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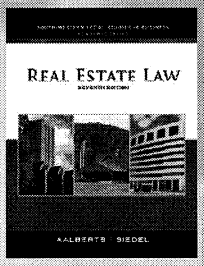

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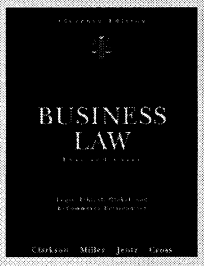

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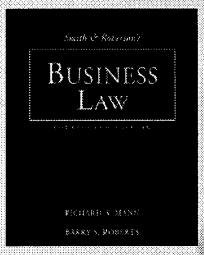

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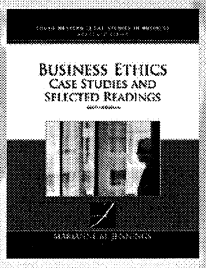

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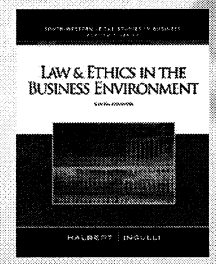

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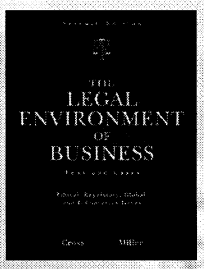

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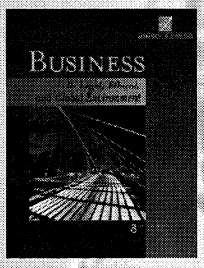

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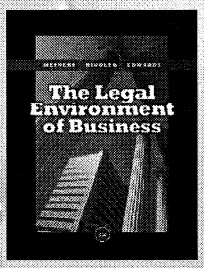

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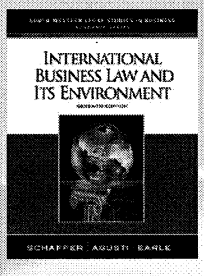

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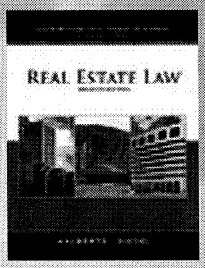

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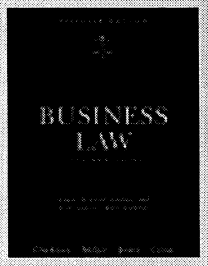

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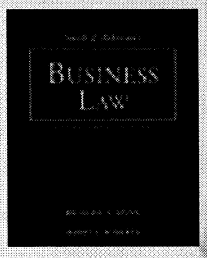

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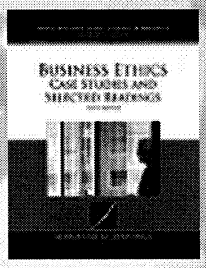

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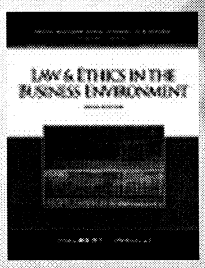

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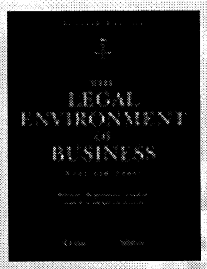

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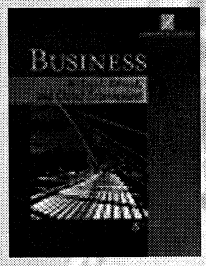

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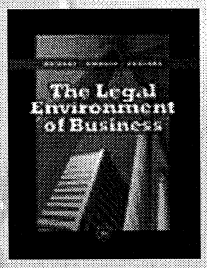

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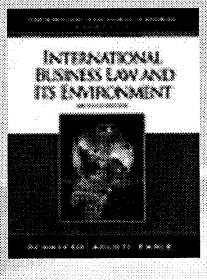

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ARTICLES

PEDAGOGY

DETERMINING DOMICILE OF NURSING HOME RESIDENTS

by
Patricia M. Sheridan*

INTRODUCTION

The United States Census Bureau estimated that as of July 1, 2005, there were 78.2 million Baby Boomers, the generation born between 1946 and 1964. In 2006, the oldest of the Baby Boomers turned 60 years old. One study indicates that, on average, 44% of those who reach age 65 may need nursing home care sometime in their remaining lifetime.[1] In light of such statistics, increasing numbers of Americans will face often difficult decisions regarding nursing home or other long-term care arrangements for their parents and then, ultimately, themselves.

When a person, due to physical or mental infirmity, moves to a nursing home or health care facility in a different state from their long-established home, which state has jurisdiction over the distribution of that person's estate when he or she dies? The legal issue presented is one of domicile, generally defined as that permanent location to which a person always intends to return. Domicile determines which state has the proper jurisdiction to administer the estate, collect inheritance taxes, and which laws govern probate or intestate distribution of the deceased person's assets.

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*Assistant Professor of Business Law, Manhattan College, School of Business, New York.

As the number of Americans needing nursing home care increases, questions of domicile will arise more frequently and should generate considerable attention beyond the legal community. This article will explain the concept of domicile, highlight its legal importance, and address the interesting question of whether relocation to an out-of-state nursing home results in a change of domicile for the nursing home resident.

WHAT IS DOMICILE?

Definition

While the exact definition of "domicile" varies from state to state, the basic meaning is the same. In New York, domicile is defined by statute as that fixed, permanent and principal home to which a person wherever temporarily located always intends to return.[2] In Florida, domicile means a person's usual place of dwelling.[3] The Connecticut Probate Court has interpreted domicile to mean the legal situs of a person established by choice or by operation of law.[4] The Maryland Court of Appeals has defined domicile as " that place where a man has his true, fixed, permanent home, habitation and establishment, without any present intention of removing therefrom, and to which place he has, whenever he is absent, the intention of returning."[5] Pennsylvania courts have held that "the domicile of a person is the place where he has voluntarily fixed his habitation with a present intention to make it either his permanent home or his home for the indefinite future."[6] The Supreme Court of New Jersey concluded that, put in simplest terms, the judicial standard of domicile is essentially equivalent to the lay idea of "home".[7]

Domicile versus Residence

Although the terms are often used interchangeably, residence and domicile do not mean the same thing. Because residence and domicile are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and the country, but only one domicile.[8] A very short period of residence in a given place may be sufficient to show domicile, if, even briefly, that residence concurs with a present intention of making it a permanent home. Mere physical presence at a place, regardless of the length of time, is not sufficient to establish domicile.[9] Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.[10]

A change of residence, by itself, does not automatically result in a change of domicile. Ordinarily, when a person is absent from a fixed abode for a particular purpose and has no intention of remaining in the new locality longer than is necessary for the accomplishment of that purpose, he does not acquire a new domicile.[11] No temporary residence, whether for the purposes of business, health, or pleasure, occasions a change of domicile.[12]

WHY IS DOMICILE IMPORTANT?

Domicile has important legal implications and can significantly affect the civil and property rights of an individual. Domicile is essentially the "headquarters" every person is compelled to have in order that certain rights and duties imposed by law may be determined.[13] The selection of a

particular location as one's permanent home indicates, in part, a willingness to accept the privileges afforded by that state's statutory scheme and be subject to the obligations imposed by it. A person's domicile is important because it will affect the rights and obligations of the parties in such matters as divorce or bankruptcy. When a person dies, the decedent's domicile determines which intestate succession and spousal right of election laws apply. If a person dies testate, domicile governs which court has proper jurisdiction to probate the will and whether the will provisions are valid and enforceable. Domicile also controls which state is entitled to collect estate or inheritance taxes.

Domicile, not residence, forms the basis for the state court's jurisdiction in estate proceedings.[14] An ancillary proceeding may be brought in a state other than decedent's domicile if decedent owned real or certain tangible property there, but the state of domicile is the proper place to probate the will and it is that state's intestacy laws that govern in the event there is no will. The administration of the estate at the domicile is regarded as the principal administration, and all other administrations, granted by reason of personal assets found in a state foreign to that of the domicile, are regarded as subordinate or ancillary.[15] A court will deny an application to probate a will if it is found that decedent was domiciled in another state at the time of death.[16]

The laws of the domicile determine the validity of any provision contained in the will. A will, prepared according to the laws of testator's domicile at the time of its execution, may contain provisions considered unenforceable under the laws of another state. If decedent later acquires a new domicile and dies there, the will must be probated in the new domicile where the laws may operate to invalidate those provisions. For instance, New York law upholds *in terrorem* or "no-contest"

clauses and the disinheritance of the contestant, even if probable cause existed for filing the contest.[17] Florida law, on the other hand, provides that such clauses are entirely unenforceable.[18] As a result, a no-contest clause in a will prepared by a one-time New York domiciliary may be invalidated if that will is ultimately probated in Florida. A similar situation arises due to differences in state laws regarding eligibility to serve as an executor or administrator of an estate. Florida law prohibits a non-Florida resident from serving as a personal representative of the estate of a Florida domiciliary, unless such person is related to decedent.[19] Most other states, including New York, have no such residency requirement of its executors. A New York resident nominated as executor under a valid New York will is automatically disqualified from acting as the personal representative if the will is probated in Florida.[20]

Domicile may have a significant impact on estate taxation and the financial burden to an estate. While real and tangible property is usually subject to tax in the state where the property is located, decedent's intangible personal property is generally taxed only in the domicile. This may encourage the parties interested in the estate to assert domicile in a tax-friendly state such as Florida, where state taxes are due only on those estates required to file a Federal estate tax return. It is possible that tax bureaus in different states may each attempt to establish domicile and impose a transfer or inheritance tax on decedent's entire estate. Such competing claims of domicile may result in undue delay and complicate the settlement of an estate. In *Lyon v. Glaser*,[21] a dispute arose as to whether New Jersey or Maryland was entitled to collect inheritance taxes. The New Jersey Supreme Court ultimately concluded that decedent was domiciled in Maryland, rather than New Jersey, and the inheritance tax imposed on her estate by the New Jersey Transfer Inheritance Tax Bureau was set aside.[22] In a

proceeding to settle the estate tax in *Estate of Bourne*,[23] the State of Florida intervened in the New York probate proceeding and claimed that decedent was a Florida domiciliary. The Surrogate's Court ruled that the State of Florida failed to establish domicile and that estate taxes should be paid to the New York State Tax Commission.[24] A worst case scenario of double taxation could occur where domicile cannot be conclusively established in a single state. In the landmark decision involving the estate of the founder of the Campbell Soup Company, the United States Supreme Court in *Hill v. Martin*[25] permitted both New Jersey and Pennsylvania to tax the estate and each collected almost $17 million in state inheritance taxes. Given these outcomes, recent articles have stressed the need for attorneys to engage in "domicile planning" for their clients to avoid unexpected tax burdens and the expense of resolving competing claims of domicile in different jurisdictions.[26]

HOW IS DOMICILE ACQUIRED?

There are generally three ways to acquire domicile – by origin, by choice, and by operation of law. A person acquires a domicile of origin at birth. Such domicile of origin is that of one's parents at the time of birth and it continues until there has been an effective change. In order to acquire a domicile of choice, there must be intent to abandon the existing domicile and an intention to acquire a new one.[27] A domicile by operation of law is that domicile which the law attributes to a person independent of his actual residence. It is applicable primarily to infants and incompetents and persons who are under disabilities which prevent them from acquiring a domicile of choice.[28]

In order to effect a change and acquire a domicile of choice, there must be an actual removal to another habitation, coupled

with an intention of remaining there permanently or at least for an unlimited time.[29] "Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention."[30] Intent is a material fact to be established and must be shown by the acts and declarations of the party. No single factor is controlling. All of the acts, declarations and conduct of a person, the manner of living, connections, associations, and interests must be considered, and from the over-all picture, intention must be ascertained.[31]

The legal presumption is that domicile has not changed, and the burden of proving the contrary rests upon the party asserting the change. The evidence must be weighty enough to overcome the presumption, bearing in mind that less evidence is required to prove a continuance of domicile than to establish a new one.[32] In *Matter of Timblin*,[33] the court explained the difficult task of proving intent to change domicile as follows:

> The proofs in domicile cases are not usually directed down a one-way street to a clear solution. These cases concern everyday acts and conversations of people not designed to frame issues in a court of law. What is said in one breath may sometimes be retracted or modified in another. Experience has shown that decisions altering one's way of life and moving his domicile are not made or manifested in a given moment. There is usually a course of events which bears upon a person's judgment and finally results in the ultimate decision.

> There may be no precise event that can be shown to establish the moment of change, but all the circumstances must be examined to arrive at a just answer.[34]

DOES ENTERING A NURSING HOME ESTABLISH A NEW DOMICILE?

A person who moves to a nursing home outside the state where he or she maintained a life-long home does not necessarily intend to acquire a new domicile there. The acts, words and conduct of the person must demonstrate a clear intention to abandon the prior home and establish a new domicile at the nursing home. The decision to enter a nursing home, however, is often emotionally charged and necessitated by a person's mental or physical condition. Understandably, a person's conduct and actions at this difficult time may not clearly indicate intention. Yet, if the nursing home resident dies without an obvious domicile in one state or another, the parties connected to the estate may be faced with the puzzling question of where to probate the will. Interested parties may be motivated to assert domicile in the jurisdiction where applicable laws are more advantageous to their respective positions. If a disagreement arises as to which state has proper jurisdiction, it will be left to a court to determine where the deceased nursing home resident was domiciled. The court must infer intention from a careful and detailed examination of the circumstances surrounding the transfer to the nursing home to determine if the person acquired a new domicile.

Person Mentally Incompetent Prior to Transfer

An initial question a court must consider is whether or not the person was mentally competent immediately prior to the transfer to a nursing home. A person suffering from dementia,

Alzheimer's disease or some other form of mental disability, does not possess sufficient mental capacity to effectuate a change of domicile. An adult who has been adjudicated incompetent by a court is incapable of forming an intention to change domicile and such a person retains the domicile he had at the time he became incompetent. The courts seem to agree that a mentally incompetent person transferring to a nursing home is changing residence only so that the prior domicile continues.[35]

In these cases involving adjudicated incompetents, the court decisions have further indicated that an individual, acting in a fiduciary capacity as a conservator, committee or power of attorney, has no right to effect a change of domicile of the ward, although he may have the power to effect a change of residence.[36] Noting that there is always the possibility of an improvement in the mental condition or even a complete cure of the affliction of a person adjudged insane, the Surrogate's Court in *Matter of Webber* [37] stated that a fiduciary is required to maintain the incompetent's status during his disability to permit the restoration of the rights and property of the incompetent upon the removal of the disability. The court reasoned that any attempted change by the fiduciary of his ward's domicile during incompetency would interfere with his restoration to his previous status in the event he should be cured of his affliction.[38] This reasoning was expanded in *Matter of Wilhelm*[39] where the court stated that if the question of domicile is one of personal concern and has no bearing on the actions of the agent to care for the principal, then the agent has no authority to change domicile. In *Wilhelm*, the principal's grandson, a donee of a power of attorney, attempted to change the domicile of the grandfather from New York, where the grandfather had lived most of his life prior to the onset of Alzheimer's disease, to a nursing home in Texas close to where the grandson resided. The court stated that the

grandfather's continued status as a New York domiciliary did not, in any way, constrain or inhibit his grandson's ability to secure medical care for the grandfather in Texas and did not limit his grandson from acting on the grandfather's behalf in any matters dealing with his grandfather's affairs.[40] The court concluded that, under these circumstances, the attorney-in-fact did not have authority to change the domicile of the donor of the power of attorney.[41]

Person Mentally Competent Prior to Transfer

If a person is mentally competent prior to a transfer to a nursing home where he ultimately dies, domicile is not so easily determined. The person is likely to have maintained some ties to the prior home and, at the same time, formed certain connections to the state where the nursing home is located. A court must compare all the facts tending to show decedent's domicile in one state with all the facts tending to show domicile in the other state. The determination of intent is inherently subjective and difficult to prove. No one factor is determinative and all relevant connections to each place are considered and weighed.

Where a person is cognizant of the change of residence, assents to it, and is satisfied with the new arrangements, he has changed his legal domicile to the nursing home.[42] In *Matter of Esser*,[43] a New York Surrogate's Court determined that decedent's intention to take up a new domicile in a nursing home was expressed by the removal of all decedent's possessions, at his direction and with his assistance, and his filing of an application for admission to the nursing home, even though decedent never actually lived to physically enter the home. The decedent, a Catholic priest, had no "home town" to which he could return and his only close relative was a sister who lived near the nursing home. The court determined that

decedent's unusual circumstances provided strong reasons why he intended to acquire the nursing home as his domicile for his remaining years.[44]

In *O'Hara v. Glaser*,[45] the Supreme Court of New Jersey determined that decedent had abandoned her New Jersey domicile for a Florida domicile even though her residence there was limited to two short periods in Florida nursing homes. "If a person's residence is actual and accompanied by an intention to remain in the State permanently, the character of the living quarters is immaterial."[46] Decedent's closest relatives and friends lived in Florida where they could visit her regularly and look after her and she often spoke of making Florida her permanent home. The court determined she clearly had no intention of ever returning to New Jersey.[47]

A transfer to a nursing home will not change domicile if the move is solely due to weakened physical condition or advancing years. The courts consistently view this type of relocation as an unwelcome, practical necessity and not the intentional selection of a new home. Where a stay in a rest home was a temporary situation with the duration of decedent's stay dependent upon his health as well as monetary and other factors, his prior home continued as his domicile and was the place he would have returned if death had not intervened.[48] The court in *Matter of Lippert*[49] made this determination despite decedent's expressions of satisfaction with the living conditions at his nursing home and his willingness to remain there indefinitely. In *Coulter Estate*,[50] the Supreme Court of Pennsylvania found that where physical presence in a particular place is occasioned solely by necessity, such as a hospital or a nursing home, a domicile of choice is not acquired. The court determined that decedent's presence in a nursing home in Delaware was a practical solution necessitated by his physical condition and advanced years so that he did not willingly

abandon his former Pennsylvania domicile.[51] Even the sale of a former residence while institutionalized did not persuade a New York Surrogate's Court that decedent had abandoned her prior Brooklyn, New York domicile.[52] In *Matter of Urdang*,[53] the court reasoned that even though the sale clearly prevented a return to her lifelong family home, it did not preclude decedent's return, health permitting, to the Brooklyn community she called home and to which she maintained strong spiritual and community ties. Her domicile continued to be Brooklyn, New York and the court determined that this was the proper place to probate her will.[54]

A court will consider all of the person's associations and connections when determining domicile. Family ties, the location of real and personal property, the amount of time spent in each location, the address used for voting records, tax returns, financial documents, receipt of mail and vehicle registration, the recitation of residence in a will and other legal documents, the place of employment and any other community, religious and civic connections are all indicators of where the person intended to be domiciled.

CONCLUSION

Domicile is ultimately a subjective determination of intent gleaned from a person's actions and conduct. A person with ties to more than one state may not have a clearly established domicile, leading to complications upon their death. Unless proper steps are taken to adopt an appropriate domicile, the estate may be burdened with the delay of competing probate proceedings and the inconvenience of estate taxation claims asserted by more than one jurisdiction.

It is particularly difficult to determine domicile after the death of a nursing home resident, who may have been unable

or unwilling to take steps to sufficiently establish their intended domicile. Domicile incorporates notions of permanence, and entering a nursing home does not automatically shift domicile to the state where the nursing home is located. In many such cases, the question of domicile is left for the courts to decide, after a careful analysis of all the factors surrounding the nursing home transfer. In the end, these decisions tend to be somewhat sentimental, invariably concluding that home (and domicile) is where the heart is.

ENDNOTES

[1] Peter Kemper & Christopher M. Murtaugh, *Lifetime Use of Nursing Home Care*, 324 New Eng. J. Med. 595 (1991).

[2] N.Y. Surr. Ct. Proc. Act § 103(15) (McKinney 2007).

[3] Fla. Stat. § 731.201(13) (2007).

[4] *Estate of Matlis*, 19 Quinn. Prob. Law Jour. 8, 22 (2005).

[5] *Shenton v. Abbott*, 178 Md. 526, 530, 15 A.2d 906, 908 (1940).

[6] *Loudenslager Will*, 430 Pa. 33, 37, 240 A.2d 477, 479 (1968) (*quoting Publicker Estate*, 385 Pa. 403, 405, 123 A.2d 655 (1956)).

[7] *O'Hara v. Glaser*, 60 N.J. 239, 248, 288 A.2d 1, 6 (1972).

[8] *Matter of Newcomb*, 192 N.Y. 238, 250, 84 N.E. 950, 954 (1908).

[9] *Lyon v. Glaser*, 60 N.J. 259, 264, 288 A.2d 12, 14 (1972).

[10] *Newcomb*, 192 N.Y. at 250, 84 N.E. at 954.

[11] *Publicker*, 385 Pa. at 405, 123 A.2d at 655.

[12] *Shenton*, 178 Md. at 530, 15 A.2d at 908.

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[13] *Williams v. Ostenton*, 232 U.S. 619, 625, 34 S.Ct. 442, 443, 58 L.Ed. 758, 761 (1914).

[14] N.Y. Surr. Ct. Proc. Act § 205(1) (McKinney 2007); Md. Est. & Trusts Code Ann. § 5-103(a) (2007).

[15] *New York Trust Co. v. Riley*, 24 Del. Ch. 354, 383, 16 A.2d 772, 785 (1940).

[16] *Matlis*, *supra* note 4, at 27.

[17] N.Y. Est. Powers & Trusts Law § 3-3.5(b) (McKinney 2007).

[18] Fla. Stat. § 732.517 (2007).

[19] Fla. Stat. § 733.304 (2007).

[20] *Matter of Gadway*, 123 A.D.2d 83, 510 N.Y.S.2d 737 (3d Dep't 1987) (where the Court admitted decedent's will to probate in New York, and not Florida, because decedent's wish to have his long-time friend and attorney, a New York resident, serve as executor would be thwarted by Florida law if the will was probated there).

[21] *Lyon,* 60 N.J. at 279, 288 A.2d at 22; *See also O'Hara,* 60 N.J. at 249, 288 A.2d at 6 (vacating tax assessment because decedent abandoned New Jersey domicile for Florida).

[22] *Lyon*, 60 N.J. at 279, 288 A.2d at 22.

[23] *Estate of Bourne*, 181 Misc. 238, 41 N.Y.S.2d 336 (Sur. Ct. Westchester Co. 1943).

[24] *Id.* at 248, 41 N.Y.S.2d at 345.

[25] *Hill v. Martin*, 296 U.S. 393 (1935), *aff'g Dorrance v. Martin*, 12 F.Supp 746 (D.N.J. 1935).

[26] Patrick J. Lannon, *Domicile Planning – Don't Take It for Granted*, 80 Fla. Bar J. 34 (2006); Philip J. Michaels et. al., *Domicile: Estate Planning*

Issues for the Mobile Client, New York State Bar Journal, July/August 2006.

[27] *Matter of Webber*, 187 Misc. 674, 675, 64 N.Y.S.2d 281, 283 (Sur. Ct. Kings Co. 1946).

[28] *Id.* at 676, 64 N.Y.S.2d at 284.

[29] *Shenton,* 178 Md. at 530, 15 A.2d at 908.

[30] *Newcomb*, 192 N.Y. at 251, 84 N.E. at 954.

[31] *Matter of Fischer*, 30 Misc.2d 1050, 1053, 220 N.Y.S.2d 518, 521 (Sur. Ct. Wayne Co. 1961).

[32] *Pusey's Estate*, 321 Pa. 248, 265, 184 A. 844, 851 (1936).

[33] *Matter of Timblin*, 6 Misc.2d 344, 346, 162 N.Y.S.2d 783, 785 (Sur. Ct. Suffolk Co. 1957).

