted by anonymous users that feature derisive statements about women, gays, blacks, Asians and Jews." [5]. While such vitriol can be ignored, the issue is complicated when the online postings become *ad hominem* attacks against a specific individual. The reason for this complication is that, as revealed above, employers employ Google and other online methods to find background on potential employees. These internet searches often unmask potentially damaging internet posts, which include "false claims about sexual activity and diseases." [6]. Power tie or not, it is rather hard to recover from such comments.

The Washington Post mentions a Yale law student who suffered from the inimical postings on AutoAdmit. "She graduated Phi Beta Kappa, has published in top legal journals and completed internships at leading institutions in her field. So when the Yale law student interviewed with 16 firms for a job this summer, she was concerned that she had only four call-backs. She was stunned when she had zero offers." [7]. While she was not able to prove it was based on the AutoAdmit postings, one cannot help but wonder the ramifications of a tainted Google search. Despite efforts by victims of the malicious AutoAdmit postings, little seems to be in the way of remedy. The owners of the AutoAdmit site (which, until quite

recently, included a third year University of Pennsylvania law student) refused to moderate the message-board. [8].Google was of no help either. [9]. Even the administration of the University of Pennsylvania Law School was contacted in an effort to temper the content of the internet postings. [10].

III: Defamation: The Race to the Bottom

Victims of this online libel appear to be between Scylla and Charybdis. There appears nothing can be done in appealing to the posters to stop, for even those interviewed for *The Washington Post* article did so on the condition on anonymity for fear of future online retribution. [11]. Various third parties with potential control over the situation appear unable or unwilling to affect action. Yet leaving such material on the internet for future employers to unearth is playing with a loaded gun. While one would like to think that employers would possess the common sense to disregard such obviously unsubstantiated vitriol, for some elite firms any blemish on one's resume is enough to torpedo chances for success. The silver bullet needed to put down this online beast may exist in tort law. Defamation as a cause of action is familiar to any first year law student, yet becomes quite complicated when applied to the internet. Defamation, simply defined, is "The act of harming the reputation of another by making a false statement to a third person." [12]. Like any action which can serve to limit free speech/free press, defamation is often controversial and contentiously litigated: "The regulation of defamation is essentially an exercise in balancing two fundamental human rights: the freedom of expression on the one hand, and the right of reputation on the other." [13].

The AutoAdmit controversy obviously pits freedom of expression against the right of reputation. Despite this, defamation seems a nearly impossible cause of action to prevail with in dealing with an internet message-board. The first issue is

also perhaps the most pragmatic: On AutoAdmit, it is impossible to know who said what. While some internet message-boards do track a user's Internet Protocol (IP) address, AutoAdmit does not, for fear of lawsuits. [14]. Therefore, no matter how harmful the content of a message, it remains truly anonymous.

Pursuing a claim for internet defamation also raises significant jurisdictional issues. While the readership of AutoAdmit is likely composed of United States citizens, it is reasonable to assume that citizens of other nations frequent the message-boards. Should a non-U.S. citizen make defamatory remarks on a website, do the laws of the United States extend beyond our national borders? [15]. The converse also raises significant international law problems: what happens when a U.S. citizen offends another nation's defamation laws? [16]. Were nations to acquiesce to each other's various defamation laws, message-board posters "would need to adjust their content to the most restrictive laws they are exposed to. This would clearly lead to a race to the bottom and valuable online content would be lost." [17].

IV: They Check In but They Don't Check Out

While suits against libelous blogs are now meeting some limited success [18], the realities of the limited ability to track/identify some internet message-board posters appears to preclude any legal remedy. The anonymous cloak that message-boards provide also renders any possible intervention by third parties equally improbable. It appears little can be done to combat the specter of employment-dashing internet comments.

Despite this perceived impotence, this author cannot help but question the overall detrimental impact of such libel. While a MySpace profile featuring pictures of a

drunken spring-break bender in Daytona Beach might reflect that one lacks the common sense/maturity not to put such material in a publicly accessible forum, a message-board "reputation" does not carry such a stigma.

A prospective employer accepting the veracity of such comments at face value is tantamount to accepting the *National Enquirer* as "news." What reasonable hiring partner would actually not make an offer to an otherwise qualified candidate based on what a clearly malicious message-board thread stated? "Listen, I know she graduated Phi Beta Kappa and will have a Yale J.D., but you just have to read what these guys are saying about her on AutoAdmit.com." One might just as well base hiring decisions on whatever happens to be written on a bathroom stall regarding a candidate. Were such a firm to refuse an offer based on an otherwise innocuous Google search, it is undoubtedly a firm one is better off without.

This new form of a resume killer is essentially the cockroach under the kitchen refrigerator. While it may be an annoying pest, it is not hurting anyone. No firm worth its salt should let such information change an employment. Additionally, as revealed above, there seems little in the form of a "Roach Motel" to combat this form of internet defamation. So, for the law students still clamoring for a summer position, don't let the potential wrath of malcontent message-board posters get in the way of pre-interview checklist. The time is far better spent trying to memorize the interviewing attorney's biography from the law firm's website.

[1] Alan Finder, *For Some, Online Persona Undermines a Resume,* THE NEW YORK TIMES, June 11, 2007, *available at*: http://www.nytimes.com/2006/06/11/us/11recruit.html?ex=1307678400&en=ddfbe1e3b386090b&ei=5090

[2] *Id.*

[3] *See*: Revelation 6:1.

[4] Finder, *supra* note 1.

[5] Ellen Nakasima, *Harsh Words Die Hard on the Web*, THE WASHINGTON POST, Mar. 7, 2007, at A01,*available at*: http://www.washingtonpost.com/wp-dyn/content/article/2007/03/06/AR2007030602705.html

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

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CHINA APPROVES BILL TO END PREFERENTIAL TAX TREATMENT FOR FOREIGN COMPANIES

In a move toward a market economy, China recently approved a bill creating a unified enterprise income tax of 25% for companies, thereby ending nearly three decades of preferential tax treatment for foreign companies. [1] This new enterprise income tax (EIT) law will become effective on January 1, 2008. [2] Under the new EIT law, foreign companies in China, currently benefiting from the present preferential tax regime, are expected to experience a significant increase in their tax costs while domestic companies in China will see a noticeable reduction in their tax burdens. [3]

Currently, domestic companies in China pay more income taxes than their foreign counterparts. Although China's present corporate income tax law imposes a statutory income tax rate of 33%, this rate applies mainly to domestic firms and very few foreign companies that do not qualify for preferential tax treatment e.g., foreign services companies. [4] Foreign companies that invest in certain areas, such as economic and technological development zones, foreign infrastructure and high-tech industries, enjoy a preferential income tax rate of 15% or 24%. [5] In addition, most foreign companies in China are entitled to a tax holiday whereby they are exempted from income tax for the first two profitable years in China and are only required to pay half of the set income tax for the following three years. [6] Notably, the new EIT law will eliminate these preferential tax treatments, with two major exceptions: (1) high-tech and other high priority foreign industries will still be entitled to a preferential tax treatment of 15%; and

(2) foreign companies with small profits with be entitled to a preferential tax treatment of 20%. [7]

China's new EIT law has been viewed as a response to the World Trade Organization's requirement of non discriminatory treatment between domestic and foreign firms. [8] While the policy of preferential taxation is regarded as a necessity for enticing foreign investments, it is often criticized because of its harmful effect on fair market competition. [9] The preferential treatment of foreign companies creates an unequal playing field where domestic companies would have to pay a higher tax than their foreign rivals. [10] Thus, the preferential tax treatment in China discriminates against the domestic companies and places them at a disadvantage.

Many economists refute the argument that the increase in corporate income tax for foreign firms will dampen the influx of foreign investment in China. [11] According to Liang Hong, chief China economist from Goldman Sachs Asia, foreign investment will continue to flow into the Chinese market, regardless of the 10% increase in income tax, because China's rapid economic development and higher returns as compared to other countries are major appeals to foreign investors." [12] Likewise, Patrick Horgan, head of the Beijing office of multinational communications and investment consultancy APCO, stated that "most foreign investors these days are not in China solely for preferential tax treatment. The domestic market and cheap skilled labor are just as important." [13] China's Finance Minister Jin Renquig said that the average corporate income tax in China's 18 neighboring countries and regions is 26.7%. [14] Further, the full impact of the increase in enterprise income tax on foreign companies in China will be offset by a five-year transitional period. [15]

Regardless of the opinions of economists like Liang Hong and Jin Renquig, the availability of favorable tax exemptions and cheap skilled labor in China's neighboring countries may draw certain foreign investors from China. In comparison to China's new EIT rate of 25%, foreign companies investing in special manufacturing zones in Vietnam are entitled to a 10% enterprise income tax rate along with an eight-year exemption. [16] Similarly, Thailand offers foreign companies, investing in special zones around Bangkok an eight-year exemption from enterprise income tax and five additional years at half of the set tax rate. [17] Although these two neighboring countries do not boast domestic markets comparable to that of China, they both provide cheap skilled labor which attracts foreign investments. [18] India, whose domestic market is comparable, imposes a higher enterprise income tax on foreign companies than does China. [19]

Although the impact of China's new EIT law on the influx of foreign investment is debatable, a unified corporate income tax rate for both domestic and foreign companies is a necessary step towards achieving a market economy. This author believes that the new EIT law will dampen the flow of foreign investment at some rate but the effect may be minimal due to China's considerable domestic market and maturing economy.

Sources:

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2007, *available at*http://www2.eycom.ch/publications/items/tax_news/20070320_taxalert/200703_EY_TaxAlert_e.pdf.

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[6] *Id*.

[7] Heidrich & Hausmann, *supra* note 3.

[8] *Time to Pay Dues*, BUSINESS CHINA, Mar. 26, 2007, *available at* 2007 WLNR 5473053.

[9] Don Lee, *China to End Tax Breaks for Foreign Firms*, LOS ANGELES TIMES, Mar. 17, 2007, *available at*http://www.latimes.com/business/la-fi-chinatax17mar17,0,7354978.story?coll=la-home-business.

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[14] *See, New Enterprise Tax Rate not to Affect Foreign Investment in China*, *supra* note 11.

[15] *Id*.

[16] Godfrey, *supra* note 13.

[17] *Id*.

[18] *Id*.

[19] *Id*.

FINDING REIT INVESTORS THROUGH THE EB-5 VISA PROGRAM

Real estate investment trusts looking for new investors should consider participating in an increasingly popular US immigration law program. Each year, the U.S. Citizenship and Immigration Service (USCIS) allocates 10,000 visas through the fifth category of the employment-based paths to permanent residency (EB5) to foreign-nationals who invest in the U.S. [1] Sometimes referred to as the "million dollar green card", the EB5 has been wrought with frustration due to stringent standards and wary would-be applicants. In an attempt to make the program more attractive, the USCIS made key amendments and set aside 5,000 visas (of the 10,000 total) to foreign nationals investing in designated "Regional Centers". [2]

There are generally three paths to the EB5. [3] First, a foreign-national may actively invest $1 million and hire ten employees anywhere in the United States. [4] Second, a foreign-national may actively invest $500,000 and hire ten employees in an area where the unemployment rate exceeds the national average by 150%. [5] Third, a foreign-national may invest as little as $500,000 in a USCIS designated Regional Center. [6] Regional Center investments may be passive and do not require day-to-day involvement by the foreign-national. [7] In addition, the foreign-national does not have to directly employ ten US workers, but need only demonstrate that ten US jobs will be indirectly created as a result of the investment. [8]

There are currently twenty qualifying regional centers throughout the United States, including several real estate investment trusts, a mining operation, a ski

resort, and several municipal redevelopment programs. [9] To qualify as a Regional Center, an applicant must demonstrate that the program will focus on a geographic region, promote economic growth, increase domestic capital investment, be promoted and publicized to potential investors, have a positive impact on both the regional and the national economy, and generate a greater demand for business services, utilities maintenance and repair, and construction jobs. [10]

To obtain approval, the organization must apply by submitting a narrative to the USCIS Associate Director of Operations. [11] Applicants usually include analyses from economists and industry experts addressing each of the requirements. [12] If the Associate Director determines that the application does not meet all the requirements for designation, the USCIS will issue an Intent to Deny Letter. [13] The letter explains the application's deficiencies and provides the applicant 30 days to respond with additional evidence to cure the application's defects, before it can be denied. [14] If the USCIS determines that the application still does not establish eligibility, it will deny the application without prejudice. [15] Applicants may appeal the decision to the USCIS Administrative Appeals Office. [16]

One example of a successful Regional Center operation is the Gateway Freedom Fund, which invests in a rapidly gentrifying industrial district immediately south of downtown Seattle. [17] Gateway was founded in 1996. [18] Part of its appeal is that most investors participate for-profit only without any immigration benefits. [19] The organization serves as the general partner and is responsible for building renovations, leasing, and management. [20] The investors are limited partners and as a group, may remove the general partner for cause. The investors receive 70% and the fund collects 30% of all profits. [21]

Part of the appeal of the EB5 program is that the quota has never been reached; a rarity at a time when chronic shortages plague almost every other immigration visa category. For most other permanent residency visas, the backlog is several years long, especially for nationals of "high-immigration" nations such as China and India. The EB5 provides an alternative path for foreign-nationals wishing to immigrate to the US and an opportunity for US real estate trusts looking for additional investors.

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17. *See supra* note 1.
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20. *Id*.
21. *Id*.

ANATOMY OF A TAX PROTESTER

I. Introduction

To a certain extent, most everyone becomes a tax protestor of sorts come tax season. The goal in filling out one's tax return is to ensure that one receives every penny back that can possibly be justified — not that one pays the appropriate amount of tax given one's circumstances. And yet, most of us do indeed pay. Among those that do not pay in full can be found at least two distinct categories of shirkers: the tax evader, and the tax protestor. The tax evader is content to freeride off of the compliance of the rest of society, choosing not to pay taxes but not without tacit reliance on a system that requires taxation. The tax protestor, on the other hand, eschews taxation as a matter of course, proclaiming his distaste for this or any system of taxation by not taking part therein. While the net effect for both the tax evader and the tax protester is the non-or-under-payment of tax, the tax protester feels doctrinally empowered where the tax evader just feels wily. This article is concerned with the tax protester, and will examine first three broad categories into which arguments for the non-payment of the federal income tax fall, and then it will discuss a few different methods through which the tax protester achieves his ends.

II. Arguments

Common arguments against the payment of federal income tax fall into three categories: constitutional arguments, statutory arguments, and arguments alleging conspiracies to cover up the truth behind the constitutional and statutory arguments. Constitutional arguments center around the 16th amendment which removed the requirement that taxes on certain income (from rents, dividends and other passive income derived from property) be apportioned among the state equally according to population.[1] The arguments generally allege some deficiency in the ratification of the amendment: that the different states used different punctuation in their versions of the amendment[2], that Ohio had not yet been officially proclaimed a state at the time of the ratification[3], and many other arguments along these lines.[4] Not surprisingly, none of the arguments have been accepted by any courts.

Other arguments focus instead on the statutes dealing with federal income taxation. Filmmaker Aaron Russo, producer of "America: From Freedom to Fascism," has been quoted as saying that "Title 26 is not the law, it is I.R.S. regulations and to be a law it has to be passed by Congress."[5] In the film, Russo claims that individuals who do pay tax have been tricked into so doing as no law imposes a tax liability — notably, courts have interpreted the language of the word "impose" in the code to necessarily imply liability.[6] A number of statutes expressly "impose" tax and the duty to file a return.[7]

Some tax protesters go farther and would argue that in addition to defects that may exist in the statutes or constitutional underpinnings of the income tax, the government has been hard at work conspiring to cover up these defects. Irwin Schiff, author of The Federal Mafia,

offers on his website that Federal Judges have misrepresented income tax laws "so that the public [can't] figure out what they're doing."[8] In the first chapter of his book, he emphasizes the "key role" that he feels federal courts have played in "hoodwink[ing]" the American public, aided by both the federal government generally and an "army" of accountants, lawyers and other tax preparers.[9]

III. The Means

Understanding the "why" behind the tax protester is only part of understanding how a tax protester operates. The other aspect worth overviewing here is the means through which a tax protestors attempts to avoid tax. A recent high-profile tax evader (and possible protestor), Wesley Snipes, employed a "defense" popular to tax protesters: the section 861 defense.[10] Under an erroneous interpretation of this section, the taxpayer argues that only income earned from foreign sources constitutes taxable income and fails to report domestically earned wages.[11] Section 861 is cited among the IRS' "Dirty Dozen" of tax evasion schemes, including such other classics as frivolous Constitutional arguments akin to that outlined in the first section of this article, offshore transactions, flat out fraud and abuse of a variety of different trust entities and corporation, both charitable and otherwise.[12] Others, like the incarcerated Mr. Irwin Schiff, opt not to file a return at all (as, in the eyes of Mr. Schiff, there is no obligation to file a return) — or to file a return replete with zeroes accompanied by a "confession" detailing why.[13]

IV. Conclusion

April 17 is tomorrow, and marks the due date for filing your 2006 tax return. The author wholeheartedly recommends that if you haven't yet done so, grab your 1040EZ, A, or whatever flavor you choose and get out the tax — but if you decide not to, go out with a bang like Mr. Irwin Schiff. Unlike the tax evader, the tax protester has a backbone and a vision, and it's difficult not to respect that.

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[13] *See supra* note 8.

