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ZONING AND REGULATION OF DETROIT'S ADULT ENTERTAINMENT BUSINESSES: HAS IT GONE TOO FAR?

By: Helena Varnavas

I. Background

Detroit has been working hard to revive the city and bring residential growth to the downtown area. [1] Millions of dollars have gone into renovating historic buildings, creating new public transportation, reviving the riverfront and building residential lofts in the Central Business District area. [2] Detroit wants to prove that, "the growing population can support and sustain retail and grocery development," for its current and future residents. [3] New casinos and stadiums have also enhanced the city's cultural atmosphere while attracting a wave of young professionals. [4] Issues will arise, however, when the city tries to achieve this vision of a "better Detroit" by imposing ordinances and regulations on businesses that it deems problematic to their ideal. In particular, the city of Detroit has targeted the adult entertainment business as an industry they would like to see zoned out.

II. Legal Issues for Detroit's Adult Entertainment Industry

The adult entertainment industry has been hit particularly hard by these new city ordinances and regulations. The Detroit City Council has commenced its efforts to phase these businesses out all-together by changing the zoning ordinance in 1999 to preclude new adult entertainment establishments from being opened in the Central Business District. [5] Local laws allow such modifications to zoning regulations because the city of Detroit does not need to wait for an area to deteriorate before applying a zoning remedy. [6] The city may also rely on sociological experiences of other cities in enacting legislation as long as doing so is not completely unreasonable. [7]

The City Planning Commission deemed this phase-out of adult entertainment businesses reasonable because “the B6 zoning district classification in this area may have made sense in the late 1960s when there were still wholesale and freight operations on the east side of the [Central Business District]. The subsequent development of Greektown and Bricktown, however, has rendered B6 inappropriate.” [8] In addition, all zoning ordinances must bear a substantial relation to the public health, safety, morals or general welfare in order to be valid. [9] The city of Detroit seems to think that it is for the good of the general welfare that this new zoning ordinance be enacted.

Many adult entertainment business owners, including the proprietors of Déjà Vu and the Zoo Club, believe that various provisions of this ordinance unfairly prevent them from operating a legitimate business enterprise. [10] They have brought suit against the city of Detroit and asked the court to determine that the adult use provisions of the city’s ordinance are unconstitutional. [11] It is also their view that, “such provisions vest a constitutionally defiant discretionary authority in the hands of the city officials, who have no time constraint imposed upon them to evaluate an application in order to render a decision.” [12] The city of Detroit has dragged this case out over several years in order to avoid having to a make a decision that would violate the adult entertainment business owners’ right to engage in free speech under the First Amendment. [13] The court recently decided that the city’s treatment of the plaintiffs in that matter was unconstitutional because of its failure to make a decision on the plaintiff’s application within a reasonable amount of time. Nevertheless, it went on to hold that the city of Detroit’s ordinances are not unconstitutional on their face and are still applicable to all other adult entertainment business owners in the Central Business District. [14] On appeal, the plaintiffs have asked that the city of Detroit be permanently enjoined from enforcing the adult use provisions of the Detroit Zoning Ordinance and that their operation of adult entertainment businesses be identified as a lawful conforming use for zoning purposes. This case is pending and is sure to impact all of Detroit's adult entertainment businesses currently conflicting with the city's adult provisions of the zoning ordinance.

III. Other American Cities' Regulations and Zoning Ordinances

Detroit is not the first and likely not the last municipality to employ zoning ordinances to phase-out the adult entertainment businesses. City and county governments around the nation are currently enacting the same types of legislation to bring down established adult entertainment businesses. [15] These legislative bodies normally develop an initial ordinance, update an outdated regulation, or attempt to argue for zoning and licensing restrictions in court to accomplish these shut-downs. [16] They may even try to enact laws that prescribe zoning requirements and land use regulations of areas previously zoned for adult entertainment and give the power to a review board to deny a business for lack of "wholesomeness". [17] Such tactics clearly evince an effort to legislate morality based upson personal opinions of what is "right". Cities may enact these types of legislation as long as they have a factual basis for their regulations, and plaintiffs can challenge by demonstrating that the government's evidence does not support the regulations they are seeking to enact. [18]

Not everyone thinks that the adult entertainment business should be phased-out. Organizations such as the First Amendment Lawyers' Association, the American Civil Liberties Union, People for the American Way, National Coalition Against Censorship, Coalition for Free Expression, Free Speech Coalition, Thomas Jefferson Center for the Protection of Free Expression and the Association of Performing Arts Presenters are all defenders of exotic dancing in the adult entertainment industry. [19]

IV. Conclusion

The city of Detroit wants to grow, shed its negative image and become a desirable place for relocation. Although the city considers tourists to be very important, its attempts are aimed at stimulating population growth within the downtown business area. The general population seems to feel that the adult entertainment industry is a nuisance to their community and a barrier in the way of a "better Detroit". [20] For adult entertainment business owners, this means that their rights may be compromised and will be continually diminished by adult entertainment provisions to the zoning regulations. It is uncertain as to whether the city of Detroit has gone too far with their zoning ordinances and regulations, but at this point, the city's efforts have clearly had an effect on the downtown adult entertainment industry's ability to run businesses going forward.

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[6] *15192 Thirteen Mile Rd., Inc. v. Warren*, 626 F. Supp. 803, 825 (E.D. Mich. 1985).

[7] *Id.*

[8] *H.D.V. – Greektown, LLC v. City of Detroit*, No. 06-11282, 2008 U.S. Dist. LEXIS 10940 (E.D. Mich. Feb. 14, 2008).

[9] *Davis v. Sails*, 318 So. 2d 214, 218 (Fla. Dist. Ct. App. 1975).

[10] *H.D.V. – Greektown, LLC v. City of Detroit*, No. 06-11282, 2008 U.S. Dist. LEXIS 10940, at *1 (E.D. Mich. Feb. 14, 2008).

[11] *H.D.V. – Greektown, LLC v. City of Detroit*, No. 06-11282, 2007 U.S. Dist. LEXIS 56951, at *2 (E.D. Mich. Aug. 6, 2007).

[12] *H.D.V. – Greektown, LLC v. City of Detroit*, No. 06-11282, 2008 U.S. Dist. LEXIS 10940, at *17 (E.D. Mich. Feb. 14, 2008).

[13] *Id.* at *30.

[14] *Id.*

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GET ON THE CITY BUS: THE FUTURE OF THE AMERICAN SUBURB AND HER AUTOMOBILES

I. Introduction

Jane Jacobs' 1961 book, the Life and Death of Great American Cities revolutionized the way Americans viewed the streets that stretched beyond their front door. In critiquing the programs of her era's urban planners, Jacobs held up the sentimental and somewhat physically cramped city neighborhood as the pinnacle of communal living. [1] Regardless of Jacobs' warnings, urbanism rolled on, and in so doing, the suburb was born. Despite Americans' preference towards the suburb in the later half of the twentieth century, our nation is currently poised to regret the very expansionist zest that drew them away from the urban core. With the fluctuating price of gas and the limited public transportation alternatives, suburban Americans are forced to devote an ever-growing portion of their income and time to surviving their daily commutes. [2] Reducing the price of gas may be a legitimate means of combating the immediate crisis, but even if successful, would not decrease our nation's dependence upon the automobile or curtail an expansionary suburban existence. The issue confronting policymakers today is whether to realign current residential settlement patterns or to vastly improve public transportation within suburbs. This article discusses some of the possible means available for accomplishing the latter.

II. Where we are

Until the 1950s, most Americans lived in either large cities or rural communities; today; a majority of Americans live in the suburbs. [3] Located beyond the boundaries of a large city, these suburbs are located within a metropolitan area, and initially shared many characteristics of a small town. As Eric Oliver points out, suburbs are often very singular in their social composition and land use, containing nothing but homes, nothing but white people, or nothing but the affluent. [4] Such segregation and extensive compartmentalization of society was initially trumpeted as an escape for the problems of urban life, but today stands to be the impetus behind long commutes, a social distance from one's work and local community, and more generally, an over-reliance upon the automobile. [5] The zoning that has allowed for districts of uniform character to arise in suburban locations has, ironically, removed proprietary freedom are those who were looking to take advantage of new spatial freedoms in the suburbs. [6]

Additionally, a suburb's dependence on the larger metropolis used to be a central characteristic in distinguishing it from a rural town, but this relationship has begun to wane. Modern-day suburbs now exist in physically expansive, and often exclusively suburban environments that lack the political diversity of the city and its level of political involvement. [7] Despite their goal of exiting the dilemmas of the cities, suburbanites have done themselves a great disservice by being physically and politically removed from the significant decision-making processes regarding the nation's transportation ills. Ironically, they have the highest potential be the ones directly helped by alterations in public transportation. By examining the current political trends in public transportation, and the legal action that is developing around the increase in traffic, it is possible to develop a more comprehensive understanding of what is possible if America can conquer their dependence upon the automobile.

To strive for an America that is free of cars is unreasonable and essentially un-American. Our love affair with the automobile is something that cannot be ignored, but it also cannot afford to be exacerbated. The increasing tendency of urban planning to place automotive requirements over human needs provides an excellent case-in-point for this argument. Parking lots have only recently become subject to landscape ordinances, an attempt to fight the urban head island affect created by vast expanses of black, petroleum-based asphalt. [8] [9] Additionally, zoning codes largely require a certain number of parking spaces per determined square footage, thereby ingraining in urban planning the need to accommodate cars. [10] Americans dependence on automobiles is evidenced by the statistics: only two percent of urban trips are made by public transit, and less than five percent of trips to work are made using public transit. [11] Despite this low use level, there is still convincing evidence that the public values public transportation and believes it to be an important part of the social fabric. [12]

For Americans to act upon this sentiment, their pocketbooks must be drawn away from automobile use and put towards public transit. Though reducing America's dependence upon the automobile and increasing its reliance on public transportation may be intelligent in theory, it certainly will not happen overnight. Deregulation that allows for private enterprise to become involved with public transportation would fill the time gap following a shift in public funding. These private enterprises will also be the impetus for the efficiency within the government's own endeavors.

III. Where we need to be going

In order for the common American to feel the monetary benefit of utilizing public transit, economic regulation must be refocused towards that end. As it currently stands, the federal tax system does not reflect the full economic cost of one's transportation choices. [13] Lester Brown notes that the fiscal systems of the modern transportation industry are composed of subsidies and taxes which place the emphasis on economic growth instead of the efficient use of transportation resources. [14] These standards, which foster an increased demand of single occupancy travel, must be amended. Overall, the federal tax system must encourage the use and development of public transportation. Transportation fringe benefits, such as low tax, or tax-free parking, are a few such policies that encourage individuals to choose to drive rather than take public transportation, which heightens transportation problems. One of the easiest and most effective ways to encourage public transpiration use is to reduce parking subsidies. [15]

Currently, the subsidies passed for public transit do not equal the subsidies for parking; therefore, the incentives are not equal in the minds of the American public. [16] Per George W. Bush's recent budgets, American taxpayers received $2.62 billion in benefits from the employee transpiration fringe program in the previous year, with over eighty-five percent of that benefit going towards parking. [17] The remaining fifteen percent went to public transit and carpooling initiatives, surely an allocation worthy of an increase. It is important to note that such a reallocation of the tax-benefits does nothing to increase the price of gas, but simply reduces funds for parking subsidies and places them towards public transportation improvements. Most importantly, reallocations of resources, such as the one suggested, would simultaneously aide both the decrease in America's dependence upon automobiles and increase its reliance upon public transportation. Even if the supply of parking spaces is drastically reduced, a demand for transportation would still exist, requiring an immediate alternative to cars. Privatized public transportation would be able to provide such an alternative.

While many may believe that the future of public transportation lies solely in government programs, the increasing demand to bypass congestion-filled expressways will surely produce a market for private transportation options. Recent discussion has largely centered upon private firms taking over the control and maintenance of roadways and airports, and expanding such initiatives can lead to more effective service for the general populous. Estimates place major investment banks collections at nearly 250 billion dollars invested in public infrastructure. [18] While the recent tumult of the market has yet to completely shake out, it has been the instability of the market that has lead private firms to consider public infrastructure. [19] As government capital funding drops off precipitously and the municipal bond market continues to fluctuate, the private ownership and operation of infrastructure becomes increasingly attractive. [20] Large international firms, such as Macquarie and Cintra, have been in the business for years, yet have only recently made their presence known in the Unites States. [21] The American Society of Civil Engineers estimates that the United States needs to invest at least $1.6 trillion over the next five years to maintain and expand its infrastructure. [22] Last year, the Federal Highway Administration deemed 72,000 bridges, or more than twelve percent of the country's total, "structurally deficient." While the immediate need exists in the physical infrastructure, the investments from large corporations such as Macquarie and Cintra should be additionally opened to mass transit. [23]

To counter the argument for privatized mass transit, a significant amount of academic research suggests that such a process would fail. The main hurdle presented in these papers refers to initial investment; critics argue that the initial capital investment required to establish private mass transit is simply too high. [24] If a private entity were to gain the right to run a particular system, the capital investment would either deter multiple groups from bidding on the project or limit the public's ability to remove the operator in response to subpar service. [25] While regulated monopolies do allow for single operators to take responsibility for the whole system (thereby giving upset passengers an avenue to express their grievances), smaller operators could still successfully exist. Such alternatives could include suburb-specific bus lines that are directly tailored towards the needs and timing of each neighborhood. Many of the scenarios applied to privatization use rail systems as their starting point. [26] Using these scenarios as representations for all mass transit, however, sets such a system up for failure because of the extremely high cost of rail lines and trains, in addition to competing timetables. While a single transit system may be more adept at handling peak time transportation, it is conceivable that deregulation of the process will more adequately serve specific populations in need. Using rail transit as the basis for conversation allows critics to write off options worthy of further discourse.