[34] *Id.*

[35] *Matter of Wilhelm*, 134 Misc.2d 448, 449, 511 N.Y.S.2d 510, 511 (Sur. Ct. Erie Co. 1987); *Matter of Rottenberg*, 19 Misc.2d 202, 203, 192 N.Y.S.2d 313, 314 (Sur. Ct. N.Y. Co. 1959); *Matter of Webber*, 187 Misc. 674, 681, 64 N.Y.S.2d 281, 288 (Sur. Ct. Kings Co. 1946); *But see Matter of Meyer*, 59 Misc.2d 507, 510, 299 N.Y.S.2d 731, 734 (Sur. Ct. N.Y. Co. 1969) (where medical evidence showed that adjudicated incompetent possessed at some point sufficient mental capability to choose a new home and domicile).

[36] *Wilhelm*, 134 Misc.2d at 451, 511 N.Y.S.2d at 512; *Webber*, 187 Misc. at 677, 64 N.Y.S.2d at 285.

[37] *Webber*, 187 Misc. at 681, 64 N.Y.S.2d at 288.

[38] *Id.*

[39] *Wilhelm*, 134 Misc.2d at 452, 511 N.Y.S.2d at 512.

[40] *Id.*

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[41] *Id.*

[42] *In Re Sylvester*, 409 Pa. Super. 439, 450, 598 A.2d 76, 82 (1991).

[43] *Matter of Esser*, 38 Misc.2d 963, 968, 239 N.Y.S.2d 585, 590 (Sur. Ct. Ontario Co. 1963).

[44] *Id.* at 968, 239 N.Y.S.2d at 591.

[45] *O'Hara*, 60 N.J. at 247, 288 A.2d at 5.

[46] *Id.* at 248, 288 A.2d at 6.

[47] *Id.*

[48] *Matter of Lippert*, 24 Misc.2d 81, 82, 207 N.Y.S.2d 546, 548 (Sur. Ct. Suffolk Co. 1960).

[49] *Id.*

[50] *Coulter Estate*, 406 Pa. 402, 407, 178 A.2d 742, 745 (1962).

[51] *Id.*

[52] *Matter of Urdang*, 194 A.D.2d 615, 616, 599 N.Y.S.2d 60, 61 (2d Dep't 1993).

[53] *Id.*

[54] *Id.*

HOTEL LIABILITY FOR BEDBUG AND PEST INFESTATIONS

by
Marlene Barken*
Alka Bramhandkar**
Gwen Seaquist***

INTRODUCTION

A recent spate of articles has highlighted a recurrence of bedbug infestations here and abroad.[1] Now that the unpleasant critters have arrived at even very posh hotels, some high profile cases have resulted with plaintiffs seeking millions in compensatory and punitive damages. This paper will briefly review common law concepts of innkeeper liability and how they may apply to insect infestations, particularly given the difficulty of detecting the presence of bedbugs before they bite. Secondly, the authors will examine the existing case law on liability for bedbug bites and evaluate plaintiffs' possible causes of action. Finally, suggestions will be offered regarding both the innkeeper's duty of care to inspect for and to remediate such infestations and the appropriate risk management approaches that may help to reduce both liability and bad publicity.

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*Associate Professor of Legal Studies, Ithaca College, NY.
**Associate Professor of Finance, Ithaca College, NY.
***Professor of Legal Studies, Ithaca College, NY.
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HOTELKEEPERS' DUTY TO PROTECT INVITEES FROM INSECT BITES

A. Legal Liability

Innkeepers faced with the challenge of a vermin outbreak are especially susceptible to liability. From the days of the early common law, innkeepers, like common carriers, have been held to a high standard of care regarding the safety and well being of their guests. Legal writings traced back to ancient Rome show that even then, innkeepers were subjected to a higher standard of care.[2] Numerous reasons exist for this distinction between innkeepers and other business owners whose property is open to the public.

First, with regard to the personal property of guests, such an imposition was the only way to guarantee that innkeepers did not walk off with a guests' personal property, and so it was imposed as a matter of public policy.[3] Some courts reasoned that:

> ...for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves etc; and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon that point.[4]

Likewise, with regard to personal injuries on the property, liability was also founded on the premise that the innkeeper controls the environment to which the guest is admitted. The guest has little to no control over what he or she may find in terms of cleanliness, health or safety. Nor does the guest have much bargaining power when he or she becomes a guest at a hotel. Thus, the law imposes a duty on the innkeeper

that the premises are reasonably safe; or, if the premises are not safe, the innkeeper has the duty to correct the problem and /or give appropriate warnings.[5]

The standards of care vary greatly among the states, with some states still leaning toward the strict liability-insurer of safety theory, while others allow innkeepers to show that they took extreme or extraordinary care and therefore are not liable. This is reflected in part by the standard enunciated in the Restatement of Torts, Second, § 314A in which the liability of an innkeeper is categorized as, "Special Relations Giving Rise to Duty to Aid or Protect." With regard to liability, this section provides:

1) A common carrier is under a duty to its passengers to take reasonable action
   a) to protect them against unreasonable risk of physical harm, and
   b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
2) An innkeeper is under a similar duty to his guests.[6]

The innkeeper's duty is not without limits, however. When the cause of injuries is unexpected, "An innkeeper is required to exercise reasonable care in protecting patrons from injury arising from reasonably anticipated causes."[7] When the cause is something unpredictable,

> There is no legal duty to protect against an occurrence which is extraordinary in nature ... an unexpected altercation between patrons which results in injury is not a situation which could reasonably be expected to be anticipated or prevented. Accordingly, although innkeepers are required to exercise reasonable care in

> the protection of their patrons, they cannot be held to be insurers of the safety of those patrons.[8]

All states have also passed statutes regarding vermin in housing, although the language is usually framed in terms of landlord tenant law. For example, in New York the Multiple Housing Law states that,

> The owner shall keep all and every part of a multiple dwelling, the lot on which it is situated, and the roofs, yards, courts, passages, areas or alleys appurtenant thereto, clean and free from vermin, dirt, filth, garbage or other thing or matter dangerous to life or health.[9]

Thus, one could argue by analogy that the innkeeper has a similar duty, elevating a breach of the statute to negligence per se.

Even when the innkeeper may have a statutory duty to keep the premises free from vermin and pests, negligence liability may not apply if the vermin and pests are not foreseeable. For example, in *DeLuce v. Fort Wayne Hotel*[10] an actress was bitten by a rat in the hotel lobby. A statute required buildings to be free of vermin. Employees of the hotel knew that there was a problem with rats entering the building. Nevertheless, the appellate court remanded the case for a new trial because whether it was reasonably foreseeable that a rat might enter the hotel lobby was a question of fact for the jury.[11]

B. Liability and the Difficulty in Detecting and Eradicating Bedbugs

The foreseeability/reasonable care inquiry is especially pertinent to bedbug cases. Bedbugs were thought to be more or less eradicated after World War II. Their recent resurgence at

hotels is due to multiple factors, including: (1) increased global travel with high guest turnover; (2) the decreased use of pesticides and the apparent resistance of bedbugs to certain chemical treatments; (3) the ability of bedbugs to stay dormant for long periods of time and to spread effortlessly through ducts, heating systems, and contact with linen, clothing, furniture, or luggage; and (4) the fact that bedbugs typically enter hotels on guests' belongings as eggs or small nymphs that are only the size of a poppy seed. They are likely to go undetected for some time, allowing them to reproduce and to become well established. Though unpleasant, bedbugs are not known to carry disease.[12]

Bedbugs are small insects which have evolved and have adapted to living in human dwellings quite easily. They do not have wings and crawl from place to place. They are extremely small (an adult bed bug is barely ¼ of an inch long) and have a flat shape. Their flat and small size allows them to easily hide in crevices and travel in people's clothing, luggage, and other personal belongings. The only food they need is blood from warm-blooded animals including humans. Even though they prefer to feed on sleeping humans, they can come out during the day as well.

The presence of bedbugs is very difficult to establish for a variety of reasons. Their color can be white, but they routinely cast their skins. To be able to confirm infestation, one has to actually observe them crawling, which is difficult because of their small size, ability to stay hidden all day, and to survive without food (blood) for months. There are only a couple of ways their presence can be confirmed. Aside from human bites, they can leave behind reddish, fecal spots on bed sheets. The effects of bedbug bites on human skin do not necessarily confirm the presence of bedbugs. The skin lesions caused by bedbugs are not particularly different from the bites of

mosquitoes or fleas. The only sure way is to send a specimen to a trained entomologist who can run tests and provide a confirmation.[13]

Given the problems associated with identifying and eliminating bedbugs, it is no wonder that hotels treat them like "a dirty little secret" no one even wants to discuss. Yet failure to actively address an infestation can result in nightmare-like litigation.

LITIGATING BEDBUG CASES

A. Liability for Damages

The leading case on hotel liability for bedbug bites is *Mathias v. Accor Economy Lodging*,[14] in which the hotel was found to be so grossly negligent that the evidence supported an award of punitive damages. The egregious facts in this case are worth reviewing in detail because they provide a useful template for hotel managers and personnel regarding what *not* to do when confronted with a possible bedbug infestation.

In November, 2000, the plaintiffs, a brother and sister, were guests at a downtown Chicago hotel owned and operated by the defendant as part of the "Motel 6" chain. They paid over $100 for their room, received no warning of any problem with the room, and they subsequently suffered a significant number of painful and unsightly bedbug bites. Discovery revealed that the motel's extermination service, EcoLab, had found bedbugs in several rooms as early as 1998, and that it had recommended spraying every room in the motel at a total cost of only $500. The motel refused, and only the noticeably affected rooms were sprayed. The following year EcoLab sprayed another room where bedbugs were discovered, but EcoLab understandably refused to do a "building sweep" for

free as requested by the motel. By spring, 2000, the motel's manager noticed that the desk clerks were giving refunds and that numerous guests had reported ticks and bugs that were biting. Upon examining the rooms she found bedbugs and recommended to her supervisor, a district manager, that the motel be closed while every room was sprayed. Her request was refused and the motel later argued at trial that the manager was a disgruntled employee and that her testimony should be disregarded.[15]

The infestation naturally accelerated, and in one instance a guest was moved four times before locating a bug free room. Even the appellate court questioned why that guest didn't "flee" the motel.[16] By July the management acknowledged to EcoLab that it was simply chasing the bugs from "room to room" without eradicating the problem, but still the motel was unwilling to close down and systematically address the problem.[17] Instead, clerks were instructed to tell customers that the bedbugs were actually "ticks" on the apparent theory that guests would find this less alarming. This false characterization of a known problem not only amounted to fraud and subjected the guests to a probable battery, but it also reveals a misunderstanding of the nature of the threat. Ticks are more dangerous than bedbugs because they can spread Lyme disease and Rocky Mountain Spotted Fever.[18]

By the time the unlucky plaintiffs arrived at the motel in November, the only action that had been taken was to compile a list of rooms given "Do not rent, bugs in room" status.[19] Plaintiffs were nevertheless checked into one of the rooms on that list, and they suffered the consequences. The evidence introduced at trial further revealed that such rooms were being routinely rented, though certainly Motel 6 could not have charged such prices had it informed its guests of the likelihood of being bitten by bedbugs.[20] The defendant argued that it was

at most liable for simple negligence, but not surprisingly, the jury found the motel guilty of "willful and wanton conduct" under Illinois law. Each plaintiff was awarded $5,000 compensatory damages plus $186,000 punitive damages.[21]

The defendant's appeal focused primarily on the calculation of exemplary damages, which represented a 37.2 to 1 ratio of punitive to compensatory damages.[22] Motel 6 argued that pursuant to the standards set by the Supreme Court in the *State Farm and Mutual Automobile Ins. Co. v. Campbell* [23] and *BMW of North America, Inc. v. Gore*[24] cases, punitive damages should not exceed a single-digit ratio to compensatory damages. The defendant proposed a ceiling of four times actual damages as the due process constitutional limit, or $20,000 in punitive damages for each plaintiff. [25]

Judge Posner, writing for the 7th U.S. Circuit Court of Appeals, utilized the Supreme Court's recent rulings on punitive damages as a means to reexamine the penal theory that underlies the civil court's ability to levy punitive damages as an alternative to criminal prosecution. For example, if someone deliberately spits in another's face, the likely response would be to seek a civil fine through a tort action for battery rather than a criminal prosecution for assault. Here compensatory damages are an ineffective remedy. They would be difficult to determine because the harm is largely dignitary and the amount of money involved would be too slight to give the victim an incentive to sue. Moreover, limiting recovery to compensatory damages would have little deterrent effect and might incite retaliation.[26]

Penal precepts require that the punishment should be proportional to the wrongfulness of the defendant's actions. Second, there should be reasonably clear standards for determining the amount of punitive damages for particular

wrongs so that the defendant has reasonable notice of sanctions for unlawful acts and can make rational decisions regarding appropriate conduct. Third, sanctions should be based on the wrong done rather than on the status of the defendant; one should be punished for ones acts, not for being, for example, a well heeled corporation.[27]

Judge Posner's decision upheld the trial court's punitive damages award. Motel 6's attempt to cover up its bedbug infestation is analogous to the spitting instance. The award squarely addresses each of the above principles of corrective justice. The defendant's behavior was outrageous, but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional. The defendant may well have profited from its misconduct because by concealing the infestation it was able to keep renting rooms. Refunds were frequent but may not have cost less than the cost of closing the hotel for a thorough fumigation. Moreover, the hotel's attempt to pass off the bedbugs as ticks, which some guests might ignorantly have thought less unhealthful, may have postponed the instituting of litigation to rectify the hotel's misconduct. The award of punitive damages in this case serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection.[28]

Judge Posner also noted that the defendant's wealth status (an aggregate net worth of $1.6 billion) is not an appropriate measure for determining punitive damages. In this case, however, it was relevant. The defendant utilized its significant resources to engage in an extremely aggressive defense designed to develop a tough reputation and to deter plaintiffs from litigating.[29] The court found Motel 6's conduct so reprehensible and cynical that it took judicial notice of

regulatory and criminal violations that the plaintiffs had failed to raise.

> Deliberate exposure of hotel guests to the health risks created by insect infestations exposes the hotel's owner to sanctions under Illinois and Chicago law that in the aggregate are comparable in severity to the punitive damage award in this case.[30]

These sanctions could have included criminal fines for reckless conduct and revocation of the motel's license for allowing unsanitary conditions to persist.[31] Thus while the amount of the punitive damage award may have been arrived at in a somewhat arbitrary manner, it was deemed to be justified and not excessive.

The *Mathias* case understandably sent shock waves through the hotel industry since plaintiffs now had a precedent for large punitive awards. Though such damages might be small compared to other types of injury claims that could be presented, they typically are not insurable, as was the case in the Motel 6 suit.[32] Moreover, 'raising the stakes' to offset Motel 6's zealous defense rankled defense attorneys, even though most would agree that Motel 6 got what it deserved and that the holding might be limited to the extreme facts of the case.[33] As expected, the industry response has largely been to avoid negative publicity and to prevent litigation by quickly reimbursing complaining guests for their medical treatment, the cost of their stays, and sometimes their transportation and other out of pocket expenses related to the infestation. For bigger operations that carry large insurance deductibles, these costs are often not recoverable.[34] Those recalcitrant defendants who insist on denying the allegations usually end up settling, and since *Mathias*, no bedbug cases have gone to trial in the United

States. Plaintiffs' claims, however, have expanded, and they have significantly increased demands for punitive damages.

B. Subsequent Causes of Action That Have Been Settled

The *Livingston v. Holiday Inn Family Suites*[35] case bears some similarities to *Mathias*. In February of 2004, the Livingston family spent three nights at a Holiday Inn while on vacation in Lake Buena Vista, Florida. On the third night, they discovered small brown insects that were alive and moving on the sofa, mattress, box spring and bedroom wall. They complained to the hotel staff, left the property, and checked into another motel. They suffered no signs of physical injury until four or five days later, when 'red, pus filled, welt-like bug bites' erupted all over their bodies.[36] They were diagnosed as having suffered an allergic reaction to bedbug bites, and in addition, Mrs. Livingston required psychiatric treatment.[37] Their complaint sought compensatory and punitive damages for the torts of assault and battery, intentional infliction of emotional distress, ordinary and gross negligence, fraudulent concealment, and Mr. Livingston's individual claim for loss of consortium.[38]

As in *Mathias*, discovery provided significant evidence of management's knowledge of a problem, though not proof that the defendants knew that renting this particular room would result in harm to the plaintiffs. In the two weeks preceding the event, the hotel's "insect log" noted four cases of insects in rooms throughout the seventh floor, the same floor the plaintiffs inhabited. In addition, during the previous month Holiday Inn had executed an addendum to its pest control contract with an exterminator to provide for treatment of bed bugs at the hotel.[39] On motion for summary judgment, the defendant successfully argued that it lacked the requisite intent to support a claim for assault and battery. The claim for

intentional infliction of emotional distress was also dismissed, but plaintiffs' remaining causes of action survived the motion.[40] Reviewing the duties that a hotel owes to its business invitees, the court concluded that there were triable issues of fact both as to whether the plaintiffs' room was maintained in a reasonably safe condition and whether a reasonable business would have discovered and warned its guests about such a condition after being notified of the presence of insects in the hotel.[41] Following the court's order in May, 2006, the parties subsequently settled for an undisclosed amount.[42]

In a more recent suit, *Trainer v. Hilton Hotels Corp.*,[43] an opera singer suffered over 150 bites on her entire body and face while staying at a Phoenix branch of the Hilton Suites in November, 2006. Upon notice to the hotel, management grudgingly offered one free night's stay. Trainer's complaint alleged severe physical, social and emotional damages including loss of sleep, appetite, and weight, as well as problems performing professionally. She also incurred considerable costs replacing personal items and treating her own premises as a precautionary measure. The complaint added breach of warranty as a cause of action, arguing that hotel patrons have a reasonable expectation of being able to get a good night's sleep "free from any unwanted intrusions or additional guests in (their) bed."[44] In the aggregate, plaintiff sought $20 million in compensatory and punitive damages on all claims.[45] Defendants never filed a response, and the suit was quickly settled on undisclosed terms.[46]

Continuing their progression up the hospitality industry's food chain, bedbugs have now infiltrated even the classiest hotels. In December, 2006, prominent New York intellectual property attorney, Sidney Bluming, filed suit against the luxury Mandarin Oriental Hyde Park hotel in London.[47] Bluming and

his wife claimed that they suffered hundreds of painful sores as a result of bites incurred during their five day stay at the Mandarin in May of 2006, and that they unknowingly transported the bedbugs back to their recently renovated New York City apartment. There they suffered from a new wave of bites and had to discard and replace all of their affected personal property and fumigate the apartment. The lesions were especially emotionally traumatic because Mrs. Bluming is a cancer survivor with a compromised immune system, and she required numerous medical evaluations.[48]

The Bluming complaint sought relief on five counts: (1) defendant's negligence and recklessness in failing to employ customary and reasonable standards of hygiene; (2) intentional infliction of emotional distress; (3) maintenance of a nuisance by failing to warn guests of the potential danger and failing to train staff on how to deal with a bedbug infestation or to take preventative measures; (4) fraud based on the apparent knowledge by the hotel that the Bluming's room was infested because it only became available when they expressed dissatisfaction with their first room; and (5) deceptive trade practices in advertising luxury accommodations.[49] Under New York law, the last count provides for statutory damages, and the Blumings also used the advertisement of luxury accommodations as support for their claim that the Mandarin owed a heightened duty to provide high quality and clean rooms. Though the Mandarin refunded the couple their hotel costs, plaintiffs sought compensatory damages in an amount to be determined at trial and a minimum of $3 million in punitive damages.[50] The defendant moved to dismiss on jurisdictional grounds.[51] This case also recently settled on undisclosed terms.[52]

The foregoing cases reveal several trends. Unfortunately, the incidence of bedbug infestations is definitely on the rise,

and it is not limited to seedy establishments. Though most cases will not amount to *Mathias* style assault and battery, any failure by the hotel management to immediately address complaints will likely lead to litigation and support allegations of simple and/or gross negligence. Fraud, breach of express warranties as well as breach of the implied warranty of quiet enjoyment, and deceptive practices are also claims that are likely to survive a motion to dismiss. Violations of state and local sanitation, health and safety codes, and licensing statutes may also be raised. Since standard operating practices at most hotels includes staff maintenance of complaint records and insect logs, it will not be difficult for plaintiffs to come up with some evidence of awareness of a probable infestation. Such knowledge, and the corresponding responsibility to act, will be readily imputed to management. Even in those cases where the complaining party may have actually been the source of the problem, such as where a traveler unknowingly transports the bedbugs in their luggage from another location, the defendant hotel will still have the burden of proving that it acted in a reasonable and timely manner to discover and address the infestation. Though that would be a factual question for the jury, the public relations concerns and negative publicity arising from such cases will in most instances outweigh the hotel's desire to properly attribute fault. It is not surprising that bedbug suits are being settled or handled through risk management approaches that seek to avoid litigation altogether.

RISK MANAGEMENT PERSPECTIVES AND CONCLUSIONS

Bedbug infestations became an issue in the United States within the last few years. The problem first surfaced in hotels and then quickly spread to apartments, homes, airplanes and cruise ships. Orkin, one of the leading providers of pest control services, estimates that they experienced a 500 percent

increase in calls requesting treatment of bed bugs in the year 2003, and another 20 percent increase in service calls in 2004.[53] The foregoing cases indicate that bedbug related complaints are on the rise, and they are not unique to cheaper motels. Bedbugs are equal opportunity residents—they do not discriminate between rural, urban, economy and luxury hotels.

On their part, most hotels have tried to take an active role in bug infestation management both before as well as after complaints are lodged. Hotel managers recognize the adverse effects of bad publicity and loss of reputation and typically attempt to minimize any damages resulting from guest claims. In terms of dealing with an infestation before it becomes critical, industry leaders recommend that managers take a multi-pronged approach which includes a combination of the following steps:

- Educate and train housekeepers and cleaning staff on how to detect bed bugs.
- Enter a routine service contract with a pest control company that provides monthly inspections and detailed service. Having such a standing contract can substantiate the hotel's defense that it exercised reasonable care.
- Monitor landscaping outside hotel rooms to ensure that trees and bushes are not too close to the windows.
- Complete a thorough cleaning and inspection of any used furniture acquired by the hotel.
- Adopt new technologies to track bug activity electronically. Some of these techniques include heat processes that do not use any pesticides.[54] Though thermal approaches may be more expensive, they have the added advantage of returning a room to use by the following day, rather than having to wait three or four

> days with insecticides. The extra cost may be offset by a reduction in lost revenues.[55]

In spite of all the care a hotel may take, there is no guarantee that an infestation will not occur. Once the infestation has been detected, a pest control service provider will need to treat everything in the room. The treatment has to include mattresses, bedding, sofas, walls, floors, picture frames, and cushions. Since hotels are a 24/7 operation, spraying and fumigation and/or use of heat processes must be done in such a manner that guests are not worried about their stay. Also, it may be necessary to treat the rooms on either side of the affected area in order to effectively contain the problem.[56] Depending upon the layout and nature of the establishment, it may be better to cordon off the entire floor in order to avoid guest anxiety and a mass exodus from the hotel.

