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Pace University

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Pace University

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TRADE DRESS PROTECTION AND THE CONFUSION WITH DESIGN PATENTS
PART TWO: DESIGN PATENTS

by

Roy J. Girasa*
Richard J. Kraus**

INTRODUCTION

There are two major forms of protection given to ornamental designs of a particular product, namely protection given by In Part One of this article we reviewed the protection given under trademark law which has, as its basis, the prevention of confusion to consumers who seek to purchase a particular product having the unique, non-functional ornamental appearance of a product or packaging. In this Part Two, we will explore the protection granted under patent law which seeks to protect any new, original and ornamental design in a manufactured product. We will make a comparison both between a design patent and the more common form of utility patents as well as between a design patent and trade dress protection. Parenthetically, we will also include a discussion of the possible applicability of copyright law to the unique designs of a product.

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*Professor of Law, Lubin School of Business, Pace University, Pleasantville, New York.
**Professor of Law and Chairperson of Department of Legal Studies and Taxation, Lubin School of Business, Pace University, Pleasantville, New York.

DESIGN PATENT PROTECTION

Design Patent

Patents are protected by the U.S. Patent Act under Title 35 of the U.S. Code. The Act states:

> §101 Patents patentable.
>
> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.
>
> §171. Patents for design.
>
> Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor, subject to the conditions and requirements of this title. The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided.

Protection is given to the appearance of an article of manufacture and not to its functionality or utility which are covered by a utility patent.[1] The latter protects a process, a product, an invention, or a composition of matter. A design patent relates only to the visual ornamental characteristics embodied in or applied to a manufactured item. It may constitute the configuration or shape of an article, to the surface ornamentation applied to an article, or to a combination of a configuration and the surface ornamentation. It must be an

inseparable part of the manufactured article; it must have a definite pattern of surface ornamentation.[2] The protection is narrow, limited to what is shown in the drawings in the patent and limited only to the novel ornamental features of the patented design.[3] The U.S. Patent and Trademark Office has classified design patents into 33 categories.[4] It is necessary to apply to the U.S. Patent and Trademark Office which examines and grants protection to any person meeting the statutory and regulatory standards of the Office.[5]

The design need not be obvious to the user but may be located out-of-view. In *Seiko Epson Corp. v. Nu-Kote Int'l, Inc.*,[6] the issue arose concerning the validity of the design and shape of ink cartridges that were not in view after its installation and during its use in the printer. The District Court said that the consumer was not concerned with the design of the cartridge and, thus, was not a valid design patent. The U.S. Court of Appeals reversed the lower Court's decision stating that: "The validity of a design patent does not require that the article be visible throughout its use; it requires only that the design of an article of manufacture and that the design meets the requirements of Title 35 [the Patent Act]." The Court cited a case involving a design patent for a hip prosthesis that was no longer in view after implementation that also was found to be protected.[7] It further noted that the ornamental design need not be esthetically pleasing; although a design is for a useful article, furthermore, its patentability is to be based on the article's design rather than its use.

The following table compares the law governing design patents with the regulation of utility patents.

Table 1. Summary Comparison of Design Patents with Utility Patents[8]

Utility Patents	Design Patents
14-year protection	20-year protection
Must contain only one claim	May have multiple claims
Protects only ornamental features of article	Protects entire invention or process
Must be non-functional	Must be functional
Must be new and non-obvious	Must be new, non-obvious, and useful
Relatively inexpensive and easy to file	Complex and expensive to file
No maintenance fees for life of patent	Maintenance fees to be paid three times during life of patent
No provisional patents permitted	Provisional patents permitted
No pre-issue publication of design patent applications	Pre-issue of utility patent applications
No protection from Patent Cooperation Treaty	Protection from Patent Cooperation Treaty

The Expiration of Design Patents and the Continuation of Trade Dress Protection:

Whether an expired design patent may allow the patent holder to claim trade dress protection has yet to be determined by the Supreme Court. But the Court did determine, as described above, that the expiration of a utility patent would most likely preclude the holder from trade dress protection. The reasoning in *TrafFix*, however, may not be applicable to design patents. Unlike a functional utility patent, §171 of the Patent Act gives design patent protection to a "new, original and ornamental design for an article of manufacture." One author has suggested that if and when the issue is presented to the Supreme Court, the Court would likely hold that "trade

dress law cannot be used to 'extract' subject matter that is in the public domain by virtue of an expired patent."[9]

Two post-*TrafFix* lower court cases are relevant. *Keystone Mfg. Co., Inc. v. Jaccard Corp.*,[10] described District Court cross-motions to construe the defendant's expired utility patent and the claim by the defendant of trade dress infringement. The defendant claimed that its design patent gave rise to a presumption that the ornamental design on an expired utility patent for a meat tenderizer was non-functional and thus is entitled to trade dress protection. The Court determined that the defendant's assertion of a presumption of non-functionality was not warranted. The Court noted that other District Court decisions had reasoned that: "[b]ecause a design patent is granted only for non-functional designs, it can serve as evidence that a plaintiff's trade dress is not functional" and that a design patent presumptively indicates that design is not *de jure* functional.[11] The Court, however, refused to find a presumption of non-functionality. It cited the treatise of J. Thomas McCarthy, *1 McCarthy on Trademarks and Unfair Competition* 7:93 (4th ed. 2005). McCarthy stated that "while a design patent is some evidence of non-functionality, alone it is not sufficient without *other evidence*." The case was to continue in order to gather evidence of the merits of the respective claims.

The Sixth Circuit Court of Appeals upheld a District Court decision in *Fuji Kogyo Co., Ltd. v. Pacific Bay Int'l., Inc.*[12] The plaintiff, Fuji, had appealed from an adverse decision of the District Court which dismissed its action for alleged infringement of its registered and unregistered trademarks. Fuji had previously applied for and been granted certain utility and design patents concerning fishing line guides on a fishing rod. The plaintiff then learned of a competitor's intent to market similar guides upon the expiration of the utility

patents. Fuji then registered its product designs as trademarks. The trademark claims were based on a portion of the fishing guides consisting of legs forming a "V" design. The District Court determined that the trademark product configurations were functional and thus beyond trademark protection.[13] The Court of Appeals agreed. It noted that: "The ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure."[14] Once the protective period of 20 years for utility patents has expired, "knowledge of the invention inures to the people, who are thus enabled without restriction to practice it and profit by its use.[15]

The question of whether design patents and trade dress protection are mutually exclusive, then, remains to be determined.[16] It appears at this juncture that a possessor of a design patent may also claim trade dress common law trademark protection under limited circumstances. Earlier precedents emphasized that, upon the expiration of a patent, the subject matter becomes public property.[17] But the Court of Customs and Patent Appeals (now the Court of Appeals for the Federal Circuit) in 1964 decided that trademark rights are independent of patent rights; the expiration of patent protection has no effect on the determination of trademark rights.[18] Later cases appear to confirm the independence of patent from trademark rights. Each claim must be looked at separately to determine whether to permit a claim for protection under either or both forms of intellectual property protection.[19] The ultimate determination will likely come from the Supreme Court. It did deny trade dress protection after the expiration of a utility patent in the *TrafFix* case but the basis of its reasoning was the functionality of the claimed mechanism.[20] A design patent, however, may contain essential elements of a product that are merely ornamental and may be, then, the basis for trade dress protection.

AN ADDED PROTECTION: COPYRIGHT COUPLED WITH TRADE DRESS

A *copyright* is the protection given to a person for the expression of an idea, such as a book, poem, musical composition, dance movements and other such creations. Copyright law today has its legal basis in the U.S. Constitution and in statutory enactments.[21] Copyright protection is given to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[22] It is not enough to have a creative thought or concept. It must "fixed" in a tangible medium of expression, such as in a copy that may be seen, reproduced, or communicated in a somewhat permanent form. Works of authorship include but are not limited to: (1) literary works; (2) musical works, including the accompanying words; (3) dramatic works including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.[23] The work to be protected must be *original*, i.e., not a duplication from a prior work. It need not be useful, as patented products or processes often are.

Knitwaves Inc. v. Lollytog Ltd.[24] illustrates the interplay of copyright and trademark trade issues. The District Court issued a permanent injunction and other relief against a sweater manufacturer finding a violation of both the Copyright Act, the Lanham Act and the New York statute prohibiting unfair competition. In 1990, the plaintiff, Knitwaves, had introduced its "Ecology Group" collection of sweaters. The company's "Leaf Sweater" was a multicolored striped sweater with puffy leaf appliqués; its "Squirrel Cardigan" had a squirrel and leaves applied onto its multipaneled front. The defendant

copied the styles in 1992 as part of its competing line of sweaters. The Court of Appeals upheld the finding of a copyright violation but reversed as to the finding of a trade dress violation.

The Court, citing §101 of the Copyright Act,[25] stated that clothes are not copyrightable as useful articles that have an intrinsic utilitarian function rather than merely to portray the appearance of the article to convey information.[26] On the other hand, fabric designs, as that of the art work on the plaintiff's sweaters, are considered to be "writings" and are protected under copyright law.[27] To prove infringement of a valid copyright, the plaintiff is required to prove:

> (1) The defendant has actually copied the plaintiff's work; *and* (2) the copying is illegal because a substantial similarity exists between the defendant's work and the protectable elements of plaintiff's.[28]

The Court denied defendant's contention that its copy was not substantially similar to that of the plaintiff's sweaters. The test of "substantial similarity" is the "ordinary observer test" which means whether "an average observer would recognize the alleged copy as having been appropriated from the copyrighted work."[29] The Court agreed with the District Court that there was overwhelming similarity of the sweaters "total concept and feel" with that of the plaintiff, even though there were some differences.[30]

On the other hand, the Court reversed the District Court's decision of a finding of a trade dress violation; under the functionality doctrine the alleged violation would be defeated. The doctrine applies even to features of a product that are purely ornamental.[31] The primary purpose of the

Knitwaves' sweaters was not source identification but rather was aesthetic. The sweaters did not meet the first requirement of an action under §43(a) of the Lanham Act because they were not used as a mark to identify or distinguish the source of the articles. To prevail in the case, the plaintiff would have to prove that its dress is distinctive of the source and that there is a likelihood that consumers would be confused as to the source of the product as being either that of the plaintiff or that of the defendant.[32] "To establish that trade dress is distinctive of a particular source, a plaintiff must demonstrate that it is 'inherently distinctive' or that it has become distinctive through acquiring 'secondary meaning' to the consuming public."[33] The test for trade dress was whether the product's ornamental features served as a designator of the origin of the product, that is, whether a buyer of the sweater would immediately differentiate it from those of competitors. Because the primary objective of Knitwaves was aesthetic rather than source identification, the Court refused to find a violation of trade dress.[34]

The Court of Appeals in *Brighton Collectibles, Inc. v. Renaissance Group Intn'l*[35] upheld the District Court's decision enjoining the defendant, Renaissance, from distributing purses that were manufactured with dangling hearts similar to watches manufactured by the plaintiff. The Court determined that there were several major similarities between Renaissance's heart and the heart copyrighted by the plaintiff. A likelihood of confusion existed among customers purchasing the defendant's purses because the customers were familiar with the size, shape, and color of the plaintiff's decorative watch design. The defendant could manufacture and use an ornamental dangling heart provided it was not confusingly similar to the dangling heart made by the plaintiff. The Court also based its decision upon trade dress protection

violations, noting that the "total image" of the dangling heart of both parties was similar.[36]

In *Blue Nile, Inc. v. Odimo Inc.*,[37] the District Court noted that the plaintiff owned and operated a fine jewelry retail business, making sales through its three websites. Defendants operated similar businesses and also sold products through their respective websites. The plaintiff claimed that the defendants copied elements of the plaintiff's websites protected by the Copyright Act, and that the defendants copied the "look and feel" of plaintiff's diamond search webpage. The Court analyzed the claim for trade dress infringement. It denied defendants' request for dismissal of the claim on the basis of the alleged preemption of §301 of the Copyright Act over claims arising under state common law or statutes.[38] The Court stated that §301 does not limit rights or remedies under other federal statutes although courts have limited the application of the Lanham Act when copyright interests are at issue.[39] The claim of "look and feel" under trade dress common law trademark, furthermore, although novel, survives the motion to dismiss because it is a theory outside the Copyright Act.[40] The difference is whether the claim of "look and feel" arises out of the expression of an idea that is the province of copyright or is the idea itself, which is outside the purview of copyright. In addition, there appeared to be support for trade dress "look and feel" claims in a number of law review articles and several unpublished District Court cases. The solution must be left to proof elicited at the trial of the action.[41]

The Court of Appeals denied copyright protection to a RIBBON RACK, a bicycle holding rack made of bent tubes in *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*[42] The plaintiff Brandir claimed that the wire sculpture which inspired the RIBBON RACK was initially displayed in the artist's home as a means of personal expression, but was never sold; that

allegedly the creation of the wire sculpture in the shape of a bicycle was never thought to be utilitarian in nature.

The Court cited in part the legislative history of the Copyright Act. The House Committee's intention was not to grant copyright protection to the shape of an industrial product that may be aesthetically pleasing and valuable unless it was separable from the utilitarian aspects of the article.[43] It adopted the test offered by Professor Robert Denicola[44] who stated that "the statutory directive requires a distinction between works of industrial design and works whose origins lie outside the design process, despite the utilitarian environment in which they appear."[45] The Court concluded that "if design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements. Conversely, where design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability exists."[46] Accordingly, although the bicycle RIBBON Rack had aesthetic aspects, nevertheless, there were no artistic elements that were separable and independent from the utilitarian aspects of the product.[47] The Court remanded the case to the District Court, however, for a plenary consideration as to with respect to whether trade dress protections offered by the Lanham Act may have been violated by the defendant.[48]

POSITIVE AND NEGATIVE ASPECTS OF TRADE DRESS AND DESIGN PATENT PROTECTIONS

Commentators[49] have noted that design patents are weak patents and should be used sparingly. These patents protect only the ornamental exterior design of an object and not the idea or the invention itself. Both modes of protection nevertheless may well constitute part of an arsenal of weapons

to be used to prosecute claims against alleged infringers. Claims under these two modes of protection, joined with state claims of unfair competition, may offer significant protections for the owner of the claimed rights. Protection of a product's design may be critical to a company. The design serves as an important marketing tool for the product's sale and distribution; just prior to the introduction of Apple Computer's iPod, for example, Apple filed for a protective design patent.[50]

The following table compares the law governing trade dress protection with the regulation of design patents. It will assist the determination of methods needed to protect the owner of claimed rights.

Table 2: Summary Comparison of Trade Dress with Design Patent[51]

Design Patent	Trade Dress
Non-functional item	Non-functional but may be functional if ornamental or surface decoration dominates
Indefinite renewal of trademark	14-year protection
Normally requires secondary meaning (source identification) and avoid confusion	Must be new and non-obvious; need not be useful or have secondary meaning
Common law trademark	Requires examination and issuance by U.S. Patent and Trademark Office
May concern multiple claims	Must include only a single claim
Protected without governmental filing	Costly process of filing though much less than an

	utility patent
Takes place when connection to a company is demonstrated	Has demonstrable property right as a patent grant
Must be proven in court	Presumption of validity at a trial
Relief generally of injunction and must prove damages	Compensatory and statutory damages for infringement including infringer's profits
Protection against reproduction of similar article and protect reputation and source of the product	Seeks to protect a specific design
Requires distinctiveness in the marketplace	Owner may receive rights prior to a sale

EXTRATERRITORIAL EFFECTS OF AN INJUNCTION WHICH SEEKS TO PROTECT THE RIGHTS OF AN OWNER

A court will almost always grant an injunction barring a defendant from abusing an alleged trademark or patent right upon a finding that a plaintiff is likely to succeed in its claim of a violation of such an intellectual property right. A difficulty may arise concerning the injunction's extraterritorial effect. This issue appeared in *Fun-Mental Too, Ltd. v. Gemmy Industries Corp.*[52]The defendant Gemmy had manufactured the allegedly infringing toys through its Chinese factory. The company now claimed that the injunction issued against it by the District Court was an improper extension of the Lanham Act to a foreign jurisdiction. The Court in determining the issue cited *Steele v. Bulova Watch Co.*[53] This Supreme Court decision set forth a three-fold test for analyzing the extraterritorial reach of the Lanham Act. The test requires a

court to address the following questions: (1) does the defendant's conduct have a substantial effect on United States commerce; (2) is the defendant a United States citizen; and (3) is there an absence of conflict with trademark rights established under federal law? The Court answered all three questions in the affirmative and asserted the extraterritorial effect of the injunction. The Court further stated that federal courts have previously granted injunctions for violations of the Lanham Act but have also declined to do so on other occasions if the three questions could not be answered affirmatively.[54]

CONCLUSION

A manufacturer with a new design for a product has a variety of legal measures that may offer assistance in protecting the uniqueness of its creation. The menu of choices, however, contains a certain degree of confusion. The choices of federal protection include that of asserting trade dress and design patent protections. But the *Wal-Mart* decision differentiated product design and product package trade dress. The choice will have to be whether to rely on the much longer but less certain protection of trade dress trademark protection or seek a 14-year monopoly by a design patent filing. We must await the further determinations of the Supreme Court concerning the relevant issues such as the use of trade dress protection after the expiration of a design patent and other relevant issues. It is imperative to seek counsel who is familiar with the latest developments in this fluid area of the law.

ENDNOTES

[1] *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1123 (Fed. Cir. 1993).

[2] www.uspto.gov/web/offices/pac/design/toc.html.

[3] *Keystone Mfg. Co. v. Jaccard Corp.*, No. 03-CV-638S, 2007 U.S. Dist. LEXIS 13094 (W.D.N.Y., Feb. 26, 2007) citing *In re Mann*, 861 F.2d 1581, 1582 (Fed. Cir. 1988) and *OddzOn Prods. v. Just Toys*, 122 F.3d 1396, 1405 (Fed. Cir. 1997).

[4] The classification follows:

D01- Edible products
D02- apparel and haberdashery
D03- Travel goods and personal belongings
D04- Brushware
D05- Textile or paper yard goods; sheet material
D06- Furnishings
D07- Equipment for preparing or serving food or drink not otherwise specified
D08- Tools and hardware
D09- Packages and containers for goods
D10- Measuring, testing, or signaling instruments
D11- Jewelry, symbolic insignia, and ornaments
D12- Transportation
D13- Equipment for production, distribution, or transformation of energy
D14- Recording, communication, or information retrieval equipment
D15- Machines not elsewhere specified
D16- Photography and optical equipment
D17 Musical instruments
D18- Printing and office machinery
D19- Office supplies; artists' and teachers' materials
D20- Sales and advertising equipment
D21- Games, toys, and sports goods
D22- Arms, pyrotechnics, hunting and fishing equipment
D23- Environmental heating and cooling; fluid handing and sanitary equipment
D24- Medical and laboratory equipment
D25- Building units and construction elements
D26- Lighting
D27- Tobacco and smokers' supplies
D28- Cosmetic products and toilets articles
D29- Equipment for safety, protection, and rescue
D30- Animal husbandry
D32- Washing, cleaning, or drying machine
D34- Material or article handling equipment
D99- Miscellaneous

See www.freepatentsonline.com/design-patents.html.

[5] The applicable statutory references are: 35 U.S.C. §§171-173, 102-103, 112, 132 and the regulatory references are 37 CFR §§1.84, 1.152, and 1.121.

[6] 190 F.3d 1360 (Fed. Cir. 1999).

[7] *In re Webb*, 916 F.2d 1553 (Fed. Cir. 1990).

[8] See Scott D. Locke, *Fifth Avenue and the Patent Lawyer: Strategies for Using Design Patents to Increase the Value of Fashion and Luxury Goods Companies*, 5 J. Marshall Rev. Intell. Prop. L. 40 (Fall, 2005).

[9] *Saidman, supra* note 96, at 205 citing an earlier article containing the same conclusion: Perry J. Saidman, *Kan TrafFix Kops Katch the Karavan Kopy Kats? – or- Beyond Functionality: Design Patents are the Key to Unlocking the Trade Dress/Patent Conundrum*, 82 Journal of the Patent and Trademark Office Society (JPTOS) 839 (Dec., 2000).

[10] 2007 U.S. Dist. LEXIS 13094 (No. 03-CV-648S (W.D.N.Y., Feb. 26, 2007).

[11] *Krueger Int'l, Inc. v. Nightingale, Inc.*, 915 F. Supp. 595, 605 (S.D.N.Y. 1996) and *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1342 n. 3 (C.C.P.A. 1982).

[12] No. 05-5854 (Aug. 23, 2006, 6th Cir. 2006).

[13] *Fuji Kogyo Co. v. Pac. Bay Int'l*, No. 02-42 (M.D. Tenn.) at 61.

[14] *Id., c*iting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1969).