WILL CONGRESS KILL THE "DEATH" TAX?

Estate and gift taxes have been a thorn in the side of the affluent for ages, while serving as an efficient stream of revenue for the federal government. Gift and estate taxes are two different types of taxes. Gift taxes apply to lifetime transfers of assets, while assets transferred at death are subject to estate taxes. [1] The Federal estate tax is levied "on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States." [2] The current status of the estate tax is governed by the Federal Economic Growth and Tax Reconciliation Act of 2001 ("EGTRRA"). [3] Under EGTRRA, the estate tax has a ceiling of 45% of an individual's estate in 2007 through 2009, a ceiling of 35% in 2009 and is fully repealed by 2011. [4] However, a sunset provision means that if Congress does not reenact the relevant provisions of EGTRRA, the estate tax would continue in 2011 at a maximum rate of 55%, which was the rate before EGTRRA. [5] Currently, only estates greater than $1.5 million are subject to the estate tax. [6] Because Congress has yet to reenact the specific EGTRRA provisions, the future of the estate tax remains murky.

So what are the future routes the estate tax can take? One avenue would be to permanently repeal the estate tax. [7] Alternatively, Congress could reenact provisions of EGTRRA to extend the 35% rate until 2016 and continuously reenact the sunset provisions to lock in the 35% rate. [8] Another idea would be to retain the estate tax, but create a more generous exemption so that only estates greater than $5 million would be subject to the estate tax. [9] On that same note, the rate of the estate tax could be lowered to around 25% in hopes of negotiating a compromise. [10]

But what is the big stink about the estate tax? Studies show that the estate tax currently affects a mere two percent of estates. [11] Why has opposition to the estate tax been able to garner such broad public support, especially in times of worsening budget crises and economic hardship?

One answer lies behind the public policy that people should not be taxed on the fruits of their life's labor, which involves fortunes set aside for heirs. [12] After all, the reason the decedent worked so hard was so that they could set aside wealth to provide for their heirs, right? Opponents, usually consisting of "small-business owners, farmers, trade associations and corporate lobbying groups like the American Council on Capital Formation," [13] criticize the current system as a form of double taxation and suggest the tax fails to prevent the concentration of wealth, instead stifling economic growth. [14] According to a website operated by The Seattle Times Company, DeathTax.com, estate taxes are unreasonably high and force heirs "to sell their business, break up or liquidate their assets soley [sic] to pay the tax. This kills jobs and discourages owners from growing their businesses." [15] The site also alleges that the estate tax does not effectively raise government revenues, hinders American businesses, costs Americans jobs, and that the national economy would be bolstered by a permanent repeal of the tax. [16]

On the other hand, proponents of the estate tax propose the obvious question – how could a tax that only effects a mere 2% of the population have such a detrimental effect on society? The repeal of the estate tax would decrease government revenues by an estimated $70 billion per year. [17] As for claims of double taxation, proponents counter that often the new wealth has not yet been taxed in the first place because the property reflected in the estate tax has often appreciated over time creating new wealth in which the taxing authority has yet to

assert its jurisdiction. [18] Proponents of estate tax also further their views with policy arguments, suggesting a repeal would cause a harmful concentration of wealth, poor economic stability, and create an aristocracy. [19] It is also seen as unreasonable due to the small number of people affected by the tax.

In the face of worsening budget crises, wars in Iraq and Afghanistan, natural disasters such as Hurricane Katrina, and growing disparity between the rich and the poor, it would be both unreasonable and irresponsible for Congress to enact a full repeal of the estate tax. Repealing the tax would serve as a handout to the wealthy, at the expense of 98% of Americans. A far better solution would be to draft a generous exemption, but to require the taxpayer to meet specific criteria to take advantage of a more generous exemption. This would prevent small business owners and family farms from being torn apart as alleged by opponents, but would not hamper federal revenue collection at expense of lower and middle class Americans.

While states have begun to address the estate tax issue, the federal response remains unclear. For estate tax planners, the turbulence has only generated a greater need for services. [20] With discrepancies in state and federal law, estate planners are in even greater need to resolve ambiguities and plan for the future, appealing especially to high net worth families. [21] While the future of the estate tax remains uncertain, the field of estate planning is likely to continue to grow and taxpayers should stay tuned to political winds for the future of the estate tax.

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[6] Edmund L. Andrews, *Death Tax? Double Tax? For Most, It's No Tax*, N.Y. TIMES, Aug. 14, 2005, at C4.

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[8] *Id.*

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[10] *Id.*

[11] Susan K. Hill, *Leaping Before We Look?: Repeal of the State Estate Tax Credit and the Consequences for States, Americans, and the Federal Government*, 32 PEPP. L. REV. 151, 158 (2004).

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[13] Andrews, *supra* note 6.

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[15] DeathTax.com, The Death Tax is Killing Family Business, http://www.deathtax.com/deathtax/index.htm (last visited March 12, 2007).

[16] *Id.*

[17] Andrews, *supra* note 6.

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THE CLASSICAL LEGACY OF ADMIRALTY: THE ROMAN EXPERIENCE (PART TWO OF A TWO-PART SERIES)

Last month we examined some pre-Roman beginnings of modern admiralty doctrine, starting from pre-history through the Greek city states. [1] This month we will continue our study of the classical beginnings of admiralty and maritime law by examining mighty Rome – what its legal system was like, how Rome's laws evolved and amplified the admiralty that came before them, and most importantly how Rome's influence on maritime legal matters influenced a wide array of modern doctrines from maritime tort and contract liability to general average. I highly recommend reviewing my last article, published on February 15, before continuing on. [2] This will set the stage for understanding what Rome inherited and what she gave back to the western legal tradition after her downfall.

At the height of her power, Rome stretched from Scotland to Persia to Spain to Romania. [3] The economic and military might of the Empire was the greatest western civilization had seen to that point in history, and arguably the greatest until the modern superpower appeared in the twentieth century. [4] Surprisingly, this success came without an early development of shipping and naval superiority. [5] In fact, pirates remained a problem on the Mediterranean Seas through the Republic period until the time of Julius Caesar. [6] The Romans did not develop large vessels until the time of the Punic Wars, and then they were for military purposes only. [7] Once the Mediterranean was rid of the pirate threat, the entire region was ripe for a blossoming of maritime commercial growth.

Starting during the reign of Emperor Augustus Caesar (31 B.C. – 14 A.D.) [8] and lasting through Emperor Nero (54 – 68 A.D.) [9] the Empire experienced a period of peace and prosperity known as Pax Romana. [10] During this period, the Romans enjoyed freedom from invasion and social strife to develop greater commercial ties within the Empire and with Rome's neighbors. [11] The height of this commerce could reasonably be said to have occurred during the reign of Emperor Marcus Aurelius. Roman coins from his period have been found in coastal archeological sites in Vietnam and China, which means that Roman commerce extended nearly to the end of the known world during that period. [12]

I will start this article with a brief explanation of the Roman legal system, because it was not quite like anything in the modern common law or even civil law traditions. Then, I will analyze the major contributions the Romans left us, with modern examples from recent cases in admiralty. These include: admiralty and maritime torts, maritime contracts, marine insurance, and the modern doctrine of general average. [13] I will then conclude with a brief summary of the classical legacy of admiralty, and how the modern-day maritime bar can benefit from a basic understanding of the ancient beginnings of their craft.

I. The Roman Legal System

The Romans had the most developed system of laws of all ancient civilizations, but ironically they were the most disorganized while in use. [14] Roman law consisted of a variety of senatorial enactments, imperial decrees, and decisions of Roman courts of law. [15] The Romans did not publish records of judicial enactments, so over time their laws became more and more difficult to apply. [16] Moreover, unlike the theory prevalent in the United States today, the Romans were not concerned with writing down laws for the masses to read for themselves. [17] In the early Republic, a group of high ranking officials known

as the *decemviri legibus scribundis* were the main law interpreters, and they did not give any reasoning for the way they decided controversies nor did they make written laws available. [18]

This changed in 450 B.C. when Roman historian Livy noted the creation of the XII Tables, Rome's first legal code. [19] It consisted mainly of the procedures required for finding relief to various harms recognized under Roman law, but little substantive law as such. [20] Livy described the tablets as "laws that every individual Roman citizen not only consented to accept, but (felt) that he himself had actually proposed himself." [21] Several centuries later, after the fall of the western portion of the Roman Empire and the birth of the Byzantine Empire, the second major codification period of Roman law came into being. First, the Code of Theodossus was created in the middle of the 5th century to organize the jumble of laws that were left in the aftermath of the fall of the western empire. [22] Next, about ninety years later, the *Digest of Roman Law* and the *Institutes* were both ordered to be researched and completed under Emperor Justinian. [23] These are said to be merely updates of the Code of Theodossus, but to modern historians they represent the sum of Roman law in a systematic manner. [24] Most of what we know of the workings of Roman admiralty comes from these two documents, and the aforementioned Rhodian Sea Code. [25] The Code was a later Byzantine legal instrument, but can be said to summarize ancient admiralty and maritime law up to its promulgation. [26]

It should be noted that the Romans did not differentiate their laws into different areas, with different theories of recovery, as we do. [27] For example, the Romans did not separate torts from contracts but instead took every issue on a case-by-case basis. [28] Thus, studying Roman admiralty is sometimes difficult because, although the Romans followed maritime customs from the past, their law didn't differentiate between harms occurring on the seas and those occurring on land. [29] By comparison, our own system of admiralty is heavily divided into

theories of liability. [30] Claiming admiralty jurisdiction properly depends solely on the theory of liability advanced – contracts require different indicia of jurisdiction than tort; general average requires a different procedure to seek recovery than removing a maritime lien from a vessel, etc. [31]

Because it is easier to apply modern examples of the case law to our way of thinking, I have decided to discuss the substantive doctrines of the Roman admiralty under modern theories of liability.

II. Admiralty and Maritime Torts

Law in antiquity had a slightly different viewpoint on harms and remedies than modern law. Whereas modern law generally guarantees rights that are standing features in society, the law in antiquity did not affect the everyday relationships of people unless they were harmed in specific ways. [32] Roman law was no different, and it revolved around whether or not a specific act would create liability in a person or thing. [33] Early in Roman law, liability was held against whatever instrument or person caused the specific injury. [34] For example, if a man was injured by another by an instrument such as a weapon or dangerous object, the action was brought against the instrument. [35] The man was liable in that the weapon was his instrumentality, but in theory this was not true vicarious liability in the sense that our common law understands it because the man could defend as if he were the instrument, as opposed to being automatically liable as in strict liability. [36]

Eventually, Roman law developed over several hundred years into a system of liability more akin to "eye for an eye," all strictly defined in statute. [37] Justinian's *Digest* lists several nautical actions that would be considered torts today, and also the appropriate remedy for the harm. [38] It is

interesting to note that these remedies seem to be completely disjointed from both the extent of the harm and the culpability of the parties named in the code. For example, the chapter titled "Concerning the *Lex Aquilia*" details the Roman law on ship collision. [39] Generally, the law required the sitting court to determine what party caused the collision and then determine if the ship's crew, her captain, or natural forces beyond human control were the cause of the loss of the damaged ship. [40] If the crew was at fault, the action would lie against them to the extent dictated by the Code. [41] There is also mention of possible minor offenses such as if the sailors were responsible for a loss of cargo, there were other punishments that could be enacted of a lesser extent. However, the Code did have some built in protections for sailors – if the fish were lost on account of ripped or otherwise defective nets, then the sailors were allowed to escape liability for the harm because "it would be uncertain whether (the fish) would be caught. [42]
If the action lay against the captain, [43] the liability was the same but the penalties would be less severe. [44] This was a reoccurring theme in the Roman legal system; monetary penalties and other remedies were not distributed fairly among the classes of Roman inhabitants. [45] The Roman law did not differentiate between civil and criminal law, and average citizens could perform the function of bringing charges against others even if the charge was something modern law would recognize as criminal. [46] There was no such thing as imprisonment or rehabilitation, and if there was no monetary remedy for a given offense the only other options were death or exile. [47] Slaves and freeman could rarely escape death if they were convicted of an offense, but the citizenry of Rome (especially those that were particularly affluent) could usually escape execution (or worse, death in gladiatorial combat) by using their connections. [48] Captains fit this upper class status, and thus were not punished as severely as those of lower rank on the ship. [49]

Injuries to seamen and other maritime workers in Roman law were no different than injuries to any other person in the Empire. Here, "fault was the basis of liability" as it is today. [50] For example, the modern maritime law related to negligence (as opposed to its land-based cousin of the same name) requires clear causation in order for a plaintiff's claim to succeed. [51] The admiralty claims of unseaworthiness (a cause of action by seamen against the owners of a vessel based on an unreasonable risk theory), maintenance and cure (a cause of action by seamen against the owners of a vessel for medical care and convalescence for injuries sustained "in the service of the vessel), and maritime defamation [52] all require strong showings of factual and proximate causation in order to succeed. [53] In many maritime claims, duty is clear and unnecessary to prove once the plaintiff is established as a seamen or the equivalent depending on the particular claim. [54]

There is one area of seamen's remedies that is not of ancient origin – wrongful death. [55] This cause of action developed in the nineteenth century British and American admiralty courts and is currently codified in the Death on the High Seas Act (DOHSA). [56] DOHSA does have the ancient element of liability for fault, however, as well as other theories of liability such as products liability [57] and intentional conduct. [58]

III. Maritime Contracts

The Romans did not have a developed system of keeping promises and enforcing obligations as we do today. [59] Our system of contract law developed from decisions of English common law courts. [60] Instead, much like torts the Romans had a loose series of rules that applied to specific circumstances, and the law only recognized a very narrow class of promises that could be legally-

enforced. [61] The Romans also did not differentiate between contracts and "maritime" contracts, as modern law does. [62]

There were a few specific classes of enforceable contracts in Roman law, and they were grouped in how "formal" their creation was. [63] The most formal was known as *stipulato*, which was a specific promise from a party to another party that made a right in the receiving party and a legally-enforceable duty within the promisor. [64] The *Institutes* [65] detail what was required in the Roman Empire to create *stipulato*, which essentially was only that the parties be legally capable of forming contracts and that the intended promises not be illegal under other Roman law. [66] The *stipulato*was created verbally, by the promisor stating exactly what his duties and rights would be under the contract, and the promisee repeating exactly the same thing back. [67] The law believed that the promise would be legally binding because the parties understood exactly what was expected of each of them through this exact exchange. [68] Other types of lesser formal contracts were possible, but it is unlikely that these information agreements played any significant part in Roman admiralty. [69] Of the contracts relating to maritime issues in Rome, the three most prevalent are sales contracts (*emptio venditio*), contracts for the carriage of goods (*lacatio conductio*), and marine insurance on loans for items shipped over water (*mutuum*). [70] Although *stipulato* was theoretically sufficient for contracts for the sale of goods, Roman law required that the exchange of promises be exactly for what was to be exchanged. [70] Although the Roman economy was clearly agrarian and prices for agricultural commodities did not change as drastically on a short-term basis as they can today, the law required that the terms of the *stipulato* be correct. [71] Thus, Roman contract law never developed an efficient means for creating binding contracts when certain terms were impossible or difficult to manifest. [72] For example, a *stipulato* required a fixed price and there was no

way to create an enforceable promise when a price was uncertain or subject to change, and no contract was possible where a buyer would purchase all commodities produced by a certain seller – a modern output contract. [73] Roman law never fully fixed this omission, [74] but the sales contract, a specialized enforceable promise based on the sale of goods, was developed to fix the problems presented by the formal*stipulatio*. [75] Basically, a sales contract functions in essentially the same way that a *stipulatio*does, except the specialized contract has a number of automatic warranties attached to it because of the special nature of its function. [76] One of these warranties protected a buyer from being deprived of items purchased for lack of good title, similar to a modern warranty of quiet enjoyment. [77] Another warranted the quality of the goods promised, to protect the seller against fraud in purchasing goods he wasn't able to see personally. [78] This was especially useful in the purchase of goods from sources in other parts of the empire, and paved the way for an increase in shipping as the Empire progressed. [79]

These warranties acted as safeguards from common problems associated with purchasing goods from strangers across vast distances, so after the sales contract was developed in the second century B.C. the law opened the door for purchasing goods from different parts of the empire instead of finding items locally, or in most cases simply doing without. [80] Once goods started to be purchased over vast distances, the need to create special contracts to transport these goods became apparent. The Roman law thus developed the first contracts for the carriage of goods, or *lacatio conductio*. [81] These came in a variety of subcategories, including hiring a ship by itself (the fore-runner of the modern bare boat charter) or the contract for the transport of goods from one port to another. [82] Generally, these contracts were Roman sales contracts with an added warranty that allocated the risks associated with ancient sea voyages. [83] The law held the seller (shipper) liable only for losses that he

could have prevented; thus, theft of the goods made the shipper liable to the buyer for a monetary remedy, unless the theft occurred with force such as armed thieves in the shipyards or a mutiny on the ship. [84] Most other contingencies were at the buyer's risk. [85] This forwarded an important policy goal that allowed shipping to continue without making financing of the voyages too difficult for ship owners to undertake. The former Rhodian theory of General Average was also extensively used by Roman courts and found much legitimacy inside the *lacatio conductio*. [86]

The *Digest* indicates in the specific instance of a ship's cargo being stolen, the loss should be distributed over all the parties who had cargo aboard. [87] This is similar to the doctrine of General Average, explained below in section IV. [88]

IV. Vessel Financing and Marine Insurance

Ship financing has its birthplace in Roman law. [89] Forming a *stipulato* was unnecessary for the law to legally-recognize a loan. [90] A lender was protected by simply giving money to a borrower, whose receipt of the money instantaneously created an obligation within him to repay the loan at the terms specified by the borrower. [91] Loans developed into more and more complex forms throughout the Republic and Empire periods, and one of the offshoots was known as a *fenus nauticum*, or sea loan. [92] This loan was meant exclusively for maritime uses, such as the building or purchase of vessels, paying for carriage of goods, or paying for necessaries for seamen. [93] These loans were especially risky for lenders, because the usual terms of the loan eliminated the borrower's duty of repayment if the ship wrecked or otherwise did not perform as it was expected. [94] However, for this release the borrower had to pay a substantial increase in interest for the loan. [95]

The sea loan also forwarded the important public policy of promoting ancient shipping, by allowing shippers to accomplish what in effect was insurance on the goods. Marine insurance has its roots in the sea loan, [96] because buyers

eventually started taking loans out for the purpose of paying for goods if they were lost at sea. If the goods arrived safely, the buyers simply paid back the loan immediately with the premium that was accumulated by interest. Eventually, this evolved into insurance policies based on the sea loan that didn't involve loan money at all; borrowers would pay a premium for coverage and the lender would only be obligated to "lend" the money in the event the goods covered were lost at sea. [97]

Modern ship financing and marine insurance works under different theories than in ancient times, but the basic idea of securing valuable cargo from the perils of the sea are alive and well. Today, modern marine insurers (the largest and perhaps the most trusted is Lloyd's of London) require more security than a simple *stipulato*, but marine insurance reduces the costs associated with risk on the high seas and provides many more manufacturers and shippers the ability of sea shipping than would be available without. [98]

V. General Average

The former Rhodian doctrine of General Average worked its way into the *Digest* also, and to a large degree it is in the same spirit as is today. [99] General Average is somewhat if a mystery to those who are not familiar with the innermost working of admiralty, because there is not a land doctrine similar to it at all. Essentially, General Average is a risk- and cost-allocation device that the courts use to spread losses at sea across all those benefited by the loss. [100] Take for example an ancient ship carrying the cargo of three different parties – $100 of wheat, $100 of olives, and $100 of iron ore. On its way to the port of debarkation, the ship navigates unknowingly into a storm and is tossed about severely. The captain realizes that the ship can run for shore and wait out the storm, but presently it is too heavy to make it there before

the ship capsizes. The captain orders the iron ore tossed overboard, lightening the ship, and saving the rest of the cargo.