An assistant manager of a national hotel franchise, who wishes to remain anonymous, advised the authors that while bedbugs have not been an issue in their properties, the hotel chain is self insured and would usually be able to settle any such claims with complimentary rooms and other perks.[57] A representative from the insurance company used by the owner of another hotel franchise concurred, and he indicated that the majority of such claims are settled before they reach the court system. If the amount of the claim is below the large deductible that most hotels carry, the insurance company does not have much concern. Beyond the deductible, most insurance companies defend the hotel as long as the damage is not intentional. Most hotel insurance policies are standardized, offering similar coverage for medical expenses. These standard policies typically do not contain specific clauses pertaining to injuries sustained due to the presence of bedbugs.[58]

If the figures provided by Orkin can be trusted, the bedbug problem is probably here to stay. Perhaps public awareness and discussion has been minimal as many hotel guests have not figured out that their skin rashes may be due to bedbug bites. In addition, many hotel owners are probably settling any complaints and claims quietly, especially if the amount involved is less than their deductible. As insurance companies have not been overly involved, they have not yet identified any need to amend the existing coverage to specifically address the liability issues arising out of injuries caused by bedbugs. The best approach any hotel management should follow is an ounce of prevention, starting with using standing exterminator agency contracts and continuously training employees to be vigilant.

ENDNOTES

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5 *Jungjohann v. Hotel Buffalo*, 5 A.D.2d 496, 173 N.Y.S.2d 340 4th (1958).

6 Restatement of the Law, (second) of Torts, The American Law Institute (1965-2007).

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8 *Id.*

9 Multiple Dwelling Law § 80 (New York McKinney's)

10 311 F. 2d 853 (6th Cir. 1962).

11 *Id.* at 857. See also *Rein v. Benchmark Construction Company*, 865 So. 2d. 1134,1146 (Miss. 2004) in which an elderly woman was bitten by fire ants while in her bed at a nursing home, and later died. In a lawsuit by her estate against the nursing home, the builder of the nursing home and the landscaper, the court found " The terrible tragedy that occurred at Silver Cross was an unusual, improbable, and extraordinary occurrence. We hold that, as in *Sturdivant*, the event here was too remote to require Benchmark to foresee. Mrs. Rein's death due to fire ant bites was a mere possibility, and no more."

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14 347 F.3d 672 (2003).

15 *Id.* At 674.

16 *Id.* At 676.

17 *Id.* At 676.

18 *Id.* At 676.

19 *Id.* At 676.

20 *Id.* At 677.

21 *Id.* At 672.

22 *Id.* At 678.

23 538 U.S. 408 (2003).

24 517 U.S. 559, 581 (1996).

25 Mathias at 673.

26 *Id.* At 677.

27 *Id.* At 677.

28 *Id.* At 677.

29 *Id.* At 677.

30 *Id.* At 678.

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32 "Lawsuits over bedbugs a nightmare for hotels. (News)." *Business Insurance* 38.8 (Feb 23, 2004).

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37 *Id.* at 2.

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41 *Id.* at 6.

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44 *Id.* at 6.

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49 *Id.* at 8.

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52 *Id.*, Settlement Order entered April 20, 2007.

53 "New data affirms bed bug resurgence: biting pests active in 43 states in 2004." *Hotel & Motel Management* 220.9 (May 16, 2005). http://find.galegroup.com/itx/start.do?prodId=ITOF.

54 Interview with CEO & President, franchise owner of a national motel chain, Feb. 18, 2007.

55 "Unwelcome Guests," *op. cit.* at note 1.

56 *Id.*

57 Personal interview, Feb. 26, 2007.

58 Personal interviews with two insurance agents specializing in selling insurance policies to hotels in upstate New York, Feb. 28, 2007.

PHILIP MORRIS USA V. WILLIAMS: THE SUPREME COURT STRUGGLES WITH THE QUESTION OF PUNITIVE DAMAGE AWARDS AND THE ANSWER IS STILL AT LARGE

by
Dennis D. DiMarzio*

I. INTRODUCTION

Corporate American and plaintiffs' attorneys alike anxiously follow developments in civil litigation law involving punitive damage awards. While these two constituencies may hold opposing interests and wholly divergent views on the subject, they both waited with high anticipation for the United States Supreme Court to render its recent decision in the case of *Philip Morris USA v. Williams*.[1] In the *Williams* case, the Court reviewed due process questions in connection with a compensatory damages and $79.5 million in punitive damages against a tobacco giant in the state of Oregon.

In a five to four decision, with three dissenting opinions, the Court overturned the decision, ruling that the Due Process Clause does not permit a jury to base a punitive damage award on harm to third party victims not before the court. Notwithstanding this holding, the Court ruled that juries could continue to consider harm to nonparties in determining the degree of reprehensibility of the defendant's conduct. Furthermore, the Court failed to address the question of whether the award was constitutionally grossly excessive.

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*Professor of Business, Henderson State University.

Ultimately, the case was remanded so the Oregon Supreme Court could apply the right constitutional standard, which might then result in the need for a new trial or a change in the level of the punitive damages award.

While corporate America generally viewed the *Williams* decision favorably, it was less than fully satisfying because the Court did not impose a clear cap on punitive damages, and to date the Court has failed to give a definitive answer as to the constitutional limits of a punitive damages award. Clouding the impact of the decision all the more is the natural confusion implicit in a ruling that says that while a jury cannot base a punitive damage award on harm to third parties not before the court, that jury can continue to consider harm to non-parties in determining the degree of reprehensibility of the defendant's conduct. A sharply divided court as evidenced by the five to four decision, including three dissenting opinions, and a forever vigilant army of plaintiff's attorneys pursuing corporate defendants makes the current corporate environment unsettling in this area.

The purpose of this paper shall to be analyze the case of *Philip Morris USA v. Williams*[2] and to evaluate its implications. A brief historical overview of the law of punitive damages will be present4ed in order to gain a proper perspective of the *Williams* decision. The *Williams* decision will then be discussed. Finally, the implications of this decision will be evaluated.

II. BRIEF HISTORICAL OVERVIEW OF THE LAW OF PUNITIVE DAMAGE AWARDS

"Punitive damages have been part of American jurisprudence since the country's beginnings."[3] As early as

1852, the Supreme Court in the case of Day v. Woodworth[4] stated, "It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of the offense rather than the measure of compensation to the plaintiff ..."[5] However, the Supreme Court long embraced "...traditional notions of federalism and allowed the area of tort law, including the awarding of punitive damages, to remain with the states."[6]

The Supreme Court refrained from even entertaining the possibility of reviewing a state court punitive damage award under a due process clause analysis until 1989.[7] One commentator[8] aptly suggests that there might be any number of explanations that ultimately led the Supreme Court to consider reviewing state court punitive damage awards. He identifies a tort reform campaign undertaken in the 1980s by "insurance companies, newspaper and magazine publishers, and other tort reform advocates".[9] Additionally, state legislatures and courts were actively addressing the punitive damage problem with tort reform legislation and more frequent reviews of awards.[10] Finally, the petitioner and amici briefs in the *Browning – Ferris*[11] case strongly argued that there was an "explosion in the frequency and size of punitive damage awards."[12]

A. The Early Supreme Court Punitive Damage Cases

In 1989, in the *Browning - Ferris*[13] case, the Supreme Court reviewed a $6 million punitive damages award to determine if it violated the Excessive Fines Clause of the Eighth Amendment.[14] A Vermont district court jury awarded $51,146 in compensatory damages and $6 million in punitive damages in a civil suit based on antitrust violations and tortious interference claims. The Court upheld the award, ruling that,

"The Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government, and thus did not apply to a dispute between private parties."[15] The Court declined to address the issue of whether such a punitive damage award could violate the Fourteenth Amendment due process clause because the parties did not raise the issue, but added that the issue "...must await another day."[16]

Two years later, in the case of *Pacific Mutual Life Insurance Co. v. Haslip*,[17] the Court directly addressed a punitive damages award challenged under the due process clause. The Court reviewed a punitive damage award of more than $1 million against an insurance company whose agent had misappropriated the plaintiffs' insurance premiums, resulting in the cancellation of the plaintiffs' health insurance. The punitive damage award which amounted to more than four times the compensatory award was ultimately upheld by the Court. However, the Court cautioned that such an award was "close to the line."[18]

The Court again addressed a due process clause challenge to a punitive damage award in 1993 in the case of *TXO Production Corp. V. Alliance Resources Corp.*[19] The plaintiff won a slander of title claim and recovered $19,000 in actual damages and $10 million in punitive damages. The defendant attempted to use a worthless quitclaim deed to force a renegotiation of the terms of oil and gas leases with the plaintiff. Even though the punitive damage award stood at a 526-to-1 ratio to the actual damage award, the Court ruled that it was "... appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if future behavior were not deterred."[20] The Court refused to "... draw a mathematical bright line between the

constitutionally acceptable and constitutionally unacceptable that would fit every case."[21] Justice O'Connor offered a biting dissenting opinion in which she described the punitive damage award as "a dramatically irregular, if not shocking, verdict..."[22] and roundly criticized the decision for "no course at all" and for choosing "... not a single guidepost to help other courts find their way through this area."[23]

B. The More Recent Supreme Court Punitive Damage Cases

In 1996, in the case of *BMW of North America, Inc. v. Gore*,[24] the Court finally reversed a punitive damage award for being constitutionally excessive. In doing so, the Court fashioned a three-prong analysis for determining excessiveness. In the *Gore* case, the plaintiff claimed that the paint on his new luxury automobile had been damaged in transit, and that the defendant had repainted the car, concealing the repair and corrosion. The plaintiff was awarded $4,000 in compensatory damages and $4 million dollars in punitive damages which was reduced to $2 million dollars by the Alabama Supreme Court. First, the Supreme Court acknowledged that he Alabama Court had been correct in reducing the punitive damage award to the extent some of that award was based on conduct of BMW in other states that was legal in those states and that had no impact on Alabama or its residents.[25] Then, the Court held that whether a defendant had fair notice of the amount of the award should be determined through the analysis of three guideposts: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases.[26]

Using the three guideposts, the Court determined that the punitive damage award was grossly excessive in violation of the Fourteenth Amendment due process clause and reversed and remanded the decision. Indicating that the first guidepost of reprehensibility was "... perhaps the most important indicium of a punitive damage award's excessiveness ...,"[27] the Court observed that Mr. Gore's harm was "entirely economic" and BMW's conduct "...evidenced no indifference to or reckless disregard for the health and safety of others."[28]

Then addressing the punitive damage ratio to the actual harm inflicted on the plaintiff (the second guidepost), the Court observed a 500 to 1 ratio. While the Court refused to draw a "mathematical bright line"[29] that could be sued for this and future punitive damage award cases, it cited the constitutionally acceptable 4 to 1 ratio in the *Haslip*[30] case and the 10 to 1 ratio in the TXO[31] case. (The 10-to-1 ratio was determined by figuring the harm to the victim that would have ensured if the torious plan had succeeded). Clearly, the Court found the 500 to 1 ratio to be constitutionally unacceptable. In doing so, the Court saw fit to explain "...low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act resulted in only a small amount of economic damages."[32] As one commentator aptly observed, "Thus, the Court in *Gore* left a large grey area between 4 to 1 or 10 to 1 ratios on the one hand and the unacceptable 500 to 1 ratio on the other."[33]

The Court also determined that the disparity between the punitive award and the comparable civil or criminal penalties for the wrong (the third guidepost) justified their decision to reverse the award. Alabama law penalties for such a wrong would have been no more then $2,000 and other states penalties would have been no more than $10,000. "None of

these statutes would provide an out-of-state distributor with fair notice that the first violation – or indeed the first 14 violations – of its provisions might subject an offender to a multimillion dollar penalty."[34]

The *Gore* Court was deeply divided. Justice Scalia was joined by Justice Thomas in a dissent that expressed the view that the Court's step into the excessive punitive damages area was a wrongful incursion into the province that should have been left to the judgment of state courts and juries. Furthermore, they strongly criticized the Court's guideposts as a confusing "...road to nowhere."[35] Justice Ginsbug was joined by Justice Rehnquest in a dissenting opinion as well. They too expressed the view that the Court was treading in an area that should have been left to state concern and that the Court will now be policing the area.

In its next punitive damages case, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[36] the Supreme Court vacated and remanded a Ninth Circuit Court of Appeals decision which had affirmed a district court decision granting $50,000 in compensatory damages and $4.5 million dollars in punitive damages in a trademark violations claim. The Ninth Circuit Court erred in applying a less demanding abuse of discretion standard, because it failed to use the *Gore* guidelines standard.

Finally, in 2003, the Court decided the case of *State Farm Mutual Automobile Insurance Co. v. Campbell.*[37] In this case, an insured, when driving with his wife in Utah, was involved in a multivehicle accident that was fatal to one of the other drivers. The other parties offered to settle their claims for the $50,000 amount of the insured's policy limits, but he insured's automobile insurer rejected the offer. Ultimately a verdict was rendered against the Campbells in excess of their

$50,000 policy amount. The plaintiffs in this case settled in exchange for the Campbell's agreement to pursue a bad faith lawsuit against State Farm and to assign most of the proceeds to the original plaintiffs and their lawyers. The jury returned $2.6 million in compensatory damages and $145 million in punitive damages. The trial court reduced these awards to $1 million and $25 million respectively. However, the Utah Supreme Court reinstated the jury's $145 million punitive damage award.

The Supreme Court overturned the $145 million punitive damage award, holding that it was excessive in violation of the Fourteenth Amendment's due process clause. In doing so, the Court "gave new and expanded analysis and explanation of all three of the *Gore* guidepost."[38] The Court stated that in determined represhensibilty a court should consider whether "...the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."[39] The Court further explained that "the existence of any one of these factors weighing in favor of a plaintiff may not be enough to sustain a punitive damages award; and the absence of all of them renders any award suspect."[40]

The Court was particularly concerned with the fact that the Campbell litigation had been used to punish perceived wrongful conduct by State Farm throughout the country. In fact, the Utah Courts had relied upon evidence involving a host of practices unrelated to the Campbell's case and in numerous states beyond Utah. The Court ruled that the Utah Courts acted unconstitutionally when they "...awarded punitive damages to

punish and deter conduct that bore no relation to Campbell's harm."[41]

The *Campbell* Court added significant clarification to the ratio guidepost. While it again refused to fashion a mathematical bright line formula, it explained that "... few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree will satisfy due process."[42] The Court further stated that "...when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[43] Awards exceeding the single-digit ratio of punitive to compensatory damages would be presumptively unconstitutional. Higher ratios could be approved if the defendant's conduct is "particularly egregious."[44]

Regarding the third *Gore* guidepost, the Court emphasized the limited utility of criminal penalties in the constitutional evaluation of a punitive damage award and that civil sanctions examined should relate to the type of wrong done to the plaintiff.[45] Significantly, the Court held that "...the wealth of the defendant cannot justify an otherwise unconstitutional punitive damages award."[46]

III. *PHILIP MORRIS USA V. WILLIMAS*

With this backdrop of history and expanding case law, the Supreme Court granted certiorari to hear the *Williams*[47] case. A plaintiff widow in Oregon brought a negligence and deceit claim against the defendant for the wrongful death of her husband. He was a long-time smoker of the defendant's product, Marlboro cigarettes. In his closing argument, the plaintiff's attorney made an impassioned plea for the jury to consider the harm done to countless third parties not before the

court that were harmed and killed by smoking Marlboro cigarettes. Ultimately, the Oregon jury awarded the plaintiff $821,000 in compensatory damages and $79.5 million in punitive damages. The Oregon trial court rejected the defendant's jury instruction concerning punishment of the defendant for harming third parties not before the court. The Oregon Supreme Court upheld the punitive award in full, holding both that the jury could punish the defendant for harms to nonparties arising out of conduct similar to the conduct that injured the plaintiff and that the punitive damage award was not constitutionally excessive.

The Supreme Court in a 5 to 4 decision, with 3 dissenting opinions, reversed and remanded the case. Specifically, they ruled that an award based in part upon punishment of a defendant for harming parties not before the Court does not in fact violate the Fourteenth Amendment's due process clause.[48] However, the Court made it clear that a jury could consider harm to nonparties as it relates to the element of reprehensible conduct by the defendant.[49] Because the Oregon Supreme Court's application of the correct standard could lead to a new trial or a change in the level of the punitive damages award, the Court would not consider the question of whether the award was unconstitutionally grossly excessive.[50]

IV. IMPLICATIONS OF WILLIAMS

A. The Williams Dissenting Opinions

There is no better place to begin the evaluation of the implications of the *Williams* decision than to examine the dissenting opinions written in the case by Justice Stevens, Justice Thomas, and Justice Ginsburg. Justice Stevens expressed his view that the Court should have allowed the state or Oregon and its court to decide the tort claim in question.

Furthermore, he saw nothing wrong with allowing a jury to consider harm to nonparties for the purpose of determining a punitive damage award. Punitive damage awards like criminal sanctions are designed for retribution and deterrence. Likewise, because punitive damages are so similar to criminal sanctions, he thought the Excessive Fines Clause of the Eighth Amendment[51] had application to the case. Finally, he thought the Court should have exercised restraint and been more "open-ended"[52] in its definition of due process in the case.

Justice Thomas expressed the view that the Constitution "...does not constrain the size of punitive damage awards."[53] Furthermore, he stated that the "...Court's punitive damages jurisprudence is insusceptible of principled application."[54]

Justice Ginsburg declared that she would have upheld the Oregon Supreme Court decision. She felt that court sought "...diligently to adhere to our changing, less than crystalline precedent."[55] Furthermore, she expressed the view that the defendant failed to raise proper objections at trial to establish a record for the Supreme Court to review. The Court reached "outside the bounds" of the case.[56]

The Supreme Court itself is strongly divided in its view of the *Williams* decision. The Court disagreed as to whether it should even entertain such cases. There was concern about the confusing rule allowing juries to consider harm to nonparties only as it relates to the question of the reprehensible nature of the defendant's conduct. In this and in earlier cases, the dissenting justices criticized the confusing guidelines issued by the Court. Furthermore, as a result of the *Williams* decision, the Court has now positioned itself to police countless future punitive damage award cases.

In fact, the Court recently granted a writ of certiorari to review a $55 million punitive damages award in a Ford Explorer rollover case from a California state court. In *Buell-Wilson v. Ford Motor Co.*,[57] a woman and her husband sued Ford, claiming that her Ford Explorer SUV had been defectively designed and was prone to rollovers. Her spine was severely injured when her Ford SUV fishtailed and rolled over four times. The San Diego jury initially rendered a $386.6 million verdict against Ford, including $246 million in punitive damages. The verdict was reduced twice, first by the trial judge and later by a state appeals court. The compensatory award was reduced to $27.6 million, and the punitive damages award to $55 million. Plaintiffs' attorneys and potential corporate defendants alike anxiously awaited the Court's decision. It was surprising to many that the Court would so soon revisit the punitive damages award question. There was anticipation that the Court might clarify its punitive damages award guidelines. Instead, in a one-line order, the Court vacated the award and remanded the case to the California Appeals Court "...for further consideration in light of *Philip Morris USA v. Williams*..."[58] Based on the confusing guidelines set forth in the *Williams* case, it is reasonable to expect that the Supreme Court will be receiving numerous certiorari petitions for review in the future.

B. Potential Defendant Corporations Generally Benefited From the Williams Ruling

There are a number of reasons why potential defendant corporations generally benefited from the *Williams* ruling. First, the Court held that juries cannot consider harm to nonparties except as it relates to the reprehensibility of the defendant's conduct when assessing punitive damage awards. This should certainly lower the level of future punitive damage awards. Even though the Court did not address the excessive

damage issue, there is every reason to believe that the current Court will follow its recent line of cases wherein important guidelines were enunciated which should generally tend to lower the level of punitive damage awards.

C. State Legislatures and Courts Will Likely Continue With Tort Reform and Case Reviews

Statutory tort reform and state judicial review affecting punitive damage awards is likely to continue after the *Williams* decision. One commentator has chronicled recent developments in those areas.[59] The following table was presented in his study of this area:

Table 2: Checks and Balances on Punitive Damages

The number of states that either prohibit punitive damages or that have enacted one or more tort limitations.	45
The number of states that have raised the standard of proof from a preponderance of the evidence to "clear and convincing" evidence.	34
The number of states that cap or limit the amount of punitive damages or prohibit recovery altogether.	25
The number of states that have fortified jury instructions on punitive damages.[60]	22
The number of states that may require plaintiffs to share a portion of their recovery with the state or a state entity.	10
The number of punitive damages hot spots that have not enacted at least one punitive damage reform.	1
The number of states with compulsory post-verdict reviews of punitive damages awards for excessiveness.[61]	50

This table illustrates that even before the *Williams* decision; states were already addressing the issue of punitive damages in a way that should benefit defendant corporations.

V. CONCLUSION

The *Williams* decision generally promises to benefit defendant corporations because it announced guidelines place more limitations on punitive damage awards. However, the confusion inherent in those announced guidelines and the divided view of the Supreme Court itself on the issue suggest that this remains a grey area of law. Historically, when the Court has struggled with grey areas of law by announcing less than clear guidelines, more cases in that area have been appealed, and the Court has had to entertain later cases to clarify the law.[62] For example, the Court struggled for decades trying to adequately define what speech is "obscene". In the 1964 case of *Jacobellis v. Ohio*,[63] Justice Potter Stewart, in attempting to further define obscene, penned his infamous "...I know it when I see it..."[64] line. That kind of confusing definition led the Court to revisit the same question several more times in later cases.

While the current Court is beyond the "I know it when I see it" stage in defining appropriate punitive damage award guidelines, it is still struggling with the question and the ultimate answer is still at large. It is likely that there will be a parade of new punitive damage award cases appealed. Furthermore, it is likely that the Supreme Court will ultimately have to revisit the punitive damages award question to better clarify its due process guidelines.

ENDNOTES

[1] *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 2007 U.S. LEXIS 1332 (2007).

[2] *Id.*

[3] Sheila L. Birnbaum, *The Benjamin N. Cardoza Lecture: Punitive Damages and Due Process: How Much is Too Much?,* The Record of the Association of the Bar of the City of New York, 61 The Record 165 (2006).

[4] *Day v. Woodworth*, 54 U.S. 363 (1852).

[5] *Id.* at 371.

[6] Ansley C. Tillman, Note, *Unwarranted Entry: An Examination of the Supreme Court's Decision to Enter the Punitive Damages Arena*, 24 Rev. Litig. 473 at 473 (2005).

[7] *Browning – Ferris Industries of Vermont v. Kleco Disposal, Inc.*, 492 U.S. 257 (1989).

[8] Tillman, supra note 6, at 484, 485.

[9] *Id.*

[10] *Id.* at 483, 484.

[11] *Browning – Ferris Industries of Vermont v. Kleco Disposal, Inc.*, 492 U.S. 257 (1989)

[12] Tillman, supra note 6, at 483.

[13] *Browning – Ferris Industries of Vermont v. Kleco Disposal, Inc.*, 492 U.S. 257 (1989)

[14] U.S. CONST. amend. VIII.

[15] *Browning – Ferris Industries of Vermont v. Kleco Disposal, Inc.*, 492 U.S. 257 at 268 (1989)

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[16] U.S. CONST. amend. XIV § 1.

[17] *TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 443 (1993).

[18] *Id.* at 19.

[19] *TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 443 (1993).

[20] *Id.* at 460.

[21] *Id.* at 458.

[22] *Id.* at 481.

[23] *Id.* at 480.

[24] *BMW of North American, Inc. v. Gore*, 517 U.S. 559 (1996).

[25] *Id.* at 572-73.

[26] *Id.* at 574-75.

[27] *Id.* at 575.

[28] *Id.* at 576.

[29] *Id.* at 583.

[30] *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1 (1991).

[31] *TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 443 (1993).

[32] *BMW of North American, Inc. v. Gore*, 517 U.S. 559 at 584 (1996).

[33] Birnbaum, supra note 3, at 172.

[34] *BMW of North American, Inc. v. Gore*, 517 U.S. 559 at 584 (1996).

[35] *Id.* at 605.

[36] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* 532 U.S. 424 (2001).