Public Private Partnerships have become highly popular as of late, yet the need for government initiation of these projects has stood in the way of their expansion. In response to this bureaucratic roadblock, many states have begun to permit private parties to submit unsolicited proposals for such projects. [27] Policies allowing the private market to devise its own solutions to the regulatory boondoggle are both responsible and only one of the many ways in which the government can establish a more efficient allocation of resources with regards to mass transit.

IV. Conclusion

By decreasing America's reliance on the automobile via an increase in public transportation, the nation may be able to counter a wide variety of the ills that are currently plague a large segment of the nation. While the potential ramifications may be as small as decreasing our nation's dependence upon foreign oil, they may also be as large as combating the obesity epidemic sweeping our country. The improvement in public transportation may even reduce the vast amount of political disenfranchisement that exists within suburban communities. Regardless of the outcome, improvements in public transportation will decrease America's dependence upon the automobile and foreign oil. While it is unreasonable to assume that Americans will eventually ditch their cars, a more efficient and adept public transportation system will allow American boys to spend less money on gas and save up for that shiny new Corvette instead.

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[22] Anderson, supra note 18.

[23] Id.

[24] Mark Reutter, *Economist Examines Hurdles to Privatization of Urban Mass Transit*, News Bureau for the University of Illinois at Urbana-Champaign (2003).
[25] Anderson, supra note 18.

[26] Id.

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PREVENTING PRICE-GOUGING OF GASOLINE AFTER NATURAL DISASTERS

I. Introduction

In 2007, in response to the public's anger about the high cost of gasoline after the hurricane disasters, the House of Representatives drafted and passed the Federal Price Gouging Prevention Act ("FPGPA"), which reads in part:

"It shall be unlawful for any person to sell…during a period of an energy emergency, gasoline…at a price that
(A) is unconscionably excessive; and
(B) indicates the seller is taking unfair advantage of the circumstances related to an energy emergency to increase prices unreasonably." [1]

To date, the Senate has not voted on the bill. While the victims of recent hurricanes were understandably angered with rising gasoline prices in the days following the disasters, the FPGPA would ultimately do these consumers more harm than good in terms of economic recovery because the language of the bill sets an unclear standard for law enforcement, merchants and consumers, and anti price-gouging legislation has been shown to cost consumers more money long-term. Rather, modification of federal and state legislation already in place would most effectively prevent the unfair manipulation of gasoline prices.

II. Legal Standard

Paragraph (1) of the FPGPA defines punishable behavior as that which is ***unconscionable*** and that which takes ***unfair advantage***.[2] Such terms require subjective interpretation that increases the difficulty of both compliance and enforcement.[3] U.C.C. §2-302 does not even contain a definition or a standard to determine whether the terms of a contract are in fact unconscionable.[4]

In attempting to provide a workable standard, paragraph (3) of the FPGPA looks to whether the amount charged: (i) *grossly* exceeds the average price at which the gasoline was offered for sale during the 30 days prior to such proclamation;

(ii) *grossly* exceeds the price at which gasoline was readily obtainable in the same area from other competing sellers during the same period;

(iii)*reasonably* reflected additional costs, not within the control of that person, or reflected additional risks taken by that person to sell gasoline under the circumstances; and (iv) was *substantially*attributable to local, regional, national, or international market conditions. (emphasis added) [5]

Though this paragraph is intended to provide guidance, it only provides additional terms that are equally open to subjective interpretation; the terms *grossly*, *reasonably*, and *substantially* do not significantly clarify the standard for paragraph (1).   The argument for the use of such terms is that their subjective quality gives the court discretion in deciding whether an action or contract qualifies as unconscionable or one that takes unfair advantage.[6] Greater specificity might rob the law of its flexibility, its ability to evolve with changing times and changing community standards.[7]

The disadvantage of using such vague terminology in the FPGPA is that the language sets an unclear standard that harms merchants and consumers alike.[8]   Without a clear guideline as to what constitutes an actionable price, consumers in a post-disaster state jump to report prices they believe are unfair, and otherwise innocent merchants are forced to defend themselves in court for prices they thought were reasonable, clogging bureaucracy with false claims.[9] The FPGPA's language creates a significant risk of litigation costs, the burden of which ultimately falls back on the consumer.[10]

Such discretionary language is not required for price-gouging legislation. A number of states that have passed anti price-gouging legislation have recognized the disadvantage of the ambiguous standard and have opted for more specific standards in the form of percentage-caps or no-increase laws. California and Arkansas, for example, bar hikes in the wake of a declaration of an emergency that exceed a certain percentage-point increase over the pre-emergency price level.[11] Georgia, Louisiana, Mississippi, and Connecticut bar any price increase beyond that required by the higher costs of post-disaster economic activity.[12] While these standards may not initially appeal to merchants in that they restrict prices, the standards are actually beneficial because of their clarity.

III. Existing Federal Legislation

Generally speaking, anti-trust laws cover three broad areas: collusion among competitors, anti-competitive mergers, and exclusionary practices.[13]

Prevention of collusion falls under the Sherman Anti-Trust Act, which Congress intended to protect the right of producers to compete on their merits, and, in turn, the right of consumers to enjoy the lower prices that must result from that competition.[14] Thus, horizontal price-fixing of gasoline, such as agreements by competitors to set a floor on prices or to raise prices, would be a violation of that Act.[15]

The Sherman Act also reflected Congress's opinion that when businesses combine in such a way as to reduce competition, consumers suffer, and legislative bodies have both a right and a duty to intercede on behalf of those vulnerable consumers.[16] This conclusion is restated in the Clayton Act, which prohibits mergers that may substantially lesson competition or tend to create a monopoly.[17]

Finally, the antitrust laws also protect consumers from "abuse by single-firm conduct such as the illegal maintenance or acquisition of monopoly power. Generally, unilateral conduct violates the antitrust laws only if a firm has sufficient market power that its actions could not be counteracted by its competitors or by new entry."[18]

Significantly, anti-trust laws do not necessarily guarantee low prices, only the conditions that lead to them.[19] This distinction is intentional; the United States Supreme Court has recognized that while it may set the circumstances for achieving a fair price, the workings of a liberal market are better able to determine the fair price itself.[20] While anti-trust laws prohibit fixing maximum prices, the entire goal of the FPGPA is to accomplish just that. In doing so, the FPGPA fails to recognize the Supreme Court's view that "[a]ny combination which tampers with price structures is engaged in unlawful activity. Even though the members of this price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces."[21]

IV. The Effect of the FPGPA on the Market

Free-Market Theory

Most hurricane victims who felt they were subjected to price-gouging assumed that the supply of gasoline to their disaster area remained constant, and that merchants took advantage of consumers who had no other options. This assumption is incorrect; a disaster actually cuts off the supply of gasoline to merchants in the disaster area. Consumers then outbid one another for the limited amount of gasoline available, and the price peaks at an amount no consumer is willing to outbid. Those who cannot afford the price find alternatives (walking, biking, and carpooling) that eventually reduce the demand for gasoline. As the area recovers, supplies of gasoline return to normal levels, causing merchant competitors to then reduce their prices to attract consumers. Thus, gasoline price fluctuations after a disaster are not breakdowns in the market system, but rational, predictable responses to changing circumstances.[22] Statistically, the responses to Hurricane Katrina and Rita tracked the supply-and-demand model almost perfectly.[23]

Consequences of Price Controls

In 1971 President Nixon attempted executive branch implementation of price controls for crude oil and refined petroleum, and the results were overwhelmingly negative.[24] One of the short term consequences of price controls is that they make gasoline lines longer.[25] Under supply and demand theory, prices rise to an amount that only a certain number of consumers can afford, thus ensuring that the limited supply of gasoline in the disaster area will last until regular supply routes can be reestablished. With price controls, however, many more consumers can still afford to purchase gasoline, virtually ensuring that the supply in the disaster area will run out. The fear of losing supply triggers consumers to fill up more frequently, causing long lines at stations. Gas station operators, unwilling to pay extra for bringing in gasoline from elsewhere because they cannot pass the costs on to consumers, then close their stations, making lines even longer at the stations left open.[26]

Another short-term consequence of price controls is market waste. A study of the gasoline lines that developed when California ordered Chevron to sell gasoline at a discount estimated that the added costs in time associated with price controls were 116 percent of the monetary savings provided by price controls.[27] In other words, price controls did not allow time to be used most efficiently; because time wasted can never be recovered, price controls result in what is known as market waste. Any savings to consumers from lower prices are dissipated by the cost of time lost.[28]

A third consequence of price controls is an inefficient use of the limited supply of gasoline available. When gasoline is purchased by consumers who have time to wait in lines (consumers with "lower time value"), more highly valued uses of gasoline go unfilled.[29] Instead of gasoline going to those most willing to pay for it (e.g. delivery trucks), it goes to those with the most time on their hands (e.g. the household teenager). Because price controls give suppliers no financial incentive to stockpile extra gasoline or increase the supply to a disaster area, reestablishing supply takes an even longer time.[30] Areas with less need, but free price range, receive the gasoline instead.

Market prices avoid these consequences and guarantee that resources will flow from those areas untouched by the catastrophe. After the hurricanes, demand in the affected areas for gasoline grew significantly due to evacuations and relocation efforts.[31] Consumption actually increased in the Gulf Region despite about a thirty-nine cent increase per gallon of gasoline; cost in surrounding, unaffected areas, however, rose about sixty-one cents per gallon, causing a reduction in demand by about fourteen percent.[32] Market prices allowed the gasoline to move from the area of lower demand to the area of higher demand. Had price increases been illegal in Louisiana and Mississippi, gasoline prices would have remained low and gasoline would have instead gone to higher paying areas such as the Northeast.[33]

This suggests a slippery slope: as the perception emerges that price controls are not leading to efficient and equitable allocation of gasoline, the temptation is to create even more stringent regulations.[34] This downward spiral into more and more legislation accounted for much of the waste associated with oil prices in the 1970s.[35]

Vulnerable Populations

The argument against letting the market control the distribution of gasoline after a disaster is that only a small population of wealthy consumers will have access, while the vulnerable population will be left to fend for itself.

The reality is that lower-income families and consumers in rural areas do not benefit from price controls. "[E]vidence shows that choosing between a significantly cheaper gasoline with wait time and a more expensive/no-wait station is not highly sensitive to income. Rather, price caps in effect give individuals with higher income the advantage of using their resources to obtain the scarce good. Those with high values of time have an incentive to hire others with lower values of time to wait in line on their behalf."[36] Price caps hurt rural areas even more by lowering the financial incentive for distributors to take on the additional costs needed to get the gasoline there.[37]

In addition, disconnects between market prices and controlled prices of goods often lead to black market operations.[38] "[S]ellers recognize that there are consumers who are willing to pay a higher price to ensure access to their desired goods. The higher prices on the black market will cause the seller to divert goods away from the legitimate market…"[39] As more goods become siphoned off to the black market, those who benefit become the ones with the resources necessary to take part in the illegal transactions.[40] The population sought to be protected by price controls suffers as it usually has less resources, and the market performs less efficiently than it would with an equal balance of information.[41]

V. State Involvement and Alternatives

Twenty-nine states and the District of Columbia already have laws that prohibit the excessive pricing of gasoline during periods of abnormal supply disruption, normally triggered by a declaration of emergency by the President or the governor.[42] These statutes are just as troublesome as the FPGPA because they aim to control prices in a manner that works against supply and demand theory. Short of being repealed (which no state legislator would attempt to do without risking voter approval) these statutes should be modified so that they cause minimal interference with market recovery.

First, any price-gouging statute should define the offense clearly.[43] An ambiguous standard would only confuse consumers and businesses and would make enforcement difficult and arbitrary.[44]

Second, anti-gouging laws should be limited to the areas of the actual disaster, or areas where survivors are likely to flee.[45] Proposals that apply on a state-wide level, even when the disaster only physically impacts a limited area, risk market recovery in the entire state as opposed to a narrowly-tailored region. Similarly, applying anti-gouging laws in areas far from disaster-zones do not make economic sense because they prevent gasoline supplies from being most efficiently used.[46]

Third, anti-gouging laws should only apply in circumstances where there is actual and widespread physical destruction, particularly to banks and electronic payment systems.[47] Breakdowns in such financial systems may prevent market forces from operating as supply and demand predicts; consumers may place immense value on gasoline but may not be able to complete transactions due to limited financial access.[48] Gasoline, then, will not sell to those who value it the most but to those who happen to have liquid assets.[49] Thus, anti-gouging laws may serve as a price holder while consumers regain access to their finances.

Fourth, anti-gouging laws should come with strict time limits. While merchants and consumers alike are vulnerable immediately after a disaster, holding prices too low for too long in the face of temporary supply problems risks distorting the price signal that ultimately will relieve the problem.[50] If supply responses and the market clearing price are not considered, wholesalers and retailers will run out of gasoline and consumers will be worse off.[51]

Finally, anti-gouging laws should provide for consideration of local, national, and international market conditions that may be a factor in the tight supply situation.[52] International conditions that increase the price of crude oil naturally will have a downstream effect on retail gasoline prices.[53] Local businesses should not be penalized for factors beyond their control.[54]

Initiating state change, however, is an uphill battle given that many of these statutes were enacted to appease emotional voters. To provide incentive for states to modify their anti-gouging laws, the federal government should reward states that chose to adopt disaster relief laws more in sync with the laws of supply and demand theory.[55] The federal government could, for example, take an active role in directing relief supplies to areas where the prices for those goods were highest, presumably those areas where the demand for those goods are the greatest.[56] This plan would provide the following benefits over the FPGPA, detailed below.

First, this would encourage states to abandon artificially low price caps on gasoline.[57] Current statutory price limits on gasoline dictate an amount far lower than what supply and demand would dictate under post-disaster circumstances. By distributing disaster aid to regions with higher prices (based on a greater need), states would have an incentive to let the price reflect the true demand.