[15] *Id.*

[16] For a discussion, see Tracy-Gene G. Durkin and Julie D. Shirk, *Design Patents and Trade Dress Protection: Are They Mutually Exclusive?*, 87 J. Pat. & Trademark Off. Soc'y 770 (Oct. 2005).

[17] *Wilcox & Gibbs Sewing-Machine Co. v. Gibbens Frame*, 17 F. 623,625, *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 185 (1896), and *Kellogg Co. V. National Biscuit Co*,, 305 U.S. 111, 119-20 (1938). See Tracy-Gene G. Durkin *Id.*

[18] *In re Mogen David Wine Corp.*, 328 F.2d 925, 926 wherein the Court held that the cessation of a design patent did not preclude a request for trademark registration of the applicant's unique configuration of its wine decanter wine bottles.

[19] See *Krueger Int'l., Inc. v. Nightingale, Inc.*, 915 F. Supp. 595 (S.D.N.Y. 1996), *Topps Co., Inc. v. Gerrit J. Verburg Co.*, No. 96 Civ. 7302, 1996 U.S. Dist. LEXIS 18556 (S.D.N.Y. Dec. 12, 1996). See Tracy-Gene G. Durkin, *Id.*

[20] *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29-30 (2001).

[21] Article 1, Section 8 of the Constitution provides: "The Congress shall have the power…To promote the Progress of Science and the useful Arts, by securing for limited Times to authors and Inventors the exclusive Right to their respective Writings and Discoveries."

[22] 17 U.S.C. Section 102(a).
[23] Id.
[24] 71 F.3d 996 (2d Cir. 1995).
[25] 17 U.S.C. §101.
[26] Citing *Whimsicality, Inc. v. Rubie's Costume Co.*, 891 F.2d 452, 455 (2d Cir. 1989).
[27] *Knitwaves Inc.* at 1002 citing *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 763 (2d Cir. 1991).
[28] *Id.* at 1002 citing *Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 122-23 (2d Cir. 1994).
[29] *Id.* citing *Folio Impressions*, 937 F.2d at 766.
[30] *Id*. at 1004.
[31] Citing *Restatement (Third), §17 cmt. c.* which states that "A design is functional because of its aesthetic value only if it confers a significant benefit that cannot be practically be duplicated by the use of alternative designs."
[32] *Knitwaves, Inc.* at 1006 citing *Jeffrey Milstein,Inc. v. Gregor, Lawlor, Roth, Inc.*, 58 F.3d 27, 31 (2d Cir. 1995).
[33] *Id.* citing *Villeroy & Boch Keramische Werke K.G. v. THC Systems, Inc.*, 999 F.2d 619, 620.
[34] *Id.* at 1009.
[35] No. 06-56008, 2007 U.S. App. LEXIS 15026 (9th Cir., June 20, 2007).
[36] Citing *Sports Form, Inc. v. United Press Int'l Inc.*, 686 F.2d 750,762 (9th Cir. 1982).
[37] 478 F. Supp.2d 1240 (W.D. Wa. 2007).
[38] §301(a) of the Copyright Act states: "Preemption with respect to other laws. (a) On or after January 1, 1978, all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright…are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.
[39] *Blue Nile, Inc. v. Odimo Inc.*, 468 F. Supp. 2d 1240, 1243 (W.D. Wa. 2007), citing 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, §1.01. The Supreme Court warned against misuse or extension of the Lanham Act in areas traditionally occupied by patent or copyright

laws, *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003). For a discussion of preemption under the Copyright Act, see Elizabeth Helmer, *The Ever-Expanding Complete Preemption doctrine and The Copyright Act: Is This What Congress Really Intended,"* 7 North Carolina J. of Law and Tech., Issue 1 (Fall, 2005).

[40] *Id.* at 1244.

[41] At 1245-1246. The Court noted that a similar issue arose in *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.* 886 F.2d 1173 (9th Cir. 1989).

[42] 834 F.2d 1142 (2d Cir. 1987).

[43] *Id.* at 1143 citing H.R. Rep. No. 1476, at 55.

[44] Robert Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 Minn. L. Rev. 707, 709-17 (1983).

[45] *Brandir* at 1145 citing Denicola *id.* at 742. Denicola further noted that the statutory limitation of copyrightability as "an attempt to identify elements whose form and appearance reflect the unconstrained perspective of the artist" that are not the product of industrial design.

[46] *Id*. at 1145.

[47] *Id.* at 1147-1148.

[48] *Id.* at 1148. The Court noted that §43(a) of the Lanham Act may offer protection to the plaintiff inasmuch as "the design of a product may function as its packaging or protectable trade dress." The question to be determined by the trial court was whether the design feature was "essential to the use of purpose of the article" or "affects the cost or quality of the article." Trade dress may offer protection if the article has acquired a secondary meaning.

[49] See, for example, Eugene R. Quinn, Jr., *Design Patents*, www.ipwatchdog.com/design_patents.html.

[50] See Robert D. Gunderman and John M. Hammond, *"All That Glitters,"* http://www/ipfrontline.com/depts/article.asp?id=14177&deptid=2.

[51] For a detailed comparison, see Moshe H. Bonder, *Patent & Lanham Acts: Serving Two Legitimate Purposes or Providing an Indefinite Monopoly?*, 15 Alb. L.J. Sci. & Tech. 1.

[52] 111 F.3d 993, 1006 (2d Cir. 1997).

[53] 344 U.S. 280, 286 (1952).

[54] *Fun-Mental* at 1006. In *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 642-43 (2d Cir. 1956), the Court of Appeals refused to extend Lanham Act jurisdiction with respect to issuance of an injunction against a Canadian retailer using a Canadian trademark to sell products within Canada.

TELLING YOUR PARENTS YOU'RE DRINKING TOO MUCH—FERPA'S PARENTAL NOTIFICATION EXCEPTION

by

Gwen Seaquist*
Marlene Barken**

BACKGROUND

It is perhaps a parent's worst nightmare: their child is away at a college or university, presumably completing courses and participating in a social life when the telephone rings. University officials inform the parents that their child is dead from a drug overdose or binge drinking. The parents were completely unaware of any problem with their child, or thought that any problems were under control. The University, on the other hand, has been aware of a problem with the student, but has not informed the parents until it is too late. Or, perhaps the parents did contact the school and were refused information about their son or daughter.

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*Gwen Seaquist, *Professor of Legal Studies, Ithaca College, NY.
**Marlene Barken, Associate Professor of Legal Studies, Ithaca College, NY.
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As farfetched as such a story might sound, this was the actual scenario in a case involving a 19 year old named Jason Wren, a student at the University of Oklahoma. According to newspaper reports, Jason was removed from campus for violating drinking rules on campus and placed in an apartment. Upon learning of the move, the student's father, Jay Wren, tried in vain to find out what had happened to his son but University officials told him the information was protected under the Family Educational Rights and Privacy Act, known as FERPA.[1] After moving to the off campus apartment, Jason died from what has been described as a "night of binge drinking." Following their son's death, the parents subsequently learned that their son had suffered from previous drinking incidents of which the university was aware. Jay Wren told *Kansas City Star* reporter Marά Rose Williams. "I would have pulled him out to get him back here where we could keep an eye on him."[2]

In a more recent case, in 2007 the dean of students and the associate vice president for student affairs at Rider University, along with three student officers of a campus fraternity were charged with aggravated hazing in the drinking death of a freshman pledge at a fraternity initiation.[3] Though the criminal charges against the university administrators were dropped, the civil suit is currently in litigation. Claims were filed against the University, national and local fraternity chapter, school officials and local fraternity officers.[4] The tragedy triggered university President Rozanski to establish a task force to review Rider's alcohol policies, enforcement, education, outreach and Greek life. Those recommendations have now been implemented, including the requirement of parental notification for all alcohol policy violations as allowed pursuant to FERPA.[5]

FERPA is a Federal law that protects the privacy of student education records. The law is administered by the U.S. Department of Education's Family Compliance Office and applies to all schools that receive funds under an applicable program of the U.S. Department of Education.[6] Originally entitled the Buckley Amendment, the law was first passed in 1974 as a sweeping revision of student privacy protections. Generally FERPA provides students and parents a right to inspect and to "correct" educational records or face a penalty of having federal funds cut off.[7] With that said, there are numerous records covered by the Act that are not available for disclosure ranging from letters of recommendation to financial records to disciplinary reports.[8]

In 1998, FERPA was amended to allow institutions of higher education the option to notify parents of students under the age of 21 if their son or daughter violated any alcohol or drug provisions at their respective institution. FERPA provides that:

> Nothing in the Act or the Higher Education Act of 1965 shall be construed to prohibit an institution of higher education from disclosing to a parent or legal guardian any information regarding any violation of any Federal, State or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance regardless of whether that information is contained in the students' education records if (A) the student is under the age of 21 and (B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.[9]

Further amendments to the Act were proposed in 2008 to clarify this provision regarding notifying parents of alcohol and drug violations.[10] The wording of the statute gives colleges and universities the choice to institute a parental notification policy, but they are not required to do so. Moreover, since the statute does not define "disciplinary violation," the institution may have considerable latitude regarding both what constitutes a disciplinary matter and what information is disclosed.[11]

DECISION TO DISCLOSE

Since FERPA now makes it clear that institutions of higher education *may* disclose information about alcohol and drug indiscretions, the next question then becomes, *should* such disclosure take place? The law seems well settled that there is no affirmative duty on behalf of the institution to inform;[12] yet statistics reveal that drug and alcohol use on college and university campuses is rampant. A study published by the National Center on Addiction and Substance Abuse at Columbia University found that in 2001 there were more than 1,700 deaths from unintentional alcohol-related injuries among college students, up 6% from 1998. Also in 2001, 97,000 students were victims of alcohol-related date rape or sexual assault, and almost 700,000 students were assaulted by a student who had been binge drinking.[13]

In a peculiar irony, many argue that the well intentioned movement in the 1980's to reduce teenage drunk driving by imposing a nationwide minimum drinking age of 21 has actually had the converse effect of encouraging heavy drinking by those under 21.[14] Recent surveys and the Harvard School of Public Health's College Alcohol Study confirm what has been called the "college effect," where

> …every fall college administrators witness a significant change for the worse in students' alcohol consumption immediately after they arrive on a campus as first-year students…binge drinking almost doubles (to about 45 percent) and abstention decreases by nearly half in just six weeks—and those numbers will change very little over the course of the next four years.[15]

The ease of obtaining fake identification exacerbates the problem,[16] as does the fact that students frequently party off campus to avoid being caught drinking illegally. With less oversight from adults, heavy drinking, brawling, and sexual misconduct are more likely to occur."[17] In addition to the prevailing misuse of drugs and alcohol, some colleges and universities are seeing a shift in the traditional parent-student relationship. Today, more parents want to be involved in the lives of their sons and daughters, and that may include being informed of their children's' transgressions. Cell phones, instant messaging and texting seem to have delayed or permanently changed the separation that earlier generations experienced upon leaving home for the independent world of college.

The University of Delaware was the first college to implement a parental notification policy in the early 1990s, before FERPA was amended. President Roselle viewed parents as the key to stopping alcohol abuse since they controlled the purse strings.[18] Moreover, he did not want to be in the position of ever having to tell a parent, "'We knew there was a problem but we didn't tell you.'"[19] President Roselle correctly identified the box that colleges and universities find themselves in—students who formerly went through the drinking age rite of passage at the end of high school now

spend approximately three years on the college's time waiting to make that transition to legal age of consumption. Institutions of higher education are now expected to engage in education, early intervention, treatment, health protection and promotion and environmental management of drinking related problems.[20] Given the widening net for potential college liability,[21] it is not surprising that with the enactment of the FERPA parental notification amendments, many institutions followed the University of Delaware's lead.

While current statistics are difficult to find, Bowling Green University conducted a survey of judicial affairs officers at 189 institutions a decade ago. "As of January 2000, 58.7 percent indicated they had parental notification policies or practices in effect (77.6 percent of private institutions, 43.3 percent of public), and 24.9 percent were actively considering adopting such a policy. Most campuses chose to notify parents by letter (59 percent), though a significant number utilized both telephone and letter (25.3 percent). Although 63.9 percent of policies allow for notification after a first violation, in practice notifications are about evenly divided between first and second violations.[22]

In contrast, a few schools have received negative comments from parents when attempting to implement such a system. Some parents objected to the University of Missouri's parental notification policy as a violation of their children's' right to privacy, and the university responded by sending out a form to parents of students under 21 to allow them to opt out of notification. In 2007, 37 parents opted out.[23]

Setting policy remains a difficult balancing act. Administrators worry that immediate notification of parents prevents students from learning how to cope with their own problems. There is also the potentially serious and life-

threatening concern that the threat of parental notification will deter students from seeking help for alcohol-related illnesses.[24] To address this criticism, some schools such as Emory University, Duke University and Dartmouth have adopted "medical amnesty" policies to shield individuals and organizations (such as fraternities and sororities) from disciplinary action when medical assistance for alcohol and drug related emergencies is sought.[25] Also known as "good Samaritan" policies, the amnesty applies to students who seek assistance for themselves and for others, and for the student receiving medical attention. While studies show that amnesty policies lead to substantial increases in the number of students seeking medical assistance, most colleges have not adopted such an approach, believing it condones excessive and underage drinking.[26]

EFFECTIVENESS OF PARENTAL NOTIFICATION

Does disclosure work? "Initial research, albeit preliminary, shows that parental notification policies, as permitted under the FERPA amendment, have produced a reduction in repeat violations of institutional drug and alcohol policies." [27]

Whether to disclose such violations to parents is a matter of intense debate. On the one hand, some statistics are emerging that parental involvement results in decreased alcohol and drug problems on campus. "The Bowling Green research provides preliminary data indicating that parental notification policies work in terms of reducing alcohol-related problems. Of the judicial affairs officers utilizing parental notification, more than half reported positive results, with 39.7 percent indicating slight and 12.7 percent indicating significant reductions in the number of alcohol violations following implementation of the policy." [28]

"Another indicator of effectiveness is the number of repeat violations among students whose parents were notified of a violation. Several institutions, including the University of Delaware, Texas A&M, Radford University, Utah State, Ohio University in Athens, and the Pennsylvania State University (Penn State), have noted reduced rates of recidivism after they began notifying parents of violations as part of their overall alcohol and other drug prevention efforts." [29]

Many of these campuses, and others that have instituted parental notification within a comprehensive approach to prevention, have reported additional positive results, including fewer suspensions, less vandalism, higher retention rates, fewer hospitalizations, and increased upper class student interest in living in residence halls."[30]

Frostburg State officials credit those policies with an 89 percent plunge in second offenses after the rules were implemented in 1998-99. Off-campus citations dropped 39 percent after Gibraltar extended the policies to off-campus arrests last year. "Clearly, working with parents gets the message out," Gibraltar said. "If your mom or dad calls you up and says, "If I hear another word that you're out of line, you're out of school,' I think that probably has an impact."[31]

CONCLUSION AND RECOMMENDATIONS

Clearly, colleges and universities have to be concerned about their liability if they fail to notify parents of a student's alcohol problem. While the current law does not find a duty to do so, the recent amendments in FERPA facilitate disclosure. The stage is set for courts to begin finding that if colleges and universities can send out scores of admissions, catalogues and promotional materials to families, then institutions certainly

should communicate with families when the student is at risk, exactly the time when families would be most interested in hearing from them.

While college administrators may lament Congress' paternalistic approach, it is also fair to note that over the last two decades many colleges have marketed themselves as caring, nurturing, "home away from home" environments. As the tuition has increased, so have parental expectations. As long as the drinking age remains at 21, colleges will be in the position of monitoring and policing student growing pains. Given the statistics on binge drinking on college campuses, it is unrealistic to assume that prohibition will work. Colleges should devise pragmatic approaches that incorporate both medical amnesty programs to get immediate help to students in need and close communication with parents as allowed under FERPA.

ENDNOTES

1. Barbara Shelly, "Balance Tipped Too Far Away from Parents' Right to Know," Commentary, March 26, 2009 at http://www.kansascity.com/277/story/1108786.html.
2. Mara Rose Williams, "College Students' Right to Privacy Often at Odds with Parents' Need to Know," March 19, 2009 at http://gordie.org/pdf/KansasCity_FERPA.aspx.
3. Paula Wasley "Rider U. Officials Indicted in Student's Death", The Chronicle of Higher Education, Aug. 17, 2007, Vol. 53, No. 50, p. 30.
4. *Estate of Deceased College Student v. Rider University, Phi Kappa Tau, et al*. at http://hazinglaw.com/results.htm. (July 8, 2009). *See also* "Judge Dismisses Rider U. Hazing Charges," http://www.blnz.com/news/2007/08/27/Judge_dismisses_Rider_hazin.
5. *Rider University Report of the Presidential Task Force on Alcohol, Personal Responsibility and Student Life*, at www.rider.edu.(June 19, 2007).
6. Family Educational Rights and Privacy Act (FERPA) at http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html (June 16, 2009).

7. “No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.” 20 USC. S1232 g (a) (1) (B) (Jan. 8, 2008).

8 . “The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student’s right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition. 20 USC. S1232 g (a) (1) (c) (Jan. 8, 2008).

9. 20 USCA § 1232 (g.) (i.) (Jan. 8, 2008).

10. “The proposed regulations are also needed to clarify that colleges and other institutions may disclose information from education records to an eligible student's parents, without consent, under § 99.31(a.)(15) if the institution has determined that the student has violated Federal, State, or local law or an institution's rules or policies governing alcohol or substance abuse (provided the student is under 21 years of age), and in connection with a health or safety emergency under §§ 99.31(a.)(10) and 99.36 (regardless of the student's age) if the information is needed to protect the health or safety of the student or other individuals. These exceptions apply whether or not the student is a dependent of a parent for tax purposes. These proposed regulations would clarify the Department's policy with respect to an agency's or institution's disclosure of information from education records to parents under the health and safety emergency exception and do not represent a change in the Department's interpretation of who may qualify as an appropriate party under the health or safety emergency exception to the consent requirement. While institutions may choose to follow a policy of disclosing education

records to parents of eligible students in these circumstances, FERPA does not mandate such a policy." at www.ed.gov/policy/gen/guid/fpco/pdf/ht12-17-08-att.pdf.

11. Edgar M. Smith "Away at College: Young, Drunk, and Busted, College and University Parental Notification Policies", *Educational Law Consortium, The University of Georgia Institute of Higher Education Forum*, Volume 1 p. 10 (2005). Educational Law Consortium.org/forum/2005/papers/smith.pdf.

12. "Courts have not yet held that colleges or universities have an affirmative duty to notify parents of a distressed student." *Prevention Updates, The Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention* at http://www.higheredcenter.org/files/product/notification.txt. (June 2001)

13. Lauran R. Duran and Sulaiman Beg, "Wasting the Best and Brightest", at http://www.casa Columbia.org./absolutenm;templates/ Press Releases.aspx?articleid=477 (2007).

14. Michael Clay Smith and Margaret D. Smith "Treat Students as Adults: Set the Drinking Age at 18, not 21", *The Chronicle of Higher Education*, Vol. 45, Iss. 27; pg. B8.(May 12, l999).

15. Brandon Busteed "The Mistake Colleges Make About Student Drinking," *The Chronicle of Higher Education*, Vol. 54, Iss. 34; pg. A. 34 (May 2, 2008.).

16. Smith, *supra* note 11, at p. 6.

17. Smith and Smith, *supra* note 14.

18. Smith, *supra* note 11 at p. 8.

19. *Id.*

20. *Id.*

21. For a discussion of the legal theories behind a wrongful death lawsuit against a college for the death of a student and the college counseling center's liability for inadequate mental health services, *see* Seaquist, Kelly and Barken, "College and University Liability for Student Suicides," *North East Journal of Legal Studies*, Vol. 11, 65-78. (Spring 2003).

22. *Prevention Updates*, *supra* at note 12. "However, a survey in the Spring of 2000 was jointly conducted by the Association for Student Judicial Affairs' (ASJA) Model Policy Committee and the doctoral program in Higher Education at Bowling Green State University. This survey was distributed to ASJA members representing approximately 600 schools. The survey was returned by approximately 200 institutions. The findings suggest that the majority of schools are in fact adopting a more aggressive plan of parental notification. Approximately 59% of respondents indicated they had policies or practices in place to notify parents and additional 25% of respondents indicated that they were actively considering the adoption of

such policies. Only approximately 16% of the respondent institutions had no policy and were not considering one. Certainly, additional future research is needed to assist the higher education community in responding to this difficult issue." *Working report from the Inter-Association Task Force on Alcohol & Other Substance Abuse Issues Members* at http://www.iatf.org/parent1a.htm.

23. Elizabeth Bernstein, "Colleges Move Boldly On Student Drinking Exploiting an Exception to Federal Privacy Laws, Schools Increasingly Notify Parents When Kids Are Caught With Alcohol", *Wall Street Journal* at http://online.wsj.com/article/SB119690910535115405. (December 6, 2007).