[37] *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

[38] Birnbaum, supra note 3 at 173.

[39] *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 at 419 (2003).

[40] *Id.*

[41] *Id.* at 442.

[42] *Id.* at 425.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 428.

[46] *Id.* at 427.

[47] *Philip Morris USA v. Williams*, 127 S. Ct. 1057; 2007 U.S. LEXIS 1332 (2007).

[48] *Id.* at 1333.

[49] *Id.* at 1338.

[50] *Id.* at 1337.

[51] U.S. CONST. amend. VIII.

[52] *Philip Morris USA v. Williams*, 127 S. Ct. 1057; 2007 U.S. LEXIS 1332 (2007).

[53] *Id.*

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[54] *Id.*

[55] *Id.* at 1338.

[56] *Id.* at 1337.

[57] *Buell-Wilson v. Ford Motor Co.*, 127 S. Ct. 2250, 2007 U.S. LEXIS 5161 (2007).

[58] *Id.* at 2250.

[59] Michael L. Rustard, *Symposium: Access to Justice: Can Business Co-Exist with the Civil Justice System?: The Closing of Punitive Damages' Iron Cage*, 38 Loy.L.A.L. Rev. 1297 (Spring 2005).

[60] *Id.* at 1360.

[61] *Id.* at 1360.

[62] See *Roth v. United States*, 354 U.S. 476 (1957); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Miller v. California*, 413 U.S. 15 (1973); *Brockett v. Spokane Arcades, Inc.*; 472 U.S. 491 (1985); *Pope v. Illinois*, 481 U.S. 497 (1987); and *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

[63] *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

[64] *Id.* at 197.

GARCETTI et al. v. CEBALLOS—A REWORKING OF FIRST AMENDMENT FREE SPEECH RIGHTS FOR PUBLIC EMPLOYEES

by
J.L. Yranski Nasuti*

The issue of whether a public employer can require its employees to forfeit their First Amendment speech rights is one that the courts have dealt with for well over a hundred years. During the first term of the Roberts' court, the two new justices joined in a 5-4 decision that whittled away at the circumstances under which public employees may speak out on public matters without fear of retaliation by their employers. This paper will review the cases that have shaped the discussion in this area of First Amendment law and evaluate the impact of the Supreme Court's decision in *Garcetti et al. v. Ceballos.*[1]

I.

In 1892, Justice Oliver Wendell Holmes articulated the state of the law with regard to a public employee's free speech rights in the case of *McAuliffe v. Mayor of New Bedford.*[2] McAuliffe, a public employee, had challenged the constitutionality of a municipal rule that prohibited police officers from soliciting money for any political purposes. Holmes infamously rejected the petitioner's claim by noting that even though a person "may

*Professor of Legal Studies in Business, Hagan School of Business, Iona College, New York

have a constitutional right to talk politics, . . . he has no constitutional right to be a policeman."[3] Holmes did not differentiate between the constitutional rights of a public employee and a private employee. Instead he made the blanket observation that "there are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered to him."[4] The holding in the *McAuliffe* case was unequivocal—public employers could require their employees to choose between exercising free speech rights and retaining jobs in the public sector.

By the second half of the twentieth century, the U.S. Supreme Court had begun to recognize constitutional problems with the Holmesian model. Some of these problems were addressed in a series of cases that challenged the government's authority to restrict a public employee's right to express personal political beliefs or to mandate that an employee execute a loyalty oath. In *Wieman v. Updegraff,*[5] the court struck down an Oklahoma statute that required state employees to swear under oath that they were not, nor had they been for the preceding five years, members of any organization listed by the U.S. attorney general. Justice Tom Clark, writing for the majority, found that the act created a conclusive presumption of disloyalty for anyone who had been a member of, or affiliated with, one of the proscribed organizations, even if that person (at the time of the affiliation) did not have actual knowledge of the purpose and nature of the organization. Justice Hugo Black's concurring opinion more plainly stated that the imposition of a loyalty oath violated the public employee's constitutional guarantee of freedom of speech. Eight years later, in the case of *Shelton v. Tucker,*[6] the court

invalidated an Arkansas statute that compelled teachers employed in state-supported schools or colleges to file annual affidavits listing every organization that they had belonged to during the preceding five years. Justice Potter Stewart's majority opinion acknowledged that even though the state had an interest in investigating the competence and fitness of the teachers that it hired for its schools and even though it could consider a broad range of factors,[7] it could not use means that "broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[8] The Supreme Court also found fault with a New York plan whose stated purpose was to prevent the appointment and retention of subversives to positions in state run institutions of higher education. Justice William Brennan's decision in the case of *Keyishian et al. v. Board of Regents of the University of the State of New York*[9] concluded that the state's plan was unconstitutional because it was vague and because it abridged the public employee's right to freedom of association. As in *Shelton*, the court found that while the state had a legitimate interest in protecting its education system from subversion, it needed to use narrower means to reach that end.

The First Amendment free speech issue in the landmark case of *Pickering v. Board of Education*[10] did not involve an employee who refused to take a loyalty oath or who belonged to a subversive organization. The employee in *Pickering* was a public school teacher who disagreed with the fiscal policies of his school board. He sued the board for violating his free speech rights after they terminated him for expressing his disapproval of those policies in a letter to the editor of the local newspaper. In order to determine if a First Amendment violation had occurred, the Supreme Court focused on the nature of the speech and the competing interests of the public employee and the public employer. The broad *Holmesian* notion that a public employer could automatically suspend a

worker's free speech rights as a condition of employment was rejected by the Court at the same time that it noted that the state, as an employer, had an interest in regulating its employees' speech in a way that was significantly different from the way it regulated the speech of the public in general. Justice Thurgood Marshall, writing for the majority, held that the only way to resolve the problem was to "to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[11] Since the funding of public schools was a matter of legitimate public concern, the court needed to weigh the competing interests of the employee (as citizen) with the interest of the school board (as employer). In the end, the majority of the court concluded that the teacher's right to speak was protected by the Constitution and could not be used to justify his dismissal since the school board was neither able to show that the teacher had knowingly and recklessly made false statements[12] nor that the teacher's speech had interfered with his immediate supervisors maintenance of discipline or disrupted the harmony among his co-workers.[13]

Pickering's progeny continued to emphasize the right of a public employee, as a citizen, to comment on matters of public concern. In *Perry v. Sindermann*,[14] the plaintiff, an untenured professor at a state college, was terminated after he publicly aligned himself with a group critical of the board of trustees' position on a number of issues. Justice Potter Stewart, writing for the majority, held that "even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, [it may not do so] on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[15] That same reasoning was also applied in

the case of *Mt. Healthy City School District Board of Education v. Doyle*,[16] in which the Court held that while an untenured teacher may be fired for "no reason at all," he may not be fired for exercising his First Amendment speech rights unless the public employer can demonstrate by a preponderance of the evidence that it would have reached the same decision in the absence of the protected conduct. In *Givhan v. Western Line Consolidated School District*,[17] a public school board terminated a junior high school teacher who had, in a series of private conversations with her school principal, allegedly made "petty and unreasonable demands" in a manner that was variously described as "insulting," "hostile," "loud," and "arrogant." The teacher's comments involved claims that the school's employment policies and practices were racially discriminatory. The Supreme Court, in a unanimous opinion written by Justice William Rehnquist, held that the First Amendment protected the teacher's criticism even though the employee had arranged to communicate her views privately with her employer rather than to spread her views before the public.[18]

While *Pickering* made it clear that a public employee's speech would be protected if it concerned a matter of public concern and if it was not detrimental to the competing interests of the government as employer, it failed to establish guidelines for determining when the employee's speech related to a matter of public interest and when it caused detrimental harm to the employer. The court confronted that problem in the case of *Connick v. Myers*,[19] in which a state assistant district attorney claimed that her First Amendment rights were violated when she was terminated in retaliation for her distribution of a questionnaire relating to internal office affairs. The employee, who served at the pleasure of the district attorney, had strongly objected to the district attorney's plan to transfer her to a different office. After the district attorney refused to reconsider

his decision, the plaintiff prepared a questionnaire, which she distributed to her co-workers, concerning the office transfer policy, office morale, the need for a grievance committee, the level of confidence in the supervisors, and whether the employees had felt pressured to work in political campaigns. When the district attorney subsequently fired the employee, he cited both her refusal to accept the transfer and her insubordination in distributing the questionnaire.

Justice Byron White's majority opinion in *Connick* reviewed the cases leading up to and following from *Pickering* and saw a common theme—"the [invalidation of] statutes and actions [that] sought to suppress the rights of public employees to participate in public affairs."[20] The First Amendment protects the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people"[21] and can be invoked to protect the speech of public employees when that speech relates to matters of political, social, or other concern to the community. When, however, the employees' speech does not fall within one of those areas, public employers may manage their offices without "intrusive oversight by the judiciary in the name of the First Amendment."[22] Public employees may not be deprived of fundamental rights just because they are public employees—nor may they claim an entitlement to a unique immunity for employee grievances that the First Amendment would not extend to those who work in the private sector. In general, a public employee who speaks on matters of personal interest cannot expect the federal court to review the wisdom of subsequent negative personnel decisions. White then stated that the way to determine whether the employee's speech concerns a matter of public is to look at the entire record and consider the content, form, and context of the speech.[23]

The majority in *Connick* identified only one item on the employee-prepared questionnaire that addressed an issue of public concern—the question asking whether the public employees felt pressured to work on political campaigns.[24] That finding, nonetheless, triggered a balancing of the employee's First Amendment interests in asking that question against the employer's interest in exerting its discretion in the effective and efficient management of internal personal affairs. In the end, the court concluded that the balance was in favor of district attorney's claim that the toleration of the employee's speech would disrupt the office, undermine his authority, and destroy the close working relationships within the office and not in favor of the employee's more limited speech interest.

Pickering and *Connick* established the standards to be applied in future public employee free speech cases. In *Rankin v. McPherson*,[25] Justice Marshall (the author of the *Pickering* decision) held that it was a violation of the First Amendment for a constable to fire a clerical employee who made a comment at work expressing the hope that a second assassination attempt on President Reagan be more successful than the first. The content, form, and context of the employee's statement supported the threshold conclusion that the speech involved a matter of public concern even though it was made during the course of a private conversation.[26] In applying the *Pickering* balancing test, the court cited three reasons why the constable's interest in terminating the employee did not outweigh her interest in exercising her First Amendment rights: 1. There was no evidence that the speech interfered with the efficiency of the office; 2. The comment, which was made at the workplace, was part of a private conversation, and 3. The comment could have had no more than a minimal impact on the functioning of the law enforcement office since the employee's duties did not involve

confidential or policy-making matters and since she had no direct contact with the public.[27]

Seven years later, the U.S. Supreme Court, in the case of *Waters v. Churchill*,[28] had to decide whether a public hospital's decision to fire a nurse, based on a conversation that she had had with a co-worker during a work break, was in violation of her First Amendment rights. One important feature of the case was the fact that the employer and employee disagreed over the actual content of the conversation. The hospital believed that the employee had made disruptive statements that were critical of both her department and the hospital and that discouraged another employee from transferring into the nurse's department. The nurse's version of the conversation, which was corroborated by others who had overheard part of it, indicated that her speech was largely limited to nondisruptive statements in which she criticized the hospital's cross-training policy because of its impact on patient care. The unusual issue in this case was whether the *Pickering* and *Connick* tests should be applied to what the public employer thought the employee had said or to what a trier of fact might ultimately determine had actually been said.[29] In a decision announced by Justice Sandra Day O'Connor, the court held that it would be appropriate to apply the tests to what the government employer reasonably thought was said so long as that conclusion was made in good faith and the employer had followed procedures that were within the range of what a reasonable manager would use.

Justice John Paul Stevens further defined the breadth of a public employee's First Amendment speech rights in the case of *United States v. National Treasury Employees Union.*[30] The plaintiffs in that case were federal employees who had challenged the constitutionality of a law that made it illegal for them to receive compensation in exchange for delivering

speeches or writing articles. The statutory restriction applied even when the speeches and articles related to topics that had nothing to do with the employees' official duties. The court acknowledged that *Pickering* might allow Congress to impose restraints on the job-related speech of its public employees in those instances where the government could demonstrate that it had a greater interest, as an employer, in promoting the efficiency of the public services that it performs through its employees than the employees had in speaking on a matter of public concern.[31] There was, however, a significant difference between *National Treasury* and *Pickering*—in that *National Treasury* involved much more than "a *post hoc* analysis of one employee's speech and its impact on the employee's public responsibilities."[32] This factual distinction meant that the government's burden was even greater since the statutory prohibition was in fact a wholesale deterrent to a broad category of expression by a massive number of potential speakers.[33]

II.

The U.S. Supreme Court first heard oral arguments in the case of *Garcetti et al. v. Ceballos* in October 2005—when John Roberts was the newly confirmed chief justice and Samuel Alito had not yet replaced Sandra Day O'Connor. It was only after Justice O'Connor had stepped down from the bench and the case had been reargued in March 2006 that Justice Alito was able to provide Justice Anthony Kennedy with the deciding vote for his majority's opinion.[34]

Richard Ceballos, a deputy district attorney in the county of Los Angeles, was serving as a calendar deputy when a defense attorney contacted him concerning an affidavit that a police officer had presented to the court in order to obtain a search warrant. The attorney told Ceballos that he had filed a

challenge to the warrant based on some serious inaccuracies in the affidavit and asked the deputy district attorney to review the case. According to Ceballos, this was not an unusual request. After reading the affidavit and visiting the location for which it applied, Ceballos came to the conclusion that there were indeed problems with the document.[35] His next move was to contact the warrant affiant, a Los Angeles County deputy sheriff. When Ceballos was unable to get any satisfactory explanations for the discrepancies, he informed Carol Najera and Frank Sundstedt, his immediate supervisors, of his findings. He then prepared a disposition memorandum explaining his concerns and recommending that the case be dismissed. A few days after he submitted the memo to Sundstedt, Ceballos prepared another memorandum for Sundstedt describing a second conversation with the warrant affiant. Eventually a meeting was set up with Ceballos, Sundstedt, Najera, the warrant affiant, and a number of other members of the sheriff's department to discuss the affidavit. The meeting ended acrimoniously with one of the officers criticizing Ceballos for his handling of the case. Sundstedt rejected Ceballos' recommendation to dismiss the case and instead proceeded with the prosecution. The defense then called Ceballos to testify as to his concerns about the affidavit in the hearing at which the trial court denied the defendant's motion to traverse. It was at this point that Ceballos was reassigned from his calendar deputy position to a trial deputy position, transferred to another courthouse, and denied a promotion.

After unsuccessfully seeking relief through an internal employment grievance procedure, Ceballos sued Los Angeles County, the district attorney, and his former supervisors in the U.S. District Court for the Central District of California.[36] His action, under Rev. Stat. §1979, 42 U.S.C. §1993, alleged that the defendants had subjected him to adverse employment

actions in retaliation for speech that was protected by First Amendment. The defendants filed two motions for summary judgment, both of which were granted by the lower court. The first, on behalf of the individually named defendants (the district attorney in his individual capacity, the then head deputy district attorney, and Ceballos' immediate supervisor), was based on a claim of qualified immunity. The second, on behalf of the county and the district attorney in his official capacity, invoked a claim of Eleventh Amendment immunity. On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed the lower court on the grounds that: 1. The claim of qualified immunity was unavailable, since *Pickering* and *Connick* clearly establish that if the public employee's speech involved a matter of public concern, it could outweigh the public employer's interest in limiting that speech and 2. The claim of Eleventh Amendment immunity was also unavailable to the named defendants since it did not apply to the political subdivisions of a state (such as the county) and did not apply to the district attorney (unless it could be shown that he had been performing a state, rather than county, function when he engaged in the alleged acts).[37]

The U.S. Supreme Court reversed the Ninth Circuit's decision--and in a manner that substantially altered the future application of the basic principles of *Pickering* and *Connick.* Justice Kennedy reframed the constitutional issue so that it was no longer a matter of whether the government may condition public employment on a basis that infringes the public employee's constitutionally protected interest in free speech—but "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties."[38] The majority responded to this new inquiry by establishing a *per se* rule that denies First Amendment protection from employer discipline to public

employees when the speech in question is made in the course of the employees carrying out their official duties.

Kennedy began his analysis of the law by acknowledging that *Pickering* was a "useful starting point in explaining the Court's doctrine."[39] By the time he was done, he had basically concluded that *Pickering* balancing test was inapplicable in those cases in which the public employees were claiming First Amendment protection for speech made while acting in their official capacities. *Pickering* and *Connick* had mandated a two-step inquiry into public employee free speech cases. The threshold question involved a determination of whether the employees had spoken as citizens on matters of public concern. If the answer to that question was no, the court needed to proceed no further since the First Amendment would not protect the employees from any sort of employer reaction. If the answer was yes, the public employees might have a First Amendment claim if the court determined that, on balance, the pubic employer was not adequately justified in treating the employees' speech differently from that of other members of the general public.

In *Ceballos*, the majority opinion redefined the initial *Pickering* inquiry in a manner that substantially reduced the chances that the court would ever need to proceed to the second inquiry. Under Kennedy's reformulation, the initial question now differentiates between public employees who speak "as citizens" on a matter of public concern and public employees who speak "in their official capacities" on a matter of public concern. If a court determines that the employees have spoken as citizens on matters of public concern, it can apply the *Pickering* balancing test. If, on the other hand, it determines that the employees have been speaking in their official capacities, it would no longer matter whether they have been addressing a matter of public concern. Under the court's

majority opinion, if the speech is made in the course of the employees' official capacities, "the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[40]

Kennedy reviewed a number of post-*Pickering* cases[41] and observed that the guiding principles of these decisions were two-fold--"to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions."[42] In applying these principles to the *Ceballos* case, Kennedy focused almost entirely on the needs of the public employer. Ceballos' conclusion that the police department had used an affidavit that contained serious misrepresentations in order to obtain a search warrant might have been judged to be a matter of public concern. Any societal interest in that information was, however, irrelevant to the question of whether Ceballos could claim free speech protection for voicing concerns about the affidavit.

The "controlling factor" for the majority was that Ceballos' concerns were made in his capacity as a prosecutor who had a responsibility to advise his supervisor on how to handle a pending case. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simple reflects the exercise of employer control over what the employer itself has commissioned or created."[43] Ceballos acted as an employee, and not as a citizen, when he carried out his professional duties. Therefore, the government, in its capacity as his employer, could legitimately evaluate his performance without fear of First Amendment challenges in order to "ensure that their employees' official

communications are accurate, demonstrate sound judgment, and promote the employer's mission."[44] For Kennedy, it was a matter of legitimate managerial discretion for the government, as employer, to determine if Ceballos' memo had been so inflammatory or misguided that corrective action was justified. The alternative (allowing judicial intervention in the conduct of governmental operations) would be "inconsistent with sound principles of federalism and the separation of powers."[45]

Kennedy concluded by noting that there were three reasons why public employees should not be concerned about the lack of First Amendment protection when they engage in speech that exposes governmental inefficiency and misconduct. The first was his presumption that public employers would be receptive to constructive criticism by their employees. The second was that "the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes"[46]—would sufficiently protect public employees who exposed wrongdoing. The final reason, which applied more specifically to government attorneys such as Ceballos, was that there were rules of conduct, constitutional obligations, and criminal and civil laws that would "protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions."[47]

III.

The four dissenting justices, John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer, issued three dissenting opinions that questioned the majority's dramatic undercutting of the holdings in *Pickering* and *Connick.* Stevens, writing for himself, began by noting that "the proper answer to the question "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties" is "Sometimes" not

"Never.""[48] The "Sometimes" answer would be appropriate in those instances where the public employee's speech was unwelcome because it had revealed facts that the supervisor had wanted to conceal.[49] Stevens also raised a concern that the "perverse" outcome of the court's new rule would be to encourage public employees to "voice their concerns publicly [in their capacity as protected citizens] before talking frankly to their superiors [in their capacity as unprotected employees]."[50]

The second dissenting opinion, which was written by Souter and joined by Stevens and Ginsburg, was based on the premise that although the public employer had a substantial interest in having its policy and objectives effectuated and in demanding competence, honesty, and judgment from its employees, its interest in the efficient implementation of that policy might be trumped by private and public interests in the speech of public employees when that speech addressed official wrongdoing and threats to health and safety. The applicability of the First Amendment protection to public employees who exposed such behavior should not be denied just because the employees did so in the course of performing their official duties. Souter acknowledged that there was a sliding scale of protection that applied to speech. At one end was the protected speech of private citizens on a matter of public importance—and at the other end was the unprotected speech of government employees "complaining about nothing beyond treatment under personnel rules."[51] Somewhere in between the two extremes was the speech of public employees that was unwelcome to the public employer and yet of significant public interest. That was the kind of speech that needed to be scrutinized under the *Pickering* balancing test since it was speech that was neither absolutely entitled to protection nor absolutely beyond the scope of protection.