Second, the possibility of governmental competition will prevent suppliers who truly do possess monopoly power from pricing above the competitive level.[58] The fear of drawing in competition in the form of emergency relief will induce suppliers to charge a lower price that might otherwise be charged.[59]

Finally, the price of goods might provide a better indicator of need for aid providers.[60] Such providers often face difficulty in determining which areas to distribute relief to, and how much relief to provide. The market price of emergency supplies might be the most efficient way to allocate scarce goods to those who need them most.[61]

VI. Conclusion

In limiting free market prices, FPGPA and its state counterparts will ultimately do more harm than good to the consumers and the economy. Instead of protecting and serving vulnerable, low-income populations after a natural disaster, the FPGPA will cost them more in time and money. Because the federal government already has legislation in place to prevent the unfair manipulation of gasoline prices, and because alternative solutions are more effective in allowing gasoline markets to recover efficiently, the FPGPA should not be passed by the Senate.

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[51] Id.

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AND THE WALLS CAME TUMBLING DOWN: DEREGULATION & THE CURRENT FINANCIAL CRISIS

I. Introduction

While intellectuals, economists, bankers, and pundits try to explain the ins and outs of the economic downturn we are currently facing, many on "main street" are asking "what happened to make my 401k retirement savings account diminish so much in value since I looked at it in August?" The fact is that many hard working individuals have no idea what happened to cause the global economic downturn we are currently facing, and the explanations being put forth by most media outlets simply do not make sense to many people.

In trying to understand the situation, there are without question many factors that played a role. Trying to identify one overwhelming factor would be futile, however, this article will look specifically at the role deregulation played in the financial crisis.

II. Deregulation

Deregulation has received a lot of the blame for the current crisis. [1] Deregulation can be defined loosely as the removal of regulatory barriers to permit free markets to perform their functions. The deregulation movement that we currently have in the United States began in the late 1970s under the Jimmy Carter administration. [2] With the notion that less government intervention allowed the market to do what it was supposed to and foster more growth, deregulation spread from the Airline Deregulation Act of 1978 to telecommunications, and later banking and financial markets. [3] Many now say the consequence of allowing the financial markets to go unregulated was the impetus for the current financial crisis. [4]

III. The Deregulation of Savings and Loans

The last major deregulation related crisis in the United States stemmed from the savings and loans collapse that started in 1966. [5] In the 1960s, there was a lot of volatility in interest rates. [6] Back then, depositors with funds in savings and loans institutions at the time would withdraw their cash whenever interest rates went up, in order to maximize their returns by putting the cash in higher interest investment vehicles. [7] Because interest rate ceilings prevented savings and loan organizations from increasing their interest rates, and other regulations limited their business prospects to granting home mortgages and accepting deposits, the savings and loans industry could not compete with other financial services institutions. [8] In 1979, Paul Volcker, the then Federal Reserve Board chairman, decided to restrict money supply which in turn caused interest rates to increase significantly, resulting in losses of approximately $9 billion for the savings and loans industry in 1981 and 1982. [9]

Subsequently, congress enacted legislation to prevent shutting down the savings and loan industry, including the Depository Institutions Deregulation and Monetary Control Act (DIDMCA), [10] and the Economic Tax Recovery Act of 1981 (ETRA). [11] Under DIDMCA, substantial regulatory requirements for savings and loans organizations were eliminated. The statute made savings and loans similar to any other depository institution, allowing them to make real estate loans without regard to location, and invest directly in corporations. [12] The

ETRA further gave substantial incentives to individual taxpayers for real estate investment, permitting individuals to seek loans from whatever institution would be willing to make the loans. For instance, Section 123 of ETRA increased the one time exclusion for an individual who had attained the age of 55 from $100,000 to $125,000. [13] Considering the situation that the savings and loan industry was in, it made sense that they would lend to anyone that came into their doors to stop the bleeding. The Garn-St Germain Depository Act of 1982 was the final step in the deregulation of savings and loan organizations. [14] The act essentially completed the process of deregulating the savings and loan industry by allowing such institutions to invest in commercial, corporate, business or agricultural loans and loans secured by personal property and non-residential real estate. [15]

Even with all the deregulation, the savings and loan industry still was unable to compete. This failure to compete resulted in aggressive lending and riskier investments, all of which led to mounting losses in the industry. From 1982 through 1989 when regulation was once again infused into the savings and loan industry by a government bailout, many savings and loan organizations had gone under, and many more were unprofitable. [16] Estimates of the cost of the savings and loans crisis vary from expert to expert. However, according to the Federal Deposit Insurance Corporation, the cost to taxpayers was $124 billion, with another $29 billion borne by the thrift industry. [17]

IV. The Deregulation of Banks and Financial Institutions

Fast forward two decades to 1999, when president Clinton signed another act of deregulation, the Gramm-Leach-Bliley Act of 1999 (GLBA). [18] The GLBA repealed the parts of the Glass-Steagall Act of 1933, passed during the Great

Depression era, that prevented investment banks from offering commercial banking and insurance services. [19] With limited regulation, banks and other lending institutions began to offer high risk mortgage-backed securities. Mortgage-backed securities are "debt obligations that represent claims to the cash flows from pools of mortgage loans, most commonly on residential property."[20] Individual mortgage loans are purchased from banks and other loan originators and bundled into pools by mostly private entities. [21] These entities then issue securities that represent the principal and interest payments on the home mortgages, and sell them to investors. [22] The principal and monthly payments from the home owners are paid to the financial institution that created the mortgage-backed security, and the thousands of investors that buy the securities are paid from the mortgage receipts.

In highly simplified terms, a large portion of current mortgage crisis can be traced to these mortgage-backed securities. With home prices rising over the last several years, banks were making high risk, unsecured loans to individuals who simply could not afford to pay them back. With the advent of adjustable rate mortgages and sub-prime loans, individuals with a less than stellar credit history were allowed to purchase homes that were far beyond their economic reach. An adjustable rate mortgage is a loan whose rates will change. [23] Lenders give a prospective buyer an introductory rate that is fixed for a period of time, ranging from six months to five years. After the fixed period, the interest rate will change, sometimes significantly, and many homeowners are then unable to handle the revised payments. Similarly, a sub-prime loan is one offered above prime rates. [24] Homeowners that cannot qualify for prime rate loans, typically borrowers with low credit scores, or ones with a limited credit history, were the targets for sub-prime loans. [25] Over the last several years, mortgage-backed securities were increasingly made up of mostly these high risk sub-prime and adjustable rate mortgages. [26] Because these mortgage-backed securities are essentially spreading the risk of a default over thousands of investors, such that one default would have little impact on the security, they were considered a minimal risk, high reward investment, and increasingly purchased and sold all over the world.

Further, banks and other financial institutions were willing to make these loans because of the substantial increases in home prices over the last decade. The prevailing logic was that if a few homeowners were unable to pay the loans when the adjustable rate mortgages reset to a higher rate, or subprime lenders simply could not afford the homes anymore, then the homes would have appreciated in value sufficiently enough that the mortgagor could foreclose on the home with the expectation of being able to sell the property at an increased price. However, when home prices began to fall and the Federal Reserve Board began to raise interest rates in 2006, the once vaulted mortgage-backed securities fell into disfavor with investors. When interest rates are low and housing prices are rising, mortgage-backed securities are generally a safe investment. [27] However, when the opposite happens, financial institutions receive less money to honor the products' obligations with a fixed return product such as a morgage-backed security. [28] Further, when financial institutions have heavily leveraged to purchase these mortgage-backed securities, they feel the pinch from both ends. [29] They are unable to make payments on the loans taken to purchase the securities, and they are required to pay the purchasors of said securities based on the terms of purchase.

V. The Consequences

The general consequences of deregulation of banks and the financial services industry, and specifically of failed mortgage-backed securities are far reaching.

The federal government has had to nationalize financial giants Fannie Mae and Freddie Mac, which owned a combined $5.4 trillion in mortgage-backed securities. [30] In addition, the Emergency Economic Stabilization Act of 2008, better known as the $700 billion bailout bill, will more than likely exceed the $1 trillion dollar mark when the economic clean-up is all is said and done. [31]

VI. Conclusion

While deregulation is surely not the cause of the financial crisis the country is currently facing, it would be irrational to say that it did not play a part. However, one cannot discount the fact that if consumers did not bite of more than they could chew by borrowing money for homes they absolutely knew they could not afford, and financial executives did not create designer products that they had to knew would someday go up in smoke, we would not have to look to other causes to validate the mess we are currently in.

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INTERNATIONAL PERSONAL DATA PROTECTION AND ITS REDRESS

I. Introduction

Personal data protection may be of concern anywhere, anytime in this information society. It is common to submit personal information to create digital identification or authorization to perform certain kinds of online activities, such as an electronic transaction. [1] In addition, all Internet traffic may be automatically tracked and restored by the visited website controller using Cookies technology or equivalent softwares. [2] There is a strong incentive to collect and store the data because it is valuable for business purposes in offering customized service and it is easy and cheap to do so. [3] However, it has not been guaranteed that data collectors manage the personal data in an appropriate manner. Thus, it has drawn the interests of the international society to establish personal data protection principles and have an effective redress or resolution method in case of breach.

II. Background on Data Protection Disputes

The goal of collecting data is reasonable for business purposes: business entities may provide better service by customizing their website and services. However, the collected information data may be inappropriately secured and used for secondary purposes, [4] which would be even more serious if the information were collected without the users' consent. Moreover, the personal information may be sold to solicitors or spammers.

Disputes arising out of personal data protection are related to the infringement of privacy as well as the violation of property rights on personal data. [5] Thus there are two approaches in resolving the disputes: the first is the privacy or sociorights approach, dealing with data protection disputes as a privacy issue of human rights and relying on legislation to regulate these rights. [6] The second is the market or liberalism approach, dealing with data protection disputes as a property right in the market and relying on the market efficiency of self regulation to regulate these rights. [7]

III. International Efforts to Establish Personal Data Protection Principles

There is some international consensus on what personal data is and how it should be protected. The Organization for Economic Cooperation and Development (OECD) enacted the Guidelines on the Protection of Privacy and Transborder Flows of Personal Data in 1980 [8] and the United Nations (UN) also published the United Nations Guideline Concerning Computerized Personal Data Files in 1990. [9] However, although these guidelines may be the result of international consensus on the protection of personal data, the provisions do not have legal effects and are too vague to be applicable to the disputes related to personal data protection.

Thus, when European Parliament and the Council of the European Union formally adopted Directive 95/46/EC of the European Parliament and of the Council of October 24, 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data in 1995 [10], it was sensational in the field of personal data protection. [11] Applying this directive to personal data processing by automatic means, [12] it mandated member states to enact the necessary laws, regulations and administrative provisions following its principles. [13]

Even though the 1995 Directive is a regional agreement, it has affected the entire international society because it permits the transfer of personal data to a third country only if the third country has an "adequate level of protection" on the personal data. [14] Responding to the 1995 Directive, the U.S. Government, which prefers the liberal approach and self-regulation modality, established the Safe Harbor agreement to meet the standard of the 1995 Directive. [15]

In considering the international principles on personal data protection, human rights should not be disregarded. Article 17 of the International Covenant on Civil and Political Rights (ICCPR) [16], which specified article 12 of the Universal Declaration of Human Rights [17], provides relief if the international minimum standard fails to satisfy the ICCPR.[18] As a result, the proposed international standard is a mere scrap of paper, if it fails to satisfy the ICCPR. It therefore seems that a balance of privacy rights and market efficiency would be the most effective equilibrium in resolving the data protection disputes. [19]

IV. Redress/Dispute Resolution for Data Protection Disputes

The data protection principles require the "establishment of enforcement remedies and mechanism," [20] since a smooth transaction is usually ensured by the appropriate dispute resolution mechanism. The ideal dispute resolution mechanism should be effective, efficient, fair, and transparent. [21]

In the field of data protection, alternative dispute resolution (ADR) is suggested as an appropriate dispute resolution method. [22] ADR is, although it is variously defined depending on the context, all private alternatives to litigation. [23] There are countless types of ADR, including negotiation, mediation, and arbitration. [24] As a substitute for litigation, ADR methods share these common characteristics: ADR is flexible, speedy, and inexpensive.

V. Promises and Concerns of ADR for Personal Data Protection Disputes

The international flow of data occurs with the Internet and E-Commerce. It is desirable to resolve disputes arising from the Internet and E-Commerce through ADR because of its unique cyberspace norms and complicated conflicts of laws issues. [25] ADR can provide online alternative dispute resolution to those who want to stay in the online realm in resolving their disputes. ADR also promises confidentiality. Parties engaged in the data disputes would be reluctant to litigate because some private data could be revealed in the trial proceedings. However, ADR could provide confidentiality for both parties. ADR is less expensive and more speedy than litigation due to its simple procedure and private nature. [26] The flexibility and autonomy may be major benefits to using ADR.

As a private mechanism, ADR is independent from national courts and laws so that it is suitable to resolve disputes arising from international transactions. [27] As long as there is a valid ADR agreement between the parties, ADR can resolve the jurisdiction and choice of laws issues, which are inseparable but insoluble in disputes arising out of international or transnational transactions. [28] In addition, ADR could prevent potential bias for the nation's citizens by providing a neutral forum. [29]

ADR could also serve as a better means of enforcement. Although there are international efforts to make a convention for the enforcement of foreign court decisions, the enforcement of judicial decisions in a foreign jurisdiction has not been guaranteed. [30] However, an international ADR mechanism would increase the probability of enforcement. If ADR is the enforcement mechanism of choice under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, its enforcement is guaranteed under the convention. [31]

As with most things, ADR has both benefits and problems. The criticisms of ADR stem from the lack of human interaction, inadequate authenticity, inability to meet writing requirements, insufficient accessibilities, inadequate discovery, and the limited range of disputes that it can resolve. [32]

In response to the concerns, there may be ways to make ADR more effective. The first solution is self-regulation, [33] which relies on the ADR provider themselves or the third-party evaluation companies using trust marks. The second is to develop a centralized ADR system [34] to manage the quality of ADR services. The third is security technology [35] to provide stable service and secure confidentiality. Lastly, the fourth is the development of incentives for the enforcement of ADR agreements and its decisions.