24. *Id.*

25. Smith, *supra* at note 11, page 17.

26. Peter Schworm, "Emerson revises policy on alcohol: will shield those seeking help," *The Boston Globe*, at www.boston.com/news/.../emerson_revises_policy_on_alcohol, (Feb. 19, 2009).

27. "Student Drug and Alcohol Violations at Institutions of Higher Education: Parental Notification and Access to Student Records" at http://jsg.legis.state.pa.us/Parental%20Notification%20Drug%20and%20Alcohol.html.

28. The Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention at http://www.higheredcenter.org/files/product/notification.txt (June, 2001).

29. *Id.*

30. *Id*.

31. "College Finds Parents Help Slash Alcohol Violations", *The Washington Times*, at http://www.outsidetheclassroom.com/newsevents/media/article_WashTimes.asp (Sept. 5, 2008).

DOUBLE REVERSAL ON THE APPLICATION OF SECTION 382 TO TROUBLED FINANCIAL INSTITUTIONS

by

Walter G. Antognini*
Vincent Barrella**

INTRODUCTION

Congress has passed provisions intended to limit the shopping for net operating losses and other attributes. Primary among such provisions is Internal Revenue Code section 382. This section provides that when a corporation undergoes a sufficient change in its stock ownership, use of losses and credits from before the change in ownership are limited in periods after the change. In essence, the corporation is limited in the amount of losses to an amount that, at least theoretically, approximates the losses and credits the corporation would have naturally used if the ownership change did not occur.

The rationale for these limitations has long been recognized if not accepted. We have long lived with rules that frown upon the purchase of another taxpayer's tax attributes. But these are unusual times. The financial health of most of our largest financial institutions has deteriorated significantly. The U.S. government has been called upon to assist in preventing further meltdown of our financial system. The very financial

*Lubin School of Business, Pace University, NY.
** Lubin School of Business, Pace University, NY.

institutions that the U.S. government will directly aid with the transfer of hundreds of billions of dollars will also have the aid of tax savings (presumably, mostly in the future) from the losses that they are now suffering – unless provisions such as section 382 limit, perhaps severely, those savings. In this context, various government authorities, including from both the executive and legislative branches, have created laws to address the crisis in general, and the limitations on tax savings in particular. A question has arisen as to the validity of some of this guidance directed to the limitation on tax attribute carryovers in light of legislation, both from the recent and the distant past. This paper addresses that question.

One such piece of guidance, IRS Notice 2008-83, reversed the normal 382 rules by providing that a bank's losses from losses or bad debts would not be treated as subject to the section 382 loss limitation rules. Congress then reversed the Treasury's reversal by providing that the Notice would no longer apply prospectively.

ANALYSIS OF INTERNAL REVENUE CODE SECTION 382

The central purpose of Code Section 382[i] is to limit the carryover of a corporation's losses, and through section 383[ii], to limit the carryover of other favorable attributes, such as credits. This limitation is triggered upon an ownership change of the corporation.[iii] The central premise behind the limitations is that losses and other favorable attributes are carried over for the benefit of the owners of the corporation at the time that the losses and other favorable benefits were economically accrued. Stated differently, a company's losses and other attributes should not be available for sale through the mechanism of selling a corporation (i.e., its stock) and allowing the new

owners to infuse capital or profitable businesses such that future profits would be protected from taxes by the losses or other attributes carried from years prior to the stock sale.

The premise behind the carrying of attributes is that the taxpayer(s) that suffered the losses would, eventually, be allowed to offset profit years with loss years, thereby smoothing income over time. If new owners were allowed to use the losses or other attributes carried over, a particular taxpayer would not be offsetting profit years with loss years. Instead, the U.S. government would effectively be subsidizing the company's new owners through tax savings. But, what if the new owner (or at least an owner that causes the change in ownership) is the U.S. government? Is the central premise for limiting the use of losses and other attributes violated in this instance? This is the central issue raised by the various authorities discussed in this paper.

Section 382(a) is the main operative provision of the attribute limitation rules. It provides that the amount of taxable income of any "new loss corporation" for any "post-change year" which may be offset by "pre-change losses" shall not exceed the "section 382 limitation" for each year. All of the quoted items in the previous sentence are defined in section 382. Central to all of these definitions is a further term, an "ownership change". The essential test for an "ownership change" is whether the percentage of stock owned by one or more 5-percent shareholders increases by more than 50 percentage points during a testing period of, generally, 3 years.[iv] A corporation must make the determination of whether an ownership change occurs as of each "testing date".[v] Each time an owner shift occurs is a testing date.[vi] A "new loss corporation" is, generally, a corporation with a net operating loss carryover (or having a net operating loss in the year of an ownership change) or a "net unrealized built-in loss" which

goes through an ownership change.[vii] A "post-change year" means any taxable year ending after the date of an ownership change.[viii] The term, "pre-change losses", refers to the corporation's net operating losses from years ending before or in the year of the ownership change.[ix]

The "section 382 limitation" provides the most important limitation on the use of pre-change losses in post-change periods. The theory behind the limitation is to allow the loss corporation to use the amount of loss carryovers it would otherwise use if it had not changed owners. From this theoretical perspective, a corporation would naturally use an amount of losses equal to a normal return on the value of the corporation as well as to offset any net built-gains in assets owned by the corporation. Practically, this term consists of two components, the annual component, described in section 382(b), and the recognized built-in gain component, described in section 382(c)(2). The loss corporation determines the annual component by multiplying the value of the corporation (as measured by the value of all of the corporation's outstanding stock before the ownership change) by the long-term tax-exempt rate.[x] The long-term tax-exempt rate, determined under section 382(f), is based on rates published by the IRS each month. [xi] The recognized built-in gain component allows the loss corporation to increase its use of pre-change losses for gains that were recognized subsequent to the ownership but economically accrued prior to the ownership change. From a theoretical perspective, a corporation would not naturally be limited in using its own losses, even without an ownership change, to the extent it has gains that were economically accrued in the same timeframe (i.e., the periods before the ownership change) that the carryforward losses accrued. Hence, subject to various limitations, the section 382 limitation is increased for these recognized built-in gains.[xii]

TROUBLED TIMES

The body of law and understanding built around section 382 had become well established and well entrenched after decades of existence. Then, the crises in the financial markets and financial institutions hit. The continued viability of many, if not most, of our largest financial institutions came into question. Governmental authorities at many levels rushed into the breach in an attempt to stem the crisis. The Emergency Economic Stabilization Act of 2008 ("EESA")[xiii] was a major component of these efforts.

Section 101(a)(1) of EESA gave the Secretary of the Treasury the authority, "to establish the Troubled Asset Relief Program (or "TARP") to purchase and to make and fund firm commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by the Secretary."

Section 101(c) of EESA gives the Secretary authority, "to take such actions as the Secretary deems necessary to carry out the Authorities in this Act, including, without limitation, the following:

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(5) Issuing such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of this Act."

Further, the existing Internal Revenue Code section 382(m) provides authority to the Secretary to prescribe regulations, "… necessary or appropriate to carry out the purposes of this section and section 383, including (but not limited to) …", five

different purposes, none of which appear to bear on the five notices indicated below.[xiv]

The Secretary, citing these authorities, issued various guidance, including IRS Notice 2008-76[xv], IRS Notice 2008-83[xvi], IRS Notice 2008-84[xvii], IRS Notice 2008-100[xviii], IRS Notice 2009-14[xix,], IRS Notice 2009-38[xx] and IRS Notice 2010-2[xxi]. In Notice 2008-76, the IRS indicated that it will issue regulations under section 382(m) providing that the term "testing date" shall not include, with respect to a corporation as to which there is a Housing Act Acquisition, any date on or after the date on which the United States (or an agency thereof) acquires stock in a Housing Act Acquisition. In Notice 2008-83, the IRS indicated that for purposes of section 382(h), any deduction allowed to a bank after an ownership change with respect to loans or bad debts (or an addition to a reserve) will not be treated as a built-in loss or deduction attributable to periods before the change date.[xxii] Further, these banks are told that they may rely on the treatment set forth in the notice unless and until there is additional guidance. In Notice 2008-84, the IRS indicated that it intends to issue regulations providing that the term, "testing date" will be modified to exclude any date as of the close of which the United States owns a more-than-50-percent interest in a loss corporation. In Notice 2008-100, the IRS indicated that it intends to issue regulations providing, *inter alia*, that certain instruments acquired by the Treasury under the Capital Purchase Program pursuant to EESA will not be treated as stock for purposes such as increasing the percentage of stock owned by the U.S. (as a 5-percent shareholder), thereby avoiding the triggering of an ownership change as a result of the acquisition of such stock. But, that stock is still generally considered outstanding for purposes of determining changes in the percentage of ownership of other shareholders. Notice 2010-2[xxiii] amplifies and supersedes Notice 2009-38 which amplified and superseded Notice 2009-

14 which amplified and superseded Notice 2008-100. It provides, *inter alia*, that for all federal tax purposes, any instrument issued to the Treasury under 5 listed program (e.g., TARP), whether owned by the Treasury or by subsequent holders, shall be treated as debt instruments if denominated as such, and as preferred stock (described in section 1504(a)(4)) if denominated as preferred stock. Furthermore, preferred stock will not be treated as stock while held by the Treasury or other holders for purposes of section 382 except for purposes of valuing the loss corporation (i.e., by valuing all of the stock of the loss corporation pursuant to section 382(e)).[xxiv] The notices generally provide that taxpayers may rely on them unless and until there is subsequent guidance.

THE AMERICAN RECOVERY AND REINVESTMENT ACT

Section 1261 of The American Recovery and Reinvestment Act of 2009 addresses IRS Notice 2008-83, and only this notice.[xxv] In a somewhat unusual action, Congress questioned the validity of this particular notice. First, Congress found that the Treasury's authority to write regulations as provided in section 382(m) does not authorize the Secretary to provide exemptions or special rules restricted to particular industries or classes of taxpayers.[xxvi] Congress then went on to indicate that the notice is inconsistent with the congressional intent in enacting section 382(m) and the legal authority for the notice was deemed doubtful.[xxvii] Congress nonetheless recognized that taxpayers should generally be able to rely on guidance issued by the Treasury and that legislation was therefore needed to clarify the force and effect of the notice.[xxviii] Congress therefore deemed Notice 2008-83 to have the force and effect of law with respect to any ownership change occurring on or before January 16, 2009, but will have no force

or effect with respect to any ownership change after such date.[xxix]

It is significant to note that the Conference Report to The American Recovery and Reinvestment Act made reference to all 5 Notices previously indicated and yet the validity of only Notice 2008-83 was addressed.[xxx] This strongly suggests that Congress recognizes and blesses the validity of the other Notices.

Was Congress correct in questioning the validity of Notice 2008-83? The best answer, of course, is that the question is now moot. It is certainly within the power of Congress to override executive guidance that relies on Congressional authority in the first place. And, the question of validity and application is now firmly established.

Another question that naturally arises is why Congress singled out Notice 2008-83, leaving the other notices intact. While all of the 5 notices provide for special treatment not specified in section 382, only Notice 2008-83 provides for special treatment without regard to whether the U.S. takes back securities in a company. The other 4 notices address issues that arise when the U.S. Treasury takes back securities and whether the taking back of these securities will cause an ownership change, triggering a limitation of losses under section 382. Perhaps these 4 notices are given special treatment because while the limitation of loss and other attribute carryovers will save the Treasury taxes, application of these limitations will at the same time further jeopardize the fragile financial health of the very companies that taxpayer money is being used to bolster. Arguably then, between the authority granted in section 382(m) and EESA, these other notices should be held valid. This leaves Notice 2008-83 alone as being invalid. This Notice would have had the benefit of saving taxes of,

conceivably, any (section 581) bank that has undergone an ownership change. While it might be argued that in these times, improving the financial health of any and every bank is an important step to economic recovery, Congress clearly indicated that it alone has the authority to single out particular industries for special treatment.

FURTHER ANALYSIS OF SURVIVING NOTICES

As discussed above, Congress has removed the effectiveness of Notice 2008-83, except for the limited period of time before Congress took action indicating its disapproval of the Notice. As such, the effectiveness of that Notice is no longer an issue. But, the other notices remain viable, including, presumably, Notice 2009-38, which amplified and superseded a notice (Notice 2009-14) that Congress specifically recognized and left in place.

In Notice 2008-76, the IRS indicated that it will issue regulations under section 382(m) providing that the term "testing date" shall not include, with respect to a corporation as to which there is a Housing Act Acquisition, any date on or after the date on which the United States (or an agency thereof) acquires stock in a Housing Act Acquisition. A "testing date" is a key component in triggering the application of section 382 limitations. The testing date is the date on which a loss corporation is required to make a determination of whether an ownership change has occurred.[xxxi] Furthermore, all computations of increases in percentage ownership are to be made as of the close of the testing date.[xxxii] It would seem, therefore, that if there is no testing date, there is no requirement to determine whether an ownership change has occurred, and, further, there would be no measurements of ownership increases. Based on the literal language of the notice, once the United States makes the appropriate stock acquisition, these

consequences for the corporation would go on forever, even if the United States disposes of its stock. The corporation would be forever free of section 382. Query whether this is what the Treasury intended and whether this broad position will find its way into the actual regulations.

In Notice 2008-84, the IRS indicated that it intends to issue regulations providing that the term, "testing date" will be modified to exclude any date as of the close of which the United States directly or indirectly owns a more-than-50-percent interest in a loss corporation. This notice is similar to Notice 2008-76, discussed above, in that it primarily modifies the term "testing date" by removing certain circumstances from the application of that term. There are, however, a few key differences. First, while Notice 2008-76 precludes a testing date where the U.S. makes a Housing Act Acquisition, Notice 2008-84 can apply regardless of the circumstances under which the U.S. becomes a shareholder. But, second, while Notice 2008-76 can apply regardless of the level of ownership by the U.S., Notice 2008-84 requires the U.S. to be a more-than-50-percent owner. Third, while Notice 2008-76 would under its literal language apply to the corporation forever once it applies at all, Notice 2008-84 only applies as long as the U.S. remains a more-than-50-percent owner. And so, if the U.S. is a more-than-50-percent owner, the section 382 limitations will seemingly not apply to the corporation. This would appear to make sense – imposing an increased tax liability would work to the detriment of its shareholders, with the U.S. the largest such shareholder. Thus, the U.S. would otherwise be taking its own money while potentially harming a company it is purposely trying to resuscitate.

Notice 2010-2 amplifies and supersedes Notice 2009-38 which, in turn, amplified and superseded Notice 2009-14 which, in turn, amplified and superseded Notice 2008-100.

Notice 2010-2 generally treats all instruments issued to the Treasury denominated as indebtedness as indebtedness for all federal tax purposes.[xxxiii] This rule generally applies to all instruments issued to the Treasury pursuant to specified EESA programs ("the Programs).[xxxiv] In a similar fashion, preferred stock will be deemed stock described in section 1504(a)(4).[xxxv] Furthermore, these instruments will not be treated as stock for purposes of section 382 while they are held by the Treasury or by other holders, except that stock described in section 1504(a)(4) will be treated as stock for purposes of section 382(e)(1). These rules in essence provide a safe-harbor of sorts. The general principles of tax law determining the characterization of instruments can be complicated and uncertain. The Notice's rules, to the extent they apply, remove that uncertainty. And, because section 1504(a)(4) stock is not treated as stock for purposes of determining whether an ownership change occurs but is considered stock for purposes of measuring the section 382 loss limitation, then, if an ownership change does occur, the Notice clarifies a pro-taxpayer position.

Notice 2010-2 also provides rules for the treatment of warrants.[xxxvi] Except for warrants issued pursuant to the Private CPP and S Corp. CPP programs, warrants owned by the Treasury or subsequent holder will be treated as an option and not as stock. Again, this removes a contrary possibility outlined in regulation §1.382-4(d) where an option (such as a warrant) could be considered stock under certain circumstances. A warrant issued to the Treasury pursuant to the Private CPP will be treated as an ownership interest in the underlying stock, but that stock will be deemed preferred stock described in section 1504(a)(4) – again a favorable treatment from a taxpayer's perspective. Any warrant issued to the Treasury pursuant to the S Corp CPP will be treated as an ownership interest in the underlying indebtedness, thus

removing the possibility of having that warrant treated as stock which might otherwise trigger an ownership change.

Notice 2010-2 clarifies that for all federal tax purposes, any amount an issuer receives in exchange for instruments issued to the Treasury under the programs are treated as received in their entirety for the instruments.[xxxvii] This removes the possibility of applying general principles of tax law which could, in theory, determine a different treatment.

The notice then provides rules more substantive in nature. For purposes of section 382, any stock issued to (and held by) the Treasury pursuant to the Programs shall not cause the Treasury's ownership interest to have increased.[xxxviii] But, such stock is considered outstanding for purposes of determining the percentage of stock owned by others. This appears to offer the best of both worlds in determining ownership changes. The Treasury will not, in essence, be a shareholder that causes the corporation to surpass the change in ownership requirement, and yet, that Treasury-owned stock will have the effect of lowering the percentage of stock owned by others, thus masking (at least in part) any increase in stock ownership those other shareholders might have. But, caution is advised here. The notice goes on to indicate that if the corporation redeems that stock owned by the Treasury (issued to the Treasury pursuant to the Programs) then the redeemed stock will be treated as though it had never been outstanding.[xxxix] This treatment is for purposes of measuring shifts in ownership of a 5-percent shareholder on any testing date occurring on or after the redemption of the Treasury. Thus, while the redemption of the Treasury will not trigger an ownership change due to the ownership levels of other shareholders, subsequent owner shifts could trigger an ownership change because increases in ownership by these other shareholders that may have been

previously “masked” (as suggested previously) will no longer be masked.

Notice 2010-2 goes beyond prior notices in addressing the treatment of stock, presumably common stock, which could have been previously held by the Treasury. As previously discussed, if the Treasury buys common stock, this ownership will not trigger application of section 382. But, what if the Treasury sells this common stock (not in a redemption)? Ownership by those new owners could trigger application of section 382. And, all shareholders owning less than 5 percent are treated, as a group, as one 5-percent shareholder.[xl] But, Notice 2010-2 provides that if the Treasury's sale creates a public group, that new public group's ownership shall not be treated as having increased solely as a result of the Treasury's sale.[xli] The new public group's ownership is considered outstanding for purposes of measuring other 5-percent shareholders' percentage of stock owned.

In a further rule potentially beneficial to the corporation, a capital contribution made by the Treasury pursuant to the Programs will not be considered to have been made as part of a plan a principal purpose of which is to avoid or increase any section 382 limitation, thus avoiding adverse consequences that might otherwise occur under section 382(l)(1). Section 382(l)(1) addresses a potential abuse. As previously discussed, section 382 imposes a limitation, the annual component of which derives from the value of the loss corporation. Can one increase the value of the loss corporation, and thus increase the annual component of the loss limitation, by contributing to the corporation’s capital prior to the measurement of the annual loss component on the change date? Section 382(l)(1) addresses that question, indicating that such capital contribution will not be considered for purposes of section 382, thus precluding the increase in the loss limitation where a

principal for the corporation receiving the capital contribution is to avoid or increase any section 382 limitation.[xlii] And so, the rule provided by the notice removes this possibly adverse consequence.

Notice 2010-2 addresses another possible issue. If the Treasury acquires an instrument in exchange for an instrument issued to the Treasury under the Programs, will that instrument acquired, and any instrument acquired in a further exchange for that acquired instrument, also be treated under the rules of the Notice? The answer is a partial yes. Paragraphs (C), (D), (E), and (F) apply to these "Covered Instruments", but not paragraphs (A) and (B).[xliii] Thus, the previously discussed deemed characterization provisions will not apply to the Covered Instruments, but the other, more substantive, provisions will apply. Characterization of the Covered Instruments will be determined under general federal tax law principles.

Finally, the Notice provides rules allowing taxpayers to rely on the guidance indicated in the Notice.[xliv] The guidance indicated in the Notice will continue to apply unless and until the Treasury issues additional guidance. And, any future contrary guidance will not apply to any instrument issued to the Treasury (or Covered Instrument exchanged for instruments issued to the Treasury) prior to such contrary guidance.[xlv]

CONCLUSION

Pursuant to IRS Notice 2008-83, banks received a special treatment in which losses on loans or bad debts would not be treated as built-in losses or deductions subject to the limitations under section 382. But, due to Congressional action in the Recovery and Reinvestment Act of 2009, this special treatment

has been limited to ownership changes occurring during a limited period of time.

Other IRS Notices addressing application of section 382 to companies that have received financial assistance from the U.S. remain intact. These notices provide generally that the investments that the U.S. makes in troubled financial institutions will not trigger application of attribute limitations under section 382. As a result, the potential disadvantage of the section 382 limitations should not be considered when deciding whether to receive help from the U.S. And, of course, these troubled institutions will as a result receive both direct financial aid as well as future tax savings should their fortunes reverse, producing taxable profits.