Souter recognized that there were legitimate instances where the speech of a public employee should not be protected—especially when it "can distract co-workers and supervisors from their task at hand and thwart the implementation of legitimate policy."[52] He also saw a legitimate role for the court to weigh, on a case-by-case basis, the relative merits of the public employer's need to promote managerial efficiency and the public employees need to speak out on matters of public concern. The majority's new *per se* rule would prevent the court from doing so when the public employees' speech, which was critical of the administration by the public employer, was made "pursuant to official duties". Souter found it ironic that those public employees, who are "often in the best position to know what ails the agencies for which they work,"[53] would have such limited First Amendment protections when speaking on matters of public concern.[54] He expressed surprise that the majority's rule would seemingly protect a public employee who "repeats statements made pursuant to his duties but in a separate, public forum or in a letter to a newspaper."[55] He also pessimistically suggested that one outcome of this case would be a move by public employers to restate the official duties of their employees in such a broad way that the result would be to "so exclude some currently protectable speech from First Amendment purview."[56]

There were two important, and recurring, assumptions in Souter's dissenting opinion. The first was that the majority was wrong to categorically separate the citizen's interest from the public employee's interests. The people attracted to public service are often those who do so in order to unite their advocations with their vocations. The government's own advertisements were even designed to attract potential employees who were willing to serve as "citizen servants."[57] The second was the conviction that there was no adequate justification for tweaking the holding in *Pickering* in order to

create the new *per se* rule. While Souter agrees with the majority that the "employee who speaks out on matters subject to comment in doing his own work has the greater leverage to create office uproars and fracture the government's authority to set policy to be carried out coherently through the ranks,"[58] he worries that a categorical exclusion of First Amendment protection for speech made in the course of doing official business is overreaching. Under the new rule the courts would no longer be able to balance the interests of the government and the public employees with regard to speech relating to official dishonesty, deliberate unconstitutional action, other serious wrongdoing, or threats to health and safety if that speech was made by the employees in the course of their official duties. Souter also dismissed the majority's fear that allowing that kind of judicial scrutiny would result in flood of litigation by pointing to the experience in the circuit courts that have recognized similar claims by public employees.[59]

Souter also rejected two of the majority's non-*Pickering* related reasons for its holding. The first was the court's acceptance of the idea that all statements made by public employees within the scope of their employment is speech that belongs to the government—and, consequently, "should be differentiated as a matter of law from the personal statements the First Amendment protects."[60] While it may be true that some public employees are hired to espouse "a substantive position prescribed by the government in advance,"[61] not all government workers are "hired to speak from a government manifesto."[62] The speech of this later group should be treated differently. His second objection related to the majority's contention that there was adequate state and federal whistle-blower legislation to protect public employees from retaliatory actions. The fallacy with that contention is the fact that many of those statutes do not apply to all employee speech that addresses matters of official wrongdoing; [63] do not always

apply to public employees of municipalities and other subdivisions; may, in the case of the federal Whistle-blower Protection Act of 1989, 5 U.S.C. §1213 *et seq.*, require the public employee to show with "irrefragable proof" that the official criticized was neither acting in good faith nor in compliance with the law; and may exclude protection for federal employees who make comments in connection with normal employment duties.[64]

The concluding section of Souter's dissent related to specific matters that the Ninth Circuit Court of Appeals needed to focus on when it considered, on remand, the additional retaliation claims resulting from speech by Ceballos that may not have been made within the scope of his official duties. Souter identified a number of key factual matters that Kennedy had not emphasized because of the particular focus of the majority opinion.[65] When the Court of Appeals had originally considered Ceballos' case, it had concentrated on the First Amendment claim relating to the statements made in his disposition memorandum. These were the statements that the majority of the U.S. Supreme Court deemed to be unprotected under *Pickering* since they were made in the context of the employee's official duties. On remand, the court's obligation would be to consider if *Pickering* would apply to those other instances. At that point that Souter hoped that "the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process."[66]

The final dissenting opinion, which was written by Justice Breyer, presents an answer to the question of "whether the First Amendment protects public employees when they engage in speech that both (1) involves matters of public concern and (2) takes place in the ordinary course of performing the duties of a governmental job"[67] that is different from those of Kennedy and Souter. Breyer began by pointing out that the majority and

minority opinions were on based on certain common ground.[68] That common ground ended when the justices were called upon to respond to the ultimate question that was raised by Kennedy—does the First Amendment protect a government employee from discipline based on speech made pursuant to the employee's official duties. Breyer's comment on Kennedy's answer of "Never" is simply that "that word, in my view, is too absolute."[69]

While Breyer agreed with the majority that there was a need to "afford government employers sufficient discretion to manage their operations,"[70] he also recognized that there were circumstances where the need for constitutional protection justified the limitation of government action and the imposition of the *Pickering* balancing test. The present case, which involved an alleged retaliation by the government of one of its own lawyers for fulfilling what he considered to be his obligation under *Brady v. Maryland*,[71] justified a *Pickering* review for two reasons. The first was that Ceballos' speech was a particular kind of professional speech that was subject to independent regulation by the canons of the legal profession.[72] Consequently, the public employer's interest in forbidding that speech is diminished where the canons have imposed an obligation to speak.[73] The second was that the U.S. Constitution also imposed speech obligations on the professional public employee.[74]

While Breyer agreed with much of what Souter included in his dissenting opinion, he also felt that there were problems with the standards Souter set for the application of *Pickering*. Souter had argued that the *Pickering* balancing test should apply in all cases and that the public employer would prevail unless the employee "speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it."[75] Breyer discomfort originated in Souter's statement that

"only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor."[76] Rather than limiting the instances that constitute "matters of unusual importance," the qualifying statement seemed to open up the category to all sorts of "daily bread-and-butter concerns for the police, the intelligence agencies, the military, and many whose jobs involve protecting the public's health, safety, and the environment."[77] This, in turn, does nothing to avoid the need, by the court, to undertake the balance in the first place. What Breyer feared was that dissatisfied employees would litigate in an attempt to have the courts unreasonably interfere with the public employer's managerial function rather than use the other available grievance-resolution vehicles.[78] In the end, Breyer concluded that Kennedy's reasoning was too narrowing and Souter's too broad. A public employee's speech should be protected if it involves a matter of public concern, and even if it takes place in the course of ordinary job-related duties, so long as there is an "augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs."[79] Since Breyer found those conditions to exist in Ceballos' case, he concluded that the application of the *Pickering* test would have been appropriate.

IV.

After *Ceballos*, public employees may continue to speak on issues of public concern—but not, it would appear, with First Amendment protections, if that public concern involves the disclosure of a wrongdoing in the workplace that was discovered by the employees in the course of carrying out their official duties. Protecting the employer's need for efficiency and harmony in the workplace would appear to trump an

employee's disclosure that there is something 'rotten in Denmark.'

The new rule for determining whether the speech of public employees is protected under the First Amendment requires the court to extend protections to the public employees only when they engage in public discourse as citizens on a matter of public concern--but not if they make those same comments pursuant to their official duties. The *Pickering* balancing test is now applicable to an even smaller closed set of First Amendment cases. "When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny."[80] The majority of the new Roberts' court (or is it the new Kennedy court) appears to be quite satisfied with having formulated a *per se* rule that guarantees some certainty in outcome. Unfortunately it also seems to have done away with a judicial scrutiny of those cases in which the public employees (who may be the only citizens with access to important information about the mismanagement of government) will be unable to actually speak on those matters of public concern without fear of employment retaliation.

ENDNOTES

[1] 547 U.S. ____ (2006); 126 S.Ct. 1951 (2006).

[2] 155 Mass. 216, 29 N.E. 517 (Mass. 1892).

[3] Holmes' view that a public employee had no right to object to conditions that the public employer placed on the employee's exercise of constitutional

rights was followed by the court into the beginning of the second half of the twentieth century. See *United States v. Wurzbach,* 280 U.S. 396 (1930); *Public Works v. Mitchell,* 330 U.S. 75 (1947); *Garner v. Los Angeles Bd. of Public Works*, 341 U.S. 716 (1951); and *Adler v. Board of Education*, 342 U.S. 485 (1952).

[4] *Supra,* n. 2, at 517.

[5] 344 U.S. 183, 73 S.Ct. 215 (1952).

[6] 364 U.S. 479, 81 S.Ct. 247 (1960).

[7] *Id.* at 485.

[8] *Id.* at 488.

[9] 385 U.S. 589, 87 S.Ct. 675 (1967).

[10] 391 U.S. 563, 88 S.Ct. 1731 (1968).

[11] *Id.* at. 568.

[12] *Id.* at 574.

[13] *Id.* at 570.

[14] 408 U.S. 593 (1972).

[15] *Id.* at 597.

[16] 429 U.S. 274 (1977). The public school teacher in this case was not rehired after he informed the local radio station of a memorandum relating to a dress code that the school principal had sent to various teachers in an attempt to improve the chances of getting public approval for a bond issue.

[17] 439 U.S. 410, 99 S.Ct. 693 (1979).

[18] *Id.* at 415-416.

[19] 461 U.S. 138, 103 S. Ct. 1684 (1983).

[20] *Id.* at 144-145.

[21] *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan,* 376 U.S. 254, 26 (1964.)

[22] *Supra,* n. 20, at 146.

[23] *Id.* at 147-148.

[24] According to the majority, the other questions simple "reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a *cause celebre*." *Id.* at 148.

[25] 483 U.S. 373; 107 S.Ct. 2891 (1987).

[26] The employee had said, "Shoot, if they go for him again, I hope they get him." The statement, which was made soon after she heard a news report that President Reagan had been shot, was a final comment in a discussion she was having with her boyfriend about the president and some of his administration's policies.

[27] *Supra*, n. 25, at 390-391.

[28] 511 U.S. 661; 114 S.Ct. 1878 (1994).

[29] *Id.* at 664.

[30] 513 U.S. 454; 115 S.Ct. 1003 (1995).

[31] *Id.* at 465-466 (citing *Pickering* , *supra,* n. 10, at 568.)

[32] *Id.* at 467.

[33] The government failed to meet its burden in that it could not establish that the provision was a reasonable response to the posited harms and that the speculative benefits that the ban might provide the government where insufficient to burden an certain groups of lower-level executive branch employees.

[34] The justices joining in Kennedy's majority opinion included Chief Justice John Roberts, Antonin Scalia, Clarence Thomas, and Samuel Alito.

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[35] The alleged inaccuracies in the affidavit related to the description of a roadway and the ability of a stripped-down truck to leave tire tracks on a particular road surface. *Supra*, n. 1, at 1956.

[36] *Ceballos v. Garcetti, et al.*, 2002 U.S. Dist. LEXIS 28039 (Case No. CV-00-111060).

[37] *Ceballos v Garcetti, et al.*, 361 F.3d 1168, 1170 (9th Cir, 2004); 2004 U.S. App. LEXIS 5328 (2004).

[38] *Supra*, n. 1, at 1951.

[39] *Id.* at 1957.

[40] *Id.* at 1960.

[41] The cases considered included *Waters v. Churchill, supra*, n. 28; *Perry v. Sindermann, supra*, n. 14; *San Diego v. Roe,* 543 U.S. 77, 82 (2004), *United States v. National Treasury Employees Union, supra,* n. 30; and *Rankin v. McPherson, supra,* n. 25.

[42] *Id.* at 1959.

[43] *Id.* at 1960.

[44] *Id.* at 1960.

[45] *Id.* at 1961.

[46] *Id.* at 1962.

[47] *Id.* at 1961.

[48] *Id.* at 1962.

[49] Examples would include: a police internal investigator being demoted for bringing the false testimony of a fellow officer to the attention of a city official (*Branton v. Dallas*, 272 F. 3d 730 (CA5 2001); a police officer being sanctioned for reporting criminal activity of a politician who was a friend of the police chief (*Delgado v. Jones*, 282 F. 3rd 511 (CA7 2002); a

school official's contract not being renewed as a result of her testifying about the district's desegregation efforts (*Herts v. Smith*, 345 F. 3d 581 (CA8 2003); an engineer being fired for reporting that contractors were failing to complete projects that might result in a structurally unsafe dam (*Kincade v. Blue Springs,* 64 F. 3d 389 (CA8 1995); a lottery board security officer being fired after informing the police of theft due to managerial ineptitude (*Fox v. District of Columbia*, 83 F. 3d 1491 (CADC 1996).

[50] *Supra,* n. 1, at 1963.

[51] *Id.* at 1964.

[52] *Id*. at 1964.

[53] *Id.* at 1964, citing *Waters v. Churchill*, *supra,* n. 28, at 674.

[54] Souter suggests that under the new rule the teacher in the *Givens* case (*supra*, n. 17) would still be protected if she complained to her principal about discriminatory hiring practices even though the school personnel officer making the same comments to the same principal would not—the distinction being based on the fact that personnel policy is not within the scope of the teacher's official duties while it is within those of the personnel officer. *Ceballos, supra*, n. 1, at 1965.

[55] *Id.*, footnote 1, at 1965.

[56] *Id.*, footnote 2, at 1965. Kennedy responded to this criticism by rejecting the suggestion that the public employers would purposely create excessively broad job descriptions. At any rate, "the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Id.*, at 1962.

[57] *Id.* at 1966. Souter quotes from a variety of government personnel publications to demonstrate what is expected of a government employee. One example, the Code of Ethics for Government Service, H. Con. Res. 175, 85th Cong., 2d Sess., 72 Stat. B12, states that "Any person in Government Service should: . . . put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department," and shall "expose corruption wherever discovered."

[58] *Id.* at 1967.

[59] *Id.* at 1968. Souter further suggests that the new rule may, in fact, result in an increase of fact bound litigation relating to the issue of whether a particular public employee's statements were made pursuant to official duties.

[60] *Id.* at 1968.

[61] *Id.* at 1969. This would be the case in situations similar to *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759 (1991) (in which the government could forbid the recipients of Title X funds—and their staffs—from any on-the-job counseling in favor of abortion as a method of family planning.)

[62] *Id.* at 1969.

[63] In *Givan*, *supra* n. 17, the applicable state statute would not cover the private comments made by the teacher to the principal.

[64] *Id.* at 1970-1971.

[65] These included the facts that Ceballos had wanted to work for the government out of a personal commitment to perform civic work; had complied with his supervisor's request to tone down the accusatory rhetoric in this memorandum relating to the affidavit; had balked at writing a newly cleansed memorandum as per the instructions of his supervisor after Ceballos informed her that he thought he had an obligation under *Brady v. Maryland*, 373 U.S. 83 (1963) to give the defense a copy of the memorandum as exculpatory evidence; had been told by his supervisor that he would suffer retaliation if he testified to the trial judge that the affidavit contained intentional fabrications; and had spoken out at a meeting of the Mexican-American Bar Association about the misconduct of the Sheriff's Department in the criminal case, the lack of any policy in the District Attorney's Office with regard to the handling of allegations of police misconduct, and of the retaliatory acts of his supervisors. *Id.* at 1971-1972.

[66] *Id.* at 1973.

[67] *Id.* at 1973.

[68] Breyer suggested that there were four areas of common ground. The first was that since all speech was not entitled to the same protection, judges had to apply different protective presumptions in different contexts. The second was that the speech of public employees was only protected when the protection did not unduly interfere with legitimate government interests—including the government's interest in efficient administration of the workplace. The third was that First Amendment protection was only applicable to speech by employees who spoke as citizens on matters of public concern—and only if the interests of the employees in commenting on matters of public concern could out-balance the interests of the government in promoting efficiency of the public services through its employees. The final area of common ground was the court had not previously determined which screening test would apply in cases in which the public employees spoke on matters of public concern in the course of performing their ordinary duties. *Id.* at 1973-1974.

[69] *Id.* at 1974.

[70] *Id.* at 1974.

[71] *Supra*, n. 65.

[72] *Id.* at 1974.

[73] *Supra,* n. 1, at 1974.

[74] These constitutional obligations may include the requirement that a prosecutor communicate with the defense about exculpatory and impeachment evidence that the government possesses and that a prison doctor communicate with superiors about seriously unsafe or unsanitary conditions in a cellblock. *Id.* at 1974-1975.

[75] *Id.* at 1967.

[76] *Id.* at 1975 (citing *id.* at 1967)

[77] *Id.* at 1975.

[78] *Id.* at 1975. The non-judicial grievance mechanisms include arbitration, civil service review boards, and whistle-blower mechanisms that have been

bargained for by the employees or enacted by the state and federal legislatures.

[79] *Id.* at 1976.

[80] *Id.* at 1961.

COLLEGE STUDENT SUICIDE: LIABILITY FOR ADMINISTRATIVE POLICIES?

by
Michael A. Valenza*
Pamela L. Valenza**

I. INTRODUCTION

Colleges and universities are becoming increasingly aware of the need to address rising concerns over student suicide. Yet, it is also increasingly recognized that the necessary and appropriate administrative policy responses to student suicides are neither uniform in approach nor free of potential liability.

Suicide is the second leading cause of death among college-aged people with approximately 1100 suicides per year nationwide.[1] In 2001, the rate of suicide of young adults attending college aged 20-24 was 12 per 100,000 students.[2] The ratio of male to female suicides for this age group was 7:1.[3] On average, one young person aged 15-24 dies by suicide every two hours and 11.8 minutes.[4] It is also estimated that for every completed suicide of a young person, there are 100 to 200 attempts.[5] Compared to the general population, college-aged persons (18-24) contemplate suicide more often than any other age group.[6] Males between the ages of 20 and 24 are six times more likely to contemplate suicide than females.[7] Nonetheless, while males constitute 75-80% of all completed

*Assistant Professor, Legal Studies, Temple University Fox School of Business and Management.
**Temple University, School of Medicine, Class of 2011.

college student suicides, a greater number of females than males attempt suicide.[8] One out of every twelve college students has made a suicide plan.[9] In Fall 2005, a National College Health Assessment conducted by the American College Health Association found that 11% of female college students and 10% of male college students seriously considered suicide in the twelve months prior to the survey.[10] When compared to the same survey conducted in Spring 2000, there was a 10% increase in both male and female students seriously considering suicide; however, throughout the five-year period in which the survey was conducted, suicide contemplation levels remained relatively constant in both males and females.[11] In a National College Health Risk Behavior Survey conducted ten years prior, 10.3% of college students aged 18-24 seriously considered suicide in the twelve months prior to the survey while 6.7% of college students had made a detailed suicide plan.[12]

Despite these staggering statistics, there is an even deeper issue at hand. While the percentage of persons contemplating suicide fluctuates very little, the percentage of persons carrying out suicidal ideation is increasing. However, it remains unclear as to whether the number of attempted suicides is increasing or that more students are reporting suicide attempts.[13] Ninety-five per cent of all college students who die by suicide have a diagnosable psychiatric illness at the time of their death.[14] The use of alcohol and illegal drugs may increase the effect of a psychiatric illness. Increased risk of suicide may follow substance abuse, impulsive behavior, anxiety, and feelings of rage and hopelessness in a person suffering from depression or other psychiatric illnesses.[15] A national survey of minimum-age drinking laws and suicides correlated lower minimum-age drinking laws with higher suicide rates for adolescents age 18-20.[16] A 2002-2003 survey conducted by the Centers for Disease Control and Prevention found that 2.8% of all persons

suffer serious psychological distress.[17] In the college atmosphere, 95% of admissions directors reported an increase in the number of freshmen who arrive on campus taking medications.[18] Anti-depressants have surpassed birth control pills as the number one medication in college.[19]

In a society where more and more young people are encouraged to pursue higher education while, at the same time, more prescription drugs are available to help people with psychological problems achieve those goals, conflicts begin to arise when mentally unstable persons enter the turbulent, high-stress environment of a college campus. The onset of psychiatric disorders may surface earlier when triggered by stressors found in a college atmosphere. Common stressors in college include greater demands for high academic performance, changes in family relations and social life, increased financial and social responsibility, increased dependence on self in a new environment, awareness of sexual orientation and identity, and preparation for life after graduation.[20]

Notwithstanding the increased number of students requiring mental health services, fewer than one in five college students receive information about such mental health services including suicide prevention.[21] In addition, fewer than 20% of adolescent suicide victims are in treatment at the time of death.[22] Recent cases from around the U.S. have raised the issue of university liability arising from failure to properly identify affected students, failure to provide counseling opportunities for those students, and failure to implement procedures for treatment of these students.[23]

In Pennsylvania, for example, the news media have reported multiple incidents of student suicide, most notably and recently that of a University of Pennsylvania football player, but one

must assume that there have been numerous others that have simply not received the same degree of media scrutiny.

One such incident, that was not widely reported in the press, but which resulted in a lawsuit brought by the parents of an Allegheny College junior, was the subject of a detailed memorandum and order issued by a Crawford County trial judge. Multiple defendants were sued by the parents who alleged various negligent acts committed by the college, its trustees, the college president, the off-campus fraternity where the suicide occurred, and the treating therapist and physician.

In ruling upon the defendants' summary judgment motions, Judge Feudale concluded, "...this is a case of first impression and neither counsel nor this court were able to find any Pennsylvania cases imposing a duty to prevent suicide on a college or its employees."[24] That such claims would not already have been the product of a body of established case law, especially in light of the statistical evidence of so many potential claims, suggests that an analysis of both the current case law and existing university policies be undertaken to determine whether there are any discernible changes in case law and university policy responses. And, if the recent "surge" in similar claims nationwide is to be given its proper place in such an analysis, then one must address exactly what may be the cause of any recent findings of liability. Finally, the sheer number of incidents (ignoring for the moment any liability issues) suggests, as a matter of morality, colleges and universities may need to create a much more involved and personally invasive set of guidelines and policies to protect their students. While such pro-active actions taken by colleges and universities may constitute the triggers for liability-producing conduct, it appears that the recent spate of claims and settlements should in any event justify a more sensitive approach to this nationwide problem. Colleges and universities

should recognize that, moral questions aside, there may soon be a time when the courts are more willing to recognize the existence of obligations not previously fixed in the law.

Before addressing the foregoing *Mahoney* case[25] further, and other more recent reported decisions and settlements, a review of older decisions may be instructive.

II. TRADITIONAL RULES OF LAW

The traditional view was that civil liability did not follow from a failure to prevent suicide. The taking of one's own life was considered an intentional, and criminal, act. As such, suicide constituted an intervening, superseding act that would preclude a finding of liability on the part of a civil case defendant. Colleges and universities were counted within the traditional view, and early cases involving defendant administrators and colleges typically resulted in summary judgment findings. The predominant basis for such early case findings was the absence of a recognized duty to diagnose a psychiatric illness and thus the absence of any duty to prevent the suicide from occurring.

One of the earliest reported cases addressing the issue of liability involved a student at Stout State College in Wisconsin. The parents instituted a lawsuit against the college's director of student personnel services (Iverson), who was not a trained medical provider.[26] The Wisconsin Supreme Court, in affirming the lower court's dismissal of all claims against Iverson, held that the creation of a duty of a non-physician or non-psychiatrist to do that which a trained medical expert does would be unreasonable.[27] The Court did, however, leave open the question of whether a college physician/psychiatrist would owe such a duty.

In 1976, the California Supreme Court, in *Tarasoff et al. vs. The Regents of the University of California et al.*,[28] a case that has since been cited nationwide, reversed the grant of judgment to University of California psychotherapists employed at the university's Cowell Memorial Hospital. While this case involved university-employed psychologists treating a non-student voluntary outpatient, it significantly altered the landscape involving a doctor's duty to provide notice of danger presented by a patient. The defendant psychotherapists, while being aware of their patient's threats to kill Ms. Tarasoff, failed to warn the victim of those threats. While *Tarasoff* has been cited most often for its recognition of a duty to warn a third party, such as Tarasoff, the case is also noteworthy for its discussion of the concept of foreseeability as later embodied in the Restatement[29] duty of care and for the distinction made between medical practitioners and non-medical defendants when assessing duties of care and potential liability-producing conduct.

The question of just who may be a "practitioner," that is, a health care provider, was addressed in *White v. The University of Wyoming et al.* by the Wyoming Supreme Court in 1998.[30] Since Wyoming law included a Governmental Claims Act (providing for immunity),[31] the plaintiffs, parents of the deceased university student, were required to prove that the particular university administrators were "health care providers" within the meaning of the Claims Act. The Act did not contain a definition of "health care provider." The administrators, whose positions included suicide risk assessment and making referrals to appropriate support services, but were not medically trained or licensed, were determined by the court not to be such providers and, therefore, not within an exception to immunity under the Claims Act.

These cases suggest that non-liability would be the rule absent a health care provider/patient relationship. Consequently, if a college or university did not itself operate a "health care" facility, or have health care providers as agents, liability-producing conduct would not follow.

III. RECENT CASE LAW

Several more recent cases from multiple states have crystallized the issues that arise within the context of claims made against universities and their administrative and medical/psychological agents. These cases suggest there are now subtle, if not more obvious, changes afoot, inferring that liability may arise from more involved university conduct contributing to a student's suicide. And, where a university official performs an act that is of a medical or therapeutic nature, the official may be characterized as a "practitioner" for liability purposes.

In *Wallace v. Broyles*,[32] a university trainer administered Darvocet to a student who later committed suicide. The Arkansas Supreme Court reversed a dismissal of the plantiff's claim. In *Jain v. State of Iowa*,[33] a University of Iowa freshman committed suicide in his dormitory room. The suicide was not the first attempt and university staff had been aware of the deceased student's prior attempt. The Iowa Supreme Court, in affirming a lower court dismissal of the plaintiff/father's claim as administrator of the estate, addressed two pertinent issues. First, the Court considered application of section 323 of the Restatement (Second) of Torts and rejected the plaintiff's contention that section 323 supported a finding that the university owed a duty of care that was violated when the university failed to notify the parents that their son had attempted suicide.

> "...the record before us reveals that the university's limited intervention in this case neither increased the risk that Sanjay would commit suicide nor led him to abandon other avenues of relief from his distress. Thus no legal duty on the part of the university arose under Restatement section 323 as a matter of law. The district court was correct in so ruling."[34]

Second, the court reiterated prior Iowa law that "...the act of suicide is considered a deliberate, intentional and intervening act that precludes another's responsibility for the harm" (citations omitted). The court however went on to say that "...an exception to this general rule arises from the existence of a special relationship that imposes upon a defendant the duty to prevent foreseeable harm to the plaintiff (citation omitted). In such a case, the doctrine of intervening/superseding act will not relieve a defendant of liability (citation omitted). That is because the intervening act (in this case, suicide) is the very risk the special duty is meant to prevent."[35]

A special relationship may be seen clearly in the factual circumstances of the connection. For example, doctor-patient scenarios need no further explanation. Other circumstances, such as that of a student being detained in a "holding cell" at a campus police station,[36] would require some factual determination of the events leading up to the suicide including, for example, any indications that the student was at risk.