VI. Conclusion

The international protection of personal data is complete when disputes or conflicts are assured to be effectively resolved and enforced. [36] Moreover, the protection should be internationally harmonized to prevent any conflicts from different protection standards which could potentially cause obstacles in international commerce and data transfer. [37] Even though the Safe Harbor agreements of the U.S. have been effective in satisfying the standard of the 1995 Directive, [38] the international information society has raised new issues on personal data protection. [39] Because it is impossible to establish principles responding to all arising issues, it would be a good safety net for the society to have an effective redress for personal data disputes.

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NON-COMPETE AGREEMENTS: FRIEND OR FOE?

I. Introduction

In today's economic climate, the excitement of finding a new job can be overwhelming. Additionally, In the rush of starting work, it is easy to skim the fine print of a contract without fully understanding its terms. Non-compete agreements in employment contracts can cause much unnecessary hardship on an individual once that individual chooses to switch jobs. Additionally, while it may seem unintuitive that an individual cannot use skills learned at one job to advance his career at another job, many companies rely on non-compete clauses to limit just that. This article will discuss non-compete agreements generally, the history of non-compete agreements and the legal standards state courts use in examining non-compete agreements. It will then discuss how to enforce and contest non-compete agreements. Finally, it will conclude by giving advice for the employer or employee who is unsure about how to approach a non-compete agreement.

II. Non-Compete Clauses Generally

A non-compete agreement, also called a non-compete clause, restrictive covenant, or covenant not to compete, is essentially a clause used to restrict what an employee can do once that employee leaves his or her job. [1] The purpose of non-compete agreements is to preserve the interests of the former employer with whom the employee has signed the agreement. [2] "Non-compete clauses are used by established businesses to prevent employees from engaging in competition or appropriating confidential information for their own use or use by competitors." [3] They may also be used by start-up companies in order to protect lucrative information used or needed in the start-up of a that business. [4] Non-compete agreements can take the form of a clause in a larger agreement, like an employment contract, or can be a completely separate agreement. [5]

III. History of Non-Compete Agreements

Non-compete agreements have been around since the the 1400's. [6] "The first recorded noncompete case was brought in England in 1414, when a dyer of clothes tried to enjoin a former assistant of his from setting up shop in the same town." [7] However, as the "free transferability of property and goodwill became an important social goal", non-compete agreements were disfavored by courts in this same area. [8] There was a shortage of labor because many workers died from the Bubonic Plague and non-competes were seen as a barrier to craftsmanship and open trade. [9] Legal Scholars opine that courts did not routinely enforce non-compete agreements until the start of the Industrial Revolution. [10]

IV. Legal Implications of Non-Compete Agreements

The validity of non-compete agreements differs from state to state. [11] Some have held that non-competes are completely and always invalid. [12] Others have found that non-competes are enforceable in certain circumstances. [13]

Illinois is among the thirty two states (plus the District of Columbia) that allows non-competes to be enforced. [14] Among the states that allow non-competes to be enforced, there are general rules that courts will follow. Applying the rule of reasonableness and the blue pencil rule are just two common methods employed by courts in determining whether to enforce a non-compete. [15]

The Rule of Reasonableness dictates that a non-compete must be reasonable in order to be enforceable. [16] Employers generally have the upper hand and can control negotiations between the employer and a new employee. [17] "Generally, management has much more leverage than employees in negotiating noncompete clauses. Restrictions on future employment usually arise at the beginning of an employment relationship, when employees have little bargaining power to resist these terms. Moreover, most employees do not seriously contemplate the possibility of leaving future employment at the outset of the relationship and, therefore are not overly concerned about specific terms that might circumscribe their future employment prospects." [18] Therefore, the courts in states that enforce non-competes have found it imperative to allow the employee to have an out when the agreement or clause itself is unreasonable. [19]

The "blue pencil rule" allows courts to change a non-compete agreement that is too restrictive in its original form. [20] The court may then enforce the modified agreement. [21]

In states where non-competes may be enforced, courts will also look to the face of the agreement. [22] In particular, most well-written non-competes will specify geographic scope of the restriction, scope of services to be restricted and the duration of time the clause should cover. [23] "Non-compete clauses must protect a legitimate business interest of the employer, such as trade secrets, confidential information, and customer relationships." [24] To also protect the interests of the employee who is in search of employment, these three factors must be reasonable and not overreaching. [25] Additionally, recent Massachusetts cases have held that a non-compete agreement will be found invalid if the employer has changed job positions, increased salary, or changed bonus eligibility and the language of the agreement does not specify that it will still be valid under such circumstances. [26]

Alabama, California, Colorado, Delaware, Massachusetts, and North Dakota Have all held that non-compete agreements are completely and always invalid. [27] California, in particular, has a strong policy in favor of "competition and employee freedom." [28]

The remedy for violation of a non-compete agreement is either damages or an injunction. [29] Additionally, new employers may be held liable for hiring an employee who has signed a non-compete agreement with another employer. [30]

V. Economic Implications of Non-Compete Agreements

The overall economy of a state or region can be affected by the legal status of non-compete agreements. [31] The East Coast, for example, has lost many companies to California because of the tendency to enforce non-compete agreements [32]. California, which does not enforce non-compete agreements, has seen a huge increase in industry. [33] Bijan Sabet, a partner at a Venture Capitalist firm explains, "If you look at California, there are a lot of startups created from alumni of successful and unsuccessful companies. [34] Many of these entrepreneurs came from companies that we would call competitors to their new thing. [35] How many people are at Google that used to work at Yahoo? How many folks are at Apple that used to work at Microsoft? Where did the earliest Apple employees come from? How about the founders of Intel?" [36] Sabet goes on to explain that California's policy against enforcing non-competes lead to the rise of Silicon Valley as a leader in the technology industry. [37]

VI. Enforcing and Contesting the Valid Non-Compete Agreement

If an employee finds himself in a situation where he has found a new job, but signed a non-compete agreement with his prior employer, he may still be able to take the new job. [38] The employee should generally not disclose the existence of the non-compete until later in the interview process, when the potential new employer has expressed a strong interest in the job candidate. [39] That way, the employer will be more likely to work with the employee to find a way to hire him. [40]

Additionally, dealing directly with the former employer is a good way to calm fears. [41] "Once the employer is satisfied that you won't use inside information to compete, they are a lot less likely to sue to enforce your non-compete clause. Since non-compete clauses are becoming more common, more employers are open to taking this step to avoid litigation." [42]

VII. Conclusion

The existence of a non-compete agreements can make or break an individual's career. If a non-compete agreement is found to be valid, an employee may find himself looking for work in a new field. However, if the employee takes steps before signing the non-compete, such as making sure it is narrowly tailored, it will be less likely to interfere with the employee's next job search. Additionally, before signing any contract, including a non-compete agreement, an employee should consult with an attorney who has the appropriate specialty.

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CHIPPING AWAY AT THE RIAA'S "MAKING AVAILABLE" THEORY OF COPYRIGHT INFRINGEMENT

I. Introduction

On September 8, 2003, the Recording Industry Association of America (RIAA) filed copyright infringement lawsuits against 261 individuals for sharing songs on peer-to-peer (P2P) networks.[1] In the five years since, the RIAA has sued, settled, or threatened litigation against over 30,000 Americans for alleged violations of the Digital Millennium Copyright Act.[2] These actions have attracted a great deal of public attention, largely due to the fact that the suits have hit very close to home for many Americans. Unlike prior lawsuits, which targeted software programs such as Napster and Grokster, this new chapter in the file-sharing saga has focused on ordinary people.[3] The targets of the RIAA's legal claims run the spectrum of everyday people who are not typically the subjects of copyright actions, including children, parents, grandparents, single mothers, professors, and college students.[4]

The RIAA's strategic offensive against music consumers has spurred a firestorm of debate concerning topics such as copyright law, technology, privacy, and legal procedure. For the first few years of the RIAA's legal efforts, the focus of legal and social observers centered on the RIAA's tactics for identifying and filing suit against potential defendants.[5] In the last year, however, as contested cases have made their way through district court litigation, the focus has shifted to the interpretation of black-letter copyright law. The

RIAA's "making available" theory of infringement has garnered a great deal of attention, though its acceptance by district courts has been inconsistent. To date, the few district courts to rule on the matter have each interpreted the Copyright Act differently in the context of file-sharing, indicating that there is likely to be ongoing uncertainty until appellate level courts offer clarification. For the moment, though the trend is moving away from acceptance of the "making available" theory, courts appear more willing to allow the RIAA to prevail on the basis of actual dissemination.

II. The Right to Distribute Under the Copyright Act

Allegations of file-sharing implicate the right to distribute creative works, and the RIAA cases are thus litigated under this provision of the Copyright Act. Section 106(3) of the Copyright Act gives a copyright owner the exclusive right to distribute, or authorize others to distribute "copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership."[6] The concept of distribution is often interrelated to publication, as "the distribution of copies or phonorecords of a work to the public constitutes a 'publication' of such work."[7]

III. The *Thomas* Decision and the Origins of the "Making Available" Theory

The "making available" theory of copyright infringement has been the keystone to the RIAA's legal claims. However, there is no express statutory authority for equating "making available" with infringement in the absence of evidence of actual acquisition of the work by another party. The Copyright Act states that "anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 . . . is an infringer of the copyright of the author."[8] Thus, the litigants in RIAA cases have been engaged in a heated debate over the plain meaning of the term "distribution" in section 106(3). The RIAA believes that distribution occurs when a copyrighted work is made available for download over P2P networks, while opponents argue that no distribution takes place until someone downloads the work and there is actual dissemination. This distinction is key because the RIAA does not obtain evidence of actual downloading of the songs found in shared folders. The only evidence of actual downloading it brings to court are the downloads performed by its investigators, who are arguably agents. As a result, the RIAA has no evidence that songs "made available" were actually disseminated to others.

At the dawn of the Internet age, courts were forced to confront the issue of sharing copyrighted works over electronic networks. In *Playboy Enters., Inc. v. Frena*, the defendant was the proprietor of a subscription-based, computer bulletin board service onto which users uploaded scanned images from Playboy magazine for other users who downloaded them.[9] The court said that by making the images available for downloading, the defendant "supplied a product," thus engaging in unauthorized distribution of copies to subscribers.[10] It is noteworthy that, in this case, Fena admitted that each of the files had been downloaded by at least one of his customers, clearly evincing actual dissemination as well.[11] Due the heavy pressure placed on defendants to settle, the extensive amount of pre-trial procedural motions, and the RIAA's frequent decisions to drop suits involving innocent and mistakenly identified defendants, the first RIAA case against a private individual to reach a verdict was *Capitol v. Thomas* in 2007. In *Thomas,* a Minnesota woman was found liable for willful copyright infringement because she uploaded twenty-four songs on the Kazaa P2P network.[12] Prior the jury's award of $222,000 in statutory damages, both parties vehemently contested jury instruction number fourteen, relating to the standard for copyright infringement.[13] The defendant's counsel urged the judge to maintain his original instruction, mandating that an actual transfer, rather than merely making files available, is necessary for a determination that the right to distribute has been violated.[14] The judge, however, amended the instruction, siding with the plaintiff's interpretation that making a copyrighted work available is infringement.[15]

The *Thomas* decision was seen as a major victory for the RIAA, both in term of the verdict and the extremely high damage award, which would seemingly compel other defendants to settle out of court. The victory did not last long, however. After receiving a motion to set aside the verdict, the judge reconsidered his jury instruction in light of case law he had subsequently come across.[16] Ultimately, Judge Davis concluded that the jury instruction was inaccurate and overturned the verdict.[17] In doing so, he offered a detailed plain meaning analysis pertaining to the interpretation of the work "distribution." Upon examining the use of the term in other provisions of the Copyright Act, in addition to the analogous Patent Act, he determined that distribution requires actual dissemination.[18] Judge Davis looked at the phrase "distribute . . . to the public . . . *by sale or other transfer of ownership, or by rental lease, or lending*" and judged that an

affirmative act beyond a mere offer to distribute was necessary to effectuate "distribution."[19]
Judge Davis also determined that a "publication" and "distribution" were separate concepts.[20] Specifically, he said that a "publication effected by distributing copies . . . of the work is a distribution," while "a publication effected by merely offering to distribute copies . . . is merely an offer of distribution, not a distribution."[21] Essentially, in reviewing the Copyright Act as a whole, he determined that a publication could encompass an offer to distribute, but an offer to distribute does not fall within the statutory right to distribution.[22]

In the wake of the recent ruling, the RIAA's notion of a precedent-setting victory in *Thomas*
has been tempered, and their keystone legal theory has been dealt a severe blow. Nevertheless, when the case is retried, Judge Davis did determine that the downloads conducted by the RIAA's investigation company, MediaSentry, can be used as evidence of copyright infringement at the new trial.[23] Such evidence could show actual dissemination of the files Ms. Thomas made available, though it is sure to elicit another argument regarding the downloading of songs by an agent. Practically speaking, a copyright holder, or its agent, cannot infringe on a copyright it owns.