Another, more theoretical, result from the flurry of activity in this area involves the issue of validity of guidance in general. For years to come, section 1261 of the American Recovery and Reinvestment Act of 2009 can be referred to as authority for how far executive branch guidance can and cannot extend without explicit Congressional authority. If it was not apparent before, it appears now that executive guidance cannot be thought of as valid just because pressing circumstances seem to require special rules not contemplated by Congress.

ENDNOTES

[i] IRC §382, 26 USC §382.

[ii] IRC §383.

[iii] IRC §§382 (a), (d), (j).

[iv] IRC §382(g) defines the term, "ownership change", while §382(i) defines the term, "testing period". A "5-percent shareholder" is any shareholder is any person owning 5 percent or more of the stock of a corporation at any time during the testing period. IRC §382(k)(7). By

limiting the focus to stock ownership changes of 5-percent shareholders, section 382 generally allows one to ignore changes in ownership of smaller shareholders, as might particularly be the case with publicly-traded companies. For example, a majority of the stock of General Electric owned today may be owned by different shareholders than owned the stock 3 years ago. But if all the changes occurred with shareholders always owning less than 5 percent, these ownership changes can be ignored.

[v] Income Tax Regulations §1.382-2(a)(4).

[vi] Income Tax Regulations §1.382-2(a)(4)(i). Regulation §1.382-2(a)(4)(ii) provides limited exceptions.

[vii] IRC §382(k). A corporation generally has a net unrealized built-in loss if the aggregate adjusted bases of its assets exceed the fair market value of these assets by a prescribed threshold amount. §382(h)(3). Thus, a corporation can be subject to the section 382 limitations even if it does not have an actual net operating loss prior to the ownership change. The theory is that these net unrealized built-in losses accrued prior to the ownership change will eventually become deductible losses, and at that point these losses are conceptually similar to actual net operating losses accrued prior to the ownership change.

[viii] IRC §§382(d)(2), (j). More specifically, the post-change year means any year ending after the "change date", IRC §382(d)(2), where the change date is the date of the last component of an ownership shift involving a 5-percent owner, or, in the case of equity structure shift, the date of the reorganization. In essence, the change date is the date of the shift that puts the corporation over the top of the minimum 50-percentage point change within the 3-year testing period.

[ix] IRC §382(d)(1). Losses in the year of the ownership change are allocated between the periods before the ownership change (and, hence, treated as pre-change losses) and periods after the ownership change (and, hence, not treated as pre-change losses) generally on a ratable allocation based on the number of days in each period.

[x] IRC §§382(b)(1), (c)(2), (e).

[xi] The long-term tax-exempt rate is intended to approximate the rate of Treasury securities of comparable maturities, adjusted downward to account for the differences between taxable securities and tax-exempt securities. See, §§382(f) and 1274(d).

[xii] While the tax law primarily focuses on the limitation of net operating losses, sections 382 through 384 are not limited to this possibility. For example, the limitations also generally apply to deduction items that economically accrued prior to the ownership but are reported for tax purposes after the ownership change. §382(h)(6)(B). Conversely, income

items economically accrued prior to the change but reported after are generally treated as recognized built-in gains. §382(h)(6)(A). Built-in losses (i.e., a loss from an asset with an adjusted basis in excess of its fair market value on the change date) recognized after the ownership change are generally subject to the same loss limitation rule as net operating losses. §382(h)(1)(B). Capital loss carryovers are likewise generally subject to the same loss limitation rules. §383(b). The overarching goal of sections 382 and 383 is to set one general limit for a corporation's use of pre-change attributes – the section 382 limitation, previously discussed. Having set this one overall limitation, the sections then determine which attributes will in fact be used within the confines of this limitation. This determination is made somewhat more complicated in the instance where credits are carried over from pre-change years. Section 383 addresses this issue. The essence of the rules is that the taxpayer's use of all attributes is limited to the benefit determined by the section 382 limitation. In the case of credits, then, the benefit must be tax-effected. For example, if the section 382 limitation for a particular year is 10,000,000 and the tax savings from that 10,000,000 would be 3,400,000, then the taxpayer can use total attributes that would provide a benefit of 3,400,000. If the taxpayer uses 2,400,000 of credits, then the taxpayer can also use losses that would provide a benefit of the remaining 1,000,000: 1,000,000/.34 = approximately 3,000,000 of losses.

[xiii] Pub. L. No. 110-343 (2008).

[xiv] Because none of the five purposes specifically listed in section 382(m) appear to relate to the notices, the reliance on section 382(m) would seem to relate back to the more general authority, " … necessary or appropriate to carry out the purposes of this section and section 383, …".

[xv] 2008-39 I.R.B. 768 (September 29, 2008).

[xvi] 2008-42 I.R.B. 905 (October 20, 2008).

[xvii] 2008-41 I.R.B. 855 (October 14, 2008).

[xviii] 2008-44 I.R.B. 1081 (November 3, 2008).

[xix] 2009-7 I.R.B. 516 (February 17, 2009).

[xx] 2009-18 I.R.B. 901 (May 4, 2009).

[xxi] 2010-2 I.R.B. 251 (January 11, 2010).

[xxii] A bank is as defined in section 581. Section 382(h) is the provision which, *inter alia*, treats an unrealized built-in loss as a loss that is subject to the section 382 limitation. By removing such loan losses and bad debts from the application of section 382(h), these losses will not be subject to the section 382 limitation.

[xxiii] 2010-2 I.R.B. 251.

[xxiv] As previously indicated, the corporation is valued for purposes of determining the annual component of the section 382 loss limitation.

This provision in the Notice therefore works to the benefit of the taxpayer in that the preferred stock issued to the Treasury pursuant to one of the 5 listed programs is ignored as stock generally, thereby avoiding an owner shift, but not ignored for purposes of determining the value of the loss corporation, thereby increasing such value and the annual component of the section 382 limitation should an ownership change otherwise occur.

[xxv] Pub. L. No. 111-5 (2009), signed into law on February 17, 2009.

[xxvi] Id., §1261(a)(1).

[xxvii] Id., §§1261(a)(2) & (3).

[xxviii] Id., §1261(a)(4).

[xxix] Id., §1261(b)(1). The effectiveness of Notice 2008-83 was also extended to ownership changes after January 16, 2009 if pursuant to a binding written contract entered into on or before such date and under other similar circumstances. P.L. 111-5, §1261(b)(2).

[xxx] Conference Report to P.L. 111-5, Division B, footnote 55, p.45.

[xxxi] See, Income Tax Regulations §1.382-2(a)(4).

[xxxii] Id.

[xxxiii] 2010-2 I.R.B. at 252, ¶III(A).

[xxxiv] The Programs include, "… (i) the Capital Purchase Program for publicly-traded issuers (Public CPP); (ii) the Capital Purchase Program for private issuers (Private CPP); (iii) the Capital Purchase Program for S corporations (S Corp CPP); (iv) the Targeted Investment Program (TARP TIP); (v) the Asset Guarantee Program; (vi) the Systemically Significant Failing Institutions Program; (vii) the Automotive Industry Financing Program; and (viii) the Capital Assistance Program for publicly-traded issuers (TARP CAP)". Id., ¶I. This treatment of instruments does not extend, however, to instruments issued pursuant to the TARP CAP program – the treatment of these instruments for federal tax purposes will instead be determined by applying general principles of federal tax law.

[xxxv] Id. This provision does not apply to instruments issued pursuant to TARP CAP - the treatment of these instruments for federal tax purposes will instead be determined by applying general principles of federal tax law. Section 1504(a)(4) describes stock which in essence represents plain vanilla preferred stock – non-voting, limited and preferred as to dividends without the right to participate in corporate growth to any significant extent, no more than a reasonable redemption price (if any), and not convertible into another class of stock.

[xxxvi] Id., ¶III(B).

[xxxvii] Id., ¶III(C).

[xxxviii] Id., ¶III(D).

[xxxix] Id., ¶III.

[xl] IRC §382(g)(4).

[xli] 2010-2 I.R.B. at 252, ¶III(E).

[xlii] IRC §382(l)(1)(A). Any capital contribution made within the 2-year period ending on the change date are treated as having this bad purpose unless the regulations provide otherwise. IRC §382(l)(1)(B).

[xliii] 2010-2 I.R.B. at 252, ¶III(G).

[xliv] Id., ¶IV.

[xlv] Id. This reliance also extends to instruments issued to the Treasury (or Covered Instruments exchanged for instruments issued to the Treasury) after any future contrary guidance if there was a binding contract to issue such instruments (or to exchange such Covered Instruments) as of the date of the contrary guidance.

Heart Balm Redux: Should the Cause of Action for Alienation of Affection be Revived as a Remedy for Economic Loss?

by

Dr. Sharlene A. McEvoy*

ABSTRACT

For many years alienation has been affection was a discredited cause of action. At least one state is considering reinstating it by statute. This article analyzes the civil claim as a possible remedy for economic loss resulting from a damaged relationship.

INTRODUCTION

The claim of alienation of affection has its origin in the Teutonic tribal notion that a husband had the right to kill the man who had committed adultery with his wife.[1]

Later, instead of allowing the wronged male to kill his rival, the notion arose that the spouse/victim had the right to get financial recompense from the wrongdoer. The money would then be used to purchase a new wife.[2]

The Anglo Saxons allowed a civil claim for alienation of affection, which stemmed from the notion that the wife was the husband's property and, as with any property loss, the victim had a right to obtain compensation.[3]

*Dr. Sharlene A. McEvoy is a Professor at the Charles F. Dolan School of Business at Fairfield University, Fairfield CT

New York was the first state to adopt the tort by common law decision in 1866.[4] Other states followed suit either by common law or statute. After reconsidering the issue, some states abolished the claim by statute.[5] Other states did so judicially.[6] Nevertheless, there are several states that maintain it as a viable cause of action including Illinois, South Dakota, Hawaii, Mississippi, Missouri, New Mexico, North Carolina and Utah.[7]

South Carolina ended the claim by judicial decision[8] but has recently considered a bill to reinstate it.

Why permit a claim for alienation of affection? The reason that the marital relationship has certain rights and obligations including the society or companionship of the partner, sexual relations, and financial support. In other causes of action, a spouse can maintain an action for the loss of consortium as a result of the injury suffered by the partner.

This article urges a reconsideration of the tort as a remedy for the loss of financial support of a spouse due to adultery.

If such claims as intentional interference with a contractual relationship and interference with prospective economic advantage are recognized torts, why not permit a tortious claim for disruption of the marital relationship which is based on financial considerations as well as personal compatibility?

This article will analyze cases involving alienation of affection claims in the past and offer arguments as to why the tort once viewed as antiquated, might offer a remedy for the modern spousal relationship and its financial ramifications.

HUSBAND SUES BOYFRIEND

Oddo v. Presser[9] is a case with facts that are typical of alienation of affection claims. Thomas Oddo married Debra Tyson in 1988. Oddo was employed as an investment adviser and as a wrestling coach at Davidson College while Debra worked as a vice-president at Bank of America.[10] The couple had three children.

By 1999, Debra had become dissatisfied with her marriage and contacted a former boyfriend, Jeffrey L.Presser.[11] Debra and Presser met thee times in March 1999, engaged in sexual relations and kept in touch via email.[12]

After Debra admitted that she was in love with another man, the Oddos separated and later divorced.

After Thomas Oddo learned that Presser and his wife had been involved,[13] he sued Presser for compensatory and punitive damages for alienation of affection and criminal conversation.[14] A jury found Presser liable to Oddo and awarded him $910,000 in compensatory and $500,000 in punitive damages. Presser appealed the judgment arguing that the damages were too speculative and uncertain[15].

Oddo claimed that he left his jobs due to his acute mental distress and depression. The court allowed the judgment based on his investment counselor position to stand but agreed with the defendant that the loss of tuition benefits for his children at Davidson College was too speculative because the children were ten, seven and three years old, far from deciding whether or not to attend college. It was also unclear whether or not the school would continue to offer the benefit.[16]

The appellate court permitted the punitive damage awarded to stand because “evidence of sexual relations” will allow a plaintiff to get to the jury on the issue of punitive damages in a claim for alienation of affections.”[17] The court noted that in the Presser had “engaged in sexual intercourse

with Oddo's wife on two separate occasions prior to her legal separation from plaintiff."[18]

Utah also permits a cause of action for alienation of affections, but the question in Heiner v. Simpson[19] was whether that claim could be pleaded along with the intentional and negligent infliction of emotional distress.[20] Paul Heiner was married to Christina Simpson for 25 years. Prior to her marriage, Christina, while in her teens, lived with Tom Simpson and his wife because of problems in her family.[21] Tom Simpson and Christina began a sexual relationship that continued during her marriage to Heiner. Two of the children born during the marriage were Simpson's biological children. Christina and Heiner later divorced and Heiner sued Simpson for fraud, intentional and negligent infliction of emotional distress, and alienation of affection.[22]

While the court dismissed the claim for fraud, it allowed the emotional distress claims along with the claim of alienation of affections as long as Heiner did not recover the same damages twice.[23]

WIFE v. GIRLFRIEND/CURRENT WIFE

Another case from North Carolina, Hutelmyer v. Cox[24], involved the ex-wife of the plaintiff's ex-husband.

Dorothy Hutelmyer sued Margie B. Cox for alienation of affection and criminal conversation. The facts were that Dorothy and Joseph Hutelmyer were married in 1978 and lived together with their three children until 1996. When the Hutelmyers divorced, Joseph married Cox in 1997.[25]

Dorothy testified that she and Joseph enjoyed a fairy tale marriage that was "joyous, warm and devoted."[26] They took numerous family vacations, coached their children's teams, and volunteered with local organizations. Dorothy and Joseph took business trips together and Joseph wrote love

poems to his wife and even gave her a collection of love songs as a Valentine Day's gift one year. The couple maintained an active sexual relationship.[27]

After Margie Cox separated from her first husband in May 1992 she became flirtatious with Joseph Hutelmyer for whom she worked as a secretary.[28]

They began to spend more time together, dining and working late at the office. She began accompanying Hutelmyer on his business trips instead of wife Dorothy.[29]

Joseph began staying over night at Cox's home and the couple openly displayed their affection at work. As he began to spend less time with his wife and family, his intimacy with Dorothy declined.

In January, 1996, Joseph told Dorothy that he was leaving. The latter testified that she was shocked and heartbroken at this announcement.[30]

Cox admitted that she and Joseph began a sexual relationship in 1994 which continued through 1996. She claimed that she believed that he had moved into an apartment but admitted that Joseph had told her that he wanted to mend his relationship with his wife.[31]

Dorothy Hutelmyer brought evidence of her emotional and physical distress she suffered as the result of the ending of her marriage as well as loss of income, life insurance and pension benefits.[32]

The jury returned a verdict finding Cox liable for alienation and criminal conversation awarding Dorothy Hutelmyer $500,000 in compensatory and $500,000 in punitive damages.[33]

Hawaii also recognizes a claim for alienation of affection.

In Hunt v. Chang,[34] Joan H. Hunt sued for herself and her minor child for alienation of affections.

The Supreme Court of Hawaii cited the five elements of a cause of action established in a case called Long v. Fischer.[35]

1. The defendant must have exercised improper, willful and malicious influence on the Plaintiff's spouse in derogation of the plaintiff's marital rights.

2. Plaintiff's spouse must not have voluntarily accepted defendant's advances at the outset of the affair.

3. Plaintiff's spouse must not have actively contributed to the procuration by intentionally seeking the companionship and affection of the defendant.

4. The plaintiff must prove he or she was not at fault in causing the other spouse's affections to stray.

5. The willful and malicious influence of the defendant on the plaintiffs spouse must be proven as the procuring cause of the loss of love and affection which plaintiff's spouse formerly held for the plaintiff.[36]

Joan Hunt and James were married in June, 1964 and their son was born 29 days after their marriage.[37] Evidence showed that James Hunt had problems with alcohol and that he regularly changed employers. Joan and son, Jimmy followed James to his various jobs in different states.[38]

In 1977, Joan filed a divorce complaint against James in California because of his drinking and gambling but James promised to stop and so she dropped the divorce petition.[39]

In September 1974, James went to Hawaii to work as a general manager at a restaurant while Joan and Jimmy remained in Phoenix.

James Hunt met Elaine Chang in October, 1974. The latter admitted that she knew he was married. A few months later Hunt and Chang moved in together.[40]

Chang supported Hunt while he was living with her including trips abroad and to Las Vegas. Chang even gave Hunt money with which to gamble.

Joan Hunt claimed that James wrote her twice a week and called her every Sunday from August, 1974 until June, 1975. James said that he wrote only two or three times a month.[41]

Eventually James wrote Joan that they were "through."[42]

Joan later learned from a friend that Elaine Chang and James "were very friendly." When Joan called James in Hawaii, he asked her not to come to Honolulu and said that she and Jimmy should stay in Arizona.[43]

Elaine Chang broke in on the conversation and told Joan "I am supporting him and you are using my telephone and I don't want you to call this house now or ever again."[44]

James later testified that he had thought of divorcing Joan and that he was not in love with her when left for Hawaii.[45]

Joan testified that she and James "were very much in love. Had been for years."[46]

The Hawaii Supreme Court held that Joan Hunt had failed to prove all five elements of the claim for alienation of affection established by the case Long v. Fischer.[47]

The court found that Chang had exercised "improper, willful, and malicious influence on James Hunt in derogation of Joan Hunt's marital rights and that the latter "was not at fault in causing the spouse's affections to stray," but that Joan Hunt's claim fell short because, although James Hunt

voluntarily accepted Chang's advances at the outset and actively contributed to Chang's effort of procuring, Joan Hunt failed to prove Chang's willful and malicious influence on James caused the loss of love and affection thus failing to establish a claim for alienation of affection.[48]

The court also rejected Joan Hunt's claim for alienation of affection for James, Jr. because a minor child does not have a cause of action for alienation of affection.[49]

THE EMPLOYER/EMPLOYEE SITUATION

Thornburg v. Federal Express Corp. provided an unusual set of facts for an alienation of affection claim.[50] Keith and Roberta Thornburg had been married since 1986. In 1997, Roberta began an affair with Wade Hunt, her supervisor, when both worked for Federal Express.[51]

Keith Thornburg confronted Hunt and the latter ended the relationship with Roberta. The Thornburgs later reconciled their marriage.[52]

Some Fed-Ex employees filed grievances concerning Hunt's sexual misbehavior on the job claiming discrimination. During the Fed-Ex investigation, the Hunt-Thornburg liaison came to light.[53]

Roberta Thornburg was so upset by the disclosure that she became disabled from doing her job and had to assume "light duty" assignments.[54]

Fed-Ex tried to help her find another job and later offered her a transfer to an office in Savannah. Roberta wanted to accept the offer but Keith Thornburg refused to move and told her if she accepted, the marriage was over.[55]

Roberta took the transfer and moved with her two children to Savannah while her spouse was out of town.

Upon arriving home and discovering his wife and family gone, Thornburg went to the Fed-Ex office where

Roberta had worked and inquired about her whereabouts. Fed-Ex declined to provide any information.[56]

As a result, Thornburg sued Federal Express alleging 1) alienation of affection, 2) negligent infliction of emotional distress and 3) the intentional infliction of emotional distress. The Missouri Court of Appeals dismissed all the claims.[57]

The Thornburg case is not the only one in which an employer was sued for alienation of affections. A Utah case, Jackson v. Righter considered the issue of employer vicarious liability for the tort. Jackson's ex wife worked for Novell, Inc. Her supervisor promoted her and gave her bonuses and gifts.[58]

Ms. Jackson and her supervisor became close, traveled together and began an affair. When the relationship ended, Mrs. Jackson began an affair with her co-worker.[59] Mr. Jackson discovered his wife's affairs and attempted to reconcile the marriage without success and subsequently divorced.[60]

Jackson sued Novell and the two employees. The suit against the former was based on vicarious liability for the negligent supervision and retention of the employees.[61]

The Utah Supreme Court held that some actions, like the employees' conduct, was outside of the scope of employment. Employers should not have a duty to monitor their employees to determine any personal relationships between them because they would clearly be outside of the scope of employment.[62]

REVIVE THE TORT OF ALIENATION OF AFFECTION?

Among the reasons to permit a civil action for the tort of alienation of affection were to ensure the legitimacy of children because property was passed from father to son. This issue would seem to be less important today because of the existence of paternity and DNA testing.[63]

Another reason for the tort was to protect the husband's property rights to his wife. Women are no longer considered chattel of the husband.[64] In fact women have achieved equality with men in many areas.