Fast forward several weeks when the owners of the iron ore sue over the loss of their cargo. The courts will (and have since pre-Roman times) order all of the parties benefited from the loss of the ore (the two other owners of the cargo as well as the owner of the ship) to compensate the owner of the ore for her loss. [101] "But for" the loss of the ore, the entire ship, its crew, and the remaining cargo would have been lost as well. The closest approximation of General Average in land law is unjust enrichment (restitution theory) in contract law; [102] however, the two differ greatly because the owners of the saved cargo do not have a say in whether the iron ore is tossed overboard or if the ship if left to the perils of the sea. [103] Admiralty courts in Roman times as well as today imposed liability on the owners of the saved cargo merely because their property was saved where others were lost, and justice requires compensation.

Essentially, the process works the same today as it did in Roman times, but the procedures are more complex (involving a variety of specialized adjusters to determine exactly how much the saved cargo's value was increased, [104] compared with the value of what was lost) [105] and, because of increased cargo containerization on common law countries' ships, [106] disposing of cargo is difficult to do while at sea. General Average is usually only available in a few modern circumstances, [107] but we own the basic concept to the Romans.

In general, cargo loss is no longer an issue on modern container ships unless the entire vessel is lost. [108] Instead, courts are likely to apply the doctrine to expenses incurred by the vessel in actions required to save the vessel itself or protect its cargo from unreasonable damage or destruction. [109]

VI. Conclusion: The Classical Legacy of Admiralty

"The empires on land rose and fell, one after another; and from time to time Europe's land found itself in a general condition of political and legal chaos. But, through all these vicissitudes there lived on at least one continuous, growing, and mature body of law. The sea-law continued, independently of racial and dynastic changes, because its vogue was in a region owned by no king or tribe or chieftan – the Sea. The galleys were its home. The mariners of all waters had a common life and experience; their common guide was the sun by day and the stars by night; and so the common custom of sea-merchants was sealaw." [110]

Stemming from the mess that Roman jurisprudence became in the later years of the Empire, Emperor Justinian codified the body of Roman laws, decisions, and decrees into his *Institutes* and his *Digests*. The Roman law descended down to us through the middle ages in this manner, and that is why the civil, codified law systems of Western Europe are recognized as "Roman Systems." Within this codification, much of modern Admiralty survived in its original form. [111] Both historians and jurists alike recognize that in addition Admiralty's unique nature made it particularly resistant to the evolution that laws undergo with the passage of time: the rise and fall of empires, the crowning of new leaders, popular revolutions, and changing societal norms that are inevitably worked into law in the form of public policy or equity exceptions. [112] Where Roman laws on land fell into disuse with the disintegration of the Empire, maritime law lived on because the Romans adapted customs that were already in use for their own, and when they disappeared the seafarers of Europe kept doing what they had done for hundreds of years previous. [113]

It has been noted that Admiralty as Anglo-American law understands it is more akin to the civil law than to common law, and for good reason. When the Romans left England during the decline of their empire, their law left with them. [114] Over hundreds of years the English developed new theories of liability for torts and contracts and distinguished principles of law into different disciplines as we do today. [115] The United States inherited these principles before the American Revolution. [116] However, the admiralty and its intricacies lived on among the seafaring nations of Europe and were incorporated into medieval documents such as the Laws of Oleron and the Laws of Wisbuy, which bridged the gap between the ancient admiralty and maritime law and what we know today. [117]

The next time you go on a cruise, take a ferry boat across a river, read the latest *Master and Commander* book, or even see a cargo container rumble by on a train as you wait next to a railroad crossing, think about the rich history of the Anglo-Saxon admiralty and maritime tradition and its foundation in classical history.

This is the second part of a two part series. The first part was published on February 15, 2007, and can be viewed under the "Transportation" tab on the left side menu.

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[2] *Id. See also* 1 BENEDICT ON ADMIRALTY §§ 2-5 (Lexis 2006).

[3] *See Roman Empire*, WIKIPEDIA (March 14, 2007), http://en.wikipedia.org/wiki/Roman_Empire.

[4] *See id.*

[5] THOMAS J. SCHOENBAUM, 1 ADMIRALTY AND MARITIME LAW § 1-3 (Practiconer's Treatise ed., 2004).

[6] KARL CHRIST, THE ROMANS 1997-99 (1984).

[7] *See id.*

[8] *See* SUETONIUS, THE TWELVE CAESARS 329 (Penguin Classics ed., 1989).

[9] *Id.*

[10] CHRIST, *supra* note 6, at 60-62.

[11] *Id.*

[12] SPENCER C. TUCKER, VIETNAM 22 (1999).

[13] Admiralty and maritime law is considered separate doctrinally than land-based law. This is so even for doctrines that seem similar or even synonymous with its continental cousins, such as the comparisons between the general maritime law's negligence and common law negligence. For example, both forms of negligence involve a duty of care, breach, causation, and damages, but maritime law typically modifies the duty of care to activities on the high seas, and allows the claim only against those in navigable waterways. Keep these policy differences in mind – the law on sea versus the law on land – while looking at admiralty topics. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW §§ 1-5, 3-2, 3-3 (4th ed., 2004) (hornbook edition).

[14] CHRIST, *supra* note 6, at 121.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 122.

[18] *Id.*

[19] *See* LIVY, THE HISTORY OF EARLY ROME 234-235 (Penguin Classics ed., 2003).

[20] *See* CHRIST, *supra* note 6, at 121-22.

[21] *See* LIVY, *supra* note 19, at 234-35.

[22] *See* text accompanying note 1, *supra*.

[23] CHRIST, *supra* note 6, at 131.

[24] *Id.*

[25] *Id.*

[26] *See* 1 BENEDICT ON ADMIRALTY, *supra* note 3, at § 3.

[27] *See* CHRIST, *supra* note 6, at 131-5.

[28] *See id.*

[29] *See id.*

[30] *See generally* SCHOENBAUM, *supra* note 5, at §§ 1-1,3.

[31] *Id.*

[32] JUSTINIAN, THE DIGEST OF ROMAN LAW 14 (Penguin Classics ed., 1979).

[33] The Romans were generally unconcerned with omissions, such as a dereliction of an affirmative duty in modern times could give rise to liability.

[34] OLIVER WENDELL HOLMES, THE COMMON LAW 8, 10-12 (Barnes and Noble ed., 2004) (1881).

[35] *See id.*

[36] *Id.* at 10.

[37] The statutes were alive and well in the east empire (where Justinian reigned), but it should be noted that law was in short supply in the west during those years. It is questionable whether the code had any effect west of Greece, but certainly the traditional maritime laws that were customary across the Mediterranean were in force.

[38] JUSTINIAN, *supra* note 32, at 88.

[39] *Id.*

[40] *Id.* at 89.

[41] *Id.*

[42] *Id.*

[43] CHRIST, *supra* note 6, at 124. (In this sense, "captain" refers to any person on board a vessel that is in charge of men, not only the person in charge of the vessel itself).

[44] *Id.*

[45] *See generally id.* at 63-94.

[46] *Id.* at 123.

[47] *Id.*

[48] *Id.* at 124.

[49] *See id.*

[50] SCHOENBAUM, *supra* note 13, at § 12-2.

[51] *Id.* at § 3-3.

[52] *Id.* at § 3-1.

[53] *See generally id.* at §§ 3-9, 4-28.

[54] *See id.* at §§ 4-8, 4-9.

[55] *See generally id.* at §§ 6-1, 6-3.

[56] *Id.* at § 6-2.

[57] *Id.* at § 3-6.

[58] Id. at § 3-10.

[59] JEFFERY FERRIEL AND MICHAEL NAVIN, UNDERSTANDING CONTRACTS 21 (2004).

[60] *Id.*

[61] *Id.*

[62] *See* note 27, *supra*.

[63] *Id.*

[64] Tony Weir, *Contracts in Rome and England*, 66 Tul. L. Rev. 1615, 1620 (1992).

[65] Justinian, *Institutes*, III.19

[66] R.W. LEE, THE ELEMENTS OF ROMAN LAW 256 (3rd ed., 1986).

[67] *Id.*

[68] DAVID JOHNSTON, ROMAN LAW IN CONTEXT 77 (1999).

[69] Unlike today, the Roman "business" of shipping was highly formal. The average person could not send even small items without hiring a courier – the postal system wasn't quite invented yet! Because of this formality, only the strongest contracts would have been used.

[70] *Id.* at 77-78.

[71] *See id. See also* Allen Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 589 (1969).

[72] *See* Farnsworth, *supra* note 71.

[73] ALLEN FARNSWORTH, CONTRACTS 599-600 (4th ed., 2004) (hornbook edition).

[74] Even in a sales contract, Roman law required that the terms be definite in price and material. Thus, a generic good such as wheat could not be the subject of a contract because the agreement must have been for a specific bunch of wheat. This was almost impossible to articulate in the ancient world as it would be in modern times. *See* JOHNSTON, 79-80.

[75] JOHNSTON, *supra* note 74, 79.

[76] *Id.* at 80-83.

[77] *Id.* at 81.

[78] *Id.* at 83.

[79] *See id.* at 96-98.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 97.

[83] *Id.* at 83. For information on modern contractual warranties, *see* FERRIEL AND NAVIN, *supra* note 68, at 357-407.

[84] *Id.*

[85] *Id.*

[86] *Id.* See also Erasmus Benedict, *The Historical Position of the Rhodian Sea Law*, 18 YALE L.J. 223, 240 (1909).

[87] *Digest* 14.2.3

[88] *See also* SCHOENBAUM, *supra* note 13, at § 15-1.

[89] JOHNSTON, *supra* note 68, at 92.

[90] *Id.* at 84.

[91] In Ancient Rome, the standard interest rate for loans was 12%, or 1% per month. This was only customary and lenders were usually free to set their own interest rates at their own needs. Occasionally the government would set limits on interest rates, but these were rare before the Byzantine period.

[92] JOHNSTON, *supra* note 74, 95-96.

[93] *See id.*

[94] *Id.* at 95.

[95] *Id.*

[96] There is some evidence that marine insurance was also practiced in Mesopotamia, but in a different form than their Roman counterparts. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 913 n. 5 (Hornbook ed., 2006).

[97] *See Id.*

[98] This principle also applies to other forms of transportation law, such as railroad freight shipping.

[99] SCHOENBAUM, *supra* note 13, at § 15-1.

[100] *See generally Id.*

[101] *See generally* FERRIEL & NAVIN, *supra* note 59, at §§ 15.01-15.03.

[102] *See* SCHOENBAUM, *supra* note 13, at § 15-1.

[103] *Id.*

[104] *Id.*

[105] *Id.* (Professor Schoenbaum notes that these calculations, performed by dedicated general average adjusters, can sometimes take years to accomplish).

[106] *See generally* MARC LEVINSON, THE BOX (2006).

[107] *See* SCHOENBAUM, *supra* note 13, at § 15-1 (noting that modern general average expenses can be as diverse as charges run up at an emergency port of refuge to charges relating to repairs).

[108] Shipping containers are large metal boxes that are packaged and sealed at the sender's business or factory, and then shipped as a unit to be opened at the buyer's business or factory. Containers save countless hours of time loading and

unloading ships, because their uniform size makes stowage easy by crane. This reduces shipping costs tremendously. See generally LEVINSON, supra note 106.

[109] See text accompanying footnote 107, *supra*.

[110] *Quoted in* BENEDICT ON ADMIRALTY, *supra* note 3, § 2.

[111] BENEDICT ON ADMIRALTY, *supra* note 3, § 2.

[112] *See* 1 SCHOENBAUM, *supra* note 5, at §§ 1-2, 1-3., 1-4.

[113] *See id.*

[114] Allen Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 589 (1969).

[115] The common law approach seeks to find a "perfect" metaphysical law by applying established doctrine to a plethora of different fact patterns over time, thus finding exceptions and new doctrine as law evolves. This did not readily apply to maritime law as uniformity is a good in itself, especially when seamen and others on board vessels can speak a multitude of languages and have other barriers to direct, meaningful communication.

[116] As a product of our English roots, admiralty law was established early in the colonies. This is probably a matter of the maritime nature of the connections across the Atlantic between England and her colonies. The influence of other world powers in North America – France, Spain, and the Netherlands – didn't influence this maritime law because they all shared in the same past as did England.

[117] SCHOENBAUM, *supra* note 6, § 1-4.

AUTOMATED DOCUMENT REVIEW: COST SAVER FOR THE STARTUP FIRM?

Paper cuts, tired eyes, and boredom are all terms associated with the task of document review. Lawyers may spend countless hours poring over documents for a single word, phrase or name. Those hours quickly add up, especially when there are hundreds or thousands of documents. Document review might be an income generator for a large firm that can afford to let a new associate sit in a room and sift through stacks of paper, but the same task might cripple the operations of a small firm or solo practitioner. [1] "With discovery requests growing exponentially, the legal department's challenge is to get smarter and faster or to spend more money and time in reviewing documents." [2] The American Bar Association reports that 48 percent of attorneys are solo practitioners. [3] Furthermore, only 14 percent of attorneys work in firms with more than 100 attorneys. [4] Is there anything that small firms and solo practitioners can do to make the arduous task of document review more efficient? This article will address the previous question by mentioning the potential cost and accuracy benefits of automated document review. [5]

Cost is a real concern when it comes to document review. In one study the cost of manually reviewing 30 gigabytes of data could cost $3.3 million whereas an automated review could cost less than $360,000. [6] A small firm may never think of taking on a case with 30 gigabytes of data, but the introduction of automated document review may change that.

Automated document review will not help firms unless it is accurate. In one study, the accuracy rate for an automated document review of 48,000 documents

ranged from 95 percent to as high as 98.8 percent. [7] On the other hand, the accuracy rate for manual review of the same documents averaged 51.1 percent. [8] Automated document review not only promises to reduce the cost of document review, but also to reduce the cost of not finding the right documents. [9]

For those looking to hang a shingle as a solo practitioner or small firm, automated document review may reduce costs and make otherwise impossible cases manageable, especially if competition drives down the price of automated document review. [10]

End Notes:

[1] See Anne Kershaw, *Automated Document Review Proves its Reliability*, Digital Discovery and e-Evidence, Nov. 2005, at 10, available at https://www.lexisnexis.com/applieddiscovery/NewsEvents/PDFs/200511_DDEE_LegalLandscape.pdf ("Traditional methods of document review are typified by manual review using contract attorneys, entry level lawyers or paralegals.").
[2] Tom Strack, *Accelerating Document Review*, Metropolitan Corporate Counsel, Sept. 2006, at 30.
[3] American Bar Association Lawyer Demographics Summary, www.abanet.org/marketresearch/lawyerdem2004.pdf .
[4] *Id.*
[5] Automated document review is the use of some form of computer program to aid the process of reviewing documents. There are various forms of automated review, some forms look for selected criteria and others look for certain groups of words, for a general discussion of the various types of automated document review programs see Kershaw, supra note 1, at 11.