IV. Recent Court Decisions Concerning File-Sharing

Within a year of the original Thomas decision, a handful of other cases at varying stages of litigation undertook a similar analysis of the "making available theory." *Elektra v. Barker* represents one major decision of significance. Though the judge was merely ruling on a motion to dismiss, it was one of the few cases in which the arbiter has heard arguments and been fully briefed on the "making available" dispute.[24] In *Barker*, Judge Karas determined that Congress intended the terms "publication" and "distribute" to be synonymous when it enacted the Copyright Act.[25] He further stated that though making files available is not distribution, it is making an offer to distribute.[26] In his opinion, an allegation of an offer to distribute is sufficient to take the case to trial, and he thus denied the defendant's motion to dismiss.[27]

A ruling denying the RIAA's motion for summary judgment in *Atlantic v. Howell* featured reasoning diametrically opposed to that offered in *Barker*. In *Howell*, after reviewing briefs and hearing oral arguments, the federal district court decisively rejected the "making available" theory of infringement.[28] The court did not settle for *Barker's* acceptance of the offer to distribute theory; on the contrary, it determined that an infringement of the distribution right requires actual dissemination.[29] Furthermore, unlike Judge Davis's decision in *Thomas*, this court determined that evidence of MediaSentry's downloads from the defendant's shared file is not sufficient to establish distribution because this defendant had argued that Kazaa had shared his whole hard drive without his knowledge.[30] In a rather unprecedented comment, the court went on to suggest that P2P file-sharing might not implicate the distribution right at all.[31] Rather, it stated that what is really happening is series of reproductions, moving the legal grounds for suit over to section 106(1).[32]

Further muddying the waters, in *London-Sire v. Doe 1,* a Massachusetts court offered perhaps the most comprehensive analysis of the infringement of the distribution right. First, the court rejected the "making available" theory, favoring an actual dissemination standard.[33] In returning to the language of the stature, the court focused on the Copyright Act's reservation to the owner the right "to do and to authorize . . . the distribution."[34] It cited precedent indicating that Congress's intent in including the words "to authorize" was to avoid any uncertainty as the statute's applicability to contributory infringers.[35] Focusing on the language "to do," a defendant, according to this court, cannot violate the Copyright Act by authorizing an infringement if no actual infringement occurs.[36] Therefore, the "making available" theory does not suffice.[37] Rather, the alleged infringer must take more affirmative steps before the work changes hand and "do" the infringing.[38]
The court went on to distinguish between a publication and a distribution, stating that a publication incorporates a distribution, though not vice versa. It offered an example by stating: "[S]uppose an author has a copy of her (as yet unpublished) novel. If she sells that copy to a member of the public, it constitutes both distribution and publication. If she merely offers to sell it to the same member of the public, that is neither a distribution nor a publication. And if the author offers to sell the manuscript to a publishing house 'for purposes of further distribution,' but does not actually do so, that is a publication but not a distribution."[39]

Following this line of reasoning, the court believed that Congress's choice of the word "distribute" as the section 106(3) right indicates that distribution, not a mere offer of distribution must occur to trigger infringement.[40] The only positive aspect of this decision, as far as the RIAA is concerned, was the court's willingness to allow the case to proceed further into discovery on account of the notion that an allegation of an offer to distribute is sufficient to keep the case alive, allowing the plaintiff a chance to prove actual distribution at a later stage in the process.[41]

V. Conclusion

The wide range of right to distribute interpretations handed down by courts in the last year alone indicates the likelihood that we are to see more litigation on the subject. As is often the case, it is noteworthy that an issue with seemingly narrow counters elicits such nuanced differences in statutory interpretation. The dispute over the competing infringement standards, "making available" and "actual dissemination," is rooted in the language of section 106(3). From there, the analysis expands into the definition of the terms "distribution" and "publication," whereupon some courts choose to do a comprehensive analysis of the Copyright Act and even look at related statutes as well.

Most likely, Congress and federal appellate courts, and perhaps even the Supreme Court, will have to step into the fray. If and when this occurs, it will be interesting to observe whether policy considerations are introduced into the assessment of black letter law, as the social and technological implications of file-sharing further coalesce into a quantifiable economic impact. The recording industry alleges that it is losing a great deal of money. For their part, the anti-RIAA forces have indicated that they do not seek a file-sharing free-for-all, as they have proposed compulsory license systems in which fees are collected from P2Ps by performing rights organizations.[42] As courts hammer out their legal analyses of the situation, it is clear that the lawsuits have not chilled P2P file-sharing, and the RIAA has no intention of discontinuing its aggressive pursuit of online piracy.

For time being, it seems as though the "making available" theory has been disfavored by trial courts. Despite this trend, anti-RIAA forces should not rejoice, as many of those same courts are willing to allow the RIAA's own downloads as evidence of actual dissemination. I suspect we will get more opinions on the subject in the near future, until one day, as Judge Davis implored when he set aside the *Thomas* verdict, the Supreme Court or Congress steps in with a definitive test.

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TAMED TIGERS: SOVEREIGN WEALTH FUNDS AS PASSIVE INVESTORS

I. Introduction

The purpose of this article is to analyze the current role of sovereign wealth funds in a corporate governance scheme. Sovereign wealth funds, which have become increasingly important institutional investors in the United States, have found their activities in equities markets in the United States increasingly constrained due to stringent regulations. While these sovereign wealth funds raise important policy considerations for lawmakers, these regulations hinder sovereign wealth funds in their role as investors. Despite the power the sovereign wealth funds could hold in American companies, these funds have effectively become "tamed tigers." Despite their enormous power, they simply cannot exercise it. Thus, this article will examine whether having sovereign wealth funds in a "tamed tiger" capacity should continue or whether regulations should encourage more activity from sovereign wealth funds.

II. Sovereign Wealth Funds

The best definition of what sovereign wealth funds are and what they do comes from the Santiago Principles, which is as follows.

> Sovereign wealth funds (SWFs) are special-purpose investment funds or arrangements that are owned by the general government. Created by the general government for

> macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies that include investing in foreign financial assets. SWFs have diverse legal, institutional, and governance structures.[1]

This description effectively encompasses the basic structures and objectives underlying sovereign wealth funds. Separating sovereign wealth funds from other institutional investors, such as hedge funds and mutual funds, is the element of state ownership. While most other institutional investors have profit as their sole objective, state ownership of sovereign wealth funds adds a layer of general policy objectives to these sovereign wealth funds. Furthermore, sovereign wealth funds typically have one of three sources of funding: account surpluses from commodity exports (such as oil), excess foreign exchange reserves, and pension reserves.[2]

These sources of funding have allowed sovereign wealth funds to balloon in size. As of the end of 2007, sovereign wealth funds had $3.3 trillion in assets under management.[3] This total dwarfed the $1.9 trillion managed by hedge funds and the $800 billion managed by private equity, but was much smaller than pension funds ($28.5 trillion), mutual funds ($27.3 trillion), and insurance funds ($19.1 trillion).[4] The largest commodity-based sovereign wealth fund is the Abu Dhabi Investment Counsel, based in the UAE, with $875b in assets under management, while the Government Pension Fund of Norway is the largest non-commodity sovereign wealth fund, with $380b in assets under management.[5]

Given the size and policy objectives of these sovereign wealth funds, there have been a number of concerns raised about sovereign wealth funds. In essence, the concerns with these funds
focus on sovereign wealth funds taking up large equity positions in American companies and exploiting their control. Securities
and Exchange Commission Chairman Christopher Cox encapsulated these concerns when
he pondered whether these funds, “will always direct their affairs in furtherance of investment returns, or rather will use business resources in pursuit of other government interests.”[6]

III. The Response: CFIUS

The United States government has a
strong regulatory structure in place to alleviate these concerns. The primary regulator of sovereign wealth
funds is the Committee on Foreign Investment in the United States (CFIUS). In the context of sovereign wealth funds,
CFIUS reviews any of their acquisitions of U.S. firms that could result in control of those firms where that control could affect the national security of the U.S.[7] This national security inquiry has a broad
focus, as the review centers on whether the fund acquires control of the “critical infrastructure of or within” the United States.[8] Furthermore, under subsequent regulations,
“control” is given a broad definition to encompass the power, direct or indirect, to “determine, direct, or decide matters affecting an entity.”[9] CFIUS

has the power to suspend or prohibit the transaction and can seek divestiture or other relief in order to enforce its powers.[10]

These broad statutory and regulatory mandates allow CFIUS to alleviate concerns of sovereign wealth funds abusing controlling positions in U.S. firms. CFIUS deters these funds from using their business resources in the U.S. in pursuit of government interests, rather than in pursuit of investment returns. Moreover, rather than outright block these transactions, CFIUS typically places conditions on controlling foreign owners in exchange for their approval. When a subsidiary of French company Matra purchased Fairchild Industries, a space and military firm,[11] CFIUS required Matra to overhaul its export control system in exchange for approval.[12]

Some people want CFIUS to take a more critical eye toward sovereign wealth funds. One of the most outspoken proponents of further regulation constraining sovereign wealth funds is U.S. Senator Evan Bayh of Indiana. In a February 2008 op-ed, Bayh voiced his concerns about the increasing power and influence of sovereign wealth funds, particularly those in Russia and China.[13] While Bayh gave credence to national security concerns posed by these funds, he also cited the potential for intellectual property theft and currency manipulation among the dangers these funds could pose.[14] He also discussed the need for a broader definition of “control” to encapsulate situations where a dominant foreign minority shareholder.[15] Bayh mentioned Citigroup's largest individual shareholder, Saudi Prince Alwaleed bin Talal at less than 5%, in passing.[16] Tellingly, at the end of 2007, Prince Alwaleed was instrumental in the ousting of Citigroup CEO Chuck Prince, despite holding a very small percentage of Citigroup's shares.[17]

As justified as these concerns and calls for stricter regulation may be, the CFIUS process is open to abuse. One way this process can be abused is in the context of hostile takeovers. British Tire and Rubber (BTR) attempted to purchase Norton Company, an American firm that manufactured ceramic ball bearings used in the space shuttle.[18] Norton garnered political support through claims of national security concerns. Over 100 congressmen urged a CFIUS investigation.[19] Eventually, a white knight in the form of a French buyer made an offer for Norton Company at a higher price.[20] No national security concerns were raised about the French buyer and the deal went through.[21]

While this regulatory structure provides strong protection of national security interests, it has also hamstrung the influence of sovereign wealth funds. This process is open to political abuse. Furthermore, CFIUS placing conditions on acquisitions keep sovereign wealth funds from effectively exercising control. Without this influence, sovereign wealth funds are basically forced to be passive shareholders. If sovereign wealth funds take an active role in a firm where they have control, they could face possible retribution from CFIUS. They are forced to be tamed tigers.

This creates a set of unusual incentives for sovereign wealth funds and firms in which they invest. Sovereign wealth funds have a much lower incentive to monitor equity investments in U.S. firms. If these U.S. firms have managers who are making poor business decisions, sovereign wealth funds would be hesitant to remove these managers, even if their rationale was for legitimate reasons. Sovereign wealth funds have the resources and expertise to effectively monitor their equity investments and to bring in top-flight managers to these firms. Sovereign wealth funds that have no political motivation whatsoever will avoid investing in the United States simply because they do not want to deal with these regulatory hurdles. The cost of becoming tamed tigers might become too much for them to stomach.[22]

IV. What to favor?

These potential abuses by sovereign wealth funds and the firms which receive their equity investment raise a basic question for regulators and legislators: How should these concerns be balanced? Any regulation which minimizes the potential

for sovereign wealth funds to abuse controlling positions in these firms reduces the ability and incentive these funds have to monitor and control their investments. In contrast, a regulation
which encourages sovereign wealth funds to take an active role in the corporate governance of these firms would open the door for sovereign wealth funds to act contrarily to sovereign wealth funds. If
legislators and CFIUS instead aimed to strike a balance between these competing interests, a suitable balance might not be found, resulting in more potential
for abuse from both sovereign wealth funds and from their equity investments.

A "time will tell" approach might help create a better
understanding of how state ownership affects the investment activities of sovereign wealth funds. The current
credit crisis could help illuminate whether these sovereign wealth funds are acting for investment or political purposes. For example, Norway's Government Pension Fund
was short-selling the bonds of Iceland's distressed banks, which resulted in Iceland's
prime minister accusing Norway of attempting to destabilize Iceland's economy.[23] The recent collapse in the price of oil[24]
could also shine a light on how sovereign wealth funds behave, given that a number of them are both strongly dependent on account surpluses from oil exports
and are in countries which have based their economies around oil.

There is also something to be said for caution. The analysis above strongly suggests that
these sovereign wealth funds have a lot of potential for mischief. National

security concerns aside, these sovereign wealth funds are large enough to move markets in significant ways. Corporate governance concerns resulting from the inability of sovereign wealth funds could at least be limited to specific firms. However, creating potential for misbehavior from sovereign wealth funds could have widespread disastrous consequences within and beyond the markets. While a number of existing political, regulatory, and economic factors make equity investment an unlikely avenue for sovereign wealth funds to abuse their power,[25] further regulation might be necessary. If an individual minority shareholder like Prince Alwaleed has enough power to oust a CEO, sovereign wealth funds with even greater resources and political influence could do much more damage in comparable minority shareholder positions.

While this trade-off might be a bitter pill to swallow, it is necessary. Misbehaving managers at various firms would be preferable to the potential troubles these sovereign wealth funds could create. Sovereign wealth fund investment should be encouraged, but regulators must ensure they will remain passive. These tigers have to be tamed.

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MERGER TALKS IN DETROIT AUTO BUSINESS

I. Introduction

Since September, General Motors ("GM") and Chrysler's majority owner, Cerberus Capital Management have been in talks over the possibility of acquiring Chrysler. [1] Both companies are facing a financial crisis as both have suffered huge losses during this economic recession. [2] Moody's Investor Service stressed that GM would run out of operating cash next year without new sources of capital. [3] GM sees its merger with Chrysler as its bailout providing the company with revenue, cash flow, and cash reserves to make it through the coming year. [4] Merger talks have dealt with GM acquisition of Chrysler's auto business and Cerberus merger with lender Chrysler Financial Services and GM's ownership of GMAC Financial Services. [5] However, the question remains: how beneficial will the GM-Chrysler merger be to these companies. In this article, the advantages and disadvantages of the merger will be discussed.