A third reason for the tort was to protect marriage from outside interference. This would seem to be the most legitimate reason because permitting such lawsuits would be a deterrent to outsiders who might interfere with the relationship. By and large modern marriage is an economic as well as a personal relationship. In the modern marriage, both parties contribute economically to the enterprise. When a third party interferes with the marital relationship, the economic impact can be devastating.

Consider the case of Candi Wagner who married Gary Vessel. After nine years of marriage and three children, Wagner learned that Vessel was having an affair.[65] Wagner discovered letters written by one Cathy Nolen to Vessel. Wagner's lawyer characterized the letters as part of a seduction that destroyed Wagners' marriage.[66]

The Utah jury agreed that Nolen caused the alienation of Vessel's affection and awarded Wagner $500,000 payable in installments of $540 per month. Nolen's wages were garnished to fund the award.[67]

There are many challenges in bringing these suits. First, the plaintiff must show that the marriage was sound before the complained of affair occurred.[68] Second, it is not enough to prove that there was an affair but that it was the cause of the end of the marriage.

Third, lawyers are reluctant to represent plaintiffs on a contingency basis because the outcome is never assured. Plaintiffs can lose the case or settle out of court because they want to maintain their privacy.[69]

Critics claim alienation of affection has been used as a form of blackmail to extract money from the guilty party who

has engaged in an affair and who may decide to settle a case to avoid untoward publicity.[70]

Despite the fact that many states have abolished the cause of action, at least one is considering its reinstatement.

A bill introduced into the South Carolina legislature in 2008 would revive the claim.[71]

Supporters say that the law would protect families and make third parties think twice about breaching a marriage because such an act would have grave financial consequences for the culprit.

The sponsor of the South Carolina law, Jake Knolls, says that if there are consequences when someone steals your property, there should be reparations paid when someone steals your spouse.[72]

CONCLUSION

While there appears to be sentiment to revive the cause of action for alienation of affection given court decisions and other developments, there are some objections due to its historic origins. Perhaps the tort should be reestablished but renamed to intentional interference with an economic relationship, focusing on the financial implications of disrupting a marriage when both parties are contributing to the relationship. This would satisfy those who feel that reinstating the alienation of affection would revive memories of women being regarded as property.

ENDNOTES

[1] Bruce V. Nguyen, "Hey, That's My Wife! - - The Tort of Alienation of Affection in Missouri," 68 Mo.L.Rev 241 (2003) at 243. (hereinafter "That's My Wife")
[2] Id.
[3] Id at 244.

[4] Id See also Hermance v. James 47 Barb 120 (N.Y. Gen Term 1866)

[5] States abolishing alienation of affections include the following: Alabama, Ala.Code 6-5-331 (1993); Arizona, Ariz.Rev.Stat.Ann.25-341 (West 2000); Arkansas, Ark. Code Ann. 16-118-106 (Michie 2001); California, Cal. Civ. Code 43.5 (West 1982); Colorado, Colo. Rev. Stat. 13-20-202 (1997); Connecticut, Conn. Gen. Stat. 52-572b (1991); Delaware, Del Code. Ann. Tit 10, 3924 (1999); District of Columbia, D.C. Code Ann. 16-923 (2001); Florida, Fla. Stat. ch 771.01 (1997); Georgia, Ga. Code Ann. 51-1-17 (1998); Indiana, Ind. Code 34-12-2-1 (1998); Kansas, Kan.Stat.Ann.23-208 (2995); Maine, Me. Rev. Stat. Ann. tit 14 301 (West (2001); Maryland, Md. Code Ann. Family Law 3-103 (1999); Massachusetts, Mass. Gen. Laws Ann. Ch. 207, 47B (West 1998); Michigan, Mich. Comp. Laws 551.301 (repealed 1980); Minnesota, Minn. Stat 553.01 (2000); Montana, Mont. Rev. Code Ann. 27-1-601 (Smith 2001); Nebraska, Neb. Rev. Stat. 25-21, 188 (1995); Nevada, Nev. Rev. Stat. 41.380 (2002); New Hampshire, N.H. Rev. Stat. Ann. 460:2 (1992); New Jersey, N.J. Stat. Ann.2A23-1 (West 2000); New York, N.Y. Civ. Rights Law 80-a (McKinney 1992); North Dakota, N.D. Cent. Code 14-02-06 (1997); Ohio, Ohio Rev. Code Ann. 2305.29 (Anderson 2001); Oklahoma, Okla. Stat. tit. 76, 8.1 (1995); Oregon, Or .Rev. Stat. 30.840 (1999); Pennsylvania, 23 Pa.Cons.Stat.1901 (2001); Rhode Island, R.I. gen. Laws 9-1-42 (1997); Tennessee, Tenn. Code Ann. 36-3-701 (2001); Texas, Tex. Fam. Code Ann.1.107 (Vernon 1998); Vermont, Vt. Stat. Ann. tit 15, 1001 (1989); Virginia, Va. Code Ann. 8.01-220 (Michie 2000); West Virginia, W. Va. Code 56-3-2a (1997); Wisconsin, Wis. Stat. Ann. 768.01 (West 2001); Wyoming, Wyo. Stat. Ann. 1-23-101 (Michie 2001). Veeder points out that two states have not adopted the cause of action. Id. Alaska has not addressed the cause of action by statute or case law. Id. See Moulin v. Monteleone, 115 So. 447, 448 (La. 1928) (refusing to recognize the cause of action for alienation of affections in Louisiana).

[6] States judicially abolishing the cause of action for alienation of affections include Idaho, Iowa, Kentucky, South Carolina and Washington: O'Neill v. Schuckardt, 733 P.2d 693, 698 (Idaho 1986); Funderman v. Mickelson, 304 N.W.2d 790, 794 (Iowa 1981); Hoye v. Hoye, 824 S.W.2d 422, 422 (Ky.1992); Russo v. Sutton, 422 S.E.2d 750, 751 (S.C.1992); Wyman v. Wallace, 615 P.2d 452, 455 (Wash.1980) [hereinafter Wyman II]. Four of these five abolished it as a common law doctrine (Idaho, Iowa, Kentucky and Washington) while one (South Carolina) abolished the cause of action which was based upon a statute. Veeder, 1999 S.D. 23, P12, 589 N.W.2d at 614.

[7] States maintaining a cause of action for alienation of affections include: Illinois (740 Ill. Comp. Stat. 5/1 (West 1993)); South Dakota (S.D.C.L. 20-9-7 (Michie)), Hawaii (Hunt v. Chang, 594 P.2d 118, 123 (Haw. 1979)), Mississippi (Kirk v. Koch, 607 So.2d 1220, 1222 (Miss. 1992)), Missouri (Van Vooren v. Schwarz, 899 S.W.2d 594, 595 (Mo. Ct. App. 1995)), New Mexico (Birchfield v. Birchfiel, 217 P. 616, 618-19 (N.M. 1923), North Carolina (Hutelmyer v. Cox, 514 S.E.2d 554, 560 (N.C. Ct. App. 1999) and Utah (Heiner v. Simpson, 23 P.3d 1041, 1042 (Utah 2001).
[8] Russo v. Sutton 422 S.E. 2d 750 (S.C.1992).
[9] 158 N.C. App 360 581 S.E. 2d 123; 2003 N.C. App LEXIS 1796 (2003).
[10] 581 S.E.2d 126.
[11] Id.
[12] Id.
[13] Id.
[14] Id.
[15] Id.
[16] Id at 128.
[17] Id at 129.
[18] Id.
[19] 23 P.3d 1041, 421 Utah A2v. Rep 7, 2001 UT 39.
[20] Id.
[21] Id.
[22] Id.
[23] Id.
[24] 514 S.E. 2d 554, 133 N.C. App 364 (1999).
[25] 514 S.E. 2d 557.
[26] Id.
[27] Id.
[28] Id.
[29] Id.
[30] Id at 558.
[31] Id.
[32] Id at 561.
[33] Id.
[34] 594 P.2d. 118, 60 Hav 608 (1979).
[35] 210 Kan.21, 499 P.2d 1063 (1972).
[36] 594 P.2d 123.
[37] 594 P.2d 120.
[38] Id.
[39] Id.
[40] Id.

[41] Id at 121.
[42] Id.
[43] Id.
[44] Id.
[45] Id at 122.
[46] Id.
[47] 210 Kan 21 supra note 35.
[48] 594 p.2d 125.
[49] Id.
[50] 62 S.W. 3d 421 (Mo Ct App 2001)
[51] Id at 424
[52] Id.
[53] Id.
[54] Id.
[55] Id at 425.
[56] Id.
[57] Id.
[58] 891 P.2d. 1387 (Utah 1995).
[59] Id at 1390.
[60] Id.
[61] Id.
[62] Id at 1393-94.
[63] "Hey, That's My Wife! Supra note 1 at 252.
[64] Id.
[65] Michael Kranish, "The Price of Breaking Up a Marriage," Boston Sunday Globe, Aug 26, 2001, at D1 and D2.
[66] Id at D2.
[67] Id.
[68] Id.
[69] Id.
[70] Id.
[71] "S.C. Bill Would Let Jilted Spouses Sue," N.H. Register, April, 2008 at B4.
[72] Id.

A CRITICAL EVALUATION OF THE LEGAL SAFEGUARDS OF AMERICA'S FOOD SAFETY SYSTEM

by

Dennis D. DiMarzio*

I. INTRODUCTION

While America is currently engaged in ongoing conflicts abroad and the Country struggles to navigate through a major economic crisis at home, it has yet more on its plate which must be addressed. Literally, it is the safety of the food that America puts on its plates that merits prime attention. The purpose of this paper shall be to present a critical evaluation of the legal safeguards of America's food safety system.

As the title of this paper clearly suggests, America's food safety system is "broken" and it needs to be "fixed." However, any complete and meaningful evaluation of the food safety system must necessarily trace its evolution. Therefore, a brief historical overview of America's food safety system will first be presented. Substantial attention will then be given to identifying the shortcomings of the current dysfunctional food safety system. Next, remedies available to victims of unsafe food will be discussed. Finally, possible steps that could be and are being taken to make America's food safety system safe again will be presented.

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*Professor of Business, Henderson State University.

II. BRIEF HISTORICAL OVERVIEW OF AMERICA'S FOOD SAFETY SYSTEM

The initial and yet foundational federal law that was designed to address food safety in America was enacted at the turn of the last century. The Pure Food and Drugs Act[1] was passed in 1906, and the Federal Meat Inspection Act[2] was passed in 1907. The Bureau of Chemistry administered the Food Act and the Bureau of Animal Industry administered the Meat Act.[3] (The bifurcated statutory framework remains in place yet today.) In 1927, Congress separated the Chemistry Bureau's research and enforcement responsibilities and assigned the latter to a new Food, Drug, and Insecticide Administration (FDIA), still within the USDA.[4] In 1930, the USDA deleted the "I" from the agency's name, leaving it as the FDA, the title that is used today.[5]

The reorganization of the food safety system continued over time. In 1940, President Roosevelt transferred the FDA from the USDA to the Federal Security Agency.[6] Meanwhile, the 1938 Federal Food, Drug, and Cosmetic Act was enacted.[7] It enlarged the FDA's food authority by allowing it to inspect factories,[8] to set safety tolerances for unavoidable poisons,[9] to create identity and safety standards,[10] and to require manufacturers to label food ingredients.[11] In 1953, the FDA was moved to the Department of Health, Education and Welfare (HEW).[12] In 1980, HEW was altered to create the Department of Health and Human Services (HHS) where the FDA remains today.[13]

"As the 20th Century progressed, FDA's scientists and those in the emerging food processing industry slowly built a food safety infrastructure for the United States that enabled us to claim that we had the safest food supply in the world."[14] In that earlier time, Americans grew much of their own food,

processed foods were rare, and some of the most lethal bacterial pathogens such as E Coli were unknown to nature.[15] Food imports were rare, and food safety inspections and enforcement tools were adequate for that time.[16]

Under the law, the FDA could pursue prosecution of a violating business's chief executive, seek an injunction against that business to keep it from selling contaminated food, and it had the authority to seize food found to be contaminated.[17] Generally, the FDA reacted to contaminated food already in the market place rather than taking preventive steps to safeguard the public. In fact, even with contaminated food already in the market place, the FDA had no mandatory recall power. (The lack of FDA mandatory recall power persists yet today).[18]

The United States Department of Agriculture (USDA) regulated meat, poultry, and various dairy products, and it had a continuous inspection and approval process in place that proved successful. "That system remains largely unchanged today …",[19] and it explains why those food products are generally safer yet today.[20]

Over time, other federal agencies became involved with food regulation. The Environmental Protection Agency (EPA), the Department of the Treasury, the Department of Commerce, the Centers for Disease Control and Prevention, the National Marine Fish Service, the Federal Trade Commission (FTC), the Alcohol and Tobacco Tax and Trade Bureau, and the Department of Homeland Security are just some of the more prominent federal agencies that work with over 3000 state and local agencies to oversee America's food safety.[21] Today, there are fifteen federal agencies with food safety responsibilities and at least 30 statutes that govern the area.[22]

Critics have repeatedly called for the consolidation of government control in the area of food safety.[23] As early as 1949, the Hoover Commission Report[24] recommended that the FDA be made part of the USDA. The Commission stated that the system "… creates great overlap and also confuses the public."[25] Again in 1977, the Senate Government Affairs Committee unanimously concluded that all federal food regulatory functions should be consolidated.[26] Even today, there is proposed legislation calling for consolidation of food regulatory powers.[27]

Many things have changed in America in the last century, but the Country's food safety system has remained largely unchanged since its foundational laws were enacted back in 1906. However, recent major food contamination recalls, and the circumstances that preceded those recalls suggest that change could be in the air.

III. AMERICA'S CURRENT DYSFUNCTIONAL FOOD SAFETY SYSTEM AND ITS SHORTCOMINGS

Perhaps, the strongest evidence that America's food safety system is dysfunctional and that change could be near is reflected in the number and severity of food contamination outbreaks. In a recent radio address, President Obama stated that "… the average number of outbreaks from contaminated produce and other foods … (is) 350 a year up from 100 a year in the early 1990s."[28] "The Centers for Disease Control and Prevention (CDC) estimates that as many as seventy-six million people suffer from food poisoning each year. Of those individuals, approximately 325,000 will be hospitalized, and more than 5,000 will die."[29] It is estimated that the overall negative economic impact of food borne illness may be as high as $83 billion dollars per year in the United States.[30]

Several severe food contamination outbreaks have occurred in recent years. In 2006, there were nationwide food borne illnesses and subsequent food recalls involving spinach, peanut butter, and chili. Spinach farmers reported losing $350 million.[31] In 2007, contaminated pet food imported from China resulted in the estimated death of 4,000 American pets and sickened thousands of other pets.[32] In 2008, a recall involving contaminated tomatoes resulted in $500 million dollars in losses to Florida farmers.[33]

However, the 2009 peanut butter food contamination case stands out as a classic illustration of how truly dysfunctional the current food safety system is in America. The Peanut Corporation of America sold peanut butter contaminated with salmonella, which is believed to have sickened more than 637 people and led to nine deaths. To date, more than 200 companies have recalled more than 2000 products.[34] The FDA had not inspected the plant in 8 years. While Georgia inspectors noted only minor violations, the Company ignored 12 positive test results showing the presence of salmonella in their peanut butter. The Company continued to ship its products to customers. The Company did not report these positive tests to the FDA nor did the law require them to do so.[35]

NestlA©'s inspectors, considering whether to buy products from the Peanut Corporation, sent its own inspectors to Company plants in Georgia and Texas. They observed rat droppings, dead insects, sanitary problems and other evidence of food contamination. NestlA© refused to buy any products, but it failed to notify the FDA or other customers about the food contamination.[36]

The Kellogg's Company hired American Institute of Baking International, the biggest inspection firm in the country

to audit the Peanut Company's facilities. Those audits resulted in a "superior" rating and even a "certificate of achievement award."[37] Meanwhile, The Peanut Corporation has closed all three of its facilities in Georgia, Texas, and Virginia because of salmonella contamination and it has filed for Chapter 7 Bankruptcy. Kellogg Company has lost $70 million dollars in food recalls, and it along with other Peanut Corporation products buyers are being sued for the contaminated food they sold.[38] The FDA in conjunction with the Justice Department has undertaken a criminal investigation of the Peanut Corporation, its president, and other executives.[39] The Texas Department of State Health Services assessed a $14.6 million fine against the Texas plant owned by the Peanut Corporation of America for violations involving unsanitary conditions and product contamination.[40]

The Peanut Corporation of America case is more disturbing yet again because it apparently sold contaminated products to the USDA and FEMA Departments. The USDA is recalling food packets it sent to 3 or 4 states for a free lunch program for poor children.[41] FEMA is recalling food packets it sent to tornado victims in Arkansas and Kentucky.[42]

The troubling facts involved in the Peanut Corporation of America case and the aforementioned other recent food contamination outbreaks clearly indicate the magnitude of the problem that America has with its food safety system. To say that the system is dysfunctional is an understatement. The profoundly simpler characterization presented earlier, that America's food safety system is "broken" better describes the sad current state of affairs.

A. An Under-funded and Understaffed Food Safety System

To ultimately remedy America's food safety system, one must first identify its specific shortcomings and then collectively address them. That the FDA is grossly under-funded and understaffed is not debatable. While the FDA is accountable for regulating 80% of the nation's food, it receives 24% of the food safety funding. [43] The Agency is only able to inspect about 5% of the domestic food outlets per year.[44] Worse yet, less than 0.2% of imported foods are subjected to FDA laboratory testing.[45] An FDA inspector estimated that at the current pace, it would take the FDA 1900 years to check all of the food outlets in the world.[46] The FDA recently tested a Chinese herbal supplement with a $150,000 machine known as a mass spectrophotometer at a lab in San Francisco. The test revealed such high levels of mercury that the machine had to be sent away for two weeks for proper cleaning.[47]

More workers with advanced scientific training and more advanced technology for food testing are required. This is necessary to better identify food contamination and then to trace the source of that contamination. The added expense for the government will be enormous, and it might require added fees for the food industry. Another possibility is that the government could authorize and hire independent food auditing firms[48] to assist them in carrying out their fundamental duty to protect the public health and safety.

B. An Outdated Food Safety System That Lacks Coordination, Communication, And Sufficient Regulation

While more funding for staff and technology would help improve America's food safety system, there are other major shortcomings that must be addressed to properly protect our food. Specifically, the System is outdated, and there is a

lack of coordination, communication, and sufficient food regulation. The essential framework of the regulatory legislation was enacted in 1906. In those earlier times, it was much easier to trace food from "the farm to the table." The food system today is far more complex. There are dramatically more food outlets, and food typically travels longer distances and "…through many hands and into many finished products."[49] It is now a global food system with 50% of our food being imported, including 60% of produce and 80% of seafood.[50] This is particularly troubling in today's world, where bioterrorism is an ongoing threat and other countries food safety systems are even worse than our own flawed system.

There are fifteen federal agencies with food responsibilities and at least 30 statutes that govern the area.[51] The two primary agencies are the USDA and the FDA. While there has long been a movement for consolidation, that would likely prove too costly and too complicated to accomplish any time soon.[52] Immediately, there is a strong push to concentrate more food regulatory powers into a central food agency.[53] That centralization of food safety authority in combination with proper coordination and timely communication between all parties in the food safety network would go far in improving food safety.[54]

Furthermore, more rigorous food regulation, especially with an eye toward imports and threats of bioterrorism, would improve food safety and the public's confidence in that safety. Currently, the FDA has no mandatory recall power in food contamination cases. It lacks a safety network sufficient to monitor imports. The Chinese pet food contamination outbreak that killed 4,000 American pets illustrates the problem. In 2007, because of ongoing drug and food contamination problems, the Chinese Government executed the top official of their own Food and Drug Administration.[55] While the

Bioterrorism Act of 2002 requires importers and foreign exporters of food to give advance notice to the FDA of specific shipments and requires them to maintain written records so that food traces can be accomplished,[56] the Agency still lacks a sufficient presence on foreign soil, and it does not properly monitor food processing employee backgrounds.[57]

The FDA lacks rigorous safety standards, including industry testing and reporting requirements. A lack of rigorous across the board safety standards negatively impacts home grown and imported food safety. Not requiring internal testing and FDA reporting of food contamination has contributed to countless food contamination outbreaks.

Finally, the FDA, in conjunction with the Justice Department and state authorities, ought to have stronger civil and criminal penalties in food contamination cases. Current penalties rarely result in jail time.

IV. REMEDIES AVAILABLE TO VICTIMS OF FOOD CONTAMINATION

When America's food safety system fails, countless consumers are victimized by food contamination. Those victims or their surviving heirs have litigation rights. One Commentator has accurately summarized their claims as follows: "In general, there are four different types of claims that have been brought against manufacturers: negligence, breach of warranty, strict products liability, and deceptive trade practices."[58]

A. Negligence

A traditional negligence claim requires the victim to establish that the defendant failed to exercise reasonable care,

which rarely proves to be a problem in a food poisoning case. The more difficult task often involves establishing proximate or legal causation.[59] Of course, if a consumer knew of the food contamination or should have been aware of it, an assumption of the risk or comparative negligence defense could bar or limit recovery.