[6] Kershaw, supra note 1, at 10.

[7] *Id.* at 12.

[8] *Id.*

[9] *Id.*

[10] *See Id.*

IRS STUDY CONFIRMS THE OBVIOUS

I. Introduction

Tax exempt organizations, by design, do not have to answer to shareholders. The executives of these organizations do not feel the same pressures as do executives of taxable, for-profit organizations to run the entities in the most streamlined shareholder-interest-maximizing manner. Instead, the taxpaying public (who arguably subsidizes the activities of the tax-exempt sector) relies on detailed government regulation, the vast majority of which is found in the Internal Revenue Code, to ensure that the tax exempt arena neither becomes a black hole for this country's resources nor a playground for the very wealthy. As part of this monitoring charge, the IRS recently completed a three-year investigation into the compensation of executives of tax-exempt corporations.[1] This article discusses the objectives and methodology of this investigation, its findings and its minimal impact.

II. Analysis

The Executive Compensation Compliance Project (aka "The Project") was initiated in response to a budgetary reorganization that came about in 2004 in which two new offices (the Exempt Organizations Compliance Unit and the Data Analysis Unit) of the service were created.[2] In this, their maiden voyage, the offices sought to accomplish threefold: (1) to "increase awareness of compensation as a compliance issue [and] establish [an] enforcement presence," (2) to "observe the practices and

procedures exempt organizations use to determine compensation of their officers, directors, trustees, key employees, and related persons" and (3) to "assess and enhance tax law reporting and compliance with respect to compensation practices . . .."[3] By performing an informal audit of existing practices within the tax exempt world of compensation, the offices hoped to both strike the fear of an actual crackdown into the hearts of the organizations, as well as assess the existing law as a monitoring mechanism.

In order to achieve these ends, a bi-part plan of attack was employed. In Part I, letters were sent to four categories of public charities and one category of private foundations whose tax filings from the prior year had been deemed routinely suspect, generally because of some compensatory omission.[4] In Part II, a particular aspect of compensation was addressed — that of improper compensation through an "excess benefit transaction" to "disqualified persons" within the meaning of section 4958 of the Code.[5] Under this section, any party deemed to be in a position to wield "substantial influence" over the affairs of a tax exempt organization is limited in the benefit that person can personally receive from the organization in the form of compensation — compensation outside of the limited allowable sphere is deemed an "excess benefit," and an excise tax is placed on those disbursed funds or other value.[6] Because "excess benefit" is a particular area of abuse where there is oftentimes incestuous overlap between the titles of benefactor, director and executive, this study felt it important to scrutinize the compensation received by "disqualified persons" in three categories of public charities, and one category of private foundations.

The findings of the study were somewhat unsurprising. Part I revealed much "confusion" in the way that executive compensation was intended to be reported — the letters sent to the various organizations asking them for additional information regarding their omissions were met primarily with "clarifying information" not requiring of a re-file, but also many instances of refilings.[7] Part II resulted in the proposed collection of some $20 million in excise taxes for various compensation and benefit violations.[8] While the results suggested that private foundations perhaps engaged in more excess benefit transactions/excessive compensation than did the public charities, these results were skewed by the facts that (1) the public charities had some difficulty understanding some questions that resulted in false positives for excess benefit transactions, and (2) the questionnaires created enough of a notice effect that a great deal of the excess benefit transactions supposedly being engaged in were corrected before a formal audit.[9]

III. Conclusion

What does this study mean, going forward, with regard to what the IRS can do to keep better tabs on the compensation that tax exempt organizations are doling out? "For better or for worse, the tax form is the nonprofit disclosure instrument."[10] Dan Prives, a blogger and former finance director at World Relief questions the way that very large nonprofit organizations — in this instance, Yale University — report their specific expenses and securities transactions.[11] In a telephone interview with the New York Times, Prives is quoted as having said that he was surprised "because usually A-list nonprofits like Yale

are pretty accurate in their reporting . . . It threw a whole monkeywrench into my thinking about what's being achieved by publishing these [tax] forms. You can have errors in plain sight and nobody's picking it up."[12] While this study may have dug up a few instances of underreporting and overcompensation, the fact remains that even an intensive three-year study like this hardly makes a dent in the tax exempt world. Only 600 organizations total were targeted by this study, compared to the more than 1.5 million organizations that make up 10% of this country's GDP — and these numbers are ever-growing.[13] It is possible that, at least insofar as public charities are concerned, there is enough of a donation market (that is, competition for donations among public charities) that public charities do have incentives apart from the threat of audit to maintain efficient, up-and-up administrations. However, private foundations will likely forever be an appealing option for wealthy individuals looking for a tax shelter cloaked in goodwill. This author doesn't have a solution to the problem that studies like these merely confirm — let's just hope that these societal costs are outweighed by whatever societal benefit the world of tax exempt organizations is meant to impart.

[1] Report on Exempt Organizations Executive Compensation Compliance Project–Parts I and II (Internal Revenue Service March 2007), *available at* www.irs.gov/pub/irs-tege/exec._comp._final.pdf.

[2] *Id.* at 1.

[3] *Id.* at 2.

[4] *Id.* at 3-4; *see* 26 U.S.C.A Â§ 4958 (West 2007).

[5] *Supra* note 1 at 4.

[6] *See* 26 U.S.C.A. Â§ 4958 (West 2007); *see also supra* note 1 at 2.

[7] *Supra* note 1 at 5-9.

[8] *Id.*

[9] *Id.*

[10] Stephanie Strom, *I.R.S. Finds Errors in Tax Reports of Nonprofits*, N.Y. TIMES, March 1, 2007.

[11] *Id.*

[12] *Id.*

[13] Stephen C. Gara, Khondkar E. Karim & Robert E. Pinsker, *The Benefits of XML Implementation for Tax Filing and Compliance*, THE CPA JOURNAL, December 2005, *available at*www.nysscpa.org/printversions/cpaj/2005/1205/p66.htm.

DON'T FRANCHISE ME! THE NFL'S EMERGING DILEMMA

I. Introduction

This past National Football League ("NFL") off-season, four Pro Bowl-caliber defenders were eligible for free agency in some form. [1] Two received contracts that guaranteed approximately $20 million each, while the other two agreed to contracts that guaranteed less than half this amount. [2] The four defenders were linebackers – Adalius Thomas and Lance Briggs and corner backs – Nate Clements and Asante Samuel. [3] All of them hoped to sign lucrative contracts with a significant portion of that contract guaranteed. While Clements and Thomas cashed in, Briggs and Samuel were not as lucky – they were designated with the franchise tag. [4] Accordingly, Samuel and Briggs threatened to hold-out until deep into the season to voice their disgust with the stigma of franchise designation. [5] By holding out, a player refuses to take the field until his contract situation is remedied. [6] In light of this summer's high profile protests, the current system of franchise designation is crying out for reform.

II. Background

The National Football League introduced free agency and the franchise tag designation in 1993. [7] The players association agreed to the franchise designation simply because no form of free agency existed prior to the first collective bargaining agreement. [8] Under the NFL's collective bargaining agreement, the franchise tag allows a team to sign one of its free agent's, restricted or unrestricted, for a salary equal to the average of the top five players at the respective position. [9] This process can be repeated. [10] The player can avoid

the franchise designation if another team chooses to part with two first-round draft choices as compensation for signing this player away from his current team. [11]

The franchise tag was initially thought to benefit owners and players alike. [12] The owner is virtually guaranteed that he can retain an integral player for at least one additional season because most owners will not forfeit two first-round picks for a player. [13] The player is guaranteed a large guaranteed salary for a season. [14] The underlying problem lies within the nature of NFL contracts and the lack of freedom associated with the franchise tag.

III. The Defenders Case Study

Unlike the Major League Baseball and the National Basketball Association leagues, salaries in the NFL are not guaranteed. [15] The likelihood of a career-ending injury is also higher in professional football based on the physical nature of the game. [16] Under the current system, players seek pay days that generate guaranteed money, in the case that a career-ending injury is sustained. Adalius Thomas successfully avoided being franchised by the Baltimore Ravens and signed a lucrative contract worth a guaranteed $20 million dollars over the first two seasons with the New England Patriots. [17] Briggs and Samuel were not as fortunate. The Chicago Bears designated Briggs as their franchise player, and he will only earn $7.2 million dollars this season. [18] Samuel was designated a franchise player by the New England Patriots, and will earn nearly $8 million. [19] Fellow free agent defensive back Nate Clements avoided franchise tag limbo and signed a contract that includes a guaranteed $22 million. [20] The latter have no say in whether or not they will be franchised. With

disparate results and talent for equally talented players, something is wrong with this picture.

IV. Options Open to a Franchised Player

When a player is franchised, he is left virtually without recourse. If a player is unwillingly franchised, he is bound by the collective bargaining agreement to sign the offer sheet or hope that another team is willing to exchange two first-round draft picks in exchange for the franchise-designated player. [21] Two first-round picks are valuable commodities that allow a team to infuse its roster with young and promising talent. This cost has been deemed too high by most owners. [22]

The current options available to players who would like to avoid the franchise designation are neither financially desirable nor generally feasible. The player can either (1) hold-out or (2) find a team to relinquish two first-round draft picks to compensate the current team for forfeiting its rights to the player. [23] Briggs and Samuel, upon being tagged and seeing the guaranteed dollars thrown at their contemporaries, threatened prolonged hold-outs. [24]

The threat of a hold-out does not carry much weight. A holdout would only serve to (1) drastically reduce the player's payday, (2) portray the player as selfish, potentially alienating him from teammates, and (3) depict the player as a malcontent in the eyes of potential team suitors. The players are unhappy with the status quo, but the owners will not relinquish the franchise tag because it protects them from losing their best players. While this may seem unjust, courts have also upheld the franchise tag as a valid practice. [25] Linebacker

Wilbur Marshall challenged the validity by filing memorandum in federal court, where the designation was deemed fair and reasonable – the court stated that market conditions still favored players. [26] Seeing that the franchise tag is a valid practice, the players will have to seek a forum other than the courts to address their issue with the designation. [27]

V. Conclusion

A possible solution to this problem lies not in eliminating the franchise tag designation, but in restructuring it. The franchise tag allows for a player to be designated as a franchise player for up to three seasons. [28] This discourages a team from signing a player to a long-term contract, since owners can always fall back on franchising the player the following season. This happened to Seattle Seahawks tackle, Walter Jones, who had the tag imposed on him no less than three times. [29] In this restructured solution, the franchise tag could potentially be limited to one season. This would encourage owners to either sign a player to a long-term deal, or let him walk following one year of franchise designation. This solution would benefit both players and teams. The owner would have the player for at least one season, the player would receive both a high salary, and the opportunity to test the open market the following year.

The problem associated with the lack of a player's freedom when franchised can also be alleviated through lowering the cost to sign them. If the cost of signing an otherwise franchised player was lowered, more teams would be willing to sign a franchised player. Currently, a team must forfeit two first-round draft picks in exchange for the franchise player. [30] This price is so steep, it virtually guarantees no owner will decide to utilize this course of action. [31]

Rather than two first round draft picks as compensation for losing the franchised player, the cost could be reduced to perhaps a second-round and fourth-round pick, or two second-round picks. This would encourage owners to sign a player to a long-term deal and it would encourage other owners to make bona fide offers to franchised players.

The collective bargaining agreement was renewed in 2006. [32] Will owners and the players association resolve this issue? The picture will become clearer in 2011, when the agreement expires. [33]

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TURNING BROWNFIELDS INTO BIG GREEN: PRACTICAL CONCERNS REGARDING CONTAMINATED REAL ESTATE

I. Introduction

Greenfields, otherwise known as pristine tracts of land, are becoming scarce as demand for residential property continues to rise, yet environmentalist groups are fighting to preserve these undeveloped areas. [1] How, then, can we provide more residential areas to meet the increasing demand, while refraining from construction on previously unused land? Brownfields very well may be the answer to this fundamental conflict. Brownfields are "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." [2] Some authorities report that there are more than 500,000 abandoned brownfields scattered throughout the United States. [3] While the thought of turning polluted land into a residential area may at first seem unappetizing, brownfield redevelopment is gaining more acceptance as lenders and insurers begin to give financial support for these projects. [4] As more and more builders are taking on these projects, the question remains as to whether the benefits really outweigh the risks.

II. Advantages to Using Brownfields

Those in support of brownfield redevelopment point to the numerous advantages that may stem from taking on these projects. The first possible advantage is the large profit potential for builders who decide to take on these projects. Contaminated sites generally cost the builder less money than other locations, and current technology makes it easier and less expensive for companies to clean up the land. [5] When these two factors combine, builders stand to make a large profit once they turn the land around and sell it at market value. In addition, the

local tax base and job market can be strengthened, because previously underperforming or dormant land will be put to a higher use. [6] The builders will have to employ more workers to clean up the area and construct homes, and both the builders and the ultimate landowners will pay taxes on the land once it is redeveloped. There is also the issue of utilizing existing infrastructure. [7] When builders break ground on greenfields, new roads as well as utility wires and piping must be implemented before the project is fully operational, but when brownfields are used, the existing infrastructure is often salvageable, substantially decreasing time and money spent, as well as reducing waste. From an environmental standpoint, cleaning up brownfields is beneficial because we are improving the environment; toxins from commercial and industrial areas are being removed and in their place we are building homes and parks, a more earth-friendly use. [8] "Brownfield development is the ultimate example of recycling." [9] Using brownfields also helps the environment indirectly because it takes the pressures off for using open and undeveloped land, allowing more of nature to remain unspoiled. [10]

III. Disadvantages to Using Brownfields

While the advantages of utilizing brownfields are many, the disadvantages and potential risks are worthy of consideration. For the developers of these areas, the exact profit potential is unknown for any given brownfield. The exact cost for cleaning up a brownfield can be estimated, but one cannot know for sure until the site has gotten the final seal of approval that the site is clean and ready for residential use, making these projects risky to the investor. [11] This can be somewhat alleviated by the fact that the builder may be able to pass the clean-up costs onto the ultimate buyer or even the government. [12] There is also an issue with how much can really be done with the land once it has undergone remediation. Contaminants may stretch down into the soil, and the legal standards for cleanup may or may not specify that this pollution must be

removed. Therefore, owners of redeveloped brownfields may be limited with what they can do with their land. For example, if the soil three feet below the land is contaminated, owners may be restricted from digging a well or a swimming pool on that land, decreasing their enjoyment and use of their land. [13] The last major disadvantage that may be an obstacle for developing brownfields is the fact that the process takes time and patience. It may take years for a builder to acquire, get necessary approvals, clean up, and start construction on a contaminated site, which requires a degree of dedication and depth of pockets that many private developers simply do not have. [14]

VI. Incentives to Develop Brownfields

Federal and state governments as well as organizations such as the EPA have weighed the advantages and disadvantages of redeveloping brownfields and have thrown their support strongly behind these projects. This is evidenced by various grants, tax incentives, and liability relief that have become common-place offers to those who wish to take on a brownfield redevelopment project. [15] Individual states have given companies incentives in the form of tax benefits and low-interest loans, and in some cases even eliminated "time hurdles and project approval impediments." [16] New York offers developers long-term liability relief, and protects lenders who support brownfield projects. [17] The Federal government has authorized $250 million per year from 2002 to 2006 to assist with brownfield cleanup. [18] These incentives have helped turn these potentially risky projects into consistently lucrative franchises.

V. Potential Legal Issues

While more developers and governments jump on the brownfield bandwagon due to the various incentives discussed above, a lingering question remains: With all of the liability protection given to developers, who is liable if something goes wrong and contamination remains? While technology for cleaning up contaminated sites has gotten better in recent times, there is still a possibility that

some contamination will remain, creating a potential for illness and decreasing the value of the land itself. While it is true that builders must disclose the fact that buyers are purchasing previously contaminated land, is this enough to say that someone is truly making an informed decision? There is likely to be a conflict between the corporate side of the development company which wants to disclose as much as possible to reduce potential liability, and the marketing side which wants to limit disclosure so that the purchase looks as attractive as possible. [19] This conflict could mean that the buyer may not get all of the information and therefore purchase the land without making a truly informed choice. It appears that if these buyers do not actually hire an expert to survey the land for possible contamination, which most buyers fail to do, they become responsible for any contamination of the property even though the contamination was there before the purchase. [20] These homeowners may not even have a remedy against the developer if they were granted liability relief. It is unclear, then, whether ultimate landowners are really the ones bearing the risk.

Another concern is that various standards may be compromised as pressure to develop these sites(and develop them quickly) intensifies. Health and safety should be a chief concern when turning these brownfields around for residential use. Can we ever be truly certain that all of the harmful contaminants have been removed and what the long-term effects of actually living on a reformed brownfield are? Likely not, but high environmental standards will go a long way toward reducing the risks. These environmental standards should be uniform and non-negotiable, so as to assure that political and economical concerns do not rise above the concerns regarding human life. It has been suggested that developers can "negotiate" healthy standards with the EPA during the proposal stage of a new brownfield project. [21] Also, many sites have been de-listed from databases of toxic properties in order to remove the stigma that goes along with that classification. [22] Presumably these properties were put on that list for a reason,

and taking them off only does a disservice to the public at large by misrepresenting the true danger. Uniform standards must go into classifying these properties and determining when they have been sufficiently decontaminated, based on scientific research regarding what degree of contamination is truly safe.