II. Merger, Lifeline for GM and Chrysler?

One clear implication from the merger is profit for the combined entity. GM and Chrysler look at this merger as a lifeline from their spiraling financial crisis. Chrysler's debt trades at around 30 cents on the dollar. [6] Furthermore, Chrysler has witnessed a 25% drop in its sales. [7] As for GM, the company has already lost $18.8 billion in the first six months of the year and still has not reported its third-quarter losses. [8] The consolidated entity would benefit from Chrysler's $62 billion in revenue, 1.5 million customers and $11 billion in cash. [9] This money could be used to fund some of the drastic cost-cutting to occur at Chrysler. [10] This new company would produce approximately $250 billion in annual revenue with the advantage of owning more than 30 % of the U.S. market. [11] Thus, it would improve the companies' credit rating and lower the risk that either company would have to seek bankruptcy over the next 15 months. [12]

Also, the merger has the potential for savings for GM providing GM with much needed funds. [13] These savings by GM are in purchasing and raw material costs. [14] They also include "technology savings from merging powertrain and clean technology platforms as well as corporate overlaps in engineering, marketing, distribution and advertise[ment]." [15]

In addition, GM would have access to Chrysler's products, including the successful Jeep brand and minivan lineup. [16] Furthermore, Chrysler's joint ventures, such as its deals with China's Automobile Co. and Volkswagen AG, would be accessible to GM. [17]

III. Financing Hurdles and Dealings with the UAW

However, there are major setbacks to the merger of these two companies. Most importantly, thousands of employees may be laid off as a result of the merger. The Anderson Economic Group of East Central Lansing has estimated that this merger may cause between 25,000 to 35,000 layoffs. [18] The former Chrysler executive Thomas Stallkamp stated that it would be necessary for Chrysler and GM to consolidate plants during a merger in order for the merger to be successful. [19] Consolidation means big job cuts. It will be difficult convincing the United Auto Workers Union ("UAW") to these job cuts, especially since the Union had already agreed to 85,400 job cuts at GM, Chrysler, and Ford in exchange for buyouts and early retirement deals. [20] UAW President Ron Gettelfinger has already stated that he does not favor any merger that includes more layoffs. [21]

The Union can threaten to strike if they do not support this merger. [22] Says Stallkamp, "It would require a huge deal with the UAW." [23]

In addition, GM may be unable to secure financing necessary for its acquisition of Chrysler. [24] GM had recently approached the U.S. Treasury for funding of $10 billion to support the new merger in exchange for taking an ownership stake in the combined company. [25] However, the Treasury Department has stated that it is not negotiating direct aid for the merger. [26] As of right now talks about the merger are on hold until after the Nov. 4th election as both parties hope to secure loans with the new administration. [27]

Furthermore, GM may be "over their heads" in trying to consolidate the two companies. The merged automaker would have over 10,000 dealers. [28] This is far more dealers than it needs for the amount of cars the combined company would sell. [29] Also, GM would have to design and market cars for 11 different brands. [30] Dealers have invested in franchises to sell these brands. If GM decides to discontinue any of these brands, dealers may file suit in an effort to try to recoup their investment in franchises. [31]

IV. Conclusion

GM and Chrysler should merge. Both companies are at the brink of bankruptcy. This merger would bring needed revenue back in into the companies, producing approximately $250 billion annually. [32] Although the merger will result in job cuts as both companies attempt to consolidate, the loss of jobs would be inevitable if GM and Chrysler do not merge and continue on their downward financial spiral towards bankruptcy. Thus, a merger appears to be a much needed lifeline for both companies. However, the merger could fall through if GM is unable to secure financing from the new administration for the merger. As a result, the success of the merger is uncertain.

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WALL STREET TO FRAUD STREET: DISGRUNTLED INVESTORS WANT COMPENSATION

I. Introduction

With the financial crisis showing no signs of recovery many are worried about employment, job security, investments, and the overall economy. With the collapse of Lehman Brothers Holdings, the buyout of Merrill Lynch along with several other Wall Street firms, and the government bailout of American International Group, many are beginning to reevaluate and question Wall Street and the executives that run the corporations.[1] While the Bush administration was proposing a $700 billion bailout plan, investors began to point fingers at the wealthy corporate executives that pocketed millions of dollars while the companies they worked for crumbled.[2] Although there are several factors that played a part in the Wall Street crisis, investors are lining up to sue the executives with the deep pockets.[3] Two major issue at the center of heated discussion are: fiduciary duty and executive compensation.[4][5]

II. Fiduciary Duty

A. Fiduciary Duty and Rise in Litigation

Corporate executives, as a member of the board of directors, have a fiduciary duty to the shareholders' of a corporation.[6] Trust and confidence are place in the directors of a corporation, and they are relied upon to exercise discretion and expertise to act in the best interest of the shareholders.[7] Persons acting in a fiduciary capacity are held to a high standard of honesty and full disclosure in regards to the shareholders. [8] Corporate executives, as fiduciaries, must act in the best interest of the corporation and its investors by exercising skill, care, and diligence at the disposal of his self-interest when acting on behalf of the shareholders.[9]

As the financial crisis rapidly unfolded and confidence in the market was disintegrating, the fiduciary duties of the Wall Street executives became the center of attention.[10] The investors and the public began to question whether the wealthy executives of the large companies played a major role in crashing many large Wall Street firms to the ground.[11] Investors now are claiming that corporate directors breached their fiduciary duties by selling the companies too cheaply.[12] Many companies including American International Group, Morgan Stanley, Lehman Brothers Holdings, and Washington Mutual were hit with lawsuits as the crisis in Wall Street only grew in late September 2008, and many other lawsuits are predicted to follow.[13]

The main complaint in recent shareholder suits since the Wall Street crisis is that the fiduciaries, the corporate executives, misrepresented the companies' financial position, understated their exposure to mortgage-related investments, and inflated losses in the company.[14] Further, the investors are alleging that these kinds of executive misrepresentation led to major losses for the shareholders.[15] Especially in September, many corporations experienced a large drop in stock value because of the depressed market conditions, and companies were left with no choice but to cooperate in mergers.[16] The plummet in the stock market coupled with continuing corporate mergers, furthered the investors' suspicion that corporate directors were intentionally driving down stock value in order to make dealings with other corporations to sell the companies at a cheaper price.[17] Shareholders are alleging that the executives and their decisions caused investors to lose millions of dollars, while executives collected on their multimillion dollar severance packages. [18] Lehman Brothers Holdings is currently under investigation for this very issue. Officials are investigating on whether Lehman Brothers Holdings mislead the public by announcing their intentions to file for bankruptcy and effectively drove their stock value to the floor. [19]

B. Shareholder Suits and Recent Developments

Executives accused of fraudulently inflating their corporate losses are now facing criminal charges.[20] Under federal guidelines, someone engaged in securities fraud can be convicted for zero to six months in prison; however, a variety of factors can increase the time behind bars. The factors include: the size of shareholder losses, the number of victims, and whether a defendant is an officer or director at a public company.[21] In these shareholder suits, both sides retain financial experts to determine how much shareholder harm are directly tied to the fraudulent inflation of a corporation's loss reserves.[22]

It is not easy for investors to get compensated for their losses through litigation. Investors have several legal obstacles they must overcome. Investors have to prove that their losses were because of managerial fraud and not a result of the ordinary fluctuations in the market.[23] Recently two major Supreme Court decisions have made it even more difficult for investors to bring fraud claims against corporate executives.[24]

The first obstacle comes from a 2005 ruling.[25] The Supreme Court held that alleging a director's general misrepresentation caused inflated share prices and therefore loss to shareholders, is insufficient for a fraud claim.[26] The Supreme Court ruled that an investor must prove that their losses were caused by a particular fraud, and not other market forces.[27] This first obstacle makes it harder for investors to bring a claim because fluctuation and volatility is something that is embedded in the financial market.[28] Pointing to a particular fraud, an oral or written statement, to prove that a company's misrepresentation caused the stock to rise or fall is a difficult task.[29] Also, these suits are difficult argue because companies can easily argue that the drop in the stock market were the effects of a unforeseeable market crisis.[30] The second obstacle that investors must overcome arises from a 2008 Supreme Court decision.[31] The Court held that fraud claims can no longer be brought against secondary actors such as lawyers, accountants, and other third parties involved in the "scheme" of deceit.[32] Scheme liability is no longer upheld because the Court ruled that secondary actors are too far removed from the deceit for shareholders to show reliance.[33] These recent changes in securities law benefitbusinesses and corporations but make it much more difficult for investors to bring claims.[34]

III. Executive Compensation

Executive compensation is another area of concern in the current crisis.[35] Overpaid corporate executives is not a new area of concern in corporate America.[36] The main reason why this issue is brought to light now is because, as Wall Street firms are collapsing, the executives of those firm's are walking away with more than enough money in their pockets.[37] For example, while Lehman Brothers Holdings filed for bankruptcy and their stock plummeted, Lehman Brothers' CEO Richard Fuld pocketed approximately $480 million since 2000.[38] It is also reported that Lehman Brothers Holdings agreed to pay $23 million to three executives just days before its collapse.[39] As the Bush administration pushed for the $700 billion bailout plan, congress leaders pushed to have the Treasury set standards to prevent excessive executive compensation.[40] Initially the three main approaches included: first, limiting severance packages; second, giving shareholders an advisory vote on executive pay; and finally, giving companies more authority to claw back bonuses.[41] First, severance packages is a common feature in merely every executive employment contract.[42] The current proposal would not only limits severance packages, but it would also require companies participating in the bailout plan to ban severance pay for the next two years.[43] Second, the proposed changes would require that companies set up an advisory board composed of a company's shareholders.[44] Under the proposal, the advisory board would annually vote on the top executives and pay them accordingly. [45] Although critics say that a similar system is already in place in the Untied Kingdom and the provisions have not stopped executive pay, supporters argue that this system better ties performance with awards.[46] Finally, there is a trend of having a claw-back provision be included in the executive pay agreement.[47] A claw-back provision requires that an execute give up pay or severance when it is found that corporate results were misstated.[48] Although a claw-back provision was part of the Sarbanes-Oxley law, because it is difficult to apply and hardly used, there has been a movement to include a claw-back provision in the executive-pay agreement itself.[49]

IV. Conclusion

The current financial crisis has many investors concerned about the future Wall Street. Whether it is fiduciary duties or excessive pay, it is evident that the entire system, including corporate firms, financial institutions, and government agencies, need reconstruction, reform, and regulation. Corporate executives have the responsibility of putting the best interest of the company and its shareholder's above anything else, and in the past few months there have been many allegations insisting that the priorities of Wall Street and its executives are misplaced. With the current economy and the distressed market, it is the responsibility of the executives and the regulatory agencies to help regain the public's trust and gradually rebuild public confidence in the market.

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NEW STADIUMS, HIGHER PRICES, NO REMEDY

I. Introduction

It seems like every sports franchise is building a new stadium these days. In New York alone, four franchises (the Yankees, Mets, Giants, and Jets) will be moving to three new facilities within the next two years. [1]. By 2011, other area teams including the Rangers, Liberty, Knicks, Nets, Devils, Islanders, and Redbulls will all be playing in new or renovated stadiums. [2] The allure of a new stadium cannot be denied: more luxury seating, refined amenities, state of the art technology on and off the field, attracting free agent athletes and corporate sponsors, and last but not least, the bragging rights to say "my home town ball park is better than yours!" Sadly, with new stadiums come new costs to fans of their sports, not the least of which is increased ticket prices. Additionally, apart from increased ticket prices, there are additional costs that come with new stadiums.

In the current economy, where necessities such as gas, power, and food prices are on the rise, can the average fan afford to pay for season, or single game tickets, to their team's home games? This article will examine the trend toward new stadium building, the related costs, and potential remedies to the economic effects.

II. Newer, Bigger, Better & More Expensive

It goes without saying that team owners will always say that building a stadium will have a positive economic impact on a city. Stadiums create new jobs during and after construction, and they have the ability to increase tourist spending. [3]

Further, increased foot traffic to games will also generate increased spending, which could create new jobs, and give rise to the "multiplier effect"; which essentially means that increased income creates new jobs and spending. [4] Team owners also want to attract the best free agent athletes. Part of the ploy in getting these free agents is displaying the seeker team's brand new, or newly renovated, state of the art facility.

However, when it comes right down to it, a new stadium means increased revenue streams for team owners. For example, Dallas Cowboys owner Jerry Jones is in the final stages of completing the new $1.1 billion Cowboys stadium. [5] With a standard 80,000 seats that can be expanded to 100,000, and an additional 300 suites, the revenue from ticket prices will only be the beginning for Jones. [6] The most expensive seats in the new stadium are expected to go for approximately $340 a game. [7] Naming rights for the new stadium will likely yield an unprecedented amount, and various sponsorship deals will also pad Jones' pocket. Further, with new stadiums, owners are able to increase the proportion of non-shared revenue. [8] Additionally, owners generally believe that with a new stadium comes increased attendance, and with increased attendance is increased income. [9]

The most significant increase to fans specifically will be the costs of seat options or personal seating licenses (PSLs). A PSL is essentially the right to buy seats; it gives its owner the right to purchase specific seating in a team's stadium. A PSL can last as long as the team and buyer agree to, and it does not include the cost of actual game tickets. PSLs are a way for owners to pass along costs for rebuilding or renovating stadiums to fans. In the Cowboys case, the PSLs will range from $16,000 to $150,000, which allows fans "to reserve the right to renew the seats for 30 years."[10] Even assuming that a small fraction of the stadium, say 2,500 seats, have to pay the maximum seat option, extrapolated, that total amounts to $375 million for the 2,500 seats.

New stadiums also have the benefit of an increased value for team owners. Substantial public construction subsidies and lease terms are the tip of the iceberg. [11] Team owners have to sell the economic advantages to local cities because the owners (and fans) are generally not the only ones that bear the cost of financing these new venues. Oftentimes, cities and states bear a substantial portion of the cost of the stadiums. [12] While the afore mentioned reasons are the strongest points for cities bearing a portion of the cost for stadiums, oftentimes, those reasons may actually lack credence. Some experts even say that building a stadium has very little positive, and in some cases, may have a negative impact on the local economy. [13] Although it is true that stadiums can create economic growth when they are a source of a significant export industry, [14] specifically when the stadium attracts non-locals and results in broadcast or licensing rights to national media. [15] Generally, the economic impact of sports facilities is minimal. [16]

So with this minimal economic benefit of stadium building in mind, why allow teams to keep building with the benefit of taxpayer dollars?