B. Strict Tort Liability and Express and Implied Warranty Claims

"Breach of warranty claims can be brought for breach of both express and implied warranty under the Uniform Commercial Code, requiring that certain standards be met for a product to be merchantable and punishing those engaged in fraud."[60] Depending on the facts of a case, a victim might be able to prove a breach of implied warranty of merchantability (food wholesomeness) or a breach of implied warranty of fitness for a particular purpose in addition to a breach of express warranty.

The implied warranty and strict tort claims are "no fault" claims and therefore easier to prove than simple negligence. Strict tort claims require that there be an "unreasonably dangerous" defect in the product, easy enough to prove in a food poisoning case. Proximate cause issues still represent a potentially fatal flaw in the victim's claim. "Disclaimers" might also block a victim's claim. "…A London restaurant has been asking patrons who order steakburgers served rare to sign a disclaimer confirming that they will not sue the restaurant if they develop food poisoning."[61] The disclaimer might have provided the restaurant with a legal victory in court had a lawsuit been filed, but it proved to be a commercial disaster, scaring so many would be customers away that the restaurant ultimately withdrew the disclaimer.

C. Deceptive Trade Practices, Cruel And Unusual Punishment And Obesity Claims

In some states, a victim might successfully bring a statutory deceptive trade practices claim if fraud or false advertising is involved in their case. However, two other types of claims have proven most unsuccessful to date. Prison inmates, who suffer food poisoning while incarcerated, have repeatedly brought Constitutional violation claims[62] based on cruel and unusual punishment under the 8th Amendment.[63] To win in such a case, a claimant must show: "(1) that the deprivation of humane conditions of confinement was 'objectively, sufficiently serious' enough to pose a substantial risk of serious harm; and (2) that the prison officials acted with deliberate indifference."[64] Yet in other food litigation, some have attempted to hold the fast food industry accountable for their obesity based on false advertising, fraud and negligence.[65] Again, there have been no recoveries to date in those obesity claims, and there are not likely to be any recoveries in the future.

V. STEPS FOR A SAFER AMERICAN FOOD SYSTEM

The old expression about a bad situation being "desperate, but not hopeless" might well be used to describe America's current food safety situation. This paper earlier identified major shortcomings in America's food safety system. Steps to make the system safer necessarily involve addressing those shortcomings and taking appropriate measures to improve the system. There is hope for positive change because the American Government, including the FDA, America's citizens, and even those food businesses impacted by the system, are quickly moving to improve our desperate situation.

A. American Government Ready For Action

In a recent address, President Obama called our food safety system "…a hazard to public health."[66] He pledged a billion dollar investment to upgrade our food safety. Along with announcing top FDA appointments, he said he is "…setting up a Food Working Group, seeking advice from cabinet secretaries and senior officials on strengthening food safety laws, improving coordination among government agencies and enforcing food safety laws."[67]

It is reported that there are "…about half a dozen food safety reform bills…pending on Capitol Hill."[68] The bill which has "…the best chance of passing…"[69] is sponsored by U.S. Senators Gregg, Durbin, Kennedy and Burr. It is a comprehensive bill and addresses the key shortcomings in America's food safety system. New Hampshire Senator Gregg has indicated that "…The bipartisan bill focuses on four key areas where FDA's authorities and resources need to be improved: food-bone illness prevention; food-borne illness detection and response; food defense capabilities; and overall resources."[70]

The Bill improves America's capacity to prevent food safety problems in a variety of ways. First, it "…Requires all facilities to have in place preventive plans to address identified hazards and prevent adulteration, and gives the FDA access to these plans and relevant documentation."[71] Secondly, in a food emergency, it expands FDA access to food records.[72] Thirdly, it "…allows the FDA to recognize laboratory accreditation bodies to ensure U.S. food testing labs meet high quality standards and requires food testing performed by these labs be reported to the FDA.[73] Furthermore, it "…allows the FDA to enable qualified 3rd parties to certify that foreign food facilities

comply with U.S. food safety standards."[74] Finally, it "…requires importers to verify the safety of foreign suppliers and imported food."[75]

The Bill dramatically improves America's capacity to detect and respond to food-borne illness outbreaks. FDA inspections would increase so that there would be annual inspections of high risk facilities and inspections of other facilities at least once every four years.[76] Surveillance systems would be set up to "…improve the collection, analysis, reporting, and usefulness of data on food-borne illnesses."[77] The Bill would require "…the Secretary of HHS to establish a pilot project to test and evaluate new methods for rapidly and effectively tracking/tracing fruits and vegetables in the event of a food-borne illness outbreak."[78] Most importantly, the Bill gives the "…FDA mandatory recall authority of a food product when a company fails to voluntarily recall the product upon FDA's request."[79] Finally, the Bill would give the FDA the power to suspend a food facility's registration "…if there is a reasonable probability that food from the facility will cause adverse health consequences or death."[80]

Furthermore, the Bill enhances U.S. food defense capabilities, and it increases funding to support the FDA's food safety activities. Specifically, the Bill "…directs the FDA to help food companies protect their products from intentional contamination and calls for a national strategy to protect our food supply from terrorist threats and rapidly respond to food emergencies."[81] It also increases funding for FDA's food safety activities through "…increased appropriations and targeted fees for domestic and foreign facilities."[82]

B. The FDA Releases a One Year Summary of Its Food Protection Plan

In December of 2008, the FDA offered a summary of their food protection plan. They identified three core elements in that plan as follows: (1) Prevention, (2) Intervention, and (3) Response.[83] If the proposed federal legislation goes through, it would, in fact, enable the FDA to more successfully protect American food and to prevent major future food contamination outbreaks.

Another step that would improve food safety involves more consolidation of the federal agencies that regulate food safety and better coordination and communication among those agencies and state and local governments. Critics, even many within the government itself, have long called for consolidation of government control in the area of food safety.[84] Ultimately, a bold step involving such a major overhaul of the federal regulatory control of food safety would be most expensive and complicated, but the improved protection of the public health and safety would merit the investment of both money and time.

C. Food Industry Self-Policing and the Public's Cooperation

The only additional area for food safety improvement would involve better self-policing by the food industry itself and greater public cooperation, whereby food contamination victims quickly report their case and fully cooperate with authorities to trace their food source. The food industry ought to have a record and reporting system in place to prevent the shipment of contaminated food. Food industry employees should be required to report evidence of food contamination to their employer, who should then be required to report that information to the FDA. The food industry ought to encourage and reward employees or members of the public who whistle-

blow or quickly report food contamination. Timely food contamination reports from the food industry and the public would enhance the Government's ability to prevent or to at least better control food-borne illnesses.

VI. CONCLUSION

Perhaps no one better described the current state of America's food safety system than U.S. Senator Durbin when he said it was "…outdated, under-funded and overwhelmed."[85] Again, it is a "desperate" but not a "hopeless" situation. The American Government has now identified the enormity of the problem, and it will soon be addressed in a bold and new way. If the food industry engages in more rigorous self-policing, and the public lends its full cooperation to the food safety effort, there is every reason to believe that food safety in America will improve in the future. Collectively, the Government, acting in concert with the food industry and a cooperative public, can rise to the challenge of safeguarding America's food.

ENDNOTES

[1] Pub. L. No. 59-384, 34 Stat. 768 (1906) (repealed 1938).
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THE DIMINISHING ROLE OF INTERNATIONAL TREATIES AND DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE IN THE COURTS OF THE UNITED STATES (*MEDELLIN v. TEXAS*)

by

J.L. Yranski Nasuti, JD, LLM*

The Supremacy Clause of the U.S. Constitution states that "…all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[1] Whether a treaty has been made under the authority of the United States, whether it must be enforced by individual states, and whether the president of the United States can compel a state court to enforce the decision of an international tribunal interpreting a treaty obligation of the United States were three issues that the U.S. Supreme Court addressed in the case of *Medellin v. Texas*.[2] The Court, in a six to three decision, concluded that a foreign national, who had been convicted of a capital offense in a state court, could not invoke a treaty, a decision of the International Court of Justice, and a presidential memorandum to preempt the state's limitations on the defendant's ability to file successive habeas corpus petitions. Although the decision involved a criminal appeal, it provided the U.S. Supreme Court with the opportunity to articulate a new, and narrow, bright line test for the interpretation of treaties that is now applicable to all kinds of public and private international law disputes.

*Professor of Legal Studies in Business, Iona College, New Rochelle, NY

I.

Treaty Law

The three international treaties at the center of the *Medellin* case are the Vienna Convention on Consular Relations (hereinafter "Vienna Convention" or "Convention"),[3] the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (hereinafter "Optional Protocol"),[4] and the United Nations Charter.

The Vienna Convention, whose express purpose is to "contribute to the development of friendly relations among nations,"[5] formalizes fairly uniform practices among nations regarding consular relations. Article 36 of the Convention specifically sets forth the circumstances under which a person, who has been detained in a foreign country, may have access to a consulate officer of the detainee's home country.[6] Article 36(1)(b) provides that the detaining authorities must, at the request of the detainee and without delay, notify the consular officers of the detention and promptly inform the detainee of his or her rights under the treaty. Article 36(2) further states that the detainee's rights should be exercised in conformity with the laws and regulations of the arresting county – provided that the rules and regulations "enable full effect to be given to the purposes for which [those] rights…are intended." The United States ratified the Vienna Convention, as an Article II treaty, with the unanimous advice and consent of the Senate. The treaty became binding on the United States on December 24, 1969. At the time of the ratification, the representatives of the executive branch assured the Senate that the Vienna Convention was entirely self-executing and would not require any implementing legislation.[7]

The Optional Protocol to the Vienna Convention, which was also ratified by the United States, establishes compulsory jurisdiction by the International Court of Justice (I.C.J.) in matters involving either the interpretation or application of the Vienna Convention.[8] It allows a complaining party to file a unilateral application with the I.C.J. in those instances where both countries are parties to the Convention and to the Optional Protocol. The United States was, in fact, the first signatory of the Vienna Convention and Optional Protocol to institute proceedings in the I.C.J. based on violations of the Convention.[9]

The final treaty at issue in the *Medellin* case is the Charter of the United Nations. Article 94(1) of the Charter specifies that a signatory of the Charter "undertakes to comply with the decision of the International Court of Justice in any case in which it is a party." The Statute of the International Court of Justice,[10] which is incorporated into the Charter, further states that while a judgment of the I.C.J. only "binding force…between parties and in respect of that particular case,"[11] it is considered to be final and without the right of appeal.[12]

I.C.J. Case Law

Within the past ten years, the International Court of Justice decided three cases – Case Concerning the Vienna Convention on Consular Relations *(Paraguay v. United States),*[13] *LaGrand Case (The Federal Republic of Germany v. United States),*[14] and *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*[15] – in which it concluded that the United States had violated Art. 36(1)(b) of the Vienna Convention when it failed to inform the consular officers of Paraguay, Germany and Mexico that their national had been detained in the United States.

In the *Case Concerning the Vienna Convention*, Paraguay alleged that one of its citizens, Angel Francisco Breard, had been arrested and convicted of attempted rape and capital murder in a Virginia state court without being informed of his rights under the Vienna Convention. Breard unsuccessfully appealed his case to the Virginia Supreme Court[16] and was denied certiorari by the U.S. Supreme Court.[17] He subsequently filed a motion for habeas corpus in federal court – asserting, for the first time, that his Vienna Convention rights had been violated. At the same time, the government of Paraguay filed its separate claim in the International Court of Justice against the United States. The I.C.J. responded by issuing a provisional order requesting that the United States stay Breard's execution until the I.C.J. could deliver a final decision. The U.S. Supreme Court denied Breard's writ of habeas corpus on the grounds that he had procedurally defaulted on his Vienna Convention claim when he failed to raise that claim in state court and declined to issue an order staying the execution.[18] The state of Virginia executed Breard without waiting for the I.C.J. to deliver a final judgment. At that point, the I.C.J. accepted Paraguay's request to discontinue the proceedings with prejudice.

The detainee's in the *LaGrand Case* were two German national, Karl and Walter LaGrand, who had been convicted of murder and sentenced to death by an Arizona state court. The German government's claim before the I.C.J. accused the United States of violating the Vienna Convention when it failed to inform the brothers of their right to contact a German consular officer. The I.C.J.'s judgment, which was delivered after the brothers were executed, was entered in favor of Germany. The Court held that: 1. Article 36 of the Convention conferred individual rights on detained foreign national; 2. the United States failed to comply with the treaty; and 3. the procedural default rules of the United States

prevented the rights under the treaty from being given full effect.[19] The Court added that the United States, "by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set for in that Convention.[20]

Mexico brought the *Aveno* case to the I.C.J. on behalf of 51 Mexican national who had been detained, tried, and convicted of capital crimes in the United States. The I.C.J. concluded that the United States had engaged in three categories of violations under the Vienna Convention. The first was that the United States, and its local authorities, failed to inform the Mexican nationals that they had a right to contact the Mexican consulate.[21] The second was that the United States failed to notify the Mexican consulate that its nationals were being detained in the United States.[22] The final violation related to the inability of the Mexican consuls to provide for legal representation for the detainees.[23] The I.C.J. held that the adequate reparation for these particular violations of Article 36 would involve the review and reconsideration of the convictions and sentences of the Mexican nationals by the United States courts. Although the I.C.J. allowed the United States to decide the means for the review and reconsideration, it specified that it had to involve a judicial, and not an executive clemency, process.[24]

The Presidential Memorandum

President George W. Bush reacted to the I.C.J.'s *Avena* judgment in two ways. The first was to issue an order ("President's Memorandum for the Attorney General, Subject: Compliance with the Decision of the International Court of Justice in *Avena*")(hereinafter "memorandum") stating Bush's intention to ensure that the United States discharge its international legal obligations under the *Avena* decision and

asserting his power as president to require state courts to comply with the decision of the I.C.J. in accordance with general principles of comity.[25] Bush's second action was to instruct the Secretary of State to inform the Secretary-General of the United Nations that the United States was invoking its rights to withdraw from the Optional Protocol.

II.

The Preliminary *Medellin* Cases

In 1993, Jose Ernest Medellin, a Mexican national who had spent most of his life in the United States, was arrested in connection with the gang rape and murder of two Houston female teenagers. It was alleged that Medellin, a member of the "Black and Whites" gang, had tried to talk to one of the young women. When she attempted to run away, he stopped her and threw her to the ground. Her friend was then grabbed by the other gang members. Both women were repeatedly raped over the course of an hour. In the end, the gang members murdered the girls and discarded their bodies in a wooded area.

When the Texas police arrested Medellin, they gave him his *Miranda* warnings – but failed to inform him of his right, under the Vienna Convention, to ask the government to notify the Mexican consulate of his detention. Within hours of his arrest, Medellin had signed a written waiver and given a detailed confession. He was eventually tried, convicted of capital murder, and sentenced to death. His conviction and sentence was affirmed on appeal.[26]

Medellin raised the claim that Texas had violated his Vienna Convention rights for the first time subsequent application for a writ of habeas corpus that was filed in the

Texas state court.[27] The district court denied his writ on the grounds that: 1. he was procedurally barred from a review since he had failed to raise the Vienna Convention claim at trial; 2. he lacked standing as a private individual to file claims based on the Vienna Convention; 3. he had failed to show any actual harm since he had received effective legal representation and his constitutional rights had been safeguarded; and 4. he had not been able to prove that his Fifth, Sixth, or Fourteenth Amendment rights had been violated or that the failure to notify the Mexican consulate had affected the validity of his conviction and sentence. On appeal, the Texas Criminal Appellate Court affirmed the lower court's decision to deny the writ.[28]

Medellin next turned to the federal courts for relief. After the U.S. District Court denied his application for a writ of habeas corpus that was based on his Vienna Convention claim,[29] he filed a certificate of appealability. Shortly thereafter the I.C.J. rendered its decision in the *Avena* case. (It should be noted that Medellin had been one of the 51 detainees named in the petition that was filed by Mexico with the I.C.J.). Despite the ruling by the I.C.J. that the United States had violated the Vienna Convention, that the Convention conferred individual rights, and that the convictions of the detainees had to be reviewed irregardless of procedural default rules, the Court of Appeals for the Fifth Circuit denied Medellin's request of appealability.[30] The Fifth Circuit's decision was primarily based on two cases – *Breard v. Greene*[31] and *United States v. Jimenez-Nava*.[32] (In *Breard*, the U.S. Supreme Court held that procedural default rules would trump claims based on violations of the Vienna Convention. In *Jimenez-Nava*, the Fifth Circuit ruled that the Vienna Convention did not create individually enforceable rights.)[33] Medellin then filed, and was granted, a writ of certiorari by the U.S. Supreme Court.[34]

Prior to the date scheduled for oral arguments in the U.S. Supreme Court, President Bush issued his memorandum instructing state courts to give effect to the *Avena* decision as a matter of comity. This encouraged Medellin to file a second state application for a writ of habeas corpus requesting the Court of Criminal Appeals of Texas to give full effect to both the *Avena* decision and the President's memorandum.[35] At that point, the U.S. Supreme Court dismissed Medellin's pending case as improvidently granted noting the possibility that "Texas courts will provide Medellin with the review he seeks pursuant to the *Avena* judgment and the President's memorandum."[36]

The Texas Court of Criminal Appeals dismissed Medellin's second application for a writ of habeas corpus on the grounds that it was an abuse of the writ.[37] It also rejected Medellin's two main assertions. The first was that the *Avena* decision the President's memorandum constituted binding federal law that would preempt the Texas procedural rule that prohibited successive habeas corpus petitions.[38] The second was that the original decision and memorandum did not consider previously unavailable factual and legal bases, which under §5(a)(1), would justify an exception to the prohibition against successive filing. The denial of the writ was based, in part, on the U.S. Supreme Court's holding in the consolidated cases of *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*.[39] Although the Court, in the *Sanchez-Llamas* case, skirted the issue of whether the Convention granted individual rights that could be invoked in a judicial proceeding, it ruled that the exclusionary rule was not a remedy for an Article 36 violation and that Article 36 claims were subject "to the same procedural default rules that apply generally to other federal-law claims."[40] The Texas appellate court concluded that the Supremacy Clause of the U.S. Constitution did not allow the I.C.J.'s *Avena* decision and the President's memorandum to preempt the Texas Code of Criminal Procedure, Art.11.701 §5.

III.

Medellin and the U.S. Supreme Court

In 2007, the U.S. Supreme Court granted Medellin's second request for a writ of certiorari – this time to review the state court's denial of Medellin's most recent habeas corpus petition.[41] The grant of certiorari came after the I.C.J. had already held on three separate occasions that the United States had violated of its obligations under the Vienna Convention; the U.S. Supreme Court had rejected multiple requests by convicted foreign detainees to assert Art. 36 rights; President Bush had issued his memorandum instructing the state courts to comply with the I.C.J.'s *Avena* decision; and the Texas court had refused to follow the decision of the I.C.J. and the President's memorandum to grant a writ of habeas corpus to review and reconsider the conviction. The Supreme Court's 6-3 decision was significant because it established an important new bright-line test regarding treaty law at the same time that it limited President Bush's vision of presidential power.

Three opinions were issued in the *Medellin* case: Chief Justice John Roberts delivered the majority opinion, which was joined by Justices John Roberts delivered the majority opinion, which was joined by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito; Justice John Paul Stevens presented a separate concurring opinion; and Justices David Souter and Ruth Bader Ginsburg joined a dissenting opinion that was written by Justice Stephen Breyer. Each opinion tacked the constitutional and presidential power questions from different perspectives.

The Majority Decision

For the majority, the first issue was not whether the *Avena* decision "constitutes an *international* law obligation on the part of the United States" – but rather "whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts."[42] In order to answer this question, the Court employed an interpretative approach to differentiate between self-executing treaties (those that have automatic domestic effect as federal law upon ratification) and non-self-executing treaties (those that only become domestically enforceable federal law when implementing legislation is passed by Congress). Under this interpretative approach, the Court parsed the actual text of the treaty to determine whether Congress had intended the treaty to be self-executing. A treaty could only become part of the domestic law if Congress enacted implementing statues or "the treaty itself convey[ed] an intention that it [was] "self-executing" and [was] ratified in these terms."[43] Roberts viewed the interpretative approach as a way to preserve that "Framers established [as] a careful set of procedures that must be followed before federal law can be created under the Constitution – vesting the decision in the political branches, subject to checks and balances."[44]

The majority, curiously enough, did not find it necessary to determine whether the Vienna Convention was a self-executing treaty.[45] While the *Avena* judgment was based on a violation of the Vienna Convention and created an international law obligation on the United States, the Court concluded that it did not necessarily create an obligation that was automatically binding on domestic law. According to the majority, the only treaties that were relevant to determine if *Avena* had created binding federal law were the Optional Protocol, the U.N. Charter, and the I.C.J. Statute.