VI. Looking Forward

Brownfield redevelopment programs offer a promising alternative to breaking new ground and increase the likelihood that we will be able to preserve the precious few tracts of land that remain undeveloped. The advances in technology which assist in clean-up efforts, as well as various incentive programs, ensure that this relatively new form of recycling will gain more popularity and continue to expand. It's important to remember, however, that everything comes with a price. It is contaminated land that is at issue here, and in some cases, that contamination rises to an alarming level. Caution must be taken and respect paid to the importance of cleaning the property not only in a cost-effective way in order to turn the all-important profit, but also in a way that will not compromise the quality of human life.

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[3] *See* Bea Grossman & Ram Sundar, *Brownfields Revitalization Law: Incentives, Exceptions, and Concerns*, REAL EST. ISSUES, Winter 2003.

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[5] *Id.*

[6] United States Environmental Protection Agency (US EPA), About Brownfields,http://www.epa.gov/swerosps/bf/about.htm (last visited Mar. 5, 2007).

[7] *Id.*

[8] *Id.*

[9] *See* Oliver, *supra* note 1.

[10] *See* US EPA, *supra* note 6.

[11] *See* Oliver, *supra* note 1.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *See* Grossman & Sundar, *supra* note 3.

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[19] *See* Oliver, *supra* note 1.

[20] Bradford Mank, *Reforming State Brownfield Programs to Comply with Title VI*, 24 HARV. ENVTL. L. REV. 115, 122 (2000).

[21] *See* Oliver, *supra* note 1.

[22] *See* Houldin & Pohle, *supra* note 16.

SIRIUS-XM "MERGER OF EQUALS" FACES REGULATORY CHALLENGE

SIRIUS Satellite Radio and XM Satellite Radio announced plans for a "tax-free, all-stock merger of equals" in which XM shareholders will receive 4.6 shares of SIRIUS common stock per 1 share of XM stock owned.[1] The planned merger has raised eyebrows as to whether the Federal Communications Commission (FCC) will approve the combination, particularly as under a current FCC rule SIRIUS and XM are prohibited from acquiring each other's licenses.[2] Based on this FCC rule, one has to wonder whether this is termed a "merger of equals," despite what looks like an acquisition of XM by SIRIUS, to evade harsher FCC scrutiny.

I. Terms of the Merger… of "Equals"?

Although termed a "merger of equals," this transaction appears to fit the model of an acquisition of XM by SIRIUS.[3] For one, XM shareholders will receive a certain amount of SIRIUS stock in exchange for their XM shares[4]. Second, XM shareholders will receive a 22% premium on that share transaction[5], resembling the price of a control premium in an acquisition. Third, SIRIUS's Chief Executive Officer, Mel Karmazin, will lead the combined entity as CEO, but XM's CEO, Hugh Panero, "will not have an executive role" in the new entity[6].

The rationale for the terminology "merger of equals" may have to do with the current FCC satellite radio licensing rule. In 1997, the FCC granted only two licenses and, as a measure to ensure ongoing competition, "stipulated that one of the holders would 'not be permitted to *acquire* control of the other.'"[7]. Thus,

the FCC stipulation suggests that the rule would only apply if either SIRIUS acquired XM, or vice-versa, but not if the two companies merged "equally."

II. FCC Reaction

In reaction to the SIRIUS-XM merger announcement, FCC Chairman Kevin J. Martin responded that to pass regulatory scrutiny the companies "would need to demonstrate that consumers would *clearly be better off* with both [i] more choice and [ii] affordable prices."[8] Whether this is a merger of equals or a disguised acquisition, the FCC will consider these factors in its regulatory review.

A. More Choice

There are two possible angles from which one can consider whether a SIRIUS-XM combination will provide consumers with more choice. The first is to consider whether the combined entity will offer greater programming choices to consumers than two separate entities. The second is to consider whether the combined entity will offer more choice to consumers in general, taking into account other radio media sources.

SIRIUS and XM impliedly advocate for the first angle. SIRIUS and XM claim that their combination will provide consumers with a "broader selection of content, including a wide range of commercial-free music channels, exclusive and non-exclusive sports coverage, news, talk, and entertainment programming."[9]

The second angle would look to consumer choices in general. Being that XM and SIRIUS are the only satellite radio providers[10], it seems as though consumers would have less choice with only one satellite radio provider instead of two. However, the FCC could also look to a broader market of music providers, including "digital broadcast radio providers, wireless music services on mobile phones[,] and portable players such as iPods."[11] The problem with this argument, though, is that the broader market of "choice" exists with or without a

SIRIUS-XM merger. In other words, consumers already have the choice to listen to satellite radio or another musical source, regardless of whether there are one or two satellite radio providers. Thus, whether the proposed merger will offer consumers more choice will turn upon whether SIRIUS and XM can deliver the broader radio content as promised.

B. Affordable Prices

SIRIUS and XM describe how the merger will enhance financial performance[12], and one may think that such performance benefits will flow down to consumers. SIRIUS and XM point to "better manag[ing] its costs through sales and marketing and subscriber acquisition efficiencies, satellite fleet synergies, combined R&D and other benefits from economies of scale."[13] However, one must also consider the immense costs currently faced by each company, as well as costs associated with the merger, which may affect consumer prices. Both SIRIUS and XM currently need "to overcome their debt and depreciation costs."[14] In terms of merger costs, currently "XM radio receivers [cannot] receive signals from Sirius, and vice versa."[15] Although XM and SIRIUS are expending efforts to develop a receiver which would be compatible with both signals[16], one logically would not expect this development to be cost-free. Another concern is that the presence of only one company in the market, rather than a pair of competitors, could give the merged entity "more pricing power as the only U.S. satellite radio provider."[17] Thus, while a merger may enhance financial performance, it is not clearly evident that the resulting benefits would overcome the costs currently borne by each company individually and the costs incurred to implement the merger.

III. Predicted Outcome

This is likely to be a difficult challenge for SIRIUS and XM. The FCC's concerns about choice and affordable prices indicate standards against which the FCC may modify the rule if it does not see this as a merger of equals. However, one should not discount the current FCC rule against one satellite radio provider's acquisition of the other's license. In other words, before the FCC even considers choice and affordable prices, it should look to whether the "merger of equals" is really what it purports to be, or whether the combination is a linguistic loophole to the rule against acquiring a competitor's broadcasting license. All in all, even if the FCC accepts the proposed transaction as a "merger of equals" rather than as an acquisition of XM by SIRIUS, it is not clear that the transaction would result in more choice and affordable prices for consumers, leading one to question the practicable viability of the transaction.

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[4] *Id.*
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[6] *Id.*
[7] Joseph Menn and David Colker, *Satellite Radio Competitors Agree to Merge*, L.A. TIMES, Feb. 20, 2007 at Business 1 (emphasis added).

[8] Editorial, *Radio Daze: XM and Sirius, the Nation's Two Satellite Radio Providers, Want to Merge. The FCC Should Let Them*, L.A. TIMES, Feb. 20, 2007, at 20 (emphasis added).

[9] Press Release, SIRIUS Satellite Radio, *supra* note 1.

[10] Menn and Colker, *supra* note 7.

[11] *Id.*

[12] *See* Press Release, SIRIUS Satellite Radio, *supra* note 1.

[13] *Id.*

[14] Editorial, *supra* note 8.

[15] Seth Sutel, *Satellite Radio Rivals XM and Sirius Agree to Combination*, CHICAGO TRIBUNE, Feb. 19, 2007, *available at* http://www.chicagotribune.com/news/local/michigan/chi-ap-mi-xmradio-sirius,1,2557495.story.

[16] *Id.*

[17] *Id.*

"THE IRONY OF ALL OF THIS, IS THAT THEY FAILED TO SEE THE IRONY OF ALL THIS."[1]

An Analysis of the Struggle Between American Law Schools and the Recruiters of the Department of Defense and the Judge Advocate General Corps.

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*In the interest of full disclosure, the author accepted an offer to serve in the Air Force Judge Advocate General Corps' Summer Intern Program in May-August of 2007. The views expressed in this article are solely those of the author.

I: Dear Abby

It was none other the iconic American advice columnist Dear Abby who noted, "fighting fire with fire only gets you ashes."[2]. Despite the truth to Dear Abby's statement, much of the United States' social policy fails to heed this advice so readily accessible in our daily newspapers. Centuries of racial discrimination in this nation was perplexingly countered with affirmative action and other forms of racial quotas. Apparently, lawmakers felt that implementing prejudicial policies would be the best way to curb discrimination. <*p*>

This "fire with fire" countermeasure has also seen implementation in countless numbers of our nation's law schools. The controversies surrounding the U.S. Armed Forces policy of "Don't Ask, Don't Tell" toward homosexuals are well known. In response to this, beginning in the 1980s, U.S. law schools began banning Department of Defense ("DoD") representatives from their campuses. [3]. Somehow, banning an organization because they banned a class of citizens did not seem at all odd to the respective law school administrations. To quote Jon

Stewart, “The irony of all of this, is that they failed to see the irony of all of this.” [4].<*p*>

II: Cutting Infants in Half Was Just the Beginning

The true battle between DoD recruitment efforts and law school administrations began in 1990. In 1990, the Association of American Law Schools (“AALS”) placed sexual orientation into its non-discrimination policy; following the policy was a mandatory facet of AALS membership. [5]. The conflict between AALS law schools and the DoD arose from the DoD’s efforts to recruit for the respective branches of the Judge Advocate General’s Corps (“JAG Corps”), our nation’s attorneys in uniform. The “Don’t Ask, Don’t Tell” policy of the DoD ran contrary to the non-discrimination policy of the AALS. It seemed this town was not big enough for both of these acronym-loving groups. [6].

Enter Solomon. While it would have been far more dramatic had it been the wise King Solomon from the Hebrew Scriptures [7], one cannot be too disappointed with U.S. House Representative Gerald Solomon (“Rep. Solomon”). Rep. Solomon introduced a bill that eventually became the Solomon Amendment [8], mandating, in part, that military recruiters not be denied access to campuses lest the entire university be cut off from funding derived from the Departments of Labor, Health and Human Services, Education, *et al*. [9],[10]. In short, the Solomon Amendment codified the familiar pre-adolescent axiom of “my ball, my rules,” though the stakes increased with of billions of dollars of federal aid.

III: Cry “Havoc” and Let Slip the Dogs of Litigation [11]

When one passes a law that directly challenges an organization such as the AALS, the smart money says there will be a lawsuit filed, *tout de suite*. The opening salvo came in the form of the Supreme Court’s grant of certiorari to the Third Circuit case of *Forum for Academic & Institutional Rights*(FAIR) *v. Rumsfeld*. [12]. Despite FAIR’s vociferous First Amendment Claims, Chief Justice Roberts

noted that the Solomon Amendment regulates conduct and not speech. [13]. Further, the Court found that "a military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message." [14]. The Court reversed the Third Circuit's decision unanimously, finding the Solomon Amendment constitutional. [15]. Law schools now must keep their doors open to military recruiters or face losing considerable federal funding.

While further caselaw exists challenging facets of the Solomon Amendment, the scope of this article cannot accommodate their analysis. For those interested, see *SAME v. Rumsfeld* [16] and B*urt v. Rumsfeld* [17].

IV: Forbear to Judge, for We are Sinners All. [18].

Most first year law students have dealt with the frustration of learning that they would not be taught "the law" but rather instructed on how "to think like a lawyer." This author finds it compelling that while all 1Ls make this impressive pedagogical leap, law schools refused to allow law students to think for themselves when it came to the matter of military recruitment.

While "Don't Ask, Don't Tell" is a policy with considerable flaws, there is hardly a uniform consensus on the matter. Despite this, AALS affiliated law schools arrogantly and unilaterally decided the matter was settled. Law students, in this author's experience, tend to be reasonably bright and capable individuals. Would they not be able to use their lawyer-esque thinking abilities to decide if they would entertain an interview from the JAG Corps or other organization? Should a law student feel "Don't Ask/Don't Tell" morally objectionable, it is entirely within his or her right to abstain from the interview. If a law student objected to the policy yet still felt a duty to serve the nation in a military capacity, should this option not remain open to him or her? It is surely a difficult decision for some, but one that must be left to the individual.

As Justice Breyer noted in the oral arguments of *Fair v. Rumsfeld,* should universities and law schools also have the right to exclude employers who promote affirmative action or racial diversity when the school does not agree with such policies? [18]. Where does law school administration fiat end and personal choice begin once one descends down this slippery slope?

This author finds this particular issue timely in light of the developing lawsuit against the famed New York City firm of Sullivan & Cromwell, LLP. [19]. The suit, filed in the New York Supreme Court, alleges discrimination, abuse, and bias arising from the homosexual orientation of Aaron Charney, an associate with the firm. Should the court find for Charney, one wonders if law schools will band together and deny students the opportunity of On Campus Interviews (OCI) with the prestigious firm. This author truly doubts it.

Consider further the countless white-shoe law firms who have been sued for sexual harassment by female staff and associates. This author struggles to find any OCI "blacklist" at any AALS affiliated law school.

Chief Justice Roberts could not help but note the flagrant hypocrisy of schools that banned military recruiters only to later accept the terms of the Solomon Amendment. The Chief Justice stated that law schools chose to send the message "we believe in [the nondiscrimination of homosexuals] strongly, but we don't believe in it, to the tune of $100 million." [21].

V: We Are Not Little Children, And We Know What We Want. The Future is Certain, Give Us Time to Work it Out. [22].

It is the job of the law school to educate their students to become intelligent and capable attorneys, not to play moral arbiter when it comes to potential employers. Despite the occasionally despicable corporations that the nation's top law firms represent, this author could not find a modicum of administrative protest against firm's placement at OCI. The New York University School of Law has

led some of the most rabid and polemic protests against JAG Corps recruitment, yet there is hardly a hiccup when former Enron counsel, Vinson & Elkins, comes trolling for summer associates. As noted previously, should Sullivan & Cromwell be found to have discriminated against homosexuals, this author expects the silence from law school administrations to be deafening.

As repeated student protests against the JAG Corps at our nation's top law schools have reflected, those students who oppose "Don't Ask, Don't Tell" clearly have the voice to express their discontent. It is insulting that there needs to be Federal legislation strong-arming law schools into allowing military recruiters on campus. Law students are an educated and outspoken lot; we are more than able to make these decisions for ourselves. Additionally, as noted by Justice Breyer, the remedy for issues like discrimination is more speech, not less. [23]. A decision to combat discrimination with further discrimination is setting the stage for a true negative-sum game. Never has the advice from a Dear Abby column rang more true than in this matter — it would be a shame to ignore it.

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[5] Patrick Smith, *Note*, S*olomon's Mines: The Explosion Over On-Campus Military Recruiting and Why the Solomon Amendment Trumps Law School Non-Discrimination Policies*, 79 St. John's L. Rev. 689, 691-693 (2005).

[6] *Id*., at 692.

[7] *See generally*: Shira Schoenburg, *Solomon, available at*:http://www.jewishvirtuallibrary.org/jsource/biography/Solomon.html (last visited Feb. 19, 2007).

[8] 10 U.S.C.A 983 (West & Supp. 2005).

[9] *Id*.

[10] *See* Fitch, *supra* note 3 at 13 & Smith, *supra* note 5 at 697-699.

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[12] 390 F.3d 219 (3d Cir. 2004), rev'd, 126 S. Ct. 1297 (2006).

[13] 126 S. Ct. at 1307.

[14] *Id*. at 1312.

[15] 126 S. Ct. 1297.

[16] 321 F. Supp. 2d 388 (D. Conn. 2004).

[17] 354 F. Supp. 2d 156 (D. Conn. 2005).

[18] William Shakespeare, *Henry VI: Part 2*, *available at*: http://www.online-literature.com/shakespeare/henryVI2/ (last visited Feb. 20, 2007).

[19] Fitch, *supra* note 3, at 17 (citing Transcript of Oral Argument at 3-4, *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 04-1152 (U.S. argued Dec. 6, 2005), *available at:*http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1152.pdf .

[20] *See generally*: *Aaron Charney Archives*, *available at*:http://www.abovethelaw.com/aaron_charney/ (last visited Feb. 20, 2007); Julie Creswell, *Gay Lawyer Suit Accuses Firm of Bias*, N.Y. Times, Jan. 15, 2007, *available at*http://select.nytimes.com/gst/abstract.html?res=FA0B13FE3A540C748DDDA80894DF404482 (last visited Feb. 20, 2007).

[21] Fitch, *supra* note 3, at 18 (citing Transcript of Oral Argument at 38-39, *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 04-1152 (U.S. argued Dec. 6, 2005), *available at*http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1152.pdf .

[22] The Talking Heads, *The Road To Nowhere*, on Little Creatures (Warner Brothers 1985).

[23] Fitch, *supra* note 3, at 18 (citing Transcript of Oral Argument at 38-39, *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 04-1152 (U.S. argued Dec. 6, 2005), *available at*http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1152.pdf .