III. Put Up Or Shut Up!

The fact is that sports leagues are a monopoly. [17] It really comes down to simple supply and demand. More cities can support sports franchises, than sports franchises exist. Thus, if a team wants to build a new facility or renovate its old one, and the city is not willing to put up a portion of the cost, the team will simply move to a new city. Sports leagues deliberately keep the number of franchises low, to maximize member teams' profits. [18] With more states and cities that want, and are able to sustain sports franchises, teams are able to essentially 'auction off' their franchises to the highest bidder. [19] In such situations, fans end up being the losers because they pay higher ticket prices at the gate, higher PSLs, and their tax dollars are used to finance the new stadiums.

With the current economy shrinking the lending ability of banks and increasing the loan costs for teams, it sadly makes sense that teams would try to squeeze every last dollar from their prospective suitor cities. For instance, because of the collapse of the short term debt market, the New York Jets, Giants, and Dallas Cowboys’ debt costs have increased substantially. [20] The problem is that a large portion of the clubs' debts are auction rate securities. [21] Auction rate securities are long term securities that banks hold weekly or monthly auctions to set their rates and give the holders, usually corporations or wealthy individuals, the option to sell the securities. [22] While these securities are usually considered extremely safe, due to the credit crunch, fewer banks are showing up for the auctions, resulting in greatly increased interest rates for the securities. [23] With investors losing confidence in the market, it is unlikely that the auction rate securities’ interest rates will be coming down. Further, with collective bargaining, teams are paying more to obtain quality professional athletes. Again, this results in the average fan paying more for tickets, concessions in the stadium, and PSLs.

For instance, the Giants will charge $85 to $700 for a single game ticket, and PSLs of $1,000 to $20,000 for the privilege of purchasing single game or season tickets. [24] The Jets on the other hand, will charge $4,000 to $25,000 for PSLs, and $95 to $700 for single game tickets. [25] The irony of this situation is that even though fans and cities often finance the construction of these stadiums, there is not much they can do about the increased prices for everything within the stadium.

IV. To Sue or To Vote

Unfortunately, it appears that there is little legal remedy for fans who feel that their team has priced them out of their sports escape. While individual cities may be able to negotiate a longer lease for stadium venues, or write provisions in leases that would deter teams from leaving their cities, there is very little that fans can do to avoid paying substantial costs to see their home teams. [26] In the past, fans have tried to use lease agreements between the city and the sports team to challenge increased prices. [27] In Heidrick v. PDB Sports, Ltd. [28], the plaintiffs claimed that the Denver Broncos ownership had violated the terms of their lease, by charging higher prices than NFL teams with comparably priced facilities. [29] The judge however ruled that the plaintiffs had misinterpreted the lease's limitation on ticket prices, essentially shutting the lawsuit down. [30] Alternatively, citizens can take to the ballot boxes. While voters have rejected public financing of stadiums in San Jose, Milwaukee, and Seattle in ballot initiatives, those teams were still able to obtain new stadiums. [31]

V. Conclusion

Sports have always been a way for people to escape from their day to day realities. Teams give their fans something to cheer for at coffee shops and around water coolers. Sadly, the cost of seeing an occasional game these days have become extremely restrictive. While the costs may be explainable in some instances, the fact remains that many fans are priced out of the market, with very little they can do about it.

In the end, it may come down to fans simply boycotting their team to protest price increases. In these economic times, it will not be very difficult for some fans to cut off this expense. However, while some are willing to give up their season tickets, or their intermittent foray to go and see their team, many others are financially able and willing to accept the burden of the costs. Until there is an organized boycott by all fans, or a plausible legal remedy, it appears that new stadiums and higher prices are here to stay.

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BANKING ACQUISITIONS DURING THE FINANCIAL CRISIS

I. Introduction

When the housing crisis was at its lowest point, entire neighborhoods were experiencing the possibility of foreclosure as residents defaulted on their mortgage payments. Foreclosures and consumer defaults have not only damaged the housing market but also have affected financial institutions. [1] The financial industry was hit particularly hard, especially leading subprime lending banking institutions. Washington Mutual, Freddie Mac, Wachovia, Bear Stearns, Countrywide and Merrill Lynch have been or are in the process of being acquired by big banks, strong enough to make the acquisition. [2] In this article, I will discuss the most recent acquisitions, Washington Mutual and Wachovia Corp., and analyze the benefits of this acquisition to the banking industry as well as the costs to consumers.

II. Background

Both Washington Mutual ("WaMu") and Wachovia Corp. ("Wachovia") suffered heavy losses after the housing market collapse. Wachovia and WaMu ranked first and second as the biggest providers of "option" adjustable rate mortgage loans ("ARM") [3] and WaMu ranked sixth among U.S. mortgage companies as the biggest subprime lender. [4] These subprime and adjustable rate mortgage loans were meant to aid individuals with poor credit scores to acquire mortgages. [5] Option ARM loans offered very low introductory payments and let borrowers defer some interest payments to a later period. [6] As borrowers became delinquent on their mortgages, both financial institutions suffered billions of dollars in losses. In July WaMu reported a $3 billion second-quarter loss. [7]

Furthermore, in 2006 Wachovia had made $23 billion acquisition of Golden West Financial, a large mortgage lender. [8] After the housing crisis, Wachovia's stock plummeted 93% in the past year as a result of the Golden Financial acquisition. [9] The Federal Deposit Insurance Corp ("FDIC") seized WaMu in September 2008. [10] JPMorgan Chase & Co. ("JPMorgan") then purchased WaMu from the FDIC. [11] Citigroup and Wells Fargo both made offers to Wachovia. [12] However, Wachovia made a deal with Wells Fargo for $15.1 billion. [13] Citigroup filed suit claiming that the Wells Fargo-Wachovia merger was "in clear breach of an exclusivity agreement between Citi and Wachovia." [14] Recently, Citigroup announced that it is no longer seeking the enjoinment of the Wells Fargo-Wachovia merger. [15]

III. Effects of the Acquisition

A. Survival of the Fittest Benefits the Banking Industry?

The financial crisis offers an opportunity for "U.S. large banks to get truly huge." [16] This is a once in a lifetime opportunity for banks to increase exponentially in size by buying up banks with billions of dollars in assets and thousands of branches. Although Wachovia has had suffered losses due to its bad mortgage debt, it is one of the largest banks in the U.S. with 3,300 branches in 21 states. [17] If Wells Fargo obtains Wachovia, it will create the "nation's premier coast-to-coast community banking presence" having banks in 39 states. [18] In addition, both Wachovia and WaMu offer an opportunity to get a large amount of cheap deposits. [19] During this financial crisis, these deposits are especially valuable. [20]

Jamie Dimon, chairmen and CEO of JPMorgan, has stated that their acquisition of WaMu "makes excellent strategic sense for [the] company" predicting that the acquisition would add 50 cents per share to JPMorgan's earnings in 2009 and achieving pretax savings of approximately $1.5 billion by 2010. [21] The acquisition expands JPMorgan's network reaching 42% of the U.S. population adding 5,400 branches in 23 states. [22] Through this acquisition JPMorgan became the second largest branch network in the nation. [23]

Furthermore, Wells Fargo has purchased this weakening financial establishment with no government assistance. [24] Taxpayer money will not be used to save this troubled bank. In addition, JPMorgan will be writing down WaMu's loan portfolio to about $31 billion [25] although it will not be acquiring senior unsecured and subordinated debt. [26] This trend to take the industry's assets away from weak management teams and put into the hands of capable managers through acquisition may help in stabilizing the banking market. [27]

B. Costs to Consumers

Federal regulators seem to be ignoring antitrust rules. [28] They even seem to be encouraging this climate forcing banks with thousands of branches and billions of dollars in deposits to sell at rock-bottom prices. WaMu, a bank of $307 billion in assets, was sold to JPMorgan for merely $1.9 billion. [29] Wachovia with assets of $813.4 billion and market capitalization of $33.5 billion was offered $2.2 billion by Citigroup before it was sold for $15 billion to Wachovia. [30] This monopolizing effect may hurt consumers. According to Sally Grenberg, executive director of the National Consumer League, "Whenever you have fewer businesses in an industry competing for consumers, they can inflate prices." [31] Therefore, this banking monopoly may result in higher fees on checking accounts to bounced checks as well as low interest-rate yields on deposit accounts. [32]

IV. Conclusion

As Wachovia and Washington Mutual are near collapse, their acquisition by Wells Fargo and JPMorgan are lifesavers to their customers and shareholders. Although their takeover by stronger and larger banking institutions may be necessary to stabilize the banking market, the long term effects of these acquisitions may be harmful. As financial institutions, like JPMorgan, Wells Fargo, and Bank of America become larger and monopolize the banking industry, this will cost consumers in the long-run through price inflation and low-interest yields. Only time will tell how these banking monopolies will affect the financial market.

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SALUTE YOUR SHORTS

I. A Short Introduction

With the recent collapse of numerous financial institutions, the practice of short-selling ("shorting") has come under fire. Some authors have gone so far to claim that the actions of short-sellers ("shorters") are among the core reasons for the current credit crisis.[1] In response to this outcry, the United States has imposed temporary bans on the shorting of certain stocks, particularly the stocks of firms in the banking and finance sector, citing the need to protect investors and markets.[2] Furthermore, New York Attorney General Andrew Cuomo has launched an investigation into shorters for allegedly spreading false rumors in the financial market.[3] These enforcement responses prompt the question; do shorters have a legitimate role to play in a fair and open market?

II. History, in Short

There is a long history of animosity towards shorters. Following the collapse of tulip craze in the Netherlands in the 1630s, England banned shorting, fearing the effects of that collapse would spread onto their shores.[4] More recently, shorters have been blamed for stock market crashes in Malaysia in 1997 as well as in the United States in 1929 and 1987.[5] The recent restrictions on shorting across the world are nothing new.

On a basic level, short-selling works as follows. The shorter borrows shares from her broker. The shorter turns around and sells those shares to a buyer. Eventually, the shorter buys the shares back and returns the shares to the broker. If the price of the shares has decreased between the seller selling and buying the shares, the shorter makes a profit. If the price has decreased in that time, the seller loses money.[6] A variation of this model, known as "naked shorting," involves the shorter never borrowing the shares from the broker, but selling non-existent shares to the buyer in any case.[7]

Short-selling is typically used for two purposes. The first purpose is for speculation. Some short-sellers are only looking to make a profit off of the decline in the stocks' value. This is essentially the flip side to speculators who go long on stocks looking to make a profit off of the stocks' increase in value. The second purpose is for hedging. A shorter who acts for hedging purposes is looking to offset possible future losses related to the stock she is shorting. Many hedge funds utilize short-selling for exactly this purpose, using shorting to offset potential losses from stocks on which these hedge funds have gone long.[8]

III. A Short Fuse on Rumors for Regulators

One of the primary concerns about shorters is their alleged spread of false information regarding various firms. Section 9(a)(4) of the Securities Exchange Act of 1934 prohibits dealers, brokers, sellers, and buyers of securities from knowingly making a false or misleading statement regarding any of those securities.[9] In April, the SEC charged a Wall Street trader with securities fraud and market manipulation for disseminating false rumors.[10] The SEC reached a settlement agreement with the trader; with the trader agreeing to disgorge $26,129 in profit and interest, pay a $130,000 fine, and consent to being barred from associating with any broker or dealer.[11]

One of the most striking examples of these false rumor allegations came about following the dramatic collapse of Bear Stearns earlier this year. According to a number of people within Bear Stearns, the collapse was brought about by short-sellers who wanted to bring them down. One variation of the tale involved prominent hedge fund managers celebrated bringing down Bear Stearns over breakfast the morning after Bear Stearns collapsed.[12] Other potential culprits for spreading the false rumors were a former employee and Goldman Sachs.[13] Bear Stearns CEO Alan Schwartz was adamant in his conviction that this was part of a complex scheme to induce an artificial panic and bring about the downfall of Bear Stearns.[14]

In the midst of the Bear Stearns collapse, the Federal Reserve had to step in and take action. The Federal Reserve engineered the rescue of Bear Stearns' debts through assisting JPMorgan Chase's acquisition of Bear Stearns via a credit line, taking control over Bear Stearns' portfolio, and backstopping various Bear Stearns liabilities.[15] If there is truth to these allegations, the activities of shorters must be taken as a grave threat to markets.

IV. The Short Shrift

At first glance, there could be some truth to these tales of intrigue involving covert rumors, spite, and celebration over breakfast burritos. Those who were shorting Bear Stearns profited handsomely from the firm's demise. Shorters seem to have every incentive to spread false rumors and profit from falling share prices, especially if those rumors could never be traced back to them. Yet, in spite of these Bear Stearns insiders spinning tales of rumor-mongering and coordinated attacks against Bear, the reality of the matter is that the likelihood of such a scheme occurring is minimal.

There are two things which caution against blindly blaming short-sellers for the current credit crisis. The first matter is the potential liability arising out of knowingly spreading these false rumors. The aforementioned charges the SEC brought against a Wall Street trader brought about a costly settlement for the trader.[16]

While rumors may be difficult to trace, these potential liabilities could serve as a strong deterrent for anyone who wishes to knowingly spread a false rumor.

The second matter is that firms subject to these false negative rumors can employ a powerful defense: the truth. Through employing disclosure, firms can combat false negative rumors in order to quickly restore any damage done through the spread of these rumors. Moreover, because managers must answer to shareholders and typically also have performance-based salaries and stock options, these managers have a strong incentive to disclose the truth, lest they suffer monetary loss or lose the confidence of their shareholders. On the other side of the equation, if the disclosure of the truth in response to negative false rumors serves to increase stock prices, the shorters will lose money on their positions.

Lost in all of this discussion and analysis of the role of shorters in the market is the issue of false positive misinformation. Section 9(a)(4) does not differentiate between negative misinformation and positive misinformation.[17] Knowingly spreading positive misinformation is illegal. However, there has been very little discussion or action regarding the spread of this misinformation. Managers and shareholders benefit from false positive information. As long as the share prices are high, they have little incentive to combat these rumors.