The question of whether a university could be found to have a special relationship with, and therefore a duty owed to, its students has been addressed at length in *Schieszler v. Ferrum College et al.*[37] The court therein acknowledged that while

certain common and previously recognized relationships, such as employer-employee, business owner-invitee, common carrier-passengers, would give rise to affirmative duties to aid or protect, the enumerated relationships were certainly not exhaustive. The court went on to state that relationships and concomitant duties of care could arise from the particular circumstances of a given case. More specifically, as relating to school-student relationships, "...when a college or university knows of the danger to its students, it has a duty to aid or protect them (citing Delaware cases). The conclusion that the relationship between a college or university and its students can give rise to a duty to protect students from harms of which the school has knowledge is consistent with the Virginia Supreme Court's analysis in other contexts."[38]

Significant within the context of establishing whether a duty of care was owed to the student was the *Schieszler* court's conclusion that the college itself, not just health care providers, owed such a duty. Whether a duty is owed by a college or university, absent independent duties owed by health care professionals as agents of such college or university, remains uncertain in a wider context. If such a duty is found due and owing based solely upon the existence of reasonable knowledge that a student is a danger to himself or others, then the question of what if anything a university must or should do to secure that knowledge becomes a critical issue.

The *Schieszler* court also addressed the question of whether suicide, because it theoretically constitutes an intervening and superseding (and, in fact, illegal) act, would bar a plaintiff from recovery. The court dispatched this potential finding by concluding that suicide itself is sufficient evidence of the victim's "unsound mind at the time of his death" and would therefore not bar recovery for such death.[39]

Similarly, in *Shin v. Massachusetts Institute of Technology et al.*,[40] the court, in applying section 314A of the Restatement (Second) of Torts,[41] found that a special relationship would be created between university administrators and a student when such administrators reasonably could foresee that they would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so. The court went on to conclude as a general proposition: "...As the harm which safely may be considered foreseeable to the defendant changes with the evolving expectations of a maturing society, so change the 'special relationships' upon which the common law will base tort liability for the failure to take affirmative action with reasonable care" (citation omitted).[42]

The duty of care then, under *Shin*, to be imposed upon university administrators would include the duty to take action once potential harm is foreseen. Less clear however is whether there is a duty to take affirmative steps to become aware of the potential for harm. Would the fact of enrollment in and of itself impose any specific duty on a college to address suicidal students? Would information gathered by a university in the admissions process and/or disclosed to the university by parents and/or student put the university on notice of danger and thereby impose a duty to act?

Whether the decisions rendered by the Virginia and Massachusetts courts are indicative of a movement toward recognizing some new set of duties to be imposed upon universities, or a more expansive interpretation of sections 314A and 323 of the Restatement of Torts, is uncertain. Perhaps, further case law will prove *Shin* and *Schieszler* to be aberrations rather than trend-setters.

The recent decision of the Pennsylvania trial court in the aforementioned *Mahoney v. Allegheny College et al.*,[43] as well as an earlier Rhode Island case, may be instructive as to how future courts will address these questions.

In *Klein v. Solomon et al.*,[44] the Rhode Island Supreme Court reversed a trial court's grant of summary judgment to Brown University and its psychologist defendants. Daniel Klein had committed suicide in his off-campus apartment during his freshman year, but did so after having been counseled at Brown. At least one of the university psychologists was aware of Klein's depression and suicidal thoughts. While one of the psychologists thereafter settled, on remand a jury found both Brown and the non-settling psychologist not liable.

In Pennsylvania, the parents of college student Charles F. Mahoney, IV brought suit against Allegheny College and multiple administrators and health care providers as a result of the suicide of their son.[45] While several of the defendants were dismissed from the lawsuit by agreement and the claims against the health care providers were not the subject of summary judgment motions, the trial judge granted summary judgment on all non-medical malpractice type claims. Judge Feudale addressed the legal issues pertinent to the dismissed claims through, in part, a review of non-Pennsylvania case law.[46]

As to the question of whether suicide constitutes an intervening act that automatically cuts off the chain of liability, Judge Feudale, citing *McLaughlin v. Sullivan*,[47] rejected that contention where the defendant charged with liability either actually caused the suicide or had a recognized duty to prevent the suicide from occurring in the first place. Judge Feudale therefore concentrated on the issue of when and how such a

duty to protect a student would arise and when and how such duty might be violated. He wrote that a duty of care would be found in the creation of a special relationship such as doctor and patient. This of course would be wholly consistent with current Pennsylvania law relating to medical negligence. It was presumably for this reason that the medical providers named as defendants in the lawsuit did not seek summary judgment. Whether non-medical personnel would owe a duty of care, and whether that duty of care would include the duty to prevent suicide, or the duty to make necessary referrals, or the duty to take appropriate administrative action, was much less clear and needed to be resolved by the court.

Judge Feudale placed great reliance upon the findings of the Iowa Supreme Court in *Jain v. Iowa*[48] in concluding:

> 1. There is no controlling Pennsylvania case law imposing a duty to prevent suicide or notification of impending danger on a college or its non-mental health professional employees.
> 2. There is no Pennsylvania case law imposing a personal duty
> on lay non-mental health professional college employees to prevent suicide or notification of impending danger.
> 3. Allegheny College did not have a custodial relationship with Mahoney who was an adult who lived in an off-campus fraternity house
> 4. The *Jain* case is factually and legally persuasive that there was no 'special relationship' nor 'reasonably foreseeable' events that would justify creating a duty to prevent suicide...[49]

Such a "special relationship" might however be created where factual findings disclose that the university administrators were aware of the probability of suicide. Judge Feudale distinguished *Mahoney* from *Schieszler* and *Shin,* in which the respective courts found that the involved students had not only disclosed their suicidal intentions, but there had also been prior suicide attempts, and the administrators had knowledge of these facts. While Judge Feudale seemed to recognize the duty arising from a "special relationship," as such was found in *Schieszler* and *Shin*, his opinion calls for significant evidence supporting the relationship. Such significant evidence was lacking in *Mahoney*. As to whether non-medical professionals employed by Allegheny would owe, if not a duty to prevent suicide, a duty to warn of the possibility of suicide, Judge Feudale's opinion was less clear. While he concluded that no Pennsylvania case law imposes a duty on non-mental health professional college employees to prevent suicide or notify of impending danger,[50] he went on to state:

> ...The 'duty of nonprofessionally trained persons to notify' of 'impending danger,' while arguably less burdensome than the 'duty to prevent suicide,' implicates issues of foreseeability for nonprofessional lay persons as well as issues involving the disruption of a professional confidential clinical relationship and lesser issues of a student's right to privacy and expressed wishes involving notification.[51]

The question of notification, and whether such notification is made by a medical provider or a non-medical administrator, is itself a separate issue. While health care providers are subject to the "legal and ethical obligations of confidentiality," such confidential relationships have not traditionally extended beyond those specific relationships.

The U.S. Congress in 2000 enacted The Family Educational Rights and Privacy Act (FERPA); 20 U.S.C. Section 1232g, which governs the privacy of student educational records.[52] FERPA restricts the release of a student's records to anyone without the parent's consent or unless subject to a FERPA exception.[53] One of the exceptions is where the health or safety of the student in an emergency is involved. Disclosure would then be permitted but is not required.[54] Consequently, FERPA itself does not create a legal duty to notify.

What then may be expected regarding the duty of care owed by non-medical personnel to prevent suicide, or to provide notification to interested parties of the potential for self-inflicted harm? And, what then is the responsibility of a college or university to act either in compliance with its legal duties or its moral obligations? As Judge Feudale in *Mahoney* concluded, "...we believe the 'University' has a responsibility to adopt prevention programs and protocols regarding students' self-inflicted injury and suicide that address risk management from a humanistic and therapeutic as compared to just a liability or risk avoiding perspective."[55]

Judge Feudale, while declining to create new and liability-producing thresholds for university administrators to meet, clearly recognized that the current environment and the statistical evidence call for intervention by university administrators. He, without reference to section 323 of the Restatement (Second) of Torts, would impose on universities the obligation to fashion appropriate administrative structures and procedures that would allow for timely intervention in a student's foreseeable risky course. Without reaching the implication of whether or not the creation of an administrative framework would itself create a standard of care from which liability would flow from the violation of such standard, one

might reasonably conclude that Judge Feudale was less interested in creating a rule of law and much more interested in the lives of Pennsylvania's college student population.

May universities simultaneously establish ways to help students at the same time these universities avoid assumption of liability-producing conduct? While the example of Pennsylvania, with its lack of statutory and case law obligating universities to maintain suicide prevention programs and counseling services, is a starting point in considering how to craft a reasonable and lawful administrative program, one certainly hopes that universities will nonetheless look to other states' policies in creating programming aimed at diagnosing and treating student mental disorders.

IV. ADMINISTRATIVE POLICIES

These most recent cases have raised the specter of university liability. These cases, and undoubtedly others that have not resulted in any litigation, suggest that universities must take a closer look at the issues faced by a modern day academic institution. The trend that more and more enrolled students have diagnosed mental conditions suggests that attention needs to be paid to whether these students are receiving appropriate psychiatric care and treatment while they are students. Are universities in some way permitted to preempt subsequent problems by taking steps such as requesting medical/psychological information from admitted students in order to be aware of potential problems? May universities require some form of treatment or supervision without which the university may take action such as suspension or forced withdrawal?

The first issue becomes a question of what, if anything, may be asked of prospective students regarding their psychiatric

history and whether any such inquiry would violate constitutional privacy rights and/or the Americans with Disabilities Act.[56] If liability is to be based upon knowledge of risk of harm, and therefore foreseeability of danger and injury, is there also a duty to secure that knowledge when reasonably available? If matriculating students have mental health records, can and/or should the university ask for specific mental health information in the post-admission process as a legitimate but not admissions determining inquiry? What administrative policies should a university institute to protect the student from harm and protect the university from liability? If students with pre-existing (before college) mental health conditions fail to comply by not admitting any physical or mental disability, do the parents have any duty or obligation to their children who have suicidal tendencies to inform the university? When the opportunity to present medical/psychiatric information is rejected by the student and parents, would a university thereby be immune from liability for at least some of its inaction? Once a student or parent informs the university about the student's mental health records, what should the university do with that information?

In an effort to reduce potential liability by requesting the records of matriculating students' mental health conditions, and by requesting waivers of any notice prohibitions, universities put themselves in a proverbial "catch 22" situation. Knowledge of students' mental health conditions gives universities the opportunity to target and inform those students who may benefit from the services of a university mental health center. However, advocating students to utilize university services may increase the potential for liability under Section 323(a) of the Restatement (Second) of Torts if universities fail to provide adequate care. The question of what constitutes adequate care varies from student to student and state to state. Just as national standards have been created for

medical and psychiatric care, it may be appropriate for universities to collectively address the creation of standards for themselves.

Some estate administrators have brought claims against colleges and universities for failure to notify parents or guardians of knowledge in their possession in advance of a student's suicide and that such failure would constitute negligence.[57] However, FERPA's exception, allowing notification under an emergency situation, should not be seen as an obstacle in determining what constitutes a health emergency.[58] At best, notification may generate the necessary and appropriate intervention. At worst, the university could be claimed to have committed a technical violation of the act.[59] Unless such technical violations, upon investigation by the Family Policy Compliance Office (FPCO), are deemed to be part of a pattern of violations, the likelihood of penalty (removal of federal funding) would be remote.[60] Given that there is no private right of action if improper disclosure occurs, universities should err on the side of caution and disclose student information to the parents, even if the universities thereby risk FERPA violations.

While university health care practitioners may choose non-disclosure in situations that are not easily identified as "health emergencies" to avoid potential liability, university non-medical staff members are given more leeway under the FERPA exceptions. In addition to the health emergency exception, FERPA permits non-medical staff members to disclose any and all student education and medical record information to the parents of students who are financially dependent upon them.[61] Disclosure by non-medical staff members under this alternate exception may prove to be beneficial to both parties involved and ultimately serve to protect the university from liability and, more importantly,

have a positive effect upon the students' well-being and mental health. Therefore, universities may wish to consider enacting a policy that requires all non-medical university employees to notify the parents/guardians of a mentally unstable student, assuming the university has knowledge of suicidal thought or behavior. If the claims that are now seen in the courts involve a failure to notify, even if the universities are currently prevailing on such claims, it seems obvious that the morally correct choice should include parental notice.

The second issue becomes whether a "special relationship" is automatically created between universities with a mental health service center and students with or without pre-existing mental conditions who actively seek out such treatment. In other words, what are the circumstances that would form the basis of such a relationship?[62] Can there be an administrative policy that requires mentally unstable students to undergo treatment? For non-consenting competent adults, there is no case law that requires an individual to undergo treatment.[63] While in the distant past universities may have been subject to some degree to the doctrine of *in loco parentis*, they have more recently been deemed not to have undertaken a custodial relationship with admitted students.[64] However, will universities, by affirmatively engaging a notice policy, thereby create a special relationship?

One of the more common university policies that has recently been the subject of litigation, and will most likely continue to remain the focus of similar cases, is that of suspension, leaves of absence, and removal from university housing.[65]

In *Nott v. The George Washington University,*[66] Jordan Nott, a sophomore at George Washington University (GWU), voluntarily admitted himself to George Washington University

Hospital for psychiatric treatment after he became worried about a possible adverse reaction to prescribed anti-depressants treating his depression, mood swings, and insomnia.[67] George Washington University Hospital allegedly notified GWU of Nott's confidential medical information which resulted in subsequent letters barring Nott from his dormitory housing for "exhibit[ing] suicidal behaviors and/or [being] subject to emergency psychological intervention or hospitalization"[68] and suspension from the university for "endangering behavior."[69] Nott was prevented, upon threat of arrest, from setting foot on the GWU campus, including his dorm room, and was barred from attending classes and any public or private event held on the premises.[70] As a result, Nott formally withdrew from GWU and filed suit[71] for discrimination under the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973,[72] and the Fair Housing Act (FHA).[73] GWU has entered into a settlement agreement with Nott, the substance of which agreement is confidential. One should however assume that the circumstances presented compelled the university to make a financial settlement. Nonetheless, the facts of the case are noteworthy because GWU had a policy of suspending students with mental health problems and, as of now, is reviewing and revising its policies.[74]

In *Doe v. Hunter College*,[75] a student suffering from a depressive disorder and attention hyperactivity disorder, attempted suicide and voluntarily admitted herself to a nearby hospital.[76] While the student remained hospitalized, the university, apparently without a hearing, changed the locks to the student's dormitory room and made a determination that the student would not be allowed back into university housing. A significant aspect of this claim involved the university's housing contract which stated:

> A student who attempts suicide or in anyway [*sic*] attempts to harm him or herself will be asked to take a leave of absence for at least one semester from the residence Hall and will be evaluated by the school psychologist or his/her designated counselor prior to returning to the residence Hall. Additionally, students with psychological issues may be mandated by the Office of Residence Life to receive counseling.[77]

Both plaintiff and defendants thoroughly briefed the multiple legal issues brought before the court for disposition, including the potential bar of the Eleventh Amendment to the Title II ADA claim, the Section 504 claim, and a Title VIII Civil Rights Act of 1968 (Fair Housing Act) claim.[78] While a Second Amended Complaint was filed, final trial disposition by the court was rendered unnecessary when the parties settled in August 2006. The settlement of $65,000 suggests recognition of some degree of culpability on the part of the university. In addition, the New York Attorney General's Office announced its intention to review the university's "suicide policy," further suggesting recognition that the university's policy may have been defective.

V. CONCLUSION

It is apparent that the settlements in *Schieszler*, *Shin*, *Nott*, and *Doe* suggest that the traditional common law support for universities where enrolled students either attempt to or commit suicide has eroded significantly at least in the three involved states, Virginia, Massachusetts, and New York, and the District of Columbia. It is important to note that there may no longer be grounds, certainly in these jurisdictions, for an administrative policy that allows universities to suspend

students or remove them from university housing, thereby terminating the availability of counseling and imposing upon the students and their families the process of seeking further care. Likewise, if a "special relationship" is found to exist, then any university action that would tend to sever that relationship could be construed as a breach of the university's responsibilities. In other words, once the relationship is created, the university would be obligated to fulfill its responsibilities in a careful and prudent manner under Section 323 of the Restatement of Torts.

An issue that may arise from mandatory suspension (assuming such suspension policy is maintained) is whether a suspension of a student would result in a termination of medical insurance coverage. Standard health insurance policy language allows adult students under the age of 23 to remain on their parents/guardians' policies. If the university involuntarily suspends a mentally unstable student for alleged violation of university policy, a conundrum arises where such university mandates the student to undergo treatment before returning to the university. If the student is no longer eligible for continuing health insurance coverage under a parents'/guardians' policy, the university is essentially demanding the student and/or parents to pay out-of-pocket for mental health treatment as a pre-requisite to returning to the university due to the potential for termination of coverage.

While there have been some overt, but mostly subtle, changes to the common law and responsive policies affecting university students, some states, such as Pennsylvania, have remained largely loyal to the traditional view that universities should be protected from claims other than those arising from direct medical/psychological negligence. It appears that further analysis and opinion must await appellate court decisions, not only in states such as Pennsylvania, but also in the vast

majority that have yet to provide definitive answers to the issues identified in this paper. Will these other states follow *Mahoney* and *Jain,* or move toward *Shin* and *Schieszler*?

Nonetheless, these recent decisions and settlements suggest that universities may no longer assume non-liability in the absence of a "special relationship." The need therefore to assess their current mental health assessment and treatment policies,[79] and how the universities may respond to affected students, should be placed front and center on the agendas of every residential university.

ENDNOTES

[1] Rawe, Julie and Kathleen Kingsbury. *When Colleges Go on Suicide Watch.* Time Magazine Archives. 14 May 2006. Available at http://www.time.com/time/archive/preview/0,10987,1194020,00.html.

[2] National Institute of Mental Health NIMH), which is part of the National Institutes of Health (NIH), U.S. Department of Health and Human Services. Available at http://www.nimh.nih.gov/suicideprevention/suifact.cfm. Updated 2/17/06. This number has increased from data compiled by the Big Ten Student Suicide Study, 1980-1990, Silverman, Meyer, Finbarr, Raffell & Pratt, (1997). At the time, it was found that the rate of suicide was 7.5/100,000 students. Study results can be viewed at the Cornell University Health Services. Available at http://www.gannett.cornell.edu/down...ePrev042004.pdf.

[3] *Id.*

[4] American Association of Suicidology. U.S.A. suicide: 2003 official final data. Available at www.suicidology.org.

[5] *Id.*

[6] The Jed Foundation, Suicide Fact Sheet. Available at http://www.jedfoundation.org/libraryNews_facts.php

[7] American Association of Suicidology, *supra*, n. 4.

[8] American Foundation for Suicide Prevention, Frequently Asked Questions. Available at http://www.afsp.org. 2006.

[9] American Association of Suicidology. *supra,* n. 4. Data compiled from the National Center for Injury Prevention and Control (NCIPC). Available at www.cdc.gov/ncipc/wisqars/default.htm.

[10] American College Health Association. American College Health Association - National College Health Assessment (ACHA-NCHA) Web Summary. Updated April 2006. Available at http://www.acha.org/projects_programs/ncha_sampledata.cfm. 2006.

[11] *Id.* There was a peak in the Fall 2002 survey in which 13% of females seriously considered suicide and 11% of males seriously considered suicide.

[12] Center for Disease Control and Prevention, Youth Risk Behavior Surveillance. National College Health Risk Behavior Survey. United States, 1995. MMWR 46(SS-6). Available at http://www.cdc.gov/mmwr/preview/mmwrhtml/00049859.htm

[13] Westfield et al (2005). *Perceptions Concerning College Student Suicide: Data from Four Universities*. Suicide and Life-Threatening Behavior 35(6), 640-645. December 2005.

[14] American Foundation for Suicide Prevention. *supra*, n. 8.

[15] *Id.*

[16] National Institute of Mental Health. *supra*, n. 2.

[17] Centers for Disease Control and Prevention. Health, United States 2005. Available at http://www.cdc.gov/nchs/hus.htm.

[18] see Rawe, *supra*, n. 1.

[19] Kinzie, Susan. *For College Deans, Crisis at Any Second.* Washington Post. 21 May 2005. Available at http://www.washingtonpost.com/wp-dyn/content/article/2005/05/20/AR2005052001553_pf.html. Statement by Richard Kadison, Harvard University Chief of Mental Health Services.

[20] National Institute of Mental Health. *supra*, n. 2.

[21] The Jed Foundation. *supra*, n. 6.

[22] *Id.* Statistics are for adolescents aged 15-24.

[23] See *Mahoney v. Allegheny College et al.* Case Number AD 892-2003 (C.C.P. Crawford County, PA); *Jain v. State of Iowa*, 617 N.W.2d 293 (2000); *Schieszler v. Ferrum College et al.*, 236 F.Supp.2d 602 (2002); *Shin v. Massachusetts Institute of Technology et al.*, 19 Mass.L.Rptr. 570, 2005 WL 1869101 (Mass.Super.); *Carpenter v. Massachusetts Institute of Technology et al.*, 21 Mass.L.Rptr. 49, 2006 WL 1646139 (Mass.Super.) *Nott v. The George Washington University et al.*, (unreported).

[24] *Mahoney v. Allegheny College et al.*, Case Number AD 892-2003 (C.C.P. Crawford County, PA), Memorandum and Order at 15. The Sigma Alpha Epsilon Fraternity had previously been dismissed from the lawsuit. The Board of Trustees, including its Chair, and the College President were dismissed by the trial judge upon the stipulation of the parties. Dr. Richards did not move for summary judgment, nor did Allegheny College. Those defendants and issues not dismissed from the case by the trial judge ultimately went to a jury on August 31, 2006, which found in favor of the remaining defendants on all issues.

[25] Plaintiff did not appeal the dismissals granted by the court.

[26] *Bogust et al. v. Iverson*, 10 Wis.2d 129, 102 N.W.2d 228 (1960).

[27] *Id.*, at 133.

[28] 17 Cal.3d 425 (1976).

[29] Section 323(a) of the Restatement (Second) of Torts while not specifically identified in Tarasoff, would apply. The section reads as follows: § 323. Negligent Performance of Undertaking to Render Services.

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

[30] 954 P.2d 983 (Wyo., 1998).

[31] W.S.1997 Section 1-39-103 et seq.

[32] 961 S.W.2d 712 (Ark. 1998).

[33] 617 N.W.2d 293 (Iowa, 2000).

[34] *Id.,* at 300. The "limited intervention" included a Resident Assistant's referral of the student for counseling and the Hall Coordinator's recommendation to the student that he seek professional help and allow notification of his parents (which he rejected).

[35] *Id.*

[36] *White v. The University of Wyoming et al.*, 954 P.2d 983 (Wyo. 1998).

[37] 236 F.Supp.2d 602 (U.S.D.C., W.D. Virginia, 2002).

[38] *Id.*, at 608-609.

[39] *Id.*, at 614.

[40] 19 Mass.L.Rptr. 570, 2005 WL 1869101 (Superior Court of Massachusetts).

[41] Under Section 314A of the Restatement (Second) of Torts, an affirmative duty to aid or protect will arise when a special relationship exists between the parties.

[42] *Supra*, n. 40.

[43] *Supra*, n. 24.

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[44] *Klein v. Solomon et al.*, 713 A.2d 764 (R.I. 1998).