LOOPHOLE IN THE U.S.A. PATRIOT ACT ENABLES FINANCIAL INSTITUTIONS TO PROVIDE SERVICES TO UNDOCUMENTED IMMIGRANTS

Bank of America recently announced its plan to nationalize its pilot program which provides credit cards to individuals who do not have credit histories and social security numbers. These individuals only need to have maintained overdraft-free checking accounts with Bank of America for at least three months and have a taxpayer identification number.[1] This program, which has been the target of criticism, is the latest of a series of programs commenced by various financial institutions that allows undocumented immigrants and other non-U.S. resident aliens to obtain certain financial services that would not have otherwise been available to them. Although Bank of America has asserted that its program complies with U.S. banking and anti-money laundering laws, many critics argue that this program opens business to illegal immigrants and undermines the anti-money laundering efforts of the U.S.A Patriot Act of 2001. [2]

The U.S.A. Patriot Act of 2001 is a comprehensive anti-terrorism law which has implemented several measures to strengthen homeland security, detect terrorist activities, and combat money laundering.[3] One of the primary purposes of the U.S.A. Patriot Act is to strengthen the anti-money laundering laws, specifically with respect to transactions by foreigners and foreign institutions in the United States. [4] Hence, section 312 of the U.S.A. Patriot Act requires U.S. financial institutions that "maintain private banking accounts or correspondent accounts for any non-U.S. persons or institutions to establish appropriate, specific, and if necessary, enhanced due diligence policies, procedures and controls that are

reasonably designed to detect and report instances of money laundering through these accounts."[5]

Requiring financial institutions to establish procedures for identifying, verifying and monitoring their customers has been financially burdensome to many banks, especially community-based banks which have a significant number of customers who are undocumented immigrants. [6] Verifying the identity of undocumented immigrants for the purpose of detecting money laundering is difficult because they are usually not in INS record system. Regardless, these undocumented immigrants can obtain taxpayer identification numbers from the Internal Revenue Services ("IRS") allowing them to access mainstream financial services such as mortgages. [7] The availability and use of taxpayer identification numbers undermines the anti-money laundering standards put in place by the U.S.A. Patriot Act.

An individual taxpayer identification number ("ITIN") is a tax processing number issued by the IRS to aliens who have to file income tax returns but are not eligible for social security numbers. [8] The main documentary evidence required to establish alien status for the purpose of obtaining an ITIN is an original or certified copy of an unexpired passport.[9] The immigration status of the applicant is not taken into consideration. Although the ITIN is a nine-digit number similar in format to a social security number, its purposes are different. ITINs are created solely for federal tax purposes and are not intended to be used as formal identification for nontax purposes such as obtaining a driver's license. [10] Yet, individuals with only ITINs can open bank accounts and obtain mortgages and other financial services. For example, Wells Fargo & Co. currently offers checking accounts and mortgages to non-U.S. resident aliens who only have ITINs. [11]

ITINs represents a significant hindrance to the U.S.A. Patriot Act because the IRS does not enforce rigorous identity verification procedures. [12] An individual may apply for ITINs via mail or through a registered agent. Also, undocumented immigrants who are not in the INS record system can easily obtain ITINs because their immigration status is not considered. The manner in which these undocumented immigrants obtain their jobs is also not considered. The IRS receives 1 million applications for ITINs each year and has issued over 5 million ITINs since 1996. [13] Yet, not all individuals with ITINs actually file income tax returns. [14] Hence, ITINs can be easily stolen or fraudulently obtained, making it easy for an individual to engage in money laundering.

Bank of America's credit card program sheds light on the shortcoming of the U.S.A. Patriot Act. Although the U.S.A. Patriot Act is aimed at ensuring homeland security and preventing money laundering, it does not prohibit financial institutions from providing their services to individuals with only ITINs. Rather, the Act specifically states that ITINs can be used as an identification number to open bank accounts. [15] In light of this, critics like Congressman John Doolittle have argued that ITINs are problematic because they allow undocumented immigrants assimilate easily into the society thereby hindering efforts to ensure homeland security. [16]

As long as an ITIN is an acceptable form of identification under the U.S.A. Patriot Act, financial institutions will continue to create programs allowing undocumented immigrants to obtain mainstream financial services that would not otherwise be available. The ITIN, itself, does not facilitate money laundering but rather the problem lies in the IRS procedures pertaining to the issuance of ITINs which make it easy for an individual to fraudulently obtain an ITIN. It would not be plausible to eliminate ITINs because they are necessary for federal tax

purposes. However, anti-money laundering efforts of the U.S.A. Patriot Act can be strengthened by requiring the IRS to implement more reliable and rigorous identification verification procedures when issuing ITINs.

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[3] Joseph B. Tompkins, Jr., *The Impact of the USA Patriot Act of 2001 on NON-US Banks, available at*http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/tompki.pdf.

[4] *A Report to Congress in Accordance with sec. 326(b) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act)*, Oct. 21, 2002, Department of the Treasury, *available at*http://www.treasury.gov/press/releases/reports/sec326breport.final.pdf.

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[7] Azam Ahmed & Karoun Demirjian, Undocumented Immigrants Enter Financial Mainstream in U.S., CHICAGO TRIBUNE, Feb. 14, 2007, available at http://www.kansascity.com/mld/kansascity/news/nation/16703298.htm.

[8] *Individual Taxpayer Identification Number (ITIN)*, Internal Revenue Service Website, *at*http://www.irs.gov/individuals/article/0,,id=96287,00.html#apply.

[9] *Id*.

[10] *Id*.

[11] Edwards, *supra* note 1.

[12] Department of the Treasury, *supra* note 4.

[13] *Id*.

[14] *Id*.

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INVESTING IN PRIVATIZED MUNICIPAL INFRASTRUCTURE: ACCOUNTING FOR THE LEGAL RISKS

Fortune Magazine recently declared privatized municipal infrastructure "one of the hottest asset classes in the U.S." [1] Banks and private-equity firms alike are lining up to bid on toll roads, parking garages, and for the first time ever a major U.S. airport. The city of Chicago has plans to privatize Midway Airport, which could go for as much as $3 billion. [2]

Chicago is not new to the privatization game. In fact, the city's lucrative skyway deal became a model for raising government capital to fund highway construction and pay down debt. In 2004 the city received almost $2 billion in exchange for a 99 year toll road lease. [3] Neighboring Indiana recently announced plans to lease a toll road for 75 years to a Spanish-Australian consortium in exchange for $3.85 billion. [4] It plans to use the money to fund over 130 local road projects. [5] Investors like such long-term infrastructure investments because of the relatively steady cash flow and the depreciation benefits. It is estimated that in total, the skyway lease will allow investors to recover anywhere from $300 to $400 million in depreciation benefits alone. [6]

Almost all privatization plans face political hurdles and municipal infrastructure investors are inevitably forced to take on some political risk. A recession, a war, or even an election may jeopardize the viability of an investment. However, such risks are usually publicized before bidding ever takes place and investors can adjust their expectations accordingly. Bidders simply demand higher returns from such investments than from traditional private property investments to account for

the added risk. Investors often fail, however, to account for the legal risks associated with privatization. The risk of litigation relating to the ownership or operation of municipal infrastructure does not end when the bidding begins.

Recent cases in the U.S. and abroad demonstrate that investors must take the potentially high cost of litigation into account when investing in privatized government property. Sydney Airport in Australia was privatized in 2001 and has since been profitable for the investment group involved. [7] It was dealt a blow, however, when it recently lost a case over anticompetitive practices concerning its landing fee structure. [8] One of the biggest airport revenue streams is landing fees paid by the airlines. The ability to set these fees is part of the reason airports are such attractive investments. Airlines have argued, however, that privatization can "exacerbate an airport's natural monopoly" if landing fees are not checked. [9] One of these airlines took Sydney Airport to court over the issue and won, recovering damages along with more negotiating power in the future. [10] Although the airport remains profitable, the investment has yielded less revenue than the bidders anticipated. Other privatized airports, including those in Greece, Italy, and New Zealand have recently been subjects of similar anti-competitive allegations. [11]

The risk of costly litigation is not confined to more active investments like airports, nor is it limited to actions of the investors. In 1999, Chicago faced an anti-trust suit concerning its skyway toll operation before the privatization. [12] The plaintiff argued that the skyway is the only high-speed limited access connection between Indiana and Chicago, and that Chicago's toll operation is in violation of the Sherman Act. [13] The Court held for Chicago, concluding that:

Aside from the Skyway, there are substitute routes between Chicago and Indiana. Judicial notice is taken of the location map attached to plaintiffs' responsive pleadings as exhibit A. That map shows that there are other primary competing routes connecting the Indiana Toll Road and the Dan Ryan Expressway located in the Skyway's service area, including Interstate 80/94, consisting of the Borman, Kingery and Bishop Ford Expressways. [14]

Although the Court ruled for the toll operation, it relied solely on the factual circumstances surrounding the case. The Court's reasoning is certainly no comfort to potential toll road investors, since a suit involving a different toll road in a different area with a different court room may yield a completely different outcome. The number of substitute roads in an area is usually not within the control of the investment group and the nature of transportation infrastructure leaves it prone to allegations of natural monopolization. Interested investors should consider the impact that an anti-trust violation such as this would have on the investment and adjust accordingly. Even a victory for the operation may result in costly legal fees that diminish returns.

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CAN BUSH'S HEALTH INSURANCE TAX PROPOSAL HELP SOLVE AMERICAN HEALTHCARE WOES?

Perhaps the most hot button issue in domestic politics these days is the growing healthcare problem in the United States. In 2004, nearly "46 million Americans, or 15.7 percent of the population, were without health insurance." [1] While the majority of Americans receive healthcare insurance through their employers, the issue has been exacerbated by rising healthcare costs, limited coverage, "an increasing reliance on part-time and contract workers who are not eligible for coverage," and "small employers [who] cannot afford to offer health benefits." [2] Further, even the insured are being asked to make larger contributions for their coverage, forcing many to remain uninsured because they cannot afford these contributions. [3] During his State of the Union Address on January 23, 2007, President Bush sought to tackle the issue by proposing to tax healthcare benefits but to also offer a $15,000 standard deduction or $7,500 deduction for those filling single. [4] However, critics rail against the proposal suggesting it does nothing to lower healthcare costs and eliminates problems with the current system by creating others. [5]

Under current healthcare laws, employees may exclude employer-paid coverage from their gross income as a fringe benefit under Section 106(a) of the Internal Revenue Code and employers may deduct amounts paid. [6] However, those who pay for their own health insurance receive no deduction under Section 106 and receive only minor deductions throughout the Tax Code. [7] These people must spend after-tax dollars on health insurance which are deductible under Section 213 of the Internal Revenue Code "to the extent those expenses

exceed 7.5% of adjusted gross income." [8] This system strongly favors employer-provided health insurance through tax benefits creating an incentive to employers to provide additional compensation tax-free, while disfavoring individual-paid health insurance. [9]

During World War II, the government set out to create an incentive for employer-provided health insurance by allowing employers who paid for health insurance to deduct these expenses while allowing employees to exclude the expenses from their income without recognizing additional taxable income due to wage and price controls. [10] Breaking from this logic, "Bush's proposal in a nutshell is to end the preferential tax treatment for employer-provided health insurance." [11] At his State of the Union Address, Bush proposed to eliminate the full exclusion of employer-provided health insurance and instead treat these amounts as income. [12] However, this income would be subject to a $15,000 standard deduction or $7,500 for individuals filing single. [13] Therefore, under Bush's proposal, people would only pay taxes on health insurance programs exceeding $15,000 or $7,500. [14]

Supporters of Bush's proposal include the nonpartisan Urban Institute who calls the policy "a major step toward improving the efficiency of the market for health insurance. By severing the link between work and insurance, it would offer everyone the same tax incentives to obtain insurance coverage and limit spending on healthcare." [15] Proponents suggest the policy will spur innovation and competition within the health insurance industry, forcing employees to closely compare health care options driving down costs. [16]

Proponents also suggest the proposed system offers many advantages over the current system. Economist Arnold King criticizes the current system suggesting:

"Because consumers are not spending their own money, they accept doctors' recommendations for services without questioning them and without concern for cost. Faced with an insured patient, a healthcare provider is like a restaurant catering to convention-goers with unlimited expense accounts. The customer will gladly take the most high-end recommendation and not worry about the price. Consumers are happy as well. Insulation relieves the patient of the stress of making decisions about treatment. The patient also does not have to worry about shopping around for the best price." [17]

Additionally, critics chastise the current system stating "[t]he biggest beneficiaries of the current system are high earners with employer-provided insurance. The biggest losers in the current system are low earners without employer-provided insurance." [18] Bush's proposal strives to eliminate the taxing disparity between employer-provided health insurance and those who self-insure.

Supporters of the Bush proposal also stress the program is a benefit to small business, as one small business owner wrote to the New York Times that "[p]utting the burden of selecting and paying for health benefits on employees would increase their cost sensitivity, allow better tailored coverage and allow small and medium-size employers to provide other benefits that are every bit as critical to the future of our nation." [19]

The plan has not been well received by labor unions and certain employer groups. [20] "[E]mployers haven't wanted to lose the deduction, and politicians have flinched at the prospect of taxing voters on something they have been getting tax free." [21] Others criticize the plan stressing it "gives tax breaks to the affluent with insurance and fails to help low income uninsured people." [22]

In addition, there have been many concerns about the individual health insurance market. As Richard J. Umbdenstock, President of the American Hospital Association stated, Bush's "tax proposal would have the effect of driving people to the small-group insurance market – a market that has proved unstable. For many people, even with a tax break, coverage would remain unaffordable." [23] The plan is also criticized as not ensuring the availability of health insurance at a reasonable price. [24]

Rather than a uniform credit for individuals of all income brackets Henry J. Aaron, a senior fellow at the Brookings Institution in Washington, suggests "offering larger credits to low-income households, which need help, rather than to high-income households, which don't." [25] A plan such as Aaron's would combat concerns about creating a tax break only for the wealthy while still mitigating the disparity that exists in the current system between employer-provided health insurance and individually purchased health insurance plans. [26]

Despite the taxing differences of the Bush proposal and the current system, many feel that the taxing system is not the proper venue to enact necessary lasting healthcare reform. Other ideas include revising "the antiquated educational requirements needed to practice medicine" in order to create a "plentiful supply of creative, compassionate, and reasonably priced physicians," a national healthcare system, or even structuring an educational system directed at lowering the costs of medical education. [27]

As a Lehman Brothers political analyst noted, "[t]he proposal was not well received in 2005, and we do not expect it to be received very well this year… The probability for enactment is very low in our view." [28] Whichever way the political winds blow, the issue of healthcare reform is not likely to be solved

under the Bush Administration and will still likely be among the most pressing domestic issues in the upcoming 2008 election.

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NO JUST COMPENSATION, JUST REPRESENTATION?

I. Introduction

To attain the office of the Chief Justice of the United States is to reach the culmination of a prestigious legal career in public service. It is a guaranteed opportunity to go down in the history books, to impact the world – some might even call it attaining "legal immortality." [1]

But if this is so, why is Judge Judy making more than 100 times Chief Justice Roberts' salary? Her $25 million annual salary [2] makes Roberts' newly inflated one of $212,000 [3] appear as laughable as some of the more ludicrous plaintiffs that walk into her made-for-TV courtroom.

II: Chief Justice Roberts' Constitutional Crisis

The underpaid federal judiciary is an old story, told by the succession of Chief Justices like a family fable passed down through the generations. The moral of the story remains constant from Chief Justice Burger in 1969 and through Chief Justice Rehnquist's 19-year tenure. The same complaint is now characterized by ChiefJustice Roberts as a "constitutional crisis" in his end-of-year annual report for 2006. [4] Accordingto the Chief Justice, the erosion of "judicial compensation will inevitably result in a decline in the quality of persons willing to accept a lifetime appointment as a federal judge." [5] Chief Justice Roberts also claims that the strength and independence of the federal

judiciary is being threatened, and in a time where the federal dockets are increasingly overloaded. [6] The Chief Justice asserts that some first year associates in the largest corporate firms will earn more than experienced federal judges. [7]

In the Eisenhower administration, roughly 65% of incoming judges came from the private sector and 35% from the public sector. Today's ratio reflects the opposite, wherein less than 40% of judges come from private practice, and about 60% come from the public sector. [8] The Chief Justice believes that this state of affairs is crippling our judiciary in their constitutional role of servicing the United States, because its composition is becoming less diverse. Chief Justice Roberts states that its incoming members are restricted to 1) the independently wealthy individuals who can afford to take a huge pay cut, or 2) the individuals who see the judicial salary as a pay raise. [9]

III: The Judiciary Versus the Corporate Sector

For the supposed lofty stature and cachet of a judicial office, the comparison to starting salaries in the larger legal markets is humbling. Compared even to the average American worker, whose salary (when adjusted for inflation) has risen 17.8% from 1969 to 2005, the salaries of federal district judges fell 23.9% over the same period, creating a 41.1% pay gap. [10] Meanwhile, from 1985 to 2001, the median starting salary for all firms more than doubled from $31,700 to $80,000 and more than tripled at firms with more than 1000 attorneys. [11] Roberts himself took an 80% pay cut when comparing the salary of Chief Justice to his old position's compensation at Hogan and Hartson. [12]

When
he was a partner at Hogan last year, Roberts received an "application" for a first-year associate position from his friend Judge Luttig on Fourth Circuit stationery. The rationale for the joke was based on the fact that a first-year associate's salary at Hogan was higher than Luttig's own salary as an experienced federal judge. [13]. The tables are turned now, as Luttig has since left for the top in-house counsel legal position at Boeing, a position that pays his old government salary many times over. [14] Meanwhile, the Chief Justice's previous corporate salary is merely a memory. Hogan, whose
partners earn at least $725,000 a year [15], just released a statement on January 25, 2007 announcing that the starting salary for a first-year associate would increase to $145,000. [16] For comparison, consider that District Court judges who are usually appointed in their 50s [17] and therefore have significantly more hard-earned experience than your average fresh-faced law school graduate – earn only $165,000 per year. [18]
Previous
to entering law school, this author worked for McKee Nelson LLP, a firm that released an announcement on January 26 (coincidentally, a mere day after Hogan's press release) that they would be setting the bar for the highest first-year salary in the Washington D.C. law firm market at a whopping $160,000 – not including end-of-year bonuses. [19] "It is always our mission not to lose someone because of money," declares William Nelson, McKee's co-founder and managing partner. [20]

IV: The Federal Judiciary – Crisis Free?