There is also an information asymmetry problem with positive misinformation. Oftentimes, managers are in the best position to combat misinformation since they are in a terrific position to access and publicly information about the firm. Outsiders lack access to this information and therefore cannot verify the substance of these false positive rumors. Because of their incentive to have share prices fall, shorters are enormously important for dispelling this misinformation.

Shorters are hawkish in their monitoring of firms' financial statements and accounting.[18] Shorters are excellent monitors for accounting fraud and can provide effective early warning signals to the market regarding the fundamental soundness of firms.[19] James Chanos, a well-known shorter, had his firm short Enron a year before Enron's scandal unraveled in 2001.[20] In 2002, Chanos testified before Congress. In his testimony, Chanos mentioned that his firm noticed discrepancies in Enron's financial statements and insider selling tendencies, despite the fact that Enron was a seemingly healthy and successful company at the time.[21]

Shorters are strongly incentivized to keep markets honest. They provide information and transparency in the market. Shorters provide additional monitoring in markets, which is enormously important in deterring firms from engaging in fraud and spreading positive misinformation. Furthermore, the likelihood of shorters successfully spreading false negative rumors about a firm to the point of bankrupting a firm seems almost remote, given the likelihood of liability and the ability of firms to disclose the truth. When acting lawfully, shorters serve an enormously important role in markets.

V. In Short…

Shorters serve an important function in markets. They curtail irrational exuberance. They are strongly incentivized to detect and disclose other firms' bad behavior. While shorters should be subject to the same laws as any other market actor, their pessimism should not be punished. An outright ban on shorting removes important actors from the market who contribute valuable information and transparency. Removing shorters from markets altogether only serves to remove an important monitoring component of that market.

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THE FIRST STEP TO SUCCESS: SECURING FUNDING FOR YOUR SMALL BUSINESS

I. Introduction

Anyone who has considered starting a new business can attest to the excitement that comes along with being one's own boss, setting one's own hours, and turning a personal dream into reality. However, once the initial thrill wears off, the daunting task of ensuring enough preliminary funding and finding continued financing for the business can quickly turn this dream into a nightmare. This article will discuss the ways in which a small business can obtain initial funding and continued financing. First, it will stress the importance of creating a substantial business plan to which potential investors and sources of funding can look to learn about the business. Second, it will discuss debt options for funding and financing a business. Third, it will discuss equity options for funding and financing a business. Finally, it will conclude by summarizing the options for funding for a start-up business and continued financing of a new business.

II. Making a Business Plan

Solid business plans are resources that potential investors and lenders use to understand the business they are investing in and to feel secure that their investment has a high potential for success. [1] Generally, a business plan outlines the type of business the entrepreneur wishes to start and gives financial projections for expenses and income for at least three years. [2] Additionally, if an entrepreneur can show that he or she is investing some of his or her own money in the business, investors and lenders will be satisfied that the entrepreneur has a financial stake in the business. [3] A good business plan "should show good profit potential in a short period of time." [4] However, small business owners should be aware that a even good business plan will not ensure funding if the business is based on unsteady ground. [5] Rather, a good business plan gives the investor a basis on which to invest in a company with the potential for success. [6]

Another way to make a new business appealing to potential investors and lenders is to show that the business fits a niche that no one else has filled. [7] For example, a firm became aware that surgical instruments were only sold in bulk to all medical institutions. [8] However, small medical institutions generally threw the instruments away after one use because they did not have the capability to sterilize the instruments. [9] After performing some research and speaking with various physicians and employees, the company began selling cheaper, but just as effective, disposable instruments to small medical organizations. [10] The key to finding a niche is to "try to find the right configuration of products, services, quality, and price that will ensure the least direct competition". [11]

III. Debt

Debt is defined as when a "business borrows the amount of money it needs, with an arrangement for repayment of the principal plus interest." [12] Debt can come from a variety of sources including credit cards, commercial banks, government lenders, including the Small Business Administration, and family and friends. [13]

Using credit cards may often seem like an easy fix for entrepreneurs who need more capital to start their business. [14] However, credit cards can quickly became black holes of indebtedness. "The trouble, experts say, is that few business owners take the time to read the fine print, so they don't understand the financing terms and fail to guard against rising rates." [15] Additionally, entrepreneurs who use credits cards should be sure to diversify their line of credit so that if an unanticipated cost arises, he or she has alternative payment options rather than being "tapped out" of the one credit card they use. [16]

Commercial banks are the most common source of funding for small businesses. [17] However, contrary to popular belief, banks generally do not loan money to start businesses. [18] Rather, banks serve to provide funding once a company has a solid business foundation. [19] In rare instances, however, banks will lend to start-up companies without an established foundation. [20] "[For] businesses that do not have substantial assets or healthy revenues, the bank may look at the creditworthiness of the owners. Many financial advisors counsel that you guard your personal credit as this may become handy in such cases." [21]

The Small Business Administration is a government organization that guarantees loans for small businesses. [22] The Small Business Administration guarantees loans for businesses that might not be able to qualify otherwise by allowing banks "to extend credit to companies that might not qualify conventionally . . . The loans typically have longer terms so you can stretch the payments and make them more affordable." [23]

In particular, the Small Business Association 504 program may appeal to small business owners. [24] The 504 requires the business owner to put up some of his or her own money. [25] "To finance [a] purchase through a 504 the borrower must put down at least 10%, while an SBA-certified non-profit agency lends another 40% through a government-backed boding offering. Then, a commercial bank or other lender provides the remaining 50%." [26] Although the nature of a 504 loan requires many more parties and administrative steps, it may be a good option for entrepreneurs who are having a hard time getting a private loan. [27]

Another sources of funding that is commonly used is borrowing money from family or friends. [28] While this method may be the easiest from an administrative standpoint, it often causes problems if the business fails and money is lost. [29] While family and friends may have noble intentions, if they are not experienced investors, "they don't fully understand how much risk there is . . . [M]ake sure that you understand how easily this money can be lost, and that you make them understand as well." [30] If individuals give money in exchange for a share of the business, this is considered equity, as well. [31]

IV. Equity

Equity is defined as "trading an ownership interest in the business for the funding needed by the business." [32] Equity can include private sources, venture capitalists, angels, and grants. [33]

Venture capitalists do not generally invest in start-up businesses unless there is "a rare combination of product opportunity, market opportunity, and proven management." [34] Venture capitalists invest in businesses with a high potential for capital- this means entrepreneurs will little or no experience will most likely need to look elsewhere for funding. [35] Business plans are a good way to show a venture capitalist that the firm has the necessary elements to succeed. [36]

Angels are another sources of equity for start-up businesses. [37] Angels are individuals with a substantial amount of money who invest in start-up businesses. [38] "They are stricter about screening but also more realistic about what
they're buying . . . [T]hey're not asking for too much ownership of the companies or too many rights to impact decision making." [39] Angels are a good option for individuals who want to keep substantial control of their business but do not want debt. [40]

Grants, or "free money," are another option for entrepreneurs looking for equity. [41] Grants can be found by searching the Internet, inquiring to various business groups, and searching state and local government websites. [42]

V. Conclusion

All of the sources of funding discussed above come with risk for both the business owner and the source. However, by creating a solid business plan to present to potential investors and lenders, an entrepreneur will be on the right path to success. Depending on what the business owner would like to achieve, debt or equity offer many options. Additionally, all new business owners should remember to consult with an attorney for advice on the legal implications of their actions before committing to borrow or accepting money.

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THE OBAMA "CELEBRITY" AD AND THE RIGHT OF PUBLICITY

I. Introduction

With the 2008 presidential campaign expected to break spending records, it is no surprise that both major political parties are flooding swing-state airwaves with television advertisements. While recent elections have produced the much-discussed "swift boat" and "3 a.m." commercials, the McCain campaign took a unique approach with the summer release of the so-called Barack Obama "celebrity" ad.[1] In response to the enthusiasm generated by large U.S. and European crowds at Obama's public appearances, the McCain campaign featured images of Britney Spears and Paris Hilton in an ad that characterized Obama as "the biggest celebrity in the world."[2] Such unauthorized use of celebrity images in political advertisements has been the subject of recent debate, as any potential legal actions implicate the tension between the right of publicity and the First Amendment.

II. Principles of the Right of Publicity

The right of publicity, sometimes referred to as misappropriation, is a privacy tort that prohibits the use of one's name or likeness for the benefit of another.[3] Essentially, states grant individuals a property interest in their name, likeness, and overall persona, creating a right to control the use of one's identity.[4] Right of publicity claims are litigated under state law, and the majority of the thirty states that recognize this cause of action require an infringing use of one's name, likeness, or identity to be commercial in nature.[5]

As such, right of publicity claims often center on the unauthorized use of a celebrity's identity in connection with commercial advertisements or marketing campaigns. By way of example, in *White v. Samsung*, the Ninth Circuit Court of Appeals held that a Samsung VCR commercial depicting a robot dressed to look like Vanna White infringed upon her common law right of publicity.[6]

The right of publicity is not absolute, however, particularly with respect to uses by the media.[7] The U.S. Supreme Court, in *Zacchini v. Scripps Howard Broadcasting*, acknowledged a newsworthiness defense rooted in the First Amendment.[8] Under this exception, the use of someone's identity in reports pertaining to the public interest is constitutionally protected.[9] The newsworthiness defense is broadly construed to include any subject of the public interest, including political events and social trends.[10]

The scope of the exception was illustrated in the recent dismissal of a right of publicity claim against the producers of the film *Borat*. In *Lemerond v. Twentieth Century Fox*, a New York man sued the movie studio for the use of his image in a thirteen-second clip in which he ran away from the title character after Borat attempted to introduce himself on a city street.[11]

Characterizing the film as a vulgar but ironic commentary on modern American culture, the federal district court found the use of the plaintiff's image to fit squarely within the newsworthiness exception.[12] In the eyes of the judge, *Borat's* exploration of American culture, and the bizarre and offensive reactions he received, were matters of public interest.[13]

As illustrated, the First Amendment offers strong protection for the use of one's image in conjunction with political and social commentary. Often times, however, the line between expressive and commercial uses is blurred, and certain forms of literary expression can be found to be overwhelmingly commercial in nature. Such a scenario played out in *Doe v. TCI Cablevision*. In *TCI*,

a former professional hockey player named Tony Twist, who was well-known for being the pre-eminent "enforcer" of his era, sued the creator of the comic book *Spawn* after the introduction of a villainous character named after the plaintiff.[14] The court noted that the comic book use of Twist's name had both expressive and commercial qualities: it commented on the existence of enforcers at the same time as it exploited Twist's prominence among hockey fans to make money.[15] In such circumstances, the Missouri Supreme Court decided it must apply a "predominant use" test, wherein it determines whether a specific use has a greater propensity to create artistic expression or commercial gain.[16] Emphasizing that the defendant had marketed *Spawn* products to hockey fans and sponsored a minor league hockey event, the court determined that the use of the plaintiff's name was more of a commercial ploy than artistic or literary expression.[17]

III. The Lindsay Lohan Ad

Against this legal backdrop, an advertisement somewhat similar to the McCain campaign's "celebrity" commercial recently created quite a stir. The American Beverage Institute (ABI), a trade group that advocates for the interests of the alcohol industry, took out a full page ad in the *USA Today* featuring Lindsay Lohan's mug shot from her 2007 arrest for drunk driving and cocaine possession.[18] The purpose of the ad was to voice opposition for bills passed in several states requiring that first-time drunk driving offenders install an ignition interlock system in their vehicles.[19] This device would prevent potential drunk drivers from starting their car engines if the breath test indicated a blood alcohol content of 0.15% or greater.[20] The ad included the words "Ignition interlocks are good for …" above Lohan's image, and continued, "But a bad idea for us" below the mug shot.[21] The ABI defended the ad by saying it was attempting to draw a contrast between first-time offenders and habitual drunken drivers.[22] Shortly after the ad was printed, a reportedly angry Lohan hired lawyers to determine if a right of publicity claim could be filed.[23]

For its part, the ABI claimed it was within its right to use the mug shot, as it was publicly accessible and not being used for commercial gain.[24] Certainly, a debate concerning ignition interlock system legislation is a matter of public interest, and it would be subject to the broad newsworthiness exception. Yet Lohan may try to argue that the predominant use of her image is commercial, as the ABI's strong ties to the alcohol industry creates a financial interest in the matter. Should they take the matter to court, her lawyers would need to argue that the ABI's commercial gain is manifested in the continued profits of the alcohol industry. Even if a court is willing to accept this argument, Lohan would have to demonstrate that the commercial purpose supersedes the strong speech interest in this matter of public interest.

IV. The McCain Ad

In comparison to the ABI commercial, the McCain ad seems even better situated to withstand any potential right of publicity claims.

In the midst of a close race for the highest political office in the United States, the ad seeks to express a political viewpoint regarding the perception of Senator Obama. Any presidential campaign is a matter of the utmost public interest, and subject to the highest protection of political speech. Thus, the depiction of well-known celebrities is reasonably related to the McCain campaign's political message.

Furthermore, the "celebrity" ad does not involve any commercial exploitation of Hilton and Spears' identity. The commercial does not solicit campaign contributions, and even if it did, a court may be reluctant to equate campaign capitalization with the purely commercial uses that you normally find in right of publicity cases.

V. Conclusion

Both of the aforementioned advertisements highlight the intersection between the right of publicity and the First Amendment. Many members of the legal community continue to debate the viability of a potential Lohan lawsuit. Such a claim would have to be grounded in the right of publicity, as a trademark action for false designation of origin would likely fail because viewers would not be expected to think that Lohan consented to a disparaging use of her identity. For First Amendment scholars, such a court battle could involve a very interesting analysis concerning the balance between the speech interests and commercial purposes of industry lobby groups.

On the other hand, the McCain campaign ad is likely to receive less legal scrutiny. Despite the unusual nature of the "celebrity" commerical, the strong protection of the First Amendment assures that it will not attain a level of infamy greater than some of the other noteworthy ads of presidential campaigns past.

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