The Court viewed the Optional Protocol as an agreement that established a "bare grant of jurisdiction" – and not a commitment by its signatories to comply with the resulting I.C.J. judgment. When the Senate ratified the Optional Protocol, it had not indicated, in its words of adopting or in implementing legislation, that an I.C.J. decision involving the United States would have immediate legal effect in domestic courts.[46] The majority concluded that the U.N. Charter, and not the Protocol, was the appropriate reference point to discover what obligations the United States had with regard to the International Court of Justice. Article 94(1) of the Charter states that "[e]ach Member of the United Nations *undertakes to comply* with the decisions of the I.C.J. in any case to which it is a party." (Emphasis added.) Even here the majority thought there was a significant different between "undertaking to comply" as opposed to "shall comply" or "must comply". For the majority, Article 94(1) was not a directive to domestic courts – but rather a "call upon governments to take certain action."[47] The sole remedy available when a member nation refused to comply with an I.C.J. decision was a diplomatic rather than a judicial one. Article 94(2) (which the majority referred to as "the enforcement provision") states that: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." Of course, such a remedy would most likely be toothless if the noncomplying country was the United States – or any other permanent member of the Security Council in possession of veto power.[48] The majority noted that this was the outcome that the executive branch had originally envisioned, and the one that it had conveyed to the Senate, at the time the United States agreed to the U.N. Charter and the declaration accepting general

compulsory jurisdiction by the I.C.J.[49] If the Supreme Court allowed Medellin to enforce the *Avena* decision in a domestic court, it would not only eliminate the government's option of noncompliance that was available under Article 94(2) but it would also "undermin[e] the ability of the political branches to determine whether and how to comply with an I.C.J. decision."[50]

The majority opinion also pointed to the I.C.J. Statue to support its conclusion that a decision of the I.C.J. did not automatically become a part of judicially enforceable federal laws available to individual petitioners. The language of the Statue clearly stated that the I.C.J.'s principal purpose was to hear disputes between nations and not individuals[51] and that a decision of the I.C.J. had "no binding force except between the parties and in respect of that particular case."[52] Medellin, as an individual, could not claim to have been a party to the *Avena* case (even though Mexico filed its case with the I.C.J., at least in part, because Medellin had been denied access to one of its consulate officers at the time of his arrest.) The *Avena* decision was, therefore, binding only between Mexico and the United States – but not between Medellin and the United States.

The Court further cited a "postratification understanding" of the signatory countries to the Optional Protocol and the Vienna Convention in support of its conclusion that *Avena* did not constitute bending federal law. This "postratification understanding" was evidenced by the fact that none of the 47 signatories to the Optional Protocol and 171 signatories to the Vienna Convention had treated I.C.J. judgments as directly enforceable as a matter of domestic law.[53] The fact that the Supreme Court was unable to find any other signatory nation that treated an I.C.J. judgment as directly enforceable as a matter of domestic law strongly suggested to

the Court that the United States had no need to treat the judgments any differently.[54]

Another interpretation problem for the majority was the impact that an I.C.J. decision had on state procedural law. The Supreme Court had previously held, in both *Sanchez-Llamas* and *Breard*, that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."[55] The Court recognized that since the effect of the automatic enforcement, in a state court, of an I.C.J. judgment involving treaty obligations might interfere with state procedural rules, that domestic effect must clearly have been stated as the intention of the body that ratified the treaty. Since this was not done by the Senate when it ratified the Optional Protocol, the U.N. Charter, or the I.C.J. Statute, it could not be supposed that the Senate expected the state procedural rules to be ignored.[56]

At the same time that the Court denied Medellin's right to individually enforce the I.C.J. judgment in domestic courts, it also attempted to reassure litigants in private international law matters that this decision would have no impact on the ordinary enforcement of foreign judgments or international arbitral agreements in domestic courts.[57] The Court noted that the primary difference between those cases and *Medellin* was that Medellin had asked the Court to enjoin the operation of state law and require the state to take action to "review and reconside[r]" his case.[58] Such a result would be in opposition to the general rule that judgments of foreign courts awarding injunctive relief (against individuals or sovereign nations) "are generally not entitled to enforcement."[59]

The majority further concluded that while the I.C.J. decision created a binding obligation on the part of the United States, it did not, by itself, become binding federal law with the power to preempt state criminal procedural restrictions on the

filing of successive habeas petitions. This was because "nothing in the text, background, negotiating and drafting history, or proactive among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by "many of our most fundamental constitutional protections."[60]

The final issue that the Court considered was whether President Bush's memorandum transformed the *Avena* judgment into the law of the land through the exercise of executive power "to establish binding rules of decision that preempt contrary state law."[61] The majority agreed that "the President's constitutional role "uniquely qualifies" him to resolve the sensitive foreign policy decisions that bear on compliance with an I.C.J. decision and "to do so expeditiously."[62] At the same time, that did not mean that the President had the unqualified authority to act as he saw fit. Pointing to "first principles," the majority stated that "the President's authority to act must stem either from an act of Congress or from the Constitution itself."[63] To determine whether Presidential authority existed in this case, the Court relied on the tripartite scheme for evaluating executive action that was enunciated in Justice Robert Jackson's concurring opinion in the case of *Youngstown Sheet & Tube Co. v. Sawyer*.[64]

According to Jackson, "[when] a President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[65] On the other hand, when "the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his independent powers…[T]here is [however] a zone of twilight in which he and Congress may

have concurrent authority, or in which its distribution is uncertain."[66] As a result, congressional inertia, indifference, or quiescence might enable to invite the President to take on independent responsibility.[67] Finally, "[when] the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb" and the Court can sustain his action "only by disabling the Congress from acting upon the subject."[68]

The United States government and Medellin tried to convince the Court that President Bush had the authority to require states to review and consider the cases of the Mexican nationals named in *Avena* without regard to the states' own procedural default rules. The amicus curiae brief, which was submitted on behalf of the United States, presented two arguments to support its claim that the President's actions fell within the category that would give him the maximum authority under the *Youngstown* model. The first was that the Optional Protocol and the U.N. Charter gave the President the authority to implement the *Avena* decision and that Congress had acquiesced to the use of that authority. The second was that the President's foreign affairs authority provided him with " an independent" international dispute-resolution power. A third argument, which was proposed by Medellin, suggested that the President's memorandum was a valid exercise of his constitutional "Take Care" power. The Court rejected each of these arguments based on its conclusion that the Optional Protocol and the U.N. Charter were non-self-executing treaties.

The majority found no merit in the government's assertion that the treaties gave the President authority to implement the I.C.J. decision and that Congress had acquiesced. That was because only Congress had the responsibility, and authority, to transform any international obligations arising under those treaties into domestic law.[69]

The Court agreed that the President had the authority, under Article II, §2 of the U.S. Constitution, to "make a treaty." If, however, that treaty did not contain language plainly providing for domestic enforceability, it was non-self-executing and could only become domestic law "in the same way as any other law – through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto."[70] Since Congress had not passed any legislation to implement either the Optional Protocol or the U.N. Charter, it "did not "express[ly] or implicit[ly]" vest the President with the unilateral authority to make them self-executing."[71] Consequently, the President had not acted within the first category of authority that was described in the *Youngstown* model. On the contrary, the fact that the President had attempted to "enforce" a non-self-executing treaty by unilaterally creating domestic law placed his actions squarely within Jackson's third category of unauthorized executive action.

The majority also rejected the government's claim that Congress had acquiesced to the President's actions thereby placing them within Jackson's second category of authorized actions. The Solicitor General had supported his argument by citing a number of instances in which presidents had resolved I.C.J. controversies with congressional acquiescence.[72] The Court differentiated the presidential action in those cases from the President's action in the *Medellin* case by noting that in the later that he was "transforming an international obligation into domestic law and thereby displacing state law."[73] While the President had "related" statutory responsibilities and an "established role" in litigating foreign policy concerns, that statutory role was to represent the United States before the U.N., the I.C.J., and the Security Council, but not to exercise unilateral authority to create domestic law.[74]

The Solicitor General had alternatively argued that the President's memorandum was binding on the states since it was based on the President's foreign affairs authority to resolve claim disputes with foreign nations.[75] The Court conceded that while it had upheld a narrow presidential authority to enter into executive agreements intended to settle civil claims between U.S. citizens and foreign governments or foreign nationals, that authority was not applicable in this case. That was because there was no precedent to extend that authority to "a Presidential directive issued to state court, much less one that reaches deep into the heart of the State's police powers and compel state courts to reopen final criminal judgments and set aside neutrally applicable state laws."[76]

The majority concluded by summarily rejecting the argument, submitted by Medellin and not supported by the Solicitor General, that the President's Memorandum was a valid exercise of his "Take Care" power. Under Article II, §3 of the U.S. Constitution, the President has the responsibility to "take Care that the Laws be faithfully executed." According to the Court, that authority is limited to executing laws – and not to making laws; Since the *Avena* judgment was not a domestic law, it could not be executed by the President.[77]

The Concurring Opinion

Justice John Paul Stevens voted with the majority – but did not sign on to the majority opinion. His main objection to the majority's legal rational stemmed from his conclusion that the text and history of the Supremacy Clause and the Court's precedents in earlier treaty cases did not support a presumption against self-execution.[78] That having been stated, Stevens devoted the rest of his concurring opinion to a discussion of whether the U.N. Charter and he Statute of the International

Court of Justice authorized the Court to enforce the I.C.J. decision in the *Avena* case.

According to Stevens, whatever obligation the United States had to comply with the *Avena* judgment was found in Article 94(1) of the U.N. Charter. The provision that a member of the U.N. "*undertakes to comply* [emphasis added] with the decision of the [I.C.J] in any case to which it is a party" was not seen as a model for either a self-executing commitment or non-self-executing commitment. Instead, it was "most naturally read as a promise to take additional steps to enforce I.C.J. judgments."[79] Some treaties, such as the U.N. Convention on the Law of the Sea,[80] have specifically provided for the incorporation of international judgments into domestic law. In others, Congress has had to pass implementing statutes to provide for the same result – even then the treaties themselves had included language far more mandatory than "undertakes to comply." The wording of Article 94(1) was not so unambiguous that it foreclosed the possibility of self-execution nor had the Senate issued a declaration of non-self-execution when it ratified the Charter. On the other hand, without a presumption in favor of self-execution or non-self-execution, Stevens preferred reading the phrase "undertakes to comply" as "contempl[ating] future action by the political branches."[81] This left decisions about whether to comply (and to what extent) with a particular I.C.J. judgment to the political, and not the judicial, branch of government.

Although Stevens applauded the President's memorandum as "a commendable attempt" to induce state governments to discharge the United States' international obligation, he still did not think it created binding law. Nonetheless, that did to stop him from urging Texas to "undertake to comply" with the *Avena* decision. Since it was Texas' failure to inform Medellin of his rights under the Convention that contributed to the United States having to

submit to the jurisdiction of the I.C.J., it was appropriate, in this case, for Texas to "shoulder the primary responsibility for protecting the honor and integrity of the Nation."[82]

Stevens concluded his concurring opinion with a practical evaluation of why the I.C.J.'s decision should not be ignored – the cost to Texas in complying with the *Avena* would be minimal. It was likely that the violation of the Vienna Convention actually prejudiced Medellin. On the other hand, the costs of refusing to comply were significant. Such a breach would endanger the nation's compelling interests in "ensuring the reciprocal observation of the Vienna Convention, protecting relations with the foreign governments, and demonstrating commitment to the role of international law."[83]

The Dissenting Opinion

Justice Stephen Breyer's dissenting opinion was highly critical of the majority's rigid formula for determining whether a treaty was self-executing or non-self-executing. To the question of whether the Supremacy Clause required Texas to follow the I.C.J. judgment in the *Avena* case, the minority opinion answered in the affirmative based on its belief that the majority ignored precedents that established a different view of treaties under the Supremacy Clause.

Breyer began by considering the intentions of the Founding Fathers when they wrote, in the Supremacy Clause, that "all Treaties…shall be the supreme Law of the Land." The early case of *Ware v. Hylton*[84] addressed the role of treaties in U.S. jurisprudence. In that instance, the U.S. Supreme Court had to decide whether a provision of the 1783 Paris Peace Treaty between the British and the United States had effectively nullified an earlier, and contradictory, state law – even though Congress had never enacted legislation to enforce

that particular treaty provision. The justices, who were unanimous in their conclusion that the state law was no longer valid, submitted separate opinions to explain their different legal rationales. Justice James Iredell's decision was particularly noteworthy, at least in part, because he had been a member of North Carolina's Ratifying Convention and because his legal reasoning was subsequently relied on by Justice Joseph Story, in his classic legal treatise on the Constitution,[85] to explain the intention of the Founders in drafting the Supremacy Clause.

Iredell noted that the terms of the Paris Peace Treaty could have been characterized as "executed" or "executory" – the former taking effect automatically upon ratification and later taking effect only when they are "carried into execution" by the signatory nation "in the manner which the Constitution of the nation prescribe[d]."[86] Prior to the adoption of the U.S. Constitution, in both the United States and Britain, the executory provisions only become part of domestic law if Congress (in the United States) or Parliament (in Britain) had written them into their domestic law. The adoption of the U.S. Constitution, however, eliminated the need for Congress to pass further legislation in order to enforce executory provisions such as the debt-collection provision that was at issue in the *Ware* case. That was because "under this Constitution, so far as a treaty constitutionally is binding, upon principles of *moral obligation*, it is also by the vigor of its own authority to be executed in fact. It would not otherwise be the *Supreme law* in the new sense provided for."[87] Other provisions of the Paris Peace Treaty that automatically bound the United States without further congressional action included those requiring the release of prisoners and those forbidding war-related "future confiscations."[88]

An examination of case law demonstrated that self-executing treaty provisions were not uncommon in the United States and that the Supremacy Clause (which handled the self-execution issue differently from the approach taken by many other countries) applied many, but not all, treaty provisions directly to the states. In *Foster v. Neilson,*[89] Chief Justice John Marshall held that in the United States, under the Supremacy Clause, a treaty was "the law of the land…to be regarded in Courts of justice as equivalent to an act of the legislature" and "operate[d] of itself without the aid of any legislative provision."[90] The only exception that Marshall could find this rule was if the treaty had specifically contemplated execution through legislation and, consequently, "addresse[d] itself to the political, not the judicial department."[91] By 1840, Justice Henry Baldwin had submitted a concurring opinion, in *Lessee of Pollard's Heirs v. Kibbe,* in which he stated that 'it would be a bold proposition: to claim "that an act of Congress must be first passed" for a treaty to become "a supreme law of the land."[92] In his review of Supreme Court precedents, Breyer was able to cite 29 cases (including 12 invalidating state or territorial law or policy) in which the Court had either held or assumed that particular treaty provisions were self-executing and automatically binding on the States.[93] On the other hand, he could not find two case in which the Court had taken the opposing view and held that specific congressional actions had indicated that Congress had thought that further legislation was necessary.[94]

Roberts' majority opinion created a presumption that the treaty obligations were non-self-executing unless the treaty contained specific language indicating otherwise. According to Breyer, that was "misguided" since it contradicted the many instances in which the Court had upheld treaty provisions as self-executing even though they contained no such textual language. His dissenting opinion also pointed to the majority's

failure to appreciate the significance of the fact that it was a signatory nation's domestic law that determined whether additional legislative action was necessary in order for a treaty provision to have domestic effect. The failure to include self-execution language in a treaty might simply have reflected the drafters' awareness that not all nations require implementing legislation before a treaty becomes domestic law.[95] Breyer was convinced that the presence or absence of "self-execution" language in a treaty proved nothing and was an example of the Court "hunting the snark."[96] For the minority, the unfortunate consequence of the majority's decision was that it "erect[ed] legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones.[97]

Up until *Medellin*, the Court had relied on, what Breyer characterized as, practical, context-specific criteria" to decide if the provisions of a treaty were self-executing.[98] That approach required the Court to look to the text and history of a treaty as well as its subject matter and related characteristics to determine, as Chief Justice Marshall had suggested in Ware, whether a particular treaty provision addressed itself to the political departments for further action or to the judicial department for direct enforcement. Matters relating to peace or war should be the province of political departments – while matters relating to traditional private legal rights (property, business, or civil tort recovery) should be directed to the judicial department. In addition, if a treaty provision conferred specific and readily enforceable individual legal rights, it should also be a matter for the judiciary. While Breyer conceded that the Court in the past had "not create[d] a simple test, let alone a magic formula," it had developed a practical, context-specific judicial approach that sought to separate the more run-of-the-mill judicial matters from the more politically charged ones.[99]

When Breyer applied the practical, context-specific criteria to the relevant treaty provisions at issue in the *Medellin*, case, he concluded that the provisions were self-executing. His conclusion was based on seven factors: 1. The language of treaties strongly supported direct judicial enforcement;[100] 2. The Optional Protocol had been applied to a dispute arising under a provision of the Vienna Convention, which was itself self-executing and judicially enforceable;[101] 3. It would not be logical to make a self-executing promise under the Vienna Convention, to promise to accept as final an I.C.J. judgment interpreting that self-executing promise, and then to insist that that judgment was not self-executing;[102] 4. A presumption against self-execution would have "serious negative practical implications" (especially for seventy other treaties that include I.C.J. dispute provisions similar to those found in the Optional Protocol);[103] 5. The judgment in the I.C.J. case was well suited to direct judicial enforcement since it only called for the "review and reconsideration" of any "possible prejudice" to the detainees;[104] 6. A finding that the United State' obligations under the treaty are self-executing as applied to the I.C.J. judgment does not threaten constitutional conflict with the other branches of government, does not require the Court to engage in nonjudicial activity, and does not create a new cause of action;[105] and 7. Neither the President nor Congress had objected to the direct enforcement of the I.C.J. decision.[106]

Breyer criticized the majority for "look[ing] for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language)."[107] As a consequence, the majority's ruling has the potential of depriving individuals (including businesses, property owners, testamentary beneficiaries, and consular officers) of similar dispute resolution procedures that have

been provided for in many treaties. In a world in which commerce, trade, and travel have become ever more international, this would be the wrong approach.

After briefly considering what the Court should have done if it had decided that the I.C.J. judgment was enforceable,[108] Breyer turned to the majority's holding that the President did not have the constitutional authority to enforce the I.C.J. decision in state courts. According to the minority, the President had the constitutional authority to act in the area of foreign affairs. Consequently, when that power was exercised in this case, it fell "within the middle range of Presidential authority where Congress has neither specifically authorized nor specifically forbidden the Presidential action in question."[109] Whether that allowed the President to implement the treaty provisions that bound the United States to an I.C.J. judgment with regard to the Avena parties and to require the setting aside of state procedural law was an issue that the minority raised – but chose to leave unanswered.[110]

Breyer concluded by elaborating on some of the serious consequence of the majority's holdings. The first was that it "unnecessarily complicate[d] the President's foreign affairs task"[111] by increasing the possibility that the Avena case would be taken to the Security Council, by worsening the United States' relationship with Mexico, by increasing the risks to Americans who are arrested while traveling abroad, and by diminishing the reputation of the United States for failing to follow the very "rule of law" principles that it has advocated. The second was that it "encumbered Congress with a task (postratification legislation) that, in respect of many decisions of international tribunals, it may not want and which it may find difficult to execute."[112] Finally, it weaken[ed] the rule of law for which the Constitution stands since it ma[de] it more difficult to enforce judgments of international tribunals.[113]

The Final Resolution

The State of Texas executed Jose Medellin on August 5, 2008. Medellin had filed a request for a stay of execution with the U.S. Supreme Court. The petition was based on the possibility that Congress or the Texas state legislature "might determine that actions of the International Court..should be given controlling weight in determining that a violation of the Vienna Convention on Consular Relations is grounds for vacating the sentence imposed in this suit."[114] The Court's per curium decision, which was supported by five of the justices, denied Medellin's request based on its conclusion that the likelihood of any legislative action occurring was much too remote to justify a stay. The majority further noted that th only legislative and executive steps that had been taken in the four years since the I.C.J. ruling and in the four months since the Supreme Court's last ruling were the introduction of a Congressional bill to implement the obligations under the treaty[115] and the withdrawal of the United States' accession to the jurisdiction of the I.C.J. in matters relating to the Vienna Convention. The Court also found it significant that the U.S. Department of Justice has not sought to intervene in the matter.[116]

The four dissenting justices submitted separate opinions – each favoring the granting of the stay until there could be input by the Solicitor General. Justice Stevens reiterated his previous conclusion that neither the President nor the I.C.J. could require Texas to determine whether it had prejudiced Medellin when it violated the Vienna Convention. Nonetheless, he concluded that the fact that Texas had not exerted its authority (and duty under international law) to remedy the "potentially significant breach of the United States' treaty obligations" justified a request for the Solicitor General's

view on this matter of serious national security and foreign policy.[117] Justice Souter pointed to the bill pending in Congress and the government's representation to the I.C.J. that it would take further steps to enforce the *Avena* judgment as sufficient justification to grant the stay of execution and to hear the views of the Solicitor General.[118] Justice Ginsburg also supported granting Medellin's petition in order to seek the Solicitor General's clarification of a representation that the United States had made to the I.C.J. in response to Mexico's request for provisional measure in the *Avena* case.[119] Finally, Justice Breyer cited six reasons for granting the stay. In addition to pointing out that Mexico had returned to the I.C.J. seeking U.S. compliance with its international obligations and that legislation had been introduced in Congress to "provide the legislative approval necessary to transform [the United States'] international legal obligations into binding domestic law,"[120] Breyer also argued that Congress, prior to the Court's decision in *Medellin*, may have assumed that the relevant treaties were self-executing and did not require implementing legislation, that proceeding with the execution would constitute an irremediable violation of international law, that the views of the Executive were pertinent to this matter of foreign affairs, and that the Court had incorrectly focused on the narrow issue of whether the original confession of Medellin was unlawfully obtained rather than the more important issue of whether the United States would carry out its international obligation to enforce the decision of the I.C.J.[121]

IV.