[45] *Supra*, n. 24.

[46] While the parents' civil action-complaint included counts for breach of contract and misrepresentation, Judge Feudale rejected those theories with explanation, but that discussion will not be presented in this paper.

[47] 461 A.2d 123 (N.H. 1983).

[48] 617 N.W.2d 293 (Iowa 2000).

[49] *Supra*, n. 24.

[50] *Supra*, n. 24.

[51] *Supra,* n. 24.

[52] "For the purposes of this section the term 'educational agency or institution' means any public or private agency or institution which is the recipient of funds under any applicable program." 20 U.S.C. Section 1232g (a)(3).

[53] "For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student." 20 U.S.C. Section 1232g (d). Thus, FERPA restricts the release of a student's records to anyone, including the parents, when the student is eighteen years of age or older without the student's consent.

[54] *Id.*, at 20 U.S.C. Section 1232g (b)(1)(i).

[55] *Supra,* n. 24.

[56] 42 U.S.C. Section 12181 et. seq. The Americans with Disabilities Act defines and interprets "disability" as: (a) a physical or mental impairment that substantially limits one or more of the major life activities of such

individuals; (b) a record of such impairment; or (c) being regarded as having such an impairment.

[57] *Supra*, n. 24.

[58] One commentator has suggested amending FERPA to require universities to give parental notification while at the same time receiving immunity. See Gearan, John S. *When is It Ok to Tattle? The Need to Amend the Family Educational Rights and Privacy Act.* 39 Suffolk U. L. Rev. 1027-28 (2006).

[59] The authors are making the assumption that parental notification would generate a positive intervention and that the absence of prior medical/psychological or factual circumstances presumably would not be known to the university. Consequently, one would err on the side of parental notification since current views on therapeutics suggest the benefits of family support. See also Peter Lake and Nancy Tribbensee. *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury.* 32 Stetson L. Rev. 150-51 (2002).

[60] For further discussion, see Gearan, *supra,* n. 58, at 1024. "*Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (holding private action foreclosed because FERPA creates no personal rights). See also Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 Am. U. L. Rev. 1, 11 (2001) "...(discussing procedures available when institutions violate FERPA). Individuals who believe an institution has violated FERPA may file a complaint with the Family Policy Compliance Office (FPCO). *Id.* If the FPCO determines institution violated the statute, the Office of the Secretary of the Department of Education will provide the school with a list of conditions to meet. *Id.* In extreme cases where a pattern exists, the Office may begin proceedings to withdraw federal funds. Id." [as cited in Gearan, supra, n. 58, at FN7].

[61] This exception applies to financially dependent students as defined in Section 152 of the Internal Revenue Code of 1986. Exception is found under FERPA regulations, subsection 99.31(a)(8). For further reading, please see Baker, Thomas R. *Notifying Parents Following a College Student Suicide Attempt: A Review of Case Law and FERPA, and Recommendations for Practice.* National Association of Student Personnel Administrators Journal 42(4), 518. 2005.

[62] *Id.*, at 521. One such definition of "...a 'special relationship' that exists between a student in the postsecondary setting includes a distinctive set of circumstances [that] has arisen that operates to place a legal obligation upon the university to undertake reasonable actions designed to protect the student from foreseeable harm." *Id.* See also Kaplin, W.A. and Lee, B.A. *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making* (3rd Ed., 1995).

[63] "If the patient does not consent to a treatment included under this section, and the responsible medical officer, having considered the alternatives, continues to feel that the patient needs that particular form of treatment, he should contact the Mental Health Act Commission. The Commission will send an appointed medical practitioner to consult with two persons professionally concerned with the patient, one of whom must be a nurse and the other neither a nurse nor a doctor, as well as the responsible medical officer, and give a second opinion (see par. 217). Should the appointed medical practitioner agree that, having regard to the likelihood of the treatment alleviating or preventing a deterioration of the patient's condition, the treatment may be given. He or she will certify this on form 39, also indicating either that the patient is not capable of understanding the nature, purpose and likely effect of the treatment or that the patient has not consented to it" (Section 221). Excerpt from the Mental Health Act of 1983 Memorandum on Parts I-VI, VIII-X.

[64] *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). Until Dixon, the relationship between student and college was ordinarily governed by the doctrine of *in loco parentis*. In *Dixon,* the U.S. Court of Appeals for the Fifth Circuit extended due process rights to students at tax-supported colleges, ruling that the Constitution "requires notice and some opportunity for hearing" before students can be expelled for misconduct. After *Dixon, in loco parentis* was essentially abandoned and students were deemed to be independent adults in matters involving their conduct and the obligations of their institutions. *Scheuer v. Rhodes,* 416 U.S. 232; 94 S. Ct. 1683; 40 L. Ed. 2d 90 (1974). The Supreme Court's decision, while essentially addressing a state's potential Eleventh Amendment immunity, ruled that Kent State students had the right to sue the governor of Ohio for damages incurred as a result of the 1970 National Guard shootings there. Chief Justice Berger wrote: "We intimate no evaluation whatever as to the merits of the petitioners' claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of their

respective complaints, they were entitled to have them judicially resolved." *Id.*

[65] Letter from the US Department of Education, Office for Civil Rights (OCR) to Woodbury University in California for violation of Section 504, Docket Number 09-00-2079; June 29, 2001 (3-5,7), as cited in: Pavela, Gary, *Should Colleges Withdraw Students Who Threaten or Attempt Suicide*? Journal of American College Health 54, 368-369. May/June 2006. "OCR has long made clear that nothing in Section 504 of the Rehabilitation Act prevents educational institutions from addressing dangers posed by an individual who represents a "direct threat" to the health and safety of others, or individuals whose dangerous conduct violates an essential code of conduct provision, even if such an individual is a person with a disability. A "direct threat" is a significant risk of causing substantial harm to the health or safety of the student or others that cannot be eliminated or reduced to an acceptable level through the provision of reasonable accommodations… With regard to allegations of self-destructive conduct by an individual with a disability, OCR will accord significant discretion to decisions of post-secondary institutions made through a due process proceeding that incorporates the following basic principles. An institution may make inquiry into a student's medical history and records to the extent necessary to determine the conditions and circumstances under which the student may constitute a threat to him/herself (or others), the probabilities for those conditions and circumstances occurring if the student is allowed to participate in the program under consideration, and any accommodations or mitigating measures that would enable the student to meet the institutions essential academic and technical standards for participation in that program…The determination of whether an individual is qualified to remain in a program because he/she may represent a direct threat to him/herself should take into account the differences in various settings in which the student may be situated. For example, a student may constitute a threat to him/herself when in a dormitory, but not when in the classroom…[A]lthough there is no inherent reason that issues particular to students with disabilities cannot be heard in the pertinent traditional due process forums, both the institution and the student may be better served by referring such issues to forums staffed by college personnel with more expertise in and familiarity with such issues. However, such non-traditional forums cannot deny the student with a disability the same opportunity as any other student to challenge the truth and accuracy of the accusations concerning his/her conduct and its perceived dangerousness."

[66] Plaintiff's Complaint, Civil Case No. 05-8503 (D.C. 2006), available at www.bazelon.org/issues/education/incourt/nott/nottcomplaint.pdf.

[67] *Id.*

[68] *Id.* Without clearance from the Director of the University Counseling Center and the Assistant Dean of Students, Nott would not be allowed to return to his dorm room. Only after obtaining clearance would the Community Living and Learning Center (CLLC) "determine whether and under what conditions Jordan would be allowed to return to the residence hall." Plaintiff's Complaint at paragraph 39.

[69] *Id.* The substance of Jordan Nott's interim suspension was a disciplinary proceeding pursuant to the School Code of Conduct. The question of whether or not a mental disability should even in the first instance be the subject of a disciplinary proceeding has not been discussed in this article. That issue however does merit further analysis as to whether disciplinary proceedings satisfy due process requirements and whether or not they may violate the ADA and/or Section 504 of the Rehabilitation Act of 1974.

[70] *Id.* "DC Code section 22-3302 – unlawful entry on property, which is defined as: any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building or other property, or part of such dwelling, building or other property, against the will of the lawful occupant or the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor..." Plaintiff's Complaint at paragraph 63.

[71] *Id.* Nott's First Amended Complaint alleged violations of the D.C. Human Rights Act, Intentional Infliction of Emotional Distress, Invasion of Privacy, Breach of Confidential Relationship, and violation of the District of Columbia Mental Health Information Act of 1978 (none of which will be discussed in this article).

[72] 29 U.S.C. Section 794 et seq.

[73] 42 U.S.C. Section 3604(f).

[74] Bazelon Center for Mental Health Law release on lawsuit. Student and University Settle Lawsuit on Mental Health Issues. October 31, 2006. Available at http://www.bazelon.org/newsroom/2006/10-30-06NottSettle.htm

[75] Plaintiff's Second Amended Complaint, Case Number 04 CV 6740 (U.S.D.C., S.D. New York, 2004), Court Documents, available at http://www.bazelon.org/issues/education/incourt/Hunter/courtdocs.html

[76] *Id.*, at par. 21.

[77] *Id.*, at par. 28. Hunter College's 2003-2004 Housing Contract as cited in Plaintiff's Second Amended Complaint.

[78] Memoranda in Support and Contra Motion to Dismiss Plaintiff's Amended Complaint. Case Number 04 CV 6740 (S.D.N.Y., 2004).

[79] Recognition of the need to formulate more expanded mental health programs for youth generally and in university settings as well has been expressed through passage of the Garrett Lee Smith Memorial Act passed into law by the U.S. Congress in 2004. Fifteen million dollars was designated to be appropriated by Congress, subject to appropriation of matching funds by participating educational institutions.

THE CASES OF THE DEFAULTING DONORS: CAN NON-PROFIT INSTITUTIONS RELY ON THE CONCEPT OF PROMISSORY ESTOPPEL AND GIFT AGREEMENTS TO ENFORCE PROMISED DONATIONS?

by
Dr. Sharlene A. McEvoy*

ABSTRACT

In recent years, colleges and universities have been soliciting large gifts from donors as they plan building and other projects to remain competitive for students. This article examines the options available to charities when donors renege on their pledges.

INTRODUCTION

Among the thornier issues that colleges and universities or other non-profits have to face in an increasingly competitive environment is how to handle donors who renege on a pledge of money to the institution or who otherwise creates problems.

While universities are understandably reluctant to go to court to enforce such promises for fear of alienating wealthy benefactors, some have resorted to litigation. This paper will examine these cases and their outcomes as well as steps charitable institutions can take to minimize problems attendant to these donations.

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*Professor of Business Law at the Charles F. Dolan School of Business at Fairfield University in Connecticut.

While educational institutions litigate as a last resort, there have been some cases that have gotten as far as the appellate courts including Stock v. Augsburg College[1] and Matter of Wirth.[2]

I. Stock v. Augsburg College

Elroy Stock graduated from Augsburg College in 1949 and thereafter began contributing money and time to the institution. In the 1980's Augsburg started the 21st Century Fund to raise $25 million to construct a new building. The brochure touting this fund raising program stated that there would be numerous "named gift opportunities."[3] In 1986, the Director of Alumni Relations approached Stock about a donation, suggesting that a communication wing of the new building could be named for him. Stock's initial donation was $100,000 but he believed that that amount was too small for the honor of having a portion of the building named for him so he increased it to $500,000 which Augsburg gratefully accepted.[4]

In 1986, Augsburg sent a letter asking Stock to choose a payment plan for the Elroy Stock Communications Wing and further stated that the pledge was guaranteed. The Colleges Board of Regents voted to name the wing after Stock.[5]

In February 1988, a news report revealed that Stock had, for years, been sending anonymous letters to mixed race and mixed religious families and individuals denouncing mixed race marriages and offering his views on racial purity.[6] The article discussed Stock's ties to Augsburg, his large contributions, and the fact that a wing of a building was to be named for him. Immediately, the President told Stock that, even though the building would not be named for him, the college would keep the donation. The Board of Regents voted

to uphold the President's decision but never formally notified Stock, who later learned of the decision from the media.[7]

In lieu of naming the wing for Stock, Augsburg proposed hosting a recognition dinner, placing a plaque at the entrance with Stock listed as a major donor, and listing Stock's name in the annual report. Stock rejected these alternatives but, despite his objections, his name appeared on the plaque and in the report. In February 1990 Stock told Augsburg that it had not fulfilled its agreement.[8]

From 1990-1999, Stock had numerous contacts with the school and continued to donate money – at least seventeen times - for which he received numerous personal letter of gratitude from various figures at the college including the President on least seven occasions. Stock also attended numerous functions at the College during those years including his fiftieth reunion and engaged in lengthy conversations with the Director of Alumni Relations once or twice a month.[9]

In February 1999, Stock approached the newly appointed President William Frame about naming the wing after him. Frame declined and told Stock that he should not donate any more money.[10]

In March 2000, Stock brought suit claiming breach of contract and misrepresentation but the college moved for summary judgement which was granted. The court concluded that the statute of limitations on Stock's claim was six years and that it had begun to run in September 1989 when the building was completed. Stock appealed the district court's decision to Minnesota Court of Appeals which based its decision on two issues: the statute of limitations and promissory estoppel.[11]

Under Minnesota law, the statute of limitations for a contract is six years and the cause of action begins to run once the terms of the agreement are breached. The court of appeals agreed that Stock could have sued Augsburg to recover his $500,000 donation once the building was completed in 1989 and not named for him. Thus the statute of limitations began to run then and Stock failed to bring suit until 2000, ten years later.[12]

Stock argued that even if the statute of limitations began to run in 1989, it should be tolled under the notion of equitable estoppel because of Augsburg's conduct, representations and omissions. The theory of equitable estoppel required Stock to prove:

- The college knowingly misrepresented a material fact
- It intended to induce reliance
- Stock had no knowledge of the true facts
- Stock detrimentally relied on the college's representations[13]

The court noted that discussions ended between Stock and the college in February 1990. The college never represented that the naming issue could be worked out or that things would be taken care of if Stock continued to make donations. In fact Stock admitted that he had no discussions between 1990 and 1999 with anyone regarding naming the wing nor did he tell anyone at Augsburg that he expected that they would change their minds and the agreement would be fulfilled.[14]

Should Stock have gotten his money back?

Augsburg argued that even if Stock had filed his suit in a timely manner he would not be entitled to have his money

returned because it was a charitable donation rather than a conditional gift.

The court of appeals disagreed because the College had approached Stock and solicited the donation in exchange for a promise to name the building wing after him. Stock did not donate to the general building fund. The court stated that even non-profit corporations (as well as for-profits and individuals) are expected to honor their agreements.[15]

Therefore, once Augsburg changed its mind about naming the wing after Stock, it had a legal obligation to return the money. Nevertheless, the case turned on the statute of limitations not promissory estoppel so the money was not returned.

II. MATTER OF WIRTH

Matter of Wirth involved a pledge of money to Drexel University that the latter sought to enforce after Raymond Wirth's death. Shortly before he died in 2000, Raymond Wirth executed a pledge agreement which provided:

> In consideration of my interest in Education and intending to be legally bound, I, RAYMOND P. WIRTH, irrevocably pledge and promise to pay DREXEL UNIVERSITY the sum of ONE HUNDRED FIFTY THOUSAND and 00/100 Dollars ($150,000.00)[16]

The New York Court of Appeals determined that Wirth's pledge was governed by a Pennsylvania law the Uniform Written Obligations Act[17] which provides:

"A written promise hereafter made and signed by the person.....promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement in any form of language, that the signer intends to be legally bound."

The court concluded that by the plain language of the statute, Wirth's pledge was not "invalid or unenforceable for lack of consideration."[18] The estate argued that there was a failure rather than a lack of consideration which means a failure to render the performance the parties agreed to but the court concluded that the estate had no basis for claiming that Drexel failed to render any performance.[19]

The Pennsylvania law obviated any need to address the issue of promissory estoppel. The rule means that one who makes a promise which induces a substantial change of position in reliance on the promise is estopped (or prevented) from denying its enforcement by claiming a lack of consideration.[20]

The Restatement of Contracts also recognizes a "probability of reliance" as sufficient to support a promise. Thus colleges and universities can employ this theory to enforce charitable donations but it is the rare case that gets to the appellate level. Most cases are settled.

III. Cases Litigated By Institutions

In 1990, Richard H. Barclay pledged $1 million toward the construction of a theatre at the University of California at Irvine Barclays' donation was the largest dedicated to the project. After his death, his widow refused to fulfill his pledge. Barclay had made only two $200,000 donations and $600,000 was still outstanding when he died in 1992.[21]

Marjorie Barclay's lawyer argued that she did not have to honor her husband's pledge because she had not agreed to it and it was not a business or trade debt. Her lawyer contented that she could not afford to complete the gift because she was on the brink of bankruptcy since his death.[22] The University maintained that she had sufficient assets and that the other creditors had been paid. Moreover, the school pointed out, Barclays' name had been put on the theatre and other donors had promised money based on that fact.[23] The Vice-Chancellor of Irvine contended that Barclay's pledge was a key factor in a $4.5 million private fund raising effort that was supplemented by money from the city and the University.

The University foundation, the theatre company, and city won the case in 1995 and in 1996 Barclay's estate was ordered to reimburse the formers' legal fees - $53,000. Both sides settled in 1996 but the details remained confidential. Reportedly it was for less that $600,000.[24]

Settled in 2000 was a case involving the University of Alabama and the heirs of Hugh F. Culverhouse, former owner of the Tampa Bay Buccaneers. Culverhouse's widow sued the University to nullify the $10 million pledge he had made to the business school but only paid $1 million of before he died. Joy Culverhouse maintained that she should not have to honor her husband's pledge because payments had been improperly arranged from a family fund and the University had failed to name the school after her husband as promised. After she sued, the University named the school the Culverhouse College of Commerce and Business Administration.[25]

The University settled that suit and another brought by the Culverhouse foundations for $14.5 million and the right to rename the business school.[26]

Some question how far a university should go in pursuing donors who renege on the pledges. In general, institutions would prefer not to litigate because the adverse publicity may frighten future contributors and leaves a bad taste. For example in the wake of the highly-publicized Irvine case, a lawyer reported that he had set up a charitable trust for a client who had considered leaving money to the theatre but changed his mind after reading of the Barclay case in the newspaper, fearing that Irvine might sue his wife when he died. The client left his money to a health care organization instead.[27]

Irvine officials maintained that "neither the foundation nor the theatre suffered any ill consequences" after the Barclay case. The theatre did not lack for donors and in 1994, the year Irvine sued, the University raised $20 million.[28]

One development officer offers the following rule of thumb: If the institution is going to be in financial difficulty if the pledge is not paid, there is no alternative but to litigate. If that is not the case, then it is better to avoid the negative publicity.[29]

There are however other considerations that may force a lawsuit. First, bank financing may have been obtained based on the pledge so the institution may be legally obliged to sue to secure it. Second, as a result of rules issued in 1993 by the Financial Accounting Standards Board (FASB), non-profits are required to record pledges in their financial reports when the promise is made not when the money changes hands.[30] If the pledge is on the books, the institution is under pressure to enforce it or it could be written off as a bad debt.

In favor of suing is the fact that the threat to do so sends a message to all donors that they should take their pledge

seriously. In the case of a deceased donor "college officials say they have an obligation to insure that the deceased person's wishes are honored."[31]

Avoiding Litigation

Because of numerous cases of "defaulting donors", many institutions are asking them to sign legally binding gift agreements[32] rather than relying on more informal arrangements. In addition, there is better monitoring of the status of pledges. Reminders are sent to donors who are called or e-mailed to keep track of when installments are due. In other cases, the organization will investigate the financial status of the donor to determine if the latter can make good on the pledge.

Institutions are also recruiting lawyers and former bankers as part of development teams to ensure that the donations are handled properly.[33]

A decade ago, a pledge was documented in a one page memorandum containing one or two paragraphs. Now, the lawyers in the development office draft agreements as long as twenty pages, spelling out when payments are to be made and how the money will be used.[34]

Even if the gift agreement contains the term "legally binding" it still could be challenged in court. For example, the donor or the heirs of the donor's estate may claim that the gift was used for purposes other than specified. Some courts have ruled that the agreements are not binding unless the institution "has spent the money or taken on a financial commitment based on the pledge." (promissory estoppel)[35]

CONCLUSION

The courting of a donor by a non-profit institution is a kind of mating dance. Like negotiating a pre-nuptial agreement, too much hard-nosed negotiation can dim the romance in the relationship.

One donor who made 101 million pledge to his alma mater Princeton said that he "wouldn't react real positively" if the institution insisted that he sign a legally binding gift agreement. "My word is good. If they don't trust me, they don't have to take the money – I can go somewhere else."[36]

Yet non-profits have reason to be wary because many have experienced broken promises due to a donor's change of heart or financial set back.[37] With many non-profits heavily dependent on donations for survival, it is clear that "trust but verify" is a wise watchword to follow.

ENDNOTES

[1] 2002 Minn App LEXIS 421 (unpub)

[2] 5 NY 3d 875; 842 N.E. 2d 480; 808 N.Y. §. 2d 582: 2005 N.Y. LEXIS 3309.

[3] 2002 Minn App LEXIS 421 at 2.

[4] *Id* at 3.

[5] *Id.*

[6] *Id* at 3-4.

[7] *Id* at 4.

[8] *Id* at 5.

[9] *Id* at 7.

[10] *Id* at 8.

[11] *Id.*

[12] *Id* at 11.

[13] *Id* at 12.

[14] *Id* at 13.

[15] *Id* at 17.

[16] 5 N.Y. 3d 875, 876.

[17] Pa Stat Ann, tit 33 § 6.

[18] 5 N.Y. 3d 876.

[19] *Id* at 877.

[20] Simpson on Contracts 2d ed West at 112.

[21] Kim Strosnider, "Colleges Face Prickly Dilemma When Donors or Their Heirs Renege on Promised Gifts", Chronicle of Higher Education June 26, 1998. At A 35.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* Sometimes it appears that the institution is trying to thwart the intent of the deceased. The University of Wisconsin fought the estate of donor Harold Mennes to obtain an additional $100,000 from the latter's estate despite receiving $700,000. Just before the Wisconsin state Supreme Court was about to hear the case in October, 2006, UW agreed to allow Mennes' daughter to keep $100,000 plus $34,000 in attorney's fees. Mennes had been estranged from his daughter but after a reconciliation, he signed a letter in front of two witnesses leaving her $100,000. Ryan J. Foley, "University Stops Fight to Keep Donation," The Boston Globe, Nov 24, 2006 at A 13.

In 1993 Yeshiva University sued Joel Jablonski over provisions in his will that originally left the school $6 million. Yeshiva claimed that Jablonski reduced the value of the estate that Yeshiva would have received by giving portions of it to his relatives.

In 1992, Cecilia Clare drafted a will leaving her entire estate $7 million to Allan Hancock College in California. In 1995, she made a new will that left everything to her handyman and his wife. The College argued that Clare was not mentally fit when she changed her will. A California court sided with the handyman and ordered Hancock to pay legal costs of $10,000. "Colleges Face Prickly Dilemma When Donors or Their Heirs Renege on Promised Gifts," supra note 21.

[32] Sally Beatty and Vauhini Vara, "A Pre-Nup for Donors," Wall St. J, Nov 24, 2006 at W1. (hereinafter A Pre-Nup for Donors)

[33] *Id.* Some donors will sue to get their money back if the institution is not going to use it for the intended purpose. Robert A. Holton was a chemistry professor at Florida State University who scored a breakthrough with the cancer-fighting drug Taxol which garnered him millions of dollars in royalties from his patents. In 1999 and 2001, he pledged $11 million from his foundation and $18.5 million from his lab account to augment money from the University and the state to build a chemistry building with molecular-recognition labs and to endow four professorships in the specialty of molecular recognition. When a new president was appointed in 2003, the University decided to drop the endowed positions and to build a

more general type of chemistry center. Professor Holton sued to get his money back. In fall 2006, a Florida court ordered the University to return the $11 million plus interest but allowed it to keep the $18.5 million from the lab account and spend it as the school sees fit. See Samuel G. Freedman," Bricks or Professors? A University's Choice", N.Y. Times, Dec 6, 2006 at B7.