What, then,
is the American judicial system's mission? Before one joins wholesale

with the Chief Justice's crusade for cash, it is imperative to further examine whether or not the judiciary is truly losing out on real talent as he claims. Statistically, despite the dire picture that Chief Justice Roberts paints, tenure trends actually remain stable from 1945-2000 [21], contradicting the assertion that there are an increasing number of judges leaving the bench for greener pastures. For a more complete picture of a federal judge's total compensation, it is also important to include the "Rule of 80", a dream-come-true retirement package that puts Social Security quite to shame. In essence, a federal judge can retire at age 65 or later, *or* when his age
and years of judicial service total 80. Afterwards, he continues to receive his current salary for the rest of his life. [22] To receive a pension in excess of six figures for the rest of one's life is a benefit to be taken into consideration when examining judges' actual compensation.

Moreover,
figures show that although there are some members of the judiciary leaving at a relatively young age, their loss is balanced by members that serve well into their nineties; and most serve into their mid-seventies. [23] A study showed that only 21 out of the 209 judges that resigned from 1789-1992 did so for inadequate compensation – the majority resigned for age or health reasons. [24] One of Chief Justice Roberts' strongest arguments lies in his illustration of the increased proportion of judges coming from the public sector since the Eisenhower administration. However, this trend may be explained from the simple fact that the size and scope of the government has expanded greatly

since the 1950's, creating numerous additional public positions for many more government lawyers. This group now constitutes a greater percentage of lawyers as a whole, which could explain the differential of today's judiciary appointees versus those appointed in the 1950's. [25] Chief Justice Roberts also cites the statistic that 17 judges have left their posts in the past 2 years, but fails to indicate that these 17 constitute only 2% of all federal judges. [26] Most personnel or human resources directors in the private sector would envy such an exceedingly low turnover.

V: Conclusion

Though there is disagreement on the severity and degree of the alleged constitutional crisis, it is uncontested that significant hurdles remain in any scheme to raise the judiciary's pay. The judiciary will have to turn to Congress for a salary increase, when members of Congress themselves make about the same salary. Oddly enough, "no one has noticed any steep decline in the ambition of able people to serve in Congress as a consequence of the lousy pay." [27] Others point to the the equally (if not more) hardworking public servants with less prestigious titles of associate public defenders, deputy district attorneys, and assistant attorneys general [28] – all of whom receive significantly less in compensation and retirement benefits, and certainly less recognition for their work. Further, at an economic stage in America where jobs are being lost and the nation's deficit grows, "it would be politically unpopular to recommend a significant compensation increase for individuals whose salaries already surpass that of most Americans." [29] For illustrative purposes, Representative Don Koller of Missouri opposed an increase for judicial salaries in 1999. The poor

south-central Missouri district
he represented had an average annual salary of $15,000. [30] Koller was heard to make the observation that there were 6 judges wanting raises, and 32,000 of his constituents who thought all 6 were "already grossly overpaid." [31]
Non-sympathizers
of the judiciary's wage gap say that if these federal judges are all on the verge of quitting for being underpaid when they knew of these compensation limits prior to appointment to the bench, "they shouldn't have accepted in the first place." [32] Regardless of whichever side anyone lands on, this country and its citizens are capitalistic to the core, and free competition is the name of the game. Edward B. Davis, the former Chief Judge of the Southern District of Florida, commented, "It's not the sort of situation you want. . . I went out and got a job to take care of my grandchildren." [33] Theprivate
sector salary of a corporate attorney fresh off of the judicial bench commands a high premium. Davis stated, "Federal judges can go down the street and make two to three times what they make as judges." [34] He is not alone in his observations. Former Judge Joe Kendall of the Northern District of Texas stated, "If federal judges were paid what an average partner in an average law firm
in an average city was paid," he said, " I'd still be on the bench." [35] If judges increasingly want to
leave the bench for increasingly profitable private practice jobs, it is their personal imperative to do so, when given their options from which to choose. Americans will then have to make their own difficult choice, to decide which they value more: A long tenured judge, or a lower-salaried one.

As a
last observation: Though Chief Justice Roberts primarily defines diversity in terms of financial background, there is much to be said for a different and more vital kind of diversity. In Eisenhower's day, there were few women or people of color on the judicial bench. In 2001, women and racial minorites comprised a third of the federal judiciary, representing a 68% increase from a decade prior. [36] Before we lament alongside the Chief Justice that America is fast losing the diversity of its judiciary, it is important not to overlook the more obvious gains that have been made in the past ten years alone – and to take his 'constitutional crisis' with a few grains of salt.

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THE CLASSICAL LEGACY OF ADMIRALTY: THE PRE-ROMAN WORLD (PART ONE OF A TWO-PART SERIES)

The classical world, western civilization from the dawn of written history to the fall of the Roman Empire [1] in 476 A.D., [2] was dependant on the arteries of transportation that crisscrossed Europe, the Middle East, and Africa. Like the modern world, no state existed entirely in a vacuum. Whether an empire or a city-state lived or died depended largely on its ability to move people and materials efficiently. What we know today as admiralty and maritime law has its earliest roots in the classical period. [3] This body of law was highly developed in antiquity when compared with other legal subjects, especially considering that many admiralty law doctrines are unchanged from their ancient states. Studying the state of admiralty in ancient history sheds much light on the reasons why admiralty is the way it is today, and why it differs from other doctrinal areas of law.

One half of the reason for this sophistication in ancient admiralty was the policy of keeping shipping over water quick, efficient, and effective by making detailed laws that were easy to understand and even easier to implement. The Romans, skilled legalists from the very beginnings of the Republic through the Byzantine era, refined admiralty and provided the means of its transcription into the modern world. This was done by codifying it into Emperor Justinian's *Digests* and *Institutes*, two Roman legal documents of which we are familiar with today. [4] The Romans developed a modern conception of law as a science, and not a series of universal truths, normative goals, or ethical ambitions. [5] The admiralty matters of the *Digests* and *Institutes* were not new

promulgations by Roman jurists, but instead a product of thousands of years of seafaring jurisprudence that the Romans simply borrowed and adapted to their own needs. [6]

The other reason for sophisticated ancient admiralty laws has to do with the volume of materials transported on open water during the classical period. The earliest civilizations through Greece's dominance in the pre-Christian era relied on the Mediterranean Sea and major rivers such as the Nile and the Euphrates for food and transportation. [7] Rome never came into herself until the Christian era when the Empire completely surrounded the Mediterranean and Roman shipping could sail from one port to another unhindered by threats from pirates or enemies of Rome. [8]

This article is part one of a two-part examination of admiralty in the classical period with a special emphasis on the reasons why the substantive law was created in the way it was. The state of ancient shipping and the substantive laws of pre-Greek states, Greek states, and Rome will be analyzed and compared to modern doctrine where applicable. This article specifically concerns the context of the Mediterranean Sea in ancient shipping as well has pre-Roman developments in admiralty. Every effort has been made to use original sources from antiquity. [9]

I. The Mediterranean in Context

Humanity has been traversing open water in ships long before the dawn of written history. [10] The Mediterranean Sea was ideal for western civilization's first tentative steps into seafaring because of its small size and great diversity of ethnic groups located along its shores. [11] Although historical evidence indicates that the earliest shipping probably occurred in the waters around the Arabian

Peninsula, it is clear that the state of the art in ships and seafaring came of age in the Mediterranean. [12]

Although earlier writers hint at the cultural diffusion that was able to occur between different Mediterranean groups, [13] Roman literature is awash in the commerce that occurred in the region. A part of the reason for greater sea trade during the time of the Roman Empire was pure necessity. During the reign of Emperor Gaius Caligula (37-41 A.D.), the population of the Italian peninsula increased to the point that regional farms could no longer sustain the nutritional needs of the population. Rome itself and the outlying areas between the Rubicon in the north and Sicily in the south became more dependant on foreign-produced food. The Roman system of roads, although developed far more extensively there than in other parts of the world, was incapable of supplying all the food necessary to feed the Roman population. Food riots were common, and future Emperor Claudius was nearly killed in one such riot. [14] As a result, Claudius made it one of his imperial goals to drastically revamp and expand the infrastructure of the Italian Peninsula, including deepening and expanding the capacity of the city of Rome's chief port at Ostia. [15] Afterwards, the port and the roads connecting it to Rome were more than adequate to feed the population. [16]

At its height, the Roman Empire completely surrounded the Mediterranean Sea and ships could crisscross its entire span without fear of anything but the natural hazards of seafaring in the ancient world. The city itself was very cosmopolitan by ancient standards, and a Roman of wealth and influence could acquire just about any type of food, material, or service he or she desired. [17] Roman commentator Aelius Aristides notes:

Around the Mediterranean lies the continents far and wide, pouring an endless flow of goods to Rome. There is brought from every land and sea whatever is brought forth by the seasons and is produced by all countries, rivers, lakes, and the skills of Greeks and foreigners. So that anyone who wants to behold all these products must either journey through the whole world to see them or else come to this city…. So many merchantmen arrive here with cargoes from all over, at every season, and with each return of the harvest, that the city seems like a common warehouse of the world. [18]

The types of goods and ports of origin were numerous:

One can see so many cargoes from India, or, if you wish from Arabia…. Clothing from Babylonia and the luxuries from the Barbarian lands beyond arrive in much greater volume…. Egypt, Sicily, and the civilized parts of Africa are Rome's farms. The arrival and departure of ships never cease, so that it is astounding that the sea – not to mention the harbor – suffices for all the merchantmen. All things converge here: trade, seafaring, agriculture, metallurgy, all the skills which exist and have existed, anything that is begotten and grows. Whatever cannot be seen here belongs in the category of non-existence. [19]

The Mediterranean was also an efficient medium to transport troops across vast distances to keep the empire together and ward off enemies of Rome. History indicates that the Romans did not become skilled in building large ships until the Punic Wars, when it was required to send vast amounts of soldiers and materiel across the sea to North Africa to take the war to Carthage's homeland. [20] At that time Carthage was a major naval power itself and conducting an extensive overseas commerce with its own colonies and the Greek city-states. [21] Defeating it was no small feat for the fledgling Roman Navy, and the ship

building techniques developed during the period clearly aided future technological breakthroughs in Rome's peacetime merchant fleet. [22]

Thus, it is clear that the Mediterranean, both geographically and ethnically, was a prime spot for the development of an extensive system of admiralty and maritime laws. Many of these laws were simply adapted from prehistoric maritime customs, of which become incorporated into various legal systems as time progressed. In the development of the law, two major periods are easily distinguishable: pre-Roman admiralty and Roman admiralty. Each developmental period will be discussed separately.

II. Admiralty in the Pre-Greek World

The prehistoric maritime commerce that occurred in the Arabian the Mediterranean Seas was extensive enough to make it necessary for the seamen of the day to develop their own system of customs for ships to interact with each other. These customs eventually were assimilated into the laws of seafaring nations to give their courts more legitimacy in hearing cases involving parties of more than one nation. The most ancient law code known to modern society, the Code of Hammurabi, was developed approximately 3,000 years ago in the Mesopotamian civilization. [23]

The Code outlines laws for all facets of society, but mentioned shipping extensively. Mesopotamia was not a unified state in the sense Rome was a unified state, but instead was made up of a variety of loosely organized cities sharing a common culture. The cities were linked by an extensive river trade that made use of two major waterways in the region: the Euphrates and Tigris Rivers. [24] The Code specifically discusses the remedies of ship collision and the procedure for leasing ships. [25] For example, the law proscribes a rigid cause-

and-effect procedure: a man who loses another's ship while in his custody can only right himself in the eyes of the law by procuring and turning over possession of another ship. [26] Similarly, if the bailee merely founders it, but is able to save the ship and return it to the owner, he was liable to the owner for half the value of the ship in silver; no more, no less, and in no other monetary medium. [27] The Code also details specific compensation owed seamen and longshoremen for certain duties; for example, a seaman who caulks a ship for an owner was entitled under the code to exactly two shekels of silver. [28]

A major theme in the history of admiralty is the almost unbroken evolution of the maritime law everywhere, not in segments occurring in different countries. At least one commentator has noted that most of Hammurabi's Code was heavily influenced by even more ancient Sumerian and Akkadian laws, thus the maritime provisions of the Code may date to those earlier laws. [29] Egypt inherited the basic premises of maritime law from Mesopotamia. Ancient Greek historian Herodotus in his Histories notes that Egypt at its height conducted an extensive commerce on the Mediterranean and he alleges that the Egyptians even circumnavigated the African continent. [30] Egypt's main port, Alexandria, developed into a large commercial center that retained a large population. It eventually became known as a major academic center as well, undoubtedly because of the number of foreign persons coming and going. Egyptian vessels were far more advanced than their Mesopotamian counterparts, and larger too. One such vessel discovered several decades ago measured 150 feet long. [31] Unfortunately, no documents featuring Egyptian maritime law exist today. [32]

As Egyptian sea power began to wane in 1700 B.C., [33] the Phoenician civilization bloomed in the area now occupied by modern Israel and

Lebanon. The Phoenicians are better known to historians as the inventers of the phonetic alphabet copied by the Greeks and Romans and descended as we know it today, [34] but their history implies that they must have had a detailed admiralty law as sophisticated as the Egyptians, if not more so. The Phoenicians were the first Mediterranean civilization to expand via the sea, not just over land. [35] The Phoenicians founded several colonies of quasi-independent city-states all over the Mediterranean, including Byblus, Sidon, Tyre, and Carthage. [36] This expansion was predicated not so much on population control, but instead on commercial goals. [37]

By 800 B.C., Greece became the dominant power of the Mediterranean. [38] Greece, much like the Phoenician civilization, was not a unified empire but instead a series of loosely-organized and occasionally allied city-states sharing a similar culture and similar customs. The Greeks relied on shipping perhaps more than any group before them in history. [39] Due to the decentralized nature of their culture it was generally acceptable for city-states to branch out and create colonies as far away from Greece as the Italian peninsula, Sicily, and North Africa.

Unlike the Phonecians, the Greeks expanded more for population concerns than any commercial or economic reason. [40] Their maritime law and their shipping customs reflected this. The Greeks are unique in the history of admiralty law because their law reflected a distinction between admiralty and maritime law and other, land-based disciplines. The Greeks had their own system of courts to hear maritime claims separate from other courts for land-based claims. At least one part of the reason for this had to do with the unique nature of admiralty claims over other areas of Greek laws. By keeping maritime claims separate, the law

was made more efficient and did not hinder Greek military transports and commerce between the colonies and the mother city-states. [41]

The most active Greek city-state on the Mediterranean was Rhodes, and from Rhodes western civilization received much maritime law passed through the ages, from Rome to the modern day. In fact, our modern understanding of General Average and some concepts relating to collision between ships are directly founded on Rhodian Sea law. [42] Unfortunately, we know of this connection only through references to the Rhodian Sea law through later works; only a very small fragment of the actual Rhodian law exists today, and commentators cannot accurately determine whether the fragment is a part of the code or a judicial enactment. However, it can be inferred from contemporary authors of the time that the Rhodian maritime law was extensive indeed.

Next month's conclusion to our examination of classical admiralty will feature Rome and the many features of modern admiralty and maritime law that it was directly responsible for. Look for it here in the transportation section on March 15, 2007.

Sources:

[1] At the end of Roman influence in Europe, the Empire was divided into two separate Empires by the Emperor Constantine in 330 A.D. Separate sets of emperors ruled the Empires from Rome in the west and Byzantium (later Constantinople and presently Istanbul) in the east. When historians discuss "the fall of Rome" they are referring to the fall of the western empire in 476 A.D. (see note 2). The eastern empire lived in for almost 1,000 years, knowing itself as the "Roman Empire" but modern historians knowing it as the Byzantine

Empire. *See* CHESTER G. STARR, A HISTORY OF THE MODERN WORLD 703-709 (4th ed., 1991).

[2] C. WARREN HOLLISTER, MEDIEVAL EUROPE: A SHORT HISTORY 36 (8th ed., 1996).

[3] *See* 1 BENEDICT ON ADMIRALTY § 2 (2006).

[4] JUSTINIAN, THE DIGEST OF ROMAN LAW 8 (Penguin Classics ed., 1979).

[5] *Id*. at 7.

[6] *Id*.

[7] 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 1-2 (4th ed., 2004).

[8] JOHN BOARDMAN, ET. AL., THE OXFORD HISTORY OF THE CLASSICAL WORLD 754 (1986).

[9] Greek and Latin translations of ancient authors will be from the Penguin Classics edition, or in the alternative from the Loeb Classical Library edition published by the Harvard University Press.

[10] *See* SCHOENBAUM, *supra* note 6.

[11] *Id*.

[12] *Id*.