The U.S. Supreme Court's decision in the Medellin case was a setback to the international law community and to the Bush administration. While Chief Justice Roberts' majority opinion attempted to create certitude in one area of treaty interpretation (by establishing the presumption that treaties are non-self-

executing unless they contain explicit language of intent), it failed to address the practical consequences of that decision. A wide variety of treaties (which lack the explicit language but which, nevertheless, had been thought to be self-executing) will need to be reviewed to see if implementing legislation is necessary. The treaty partners of the United States will have new grounds for wondering if the United States is really committed to honoring its international obligations. U.S. citizens who travel abroad for business or pleasure should be justifiably concerned that they might not continue to rely on the reciprocal protection of the Vienna Convention – especially in those countries with national who have been denied the same protections in the United States. The decision also place limits on the President's view of his power in matters of foreign policy. The executive branch's attempts to unilaterally trump the objections of the state court in this matter offended the Court's understanding of the role of separation of powers and federalism. It was somewhat ironic that President Bush, who had often appeared indifferent, if not hostile, to international law issues, found his power restricted by the Court in the one instance where he had directed state courts to "give effect" to a decision of the I.C.J.. As a result of its decision in *Medellin*, the Court appears to have concluded that the United States continues to have international law obligations – but not a commitment – to comply with the I.C.J.'s ruling in *Avena*.

ENDNOTES

[1] Art.II, §2.
[2] 552 U.S. 491 (2008); 128 S.Ct. 1346; 170 L.Ed. 2d 190.

[3] Apr.24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820
[4] Apr.24, 1963, [1970] 21 U.S.T. 325, T.I.A.S. No. 6820
[5] *Supra*, note 3, 21 U.S.T., at 79.
[6] Article 36(1) of the Vienna Convention, (supra, note 3) reads as follows: "With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or its detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall still have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

[7] S. Exec. Rep. No. 91-1 app. At 5 (1969) (statement of Deputy Legal Adviser J. Edward Lyery.)
[8] *Supra*, note 4, Art. 1, 21 U.S.T., at 326, "…disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."
[9] *Tehran Hostages Case (U.S. v. Iran),* 1980 I.C.J. 3 (May 24).
[10] 59 Stat. 1055, T.S. No.993 (1945).
[11] Id., Art. 59, at 1062. Final decisions in contentious matters before the I.C.J. have always been held to be binding between the parties. It was not until the case of *LaGrand (F.R.G. v. U.S.),* 2001 I.C.J. 104, paras. 116-127

(June 27), that the I.C.J. ruled that provisional matters would also be binding.
[12] *Id.*, Art. 60, at 1063.
[13] 1998 I.C.J. 29 (Apr.9).
[14] *Supra, LaGrand*, note 11.
[15] 2004 I.C.J. 12 (Mar.31).
[16] *Breard v. Commonwealth*, 248 Va. 68, 445 S.E.2d 670 (1994).
[17] *Breard v. Commonwealth*, 513 U.S. 971 (1994).
[18] *Breard v. Greene*, 523 U.S. 371, 374; 118 S.Ct. 1352 (1998).
[19] *Supra, LaGrand*, note 11, at paras. 77, 90-91, 125.
[20] *Id*. at para. 128(7).
[21] *Supra*, note 15, at para. 153(4).
[22] *Id*. at para. 153(5).
[23] *Id*. at para. 153(6).
[24] *Id*. at paras. 153(9 and 11)(referencing paras. 138-141).
[25] The full text of the memorandum states: "I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." PRESIDENT'S MEMORANDUM FOR THE ATTORNEY GENERAL, SUBJECT: COMPLIANCE WITH THE DECISION OF THE INTERNATIONAL COURT OF JUSTICE IN AVENA (Feb. 28, 2005), *available at* http://whitehouse.gov/news/releases/2005/02/20050228-18.html.
[26] *Medellin v. State*, No. 71,997 (Tex.Crim.Appl, May 16, 1997).
[27] *Ex parte Medellin*, No. 675430-A (339th Dist.Ct., Jan.22, 2001).
[28] *Ex parte Medellin*, No. WR-50, 191-01 (Tex.Crim.App., Oct. 3, 2001)(not designated for publication)
[29] *Medellin v. Cockrell*, 2003 U.S. Dist. LEXIS 27339 (D.Tex. 2003).
[30] *Medellin v. Dretke*, 371 F. 3d 270 (5th Cir., 2004).
[31] *Supra*, note 18.
[32] 243 F.3d 192 (5th Cir., 2001).
[33] *Id*. at 198.
[34] *Medellin v. Dretke*, 543 U.S. 1032, 125 S.Ct. 686 (2004).
[35] *Ex parte Medellin*, Application No. AP-75,207.
[36] *Medellin v. Drekte*, 544 U.S. 660, 125 S.Ct. 2088, 2092 (2005) (per curiam).
[37] *Ex parte Medellin*, 223 S.W. 3d 315, 357 (2006).

[38] Texas Code of Criminal Procedure, Art. 11.071, § 5(a)(2003) provides that: "The Texas Court of Criminal Appeals may not consider the merits of any claims raised on a subsequent application for a write of habeas corpus or grant relief unless the applicant provides sufficient facts demonstrating that the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application by a preponderance of the evidence; but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the State's favor one or more of the special issues."

[39] 548 U.S. 331, 126 S.Ct. 2669 (2006). Sanchez-Llamas, a Mexican national, had been arrested following a shootout with the police in Oregon. At trial, he moved to strike the incriminating statements that he made during his interrogation on the grounds that he had not been informed of his rights under the Convention. The Supreme Court affirmed the decision of the Oregon trial court and the Oregon Supreme Court denying the suppression of the evidence on the grounds that neither the treaty nor U.S. laws require the states to exclude evidence that was given without the benefit of consular notification. The Supreme Court found the suggestion that the Convention might be used to apply the exclusionary rule, an "entirely American legal creation," which is still "universally rejected" by other countries, to be "startling." *Id*. at 2679.

Bustillo, a Honduran national, had been arrested and convicted of murder in Virginia. After his conviction was upheld on appeal, he filed a habeas corpus action in the Virginia state court where he raised, for the first time, the claim that he had been denied his rights under the Consular Convention. The Virginia Supreme Court affirmed the lower court's decision that his claim was untimely and, consequently, barred by a state procedural default law. The U.S. Supreme Court reaffirmed the lower courts and rejected Bustillo's assertion that application of the state's procedural default rule would result in a denial of the "full effect" of his Article 36 rights. The Court also rejected the argument that it needed to reconsider its decision in *Breard* as a result of the I.C.J.'s subsequent decisions in *LaGrand* and *Avena.*

[40] *Id.* at 2687.

[41] *Supra,* note 2.

[42] *Id*. at 1356.

[43] *Id*. at 1356 (citing *Igartua-Da La Rosa v. United States*, 417 F.3d 145, 150 (CA 1 2005)(en banc)(Boudin, C.J.)).
[44] *Id*. at 1362.
[45] The Court concluded that by narrowing the issue "whether the *Avena* judgment has binding effect in domestic courts under the Optional Protocol, I.C.J. Statute, and U.N. Charter" it did not have to resolve the issue of whether the Vienna Convention was self-executing or whether it granted individually enforceable rights to Medellin. Id., footnote 4, at 1357.
[46] *Id.* at 1358.
[47] *Id*. at 1358 (citing *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (CADA 1988) (quoting *Diggs v. Richardson*, 555 F. 2d 848, 851 (CADA 1976)).
[48] If Mexico had petitioned the Security Council for a remedy in the *Avena* case and if the Security Council had deemed it necessary to issue a recommendation, the United States would still have been able to use its veto power on the Security Council to nullify the recommendation.
[49] *Supra*, note 2, at 1359-1360.
[50] *Id*. at 1360.
[51] Art. 34(1).
[52] *Supra*, note 2, at 1362.
[53] *Id*. at 1363.
[54] *Id*. at 1363.
[55] *Id*. at 1363 (citing *Sanchez-Llamas, supra*, note 39, at 351, citing *Breard, supra*, note 18, at 375).
[56] *Id*. at 1363-1364.
[57] *Id*. at 1365.
[58] *Id*. at 1366.
[59] *Id*. at 1367.
[60] *Id.* at 1367.
[61] *Id*. at 1367 (citing the Brief of the United States as Amicus Curiae.)
[62] *Id*. at 1367.
[63] *Id*. at 1368 (citing *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 585 (1952) and *Dames & Moore v. Regan*, at 453 U.S. 654, 668 (1981)).
[64] *Id*.
[65] *Id*. at 1368, (citing *Youngstown*, supra, note 63, at 635).
[66] *Id*. at 1368, (citing *Youngstown*, at 637).
[67] *Id*. at 1368, (citing *Youngstown*, at 637).
[68] *Id*. at 1368, (citing *Youngstown*, at 637-638).
[69] *Id*. at 1368.
[70] *Id*. at 1369. See U.S. Constitution, Art. I, §7.
[71] *Id*. at 1369.

[72] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicar. v. U.S.)*, 1986 I.C.J. 14 (Judgment of June 27); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Can. v. U.S.*), 1984 I.C.J. 246 (Judgment of Oct. 12); *Case Concerning Rights of Nationals of the Unites States of America in Moroco* (*Fr. v. U.S.*), 1952 I.C.J. 176 (Judgment of Aug. 27); *LaGrand Case*, *supra*, note 11; and *Case Concerning the Vienna Convention on Consular Relations*, *supra*, note 13.

[73] *Supra*, note 2, at 1370. While the State Department, in the 2001 *LaGrand Case*, sent letters to the states "encouraging" them to consider the Vienna Convention in the clemency process, it did not claim to give the I.C.J. decision direct effect as domestic law.

[74] Id. at 1371.

[75] Id. at 1371. The government relied on a number of cases in which the Supreme Court had upheld presidential authority to settle foreign claims pursuant to an executive agreement. See *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 415, 123 S.Ct. 2374 (2003); *Dames & Moore v. Regan*, *supra* note 63, at 679-680; *United States v. Pink*, 315 U.S. 203, 229, 62 S.Ct. 552 (1942); and *United States v. Belmont*, 302 U.S. 324, 3330, 57 S.Ct. 758 (1937).

[76] *Id*. at 1372.

[77] *Id*. at 1372.

[78] *Id.* at 1372.

[79] *Id*. at 1373.

[80] Annex VI, Art. 39, Dec. 10, 1982, S. Treaty Doc. No. 103-39, 1833 U.N.T.S. 570.

[81] *Supra*, note 2, at 1373.

[82] *Id*. at 1374.

[83] *Id*. at 1375 (citing the majority opinion at 1367).

[84] 3 U.S. 199, 3 Dall. 199 (1796). In that case, a British creditor sought payment for an American Revolutionary War debt which the debtor had previously paid, as mandated under state law, to a Virginia state fund.

[85] *Commentaries on the Constitution of the United States*, 696-697 (1833).

[86] *Supra*, note 2, at 1378 (citing *Ware*, *supra*, note 84, at 272). Examples of the Treaty's executed provisions, which were automatically effective upon ratification, included the declaration that the United States as an independent nation or the acknowledgment that the United States had the right to navigate the Mississippi River.

[87] *Id*. at 1378 (citing *Ware*, at 277).

[88] *Id*. at 1379 (citing *Ware*, at 273, 277).

[89] 27 U.S. 253, 2 Pet. 253 (1829)(involving a provision of the 1819 treaty in which Spain ceded Florida to the United States.
[90] *Id*. at 314.
[91] *Id*. at 314. (It should be noted that while the Court concluded that the treaty provision at issue was not self-executing based on certain phrasing, it changed its mind four years later when it was presented with a less legislatively oriented and less tentative – but equally authentic Spanish language--version of the same treaty,) (See *United States v. Percheman*, 32 U.S. 51, 7 Pet. 51, 88-89 (1833).
[92] 39 U.S. 353, 14 Pet. 353, 388 (1840).
[93] *Supra*, note 2, at 1379-1480. The cited cases were: *Olympic Airways v. Husain*, 540 U.S. 644, 657 (2004); *El AL Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 161-163, 176 (1999); *Zicherman v. Korean Air Lines Co*., 516 U.S. 217, 221, 231 (1996); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. Of Iowa*, 482 U.S. 522, 524, 533 (1987); *Sumitomo Shojii America, Inc. v. Avagliano*, 457 U.S. 176, 181, 189-190 (1982); *Trans World Airlines, Inc. v. Franklin Mint Corp*., 466 U.S. 243, 254, 252 (1984); *Kolovrat v. Oregon*, 366 U.S. 187, 191, n. 6, 198 (1961); *Clark v. Allen*, 331 U.S. 503, 507-508, 517-518 (1947); *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 160, and n. 9, 161 (1940; *Todok v. Union State Bank of Harvard*, 281 U.S. 499, 453, 455 (1930); *Nielsen v. Johnson*, 279 U.S. 47, 50, 58 (1929); *Jordan v. Tashiro*, 278 U.S. 123, 126-127, n. 1, 128-129 (1928); *Asakura v. Seattle*, 265 U.S. 332, 340, 343-344 (1924); *Maiorano v. Baltimore & Ohio R. Co*., 213 U.S. 268, 273-274 (1909); *Johnson v. Browne*, 205 U.S. 309, 317-322 (1907); *Geofrey v. Riggs*, 133 U.S. 258, 267-268, 273 (1890); *Wildenhus's Case*, 120 U.S. 1, 11, 17-18 (1887); *United States v. Rauscher*, 119 U.S. 410-411, 429-430 (1886); *Hauenstein v. Lynham*, 100 U.S. 483, 485-486, 490-491 (1880); *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 542 (1828); *United States v. Perchman*, 7 Pet. 51, 88-89 (1833); *United States v. Arredondo*, 6 Pet. 691, 697, 749 (1832); *Orr v. Hodgson*, 4 Wheat. 453, 462-465 (1819); *Chirac v. Lessee of Chirac*, 2 Wheat. 259, 270-271, 274, 275 (1817); *Martin v. Hunter's Lessee*, 1 Wheat. 304, 356-357 (1816); *Hannay v. Eve*, 3 Cranch 242, 248 (1806); *Hopkirk v. Bell*, 3 Cranch 454, 457-458 (1806); *Ware v. Hylton*, 3 Dall. 199, 203-204, 285 (1796); and *Georgia v. Brailsford*, 3 Dall. 1, 4 (1794).
[94] Those two cases included *Foster, supra*, note 89, which was reversed by *United States v. Percheman, supra*, note 91, and *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39 (1913), in which congressional actions indicated that Congress thought that further legislation was required.

[95] Some countries, such as Great Britain, require subsequent parliamentary legislation before a treaty becomes part of the domestic law. Others, such as the Netherlands, directly incorporate many treaties into their domestic law without explicit parliamentary action. *Surpa*, note 2, at 1381.
[96] *Id.* at 1381.
[97] *Id.* at 1380-1381, 1393-1396. Breyer cited 16 economic cooperation agreements (between the United States and Spain, Israel, Portugal, the United Kingdom, Turkey, Sweden, Norway, the Netherlands, the Grand Duchy of Luxemburg, Italy, Iceland, Greece, France, Denmark, Belgium and Austria), two bilateral consular conventions (between the United States and Belgium and the Republic of Korea), 16 friendship, commerce, and navigation treaties (between the United States and the Togolese Republic, Belgium, The Grand Duchy of Luxembourg, Denmark, Pakistan, France, the Republic of Korea, the Netherlands, Iran, Germany, Greece, Israel, Ethiopia, Japan, Ireland, and Italy), and 11 multinational conventions (the Patent Cooperation Treaty; the Universal Copyright Convention (1971); the Vienna Convention on Diplomatic Relations and Optional Protocol Concerning the Compulsory Settlement of Disputes; the Paris Convention for the Protection of Industrial Property; the Convention on the Privileges and Immunities of the United Nations; the Convention on Offenses and Certain Other Acts Committed on Board Aircraft; the Agreement for Facilitating the International Circulation of Visual and Auditory Material of an Educational, Scientific and Cultural Character; the Universal Copyright Convention (1952); the Treaty of Peace with Japan; the Convention on Road Traffic; and the Convention on International Civil Aviation), which contain provisions for the submission of treaty based disputes to the International Court of Justice that could be jeopardized by the Court's decision.
[98] *Id*. at 1382.
[99] *Id*. at 1382-1383.
[100] *Id.* at 1383-1385. The title of the Optional Protocol, "Compulsory Settlement of Disputes," emphasizes the fact that its procedures were mandatory and binding. Article 94(1) of the Charter of the U.N. requires" a member to "undertake to comply" with the I.C.J. decisions in cases in which it is a party. Article 59 of the I.C.J. Statutes, which states that a decision of the I.C.J. had "binding force" between the parties that have consented to compulsory jurisdiction, invokes quintessential judicial activity.
[101] *Id*. at 1385-1386. The fact that Article 36(1)(b) of the Convention involves individual "rights" and that dispute arose at the intersection of

individual rights with the ordinary rules of criminal procedure indicates that this is a matter with which judges are familiar.
[102] *Id*. at 1386-1387.
[103] *Id*. at 1387-1388.
[104] *Id*. at 1388.
[105] *Id*. at 1388-1389.
[106] *Id*. at 1389.
[107] *Id*. at 1389.
[108] *Id*. at 1389-1390. The judgment instructed the United States to provide for further judicial review of the 51 cases "by means of its own choosing." Since the judgment addresses itself to the Judicial Branch, Breyer suggested that the Court should have reversed the lower court and remanded the case to the Texas court to determine if the breach of the treaty had resulted in any actual prejudice to the defendant.
[109] *Id*. at 1390. (Applying Jackson's concurring opinion in *Youngstown Sheet and Tube*, *supra*, note 63, at 637.
[110] Breyer raised a number of hypothetical questions to suggest that it was incorrect to conclude that the President could never set aside a state law in exercising his Article II powers pursuant to a ratified treaty. (*Id*. at 1390.) he also noted the dearth of Supreme Court case law on the question. (*Id*. at 1390-1391.) Finally, he left unanswered (until some time in the future) the question of whether the Constitution implicitly prohibited or permitted such actions – given the Court's comparative lack of expertise in foreign affairs, the importance of foreign relations for the country, the difficulty of finding the proper constitutional balance between state and federal, executive and legislative, powers in such matters, and the likelihood that the Court would address this matter in the future. (*Id*. at 1391.)
[111] *Id*. at 1391.
[112] *Id*. at 1391.
[113] *Id*. at 1391.
[114] *Medellin v. Texas*; *Medellin v. Texas*; *In Re Medellin*, Nos. 06-984 (08A98), 08-5573 (08A99), and 08-5574 (08A99); 2008 U.S. LEXIS 5362; 77 U.S.L.W. 3073; 21 Fla.L. Weekly Fed. S 539 (August 5, 2008).
[115] Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong., 3d Sess. (2008).
[116] *Supra*, note 114, at 2.
[117] *Id.* at 3-4.
[118] *Id*. at 5-6.
[119] *Id*. at 6. The United States had responded that "contrary to Mexico's suggestion, the United States [does] not believe that it need make no further effort to implement this Court's *Avena* Judgment, and … would continue to

work to give that Judgment full effect, including in the case of Mr. Medellin." (Quoting from *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2008 I.C.J. No. 139, P 37 (order of July 16).

[120] *Id*. at 8-9.

[121] *Id*. at 9-10.