[34] *Id.* See also Bruce Collins, "Charitable Intent: Non Profits That Don't Follow Their Donors' Wishes May End Up in Court," Inside Counsel, Apr. 2006 at 100.

[35] A Pre-Nup for Donors," supra note 32 at W6.

[36] *Id.* at W1.

[37] *Id* at W6.

A MODEL FOR TEACHING LAW AND ETHICS IN A MARKETING BUSINESS ENVIRONMENT

by
Jenna M. Comizio*
Dr. Carl Malinowski**
Dr. Richard J. Kraus***

INTRODUCTION

This paper will describe a pedagogic model to explore the legal and ethical aspects of the marketing business environment. Current legal and ethical issues are examined by using the decisions of the courts of various jurisdictions to elicit undergraduate students' perceptions of the behavior described in those cases. Both Marketing and Legal Studies students contributed their legal and moral perceptions to the classroom examination of the cases.

PEDAGOGIC METHOD

Five legal opinions engendered specific questions to the students concerning (1) United States Constitutional First Amendment guarantees of free speech, (2) the distinction between sales puffery and false advertising, (3) the playful use of another's identity to sell a product, (4) home solicitation, and (5) the sale of contaminated food products. The questions

*BBA, 2007, Pace University, NY
**Prof.of Marketing, Pace University, NY
***Prof. of Legal Studies, Pace University, NY

contained both ethical and legal issues based upon actual controversies.

Questions were prepared and presented to one hundred five (105) undergraduate students. Seventy-five (75) of these students were Legal Studies students and thirty (30) were Marketing students. At the end of each case summary, the students were requested to answer five questions:

1. How strongly do you believe/not believe that the marketer acted in a correct manner?
2. How morally guilty/not guilty would you feel if you considered taking the same action?
3. How likely/unlikely is it that you would act in the same manner?
4. How likely/unlikely is it, in your opinion, that the allegedly injured parties will be able to obtain civil monetary damages and other legal remedies from the marketer?
5. How guilty/not guilty of a crime subject to fine and imprisonment, in your opinion, is the marketer?

The first three questions measured ethical perceptions and two elicited legal perceptions. The responses for Legal Studies students and Marketing students were compared in class with each other and with the court rulings.

CLASS DYNAMICS – SPECIFIC REPORTED LAW CASES ENGENDER SPECIFIC MARKETING BUSINESS QUESTIONS

The students enthusiastically responded to specific questions concerning actual rather than hypothetical cases. They actively expressed their legal and moral conclusions.

1. Does the United States Constitutional First Amendment guarantee of free speech protect marketers from any regulation of their advertisements?

Court Analysis:

Hornell Brewing Co., Inc v. Brady (USDC/EDNY 1993)[1] was presented before the United States District Court for the Eastern District of New York. Plaintiff Hornell produced and marketed the "Original Crazy Horse Malt Liquor". This alcoholic beverage was issued a Certificate of Authorization from the Bureau of Alcohol, Tobacco and Firearms (BATF) for bottling and distribution. The BATF had determined that the product and its marketing were not misleading, fraudulent or obscene. Hornell marketed the "Crazy Horse" name in order to celebrate the history of the American West. Native American leaders from the Sioux tribe and members of Congress criticized the use of the name; they stated that the malt liquor label was "insensitive and malicious marketing". A Senate Committee, in fact, adopted a resolution that directed Hornell to negotiate with the Sioux tribal leaders concerning the use of a famous Chief's name. The leaders, however, insisted on a general ban of Native American names and symbols in the marketing of products and services of any sort, especially when the marketing associated a famous and revered Native American name with intoxicating liquor.[2]

When Hornell refused to change his marketing tactics, the Congress passed legislation which banned the "Crazy Horse" name from use on the malt liquor label. Hornell brought this action to declare the statute unconstitutional because it violated his First Amendment right of free speech. The First Amendment requires the government not to "prohibit speech because the ideas expressed therein are offensive".[3] Regulation of free speech is invalid unless such speech falls within an

unprotected category; commercial speech, the language of marketing, is not considered unprotected. The government regulation must comply with four tests: first, the expression must be protected by the First Amendment (lawful and not misleading); second, the government must establish substantial interest; third, the regulation must directly advance the governmental interests asserted; and fourth, the regulation must be no more extensive than necessary to serve the interest asserted.[4]

The Certification process of the Bureau of Alcohol, Tobacco and Firearms (BATF) establishes that the Crazy Horse Label was lawful and not misleading. The label, therefore, was entitled to First Amendment protection. The substantial governmental and societal interest in banning the use of the name "Crazy Horse" was "the protection and preservation of the health, safety, and welfare of Native Americans by preventing the enhance appeal of alcohol use among Native Americans due to the use of the name Crazy Horse on a malt liquor". The demand for alcohol among Native Americans will increase due to the use of an honored leader's name. Six times more Native Americans suffer from alcoholism than the general United States population does. Native American infants are twenty times more likely to be born with Fetal Alcohol Syndrome. But no scientific evidence establishes that a law banning the use of the name "Crazy Horse" directly advances the interests of government and society. There must be an "immediate connection" between the prohibition and the government's asserted interest. The use of the name "Crazy Horse" does not demonstrably "cause a discernible increase in alcohol consumption among Native Americans". Since the product name is offensive to Native Americans, the consumption among Native Americans would arguably decrease not increase.[5]

The ban of the name Crazy Horse, furthermore, is not in proportion to the interest asserted; there must be a "reasonable fit" between the regulation and the government's asserted interest. The court found that the prohibition of the use of the name Crazy Horse anywhere, in order to protect a relatively small portion of the population, is more extensive than necessary to serve the asserted interest. The decision of the court was that the expression did not satisfy all four aspects and therefore cannot be regulated. Hornell's First Amendment right was violated.[6]

Student Analyses:

Undergraduate marketing and legal studies students questioned agreed with the decision of the court. The use of the "Crazy Horse" name should not be prohibited by any legal or even moral maxim. Speech that offends a portion of the population, the students believed, does not constitute a morally wrongful act and the students believed that they themselves would probably continue the advertising campaign on their own initiative. Native Americans would not be able to obtain monetary damages or an injunction against the malt beverage manufacturer and the use of the "Crazy Horse" name would certainly not result in criminal fines and imprisonment for the accused.

It is of interest to note that, even though the manufacturer was not subject to legal sanctions, the students believed that the offensive speech was not so offensive as to cause a moral breach of rules of sensitivity to Native American convictions.

2. Should false advertising be forbidden, regulated and even punished?

Court Analysis:

FTC v. Silueta Distributors, Inc. and Stanley Klavir[7], heard before the United States District Court for the Northern District of California, studies the effects of false advertising upon corporate and individual liability. Silueta Distributors promoted their product "Sistema Silueta" through various Spanish-language television stations. The company represented that Sistema Silueta eliminates cellulite and that customer testimonials affirm this claim. After complaints by customers, the Federal Trade Commission (FTC) brought suit against Silueta Distributors and owner Stanley Klavir for violation of the false advertisement prohibitions of Federal Trade Commission Act. The FTC asserted that the advertisement "expressly and falsely represented that Sistema Silueta will eliminate cellulite, that Sistema Silueta has caused cellulite elimination in actual use, and that consumer testimonials support the conclusion that Sistema Silueta eliminates cellulite".[8] Section 5 of the Act declares "unfair or deceptive acts or practices in or affecting commerce" unlawful. This Section gives responsibility for preventing such acts or practices to the Federal Trade Commission. Section 12 of the Act prohibits the dissemination of "any false advertisement" used to induce consumers to purchase "food, drugs, devices, or cosmetics". An advertisement is considered misleading if "(1) there is a representation, omission or practice that (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material". It is also stated that the use of any consumer endorsement that "misrepresents that the alleged results are what consumers typically achieve" violates Section 5 of the Act.[9]

The court noted that the materiality of the misrepresentations concerning cellulite elimination and customer testimonials. "[T]hese representations relate to the very reason a consumer would purchase the product, these representations, if false, would clearly mislead consumers acting reasonably under the circumstances".[10] The FTC provided the court with many instances in which Sistema Silueta failed to eliminate cellulite. The Commission introduced analytical proof that the "cream is nothing more than a moisturizer, the ingredients of which are those found in body lotions and creams generally".[11] Furthermore, the herbal diuretic tablets used in the lotion "cannot cause the loss of cellulite, only water loss, which will be replaced immediately upon ingestion of water". The defendants could provide no evidence that contradicted the FTC's findings. The court decided that "no genuine issue of fact exists as to whether defendant's Sistema Silueta advertisement was false and violated the FTC Act".[12]

The Commission also brought suit against the company's owner, Klavir. Individual liability is imposed by the FTC Act "to ensure that an individual defendant does not benefit from deceptive activity and then hide behind the corporation". An individual can be liable for "(1) having participated directly in the violative conduct, or (2) having had the authority to control the conduct". Klavir contended that he did not know and should not have known about the misrepresentations. He had bought the company from Juan Perez, who created the advertisement and verified the statements in the advertisement. Klavir had "no reason to believe that Perez's verification was not accurate". It is not disputed that Klavir had the authority to control the conduct because he was sole owner of Silueta. But the question of whether Klavir "must have had knowledge of the conduct before liability [is] attached" remained open.[13]

Individual liability requires that "the Commission... show that the individual defendant possessed one of the following: (1) actual knowledge of material misrepresentations, (2) reckless indifference to the truth or falsity of such misrepresentations, or (3) an awareness of a high probability of fraud along with an intentional avoidance of truth..."[14]

Sixty-three (63%) percent of consumers who bought Sistema Silueta returned the product; such a high degree of dissatisfaction should have alerted Klavir on the product's effectiveness. Klavir, therefore, "acted with a reckless indifference to the truth or falsity of the advertisement's misrepresentations, or, at a minimum,...Klavir had an awareness of a high probability of fraud and intentionally avoided the truth". The court added that Klavir should not have relied on Perez's verification of the product and its advertisement because "it is unlikely that Perez would have informed Klavir, a prospective purchaser, that the advertisement was deceptive...." The FTC Act, lastly, does not accept a "good faith reliance on another's representation" as a defense to individual liability. Klavir, therefore, is individually liable for the false representations expressed in the Sistema Silueta advertisement.[15]

Student Analyses:

Undergraduate marketing and legal studies students completely agreed with the decision of the court. Marketing students were more ethically sensitive than Legal Studies students to the actions of the company. They firmly believed that the company's false advertisements were reprehensible, that they would feel very guilty in using such advertising and thought that, in fact, they would never actually pursue such a course of action. Legal Studies students were particularly

sensitive to the legal liabilities of the company's customers. They thought that damages would be awarded, injunctions issued and fines and imprisonment result. Both the corporation and the individual are responsible for the deliberate misleading statements which induce customers to buy products which do not function as advertised. The false advertising of Silueta Distributors and of Klavir is legally and morally reprehensible.

3. May a marketer playfully use another's valuable identity to sell a product?

Court Analysis:

White v. Samsung and Deutsch Associates[16], decided by the United States Court of Appeals for the Ninth Circuit, describes a product advertising campaign of Samsung Electronics America, Inc. and David Deutsch Associates, Inc. Nationally circulated advertisements of Samsung products "hypothesiz[ed] outrageous future outcomes for the cultural items"[17] used in the ad. Samsung and Deutsch Associates, the company's advertiser, asserted that the ads were created to draw attention through humor.[18]

One such humorous television commercial consisted of "a robot, dressed in a wig, gown, and jewelry which Deutsch consciously selected to resemble [Vanna] White's hair and dress. The robot was posed next to a game board which is instantly recognizable as the Wheel of Fortune game show set, in a stance for which White is famous". The ad claimed obviously incredible results from the use of the Samsung VCR offered to the public. The court in this case had to decide whether White's right of publicity was violated by "appropriat[ing her] name or likeness to [Samsung's] advantage, commercially or otherwise without her consent".[19]

Defendants argued that since they did not directly use her name or real likeness in the commercial, they did not "appropriate" her. The court, however, felt that all aspects of the commercial, taken together, left little doubt of who the robot was supposed to be—"Vanna White dresses like this, turns letters, and does this on the Wheel of Fortune game show. She is the only one..."[20]

White has the sole right to exploit her value achieved from celebrity, but she will have to first "show that in running the robot ad, Samsung and Deutsch created a likelihood of confusion...over whether White was endorsing Samsung VCRs".[21] The court used a multi-factor analysis concerning public confusion. The court agreed with the defendant that they intended to spoof White in a humorous manner; but the court indicated that the defendants also intended to confuse buyers regarding White's part in the endorsement. White, therefore, was entitled to a trial concerning the violation of her rights indicated in the Lanham Act, which forbids such misleading advertisements.[22]

The defendants cited cases in which parodies were considered protected speech, but the court held that these cases "involved parodies of advertisements run for the purpose of poking fun..." and in this case, the main purpose was to sell VCRs. The spoof of Vanna White was "only tangentially related", and in this case the "difference between a parody and a knock-off is the difference between fun and profit".[23]

A dissenting opinion in this case, however, asserted that "overprotecting intellectual property is as harmful as underprotecting it". The majority decision of the court was an example of overprotection that would "stifle[s] the very creative forces it's supposed to nurture". Furthermore, the dissenting opinion asserted that intellectual property law only

protects certain appropriation and that "all creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy".[24]

Student Analyses:

Undergraduate Marketing and Legal Studies students divided their opinions about the legality and morality of the particular identity theft described in this case. Marketing students quite firmly believed that the advertising campaign of Samsung constituted ethical behavior that they would not at all feel guilty in imitating. They would, in fact, actually institute such a method of advertising the product. At the same time, the Marketing students anticipated the manufacturer and advertiser's civil liability to Vanna White for the advertisement, but indicated that the parties would not be liable for criminal fines and imprisonment. The Legal Studies students, on the other hand, strongly believed in the moral reprehensibility of the appropriation as well as in the civil liability of the parties for damages and injunction. The students, however, also indicated that no criminal liability would result.

4. Must home solicitation marketers use a higher standard of care in disclosing the product or service advertised?

Court Analysis:

Home solicitations may often lead to considerable sales puffery and even fraud. *Rossi v. 21st Century Inc.*[25] reasons that "consumers are less defensive and more comfortable in their own homes" and are "susceptible to high pressure sales tactics"[26]. Plaintiff Rossi completed an informational card at a wedding expo. Mr. Kieffer, a salesman of 21st Century Concepts Inc., doing business as Royal Prestige, then

telephoned her. In order to entice Rossi to schedule a home visit time, he promised her $100 in cash, a free facial and 100 rolls of free film. The plaintiff readily agreed to the visit. When Mr. Kieffer arrived, he gave her the $100 in cash, a certificate for a free facial and *one* roll of film. She would obtain the other 99 rolls of film, one at a time. She had to develop the first finished roll at a Royal Prestige chosen processor; she would then receive another roll after payment for the developed pictures. Mr. Kieffer also offered Rossi a reduced vacation package. She declined the solicitation. [27]

Mr. Kieffer spent much of the first visit describing the Royal Prestige "22 Piece Health System", which consisted of seven pots plus accessories, for the price of $1,505.63. Mr. Kieffer positioned the Health System as "a technically advanced means of retaining the nutritional value of cooked food" [28]; he had no supporting documents for this claim. He then suggested a relationship between the Health System and having healthier babies, a particular enticement to an engaged young woman such as Rossi. The plaintiff, relying on Mr. Kieffer's representations, decided to purchase the Health System. A sales contract was given to Rossi that stated "You, the Purchaser, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right". The reverse side was to be filled out by Mr. Kieffer, regarding date, name and address of the seller and the last possible day to cancel the order. Mr. Kieffer, however, failed to fill out this form. Rossi received the Health System approximately 29 days later; upon receiving it, she decided she wanted to cancel the sales contract. She sent the pots back to Royal Prestige demanding a refund of her money. Royal Prestige sent the pots back with a letter that stated, "the quality of our cookware is considered by many experts to be the finest manufactured in the world today". [29]

Many states have enacted statutes regarding home solicitations that give purchasers contractual rescission rights in order "to afford consumers a 'cooling-off' period to cancel contracts which are entered into as a result of high pressure door-to-door sales tactics". The court decided that the plaintiff should be afforded this contractual rescission right because of Mr. Kieffer's violations of the Door-to-Door Sales Protection Act and of General Business Law. Mr. Kieffer's failure to fill out the appropriate information on the back of the contract, the nondisclosure of the business's return policy and the general deceptive business practices afford Rossi rescission rights. [30]

Student Analyses:

Undergraduate Marketing and Legal Studies students were divided in their agreement with the decision of the court. Marketing students voiced a very strong ethical liability statement against the high-pressure sales techniques described in the case. The students would feel extremely guilty in using such techniques and were highly unlikely to actually use them. Marketing students, however, did not believe any civil or criminal liability resulted. Legal Studies students, on the other hand, expressed a decided moral repugnance for the techniques of the salesman. They indicated that they would feel guilty in using the same techniques and would not be likely to actually use these techniques. The Legal Studies students judged that both civil and criminal legal liability would occur.

5. Must a marketer use extreme caution to protect the public from the consumption of adulterated food?

Court Analysis:

The Federal Food, Drug and Cosmetic Act forbids "any act that results in food becoming adulterated while being held for sale after shipment in interstate commerce" [31]. *United States v. Gel Spice Co.*[32] describes corporate and individual civil and criminal liability of an importer, processor and packager of spices.

The importation of spices from outside the United States is subject to random pier inspections at the point of delivery. Official impartial inspections, which comply with American Spice Trade Association standards, certify the acceptability of the imported products. The Gel Spice company would then store accepted bags in its warehouse, where they are expected to be stored in a sanitary environment. [33]

Between the years of 1976 and 1979, Gel Spice experienced a rodent control problem at their warehouse. Baits, traps and glue boards were used to try to rid the warehouse of rodents. FDA inspectors made several observations and recommendations during this same time period. It seemed, however, that Gel Spice did little to try to control and eliminate their rodent problem. Four inspections evidenced the unsanitary conditions that prevailed at the Gel Spice warehouse. In July of 1976, FDA investigators observed dead rodents, some covered with maggots, on the floor of the warehouse. Several spice bags were tested positively for mammalian urine and rodent excreta. The packaging materials storage room also had decomposing rodents as well as rodent access holes. In March 1977, an investigator found rodent excreta pellets and red beetles on bags as well as in bags.

Sodium bisulfate, used to control the rodents, had spilled on the floor and rodent tracks were visible through the chemical. He also observed rodent access holes. Later that year, in July 1977, the inspection of arrowroot flour, sesame seed and whole chili pepper resulted in a similar fashion; rodent pellets, rodent hairs and mammalian urine were found on bags and the access hole was still not closed. A final inspection in January 1979 found dead rodents, rodents nesting in bags of basil and rodent excreta and hair. [34]

The court decided that the company and its President were civilly and criminally liable for the unsanitary conditions in which the spices were stored. It was clear that "the articles involved in the Information were food" and that "they were held for sale by Gel Spice after shipment in interstate commerce" [35]. The government proved beyond a reasonable doubt that the food was adulterated within the definition of the law. Food, according to the law, is adulterated "if it is packed or held under [u]nsanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health" [36]. The government proved that the food was held in unsanitary conditions; it did not need to prove the actual contamination of the food. In addition, unsanitary conditions adjacent to food left a reasonable possibility that the food may be contaminated. The court observed that the Gel Spice company and its President must use extreme care in preserving food products from contamination. [37]

Student Analyses:

Undergraduate Marketing and Legal Studies students polled strongly agreed with the decision of the court. The possibility of contaminated food convinced the students of the company's undoubted legal and moral responsibilities. Both the Marketing

and Legal Studies students strongly believed that the company was not doing the right thing, that they themselves would feel very guilty if they acted in such a matter, and were not at all likely to actually allow such conditions to exist. The company, they believed, would be very liable for damages and injunction and would also be responsible for criminal fines.

CONCLUSION

The analyses of Marketing and Legal Studies students agreed in two of the five examples described. It could be concluded that freedom of speech is such a predominate value that neither the Marketing nor Legal Studies students saw anything ethically or legally offensive in the malt beverage manufacturer planning to label its product with the name of a Chief famous in Native American history. Food contamination so disgusts people that the students agreed upon the civil and criminal liabilities of the Gel Spice manufacturer. It may concluded, therefore, that certain values are so prevalent in our culture that almost any student would exonerate the "Crazy Horse" malt beverage manufacturer, despite the manufacturer's insensitivity, and condemn the Gel Spice food contaminator.

The other three examples seem to indicate, however, that certain anomalies in attitude and approach to ethical and legal responsibilities exist among Marketing and Legal Studies students. Samsung's creative and playful use of Vanna White's likeness to obtain gain at the expense of a celebrity did not ethically offend Marketing students. Legal Studies students, however, found such conduct morally as well as legally reprehensible. Marketing students, furthermore, were evenly divided concerning "Sistema Silueta's" civil liability for false advertising, thought Samsung would only be civilly and not criminally liable and, for the most part, did not believe that the

salesman and his company were legally liable for their high-pressure sales techniques.

In the light of both the agreements and disagreements among the Marketing and Legal Studies students noted above, it seems that Marketing students could benefit from a course in Marketing Law. This study of legal principles and mandated rules of action would help to sensitize students to values adherent in the law and in the society which produces that law. The students would more clearly understand value limits upon certain actions, even if those actions are creative or humorous in nature.

ENDNOTES

[1] *Hornell Brewing Co., Inc. v. Brady* (USDC/SDNY, 1993) 819 F.Supp. 1227.

[2] *Id.* at 1229.

[3] *Id.* at 1231.

[4] *Id.* at 1233.

[5] *Id.* at 1236-1237.

[6] *Id.* at 1239, 1245-1246.

[7] *FTC v. Silueta Distributors Inc. and Stanley Klavir* (USDC/CA, 1995) 1995 U.S.Dist. LEXIS 22254.

[8] *Id.* at 22255.

[9] *Id.* at 22256.

[10] *Ibid.*

[11] *Id.* at 22257.

[12] *Id.* at 22258.

[13] *Id.* at 22259.

[14] *Ibid.*

[15] *Id.* at 22261.

[16] *White v. Samsung and Deutsch Associates* (USCA/9, 1992) 971 F.2d 1395.

[17] *Id.* at 1396.

[18] *Id.* at 1397.

[19] *Ibid.*

[20] *Id.* at 1398.

[21] *Id.* at 1399.

[22] *Ibid.*

[23] *Id.* at 1401.

[24] *Id.* at 1405.

[25] *Rossi v. 21st Century Concepts Inc.* (New York City/City Court, 1994) 618 N.Y.S. 2d 182.

[26] *Id.* at 184.

[27] *Id.* at 184-185.

[28] *Id.* at 185.

[29] *Id.* at 186.

[30] *Id.* at 187.

[31] 21 U.S.C. Section 342 (a) (4) (1976).

[32] *U.S. v. Gel Spice Co.* (USDC/EDNY, 1984) 601 F.Supp. 1205; affirmed (USCA/2, 1985) 773 F.2d 427.

[33] 601 F. Supp. at 1207.

[34] *Id.* at 1208-1209.

[35] *Id.* at 1210.

[36] *Id.* at 1211.

[37] *Id.* at 1213.