[13] *See* HERODOTUS, THE HISTORIES (Penguin Classics ed., 2003); HOMER, THE ILIAD (Penguin Classics ed., 2003);XENOPHON, THE PERSIAN EXPEDITION (Penguin Classics ed., 2003).

[14] On the problems of food supply in the early Roman Empire, *see* SUETONIUS, THE TWELVE CAESARS 196-197 (Penguin Classics ed., 1989).

[15] For information and a description of Claudius's expansion project at the Port of Ostia, and an extensive list of ancient sources verifying them, *see* VINCENT SCARAMUZZA, THE EMPEROR CLAUDIUS 168-170 (1949).

[16] For an interesting discussion on the food (and decadence!) of the Roman people, *see* KARL CHRIST, THE ROMANS 108-109 (1984).

[17] ROBERT B. KEBRIC, ROMAN PEOPLE 2-3 (4th ed., 2005).

[18] AELIUS ARISTIDES, TO ROME 11-13, translated in *Id*. at 2-3.

[19] *Id*.

[20] SCHOENBAUM, *supra* note 6, at § 1-3.

[21] JOHN WARRY, WARFARE IN THE CLASSICAL WORLD 126-127 (Barnes and Noble ed., 1998).

[22] *Id*.

[23] SCHOENBAUM, *supra* note 6, § 1-2.

[24] Both flow through modern-day Iraq and are still heavily used.

[25] F. SANBORN, THE ORIGINS OF EARLY ENGLISH MARITIME AND COMMERCIAL LAW 3-5 (1930).

[26] BENEDICT ON ADMIRALTY, *supra* note 3, § 2 note 1.

[27] *Id*.

[28] *Id*.

[29] SCHOENBAUM, *supra* note 6, § 1-2.

[30] *See id*. For Herodotus's account of Ancient Egypt, *see* HERODOTUS, THE HISTORIES 95-173 (Penguin Classics ed., 2003).

[31] BENEDICT ON ADMIRALTY, *supra* note 3, § 2 note 5.

[32] Apparently, little Egyptian law exists today at all besides evidence that the Egyptians had a system of enforcing promises and obligations. *See* SCHOENBAUM, *supra* note 6, § 1-2.

[33] STARR, *supra* note 1, 66

[34] STARR, *supra* note 1, 127.

[35] *Id*.

[36] BENEDICT ON ADMIRALTY, *supra* note 3, § 2

[37] *See* SCHOENBAUM, *supra* note 6, § 1-2.

[38] *Id*.

[39] WARRY, *supra* note 20, 23-24.

[40] BENEDICT ON ADMIRALTY, *supra* note 3, § 3.

[41] *Id*.

[42] Note that the "Rhodian Sea Code" known to legal historians is not directly from Rhodes. Instead, the common understanding is that it dates to the later Roman / early Byzantine period, around the time of the codification of Roman law under Justinian in 533 A.D. It is certain that at least some of the Byzantine Rhodian Sea Code is in fact inspired by the actual Rhodian laws, it is unclear exactly what and to what extent it is.

WHEN COACH BLOWS THE WHISTLE ARE YOU OUT OF BOUNDS?

Everyone likes to make a quick buck. In the summer, garage sales are common in neighborhoods. Some towns hold flea markets. Small carts with various items for sale adorn the aisles of most shopping malls. People sell items on Ebay. At any one of these places you might find a knockoff designer good for sale. As a kid, I had my fake Oakley sunglasses. Just recently, my sister returned from New York having purchased a knockoff Prada bag from a street vendor. Knockoff or fake designer goods exist, but what happens if you sell such goods here in Illinois and hold them out to be real? [1] How about selling such goods here in Illinois and holding them out to be fake? This article will seek to generally answer these questions for non-internet based sales in Illinois.

The Illinois Consumer Fraud and Deceptive Practices Act deems fraudulent business acts unlawful. [2] Under the Illinois Consumer Fraud and Deceptive Practices Act merchandise "includes any objects, wares, goods, commodities, . . . or services." [3] In Illinois, fraud consists of:

(1) a false statement of material fact; (2) the party making the statement knew or believed it to be untrue; (3) the party to whom the statement was made had a right to rely on the statement; (4) the party to whom the statement was made did rely on the statement; (5) the statement was made for the purpose of inducing the other party to act; and (6) the reliance by the person to whom the statement was made led to that person's injury.

[4] Thus, a person likely violates the Act if they knowningly sell knockoff merchandise as genuine. A violation of the Illinois Consumer Fraud and Deceptive Practices Act could warrant up to a $50,000 fine. [5]

The Fraudulent Sales Act governs going out of business sales.[6] If a seller makes a misrepresentation as to the quality of the goods at a liquidation or going out of business sale, and arguably holding an item out as genuine when it is in fact fake would qualify, the person making the misrepresentation can face a class B misdemeanor. [7]

As for selling knockoff goods and holding the goods out to be knockoffs, I was unable to find a case or statute prohibiting such activity in Illinois; you are, however, prohibited from knowingly selling baby food and cosmetics at flea markets. [8]

If you are a consumer, you can find more information about your rights and you can even file a complaint at the Illinois Attorney General's website. [9]

End Notes:

[1] For a discussion of lawsuits filed by famous designers against retailers for selling knockoff products see Stephanie Francis Ward, *Knockoffs Landing on Retail Shelves*, A.B.A. J., Feb. 2007 at 10.
[2] 815 Ill. Comp. Stat. Ann. 505/2 (Westlaw 2007); *see also American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995) (concluding the Act, with respect to airlines, is preempted by the Airline Deregulation Act).
[3] 815 Ill. Comp. Stat. Ann. 505/1 (Westlaw 2007).

[4] *Elston v. State Farm Fire and Cas. Co.*, 691 N.E.2d 807, 816 (Ill. App. Ct. 1st Dist. 1998).

[5] 815 Ill. Comp. Stat. Ann. 505/7(b) (Westlaw 2007).

[6] *Id.* at 350/0.01.

[7] *Id.* at 350(11); 730 Ill. Comp. Stat. Ann. 5/5-8-3(a)(2) (Westlaw 2007) (stating class B misdemeanors are punishable by up to six months in prison).

[8] 225 Ill. Comp. Stat. Ann. 465/5.5 (Westlaw 2007).

[9] http://www.ag.state.il.us/consumers/index.html .

THE BUSINESS OF SURVEILLANCE: BALANCING CONCERNS OVER UBIQUITOUS TECHNOLOGY

Since the events of September 11, there has been increased concern regarding security. To address these concerns, many private and public companies have looked to using various "ubiquitous" technologies to provide surveillance and security services. For example, the global video surveillance industry has seen a boost in growth. Joe Freeman, president of J.P. Freeman Co. Inc., expects the $7 billion global video surveillance industry to almost double within the next few years. [1] As the market for ubiquitous technologies continues to grow and then technology itself improves, some critics grumble that we are ensuring our security at the expense of privacy.

A technology that has come under scrutiny when discussing privacy is Radio Frequency Identification (RFID). RFID draws its foundation in the barcodes and UPC codes found on many products in use today. A reader sends a radio signal to a RFID tag or transponder. The RFID tag responds to the radio signal with information contained on the chip which is received by the reader. Once the devices have coupled, the tag sends a signal that is received by the source with information found on the chip. The tag can be passive, which does not require a power source, or active, which does require a power source. Passive tags draw their power from the incoming radio signal. [2] The majority of the privacy concerns have been in regards to the passive tags due to their widespread use in commercial applications.

In 2003, a group of activist organizations issued a position paper on the dangers to privacy due to RFID technology. Some of the issues were:

Hidden placement of tags. RFID tags can be embedded into/onto objects and documents without the knowledge of the individual who obtains those items. As radio waves travel easily and silently through fabric, plastic, and other materials, it is possible to read RFID tags sewn into clothing or affixed to objects contained in purses, shopping bags, suitcases, and more.

Unique identifiers for all objects worldwide. The Electronic Product Code potentially enables every object on earth to have its own unique ID. The use of unique ID numbers could lead to the creation of a global item registration system in which every physical object is identified and linked to its purchaser or owner at the point of sale or transfer.

Massive data aggregation. RFID deployment requires the creation of massive databases containing unique tag data. These records could be linked with personal identifying data, especially as computer memory and processing capacities expand.

Hidden readers. Tags can be read from a distance, not restricted to line of sight, by readers that can be incorporated invisibly into nearly any environment where human beings or items congregate. RFID readers have already been experimentally embedded into floor tiles, woven into carpeting and floor mats, hidden in doorways, and seamlessly incorporated into retail shelving and counters, making it virtually impossible for a consumer to know when or if he or she was being "scanned."

Individual tracking and profiling. If personal identity were linked with unique RFID tag numbers, individuals could be profiled and tracked without their knowledge or consent. For example, a tag embedded in a shoe could serve as a de facto identifier for the person wearing it. Even if item-level information remains

generic, identifying items people wear or carry could associate them with, for example, particular events like political rallies. [3]
RFID tags are currently being used by the U.S. military to track assets. Companies such as Wal-Mart use RFID tags for tracking and inventory purposes on item cartons and flats, but have yet to tag individual items. [4] RFID are not just limited to commercial products. In 2004, 160 employees in the Mexican Attorney General's Office were implanted with VeriChip RFID devices. [5] Ironically, some of the advantages that RFID offers over other identification systems also are some of the issues that RFID has with privacy.

One technology that has come under criticism is Shotspotter. The Shotspotter technology, which is currently being used in several U.S. cities, is comprised of series of sensors that use acoustic triangulation to locate gunfire across wide areas. [6] A argument against Shotspotter is that it potentially disregards an individual's right to privacy. Although the system is triggered on gunshot sound, some people argue that there is nothing stopping police from detecting any sound that they want, including individual words or phrases. Currently the system is only used for the sound of gunfire, and Shotspotter claims that the way that it is currently set up ensures that speech will not be detected. [7] Additionally, representatives for Shotspotter state that "anyone who does fire a gun has broken the law, and it is our position—with which district attorneys, police and civil rights groups agree—that firing a weapon illegally within city limits creates a significant threat to public safety and therefore warrants the detection of the event, investigation of its perpetrators, and possible indictment of suspects." [8] This claim has not yet been challenged in court.

New products are being developed everyday; some building off of existing technologies while others are entirely different breeds of products. The trend

appears to be an active approach to security compared to the passive technologies of the past. Intelligent video, which alerts the owner when an event occurs, is currently an "industry whose sales will grow from $60 million to $400 million within five years, according to global consulting group Frost & Sullivan." [9]

With the increasing number of new ubiquitous technologies entering society, there exists an increasing privacy concern regarding those technologies. While there are current laws that protect privacy concerns, the changing faces of technology makes it hard to ensure that the laws will encompass these new situations. Some people have reacted to these concerns by attempting to stop or slow down the implementation of the technologies, either by passing new laws limiting their use or challenging in court the legality of their use. This has the effect of hampering the design and development of new products. Inventors do not want to invent products that will not be used and companies do not want to invest in products they cannot take to market. Instead of using the law to stifle design and development, the law should carefully be used to promote it. Some of the concerns may be unfounded, and others might be mitigated by our understanding of the technologies and the ramifications brought by it. Surveillance and security is big business and will continue to grow. In order to promote this ever expanding industry, society needs to balance its concerns over the implementation of the technologies against the benefits gained from its use.

[1] Washington Technology.com, Private Eyes, Public Gains, http://www.washingtontechnology.com/news/20_12/federal/26453-1.html June 20, 2005.

[2] Association for Automatic Identification and Mobility. http://www.aimglobal.org/technologies/rfid/what_is_rfid.asp(last visited Feb. 9, 2007).

[3] RFID Position Statement of Consumer Privacy and Civil Liberties Organizations. http://www.privacyrights.org/ar/RFIDposition.htmNov. 20, 2003.
[4] W. David Gardner, RFID Chips Implanted In Mexican Law-Enforcement Workers, INFORMATION WEEK, Jul. 15, 2004, http://www.informationweek.com/showArticle.jhtml?articleID=23901004
[5] Wal-Mart Details RFID Requirement, RFID JOURNAL, Nov. 6, 2003, http://www.rfidjournal.com/article/articleview/642/1/1/
[6] ShotSpotter.com, http://www.shotspotter.com/ (last visited Feb. 7, 2007).
[7] Id.

[8] Id.

[9] Who watches the watchers in surveillance society, Feb. 6, 2007, CNN.com http://www.cnn.com/2007/TECH/02/06/cameras.surveillance.reut/index.html

DEFEATING THE PURPOSE OF THE TAX PENALTY – AN EXERCISE IN UNDERDETERRENCE

I. Introduction

The IRS has, in the opinion of this author, a (not so) popular reputation for coming down on taxpayers hard,inconsistently and infrequently. Given this perception and perhaps this reality of relative infrequence of consequence on taxpayers engaging in funny business, it makes sense that the Internal Revene Code be given some other teeth to guard against such shenanigans. In general, the tooth of choice is the threat of heavy monetary penalties. Unfortunately, a recent tax decision coming out of a Texas federal district court could mark the beginnings of a shift against the imposition of penalties on tax evaders — a shift that could embolden an already scarily bold nation of tax-shirkers.

II. Analysis

The case, *Klamath Strategic Investment Fund, LLC v. U.S.*, reads for the most part like your run of the mill tax shelter case.[1] Two attorneys, faced with the receipt of some substantial income (and therefore some substantial income tax) created a Bond Linked Issue Premium Strategy Shelter (or BLIPs), which system of initially overvalued and rapidly depreciating assets generated losses as the attorneys, partners in a variety of linked entities, gradually

relinquished their shares in the flailing enterprises.[2] The court came to the (predictable) conclusion that these series of transactions lacked economic substance. No substance was found because the facts suggested that the web of contracts/entities existed for the sole purpose of avoiding the incidence of tax, which has been squarely rejected as a business purpose having economic substance.[3] Consequently, the court held that the taxpayers were responsible for the taxes they had failed to pay.[4]

However, on the issue of penalties, they adopted the plaintiff's argument as to all three areas of penalties proposed by the IRS. The first penalty offered by the IRS dealt with the overvaluation of assets by the taxpayers.[5] On this issue the court held that "as a matter of law, an overvaluation penalty cannot apply when the IRS totally disallows a deduction or credit."[6] In so holding, the court relied on earlier 5th Circuit decisions (in conflict with 4th Circuit holding [7]) which held that in any instance where the IRS totally disallows a deduction or credit, the IRS may not penalize the taxpayer for overvaluation.[8] Essentially, this premise appears to disprove the age-old adage that two wrongs don't make a right. In this case, two wrongs (one being the creation of tax shelters lacking independent economic substance, two being overvaluation of the assets in those shelters), make a right (no penalty under the overvaluation statute).

The next penalty proposed by the IRS addressed the substantial understatement of the taxpayers' income taxes.[9] In this instance, the court held that the taxpayers had reasonably relied on "substantial authority" as produced by their creative lawyers, which authority purportedly validated their series of entities and transactions. This

author's question is this — how can the same court that states that a "tax shelter" possesses as a definitional element the aim of avoiding or evading Federal income tax, a court that also says that this shelter existed for no *other* legitimate business purpose, accept that the taxpayers reasonably relied on substantial authority in their enterprise? Admitting that the three thoughts are not inherently inconsistent, the author questions the court's very sparse analysis of what could have constituted substantial authority authorizing the transaction relative to "the weight of authorities supporting contrary treatment."[10]

Finally, the court addresses the final proposed penalty to be exacted for the taxpayers' negligent disregard for the rules and regulations of the tax code.[11] Similar in exception to the susbtantial understatement penalty, the court wriggles its way out of this one in finding that the taxpayers acted in good faith and with reasonable cause in underpaying.[12] Once again, the court very generally speaks to the expertise of the counsel sought in demonstrating the necessary diligence.[13] Given that it is not necessary, however, under this test (in contrast to the "substantial authority" test) to evaluate the quality of the opinion sought, but only the reasonableness in reliance on the opinion sought, this declination to penalize is a bit easier to swallow than the other two.

IV. Conclusion

What is the importance of this decision? On its own, not a whole lot. It isn't groundbreaking law. What it potentially represents, however, is the success of some crafty, tax-fearing

individuals in avoiding any actual repercussions for their behavior. It gives a nation full of people already chomping at the bit for tax freedom a little more rein and breathing room to explore the world of tax evasion where the carrot is possibly huge, and at smallest, about the size of the time value of money.

[1] Klamath Strategic Investment Fund, LLC v. U.S., 2007 WL 283790 (E.D. Tex 2007).

[2] *Id.*

[3] *Id.* at 9.

[4] *Id.* at 9-12.

[5] *Id.* at 12, *see also* 26 U.S.C.A. § 6662(b)(3),(h) (West 2007).

[6] *Supra* note 1 at 12.

[7] *See* Zfass v. Comm., 118 F.3d 184, 190 (4th Cir. 1997).

[8] *Supra* note 1 at 12-13, *citing* Heasley v. Comm., 902 F.2d 380, 383 (5th Cir. 1990); Weiner v. U.S., 389 F.3d 152, 161-62 (5th Cir. 2004).

[9] *Supra* note 1 at 13, *see also* U.S.C.A. § 6662(b)(2), (d) (West 2007).

[10] *Supra* note 1 at 14.

[11] *Supra* note 1 at 15, *see also* 26 U.S.C.A. § 6662(b)(1) (West 2007).

[12] *Supra* note 1 at 18-19.

[13] *See supra* note 1 at 18-19.